TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00510-CV

Steve F. Montoya, Jr., M.D.; West Texas Renal Care; and West Texas Nephrology, Appellants

v.

San Angelo Community Medical Center and Kirk Brewer, M.D., Appellees

FROM THE DISTRICT COURT OF TOM GREEN COUNTY, 119TH JUDICIAL DISTRICT NO. B150285C, HONORABLE BEN WOODWARD, JUDGE PRESIDING

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

Appellants Steve F. Montoya, Jr., M.D., West Texas Renal Care, and West Texas Nephrology (collectively, "Montoya") filed suit against defendants San Angelo Community Medical Center ("SACMC") and Kirk Brewer, M.D. (collectively, "defendants"), asserting claims for defamation per se, business disparagement, tortious interference with current and prospective business relations, improper restraint of trade under the Texas Free Enterprise and Antitrust Act of 1983 ("TFEAA"), and civil conspiracy. Brewer filed a timely motion to dismiss under Texas Rule of Civil Procedure 91a and the Texas Citizens Participation Act ("TCPA"). *See generally* Tex. R. Civ. P. 91a; Tex. Civ. Prac. & Rem. Code §§ 27.001–.011. The trial court granted both motions and

dismissed Brewer from the suit.[1] SACMC then filed a motion for summary judgment on the ground that all of Montoya's claims against SACMC were derivative of the claims against Brewer. The trial court granted the motion and dismissed the claims against SACMC with prejudice. Montoya then filed this appeal. For the following reasons, we will affirm the orders of the trial court in part and reverse and remand in part.

DISCUSSION

I. The trial court did not err in hearing Brewer's motion to dismiss

In his third issue, Montoya argues that the trial court improperly considered Brewer's motion to dismiss. He asserts first that notice of the hearing on Brewer's motion to dismiss was insufficient and second that the amended motion was not timely filed.

A Rule 91a motion to dismiss must be filed "within 60 days after the first pleading containing the challenged cause of action is served on the movant." Tex. R. Civ. P. 91a.3(a). The motion must be on file for "at least 21 days before the motion is heard," *id*. R. 91a.3(b), and each party must receive "at least 14 days' notice of the hearing," *id.* R. 91a.6.[2] "If the respondent amends the challenged cause of action at least 3 days before the date of the hearing, the movant may, before

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[1] On February 8, 2016, the trial court entered two orders: one dismissed the claims against Brewer pursuant to Rule 91a, and the other dismissed the claims against him pursuant to the TCPA. Both orders awarded to Brewer attorney's fees "in the amount of $7,950.00 + $89.64 Expenses," and the Rule 91a order specified that Brewer could only recover that sum once, "not under both this Order and the Order granting the [TCPA] motion," and that "the claims are so intertwined that segregation of fees between the two motions is not possible."

[2] Although Montoya only discusses the applicable timelines under Rule 91a, we note that a TCPA motion to dismiss similarly must be filed within sixty days of service, but the TCPA allows the trial court some discretion in extending the time to file a motion "on a showing of good cause." Tex. Civ. Prac. & Rem. Code § 27.003(b).

the date of the hearing, file . . . an amended motion directed to the amended cause of action," and such an amended motion "restarts the time periods." *Id*. R. 91a.5(b), (d).

Montoya filed his Original Petition on July 6, 2015, asserting as his causes of action: "tortious interference with current and prospective business/patient relations," defamation per se, "malice," business disparagement, and restraint of trade. In Brewer's first motion to dismiss, filed on December 8, 2015, Brewer asserted that he had been served with Montoya's petition on October 9, 2015, making his first motion to dismiss timely. A hearing on Brewer's motion was set for January 12, 2016; notice of that hearing was dated December 11, 2015. Montoya then filed his Second Amended Petition on January 4,[3] asserting the same causes of action but adding further factual allegations and attaching as exhibits two pages from a patient's chart and a sworn statement by the daughter of one of Montoya's existing patients, the contents of which will be discussed elsewhere in this opinion. On January 7, Brewer filed his amended motion to dismiss, listing the causes of action specifically listed by Montoya in his second petition[4] and also stating that Montoya had alleged as a "[c]ause of action thrown in with the factual dissertation—civil conspiracy and joint

[3] After SACMC filed special exceptions, Montoya filed his first amended petition on November 12. That petition appears to be identical to his original petition other than including a statement of the maximum amount of damages sought.

[4] Montoya filed a Third Amended Petition on January 8 and a Fourth Amended Petition on January 11. Montoya's Fourth Amended Petition alleges the same causes of action as Montoya's Second Amended Petition, as well as essentially the same factual allegations, but it is organized differently than the Second Amended Petition directly addressed by Brewer's motion to dismiss. Brewer contends on appeal that Montoya's Fourth Amended Petition was not adequately before the trial court when the court granted Brewer's motion to dismiss. However, for purposes of this opinion, we will consider Montoya's fourth petition to be the live petition at the time the trial court heard the motion to dismiss and will refer to that petition and its factual allegations in our review.

and several liability." In a written notice dated January 13, Brewer set his amended motion to dismiss for a hearing on January 29.

Montoya argues that the trial court should not have heard Brewer's amended motion to dismiss because the notice of hearing provided less than twenty-one days notice. However, Rule 91a only requires parties receive fourteen days' notice of the hearing. *See id*. R. 91a.6. Montoya confuses the notice-of-hearing time frame with the rule's requirement that a motion to dismiss must be on file for at least twenty-one days. *See id.* R. 91a.3(b). Brewer's amended motion was filed on January 7, twenty-two days before the hearing, and notice was sent on January 13, sixteen days before the hearing, fully complying with the timing requirements of Rule 91a.

Montoya further argues that Brewer's amended motion was filed more than sixty days after he was served with the lawsuit and, therefore, was untimely. *See id*. R. 91a.3(a). However, in making this argument, Montoya ignores the fact that the rule explicitly allows for the filing of an amended motion to dismiss in the event the respondent files an amended petition and neglects to mention that he amended his petition on January 4, after Brewer filed his original motion to dismiss, thus allowing Brewer to file an amended motion that reset all the relevant time periods (he further omits any mention of the fact that he amended his petition twice between the date Brewer filed his amended motion and the date of the hearing). *See id.* R. 91a.5(b), (d).

Under the plain language of Rule 91a, the trial court did not err in hearing Brewer's amended motion to dismiss. We overrule Montoya's third issue on appeal.

II. The trial court did not err in dismissing Montoya's claims against Brewer

A. Rule 91a: Applicable law and standard of review

Rule 91a provides that within sixty days of the first pleading alleging a cause of action, a party may move to dismiss that cause of action on the ground that it has no basis in law or fact. Tex. R. Civ. P. 91a.1, 91a.3(a). "Whether the dismissal standard is satisfied depends 'solely on the pleading of the cause of action.'" *City of Dallas v. Sanchez*, 494 S.W.3d 722, 724 (Tex. 2016) (per curiam) (cleaned up). "A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought." Tex. R. Civ. P. 91a.1. A motion to dismiss must identify each cause of action challenged and "must state specifically the reasons the cause of action has no basis in law, no basis in fact, or both." *Id.* R. 91a.2. The trial court may not consider evidence when ruling on a Rule 91a motion and must base its ruling only on the pleadings and any supporting exhibits. *Id.* R. 91a.6. An appellate court reviews a trial court's ruling on a motion to dismiss de novo. *Sanchez*, 494 S.W.3d at 724–25. Similarly, we base our review on the allegations set forth in the live petition and attachments thereto, construe the pleadings liberally in favor of the plaintiff, and accept as true the factual allegations. *Wooley v. Schaffer*, 447 S.W.3d 71, 75–76 (Tex. App.—Houston [14th Dist.] 2014, pet. denied); *see Bedford Internet Office Space, LLC v. Texas Ins. Grp., Inc.*, 537 S.W.3d 717, 720 (Tex. App.—Fort Worth 2017, pet. filed) (plain language of Rule 91a.6 "requires the trial court to wear blinders to any pleadings except 'the pleading of the cause of action'"). However, we need not accept as true legal conclusions put forth by the pleader. *City of Austin v. Liberty Mut. Ins.*, 431 S.W.3d 817, 826 (Tex. App.—Austin 2014, no pet.).

B. TCPA: Applicable law and standard of review

To assert a motion to dismiss under the TCPA, a defendant must show by a preponderance of the evidence that the legal action against him is based on, relates to, or is in response to the moving party's exercise of the right of free speech." *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015) (quoting Tex. Civ. Prac. & Rem. Code § 27.005(b)). The court may not dismiss under the TCPA if the party bringing the legal action "establishes 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 exercise of the right of free speech" is broadly defined by the TCPA as "a communication made in connection with a matter of public concern." *Lippincott*, 462 S.W.3d at 509 (quoting Tex. Civ. Prac. & Rem. Code § 27.001(3)). A "matter of public concern" includes issues related to health or safety or "environmental, economic, or community well-being." Tex. Civ. Prac. & Rem. Code § 27.001(7).

C. Montoya's allegations supporting his causes of action

Montoya's allegations are confusing and repetitious. However, the following is a recitation of the relevant allegations from his Fourth Amended Petition and attached exhibits.[5]

Montoya was admitted to practice nephrology, a medical specialty focusing on diseases of the kidney, at SACMC in 1981, where he maintained full staff privileges. In 2006, SACMC "created its own group of doctors owned by the hospital in both hospitalist groups and in

[5] We will assume without deciding that the exhibits were properly before the trial court. *See* Tex. R. Civ. P. 91a (trial court must decide motion based solely on pleading of cause of action, together with any pleading exhibits permitted by Rule 59), 59 (providing that written instruments, which constitute, in whole or part, claim sued upon, may be attached to pleadings).

a group named Community Medical Associates." In 2007, Brewer joined SACMC as chief of the medical staff and head of the hospitalist group that practices at SACMC.

A substantial part of Montoya's practice was obtaining new patients and treating existing patients who came to the emergency room and needed a nephrologist. The SACMC emergency room uses a rotating system of specialists admitted in that practice to see patients in the hospital and emergency room. Prior to 2007, Montoya "received his rotating share of referrals of patients with kidney [issues] until SACMC created its own practice groups." He would also receive ten to twenty calls from the emergency room each month to treat either new or existing patients.

According to Montoya, "The correct and appropriate way for any health care provider of emergency hospital services and nephrology service is to provide the highest quality of care to the patient. . . . The illegal and unjust way of treating patients is to manipulate their free choice in the market place. In this case it is to only refer a patient to a hospitalist, in a group owned by the hospital, and to them only refer a patient to a nephrologist in a hospital owned group and to malign and smear a highly qualified nephrologist in the practice at the same hospital."

Since 2007, "[t]he Defendants decided to then have a covert whisper campaign and not refer any patients to Dr. Montoya." Since that time, Montoya has received only one referral, on January 24, 2014, when Montoya received a consultation call for a patient by the hospitalist on duty and provided an initial consult. The following day, Brewer was the hospitalist on duty, and "without ever seeing the patient or the [patient's medical] chart," Brewer cancelled Montoya's consult and treatment and consulted another nephrologist. The nephrologist consulted instead belongs to a group

with which Brewer "has a contract for paid services." Montoya went to see the "call board" and "witnessed his name . . . as the nephrologist on call on January 24 and 25, 2014."

Two patients with whom Montoya had an existing patient-physician relationship requested Montoya upon their admission to the emergency room, but SACMC staff would not call Montoya to treat those patients. Both of those instances occurred when Brewer was chief of the medical staff and head of the hospitalist service at SACMC.

D. Montoya's claims against Brewer

Having reviewed the allegations in Montoya's petition in a light most favorable to him and accepting those allegations as true, we conclude that other than Montoya's claim for tortious interference "with current . . . business/patient relations," the trial court did not err in dismissing Montoya's claims against Brewer pursuant to Rule 91a. *See Wooley*, 447 S.W.3d at 75–76. As explained below, Montoya's claim for tortious interference with current business/patient relations arguably could have survived Brewer's Rule 91a motion, but fails in the face of his TCPA motion.

1. Defamation per se and business disparagement

In his first issue, Montoya contends that "Dr. Brewer's defamation was published by conduct when he removed Dr. Montoya from consulting with a patient on January 25, 2014 at 8:10 a.m."[6] Montoya argues that Brewer, "by his actions of removing Dr. Montoya as the

[6] Although Montoya argues his factual allegations supported his claim of business disparagement, his briefing does not provide authority, facts, or analysis separate from his arguments related to defamation. We thus consider those claims together.

nephrologist published a statement that Dr. Montoya was not a competent nephrologist to treat patients coming to the [SACMC] emergency room."

a. Applicable law

The elements of defamation are (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 579, 593 (Tex. 2015) (orig. proceeding). The plaintiff must plead and prove damages, unless the defamatory statements are defamatory per se. *Id.* Defamation per se refers to statements that are so obviously harmful that general damages may be presumed. *Id.* The determinations of whether a published statement is (1) false and defamatory and (2) an actionable statement of fact or a constitutionally protected statement of opinion are questions of law. *Vice v. Kasprzak*, 318 S.W.3d 1, 18 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). The elements of business disparagement are (1) the defendant published false and disparaging information about plaintiff, (2) with malice, (3) without privilege, (4) that resulted in special damages to the plaintiff. *Lipsky*, 460 S.W.3d at 592.

b. Application

Montoya's petition alleges that "Brewer did not see the patient when he removed me as the treating nephrologist he issued the change via a telephone order. [Brewer], without seeing the patient, or chart change[d] the patient's doctor." His petition includes as exhibits copies of pages from a patient's medical chart. The first page, dated January 24, 2014, and signed by a Dr. Bartels, includes a handwritten notation, "Consult Dr. Montoya." The second page, dated January 25, 2014,

and containing no signature, includes a handwritten notation, "Consult Dr. Stevenson." Based on those allegations and supporting documents, Montoya seems to allege only that Brewer arranged to have Stevenson listed as the physician consultation on a patient's chart instead of Montoya. Although Montoya makes the conclusory statement that those actions "published a statement that Dr. Montoya was not a competent nephrologist," we conclude that such conduct, assuming the factual allegations to be true, does not amount to the publication of a false statement about Montoya to a third party, nor would it constitute a statement that was per se defamatory. *See id.* at 593.

Montoya further contends that Brewer defamed him when "[t]he Defendants decided to then have a covert whisper campaign and not refer any patients to Dr. Montoya." The gist of Montoya's allegations seems to be that Brewer was directing SACMC medical staff to not refer patients to Montoya and to instead refer patients to physicians in a SACMC-affiliated practice group. However, Montoya does not allege any specific statements that Brewer made concerning Montoya or to whom. Rather, he seems to contend that, by instructing SACMC staff to not refer patients to Montoya, Brewer was effectively communicating that Montoya "should not be allowed to treat patients at" SACMC.[7] We cannot conclude that Montoya's factual allegations, taken as true, would show that Brewer published a false statement of fact about him to a third party or that it was defamatory per se. *See id.*; *see also Vice*, 318 S.W.3d at 18 ("A defamatory statement must be sufficiently factual to be susceptible of being proved objectively true or false, as contrasted from a purely subjective assertion.").

[7] Montoya also alleges that the refusal by Brewer and SACMC to refer patients to Montoya "malign[ed] and smear[ed]" Montoya, but again, he does not include any specific factual allegations beyond those discussed above.

Montoya cites *In re Memorial Hermann Hospital System*, 464 S.W.3d 686 (Tex. 2015) (orig. proceeding), in support of his contention that he alleged facts supporting his claims of defamation per se and business disparagement. In *Memorial Hermann*, as in this case, Gomez, a physician sued, alleging that the defendants (a hospital, hospital executive, and another physician) had conducted a "whisper campaign" against him. *Id.* at 696. Distinguishable from this case is that the *Memorial Hermann* court did not analyze the sufficiency of those allegations pursuant to Rule 91a; rather, *Memorial Hermann* concerned the confidentiality and discoverability of medical peer-review-committee documents and the meaning of the statutory phrase "relevant to an anticompetitive action." *Id.* at 700. The allegations and causes of action pled by Gomez were discussed as part of the background of the discovery dispute at issue. Even if that case provided instruction on pleading defamation and business-disparagement claims,[8] it is nonetheless distinguishable because unlike Montoya, Gomez alleged specific factual details that underpinned his more general "whisper campaign" allegation, including the allegation that the defendants had intentionally "manipulated" and "displayed false data and statements regarding Dr. Gomez's practice and mortality rates of his patients to an entire room filled with Dr. Gomez's professional colleagues," which "created the appearance that patients were more likely to die in Dr. Gomez's care." *Id.* at 697 (cleaned up).

We conclude that the trial court did not err in dismissing Montoya's defamation-per-se claim against Brewer under Rule 91a. *See* Tex. R. Civ. P. 91a. Taking his

[8] The court did not analyze the allegations as they related to Gomez's claims for defamation or business disparagement, but rather as they related to his antitrust and tortious-interference claims. *In re Memorial Hermann Hosp. Sys.*, 464 S.W.3d 686, 708–13 (Tex. 2015) (orig. proceeding).

allegations as true, we conclude that he did not allege facts that would entitle him to the relief he sought. *See id.* R. 91a.1; *Wooley*, 447 S.W.3d at 75–76. Further, although Montoya argues that he alleged facts supporting a business-disparagement claim, he has not provided authority, facts, or analysis in support of that argument independent of his defamation arguments and thus his business-disparagement claim fails for the same reason. *See Lipsky*, 460 S.W.3d at 592–93.

2. Restraint of trade

Montoya next contends that the trial court erred in dismissing his restraint-of-trade claim against Brewer because his petition alleges facts showing that Brewer has engaged in an "anticompetitive scheme to deprive Dr. Montoya of nephrology referrals" by referring patients only to nephrologists within a certain practice group. Brewer responds that Montoya failed to allege facts that would show that Brewer's actions caused an antitrust injury.

a. Applicable law

Restraint of trade is an antitrust claim governed by the TFEAA. *See* Tex. Bus. & Com. Code §§ 15.01–.52; *Champion Printing & Copying LLC v. Nichols,* No. 03-15-00704-CV, 2017 WL 3585213, at *10 (Tex. App.—Austin Aug. 18, 2017, pet. denied) (mem. op.). Under the relevant provisions of the TFEAA, "[e]very contract, combination, or conspiracy in restraint of trade or commerce is unlawful," and "[i]t is unlawful for any person to monopolize, attempt to monopolize, or conspire to monopolize any part of trade or commerce." Tex. Bus. & Com. Code § 15.05(a), (b). A person may bring suit "whose business or property has been injured by reason of any conduct declared unlawful in" those provisions. *Id.* § 15.21.

However, a plaintiff does not plead an antitrust claim merely by alleging that he has suffered economic injury; rather, he must allege that a defendant's conduct caused an "antitrust injury" by imposing an unreasonable restraint on trade. *See Champion Printing*, 2017 WL 3585213, at *13 (citing *Memorial Hermann*, 464 S.W.3d at 705). That requires a plaintiff to demonstrate "coincidence between his own injury and the public detriment that generally results from the alleged violation." *Id.* The *Memorial Hermann* court elaborated on this injury-to-competition requirement:

> 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. Whether the practice constitutes an improper restraint of trade will depend upon whether the plaintiff's allegations suggest a market in which the removal of a single competitor from the pool of competing sellers would adversely and unreasonably affect overall competitive conditions.

464 S.W.3d at 709–10 (cleaned up). In other words, plaintiffs must allege "a reduction of competition in the market in general and not mere injury to their own positions as competitors in the market." *Id.* at 709; *see also Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696, 708 (4th Cir. 1991) ("If the law were otherwise, many a physician's workplace grievance with a hospital would be elevated to the status of an antitrust action.").

b. Application

In his petition, Montoya alleges that "[t]he Defendants are trying to restrain competition" in the market for treatment of long-term kidney disease in Tom Green County and contiguous counties. He states that "patients that come into the emergency room with kidney problems/illness/disease" who are "in need of a nephrologist's care are being referred to the hospital

affiliated physician group in competition with Dr. Montoya." He alleges that "[a] monopoly in this case is caused by the elimination of Dr. Montoya and is just as harmful as it would be if driving out competition in large groups." He claims that his removal "from the hospital and its relevant market will adversely affect and unreasonably affect overall competitive conditions and cost patients money." Therefore, the thrust of his allegations is that Brewer's actions have injured him and, because he is in competition with the defendants, have adversely affected competition more broadly. However, allegations showing that anticompetitive conduct injured a single competitor do not, without more, successfully allege injury to competition. *See Memorial Hermann*, 464 S.W.3d at 709. Montoya has not alleged "supporting factual detail" as to how injury to him corresponded to injury to competition in the relevant market, as is required to plead an antitrust claim. *See id.* at 710.

Montoya again relies on *Memorial Hermann* in support of his argument, but that case is again distinguishable. In that case, Gomez alleged: that he was the only surgeon at the defendants' hospital, Memorial City, who was capable of performing a specific medical procedure, robotic-assisted heart surgery, *id.* at 696; that the defendants had made a significant investment to facilitate and promote the procedure, *id.*; that another hospital, Methodist West, was in the process of opening and "[t]here was a growing fear at Memorial City that staff would leave to go to Methodist West," *id.*; that Gomez was the first to agree to practice at Methodist West, *id*.; that Memorial City consequently would no longer be the only hospital in Houston offering that procedure and thus "faced sharing, or worse, losing that distinction to Methodist West," *id.*; that by disseminating false information about Gomez's patients' mortality rate, the defendants cast doubt on that procedure throughout the geographic market, "inoculating [themselves] from competition

from a medical service that [they] could no longer offer," *id.* at 711; and that the loss of trust in robotic heart surgery resulted in patients incurring $50,000 or more in medical expenses due to longer hospital stays, *id.* at 711–12.

Gomez's pleadings contained numerous additional factual allegations related to the competitive market, including allegations that Gomez was uniquely capable of performing a specific medical procedure within a certain geographic market, thus suggesting a market in which the removal of a single competitor from the pool of competing providers would adversely and unreasonably affect overall competitive conditions as well as consumers. *See id.* at 710. Montoya, by contrast, has not alleged supporting factual detail that, if true, would similarly suggest a market in which injury to himself would result in injury to overall competitive conditions in that market.

Montoya points to the statement in *Memorial Hermann* that "the adequacy of a physician's contentions regarding the effect on competition is typically resolved after discovery, either on summary judgment or after trial." *Id.* However, the court also explained that a plaintiff must at a minimum "sketch the outline of the antitrust violation with allegations of supporting factual detail." *Id.* Furthermore, under Rule 91a, "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 754 (Tex. App.—Beaumont 2014, pet. denied) (cleaned up). Despite having amended his petition four times by the time of the hearing on Brewer's Rule 91a motion, his pleadings lack such allegations or inferences and instead contain only bare legal conclusions that competition has been restrained unreasonably because defendants' conduct allegedly injured Montoya. *See Memorial Hermann*, 464 S.W.3d at 709–10. Having failed to allege facts that, if true,

would show that defendants' alleged actions injured competition in the relevant market, Montoya failed to plead against Brewer an antitrust claim having a basis in law. *See id*. We thus conclude that the trial court did not err in dismissing Montoya's antitrust claim against Brewer. *See* Tex. R. Civ. P. 91a.

3. Tortious interference with current and prospective business relations

Montoya asserts that Brewer tortiously interfered with Montoya's current and prospective patient relations by conducting a "whisper campaign" to not refer patients to him, by not contacting him for consultations, and by not calling him when his current patients were admitted to the emergency room. Brewer counters that Montoya failed to allege facts showing that he committed a predicate independently tortious or unlawful act. As discussed below, read liberally and indulging every possible inference in Montoya's favor, his claim related to his existing patients arguably survives Brewer's Rule 91a motion but his claim related to prospective business relations does not.

a. Applicable law as to prospective relations

To plead tortious interference with prospective business relations, a plaintiff must allege facts that would show that (1) there was a reasonable probability that the parties would have entered into a business relationship; (2) the defendant committed an independently tortious or unlawful act that prevented the relationship from occurring; (3) 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; and (4) the plaintiff suffered actual harm or damages as a result of the defendant's interference. *Coinmach Corp. v. Aspenwood Apartment*

Corp., 417 S.W.3d 909, 923 (Tex. 2013). "Independently tortious" means conduct that violates some other recognized tort duty. *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 713 (Tex. 2001).

b. Application as to prospective relations

In his petition, Montoya alleges as the independently tortious or unlawful act underlying Montoya's tortious-inference claims the same facts relating to Brewer's allegedly anticompetitive and defamatory conduct. *See Coinmach Corp.*, 417 S.W.3d at 923; *American Med. Int'l, Inc. v. Giurintano*, 821 S.W.2d 331, 335 (Tex. App.—Houston [14th Dist.] 1991, no writ). However, we have held that Montoya did not plead a defamation claim that survived Brewer's Rule 91a challenge, and thus defamation cannot provide a basis for Montoya's claim for tortious interference with prospective business relations. *See Coinmach Corp.*, 417 S.W.3d at 923. Further, we have already concluded that Montoya did not allege facts showing that Brewer's conduct caused an antitrust injury, a prerequisite to proving an antitrust violation. *See Memorial Hermann*, 464 S.W.3d at 709–10. Therefore, the allegations on which Montoya relies in support of his tortious-interference claims fail for the same reasons. *See id.*; *see also Sturges*, 52 S.W.3d at 726 (addressing requirement of predicate tort or unlawful conduct, observing that "[c]onduct that is merely 'sharp' or unfair is not actionable and cannot be the basis for an action for tortious interference with prospective relations"). We note that the *Memorial Hermann* court distinguished stand-alone antitrust claims from tortious-interference claims based on antitrust violations, observing that a plaintiff may plead a valid antitrust *violation* that could serve as the basis of a

tortious-interference claim without pleading a valid antitrust *claim*.[9] *See* 464 S.W.3d at 704–06. However, we conclude that Montoya has failed to allege facts that would show either an antitrust claim or an antitrust violation that could serve as predicate tortious conduct supporting his tortious-interference claims.

Montoya alternatively asserts that in failing to contact him for consultations, Brewer violated the Emergency Medical Treatment and Labor Act ("EMTALA"), which he argues supports his tortious-inference claims. *See* 42 U.S.C. § 1395cc(a)(1)(I)(iii). EMTALA is a federal law enacted to prevent "patient dumping," which is the practice of refusing to treat patients who are unable to pay. *Marshall v. East Carroll Parish Hosp. Serv. Dist*., 134 F.3d 319, 322 (5th Cir. 1998). Montoya contends that before "SACMC created its affiliated practice groups and/or entered into an exclusive contract with the group of hospitalists affiliated and/or managed by Dr. Brewer," he "received his rotating share of referrals as required by . . . EMTALA." In support, he cites a provision of EMTALA that requires providers "to maintain a list of physicians who are on call for duty after the initial examination to provide treatment necessary to stabilize an individual with an emergency medical condition," 42 U.S.C. § 1395cc(a)(1)(I)(iii), and argues that the "purpose of the

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[9] The court explained that tortious interference with a prospective business relation requires a plaintiff "to prove that the defendant's conduct was independently tortious or wrongful as an element of the cause of action. Thus, even without asserting a cause of action under the TFEAA, a plaintiff who asserts that a defendant's conduct is independently wrongful because it violates the laws of antitrust would, as part of proving the violation, be required to show a negative effect on competition. Such a plaintiff would still need to plead a valid antitrust *violation*, however, he would not need to plead a valid antitrust *claim*." *Memorial Hermann*, 464 S.W.3d at 705 (cleaned up). The court cited to a law review article as "discussing 'three superficially paradoxical possibilities,' each of which hypothesizes circumstances under which a plaintiff might be able to prove an antitrust violation, but not be able to recover damages under the antitrust laws." *Id.* at n.79 (citing Phillip Areeda, *Antitrust Violations Without Damages Recoveries*, 89 Harv. L. Rev. 1127 (1976)).

call list is to allow all physicians to equally receive call and paying and non-paying patients" and that Brewer was required to "have a new patient in the emergency room or hospital that needs a specialist consultation assigned to the name off the rotating consultation list." However, the EMTALA provision on which Montoya relies does not contain language governing the manner in which a provider consults physicians on the list or requiring that a physician be given a "rotating share" of consultations. *See id.* Even assuming that an EMTALA violation could serve as a predicate unlawful act supporting a tortious-inference claim, Montoya's pleadings do not demonstrate that Brewer violated EMTALA in failing to refer patients to Montoya or contact him for consultations.

Taking Montoya's allegations as true, we conclude that he has not alleged facts that would entitle him to the relief he sought. *See* Tex. R. Civ. P. 91a.1; *Wooley*, 447 S.W.3d at 75–76. The trial court did not err in dismissing Montoya's claims for tortious interference with prospective business relations under Rule 91a. *See* Tex. R. Civ. P. 91a.

c. Applicable law as to current patients

Montoya also pled "tortious interference with current . . . business/patient relations." In the context of an existing relationship, Texas courts most often discuss the cause of action of tortious interference with a contract, the elements of which are (1) an existing contract subject to interference; (2) an act of interference that is willful, intentional, and calculated to cause damages; and (3) actual damages or loss, *Prudential Ins. Co. of Am. v. Financial Review Servs., Inc.*, 29 S.W.3d 74, 77 (Tex. 2000), only occasionally discussing the claim of tortious interference with

an existing business relationship.[10] For purposes of this opinion, we will assume without deciding that Texas recognizes such a claim and that its elements are: (1) the existence of an existing business relationship that is subject to interference and (2) a willful and intentional act of interference that (3) proximately causes the plaintiff's injury.[11] *See Whisenhunt v. Lippincott*, 474 S.W.3d 30, 44 &

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[10] It is not entirely clear whether Texas recognizes a claim for tortious interference with an existing business relationship, as opposed to tortious interference with a contract. *See Whisenhunt v. Lippincott*, 474 S.W.3d 30, 44 n.14 (Tex. App.—Texarkana 2015, no pet.) (defendants questioned whether cause of action existed and plaintiff only cited cases involving interference with contract, but parties agreed that elements to be proved were those of interference with contract); *see also D'Onofrio v. Vacation Publ'ns, Inc.*, 888 F.3d 197, 214 n.18 (5th Cir. 2018) (observing uncertainty as to whether tortious interference with existing business relationship and tortious interference with contract are separate torts). Recently, the supreme court stated, "Texas law recognizes two types of tortious-interference claims: one based on interference with an existing contract and one based on interference with a prospective business relationship." *El Paso Healthcare Sys., Ltd. v. Murphy*, 518 S.W.3d 412, 421 (Tex. 2017) (reviewing lower court's analysis of claim for tortious interference with existing business relationship). Further complicating our consideration is the fact that Montoya says he is claiming interference with current business relationships but in his reply brief refers to the elements of interference with a contract, never clearly stating what he believes the elements of his claim to be.

[11] *But see D'Onofrio*, 888 F.3d at 215 ("To the extent that Texas recognizes a cause of action for tortious interference with an existing business relationship, its elements are: '(1) *unlawful actions* undertaken by [the defendant] without a legal right or justifiable excuse; (2) with the intent to harm [the plaintiff]; and (3) resulting actual harm or damage.'" (emphasis added) (quoting *American Med. Int'l, Inc. v. Giurintano*, 821 S.W.2d 331, 335 (Tex. App.—Houston [14th Dist.] 1991, no writ))); *Apani Sw., Inc. v. Coca-Cola Enters., Inc.*, 300 F.3d 620, 633–34 (5th Cir. 2002) ("The essential elements of a tortious interference with an existing business relationship cause of action are (1) *unlawful actions* undertaken without justification or excuse; (2) with intent to harm; and (3) actual damages." (emphasis added)); *Fjell Tech. Grp. v. Unitech Int'l, Inc.*, No. 14-14-00255-CV, 2015 WL 457805, at *9 (Tex. App.—Houston [14th Dist.] Feb. 3, 2015, pet. denied) (mem. op.) ("elements of tortious interference with existing business relationships are: (1) *unlawful actions* undertaken by the defendant without a legal right or justifiable excuse; (2) with the intent to harm a party to the relationship; and (3) actual harm or damage" (emphasis added) (citing *Giurintano*, 821 S.W.2d at 335)). *Cf. Giurintano*, 821 S.W.2d at 335 (explaining that in case involving interference with business relationship, *jury charge* said that plaintiff had to prove unlawful actions without legal right or justification, intent to harm plaintiff, and resulting actual harm or damage).

n.14 (Tex. App.—Texarkana 2015, no pet.). In requiring a willful act of interference, the law requires the plaintiff to show that the interference was motivated by legal malice. *See Texas Beef Cattle Co. v. Green*, 921 S.W.2d 203, 210–11 (Tex. 1996) (plaintiff suing for interference with existing contractual relationship need not show "actual malice," which "triggers recovery of exemplary damages" and is distinguishable "from legal malice, which negates the justification defense"); *Winston v. American Med. Int'l, Inc.*, 930 S.W.2d 945, 953 (Tex. App.—Houston [1st Dist.] 1996, writ denied) ("Interference with a business relationship is similar to the tort of contract interference. It is not necessary to establish the existence of a valid contract, but interference with a general business relationship is actionable only if a defendant's interference is motivated by malice."); *Ryan v. Laurel*, 809 S.W.2d 258, 261 (Tex. App.—San Antonio 1991, no writ) (person who willfully and without legal justification or excuse interferes with contract may be liable for those acts); *see also Sturges*, 52 S.W.3d at 717–26 (tracing use of "malice" in context of tortious interference claims); *Exxon Corp. v. Allsup*, 808 S.W.2d 648, 659 (Tex. App.—Corpus Christi 1991, writ denied) (legal malice is "not to be understood in its proper sense of ill will against a person, but in its legal sense, as characterizing an unlawful act, done intentionally without just cause or excuse").

d. Applicable law as to current patients

In his factual allegations that can be construed as relating to a claim for tortious interference with existing patient relationships, Montoya alleges that two elderly individuals, upon their admission to the emergency room, informed SACMC staff that Montoya was their doctor, and that each time, the staff refused to call Montoya. Montoya provided a statement by the daughter of one of the patients, in which she said her mother was "admitted to the hospitalists' service" rather

than Montoya, her "physician of choice." Neither of those allegations refers to any action by Brewer, or even to his knowledge of or presence during those admissions. However, making all possible inferences in Montoya's favor and reading his pleadings as liberally as possible, we conclude that Montoya alleged that Brewer, through his control of hospital staff and his involvement in hospital policy making, willfully and intentionally interfered with Montoya's established and ongoing doctor/patient relationship with those two patients, resulting in harm to Montoya. Therefore, the trial court erred in dismissing Montoya's claim for tortious interference with existing business relationships pursuant to Rule 91a.

Brewer also sought dismissal under the TCPA, however, and the trial court dismissed Montoya's claims on those grounds as well. In his brief, Montoya argues that his claims other than defamation and business disparagement were based on Brewer's conduct in "participat[ing] in the conspiracy aimed at depriving [Montoya] of referrals," not on "allegedly defamatory statements." Therefore, he contends, those claims are not subject to dismissal under the TCPA.

In putting forth his claim for tortious interference with existing business relationships, Montoya alleges that when two of his existing patients were admitted to the emergency room, they were treated by other doctors—as noted earlier, he does not tie those incidents specifically to Brewer. However, reading his pleadings liberally and indulging all possible inferences in Montoya's favor requires us to read the more general allegations related to those two patients in conjunction with his allegations related to Brewer, and Montoya's allegations against Brewer are that he conducted a whisper campaign against Montoya and "published a statement" disparaging Montoya by removing Montoya from being listed as a consult. Although Montoya asserts in his petition that Brewer "was

by *conduct* and a whisper campaign saying Dr. Montoya should not be allowed to treat patients" at SACMC,[12] his only actual factual allegations as to Brewer were the alleged whisper campaign and his removing Montoya as a treating or consulting nephrologist "via a telephone order." The supreme court has explained that any communication, no matter its form or medium and regardless of whether it was made in a public forum or privately, that is made in connection with a matter of public concern falls within the scope of the TCPA, and that "the provision of medical services by a health care professional constitutes a matter of public concern." *Lippincott*, 462 S.W.3d at 509–10. Thus, the factual foundation of Montoya's claim for tortious interference with existing business relationships, read very liberally to infer that such a claim could be leveled against Brewer, was his allegations about Brewer making statements related to the provision of health care. We hold that Montoya's claim against Brewer for tortious interference with existing business relationships fell within

[12] Montoya also asserts that he was "brought up on charges of incompetent patient care for misspelled words on a chart," but provides no further information about those charges, such as how or by whom the claims were instigated or their outcome, nor did he attach exhibits related to those charges or refer to the charges in his own affidavit. We do not believe that this bald assertion can support a "conduct" allegation against Brewer that might fall outside the scope of the TCPA. *See In re Lipsky*, 460 S.W.3d 579, 592–93 (Tex. 2015) ("Bare, 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."). Further, as Brewer asserted in his motion to dismiss, "to the extent any charges . . . brought by Brewer against [Montoya] were brought as part of a medical peer review process," that process is privileged and thus justified. *See Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 725 (Tex. 2001) ("justification and malice overlap to at least some extent: a lawful act is justified and not malicious"); *see also* Tex. Occ. Code § 160.010 (providing immunity from liability to persons reporting or furnishing information to medical peer review committee or board or taking action or making recommendations within scope of peer review, and providing that no claim accrues against health care entity or person who is part of peer-review body from any act, statement, recommendation, or report made without malice in course of peer review).

the scope of the TCPA.[13] We overrule Montoya's arguments related to the trial court's granting Brewer's TCPA motion as to Montoya's claim for tortious interference with existing business relationships.

4. Civil conspiracy

Montoya next argues that the trial court erred in dismissing his civil-conspiracy claims pertaining to his tortious-interference and antitrust claims, specifically, that Brewer and SACMC participated in an antitrust conspiracy and a conspiracy "to deprive Dr. Montoya of referrals." Although we will fully consider this claim as if properly pled by Montoya, we note that

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[13] Although Montoya's brief does not make further argument related to the TCPA motion and his claim for tortious interference, we note that he did not carry his burden of "establish[ing] by clear and specific evidence a prima facie case for each essential element of the claim." *See* Tex. Civ. Prac. & Rem. Code § 27.005(b), (c). In response to Brewer's first TCPA motion, Montoya filed a response, attaching his own affidavit, which recites the same factual allegations related to the consulting-doctor change on the new patient's chart and to his existing patients being seen by other doctors while in the emergency room; two pages from a the new patient's medical chart, the first showing a note, "consult Dr. Montoya," and the second stating, "Consult Dr. Stevenson"; and the sworn statement from Montoya's patient's daughter stating that although she and her mother told SACMC's staff that Montoya was her mother's doctor, her mother was "admitted to the hospitalists' service." Montoya also filed his second amended petition, attaching the excerpts from the patient's chart and the daughter's statement. After Brewer filed an amended motion to dismiss, Montoya amended his petition two more times and filed a supplemental response, this time attaching an affidavit by another doctor on the SACMC staff, stating that he "learned of the whisper campaign against Dr. Montoya" and that Brewer led "a campaign to not use independent physicians" when referring patients; and a second affidavit by Montoya, which only addresses the changing of the new patient's chart to consult a doctor other than Montoya. Montoya at best presented some conclusory statements that, read broadly, might suggest that Brewer willfully and intentionally interfered with Montoya's existing doctor/patient relationships or that Montoya might have been damaged by any such acts by Brewer. However, such "[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." *See Lipsky*, 460 S.W.3d at 592–93.

his petition does not explicitly state that conspiracy as a cause of action, instead occasionally alleging a conspiracy between Brewer and SACMC throughout his factual allegations. It was Brewer who noted that Montoya seemed to be alleging a claim for conspiracy, listing it in his amended motion to dismiss as a "cause of action thrown in with the factual dissertation."[14]

A civil conspiracy is a combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983). The elements of civil conspiracy are (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result. *Triplex Commc'ns, Inc. v. Riley*, 900 S.W.2d 716, 719 (Tex. 1995). Civil conspiracy is a derivative tort: a defendant's liability in a conspiracy action depends on participation in an underlying tort for which the plaintiff seeks to hold at least one of the defendants liable. *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996). Consequently, an appellate court does not analyze a trial court's dismissal of a plaintiff's conspiracy claims separately from the trial court's dismissal of the plaintiff's other claims. *See id.* Because we have concluded that the trial court did not err in dismissing Montoya's antitrust and tortious-interference claims, we conclude that the trial court did not err in dismissing Montoya's conspiracy claims predicated on those claims. *See id.*; *see also* Tex. R. Civ. P. 91a.

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[14] In Montoya's sixth amended petition, filed after his claims against Brewer were dismissed, he lists "Restraint of trade (Monopolization/Attempted Monopolization/Conspiracy to Monopolize)" as a cause of action and asserts a claim for "Group Boycott and Conspiracy in Restraint of trade."

Montoya has failed to demonstrate that the trial court erred in dismissing most of his claims under Rule 91a or that it erred in dismissing his claim for tortious interference with existing patients under the TCPA. We overrule his first issue.[15]

III. Summary judgment

In his second issue, Montoya contends that the trial court erred in granting summary judgment in favor of SACMC on the basis of the trial court's dismissal of all of Montoya's claims against Brewer.

A. Standard of review

We review a trial court's summary-judgment ruling de novo. *Valence Operating Co. v. Dorsett,* 164 S.W.3d 656, 661 (Tex. 2005). We take as true all evidence favorable to the non-movant and indulge every reasonable inference in the non-movant's favor. *Id.* The movant must demonstrate that no material fact issue exists and that it is entitled to judgment as a matter of law. *See* Tex. R. Civ. P. 166a(c); *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000) (per curiam). To prevail on summary judgment, the movant must establish each element of its claim as a matter of law or negate an element of the non-movant's claim or defense as a matter of law. *See M.D. Anderson*, 28 S.W.3d at 23; *C.W. 100 Louis Henna, Ltd. v. El Chico Rests. of Tex., L.P.*, 295 S.W.3d 748, 753 (Tex. App.—Austin 2009, no pet.).

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[15] Montoya contends that Brewer acted with malice and that Montoya is thus entitled to exemplary damages, *see* Tex. Civ. Prac. & Rem. Code § 41.001(7), but because we have concluded that the trial court did not err in dismissing Montoya's claims, we do not reach his arguments regarding damages.

B. The trial court erred in granting traditional summary judgment in favor of SACMC

After the trial court dismissed all of Montoya's claims against Brewer, SACMC filed a traditional motion for summary judgment. In its motion, SACMC argued that because all of Montoya's "claims of liability against SACMC derive from Brewer's alleged bad acts," and because Brewer had been dismissed from the case, SACMC was entitled to dismissal of all of Montoya's claims against it:

> Aside from Brewer, Plaintiff does not specifically allege in his live pleading any other individuals who took part in the alleged various defamatory and conspiratorial schemes Brewer supposedly perpetrated. Further, Plaintiff alleges no direct or separate liability claims against SACMC above and apart from the actions of its agent, Brewer. Instead, SACMC's only potential liability sounds in the doctrine of respondeat superior.

In his response to SACMC's motion for summary judgment, Montoya argued that the dismissal of Brewer from the suit "has no relevance to the causes of action brought against" SACMC because his claims against SACMC "are all separate and independent of Dr. Brewer." The trial court granted summary judgment in favor of SACMC and dismissed Montoya's claims against it with prejudice.

On appeal, Montoya contends that his "Sixth Amended Petition makes it clear that SACMC was being sued for its own conduct, and not merely for the conduct or statements of Dr. Brewer."[16] He argues that SACMC was not entitled to summary judgment "merely because

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[16] SACMC contends that Montoya waived that argument because "Appellants made no argument beyond a bald assertion to the trial court . . . regarding how their latest petition 'brought claims directly against SACMC for SACMC's own conduct'" and "made no request that the trial court 'consider' the allegations in their latest petition." However, as the summary-judgment movant, SACMC had the burden to conclusively negate an element of each of Montoya's claims as a matter

Dr. Montoya has not pled in detail exactly which representatives of SACMC" other than Brewer engaged in misconduct. SACMC maintains that "no other SACMC-affiliated individuals were pled to have committed actionable acts in Appellants' then-live pleading."

Although Montoya's petition[17] specifically identifies only Brewer as an agent of SACMC who engaged in misconduct, the petition also contains allegations of misconduct by other unnamed agents and "affiliates" of SACMC. The following excerpts from Montoya's petition are examples of those allegations:

- Dr. Brewer, as well as the other agents/employees of (SACMC) and/or its affiliated practices are liable under the doctrine of respondeat superior and vicarious liability.

- The Defendants (SACMC) and Dr. Kirk Brewer, along with WTMA [West Texas Medical Associates] and Dr. Brewers [sic] group of hospitalists acting by and through its agents/employees/principals/officers acted together to carry out the improper and illegal actions and therefore are jointly and severally liable for civil conspiracy in carrying out their wrongful activities.

- Also the patients of Dr. Montoya have been refused the services of Dr. Montoya when the patient is in the hospital.

- [An existing patient of Montoya] tried to see Dr. Montoya in the emergency room of [SACMC] and . . . the emergency room would not call Dr. Montoya

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of law before the burden shifted to Montoya to respond. *See M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000) (per curiam); *see also Tello v. Bank One, N.A.*, 218 S.W.3d 109, 118–19 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (observing that "summary judgments must stand or fall on their own merits, and the non-movant's failure to answer or respond cannot supply by default the summary judgment proof necessary to establish the movant's right").

[17] Montoya amended his petition twice after Brewer was dismissed from the suit. The live petition—and the one to which we refer here—is the Sixth Amended Petition, which Montoya timely filed prior to the hearing on SACMC's motion for summary judgment. *See* Tex. R. Civ. P. 63.

> to treat his existing patient. . . . Another patient of Dr. Montoya . . . requested Dr. Montoya when she went to the emergency room and she also was refused to see Dr. Montoya.
>
> - Dr. Montoya was brought up on charges of incompetent patient care for misspelled words on a chart. These actions were just taken to discredit Dr. Montoya and his ability to practice medicine in San Angelo and at [SACMC].
>
> - [SACMC and Dr. Brewer] and WTMA and Dr. Brewer's group of hospitalists (eventual defendants) are being sued for their individual roles and conduct in the monopolization, attempted monopolization, conspiracy to monopolize, and group boycott/concerted refusal to deal. While each of these entities may have engaged in the illegal conduct through their agents or representatives, they are being sued for their individual roles and conduct and not simply under a respondeat superior theory of liability due to actions of Dr. Brewer.

We conclude that Montoya's petition alleged misconduct by SACMC and its agents other than Brewer. SACMC argues that "Appellants were required to present evidence, and in a clear manner, that individuals at SACMC other than Dr. Brewer committed bad acts." We first note that SACMC's motion for summary judgment did not challenge deficiencies in Montoya's pleadings after special exceptions had been granted. *Cf. Natividad v. Alexsis, Inc.*, 875 S.W.2d 695, 699 (Tex. 1994) (after plaintiff has had opportunity to replead following special exceptions, defendant may seek summary judgment on basis that plaintiff's pleading is deficient for failure to state cause of action); *FinServ Cas. Corp. v. Transamerica Life Ins. Co.*, 523 S.W.3d 129, 145–46 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (upholding summary judgment on ground raised in motion for summary judgment that plaintiffs' amended petitions failed to cure deficiencies movant had cited in its special exceptions). Although Montoya did not identify other individual tortfeasors by name in his petition, he had no burden to identify or produce evidence of specifically named

tortfeasors in response to SACMC's traditional motion for summary judgment until the burden to do so was shifted to him. Rather, SACMC had the initial burden to conclusively negate an element of each of Montoya's claims as a matter of law. *See M.D. Anderson*, 28 S.W.3d at 23.

Further, SACMC's motion was not a no-evidence motion for summary judgment pursuant to Texas Rule of Civil Procedure 166a(i). Instead, SACMC sought summary judgment solely on the ground that Montoya's petition contained only allegations of misconduct by Brewer—a contention unsupported by the record—who had been dismissed from the suit. Because we may not uphold a summary judgment on a ground not presented in a motion for summary judgment, we must conclude that SACMC failed to carry its burden as to Montoya's claims against SACMC based on allegations of misconduct by unidentified agents of SACMC. *See* Tex. R. Civ. P. 166a(c) ("Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal."); *see also McConnell v. Southside Indep. Sch. Dist*., 858 S.W.2d 337, 341 (Tex. 1993) ("Consistent with the precise language of Rule 166a(c), we hold that a motion for summary judgment must itself expressly present the grounds upon which it is made. A motion must stand or fall on the grounds expressly presented in the motion."). We therefore must conclude that the trial court erred in granting summary judgment in favor of SACMC dismissing Montoya's claims. We sustain Montoya's second issue.

CONCLUSION

We affirm the trial court's orders dismissing Montoya's claims against Brewer.[6] We reverse the trial court's order granting summary judgment in favor of SACMC and remand that portion of the case to the trial court for proceedings consistent with this opinion.

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Cindy Olson Bourland, Justice

Before Chief Justice Rose, Justices Field and Bourland

Affirmed in Part; Reversed and Remanded in Part

Filed: May 31, 2018

[6] As noted earlier, both the Rule 91a dismissal order and the TCPA dismissal order contained language awarding Brewer attorney's fees. However, the Rule 91a order provided that Brewer "may recover these amounts only one time and not under both this Order and the Order granting the [TCPA] Motion." Thus, regardless of the grounds for the trial court's dismissal orders in favor of Brewer, Brewer is only entitled to collect fees once.