

Reversed and Remanded and Memorandum Opinion filed April 21, 2022.



In The

Fourteenth Court of Appeals

NO. 14-20-00463-CV

**NYANZA MOORE AND FRIENDS OF NYANZA DAVIS MOORE,
Appellants**

V.

DERRICK REED, Appellee

**On Appeal from the 239th District Court
Brazoria County, Texas
Trial Court Cause No. 106805-CV**

MEMORANDUM OPINION

Today, we address whether the Texas Citizen's Participation Act (TCPA) should bar a defamation lawsuit between two political candidates.¹ Concluding the TCPA applies under the circumstances presented here and the plaintiff failed to present sufficient evidence to meet his burden to overcome dismissal under the statute, we reverse the trial court's order denying the defendants' TCPA motion to

¹ Tex. Civ. Prac. & Rem. Code §§ 27.001-.011.

dismiss and remand.

Background

Nyanza Moore and Derrick Reed were candidates in the 2020 Democratic Primary for Texas Congressional District 22. Moore recorded and shared a “Facebook live” message in which, according to Reed, Moore “emphatically and falsely infer[red] that . . . Reed ‘beats women.’” Moore then made a second Facebook post in which she “expressly identified . . . Reed by name as someone who ‘beats women’” and accused Reed of beating his ex-wife. Reed also alleges that Moore implied she had a copy of a protective order involving a domestic violence incident between Moore and his ex-wife. In another Facebook post within the group entitled “Speak Out! And Tell The Truth,” someone with the profile name “Nyanza Moore for Congress” commented about Reed: “You don’t get to beat your wife and run for Congress!”

Reed filed and served a verified petition bringing a defamation claim against Moore and the group Friends of Nyanza Davis Moore (Friends). Excerpts from the Facebook posts were attached as exhibits.² Moore and Friends then filed a TCPA motion to dismiss. In response, Reed did not provide any evidence. Instead, he chose to rely on his verified petition along with its attached exhibits. The motion was denied by operation of law.

Discussion

Moore and Friends challenge the trial court’s denial of their motion to dismiss on the grounds that (1) the TCPA applies because the defamation claim is based on or in response to the exercise of the right to free speech made in connection with a matter of public concern, and (2) Reed did not establish by clear and specific

² Reed attached a screenshot of the Facebook live feed to his petition with a notation that “[a]ctual video has been submitted to the Court,” but the video is not in the appellate record.

evidence a prima facie case for each essential element of his defamation claim as required under the statute.³ Moore and Friends also contend the trial court erred in failing to award them costs and reasonable attorney's fees.

To be entitled to dismissal under the TCPA, the defendant has the initial burden to show by a preponderance of the evidence that the statute applies, and then the burden shifts to the plaintiff to establish by clear and specific evidence a prima facie case for each essential element of the claim in question. Tex. Civ. Prac. & Rem. Code § 27.005(b)-(c). We review the denial of a TCPA motion to dismiss de novo. *Republic Tavern & Music Hall, LLC v. Lorenzo's Midtown Mgmt., LLC*, 618 S.W.3d 118, 122 (Tex. App.—Houston [14th Dist.] 2020, no pet.). We first address applicability of the statute and then turn to whether Reed met his evidentiary burden to present clear and specific evidence of each element of his defamation claim.

I. TCPA Applicable

Moore and Friends contend that the TCPA applies because Reed's legal action is based on or in response to Moore and Friends' exercise of their right to free speech. Tex. Civ. Prac. & Rem. Code § 27.005(b). Under the TCPA, exercise of the right of free speech is defined as "a communication made in connection with a matter of public concern." *Id.* § 27.001(3). A matter of public concern is a "statement or activity regarding: (A) a public official, public figure, or other person who has drawn substantial public attention due to the person's official acts, fame, notoriety, or celebrity; (B) a matter of political, social, or other interest to the community; or (C) a subject of concern to the public." *Id.* § 27.001(7).

Moore and Friends contend that the challenged statements are

³ Moore and Friends also contend they are entitled to dismissal because they conclusively negated an element of Reed's defamation claim. We do not reach this issue because we conclude Reed did not meet the clear and specific evidentiary burden under the statute.

communications made in connection with a matter of public concern because Reed was previously the City of Pearland’s Planning and Zoning Commissioner and a member of Pearland’s City Council and he stepped down from the latter position to run for U.S. Congress. According to Reed, the statements “do not involve matters of public concern because people in the public were not debating the specific issues addressed in [the] publications and the media was not covering any such debate.”

What is a matter of public concern? Speech that can “be fairly considered as relating to any matter of political, social, or other concern to the community.” *Brady v. Klentzman*, 515 S.W.3d 878, 884 (Tex. 2017) (quoting *Snyder v. Phelps*, 562 U.S. 443, 453 (2011)). Such matters include “a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.” *Id.* Moreover, a person who chooses to become a candidate for public office puts their character in issue as it relates to their qualifications for the office, which is also a matter of public concern. *Cruz v. Van Sickle*, 452 S.W.3d 503, 515 (Tex. App.—Dallas 2014, pet. struck). We look to the content, form, and context of speech to determine if it is a matter of public concern. *Brady*, 515 S.W.3d at 884.

The challenged statements were made during a political campaign and involve Reed’s character and fitness for office because the statements reference an alleged crime—domestic violence—purportedly committed by Reed. *See Weber v. Fernandez*, No. 02-18-00275-CV, 2019 WL 1395796, at *6 (Tex. App.—Fort Worth Mar. 28, 2019, no pet.) (mem. op.). Allegations of domestic violence against Reed, as a former city council member and a candidate for the U.S. Congress, are “a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.” *See Brady*, 515 S.W.3d at 884; *see also Weber*, 2019 WL 1395796, at *6; *Campbell v. Clark*, 471 S.W.3d 615, 624 (Tex. App.—Dallas 2015, no pet.) (“The article and mailer at issue in this case contained statements concerning alleged crimes and government corruption implicating an incumbent county

commissioner.”). In fact, Reed concedes that the allegations, if true, “would be grounds for removal from office and would constitute crimes.” Based on the context of the statements, we conclude that they were made in connection with a matter of public concern. Accordingly, the TCPA applies to Reed’s defamation claim.

II. Prima Facie Case of Actual Malice Not Established by Clear and Specific Evidence

Because Moore and Friends met their burden to show the TCPA applies, Reed was required to establish by clear and specific evidence a prima facie case for each essential element of his defamation claim. *See* Tex. Civ. Prac. & Rem. Code § 27.005(c). As noted, Reed did not provide any evidence in response to the motion to dismiss. He contends that we can consider the pleadings and exhibits as evidence “[f]or purposes of the TCPA.” We have held that the TCPA requires something beyond allegations in the pleadings to support a rational inference that an allegation is true. *Buzbee v. Clear Channel Outdoor*, 616 S.W.3d 14, 29 (Tex. App.—Houston [14th Dist.] 2020, no pet.); *see also Gensetix, Inc. v. Baylor Coll. of Med.*, 616 S.W.3d 630, 644 (Tex. App.—Houston [14th Dist.] 2020, pet. dism’d) (plurality op.). Accordingly, a nonmovant cannot rely solely on allegations in the pleadings to establish a prima facie case as to his claims. *Buzbee*, 616 S.W.3d at 29.

That said, Reed filed a verified petition with attached exhibits. Generally, pleadings are not competent evidence, even if sworn or verified. *Laidlaw Waste Sys. (Dallas), Inc. v. City of Wilmer*, 904 S.W.2d 656, 660 (Tex. 1995). In that connection, conclusory statements in pleadings are not probative and will not establish a prima facie case. *Fawcett v. Grosu*, 498 S.W.3d 650, 660 (Tex. App.—Houston [14th Dist.] 2016, pet. denied). However, pleadings with attached evidence “setting forth the factual basis for a claim are sufficient to resist a TCPA motion to dismiss.” *Id.* (holding pleadings with attached exhibits contained a minimum quantum of clear and specific evidence in support of defamation claim) (citing *In re*

Lipsky, 460 S.W.3d 579, 591 (Tex. 2015)). As the Texas Supreme Court held, “[i]n a defamation case that implicates the TCPA, pleadings and evidence that establishes the facts of when, where, and what was said, the defamatory nature of the statements, and how they damaged the plaintiff should be sufficient to resist a TCPA motion to dismiss.” *Lipsky*, 460 S.W.3d at 591. This includes a showing of the requisite degree of fault, which in this case is actual malice. *See id.* at 593 (listing elements of defamation).

We turn to the evidence presented here. The parties agree that Reed was a public official or public figure, and thus the elements of defamation applicable here are (1) the defendant published a false statement of fact; (2) the statement defamed the plaintiff; (3) the defendant acted with actual malice; and (d) the statement proximately caused damages. *Rodriguez v. Gonzales*, 566 S.W.3d 844, 851 (Tex. App.—Houston [14th Dist.] 2018, pet. denied). The parties dispute whether Reed presented clear and specific evidence that Moore and Friends acted with actual malice.

Actual malice means knowledge of, or reckless disregard for, the falsity of a statement. *Bentley v. Bunton*, 94 S.W.3d 561, 591 (Tex. 2002). It is a term of art and does not refer to ill will, spite, or evil motive. *Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 171 (Tex. 2003). Reckless disregard in this context means that the defendant “entertained serious doubts as to the truth of [the] publication.” *Id.* (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)). Reckless disregard focuses subjectively on the defendant’s state of mind and requires more than mere negligence. *Id.* The plaintiff must establish “‘that the defendant in fact entertained serious doubts as to the truth of his publication,’ or had a ‘high degree of awareness of [the] probable falsity’ of the published information.” *Id.* (quoting *Harte–Hanks Comm., Inc. v. Connaughton*, 491 U.S. 657, 688 (1989)). Reckless disregard requires calculated falsehood, and when the defendant’s words “lend themselves to more than

one interpretation, the plaintiff must establish either that the defendant knew that the words would convey a defamatory message, or had reckless disregard for their effect.” *Id.* at 172.

Reed contends on appeal that he presented sufficient evidence to support a rational inference that Moore and Friends “entertained serious doubts as to the truth of their publications” because Moore “hired a private investigator in an attempt to corroborate her unnamed ‘reliable sources’”; is an attorney, and her profession requires her to fact check; and failed to consult with Reed, his wife, or any source other than unnamed sources who could verify the reports. Reed alleged actual malice in his petition on the grounds that Moore and Friends purportedly (1) knew the challenged statements “were false and would damage . . . Reed’s family, reputation, integrity, business and campaign”; (2) had no facts to support their statements; and (3) claimed to have a copy of a protective order between Reed and his ex-wife that did not exist. In response to the motion to dismiss, Reed argued that he established actual malice because Moore and Friends relied on unnamed sources and made no effort to investigate.

Allegations in the Petition. As an initial matter, the allegations regarding Moore’s status as an attorney who should “fact check” and Moore’s and Friends’ failure to consult Reed, his wife, or other sources, if true, do not establish anything more than negligence, which does not show actual malice. *See id.* at 172. Moreover, bare allegations that Moore and Friends knew the challenged statements were false and were aware of no facts to support the statements are conclusory. Conclusory allegations do not meet Reed’s clear and specific evidentiary burden. *See Fawcett*, 498 S.W.3d at 663. We do not consider any of these allegations to determine whether Reed presented evidence of actual malice.

Petition Exhibits. We turn to the exhibits attached to the petition to see if

they support Reed’s argument that he established actual malice by clear and specific evidence. As discussed, the exhibits consist only of screenshots from Facebook that include some of the alleged challenged statements. As to the screenshot of the Facebook live feed, there is no evidence in the appellate record of the statements that were made during that recording, so we do not consider it. There is no mention in the screenshots of Moore’s efforts or lack thereof to investigate the veracity of the challenged statements, no mention that Moore relied on unnamed sources, and no mention of a protective order.

Moore’s Affidavits. As an additional matter, we note that Moore attached an affidavit to her motion to dismiss in which she stated that her sources were “a woman who has been involved with Pearland’s local government and who has known . . . Reed for many years” and “an attorney who [had] been very close friends with . . . Reed’s ex-wife since the two attended college together many years ago.” According to Moore, “[t]he second source informed [her] that she had heard the allegations directly from . . . Reed’s ex-wife during the divorce.” Moore also attested that she tried to obtain a copy of the divorce filings, but she could not because they were confidential. Moore attached another affidavit to her reply in support of the motion to dismiss in which she stated that she hired an investigator who told her that he had obtained “a protective order involving a domestic violence situation between . . . Reed and his ex-wife.”⁴ We need not decide whether this evidence rebuts Reed’s actual malice claim because Reed did not present any evidence in support of his allegations regarding the reliability of unnamed sources and the existence of a

⁴ Below, Reed argued that the failure to investigate shows actual malice. On appeal, he argues to the contrary that Moore hired an investigator because she entertained serious doubts as to the veracity of the challenged statements. Although Moore stated that she hired an investigator, that evidence could support an inference that she sought to verify the statements. That, standing alone, does not show reckless disregard for the truth.

protective order.⁵ On this record, Reed did not meet his burden to present clear and specific evidence of actual malice.

Conclusion

Moore and Friends established that the TCPA applies to Reed’s defamation claim. And Reed failed to present clear and specific evidence of actual malice; thus, he did not meet his burden to establish a prima facie case for each essential element of the defamation claim. Accordingly, the trial court erred in denying the TCPA motion to dismiss. Consistent with Moore and Friends’ request, we reverse the trial court’s order denying the motion and remand the case to the trial court for proceedings consistent with this opinion, including dismissal of Reed’s defamation claim against Moore and Friends and an award to Moore and Friends of costs and reasonable attorney’s fees authorized by the TCPA. *See* Tex. Civ. Prac. & Rem. Code § 27.009(a)(1); *Cox Media Group, LLC v. Joselevitz*, 524 S.W.3d 850, 865-66 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

/s/ Frances Bourliot
Justice

Panel consists of Justices Jewell, Bourliot, and Poissant.

⁵ Accordingly, we do not reach Moore and Friend’s third issue in which they assert that they conclusively negated an element of Reed’s defamation claim. *See* Tex. Civ. Prac. & Rem. Code § 27.005(d) (requiring trial court to dismiss legal action if movant “establishes an affirmative defense or other grounds on which the [movant] is entitled to judgment as a matter of law”).