

AFFIRMED; Opinion Filed August 2, 2016.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-15-01052-CV

NEELY MOLDOVAN AND ANDREW MOLDOVAN, Appellants

V.

ANDREA POLITO AND ANDREA POLITO PHOTOGRAPHY, INC., Appellees

**On Appeal from the 134th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-15-03069**

MEMORANDUM OPINION

Before Justices Fillmore, Stoddart, and O'Neill¹
Opinion by Justice Stoddart

This accelerated interlocutory appeal arises from Andrea Polito and Andrea Polito Photography, Inc.'s ("APP") action for defamation, business disparagement, tortious interference with prospective contracts, and conspiracy against Neely Moldovan and Andrew Moldovan. The Moldovans moved to dismiss the action pursuant to the Texas Citizens Participation Act ("TCPA"), which provides for dismissal of actions involving the exercise of certain constitutional rights. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001–27.011 (West 2015). The trial court denied the Moldovans' motion. In two issues, the Moldovans contend the denial was error because there is no evidence that the commercial speech exception to the TCPA

¹ The Hon. Michael J. O'Neill, Justice, Court of Appeals, Fifth District of Texas at Dallas, Retired, sitting by assignment.

applies and because the trial court permitted live testimony at the hearing on the motion to dismiss. We affirm the trial court's order denying the motion to dismiss.

BACKGROUND

Appellee Andrea Polito is a photographer and the owner of appellee APP, a corporation. Appellants Neely and Andrew Moldovan² are a now-married couple who hired APP to photograph their wedding. The parties' dispute began over what was, and was not, included in the customized photography package purchased by the Moldovans from APP, but quickly escalated when the Moldovans aired their grievance on television and on social media. Polito and APP sued the Moldovans alleging they "instituted a public smear campaign." Polito and APP allege that what began as a dispute about a \$150 charge for a cover for the Moldovans' wedding album resulted in substantial damage to Polito's personal and professional reputation and APP's business. The Moldovans reply that "[t]his lawsuit is nothing more than an attempt to silence and punish Defendants for exercising [their free speech] right by taking their dispute with the Plaintiffs to the news media."

Neely owns a for-profit company, A Complete Waste of Makeup, LLC. The company "represent[s] various social media accounts for businesses." Neely also authors a blog that generates revenue "[t]hrough sponsored posts and through a blog course" that Neely teaches. For her sponsored posts, companies send her products which she reviews in posts she publishes on the blog. She also promotes the brands on Twitter, Facebook, and Instagram. After the sponsoring company reviews the posts, it compensates Neely for her services. Payments are made to Neely individually rather than to her company. The number of daily hits to her blog is relevant to the amount of money she receives from her sponsors; the more hits on her blog, the higher her compensation. Other factors affecting her compensation are the number of her

² For clarity, we refer to appellants individually by their first names and together as "the Moldovans."

followers on Facebook, Instagram, Twitter, Pinterest, Google Plus, You Tube, and “[r]eally any social media account attached to my blog,” as she testified in her deposition. Andrew has a college degree in computer engineering and a graduate degree in security engineering, and works in that field.

On January 12, 2015, the same day their dispute with Polito and APP arose, the Moldovans contacted the local NBC news affiliate, Channel 5. The Moldovans invited Scott Gordan, an NBC 5 reporter, to their home for an interview. The resulting story aired on television on January 16, 2015, with an accompanying article on NBC 5’s website. The article began, “[t]wo Dallas newlyweds claim that their wedding photographer is holding their pictures hostage until they pay an extra fee for a ‘cover’ for their photo album—even though they already paid for the book itself.” The article stated that the Moldovans had already paid Polito over \$6,000 to photograph their wedding, including the purchase of a wedding album. But Polito now required the Moldovans to pay an additional \$150 for the cover of the album they had already purchased, a fee not disclosed in the parties’ contract. The article reported that the Moldovans “have not received a CD of their pictures, which was also part of their agreement,” and “the photographer told them unless they pay for the cover or ‘forfeit’ the album, they can’t get the disk either.” “What’s more,” the article continues, “if the Moldovans don’t do anything by Feb. 18, the photographer will ‘archive’ their pictures,” and charge “another \$250” to retrieve them. The article quotes Neely’s complaints that “[o]ur wedding was over three months ago” and “[i]t’s heartbreaking because these are our memories.”

The first NBC article was viewed by more than 350,000 people. The story “went viral,” spurring thousands of “views” on the websites, blogs, and social media that carried it, and receiving comments from readers around the world. The Moldovans then published the story on social media. Neely and Andrew encouraged their social media contacts to view the story, share

negative information about Polito and APP, and use photographers other than Polito and APP. Polito closed down APP's Facebook page due to more than fifty negative reviews posted there after the story aired.

Polito and APP brought suit contending that "the Moldovans' tortious actions have damaged Polito's professional reputation, caused her extreme emotional distress, and already caused, and will continue to cause, substantial economic damages to APP." The Moldovans filed a motion to dismiss the suit, alleging that it was in response to their exercise of the right of free speech. After an evidentiary hearing at which Polito testified, the trial court denied the Moldovans' motion to dismiss. In its order, the trial court found that Neely "is primarily engaged in the business of selling social media services through her personal blog, which exempts her statements from coverage" under TCPA section 27.010(b). The trial court further found that "[a]dditionally or alternatively, Plaintiffs have proven by clear and specific evidence a prima facie case of each element of their claims for defamation per quod, defamation per se, business disparagement, tortious interference with prospective contracts, and civil conspiracy" and the Moldovans "have failed to prove by a preponderance of the evidence their defenses of opinion and substantial truth." The court concluded, "[a]s such, the Court hereby DENIES the Motion, pursuant to TEX. CIV. PRAC. & REM. CODE § 27.005." This appeal followed.

APPLICABLE LAW AND STANDARD OF REVIEW

The legislature enacted the TCPA "to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury." TCPA § 27.002; *see also In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015) (TCPA protects citizens from retaliatory lawsuits that seek to silence or intimidate them on matters of public concern). If a legal action is brought in response

to a party's exercise of the right of free speech, right to petition, or right of association, then that party may file a motion to dismiss the legal action. TCPA § 27.003.

The movant bears the initial burden to show by a preponderance of the evidence that the action “is based on, relates to, or is in response to the party's exercise of” the right of free speech, petition, or association. *Id.* §§ 27.003, 27.005(b); *Lipsky*, 460 S.W.3d at 586. If the movant satisfies this “first prong,” the trial court must dismiss the action unless the party who brought the action “establishes by clear and specific evidence a prima facie case for each essential element of the claim in question.” TCPA § 27.005(b), (c); *Lipsky*, 460 S.W.3d at 587; *see also Pickens v. Cordia*, 433 S.W.3d 179, 183 (Tex. App.—Dallas 2014, no pet.) (movant bears initial burden on first prong of section 27.005). Notwithstanding the nonmovant's proof of a prima facie case, however, the court shall dismiss a legal action against the movant if the movant establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim. TCPA § 27.005(d).

Section 27.010 lists four exemptions from the application of the TCPA. *See* TCPA § 27.010(a)–(d). One of these exemptions relates to commercial speech and provides that the TCPA does not apply to “a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, [or] services . . . or a commercial transaction in which the intended audience is an actual or potential buyer or customer.” TCPA § 27.010(b); *see also Backes v. Misko*, 486 S.W.3d 7, 21 (Tex. App.—Dallas 2015, pet. denied). The nonmovant bears the burden of proving a statutory exemption. *Better Bus. Bureau of Metro. Dallas, Inc. v. BHD FW, Inc.*, 402 S.W.3d 299, 309 (Tex. App.—Dallas 2013, pet. denied).

We review de novo the trial court's determinations that the parties met or failed to meet their burdens of proof under section 27.005. *Campbell v. Clark*, 471 S.W.3d 615, 623 (Tex.

App.—Dallas 2015, no pet.). We also review de novo questions of statutory construction. *Better Bus. Bureau of Metro. Dallas, Inc.*, 402 S.W.3d at 304–05.

ANALYSIS

In their motion to dismiss, the Moldovans alleged that all of Polito and APP’s claims arose from the Moldovans’ “protected free speech.” They contended that the trial court was required to dismiss the claims unless Polito and APP demonstrated, by clear and specific evidence, a prima facie case for each essential element of their claims. And they argued that even if Polito and APP met this burden, the case must be dismissed if the Moldovans established a valid defense such as “substantial truth or non-actionable opinion.” They now urge these arguments in this appeal.

A. Exercise of the Right of Free Speech and Statutory Exemption

The Moldovans contend that their statements were made in the “exercise of the right of free speech” as “a communication made in connection with a matter of public concern.” *See* TCPA §§ 27.001(3), 27.003(a). “Communication” is broadly defined in the TCPA as “the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.” TCPA § 27.001(1). A “matter of public concern” includes an issue related to “a good, product, or service in the marketplace.” *Id.* § 27.001(7)(E). Polito and APP do not dispute that the Moldovans’ statements were communications related to a good, product, or service in the marketplace. Accordingly, we conclude that the Moldovans’ statements were communications made in connection with a matter of public concern; the Moldovans were exercising their right of free speech; and Polito and APP’s lawsuit is based on, relates to, or was filed in response to that right. *See Backes*, 486 S.W.3d at 20.

Polito and APP contend the TCPA does not apply to protect Neely's statements³ because the commercial speech exemption applies. *See* TCPA § 27.010(b). Polito and APP argue that Neely is "a person primarily engaged in the business of selling" her social media services, and the statements in question arose out of the sale of those services or out of "a commercial transaction in which the intended audience is an actual or potential buyer or customer." *Id.*; *see Backes*, 486 S.W.3d at 21. The trial court agreed with Polito and APP, finding that "Defendant Neely Moldovan is primarily engaged in the business of selling social media services through her personal blog."

Neely's statements at issue here concern Polito's and APP's business, not Neely's. In similar circumstances, courts have determined that the TCPA applies to protect the free speech rights of persons to review providers of goods and services. *See, e.g., Better Bus. Bureau of Metro. Dallas, Inc.*, 402 S.W.3d at 308. Reviews and ratings by organizations such as better business bureaus have been held to be communications made in connection with a matter of public concern under the TCPA, not commercial speech. *See, e.g., Better Bus. Bureau of Metro. Houston, Inc. v. John Moore Servs., Inc.*, 441 S.W.3d 345, 353–54 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). These organizations are in the business of reviewing and rating providers of goods and services for the benefit of their members. The reviews do not arise out of the sale of goods or services, and the intended audience is the general public rather than entities seeking accreditation from the reviewing organization. *See Better Bus. Bureau of Metro. Dallas, Inc.*, 402 S.W.3d at 309; *see also John Moore Servs., Inc.*, 441 S.W.3d at 353–54. In these cases, the TCPA applied and the commercial speech exemption did not. *See Better Bus. Bureau of Metro. Dallas, Inc.*, 402 S.W.3d at 309; *John Moore Servs., Inc.*, 441 S.W.3d at 354.

³ Polito and APP's argument under the commercial speech exemption appears to be limited to Neely's statements on her blog.

Polito and APP argue that the Moldovans' statements were not a protected review of APP's services, but rather arose out of the marketing and sale of Neely's own blogging and social media services to her customers. Polito and APP contend that by publicizing the dispute, Neely sought to increase the number of readers of her blog so that she could charge more for her sponsored posts. Assuming this contention is true, Polito and APP must nevertheless establish that the statements arose out of "a commercial transaction in which the intended audience is an actual potential buyer or customer." TCPA § 27.010(b). Neely's "actual potential buyer[s] or customer[s]" are companies that wish to purchase favorable social media reviews of their products, not the readers of the blog who pay nothing to Neely. As in the business review cases, Neely's intended audience for her posts about Polito and APP was the general public, specifically persons seeking a wedding photographer, not entities seeking social media services. *See Better Bus. Bureau of Metro. Dallas, Inc.*, 402 S.W.3d at 309.

In *Backes*, we concluded the claimant failed to make a showing that the commercial speech exemption applied. *See Backes*, 486 S.W.3d at 21–23. We explained that the commercial speech exemption "has been construed to mean that for the exemption to apply, the statement must be made for the purpose of securing sales in the goods or services of the person making the statement." *Id.* at 21; *see also Whisenhut v. Lippincott*, 474 S.W.3d 30, 42–43 (Tex. App.—Texarkana 2015, no pet.) (disparaging comments about plaintiffs were not made for the purpose of securing sales of defendant's services because plaintiffs and defendants were in different businesses and did not compete with each other). In *Backes*, a horse breeder (Backes) sued a competitor (Misko), and the competitor filed a counterclaim for libel. *Backes*, 486 S.W.3d at 11. Another breeder (Johns) intervened, and Johns and Backes moved to dismiss Misko's libel claim under the TCPA. *Id.* We concluded that Backes's communications with Johns about Misko on a public social media forum for horse breeding enthusiasts addressed a

subject unrelated to the quarter horse business, so that the commercial speech exemption did not apply. *Id.* at 21–23. In contrast to *Backes*, Neely’s posts may have had the effect of increasing sales for her business. But as in *Backes*, the posts were not about Neely’s business. Instead, they were about her dispute with Polito and APP. We conclude the commercial speech exemption does not apply, and the trial court erred by ruling that it did.

Because we conclude the TCPA applies to the Moldovans’ statements, we must next consider whether Polito and APP met their burden of establishing, by “clear and specific evidence,” a prima facie case on their causes of action for defamation, business disparagement, tortious interference with prospective contracts, and civil conspiracy. *See* TCPA § 27.005(c).

B. Polito’s Prima Facie Case

In *Lipsky*, the court discussed the TCPA’s evidentiary standards. A “prima facie case” refers to “evidence sufficient as a matter of law to establish a given fact if it is not rebutted or contradicted.” *Lipsky*, 460 S.W.3d at 590. “Clear and specific evidence” of each essential element of a claim is more than “mere notice pleading.” *Id.* Instead, a plaintiff must “provide enough detail to show the factual basis for its claim.” *Id.* at 590–91. “In 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.” *Id.* at 591; *see also Campbell*, 471 S.W.3d at 624.

The TCPA’s requirement of proof by clear and specific evidence does not “impose an elevated evidentiary standard,” does not “categorically reject circumstantial evidence,” and does not “impose a higher burden of proof than that required of the plaintiff at trial.” *Lipsky*, 460 S.W.3d at 591. Instead, the standard is met when the plaintiff, for each essential element of her claim, provides the “minimum quantum” of “unambiguous,” “explicit” evidence “necessary to

support a rational inference that the allegation of fact is true.” *Id.* at 590; *see also D Magazine Partners, L.P. v. Rosenthal*, 475 S.W.3d 470, 479 (Tex. App.—Dallas 2015, pet. granted) (discussing burden of proof under *Lipsky*).

The parties agree on the essential elements of each of Polito and APP’s causes of action. They vigorously dispute, however, whether Polito and APP have established a prima facie case for each of these elements by clear and specific evidence. *See* TCPA § 27.005(c). And they vigorously dispute many of the material facts. They also disagree on the standard by which Polito and APP’s “clear and specific evidence” should be measured. The Moldovans argue that if an essential fact is in “legitimate dispute,” then any evidence of the fact offered by Polito and APP must fail the “clear and specific” test. (“Appellants would submit that in most instances where an essential fact is in *legitimate* dispute, the disputed evidence cannot be said to be unambiguous, sure or free from doubt, which is why it is in dispute. If there is sufficient contrary evidence on an element then the evidence cannot be employed to support the prima facie case.”) They urge that the case may proceed only if Polito and APP offer additional, undisputed evidence. In sum, they argue that if they raise a “legitimate” fact issue, then Polito and APP’s case fails as a matter of law.

In *Lipsky*, however, the court made clear that the plaintiff does not bear “a higher burden of proof than that required of the plaintiff at trial.” *Lipsky*, 460 S.W.3d at 591. At trial, a plaintiff may prevail by offering sufficient evidence to support a finding of fact in its favor, even if a defendant has offered conflicting evidence. *See, e.g., United Servs. Auto Ass’n v. Croft*, 175 S.W.3d 457, 463 (Tex. App.—Dallas 2005, no pet.) (when evidence is conflicting, jury’s verdict is generally regarded as conclusive; if there is sufficient competent evidence of probative force to support jury’s finding, it must be sustained). When “determining whether the plaintiff presented a prima facie case, we consider only the pleadings and evidence in favor of the plaintiff’s case.

We do not consider whether the defendant presented evidence rebutting the plaintiff's case; such evidence is appropriate in determining a defendant's motion for summary judgment or at trial but not in determining whether the plaintiff presented a prima facie case." *Rosenthal*, 475 S.W.3d at 480–81. In accordance with *Lipsky*, we review the record to determine whether Polito provided, for each essential element of her claim, the "minimum quantum" of "unambiguous," "explicit" evidence "necessary to support a rational inference that the allegation of fact is true." *Lipsky*, 460 S.W.3d at 590.

1. Defamation

Polito and APP pleaded causes of action for both defamation per quod and defamation per se. Polito and APP must prove that the Moldovans (1) published a false⁴ statement of fact to a third party; (2) that was defamatory concerning Polito or APP; (3) while acting with negligence regarding the truth of the statement; and (4) which caused damages, unless the statements were

⁴ In *Tatum v. The Dallas Morning News, Inc.*, No. 05-14-01017-CV, 2015 WL 9582903, at *5 (Tex. App.—Dallas Dec. 30, 2015, pet. filed), we noted that "[p]lacing the burden of proving truth or falsity is a complex matter." We explained:

The Supreme Court has held that a defamation plaintiff must prove falsity if (i) the plaintiff is a public figure, or (ii) the defendant is a media defendant and the statement involves a matter of public concern. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16, 19–20 & n.6 (1990); *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775–76 (1986); see also *Turner [v. KTRK Television, Inc.]*, 38 S.W.3d [103] at 116 [(Tex. 2000)]; *Klentzman v. Brady*, 456 S.W.3d 239, 263–64 (Tex. App.—Houston [1st Dist.] 2014, pet. [granted]). In cases not covered by these mandates, Texas has generally made truth an affirmative defense to defamation. See CIV. PRAC. § 73.005(a) (truth is a defense to a libel action); see also *Neely [v. Wilson]*, 418 S.W.3d [52] at 62 [(Tex. 2013)] (mentioning "the defense of truth" and citing § 73.005); *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995) ("In suits brought by private individuals, truth is an affirmative defense to slander.") (footnote omitted).

But recent Texas defamation cases may suggest that the plaintiff always has the burden of proving falsity. In *Lipsky*, for example, the supreme court said, "Defamation's elements include (1) the publication of a false statement of fact to a third party . . ." 460 S.W.3d at 593 (emphasis added). We recently cited *Lipsky* and placed the burden of proving falsity on the plaintiff in a libel case involving the Texas Citizens Participation Act, CIV. PRAC. §§ 27.001–.011. See *D Magazine Partners, L.P. v. Rosenthal*, [275 S.W.3d 470] No. 05–14–00951–CV, 2015 WL 5156908, at *5, *8 (Tex. App.—Dallas Aug. 28, 2015, pet. [granted]). We do not address this question here, however, because we conclude that the Tatums raised a genuine fact issue regarding falsity even if they bore the burden.

See also *Casso v. Brand*, 776 S.W.2d 551, 554 n.3 (Tex. 1989) ("We need not at this time decide whether every plaintiff in any defamation case, regardless of his status or that of the defendant, must prove falsity as an element of his cause of action."). One of our sister courts recently concluded that a "private plaintiff" is not required to prove falsity of defamatory statements against nonmedia defendants, even when the statements are on matters of public concern. *Cummins v. Bat World Sanctuary*, No. 02-12-00285-CV, 2015 WL 1641144, at *10 (Tex. App.—Fort Worth Apr. 30, 2015, pet. denied) (mem. op.) (per curiam). In this case, APP asserts causes of action for both defamation and business disparagement. For its business disparagement claim, APP must prove falsity. See *Waste Mgmt. of Texas, Inc. v. Texas Disposal Sys. Landfill, Inc.*, 434 S.W.3d 142, 155 (Tex. 2014) (stating elements of business disparagement claim). We therefore assume here without deciding that for purposes of their defamation claims, Polito and APP bore the burden of proving the Moldovans' statements were false. For the reasons we discuss, we conclude that Polito and APP offered clear and specific evidence of falsity.

defamatory per se. *See Campbell*, 471 S.W.3d at 624; *Avila v. Larrea*, 394 S.W.3d 646, 657 (Tex. App.—Dallas 2012, pet. denied).

A statement is defamatory if it tends to injure a person’s reputation and thereby expose the person to public hatred, contempt, ridicule, or financial injury or to impeach any person’s honesty, integrity, virtue, or reputation. *Tex. Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.*, 219 S.W.3d 563, 580 (Tex. App.—Austin 2007, pet. denied); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 73.001 (West 2011) (elements of libel). “[I]t is a well-settled legal principle that one is liable for republishing the defamatory statement of another.” *Neely v. Wilson*, 418 S.W.3d 52, 61 (Tex. 2013).

Statements are considered defamatory per se if they “are so obviously hurtful to the person aggrieved that they require no proof of their injurious character to make them actionable.” *See Morrill v. Cisek*, 226 S.W.3d 545, 549 (Tex. App.—Houston [1st Dist.] 2006, no pet.). A false statement will typically be classified as defamatory per se if it injures a person in his office, profession, or occupation; charges a person with the commission of a crime; imputes sexual misconduct; or accuses one of having a loathsome disease. *See Tex. Disposal Sys. Landfill, Inc.*, 219 S.W.3d at 581 (collecting cases). The issue of whether statements are defamatory per se is generally a matter of law to be decided by the court, but may be submitted to a jury if the court determines that an ambiguity exists about the meaning of the words or a predicate fact question remains about whether the statements were published or were false. *Id.*; *see also Hancock v. Variyam*, 400 S.W.3d 59, 63–64 (Tex. 2013) (discussing elements of defamation per se).

To be actionable, a statement must assert an objectively verifiable fact rather than an opinion. *Bentley v. Bunton*, 94 S.W.3d 561, 580–81 (Tex. 2002). We classify a statement as fact or opinion based on the statement’s verifiability and the entire context in which the statement

was made. *Am. Heritage Capital, LP v. Gonzalez*, 436 S.W.3d 865, 875 (Tex. App.—Dallas 2014, no pet.). Whether a statement is a statement of fact or opinion is a question of law. *Id.*

If a defamatory statement is true or substantially true, it is not actionable. *Tatum v. The Dallas Morning News, Inc.*, No. 05-14-01017-CV, 2015 WL 9582903, at *9 (Tex. App.—Dallas Dec. 30, 2015, pet. filed). We determine this question by examining the publication as a whole. *See Lipsky*, 460 S.W.3d at 594. “[T]he meaning of a publication, and thus whether it is false and defamatory, depends on a reasonable person’s perception of the entirety of a publication and not merely on individual statements.” *Id.* (quoting *Bentley*, 94 S.W.3d at 579). “A plaintiff can bring a claim for defamation when discrete facts, literally or substantially true, are published in such a way that they create a substantially false and defamatory impression by omitting material facts or juxtaposing facts in a misleading way.” *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 115 (Tex. 2000). We examine the “gist” of the publication to determine “how a person of ordinary intelligence would view it.” *Wilson*, 418 S.W.3d at 63–64. Assessing a publication’s gist “is crucial.” *Id.* at 63. A publication with specific statements that err in the details but that correctly convey the gist of a story is substantially true. *Id.* On the other hand, if a publication taken as a whole is more damaging to the plaintiff’s reputation than a truthful publication would have been, then the publication is not substantially true and is actionable. *See id.*

If statements are defamatory per se, general damages are presumed without requiring specific evidence of harm to the plaintiff’s reputation. *Tex. Disposal Sys. Landfill, Inc.*, 219 S.W.3d at 580. General damages include noneconomic losses, such as loss of reputation or mental anguish. *Lipsky*, 460 S.W.3d at 593. No particular amount of general damages beyond nominal damages is presumed. *Id.* Both an individual and a corporation may suffer reputation damages that are noneconomic in nature. *See Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc.*, 434 S.W.3d 142, 146 (Tex. 2014). If a statement is defamatory but not defamatory

per se, a plaintiff may recover only actual, compensatory, and exemplary damages, not nominal damages. *Hancock*, 400 S.W.3d at 65.

a. Publication

We first conclude that Polito and APP offered clear and specific evidence that the Moldovans published defamatory statements. In their original petition, Polito and APP pleaded that twelve groups of statements published by the Moldovans were defamatory. In their response to the motion to dismiss, Polito and APP offered evidence regarding the circumstances of each statement. The Moldovans respond that “the media storm that ensued directly from the NBC 5 story was the cause of any actual or special damages,” not the twelve groups of statements.⁵ For purposes of our analysis of Polito and APP’s defamation claim, we focus on the Moldovans’ republication of the NBC 5 article⁶ itself, rather than each of the twelve groups of statements alleged in the petition. If the article is defamatory, then the Moldovans are liable for republishing it. *Wilson*, 418 S.W.3d at 61; *see also* RESTATEMENT (SECOND) OF TORTS § 578 (1977) (“one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it”). We will include discussion of the other allegedly defamatory statements, however, when relevant to specific elements of Polito’s and APP’s defamation and other causes of action.⁷

The Moldovans republished the article’s statement that Polito and APP were “holding their pictures hostage.” The article explained that even though the Moldovans made full payment under their contract with APP, Polito and APP refused to give the Moldovans their

⁵ The Moldovans contend that “[w]hile the publication of the NBC report as a whole may have resulted in damages to the Plaintiffs, the specific statements, either singly or collectively did not.” They also argue that the twelve groups of statements “cannot be simply aggregated together for discerning the context of any singular statement.”

⁶ As we have noted, the NBC 5 story was both televised and published in written form on the internet by NBC 5. For brevity we refer to both forms of the story as “the article” or “the NBC story.”

⁷ Because of our focus on the Moldovans’ republishing of the article itself, we do not address Polito and APP’s contention that Neely’s and Andrew’s “likes” of others’ comments on social media constitute a republication of those comments creating an independent basis for liability.

pictures and negatives as the contract required. We consider whether Polito and APP established by clear and specific evidence a prima facie case on each element of their defamation claim arising from republication of the article. *See* TCPA § 27.005(c); *Lipsky*, 460 S.W.3d at 591.

b. Statement of Fact

Polito and APP offered evidence that at the time of the article’s publication, the Moldovans’ access to the pictures of their wedding was in strict compliance with the terms of the contract they signed with APP. The parties’ contract explains in some detail that “[o]riginal images of the wedding, engagement, and bridal session are the property of [APP]” and “are protected by Federal Copyright Laws.” APP “owns all copyrights for all images produced in connection with this agreement, including the exclusive right to reproduce” the images. Even if the client “choose[s] to purchase your negatives or decide[s] to purchase a wedding collection that includes wedding day negatives,” the negatives may be used “for individual print purposes only.” APP retains all other rights of reproduction. The contract provides that “[w]edding day images will be presented to the client for viewing usually within 4 to 6 weeks of the wedding date.” APP complied with this provision. The contract also provides, in bold print, “[w]edding day negatives will be provided when the final album and/or box order is delivered.” The contract further provides that the Moldovans must then select eighty photographs to be included in the album. The Moldovans had not done so at the time the story aired, despite Polito’s assurance two days previously that “we will proceed with your album order” if the Moldovans chose a cover. In sum, the contract did not allow the Moldovans to simply purchase “their” pictures and immediately obtain full rights to own and reproduce them, regardless of any dispute about an album.

Polito testified in her affidavit that during her initial consultation with Neely, she discussed the specialized album covers. She modified the photography package Neely purchased

in order to account for the cover's cost and stay within Neely's budget. APP and Polito also rely on a December 30, 2014 email in which APP's studio manager Chaney Haralson explained to Andrew that digital negatives "are not released until your album is completed," but offered "a compromise [to] release the disc once your album design is approved," six to eight weeks ahead of the contractual schedule.

The Moldovans contend that they did not make the statement that Polito and APP were "holding their pictures hostage"; rather, it "is a paraphrase by the NBC reporter at best." But as we have explained, the statement became the Moldovans' when they republished it. *See Wilson*, 418 S.W.3d at 61. Both Neely and Andrew republished the NBC story on their respective social media.

Reviewing the entirety of the publication, *see Lipsky*, 460 S.W.3d at 594, a reasonable person would perceive the statement that Polito and APP were "holding their pictures hostage" to mean that (1) the Moldovans purchased pictures of their wedding and had the right to immediate ownership and possession of them, and (2) Polito and APP were wrongfully denying this right by demanding additional payment that was never disclosed. This is a statement of fact which can be verified. *See Am. Heritage Capital, LP*, 436 S.W.3d at 875.

The Moldovans argue the statement is "obviously hyperbole" because "Plaintiffs were not holding a gun to the pictures and demanding a ransom." They argue the statement is "substantially true" because (1) Polito did not make the offer to "proceed with your album order" until after the NBC 5 interview, and (2) they "would not receive their photos unless they either forfeited the album they had paid for or paid the album cover fee." And they argue the statement is "at most a disparagement of general character," not defamatory per se.

We reject each of these arguments. In an exchange of emails the day the Moldovans contacted NBC, Haralson (APP's studio manager) stated that one of two options for "moving

forward” was to “forfeit the album as Neely asked and receive the high-res disc of wedding day and rehearsal dinner images by the end of the week.” But that was in response to Neely’s previous email stating “We may hold off on the album because we feel we’ve spent so much money with you guys already. Could we get our high res disk please?” Contrary to the gist of the NBC article, Haralson’s response to Neely’s question was consistent with the contract the Moldovans signed. And while we agree with the Moldovans that the phrase “holding their pictures hostage” cannot be taken literally, we disagree that it is hyperbole. A person of ordinary intelligence would understand the statement to mean that APP was wrongfully refusing to release pictures and digital negatives that the Moldovans paid for and were entitled to receive. As we have explained, Polito and APP introduced clear and specific evidence that they acted in accordance with the parties’ written contract, so that the article’s gist was not substantially true.

c. Defamatory per se

We next conclude that Polito and APP offered clear and specific evidence of statements by the Moldovans that were defamatory per se. Although none of the statements criticized Polito’s skill as a photographer,⁸ all of them assert that Polito and APP were “dishonest in [their] fees.” See RESTATEMENT (SECOND) OF TORTS § 573 cmt. c (1977) (quoted in *Hancock*, 400 S.W.3d at 66–67). All of the statements attacked Polito’s and APP’s alleged hidden charges and refusal to deliver photographs that were already paid for until additional undisclosed charges were paid. The supreme court in *Hancock* explained, “the inquiry is not whether a reputation is necessary for a profession. If that were true—because all professions require reputations of some sort—all statements defaming professionals would be defamatory *per se*.” *Hancock*, 400 S.W.3d at 67. The Moldovans’ statements were not limited to Polito’s reputation; they were

⁸ The record reflects that in one conversation on social media Neely complained about APP’s failure to photograph particular family groupings at the wedding, but Polito does not rely on this statement as the basis for her claim for defamation per se. Neely testified in her deposition that she had not complained about the quality of the photography she received, and “for the most part,” “loved” the pictures taken by APP of her engagement, rehearsal dinner, and wedding.

directed to Polito's and APP's honesty in the fees they charged, or as Polito and APP argue, "to paint Polito as an unethical business woman who charges hidden fees."⁹ After Polito published a response to the story, both Neely and Andrew posted and texted:

"It was lies[.] None of it was true." [Neely]

"What she said is not true none of it" [Neely]

"It sounds all professional, but it[']s all lies." [Andrew]

"Her blog post was literally all lies." [Neely]

In addition, the Moldovans republished the NBC story accompanied by their own commentary that (1) Polito was completely unresponsive for months despite the Moldovans' efforts to contact her; (2) the charge for the album cover was only a fraction of the numerous hidden fees APP charged, including \$900 for additional hours of photography at the wedding; (3) Polito herself failed to photograph their wedding, sending "2 people we had never met"; (4) despite "weeks to fulfill" its contractual obligations, APP never delivered "what we paid for"; and (5) Neely was only one of many brides cheated by Polito ("The fact that she's done this to 22 brides that have come forward over the last 24 hours proves that what I did was right," and Andrew's statement that "our photographer has scammed so many people, it[']s horrible").

Polito and APP offered evidence of the falsity of these statements. The record reflects that about a month after the wedding date, Polito personally contacted Neely to say that APP was working on the photographs over the weekend because the heater was out in the studio. The link to the photographs was sent to Neely less than a week later, "within 4 to 6 weeks of the wedding

⁹ The Restatement comment cited in *Hancock*, 400 S.W.3d at 67, also provides, "Statements concerning merchants that question their solvency or honesty in business come within the rule stated in this Section [i.e., defamation per se], as do statements charging any other quality that would have a direct tendency to alienate custom." RESTATEMENT (SECOND) OF TORTS § 573 cmt. c. The Moldovans' statement that Polito and APP were holding their pictures hostage questions Polito's and APP's honesty and had a "direct tendency to alienate custom." That is, the statements would discourage other couples from choosing Polito and APP as a wedding photographer because of the alleged hidden fees. Cf. *Shipp v. Malouf*, 439 S.W.3d 432, 441 (Tex. App.—Dallas 2014, pet. denied) ("A statement that a dentist is personally bankrupt does not adversely affect the dentist's fitness to practice dentistry—he may be a great dentist but a bad businessman."), *disapproved on other grounds by Lipsky*, 460 S.W.3d at 587–88.

date” as provided in the parties’ written contract. The timeline accompanying the written contract provided that the album order was due “6 weeks after viewing date.” The record reflects that APP followed up with the Moldovans at least twice in the following weeks, sending the order form for the album and making an offer to release the digital “negatives” ahead of the contractual schedule once the Moldovans chose the photographs for their album. Seven weeks after the initial link was sent to her, Neely responded to APP saying she was “finally getting around to filling [the album order] out.” The exchange between APP and the Moldovans about the album cover occurred four days later. After the Moldovans contacted the media but before the NBC story aired, Polito again personally contacted Neely to “apologize for not reaching out sooner.” Neely did not respond. The next direct contact by the Moldovans to Polito was to threaten further negative media coverage on “Inside Edition” if APP did not provide their digital negatives within three days.

Similarly, other than the album cover, the Moldovans’ contract with APP revealed all of the charges complained of in their social media publications. The Moldovans’ contract was for six hours of photography, and clearly stated that additional hours over the contracted time would be charged “the standard rate of \$300 per each additional hour.” The Moldovans’ itemized package included “Coverage by Two Company Photographers,” not Polito personally. APP complied with the contractual timeline in all respects. In addition, Polito testified that she explained to Neely that the cover for the album would be chosen and paid for later. She also testified that she adjusted the price of the Moldovans’ photography package to stay within Neely’s budget. Neely’s statement, “[t]he fact that she’s done this to 22 brides that have come forward over the last 24 hours,” was admittedly not a “fact” at all; Neely testified that she “guesstimated” from “five or six, maybe” messages that came to her that 22 brides had similar complaints about Polito and APP, although she could not name any of them at her deposition.

As with the statement about holding pictures hostage, these statements are not merely attacks on Polito and APP's general reputation; they attack Polito and APP in their "office, profession, or occupation." *See Tex. Disposal Sys. Landfill, Inc.*, 219 S.W.3d at 581. As Polito and APP argue, the statements accuse Polito "of contemptible business practices" such as "delaying fulfillment of contracted for services," and "acquir[ing] clients and then perform[ing] a 'bait and switch' by sending other company photographers to the clients' weddings without prior disclosure." Polito and APP argue that these statements "directly attack [Polito's] fitness as a businesswoman." Polito and APP offered clear and specific evidence that the Moldovans made statements in the NBC story and in their republication of the story that were defamatory and defamatory per se.

d. Negligence regarding truth or falsity

We next consider whether Polito and APP offered clear and specific evidence that the Moldovans acted with negligence regarding the truth of the statements. *See Campbell*, 471 S.W.3d at 624. Polito and APP offered evidence that Polito at the outset explained to Neely the procedure for choosing the album cover and adjusted the cost of the package to accommodate Neely's budget. They provided evidence that Polito offered to "proceed with your album order" on January 14. The Moldovans contend that Polito did not make this offer until after they were interviewed for the NBC 5 story earlier in the day. But it is undisputed that the offer was made before the story aired and before the Moldovans republished the story on social media, and that the Moldovans never responded. Instead, they made posts on social media that "we went to the media because her office is refusing to talk to us," and stated that they "prefer the surprise" of NBC 5 contacting Polito rather than telling her that they had contacted the media. The Moldovans never revealed that Haralson offered to release their digital negatives two months ahead of schedule. They ignored Polito's email entirely, which at the very least attempted to

initiate direct communication between Polito and Neely and at best could have solved the Moldovans' actual complaint. Instead they sought media coverage of their dispute within hours of their email exchange with Haralson; stated that “[w]e are hoping that our story makes the news and completely ruins her business;” and encouraged their social media contacts to watch the broadcast. This is some clear and specific evidence that the Moldovans acted with negligence as to the truth of the statement that Polito and APP were “holding their pictures hostage.”

e. Damages

Next we conclude that the defamatory statement was the cause of damages to Polito and APP. Polito and APP introduced evidence that over 350,000 people viewed the story around the world. Many responded by posting negative comments on Polito's Facebook page and on websites for reviews of wedding-related products and services. Polito and APP included some of these comments and reviews in the evidence they submitted with their response to the Moldovans' motion to dismiss.¹⁰ In addition to this evidence of damage to Polito's reputation, Polito offered evidence of lost income. She testified in her affidavit that “[f]rom 2011 to 2014, APP has earned roughly \$180,000 to \$255,000 for the months of January through May.” In comparison, in 2015 after the Moldovans' statements, APP “has not earned more than \$38,000.” Instead of booking 30 to 40 weddings as she had in January and February of previous years, and

¹⁰ One example of these comments was an email received in May 2015, several months after the NBC story was published: “Just to let you know. . . I have been looking for photographers for a wedding and I am so glad I saw you in the news. . . . Well you can rest assure[d] that I will not be doing business with you” The writer went on to criticize Polito for “holding their pictures hostage so you can get \$150 more for a cover which should be included in the price of the album” and stated that “cheap people get theirs in the end.” Polito also provided copies of emails she received from “The Knot,” a social media forum about weddings, informing her of new reviews of her business immediately after publication of the NBC story. The first review was entitled, “BEWARE—ANDREA POLITO IS A SCAM ARTIST,” and included a link to the NBC story. The second review, entitled “Not Honest,” began “Gets you to sign up and throws on additional costs before giving the photos. If you do not pay hidden fees she will not give pictures to you” The third review, entitled “Scammer,” began “This photographer rips off customers and holds their photos hostage. If your wedding is something you want to cherish and remember for years to come, choose someone else. . . .” Polito also provided examples of negative comments from other photographers, one of whom criticized her lack of integrity and stated, “I would urge you to send this couple both their photos and their book and stop giving a bad name to photographers everywhere.” Readers' conclusions alone do not establish liability for defamation. *See Turner*, 38 S.W.3d at 115 (“a defendant cannot be held liable for presenting a true account of events, regardless of what someone might conclude from this account”). But these comments lend support our previous conclusions regarding the gist of the article, that Polito and APP were wrongfully denying the Moldovans' contractual right to immediate ownership and possession of photographs they had purchased. As the court in *Turner* also explained, a misleading presentation of facts “can render an account just as false as an outright misstatement.” *Id.*

approximately 75 events for an entire year, Polito booked only two weddings between January and June 2015 when her response to the motion to dismiss was filed.¹¹ Polito offered the first page of APP's federal income tax returns for the years 2011, 2012, and 2013 with her affidavit in response to the Moldovans' motion to dismiss. These returns reveal APP's total income for those years. Although the Moldovans argue that the returns show decreasing total income each year, the precipitous 2015 drop to which Polito testified far exceeds this trend. At trial, each party may develop additional evidence to support their contentions. However, at this stage, Polito and APP have offered clear and specific evidence that the Moldovans' publication of the defamatory statements was the cause of damages to Polito and APP.

We conclude Polito and APP offered at least a minimum quantum of clear and specific evidence necessary to support a rational inference that their allegations of fact are true on each element of their defamation claims. *See Lipsky*, 460 S.W.3d at 592–93.

2. Tortious interference with prospective contracts

Texas law protects prospective contracts and business relations from tortious interference. *Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909, 923 (Tex. 2013). To prevail on a claim for tortious interference with prospective business relations, the plaintiff must establish (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. *Id.*

¹¹ Polito also testified that she could no longer advertise on APP's Facebook page. In her June 2015 affidavit, she stated, "I have had to close down my APP Facebook page *since January* because I cannot remove the 50-plus one-star reviews that were made as soon as the story aired, which directly damages my business' reputation."

Polito's tortious interference claim is based in part on a prospective business relationship with the Petroleum Club of Dallas, where the Moldovans held their wedding and reception. Polito offered evidence that over her career, she photographed thirty to forty weddings at the club. The last wedding she photographed at the club was on December 13, 2014. An exhibit to Neely's deposition, attached to Polito's response to the motion to dismiss, is a Facebook conversation between Neely and Lauren Callon, an event coordinator at the Petroleum Club, on January 16, 2015:

1/16, 12:04 p.m.

Lauren Callon

Hey Neely, I just saw your post! Are you having trouble with Andrea Polito? What is going on? I'm so sorry about that!

1/16, 12:06 p.m.

Neely Moldovan

we will be on the news about it tonight [sic]. Long story short we spent almost \$7000 with her and our contract included an album now shes [sic] telling us we must pay more for the cover of the album or we wont [sic] get our high res images

once I did some digging I found out this was very common and she had nickel and dimed us the whole time and several other brides too

1/16, 12:07 p.m.

Lauren Callon

Neely, I am so sorry! That is seriously crazy. I have heard awful things about her lately. I hate that. Let me know if there is anything I can do to help!!

1/16, 12:07 p.m.

Neely Moldovan

so the reporter also talked to donnie brown [sic] the wedding planner and he will be on the report tonight

honestly the best you can do is just tell girls to use someone else

james french [sic], holt haynesworth [sic]

anyone else

we've been married over 3 months and we cant [sic] get our pictures and its [sic] so upsetting

1/16, 12:08 p.m.

Lauren Callon

awesome! That's great. Oh, I never recommend her. took her off our vendor list I can't imagine how upsetting that is. That's all you have left for

your memories is your pictures. They are so precious. I really hope you get them

1/16, 12:08 p.m.

Neely Moldovan

make sure to watch tonight!!!

1/16, 12:08 p.m.

Lauren Callon

I will!

1/16, 12:08 p.m.

Neely Moldovan

Im [sic] going to post the link on facebook right after too

Im [sic] just hoping our story makes them change their ways and other brides dont [sic] have to deal with this

its [sic] the worst to have such a sour note from a day that went so well

we had no issues with ANY of our vendors

aside from them

and the issues with them started from almost day one

I posted about news contacts in park cities [sic] online resale¹² and she threatened to sue the woman in charge of the group unless she removed my post. I never even mentioned her in my post

do you have any brides currently that have her booked?

1/16, 12:30 p.m.

Lauren Callon

oh wow, what a nightmare. Not that I know of but sometimes they don't ask for my suggestions on photographer. They just tell me at the end that they have already booked. I will keep an eye out though. I'm so sorry you are having to deal with this!

1/16, 12:41 p.m.

Neely Moldovan

thanks girl! . . .

The Moldovans contend (1) the statement is opinion, “demonstra[ting] nothing more than the existence of a consumer complaint against a vendor and the consumer’s opinion and advice to others not to use that vendor”; (2) the statement is not defamatory or disparaging; and

¹² Neely testified in her deposition that she posted on “a Park Cities Resale Group” asking if anyone “had any media contacts.” She added, “I believe when someone asked me what I needed the media contact for, I said something along the lines of regarding a dispute with a photographer.” The post itself, an exhibit to Polito’s response to the motion to dismiss, states in part, “My husband and I are basically getting screwed out of getting our \$6,000 wedding photos and we are really upset and getting nowhere with the company.” Later in that series of posts Neely identifies Polito as the photographer.

(3) Polito had no probability of a future relationship “with or through Callon.” We disagree and conclude that Polito has offered clear and specific evidence of each element of her tortious interference claim.

Polito testified that she photographed events at the Petroleum Club at least thirty times in the years leading up to the January 2014 dispute with the Moldovans. This is clear and specific evidence of a “reasonable probability” that Polito would have photographed additional events at the Petroleum Club absent the Moldovans’ interference. Neely’s statements were defamatory or disparaging, and not merely statements of her opinion. Specifically in her exchange with Callon, Neely stated as fact that other brides had similar problems with Polito; problems with Polito began “from almost day one”; Polito had “nickel and dimed us the whole time”; and Polito threatened a lawsuit over Neely’s post on the Park Cities resale group site when Neely had “never even mentioned her in my post.”

Polito offered evidence that until the dispute regarding the album arose, the Moldovans understood the terms of the contract they signed, had no issues with Polito, and were pleased with the proofs of their photographs. There is evidence that Neely identified Polito on the Park Cities resale group site. And there is clear and specific evidence of the Moldovans’ “conscious desire” to prevent business relationships from occurring between Polito and others. Among other statements, Neely voiced her desire to “completely ruin[]” Polito’s business through publicity about the Moldovans’ complaint.

In their conversation, Neely advised Callon to use “anyone else” other than Polito. Neely specifically asked Callon whether there were other brides planning to use Polito at the Petroleum Club; Callon did not know but promised “to keep an eye out.” Polito offered some evidence that she photographed an event at the Petroleum Club as recently as one month before Neely’s statements, but none after.

Polito offered clear and specific evidence on each element of her claim that the Moldovans interfered with her business relationship with the Petroleum Club, and thus established a prima facie case for this claim. *See Lipsky*, 460 S.W.3d at 587.

3. Business Disparagement

APP asserts a claim for business disparagement. To prevail on this claim, APP must establish that (1) the Moldovans published false and disparaging information about it, (2) with malice, (3) without privilege, (4) that resulted in special damages to APP. *See Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 170 (Tex. 2003) (citing *Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762, 766 (Tex. 1987)). In *Forbes*, the court explained that a business disparagement claim is similar in many respects to a defamation action. *Id.* “The two torts differ in that defamation actions chiefly serve to protect the personal reputation of an injured party, while a business disparagement claim protects economic interests.” *Id.*; *see also Waste Mgmt. of Tex., Inc.*, 434 S.W.3d at 155 (discussing distinction between damages in defamation and business disparagement cases). We have determined in our discussion of APP’s defamation claim that there is clear and specific evidence that the Moldovans published false and disparaging information about APP. We turn to the elements of malice and special damages.

In *Forbes*, the court explained that a business disparagement defendant may be held liable “only if he knew of the falsity or acted with reckless disregard concerning it, or *if he acted with ill will or intended to interfere in the economic interest of the plaintiff in an unprivileged fashion.*” *Id.* (quoting *Hurlbut*, 749 S.W.2d at 766, and adding emphasis). We conclude APP has met its burden of proof on this element. *See Lipsky*, 460 S.W.3d at 590–91.

APP offered evidence that within hours of their last communication with APP, Andrew and Neely sent emails to news outlets asking for coverage of their story. Before and

immediately after the NBC story aired, Andrew and Neely published statements explaining why they contacted the media:

“My husband and I are basically getting screwed out of getting our \$6000 wedding photos . . . if anyone has a local news contact that could help us with a story that would be great. . . . I’m a blogger and I’m going to be all over this once it[’]s resolved”; Neely identifies “Andrea Polito Photography” in the post;

“We are contacting local TV stations and to know other people had the issue gives me so much ammunition to screw them over LOL”

“We are hoping that our story makes the news and completely ruins her business”/“shady people”

“Please if you don[’]t mind keeping this to yourself for now. We have some things going with the media and we don[’]t want the photographer finding out about our story yet”

Neely’s blog post “BIG THINGS and FUN THINGS” with a picture of an NBC reporter and camera in the Moldovans’ apartment

“Don’t forget to tune in to NBC DFW tonight at 10pm!! Andrew Moldovan and I would love it if you spread the word! Also the clip will be online right after!—[emoticon] feeling excited”

“We are hoping the story goes viral”

“Shits goin down!!!!” [forwarding link to NBC story]

“No one is ever going to want to hire her after that”

As discussed above, APP offered evidence that at the time the Moldovans republished the NBC 5 article on social media, they had received emails from both Haralson and Polito making offers regarding early release of their digital negatives and proceeding with their album order to which they had not responded. Polito testified she had “explained in detail to Neely the separate cost for the album covers, why the album covers are chosen after their wedding, and showed her several different examples” at the outset, before the Moldovans chose their photography package and before the contract was signed. As also discussed, the gist of the article—that Polito and APP were wrongfully denying the Moldovans their contractual rights of ownership and

possession of their pictures—was contrary to the terms of the Moldovans’ written contract with APP.

The Moldovans’ statements are clear and specific evidence of their ill will and intent to interfere in APP’s economic interests, as well as their recklessness with regard to the truth of the article at the time of publication. *See Forbes*, 124 S.W.3d at 170. Reckless disregard is a subjective standard that focuses on the conduct and state of mind of the defendant. *Bentley*, 94 S.W.3d at 591 (citing *Herbert v. Lando*, 441 U.S. 153, 160 (1979)). A defendant must “have, subjectively, significant doubt about the truth of his statements at the time they are made.” *Id.* at 596. We view the evidence in its entirety; a defendant’s motive and lack of care “are factors to be considered” in determining malice. *Id.* “[W]hile a defendant’s ill will toward a plaintiff does not equate to, and must not be confused with, actual malice,¹³ such animus may suggest actual malice.” *Id.* at 602. The Moldovans’ own statements provide clear and specific evidence that they “knew or strongly suspected that the publication as a whole could present a false and defamatory impression.” *See Bentley*, 94 S.W.3d at 603 (citing *Turner*, 38 S.W.3d at 120). We conclude that APP established its prima facie case for the element of malice in its business disparagement claim. *See* TCPA § 27.005(c).

Proof of special damages is an essential element of the business disparagement tort. *Hurlbut*, 749 S.W.2d at 767. The plaintiff must establish “pecuniary loss that has been realized or liquidated as in the case of specific lost sales.” *Id.* (quoting W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 128, at 971 (5th ed. 1984)). “Furthermore, the communication must play a substantial part in inducing others not to deal with the plaintiff with the result that special damage, in the form of the loss of trade or other dealings, is established.” *Id.* As

¹³ Common law malice—ill will, spite, or evil motive—is different from “actual malice,” a term of art used in public-figure defamation cases. *See Huckabee v. Time Warner Entm’t Co. L.P.*, 19 S.W.3d 413, 420 (Tex. 2000). “Actual malice” does not include common law malice; instead, a plaintiff must prove that the defendant made the statement “with knowledge that it was false or with reckless disregard of whether it was true or not.” *Id.*

discussed above, Polito testified regarding the pecuniary loss to APP's business, and provided financial information for APP predating the publication of the article.

The Moldovans argue the evidence is “scant at best”; Polito is not qualified to testify as a damages expert; and APP did not offer expert testimony to quantify any loss. They also cite *Lipsky* for the proposition that “[g]eneral averments of direct economic losses and lost profits without more do not satisfy the minimum requirements of the TCPA.” *See Lipsky*, 460 S.W.3d at 592–93. In *Lipsky*, the court determined that an affidavit “which discussed Range’s¹⁴ losses in very general terms” was insufficient to satisfy the TCPA’s requirement of clear and specific evidence. *See id.* at 592, 595. The affiant “averred in general terms that Lipsky’s statements caused Range to suffer ‘direct pecuniary and economic losses and costs, lost profits, loss of its reputation, and loss of good will in the communities in which it operates . . . in excess of three million dollars.’” *Id.* at 592.

Here, Polito offered more than “general terms.” She testified about specific numbers of weddings APP covered in the years before, and then after, the publication of the disparaging statements. She also offered proof of APP’s sales and income before the statements, and testified to APP’s earnings after the statements were made. She testified she was required to loan APP \$40,000 of her personal funds “to keep it from going under.” Under the standard articulated in *Lipsky*, that “clear and specific evidence” means “enough detail to show the factual basis for [plaintiff’s] claim,” we conclude that the lack of expert testimony on damages is not fatal to APP’s prima facie case of business disparagement. *See id.* at 590. In contrast to *Lipsky*, APP’s evidence is clear and specific evidence of the damages element of its prima facie case of

¹⁴ In *Lipsky*, Range Resources Corporation and Range Production Company asserted counterclaims against Steven and Shyla Lipsky for defamation, business disparagement, and civil conspiracy. *Lipsky*, 460 S.W.3d at 585. The Lipskys then filed a motion to dismiss under the TCPA. *Id.*

business disparagement. APP established a prima facie case on its claim for business disparagement. *See id.*

4. Civil conspiracy

A civil conspiracy is a combination of 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 essential elements are: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result. *Id.* There is no independent liability for a civil conspiracy. *Four Bros. Boat Works, Inc. v. Tesoro Petroleum Cos., Inc.*, 217 S.W.3d 653, 668 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). Rather, a defendant's liability for civil conspiracy depends on its participation in some underlying tort for which the plaintiff seeks to hold at least one of the named defendants liable. *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996) (orig. proceeding).

APP and Polito offered evidence that both of the Moldovans sought media coverage of their dispute with Polito and APP, and both stated their intent to damage Polito's and APP's business. Both participated in the NBC 5 story, and both republished it with their own comments. There is clear and specific evidence that the article itself was defamatory, and APP and Polito offered evidence of resulting damages. APP and Polito established a prima facie case on the elements of their conspiracy claim by clear and specific evidence. *See Lipsky*, 460 S.W.3d at 587.

APP and Polito established, by clear and specific evidence, a prima facie case for each element of each of their claims. The Moldovans did not establish by a preponderance of the evidence each essential element of a valid defense to each claim. *See* TCPA § 27.005(d). The

trial court did not err by denying the Moldovans' motion to dismiss. We overrule the Moldovans' first issue.

C. Presentation of evidence at hearing

In their second issue, the Moldovans complain that the trial court erred by permitting live testimony at the hearing on the motion to dismiss. They present no argument or authority to support their contention; their brief does nothing more than include the complaint in the "statement of issues presented for review." Issues asserted on appeal but not briefed are waived. *Davey v. Shaw*, 225 S.W.3d 843, 852 (Tex. App.—Dallas 2007, no pet.); TEX. R. APP. P. 38.1(i) (appellant's brief must contain clear and concise argument for contentions made with appropriate citations to authorities and to the record). We overrule the Moldovans' second issue.

CONCLUSION

The Moldovans' statements are not commercial speech; therefore, the TCPA applies, and Polito and APP were required to establish, by clear and specific evidence, a prima facie case for each element of their claims for defamation, business disparagement, tortious interference, and conspiracy. Polito and APP met this burden, and the Moldovans did not establish each essential element of a defense. The trial court did not err by denying the Moldovans' motion to dismiss Polito and APP's claims. We overrule the Moldovans' issues and affirm the trial court's order.

151052F.P05

/Craig Stoddart/
CRAIG STODDART
JUSTICE



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

NEELY MOLDOVAN AND ANDREW
MOLDOVAN, Appellants

No. 05-15-01052-CV V.

ANDREA POLITO AND ANDREA
POLITO PHOTOGRAPHY, INC.,
Appellees

On Appeal from the 134th Judicial District
Court, Dallas County, Texas
Trial Court Cause No. DC-15-03069.
Opinion delivered by Justice Stoddart;
Justices Fillmore and O'Neill participating.

In accordance with this Court's opinion of this date, the trial court's August 10, 2015 "Order Denying Defendants' TCPR § 27.001 Motion to Dismiss" is **AFFIRMED**.

It is **ORDERED** that appellee Andrea Polito and Andrea Polito Photography, Inc. recover their costs of this appeal from appellant Neely Moldovan and Andrew Moldovan.

Judgment entered this 2nd day of August, 2016.