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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

Case No. 24-0685

IN THE
SUPREME COURT OF TEXAS

MRG MEDICAL LLC,
Petitioner,

V.

TEXAS TRIBUNE, INC., PRO PUBLICA, INC., VIANNA DAVILA, JEREMY SCHWARTZ, AND LEXI CHURCHILL,
Respondents.

PETITIONER, MRG MEDICAL, LLC'S, MOTION FOR REHEARING

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March 31, 2025

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2. Did the Third Court of Appeals err in depriving Texas businesses of their right to assert an actionable business disparagement claim within the 2 years allowable by law?
3. Does the actionability and validity of a Plaintiff's business disparagement claim depend on whether the Plaintiff manufactures the product being sold to consumers?
4. Does the Third Court of Appeals judgement and opinion deprive MRG and similarly situated Plaintiffs of their legal right to file suit within the 2-year statute of limitations on business disparagement, regardless of whether they can provide prima facie evidence of every element of a disputed business disparagement claim?

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REFERENCE CITATION GUIDE

The Parties

This Petition may refer to the parties as follows:

MRG Medical LLC.	"MRG" or "Petitioner"
Texas Tribune, Inc., ProPublica, Inc., Vianna Davila, Jeremy Schwartz, and Lexi Churchill	"Media Defendants"

The Record on Appeal

This Petition will refer to the record as follows:

Clerk's Record	"_CR_"
Appendix	APP. Tab "____"

ISSUES PRESENTED FOR REHEARING

PETITIONER, MRG MEDICAL, LLC, presents the following issues for reconsideration:

5. Does the Third Court of Appeals err by making a prerequisite that a Plaintiff manufacture the product accompanying its services, to have an actionable business disparagement claim?
6. Did the Third Court of Appeals err in depriving Texas businesses of their right to assert an actionable business disparagement claim within the 2 years allowable by law?
7. Does the actionability and validity of a Plaintiff's business disparagement claim depend on whether the Plaintiff manufactures the product being sold to consumers?
8. Does the Third Court of Appeals ruling and opinion deprive MRG and similarly situated Plaintiffs of their legal right to file suit within the 2-year statute of limitations on business disparagement, regardless of whether they can provide prima facie evidence of every element of a disputed business disparagement claim?

I. INTRODUCTION

The Petitioner moves for rehearing to prevent the Third Court of Appeals opinion from creating an additional requirement to the special damages analysis of a business disparagement claim, which would require the products or services to be tangible pieces of property that are manufactured and directly sold to consumers to be an actionable business disparagement claim. The ruling would deprive Texas businesses who provide services related to the sale of a product, but don't manufacture the product itself, from being able to assert a stand-alone business disparagement claim.

The Third Court of Appeals opinion reversed the trial court's denial of the Media Defendant's Texas Citizen's Participation Act's Motion to Dismiss "because MRG Medical never sold COVID tests". *See Tex. Trib., Inc. v. MRG Med. LLC*, No. 03-23-00293-CV, 2024 Tex. App. LEXIS 3515, at *15 (Tex. App.—Austin May 22, 2024, no pet. h.); App. Tab 1. In substance, the Appellate Court's opinion disposed of the Petitioner claim, for the sole reason that it did not actually manufacturing the covid tests accompanying its telehealth and diagnostic testing services. However, the services being disparaged were MRG's diagnostic testing and telehealth related services, which were incorporated into purchase of the covid testing. The fact that the company asserting a business disparagement claim does not manufacture the specific products that are incorporated into the services should not be dispositive of any additional analysis of the disparagement elements.

The Appellate Court's opinion's introduction contained factual inaccuracies that are contrary to the evidence in the record. Specifically, and not limited to, the Appellate Court's opinion claimed that "No Local Governments ultimately purchased tests from Reliant" and that "negotiations for reliant to purchase MRG medical also ended without a deal." *Id at* 3; App. Tab 1. But the record contains evidence of the actual agreements MRG entered into with Reliant, and that Reliant did provide services to local government entities, to which the Appellant Court opinion states the contrary.

On its face, the court of appeals' opinion conflicts with opinions issued by this Court in its defamation-by-implication and business disparagement jurisprudence. *See generally Dall. Morning News, Inc. v. Tatum*, 554 S.W.3d 614, 628-29 (Tex. 2018), *Innovative Block of S. Tex., Ltd. V. Valley Builders Supply, Inc.*, 603 S.W.3d 409, 426 (Tex. 2020). *Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc.*, 434 S.W.3d 142, 155 (Tex. 2014). The opinions in those cases set forth the relevant elemental analysis for business disparagement and defamation by implication, which determines if Plaintiff's business disparagement claim is actionable.

In addition, the Court of Appeals disregarded analysis regarding section 16.003 of the Texas Civil Practice and Remedies Code, which extends the statute of limitations to 2 years for business disparagement claims. *See* Tex. Civ. Prac. & Rem. Code § 16.003; *See also Nationwide Bi-Weekly Admin., Inc. v. Belo Corp.*, 512 F.3d 137, 146 (5th Cir. 2007). The applicable case law does not distinguish whether the Plaintiff also had a defamation

case or whether it manufactured the product being utilized, but whether the Plaintiff can meet its burden and provide prima facie evidence of business disparagement.

The Third Court of Appeals opinion would require the products or services to be tangible pieces of property that are manufactured and directly sold to consumers to be an actionable business disparagement claim. This Court should grant review to resolve the conflict in the case law, conflict with Section 16.003 of the Texas Civil Practice Remedies Code & determinantal effect on Texas businesses' ability to assert an actionable business disparagement claim.

II. ARGUMENT

A. The Third Court of Appeals erred by making it a prerequisite that a Plaintiff manufacture the product accompanying the service provided, in order to have an actionable business disparagement claim.

The Third Court of Appeals opinion reversed the trial court's denial of Appellant's Texas Citizen's Participation Act's Motion to Dismiss "because MRG Medical never sold COVID tests". *See Tex. Trib., Inc. v. MRG Med. LLC*, No. 03-23-00293-CV, 2024 Tex. App. LEXIS 3515, at *15 (Tex. App.—Austin May 22, 2024, no pet. h.); App. Tab 1. In substance, the Appellate Court's opinion disposed of Petitioner business disparagement claim, due to the fact that it did not manufacture the covid tests accompanying MRG's diagnostic testing and telehealth related services, which were incorporated into purchase of the covid testing and, most importantly, was a product or service involved in every service whether diagnostic monitoring or telehealth services offered to its clients.

The Appellate Court's opinion essentially creates an additional element (a condition precedent) to the special damages analysis of a business disparagement claim, for said claim to be actionable. The Appellate Court's opinion requires the products or services to be tangible pieces of property that are manufactured and directly sold to consumers to be actionable under a theory of business disparagement. The opinion would narrow the acceptable "products and services" that could be subject to a business disparagement claim. The fact that the company asserting a business

disparagement claim does not manufacture the specific products that are incorporated into the services it provides to the public should not be dispositive of any additional analysis of the disparagement elements.

1. **Deprivation of Texas Business Entities' legal rights to assert business disparagement claims.**

The Appellate Court summarily dismissed the Petitioner's business disparagement claim because the Company did not manufacture the covid tests discussed in the Article. The logical and legal conclusion of the Appellate Court's opinion is that no Texas business entity can file suit alleging business disparagement, unless it manufactures and/or produces the tangible product being sold to consumers. This would mean that any Texas business entity that does not actually grow, build or manufacture a product, could never bring forth an actionable business disparagement claim. This would deprive the following Texas business entities of its legal rights to assert an actionable business disparagement claim, including but not limited to:

i. **Oil and Gas Companies** (**related transportation services):** Upstream oil and gas businesses that are involved in the exploration and extraction of natural resources would also fall victim to the Appellate Court's analysis, as they do not manufacture the raw oil and gas in Texas, they simply distribute the raw materials for refinement to consumers.

ii. **Food, Drink or Alcohol Distributors:** Sysco, H-E-B, Walmart or any Texas

business entity that is involved with the distribution of perishable goods or products that it does not directly manufacture or grow.

iii. **Texas Transportation and Freight Companies:** Like MRG, these businesses provide services to consumers by delivering goods manufactured by other entities, the delivery and services related to those goods is the service being provided.

iv. **Any service-based Texas company that provides recreational services using equipment purchased from another entity.**

Hypothetically, the Appellant Court's judgement and opinion would bar any Pharmacy or Oil & Gas Distributor from asserting a business disparagement claim under the following circumstances. If a Media Defendant falsely claimed that a Pharmacy or Distributor was selling counterfeit products to its clients, neither company would not have an actionable business disparagement claim, as a pharmacy does not directly manufacture prescription drugs & the oil and gas distributor only transports raw resources. The services provided by both is the actual distribution and related services of the product being sold. The Appellate Court's opinion would require both the Pharmacy & Oil and Gas Distributor to file a suit within the 1-year statute of limitation, as they could not assert a valid business disparagement claim, as they do not manufacture the product accompanying its services.

In effect, the Court of Appeals opinion would deprive a significant portion of Texas businesses of its right to redress false, malicious and disparaging statements made

by Media Defendants about its services, simply because the products accompanying its services are manufactured by others. The Petitioner contends that this would result in injustice, as Texas businesses would be stripped of their rights to redress wrongs and recover for special damages incurred. In addition, the erroneous application of law, which would run contrary legislative intent of Section 16.003 of the Texas Civil Practice and Remedies Code, which set a 2-year statute of limitations for business disparagement claims. *See* Tex. Civ. Prac. & Rem. Code § 16.003.

2. None of the relevant jurisprudence makes any reference to whether the disparaged product or service is required to be tangible and manufactured by the Plaintiff.

The relevant case law is clear, when a Plaintiff has "brought claims for business disparagement and tortious interference with prospective business relations a two-year statute of limitations typically applies to those causes of action." *See Nationwide Bi-Weekly Admin., Inc. v. Belo Corp.*, 512 F.3d 137, 146 (5th Cir. 2007). The cases do not distinguish whether the Plaintiff manufactured the products accompanying its services. There is no discussion in any of the relevant business disparagement jurisprudence that would require production and manufacturing of the product in order to have a valid business disparagement claim.

In *Dallas Morning News*, *Bentley* & *D Magazine* this Honorable Court opined as follows, "a plaintiff may allege that meaning arises in one of three ways…"

- **First, meaning may arise explicitly.** *See Bentley v. Bunton,* 94 S.W.3d 561, 566 (Tex. 2002)
- **Second, meaning may arise implicitly as a result of the article's entire gist.** *See D Magazine Partners, L.P. v. Rosenthal, 529 S.W.3d 429, 431 (Tex. 2017).*
- **Third, the plaintiff may allege that the defamatory meaning arises implicitly from a distinct portion of the article rather than from the article's as-a-whole gist**. *See Dall. Morning News, Inc.,* 554 S.W.3d at 628-29.

This Court further opined that that when analyzing a Plaintiff's disparagement by implication claim, "the judicial task is to determine whether the meaning the plaintiff alleges arises from an objectively reasonable reading… (explaining that "the hypothetical reasonable reader" is the standard by which to judge a publication's meaning (emphasis added)). "The appropriate inquiry is objective, not subjective.". *Id* at 631. As such, "the judicial role is **not** to map out every single implication that a publication is capable of supporting. Rather, the judge's task is to determine whether the implication the plaintiff alleges is among the implications that the objectively reasonable reader would draw." Making this determination is a quintessentially judicial task. **It involves "a single objective inquiry: whether the [publication] can be reasonably understood as stating" the meaning the plaintiff proposes.** *Id (emphasis added).*

None of the Texas case precedence cited herein require or imply that any disparaged product be tangible and that it be manufactured by the Texas business entity

to be actionable under a business disparagement claim. The Appellate Court's opinion would create an additional hurdle for Texas businesses to seek legal action to protect their business interests, contracts and customer goodwill.

For these reasons, the Petitioner requests the court grant the relief sought in this Motion and grant petition of review of the Appellate Court's decision.

B. The Appellate Court failed to evaluate the evidence and pleadings under the analysis provided in *Dallas Morning News, Waste Mgmt. of Tex., Innovative Block* and other relevant case law.

The Petitioner's business disparagement claim is only actionable based on whether it can meet its burden under the TCPA, as it relates to disparagement of its products and services and special damages. This Court has opined in multiple cases since 1987 to present on the distinction between defamation and business disparagement, specifically opining on the issue in *Innovative Block of S. Tex., Ltd. v. Valley Builders Supply, Inc.*, *In re Lipsk*y, & *Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill*, and *Hurlbut v. Gulf Atlantic Life Ins. Co.* stating in relevant part:

> "The torts of defamation and business disparagement are alike in that 'both involve harm from the publication of false information.' Business disparagement and defamation are similar in that both involve harm from the publication of false information." *See In re Lipsky*, 460 S.W.3d 579, 591 (Tex. 2015).

Defamation serves to protect one's interest in character and reputation, whereas disparagement protects economic interests by providing a remedy for pecuniary losses from slurs affecting the marketability of goods and services. *See Innovative Block of S. Tex.,*

Ltd. v. Valley Builders Supply, Inc., 603 S.W.3d 409, 417 (Tex. 2020).

> "Because business disparagement, unlike defamation, is solely concerned with economic harm, proof of special damages is a "fundamental element of the tort." *Id.* That special damages are fundamental to business disparagement makes a plaintiff's injury a useful proxy for determining when the tort is actionable. Thus, if the gravamen of the plaintiff's claim is for special damages (e.g., an economic injury to the plaintiff's business), rather than general damages to its reputation, then the proper cause of action may be for business disparagement." *Id at* 417-18.

The Petitioner does not seek nor is it requesting general damages related to its reputational harm, but special damages related to the termination of specific contracts by vendors, directly related to the disparaged services. The Petitioner asserts that based on the relevant case law, the only relevant analysis is whether the Plaintiff can provide prima facie evidence of each element of its business disparagement claim, which the Petitioner provided, and the appellate court disregarded and failed to consider.

C. The Appellate relied on facts that were contrary to evidence in the record.

The Appellate Court's judgement and opinion relied on these erroneous facts to determine that MRG's claims are reliant on defamatory statements and is therefore time barred.

The Court of Appeals incorrectly stated and relied on the incorrect fact that "no local governments ultimately purchased tests from Reliant". *See Tex. Trib., Inc.,* 2024 Tex. App. LEXIS 3515, at *3; App. Tab 1. However, significant evidence was provided in the trial court and reiterated in MRG's briefings, that Reliant, MRG's partner, would go on to attain contracts with Hays County and Travis County, providing the same

services that would have been offered by MRG in its partnership with Reliant. *See* CR 000739-746.

The Appellate Court's opinion stated that the negotiations "for Reliant to purchase MRG was unsuccessful." *Id.* This is incorrect. The record contains significant evidence that Reliant and MRG had entered into a binding agreement and had agreed to partner to provide the services required to provide covid testing and telehealth monitoring to the public.

In addition, MRG provided prima facie evidence that it would have entered into a business relationship with Dr. Legere, Dr. Lu, Dr. Barach, and Go Path Labs related to diagnostic and remote testing services through the use of telehealth & diagnostic services that were was disparaged by the Media Defendants. This is evidenced by the Nondisclosure/Non-Circumvention agreements signed with Dr. Legere, Dr Lu, Dr. Barach, and Go Path Labs. *See* CR at 000777 -792.

For these reasons, the Petitioner requests the court grant the relief sought in this Motion and grant petition of review of the Appellate Court's decision.

CONCLUSION

MRG asserted proper business disparagement claims that are governed by a two-year statute of limitations. The Article disparages MRG's products and services. Case law is clear when a Plaintiff has "brought claims for business disparagement and tortious interference with prospective business relations a two-year statute of limitations typically applies to those causes of action. *See* Tex. Civ. Prac. & Rem. Code § 16.003."

See Nationwide Bi-Weekly Admin., Inc. v. Belo Corp., 512 F.3d 137, 146 (5th Cir. 2007). The Petitioner has provided significant evidence of special damage and the gravamen of the compliant is a direct injury to MRG's services.

The Appellate Court's ruling would not only deprive the Petitioner of its ability to seek legal redress for disparagement but would deprive long-standing Texas companies who operate as distributors in their fields from having an actionable claim, such Oil, Gas, Energy, Medical Supply Companies, Food Distributors, as well as grocery chains such as H-E-B. In addition, innovative companies with breakthrough technologies would also be barred from being able to assert an actionable disparagement claim, simply because the products incorporated into their technology are manufactured by a third party.

PRAYER

Petitioner, MRG Medical LLC, respectfully requests that the Court grant rehearing, grant its Petition for Review, and proceed to the other arguments in briefing and oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, **Jonathan L. Almanza,** do hereby certify that on the **31st day of March 2025,** a true and correct copy of the foregoing motion was electronically filed with the respective Court and via electronic service issued copies to counsel of record.

/s/Jonathan L. Almanza
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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Motion for Rehearing complies with the typeface requirements in Tex. R. App. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes.

/s/Jonathan L. Almanza
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CERTIFICATE OF COMPLIANCE WITH APPELLATE 9.4(i)

I certify that this document contains 2682 words, as indicated by the word-count function of the computer program used to prepare it, and excluding the caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, statement of jurisdiction, statement of procedural history, signature, proof of service, certification, certificate of compliance, and appendix, as provided by Appellate Rule 9.4(i).

/s/Jonathan L. Almanza
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APPENDIX

Tab 1 — Court of Appeals' Opinion

Appendix

TAB 1

Tex. Trib., Inc. v. MRG Med. LLC

Court of Appeals of Texas, Third District, Austin

May 22, 2024, Filed

NO. 03-23-00293-CV

Reporter
2024 Tex. App. LEXIS 3515 *; 2024 WL 2305265

Texas Tribune, Inc., ProPublica, Inc., Vianna Davila, Jeremy Schwartz, and Lexi Churchill, Appellants v. MRG Medical LLC, Appellee

Prior History: [*1] FROM THE 345TH DISTRICT COURT OF TRAVIS COUNTY. NO. D-1-GN-22-005105, THE HONORABLE MADELEINE CONNOR, JUDGE PRESIDING.

Disposition: Reversed and Rendered in Part; Remanded in Part.

Core Terms

disparagement, Media, tests, reputation, defamation, contracts, damages, parties, matter of public concern, statute of limitations, defamatory statement, one-year, movant, limitations period, local government, pleadings

Case Summary

Overview

HOLDINGS: [1]-The TCPA applied to a dispute between defendants and plaintiff arising from a news story published by the media defendants about plaintiff's efforts to secure contracts from local governments because the article concerned the proper allocation of public funds, making it a matter of public concern; [2]-The statute of limitations barred plaintiff's business disparagement and tortious interference claims since they were solely based on defamatory statements; thus, the one-year limitations period for defamation claims applied.

Outcome

Reversed and rendered in part; remanded in part.

LexisNexis® Headnotes

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Association

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN1[⬇] **Fundamental Freedoms,**

Freedom of Association

The Texas Citizens Participation Act (TCPA) protects speech on matters of public concern by authorizing courts to conduct an early and expedited review of the legal merit of claims that seek to stifle speech through the imposition of civil liability and damages. Courts review a motion to dismiss under the TCPA using a three-step process. First, the movant bears the initial burden to show the TCPA applies because the legal action against the movant is based on or is in response to its exercise of the right of free speech, right to petition, or right of association. Tex. Civ. Prac. & Rem. Code Ann. § 27.003(a). If the movant meets that burden, the claimant may avoid dismissal by establishing by clear and specific evidence a prima facie case for each essential element of the claim in question. Tex. Civ. Prac. & Rem. Code Ann. § 27.005(c). If the claimant meets that burden, the court must still grant the motion if the movant establishes an affirmative defense or other grounds on which the moving party is entitled to judgment as a matter of law. § 27.005(d).

Civil Procedure > Appeals > Standards of Review > De Novo Review

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

***HN2*[] Standards of Review, De Novo Review**

An appellate court reviews de novo whether each party met its respective burdens under the Texas Citizens Participation Act. In determining whether a legal action is subject to or should be dismissed under this chapter, an appellate court may consider the pleadings, evidence a court could consider under Tex. R. Civ. P. 166a, and supporting and opposing affidavits stating the facts on which the liability or defense is based. Tex. Civ. Prac. & Rem. Code Ann. § 27.006(a). An appellate court reviews the pleadings and evidence in the light most favorable to the nonmovant.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

Torts > ... > Defamation > Public Figures > Limited Purpose Public Figure

***HN3*[] Freedom of Speech, Strategic Lawsuits Against Public Participation**

The Texas Citizens Participation Act (TCPA) defines the exercise of the right of free speech as a communication made in connection with a matter of public concern. Tex. Civ. Prac. & Rem. Code Ann. § 27.001(3). A matter of

public concern means a statement or activity regarding 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; a matter of political, social, or other interest to the community; or a subject of concern to the public. § 27.001(7). To be a matter of public concern, a claim must have public relevance beyond the interests of the parties. Private disputes that merely affect the fortunes of the litigants are not matters of public concern. In analyzing whether the TCPA applies to a suit, an appellate court focuses on the plaintiff's pleadings, which are the best and all-sufficient evidence of the nature of the action, while also considering the pleadings and other evidence in the light most favorable to the nonmovant and prevailing party below.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

Evidence > Burdens of Proof > Preponderance of Evidence

Governments > Legislation > Statute of Limitations > Pleadings & Proof

Governments > Legislation > Statute of Limitations > Time Limitations

HN4[] **Freedom of Speech, Strategic Lawsuits Against Public Participation**

Even if a party establishes by clear and specific evidence a prima facie case in support of its claim, the court must still dismiss the case if the movant proves the essential elements of any valid defense by a preponderance of the evidence. Tex. Civ. Prac. & Rem. Code Ann. § § 27.005(d). The statute of limitations is an affirmative defense that must be proven by the defendant. Tex. R. Civ. P. 94. To prevail on a limitations defense, the movant must show (1) when the cause of action accrued, and (2) that the plaintiff brought its suit later than the applicable number of years thereafter—i.e., that the statute of limitations has run. A plaintiff may not recast its claim in the language of another cause of action to avoid limitations. In determining which limitations period applies, an appellate court is not bound by the labels parties place on their claims but look to the real substance of the claims.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN5[] **Pleadings, Rule Application & Interpretation**

The substance of the plaintiff's pleadings to determine nature of plaintiff's claim.

Torts > Business Torts > Trade

Libel > Elements

HN6 **Trade Libel, Elements**

Defamation and business disparagement are alike in that both involve harm from the publication of false information. The two torts, however, serve different interests. Defamation serves to protect one's interest in character and reputation, whereas disparagement protects economic interests by providing a remedy for pecuniary losses from slurs affecting the marketability of goods and services. To state a claim for defamation, a plaintiff must allege (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. A defamatory statement, then, is one that tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. Business disparagement, in contrast, encompasses falsehoods concerning the condition or quality of a business's products or services that are intended to, and do in fact, cause financial harm. The publication of a disparaging statement concerning the product of another is actionable as business disparagement when (1) the statement is false, (2) published with malice, (3) with the intent that the publication cause pecuniary loss or the reasonable recognition that it will, and (4) pecuniary loss does in fact result.

Torts > ... > Defamation > Remedies > Damages

HN7 **Remedies, Damages**

The nature of a plaintiff's injury is no more than a proxy, and an imperfect one, because defamation plaintiffs may recover special damages. Where the torts meaningfully diverge, then, is not in the nature of the injury but instead in the nature of the alleged falsehoods. That is, the distinction is whether the falsehood affects the plaintiff's reputation or the marketability of the plaintiff's good and services.

Torts > Business Torts > Trade Libel > Elements

HN8 **Trade Libel, Elements**

Business disparagement encompasses disparaging statements about the product of another.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > ... > Concerted Action > Civil Conspiracy > Defenses

Torts > ... > Defamation > Defenses > Statute of Limitations

Torts > ... > Business Relationships > Intentional Interference > Defenses

Torts > Business Torts > Trade Libel > Elements

HN9[] **Statute of Limitations, Time Limitations**

One-year statute of limitations applies to business disparagement claim based solely on defamatory statements. The same period applies to the civil conspiracy theory because it shares a limitations period with that of its underlying tort. If a tortious interference claim is based solely on defamatory statements, the one-year limitations period for defamation claims applies.

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For Vianna Davila, Appellant: Mr. Marc Fuller, Mr. Joshua A. Romero, Ms. Maggie Burreson, Ms. Maggie Burreson, Mr. Marc Fuller, Mr. Joshua A. Romero.

For MRG Medical LLC, Appellee: Mr. Rene A. Flores, Mr. Jonathan Almanza, Mr. Emerson Arellano.

For Community Labs. UC: Ms. Lisa S. Barkley, Mr. Lamont A. Jefferson.

Judges: Before Chief Justice Byrne, Justices Kelly and Theofanis.

Opinion by: Rosa Lopez Theofanis

Opinion

MEMORANDUM OPINION

This dispute arises from a news story about the efforts of MRG Medical, LLC, and its founder, Kyle Hayungs, to secure contracts from local governments. The Texas Tribune, Inc.; ProPublica, Inc.; Vianna Davila; Jeremy Schwartz; and Lexi Churchill appeal from the district court's denial of their motion to dismiss pursuant to the Texas Citizens Participation Act (TCPA). *See generally* Tex. Civ. Prac. & Rem. Code §§ 27.001-.011. We reverse and render judgment dismissing MRG Medical's claims and remanding for further proceedings. **[*2]**

BACKGROUND[1]

Hayungs founded MRG Medical in 2017 "to lower health care costs through telemedicine." While attempting to persuade local governments to contract with MRG Medical, Hayungs formed relationships with local officials. Hays County Judge Ruben Becerra, for example, edited marketing materials for the company and helped Hayungs with a federal grant application. Bexar County Commissioner Tommy Calvert served on MRG Medical's advisory board.

When the COVID-19 pandemic began

[1] We draw our recitation of the background facts from the pleadings and affidavits, which we set out in the light most favorable to the nonmovant. *See, e.g., RigUp, Inc. v. Sierra Hamilton, LLC*, 613 S.W.3d 177, 182 (Tex. App.—Austin 2020, no pet.).

in early 2020, Hayungs shifted his focus to supplying COVID-19 tests to local governments. Hayungs had previously cultivated a relationship with Dr. Henry Legere, the founder of Reliant Immune Diagnostics. Dr. Legere had developed a mobile app called MD Box to help people track symptoms for certain ailments and access diagnostic tests. When the pandemic began, Dr. Legere modified the app to include COVID-19 and acquired "a large quantity of antibody tests" manufactured by a Chinese company called Wondfo Biotech. Hayungs started negotiating with Dr. Legere for Reliant to purchase MRG Medical and hire Hayungs. Hayungs, meanwhile, set out to convince Hays County and other local governments to purchase tests **[*3]** from Reliant. Becerra and Calvert appeared in a video with Hayungs that promoted the value of Reliant's tests. This effort provoked significant opposition, including from Hays County Commissioner Walt Smith. No local governments ultimately purchased tests from Reliant. The negotiations for Reliant to purchase MRG Medical also ended without a deal.

On September 25, 2020, the Texas Tribune and ProPublica jointly published an article ("Article") on their websites titled "How a local Texas politician helped a serial entrepreneur use COVID-19 to boost his business."[2] In addition to the information we have already set out, the Article describes a conversation between Hayungs and Becerra at a "county government conference" in Galveston in October 2019. A person who was present for the conversation told the Texas Tribune that Hayungs "said his focus was to ensure deals can 'move' without officials having to 'write big checks.'" The Article then explains, in parentheses, that "[i]n Hays County, contracts below $50,000 do not have to go out for competitive bidding." Another person who was present told the Tribune that "[o]nce I heard that" from Hayungs, "it was like, dude, you're going to end **[*4]** up in prison."

On September 26, 2022, MRG Medical sued Texas Tribune, ProPublica, and the three reporters who worked on the story (collectively, "Media Defendants") for business disparagement, tortious interference with current and prospective contracts, and civil conspiracy. MRG Medical based its claims on four "statements" within the Article:

> 1. "The [Media Defendants'] statement and/or provision of information implying that MRG engaged in illegal conduct by avoiding competitive public procurement by 'keeping' contracts under $50,000.00. In addition, stating that the founder was 'going to prison.' As discussed above, MRG's conduct was not illegal."

[2] ProPublica titled the article "The COVID-19 Charmer: How a Self-Described Felon Convinced Elected Officials to Try to Help Him Profit From the Pandemic." We refer to both publications as a single article because MRG Medical does not take issue with ProPublica's headline.

> 2. "Co-Conspirator [Walt] Smith's and the [Media Defendants'] statement and/or provision of information implying that MRG was selling unreliable, non-FDA authorized COVID tests and/or was not compliant with federal law. In fact, MRG was not selling COVID tests. In addition, the tests Reliant offered were authorized for sale by the FDA."
> 3. "[The Media Defendants'] statement and/or implication implying that MRG was bribing elected officials."
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> 4. "The [Media Defendants'] statement and/or provision of information implying that MRG was a fly-by **[*5]** night operation being led by a 'serial entrepreneur.'"

The Media Defendants filed a motion to dismiss under the TCPA and attached, among other things, copies of the Article as it appeared on the websites of both the Tribune and ProPublica; a demand letter from MRG Medical's counsel; ProPublica's response, with an email exchange between Vianna Davila and Hayungs attached; and a screenshot from Hayungs' Facebook account showing a picture with Hayungs and Becerra. The parties subsequently executed a Rule 11 agreement in which, among other things, MRG Medical agreed that business disparagement was the only tort underlying its civil conspiracy claim. *See Enterprise Crude GP LLC v. Sealy Partners, LLC*, 614 S.W.3d 283, 308 (Tex. App.—Houston [14th Dist.] 2020, no pet.) ("A defendant's liability for conspiracy depends on participation in some underlying tort for which the plaintiff seeks to hold at least one of the named defendants liable."). MRG Medical filed a response that began with an extended discussion of the Texas Tribune's history, its place in the media landscape of Texas, and its financial connection with one of MRG Medical's competitors. In the next part of the motion, MRG Medical argued that the TCPA does not apply and, in the alternative, that it could present a prima facie case for each claim by **[*6]** clear and specific evidence. To carry that burden, MRG Medical attached items including: articles supporting its claims about the Texas Tribune and the media in general; affidavits from Becerra and other government officials with whom Hayungs interacted with; copies of contracts between MRG Medical and third parties that were terminated after the Article was published; an affidavit from the owner of Prime Care stating that he terminated the contract with MRG Medical because of implications of the Article; and a report showing MRG Medical's financial situation.

The district court denied the motion following a hearing. This interlocutory appeal ensued. *See* Tex. Civ. Prac. & Rem. Code § 51.014(12).

LEGAL STANDARDS

HN1[⬆] The TCPA "protects speech on

matters of public concern by authorizing courts to conduct an early and expedited review of the legal merit of claims that seek to stifle speech through the imposition of civil liability and damages." *Lilith Fund for Reprod. Equity v. Dickson*, 662 S.W.3d 355, 363 (Tex. 2023). Courts review a motion to dismiss under the TCPA using a three-step process. *Montelongo v. Abrea*, 622 S.W.3d 290, 296 (Tex. 2021). First, the movant bears the initial burden to show the TCPA applies because the "legal action" against the movant is "based on or is in response to" its "exercise of the right of free speech, right to petition, **[*7]** or right of association." Tex. Civ. Prac. & Rem. Code § 27.003(a). If the movant meets that burden, the claimant may avoid dismissal by establishing "by clear and specific evidence a prima facie case for each essential element of the claim in question." *Id.* § 27.005(c). If the claimant meets that burden, the court must still grant the motion if the movant "establishes an affirmative defense or other grounds on which the moving party is entitled to judgment as a matter of law." *Id.* § 27.005(d).

HN2[⬆] We review de novo whether each party met its respective burdens under the TCPA. *O'Rourke v. Warren*, 673 S.W.3d 671, 679-80 (Tex. App.—Austin 2023, pet. denied). In determining "whether a legal action is subject to or should be dismissed under this chapter," we may "consider the pleadings, evidence a court could consider under Rule 166a, Texas Rules of Civil Procedure, and supporting and opposing affidavits stating the facts on which the liability or defense is based." Tex. Civ. Prac. & Rem. Code § 27.006(a). We review the pleadings and evidence in the light most favorable to the nonmovant. *O'Rourke*, 673 S.W.3d at 680.

DISCUSSION

The Media Defendants argue in six issues that the district court erred by denying their motion to dismiss. First, they argue that the TCPA applies to MRG Medical's claims and those claims are barred by the statute of limitations. If we disagree on limitations, the Media Defendants argue MRG Medical still failed to **[*8]** present prima facie evidence in support of each claim and that the district court erred in overruling their evidentiary objections.

The TCPA Applies

The Media Defendants argue in their first issue that the TCPA applies because MRG Medical's lawsuit "is based on or is in response to" their exercise of "the right of free speech." Tex. Civ. Prac. & Rem. Code § 27.005(b).

HN3[⬆] The TCPA defines the exercise of the right of free speech as "a communication made in connection with a matter of public concern." *Id.* § 27.001(3). A "matter of public concern"

means a "statement or activity regarding" 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"; a "matter of political, social, or other interest to the community"; or a "subject of concern to the public." *Id.* § 27.001(7). "To be a matter of public concern, a claim must have public relevance beyond the interests of the parties." *O'Rourke*, 673 S.W.3d at 681 (citing *Szymonek v. Guzman*, 641 S.W.3d 553, 565 (Tex. App.—Austin 2022, pet. denied)). Private disputes "that merely affect the fortunes of the litigants are not matters of public concern." *Morris v. Daniel*, 615 S.W.3d 571, 576 (Tex. App.—Houston [1st Dist.] 2020, no pet.) (citing *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 136 (Tex. 2019)). In analyzing whether the TCPA applies to a suit, we focus on the plaintiff's pleadings, which are the "best and all-sufficient evidence of the nature of **[*9]** the action," while also considering the pleadings and other evidence "in the light most favorable to the nonmovant and prevailing party below." *O'Rourke*, 673 S.W.3d at 681 (citing *Crossroads Cattle Co. v. AGEX Trading, LLC*, 607 S.W.3d 98, 102 (Tex. App.—Austin 2020, no pet.)).

MRG Medical argues that the Article has no public relevance because no public money was ever spent on a contract with MRG Medical. While it is true that MRG Medical never secured a contract with the government, that does not necessarily mean the dispute is a private one. The Article concerns the involvement of two public officials with MRG Medical and its founder, the efforts of those officials to secure government contracts for MRG Medical and Reliant, and the resistance to those efforts by other elected government officials. This was essentially a dispute about the proper allocation of public funds, and "where the public's purse goes, so goes the public's concern." *See PNC Inv. Co., LLC v. Fiamma Statler, LP*, No. 02-19-00037-CV, 2020 Tex. App. LEXIS 7212, 2020 WL 5241190, at *5 (Tex. App.—Fort Worth Sept. 3, 2020, no pet.) (mem. op.). Adding to the public interest, the Article raises concerns about the accuracy and usefulness of the tests, which were intended as part of the government response to the COVID-19 pandemic. *Cf. Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509-10 (Tex. 2015) (per curiam) (holding that allegations concerning whether nurse anesthetist "properly provided medical services to patients" were matter of public concern). Taken **[*10]** as a whole, the article concerns a matter with "public relevance beyond the interests of the parties." *See O'Rourke*, 673 S.W.3d at 681. We conclude that the Media Defendants carried their initial burden to demonstrate that the TCPA applies and sustain their first issue.

Limitations

The Media Defendants argue in part of their second issue that they established that the statute of limitations bars MRG's claims.

HN4[⬆] Even if a party establishes by clear and specific evidence a prima facie case in support of its claim, the court must still dismiss the case if the movant proves the essential elements of any valid defense by a preponderance of the evidence. *See* Tex. Civ. Prac. & Rem. Code § 27.005(d); *Youngkin v. Hines*, 546 S.W.3d 675, 681 (Tex. 2018). The statute of limitations is an affirmative defense that must be proven by the defendant. Tex. R. Civ. P. 94. To prevail on a limitations defense, the movant must show "(1) when the cause of action accrued, and (2) that the plaintiff brought its suit later than the applicable number of years thereafter—i.e., that 'the statute of limitations has run.'" *Draughon v. Johnson*, 631 S.W.3d 81, 89 (Tex. 2021) (quoting *Provident Life & Acc. Ins. v. Knott*, 128 S.W.3d 211, 220 (Tex. 2003)).

A plaintiff may not recast its claim "in the language of another cause of action" to avoid limitations. *Gandy v. Williamson*, 634 S.W.3d 214, 243 (Tex. App.—Houston [1st Dist.] 2021, pet. denied); *see Earle v. Ratliff*, 998 S.W.2d 882, 893 (Tex. 1999). In determining which limitations period applies, we "are not bound by the labels parties place on their claims" **[*11]** but look to the "real substance of the claims." *Pollard v. Hanschen*, 315 S.W.3d 636, 642 n.4 (Tex. App.—Dallas 2010, no pet.). To determine the real substance of the claims, we examine MRG's Medical's petition. *See Brumley v. McDuff*, 616 S.W.3d 826, 833 (Tex. 2021) (examining "***HN5***[⬆] the substance of the plaintiff's pleadings" to determine nature of plaintiff's claim). The Media Defendants argue that a one-year limitations period applies to MRG Medical's claims because the substance of each is defamation. *See Nath v. Texas Child.'s Hosp.*, 446 S.W.3d 355, 370 (Tex. 2014) (citing cases applying one-year statute of limitations to claims of business disparagement and tortious interference "when the sole basis" for each "claim is defamatory statements"). The parties do not dispute that the claim began to accrue on September 25, 2020, when the Tribune and ProPublica published the Article.

HN6[⬆] We start with business disparagement. Defamation and business disparagement are alike "in that both involve harm from the publication of false information." *In re Lipsky*, 460 S.W.3d 579, 591 (Tex. 2015) (orig. proceeding). The two torts, however, serve different interests. *Id.* "Defamation serves to protect one's interest in character and reputation, whereas disparagement protects economic interests by providing a remedy for pecuniary losses from slurs affecting the marketability of goods and services." *Innovative Block of S. Tex., Ltd. v. Valley Builders Supply, Inc.*, 603 S.W.3d 409, 417 (Tex. 2020). To state a

claim for defamation, a **[*12]** plaintiff must allege "(1) the publication of a false statement of fact to a third party, (2) that was defamatory concerning the plaintiff, (3) with the requisite degree of fault, and (4) damages, in some cases." *In re Lipsky*, 460 S.W.3d at 593. A defamatory statement, then, "is one that 'tends [ ] to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.'" *Innovative Block*, 603 S.W.3d at 417 (quoting Restatement (Second) of Torts § 559 (Am. L. Inst. 1977)). Business disparagement, in contrast, "encompasses falsehoods concerning the condition or quality of a business's products or services that are intended to, and do in fact, cause financial harm." *Id.* The "publication of a disparaging statement concerning the product of another" is actionable as business disparagement "when (1) the statement is false, (2) published with malice, (3) with the intent that the publication cause pecuniary loss or the reasonable recognition that it will, and (4) pecuniary loss does in fact result." *Id.* (citing *Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 170 (Tex. 2003)).

The Media Defendants argue that the challenged statements constitute defamation rather than business disparagement because the statements "are not about the condition or quality of any product or service MRG offers" but rather **[*13]** its reputation. MRG Medical responds that it asserted a claim for business disparagement because it alleged special damages. The Media Defendants reply that the distinction between business disparagement and defamation is the nature of the alleged falsehoods rather than the plaintiff's damages.

We agree with the Media Defendants. MRG Medical relies on the supreme court's statement that "if the gravamen of the plaintiff's claim is for special damages (e.g., an economic injury to the plaintiff's business), rather than general damages to its reputation, then the proper cause of action may be for business disparagement." *Id.* at 417-18. ***HN7***[⬆] But "the nature of a plaintiff's injury is no more than a proxy," and an imperfect one, because defamation plaintiffs may recover special damages. *Id.* at 418; *see Waste Mgmt. of Texas Inc. v. Texas Disposal Sys. Landfill, Inc.*, 434 S.W.3d 142, 155 (Tex. 2014). "Where the torts meaningfully diverge, then, is not in the nature of the injury but instead in the nature of the alleged falsehoods." *Innovative Block*, 603 S.W.3d at 418. That is, the distinction is whether the falsehood affects the plaintiff's reputation or the marketability of the plaintiff's good and services. *See generally id.*

We next consider whether the four challenged statements allegedly damage MRG Medical's reputation or the marketability of **[*14]** its goods and services. MRG Medical alleged in its petition that, at all relevant times, it

"provided seamless proprietary solutions for tele-health, remote patient monitoring, disease specific chronic care management, biometric sensors, and other goods and services" but "never offered COVID testing to anyone." The first and third challenged statements (avoiding competitive bidding rules and paying bribes) do not disparage any product or service of MRG Medical's but rather its reputation for honesty and lawful behavior. The fourth statement (that MRG Medical is a "fly-by night operation being led by a 'serial entrepreneur'") impacts its general reputation but does not disparage the quality of MRG Medical's telehealth services. *See Innovative Block*, 603 S.W.3d at 417 (characterizing defamatory statement as "one that 'tends [ ] to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him'" (quoting Restatement (Second) of Torts § 559 (Am. L. Inst. 1977)); *Hancock v. Variyam*, 400 S.W.3d 59, 63 (Tex. 2013) (describing defamation "as the invasion of a person's interest in her reputation and good name").

The Media Defendants argue that the second challenged statement—"that MRG was selling unreliable, non-FDA authorized COVID tests and/or **[*15]** was not compliant with federal law"—cannot "be read as disparaging the 'condition or quality' of any of MRG [Medical]'s products or services" because MRG Medical never sold COVID tests. We agree. ***HN8***[⬆] Business disparagement encompasses disparaging statements "about the product of another," *Innovative Block*, 603 S.W.3d at 417, but MRG states in its live petition that it "has never offered COVID testing to anyone." In other words, neither the Wondfo antibody test nor any other COVID-19 test was a "product[] or service[]" of MRG Medical. *See id.* Moreover, the harm MRG Medical alleges flowed from this statement was that third parties canceled their contracts with MRG Medical because they did not wish to be associated with MRG Medical. Considering all these allegations together, the second statement concerns MRG Medical's reputation rather than the marketability of its telehealth services. The substance of the second statement supports a claim for defamation rather than business disparagement. *See Hancock*, 400 S.W.3d at 63; *Amini v. Spicewood Springs Animal Hosp., LLC*, No. 03-18-00272-CV, 2019 Tex. App. LEXIS 9722, 2019 WL 5793115, at *9 (Tex. App.—Austin Nov. 7, 2019, no pet.) (mem. op.) (dismissing business disparagement claim because "[i]n essence, [plaintiffs] seem to argue that . . . [the defendant] disparaged the hospital's overall business practices and, by extension, its professional reputation" **[*16]** rather than hospital's commercial product or activity).

HN9[⬆] Because MRG's business

disparagement claim is based solely on defamatory statements, the one-year statute of limitations applies. *See Nath*, 446 S.W.3d at 370 (explaining that one-year statute of limitations applies to business disparagement claim based solely on defamatory statements (citing *Hurlbut v. Gulf Atl. Life Ins.*, 749 S.W.2d 762, 766 (Tex. 1987)). The same period applies to the civil conspiracy theory because it "shares a limitations period with that of its underlying tort." *See Agar Corp., Inc. v. Electro Circuits Int'l, LLC*, 580 S.W.3d 136, 142 (Tex. 2019). A one-year limitations period also applies to MRG's claims of tortious interference with prospective and existing contracts because those claims are based on the same four statements. *See Nath*, 446 S.W.3d at 370 (concluding that "if a tortious interference claim is based solely on defamatory statements, the one-year limitations period for defamation claims applies").

Having concluded that limitations bars all of MRG Medical's claims, we do not reach the Media Defendants' remaining issues.[3] *See* Tex. R. App. P. 47.1 ("The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal.").

CONCLUSION

We reverse the district court's order and render judgment dismissing **[*17]** MRG Medical's claims. We remand to the district court to consider the Media Defendants' request for court costs, attorney's fees, and sanctions.

Rosa Lopez Theofanis, Justice

Before Chief Justice Byrne, Justices Kelly and Theofanis

Reversed and Rendered in Part; Remanded in Part

Filed: May 22, 2024

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[3] Because we conclude that the statute of limitations bars all MRG's claims, we need not reach the Tribune's arguments that the statements are accurate reports of third party-statements on matters of public concern, *see* Tex. Civ. Prac. & Rem. Code § 73.005 (providing that "accurate reporting of allegations made by a third party regarding a matter of public concern" is defense), and that the Article does not reasonably support the alleged implications, *see Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d 614, 635 (Tex. 2018) ("[A] plaintiff who seeks to recover based on a defamatory implication—whether a gist or a discrete implication—must point to 'additional, affirmative evidence' within the publication itself that suggests the defendant "intends or endorses the defamatory inference." (quoting *White v. Fraternal Order of Police*, 909 F.2d 512, 520, 285 U.S. App. D.C. 273 (D.C. Cir. 1990))).

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-23-00293-CV

Texas Tribune, Inc., ProPublica, Inc., Vianna Davila, Jeremy Schwartz, and Lexi Churchill, Appellants

v.

MRG Medical LLC, Appellee

FROM THE 345TH DISTRICT COURT OF TRAVIS COUNTY
NO. D-1-GN-22-005105, THE HONORABLE MADELEINE CONNOR, JUDGE PRESIDING

MEMORANDUM OPINION

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The TCPA Applies

The Media Defendants argue in their first issue that the TCPA applies because MRG Medical's lawsuit "is based on or is in response to" their exercise of "the right of free speech." Tex. Civ. Prac. & Rem. Code § 27.005(b).

The TCPA defines the exercise of the right of free speech as "a communication made in connection with a matter of public concern." *Id.* § 27.001(3). A "matter of public concern" means a "statement or activity regarding" 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"; a "matter of political, social, or other interest to the community"; or a "subject of concern to the public." *Id.* § 27.001(7). "To be a matter of public concern, a claim must have public relevance beyond the interests of the parties." *O'Rourke*, 673 S.W.3d at 681 (citing *Szymonek v. Guzman*, 641 S.W.3d 553, 565 (Tex. App.—Austin 2022, pet. denied)). Private disputes "that merely affect the fortunes of the litigants are not matters of public concern." *Morris v. Daniel*, 615 S.W.3d 571, 576 (Tex. App.—Houston [1st Dist.] 2020, no

pet.) (citing *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 136 (Tex. 2019)). In analyzing whether the TCPA applies to a suit, we focus on the plaintiff's pleadings, which are the "best and all-sufficient evidence of the nature of the action," while also considering the pleadings and other evidence "in the light most favorable to the nonmovant and prevailing party below." *O'Rourke*, 673 S.W.3d at 681 (citing *Crossroads Cattle Co. v. AGEX Trading, LLC*, 607 S.W.3d 98, 102 (Tex. App.—Austin 2020, no pet.)).

MRG Medical argues that the Article has no public relevance because no public money was ever spent on a contract with MRG Medical. While it is true that MRG Medical never secured a contract with the government, that does not necessarily mean the dispute is a private one. The Article concerns the involvement of two public officials with MRG Medical and its founder, the efforts of those officials to secure government contracts for MRG Medical and Reliant, and the resistance to those efforts by other elected government officials. This was essentially a dispute about the proper allocation of public funds, and "where the public's purse goes, so goes the public's concern." *See PNC Inv. Co. v. Fiamma Statler, LP*, No. 02-19-00037-CV, 2020 WL 5241190, at *5 (Tex. App.—Fort Worth Sept. 3, 2020, no pet.) (mem. op.). Adding to the public interest, the Article raises concerns about the accuracy and usefulness of the tests, which were intended as part of the government response to the COVID-19 pandemic. *Cf. Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509–10 (Tex. 2015) (per curiam) (holding that allegations concerning whether nurse anesthetist "properly provided medical services to patients" were matter of public concern). Taken as a whole, the article concerns a matter with "public relevance beyond the interests of the parties." *See O'Rourke*, 673 S.W.3d at 681. We conclude that the Media Defendants carried their initial burden to demonstrate that the TCPA applies and sustain their first issue.

Limitations

The Media Defendants argue in part of their second issue that they established that the statute of limitations bars MRG's claims.

Even if a party establishes by clear and specific evidence a prima facie case in support of its claim, the court must still dismiss the case if the movant proves the essential elements of any valid defense by a preponderance of the evidence. *See* Tex. Civ. Prac. & Rem. Code § 27.005(d); *Youngkin v. Hines*, 546 S.W.3d 675, 681 (Tex. 2018). The statute of limitations is an affirmative defense that must be proven by the defendant. Tex. R. Civ. P. 94. To prevail on a limitations defense, the movant must show "(1) when the cause of action accrued, and (2) that the plaintiff brought its suit later than the applicable number of years thereafter—i.e., that 'the statute of limitations has run.'" *Draughon v. Johnson*, 631 S.W.3d 81, 89 (Tex. 2021) (quoting *Provident Life & Acc. Ins. v. Knott*, 128 S.W.3d 211, 220 (Tex. 2003)).

A plaintiff may not recast its claim "in the language of another cause of action" to avoid limitations. *Gandy v. Williamson*, 634 S.W.3d 214, 243 (Tex. App.—Houston [1st Dist.] 2021, pet. denied); *see Earle v. Ratliff*, 998 S.W.2d 882, 893 (Tex. 1999). In determining which limitations period applies, we "are not bound by the labels parties place on their claims" but look to the "real substance of the claims." *Pollard v. Hanschen*, 315 S.W.3d 636, 642 n.4 (Tex. App.—Dallas 2010, no pet.). To determine the real substance of the claims, we examine MRG's Medical's petition. *See Brumley v. McDuff*, 616 S.W.3d 826, 833 (Tex. 2021) (examining "the substance of the plaintiff's pleadings" to determine nature of plaintiff's claim). The Media Defendants argue that a one-year limitations period applies to MRG Medical's claims because the substance of each is defamation. *See Nath v. Texas Child.'s Hosp.*, 446 S.W.3d 355, 370 (Tex. 2014) (citing cases applying one-year statute of limitations to claims of business

disparagement and tortious interference "when the sole basis" for each "claim is defamatory statements"). The parties do not dispute that the claim began to accrue on September 25, 2020, when the Tribune and ProPublica published the Article.

We start with business disparagement. Defamation and business disparagement are alike "in that both involve harm from the publication of false information." *In re Lipsky*, 460 S.W.3d 579, 591 (Tex. 2015) (orig. proceeding). The two torts, however, serve different interests. *Id.* "Defamation serves to protect one's interest in character and reputation, whereas disparagement protects economic interests by providing a remedy for pecuniary losses from slurs affecting the marketability of goods and services." *Innovative Block of S. Tex., Ltd. v. Valley Builders Supply, Inc.*, 603 S.W.3d 409, 417 (Tex. 2020). To state a claim for defamation, a plaintiff must allege "(1) the publication of a false statement of fact to a third party, (2) that was defamatory concerning the plaintiff, (3) with the requisite degree of fault, and (4) damages, in some cases." *In re Lipsky*, 460 S.W.3d at 593. A defamatory statement, then, "is one that 'tends [ ] to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.'" *Innovative Block*, 603 S.W.3d at 417 (quoting Restatement (Second) of Torts § 559 (Am. L. Inst. 1977)). Business disparagement, in contrast, "encompasses falsehoods concerning the condition or quality of a business's products or services that are intended to, and do in fact, cause financial harm." *Id.* The "publication of a disparaging statement concerning the product of another" is actionable as business disparagement "when (1) the statement is false, (2) published with malice, (3) with the intent that the publication cause pecuniary loss or the reasonable recognition that it will, and (4) pecuniary loss does in fact result." *Id.* (citing *Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 170 (Tex. 2003)).

The Media Defendants argue that the challenged statements constitute defamation rather than business disparagement because the statements "are not about the condition or quality of any product or service MRG offers" but rather its reputation. MRG Medical responds that it asserted a claim for business disparagement because it alleged special damages. The Media Defendants reply that the distinction between business disparagement and defamation is the nature of the alleged falsehoods rather than the plaintiff's damages.

We agree with the Media Defendants. MRG Medical relies on the supreme court's statement that "if the gravamen of the plaintiff's claim is for special damages (e.g., an economic injury to the plaintiff's business), rather than general damages to its reputation, then the proper cause of action may be for business disparagement." *Id.* at 417–18. But "the nature of a plaintiff's injury is no more than a proxy," and an imperfect one, because defamation plaintiffs may recover special damages. *Id.* at 418; *see Waste Mgmt. of Texas Inc. v. Texas Disposal Sys. Landfill, Inc.*, 434 S.W.3d 142, 155 (Tex. 2014). "Where the torts meaningfully diverge, then, is not in the nature of the injury but instead in the nature of the alleged falsehoods." *Innovative Block*, 603 S.W.3d at 418. That is, the distinction is whether the falsehood affects the plaintiff's reputation or the marketability of the plaintiff's good and services. *See generally id.*

We next consider whether the four challenged statements allegedly damage MRG Medical's reputation or the marketability of its goods and services. MRG Medical alleged in its petition that, at all relevant times, it "provided seamless proprietary solutions for tele-health, remote patient monitoring, disease specific chronic care management, biometric sensors, and other goods and services" but "never offered COVID testing to anyone." The first and third challenged statements (avoiding competitive bidding rules and paying bribes) do not disparage

any product or service of MRG Medical's but rather its reputation for honesty and lawful behavior. The fourth statement (that MRG Medical is a "fly-by night operation being led by a 'serial entrepreneur'") impacts its general reputation but does not disparage the quality of MRG Medical's telehealth services. *See Innovative Block*, 603 S.W.3d at 417 (characterizing defamatory statement as "one that 'tends [ ] to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him'" (quoting Restatement (Second) of Torts § 559 (Am. L. Inst. 1977)); *Hancock v. Variyam*, 400 S.W.3d 59, 63 (Tex. 2013) (describing defamation "as the invasion of a person's interest in her reputation and good name").

The Media Defendants argue that the second challenged statement—"that MRG was selling unreliable, non-FDA authorized COVID tests and/or was not compliant with federal law"—cannot "be read as disparaging the 'condition or quality' of any of MRG [Medical]'s products or services" because MRG Medical never sold COVID tests. We agree. Business disparagement encompasses disparaging statements "about the product of another," *Innovative Block*, 603 S.W.3d at 417, but MRG states in its live petition that it "has never offered COVID testing to anyone." In other words, neither the Wondfo antibody test nor any other COVID-19 test was a "product[] or service[]" of MRG Medical. *See id.* Moreover, the harm MRG Medical alleges flowed from this statement was that third parties canceled their contracts with MRG Medical because they did not wish to be associated with MRG Medical. Considering all these allegations together, the second statement concerns MRG Medical's reputation rather than the marketability of its telehealth services. The substance of the second statement supports a claim for defamation rather than business disparagement. *See Hancock*, 400 S.W.3d at 63; *Amini v. Spicewood Springs Animal Hosp., LLC*, No. 03-18-00272-CV, 2019 WL 5793115, at *9 (Tex.

App.—Austin Nov. 7, 2019, no pet.) (mem. op.) (dismissing business disparagement claim because "[i]n essence, [plaintiffs] seem to argue that . . . [the defendant] disparaged the hospital's overall business practices and, by extension, its professional reputation" rather than hospital's commercial product or activity).

Because MRG's business disparagement claim is based solely on defamatory statements, the one-year statute of limitations applies. *See Nath*, 446 S.W.3d at 370 (explaining that one-year statute of limitations applies to business disparagement claim based solely on defamatory statements (citing *Hurlbut v. Gulf Atl. Life Ins.*, 749 S.W.2d 762, 766 (Tex. 1987)). The same period applies to the civil conspiracy theory because it "shares a limitations period with that of its underlying tort." *See Agar Corp., Inc. v. Electro Circuits Int'l, LLC*, 580 S.W.3d 136, 142 (Tex. 2019). A one-year limitations period also applies to MRG's claims of tortious interference with prospective and existing contracts because those claims are based on the same four statements. *See Nath*, 446 S.W.3d at 370 (concluding that "if a tortious interference claim is based solely on defamatory statements, the one-year limitations period for defamation claims applies").

Having concluded that limitations bars all of MRG Medical's claims, we do not reach the Media Defendants' remaining issues.[3] *See* Tex. R. App. P. 47.1 ("The court of appeals

[3] Because we conclude that the statute of limitations bars all MRG's claims, we need not reach the Tribune's arguments that the statements are accurate reports of third party-statements on matters of public concern, *see* Tex. Civ. Prac. & Rem. Code § 73.005 (providing that "accurate reporting of allegations made by a third party regarding a matter of public concern" is defense), and that the Article does not reasonably support the alleged implications, *see Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d 614, 635 (Tex. 2018) ("[A] plaintiff who seeks to recover based on a defamatory implication—whether a gist or a discrete implication—must point to 'additional, affirmative evidence' within the publication itself that suggests the defendant "intends or endorses the defamatory inference." (quoting *White v. Fraternal Order of Police*, 909 F.2d 512, 520 (D.C. Cir. 1990))).

must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal.").

CONCLUSION

We reverse the district court's order and render judgment dismissing MRG Medical's claims. We remand to the district court to consider the Media Defendants' request for court costs, attorney's fees, and sanctions.

Rosa Lopez Theofanis, Justice

Before Chief Justice Byrne, Justices Kelly and Theofanis

Reversed and Rendered in Part; Remanded in Part

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