Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00184-CV

Ronald F. **AVERY**,
Appellant/Cross-Appellee

v.

Dylan **BADDOUR** and Hearst Communications, Inc.,
Appellees/Cross-Appellants

From the 2nd 25th Judicial District Court, Guadalupe County, Texas
Trial Court No. 15-2186-CV
Honorable W.C. Kirkendall, Judge Presiding

Opinion by: Rebeca C. Martinez, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Rebeca C. Martinez, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: August 10, 2016

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

This is an accelerated appeal from the trial court's order (1) granting appellees' motion to dismiss appellant's defamation claim under the Texas Citizens Participation Act, but (2) denying appellees' recovery of court costs, attorney's fees, and other expenses incurred in defending against appellant's legal action. We affirm the trial court's order dismissing appellant's defamation claim against appellees, but we reverse the trial court's denial of appellees' request for court costs, reasonable attorney's fees, and other expenses; and remand the cause to the trial court for consideration of this request.

BACKGROUND

On April 11, 2015, appellant, Ronald Avery, attended a meeting of a group by the name of The Texas Republic (hereinafter, the "Texians"), which was held on land owned by Avery in McQueeny, Texas. Avery, along with others, was a speaker at the meeting. Also in attendance at the April meeting was Dylan Baddour, a reporter for the Houston Chronicle newspaper.[1]

On September 13, 2015, Baddour wrote an article about the Texians that was published on the front page of the Chronicle ("the Print article") and on the Chronicle's website ("the Web article"). The Print article discussed the Texian's views and "solemn mission" of "plotting a legalistic escape [by Texas] from Uncle Sam." The Web article was substantially the same. Both articles included photographs, and the Web article contained hyperlinks to other documents and articles. Neither article mentioned Avery by name. However, a Print article photograph showing a man seen from behind incorrectly identified Avery as the man in the following caption: "All Texians have informally renounced their U.S. citizenship, as shown on Ronald Avery's jacket."[2] The Web article showed the same photograph with the following caption: "All Texians have informally renounced their U.S. citizenship, as evident from Ronald Avery's jacket. Many members have formally renounced citizenship by filing Republic documents to Texas courts, which has no real effect. Most carry official Texian identification. Some have landed briefly in jail for explaining to law enforcement officers that they don't have a Texas drivers' license because they are citizens of the Republic." The Web article also contained a photograph correctly identifying Avery standing at a microphone with the following caption:

> In April, the Texian congress assembled beneath the blue-and-yellow flag of the Republic of Texas, on the dance floor of the shuttered Silver Eagle Taphouse near the banks of the Guadalupe River in McQueeny. They follow a speaker list, and

[1] Baddour also attended a second Texian meeting held in August of 2015.

[2] The back of the jacket had a gold star encircled by the words: "Republic of Texas-Texian National."

> members take turns at the microphone. In this photo, Ronald Avery lists grievances with the U.S., including the 2008 bank bailout, NSA surveillance, the "police state" and "immoral wars."

Following publication of both articles, Avery wrote to the Chronicle claiming he was "considering a lawsuit for libel against the Houston Chronicle and Dylan Baddour," and stating (1) the man pictured wearing the jacket was not him, (2) he was not a member of any group called "the Republic of Texas," (3) he was not anti-government, in fact he sought lawful government, and (4) he did not want, nor did he "advocate secession from the so-called 'United States of America,' as it is in fact dissolved."

The Chronicle issued a correction to the Print article on September 16, 2015, stating it incorrectly identified the man wearing the jacket as Avery and that "Avery is not a member of the organization and was not in the photograph." Avery's name was also removed from photo captions accompanying the Web article. On September 29, 2015, Avery again contacted the Chronicle and asked that it print a three-page retraction statement. The Chronicle declined the request.

On November 3, 2015, Avery sued Baddour and Hearst Communications as owner of the Chronicle and its website, alleging the Chronicle's articles were libelous. About one month later, Baddour and Hearst Communications (collectively, the "appellees") filed a motion to dismiss pursuant to the Texas Citizens Participation Act. Following a hearing, the trial court granted the motion to dismiss, dismissed Avery's defamation claim with prejudice, and denied appellees' request for court costs, attorney's fees, and other expenses incurred in defending the action. Avery appealed the dismissal of his claim and appellees cross-appealed the denial of their request for costs, fees, and expenses.

TEXAS CITIZENS PROTECTION ACT

The Texas Citizens Participation Act ("the Act") provides for the expedited dismissal of a legal action that implicates a defendant's right of free speech or other First Amendment right when

the party filing the action cannot establish the Act's threshold requirement of a prima facie case. TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.003, 27.005(b),(c) (West 2015).[3] A successful motion to dismiss under the Act entitles the moving party to an award of court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action. *Id.* § 27.009(a).

The Act contains "a burden-shifting mechanism" in seeking and defending against a dismissal. *Id.* § 27.005. As the movants, appellees had the initial burden to show "by a preponderance of the evidence that the legal action is based on, relates to, or is in response to [their] exercise of: (1) the right of free speech; (2) the right to petition; or (3) the right of association." *Id.* § 27.005(b). If appellees satisfy this burden, the trial court must dismiss the legal action unless Avery, as 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." *Id.* § 27.005(c). If Avery satisfies his burden, the burden shifts back to appellees to establish by a preponderance of the evidence each essential element of a valid defense to Avery's claim. *Id.* § 27.005(d). We conduct a de novo review of a trial court's ruling on a motion to dismiss under the Act. *Herrera v. Stahl*, 441 S.W.3d 739, 741 (Tex. App.—San Antonio 2014, no pet.). We "consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based." TEX. CIV. PRAC. & REM. CODE § 27.006(a); *In re Lipsky*, 460 S.W.3d 579, 587 (Tex. 2015).

A. Exercise of the Right to Free Speech, Petition, and Association

The Act broadly 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 § 27.001(3). A "communication" is defined as "the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic." *Id.* § 27.001(1). The

[3] The Act is sometimes referred to as an anti-SLAPP law—the acronym standing for strategic lawsuit against public participation.

Act further defines a "matter of public concern" to include, among other things, issues related to the "environmental, economic, or community well-being" and issues related to "the government." *Id.* § 27.001(7)(B & C).

In response to appellees' motion to dismiss before the trial court and on appeal, Avery asserts his libel suit is not an anti-SLAPP suit because his suit "was not designed and filed to 'punish,' hinder or prevent the Appellees from exercising their own right of free speech, petition and association to tell the public what they think secession is or why they think secession is the same as dissolution." However Avery may characterize his lawsuit, we must determine whether appellees satisfied their initial burden under the Act.

The two articles reported on the Texians "whose members believe Texas never legally became part of the United States and, therefore, remains a sovereign nation." The articles described, among other topics, the organization of the group; a recent law enforcement raid on a meeting conducted in Bryan, Texas; and a meeting to discuss various ideas on how to achieve the Texians' goals. Although the articles mentioned several people—but never Avery—the articles focused primarily on Joe Fallin whom the article described as "a struggling oil field machinery worker" and "a freshman 'senator' in a volunteer group called the Republic of Texas . . . ."

Considering the petition on which liability in this case was based, we conclude appellees made the communications at issue in connection with a matter of public concern—specifically that it implicated concerns of community well-being and involved issues related to the government. *See id.* §§ 27.001(3), 27.001(7)(B & C). Thus, appellees satisfied their initial burden of showing that Avery's defamation claim was based on, related to, or was in response to appellees' exercise of the right of free speech, such that the Act applied to Avery's claim.

B. Prima Facie Case of Defamation Claim

Because appellees carried their initial burden, the burden shifted to Avery to present clear and specific evidence of a prima facie case for each element of his defamation claim. *See id.* § 27.005(c); *Herrera*, 441 S.W.3d at 741.

A "plaintiff must provide enough detail to show the factual basis for its claim." *In re Lipsky*, 460 S.W.3d at 591. Prima facie evidence is "the 'minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true.'" *Id.* at 590 (citations omitted). "In a defamation case that implicates the [Act], 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 . . . motion to dismiss [under the Act]." *Id.* at 591. Although the Act "initially demands more information about the underlying claim, the Act does not impose an elevated evidentiary standard or categorically reject circumstantial evidence. In short, it does not impose a higher burden of proof than that required of the plaintiff at trial." *Id.* However, "[b]are, baseless opinions do not create fact questions, and neither are they a sufficient substitute for the clear and specific evidence required to establish a prima facie case under the [Act]." *Id.* at 592 (quoting *Elizondo v. Krist*, 415 S.W.3d 259, 264 (Tex. 2013)). "Opinions must be based on demonstrable facts and a reasoned basis." *Id.*

Because Avery, a private individual, brought suit against media defendants, the elements of his cause of action are: (1) appellees published a false statement of fact to a third party; (2) that was defamatory concerning Avery; (3) while acting with negligence regarding the truth of the statement, and (4) damages, unless the defamatory statements were defamatory per se. *Id.* at 593. When—as here—a private individual sues a media defendant for defamation over statements that are of public concern, the plaintiff has the burden of proving falsity—in other words, that the gist

of the statements was not substantially true. *Neely v. Wilson*, 418 S.W.3d 52, 66 n.21 (Tex. 2013).[4] A communication can convey a false and defamatory meaning by omitting material facts or juxtaposing facts in a misleading way, even though all the story's individual statements considered in isolation are literally true or non-defamatory. *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 114-15 (Tex. 2000). Whether a publication is capable of a defamatory meaning is initially a question of law for the court. *Musser v. Smith Protective Servs., Inc.*, 723 S.W.2d 653, 654-55 (Tex. 1987). However, when a publication is of ambiguous or doubtful import, the jury must determine its meaning. *Id.* at 655.

In determining whether a publication is defamatory, we construe the article as a whole in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive it. *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 154 (Tex. 2004); *Turner*, 38 S.W.3d at 114; *Musser*, 723 S.W.2d at 655. A person of ordinary intelligence "is a prototype of a person who exercises care and prudence, but not omniscience, when evaluating allegedly defamatory communications." *New Times, Inc.*, 146 S.W.3d at 157. This person "'is no dullard'" and represents "'reasonable intelligence and learning,'" not "'the lowest common denominator.'" *Id.* (citation omitted). "Thus, the question is not whether some actual readers were misled, as they inevitably will be, but whether the hypothetical reasonable reader could be." *Id.* at 157. The appropriate inquiry is objective, not subjective. *Id.*

A statement may be false, abusive, unpleasant, or objectionable without being defamatory in light of the surrounding circumstances. *Double Diamond, Inc. v. Van Tyne*, 109 S.W.3d 848,

[4] "At common law, truth was a defense in a suit for defamation; falsity was not an element of the action. But as [the Texas Supreme Court] recently observed, '[t]he United States Supreme Court and this Court long ago shifted the burden of proving the truth defense to require the plaintiff to prove the defamatory statements were false when the statements were made by a media defendant over a public concern.'" *KBMT Operating Co., LLC v. Toledo*, No. 14-0456, 2016 WL 3413477, at *3 (Tex. June 17, 2016) (citation omitted).

854 (Tex. App.—Dallas 2003, no pet.). Moreover, to be actionable, a statement must assert an objectively verifiable fact rather than an opinion. *Neely*, 418 S.W.3d at 62; *Carr v. Brasher*, 776 S.W.2d 567, 570 (Tex. 1989) (holding that all assertions of opinion are constitutionally protected). We classify a statement as fact or opinion based on the statement's verifiability and the entire context in which the statement was made. *Bentley v. Bunton*, 94 S.W.3d 561, 581 (Tex. 2002).

According to Avery, the gist of the articles is that he is a secessionist, which he claims is false because he has argued against secession for many years, and that the group of people who met in April and August of 2015 were secessionists, which he contends is also false because the Republic of Texas opposes secession. Avery contends the articles falsely made him a member of an alleged secessionist group based on the photograph that identified the man wearing the jacket as him with the caption stating "All Texians have informally renounced their U.S. citizenship" and another photograph that correctly identified him as the man standing at a microphone but included the caption "members take turns at the microphone." Avery also points to the following hyperlinks in the Web article as evidence that readers were "enraged . . . to express actual written *public hatred* towards the [Texians] and Avery": (1) a link to a document about the "Sovereign Citizen Extremist" that "will drive violence at home, during travel, and at government facilities"; (2) an article entitled "Putin's Plot to Get Texas to Secede" about secessionists going to Russia to talk about secession; and (3) an article entitled "The Growing Right-Wing Terror Threat." On appeal, Avery asserts the published falsehood that he is a member of the "Republic of Texas," the published falsehood that the "Republic of Texas" is a "secessionist organization," and the juxtaposition of inapplicable defamatory material hyperlinked to the Web article resulted in his exposure to public ridicule and hatred.

Because the defamatory meaning inquiry is objective rather than subjective, Avery's subjective perceptions of the validity of his claims are not competent evidence and do not affect

our analysis. *New Times, Inc.*, 146 S.W.3d at 157. Instead, we construe each article as a whole in light of the surrounding circumstances based on how a person of ordinary intelligence would perceive it to determine whether the publication was defamatory. *Id.*

The Print article began on the first page of the newspaper and was entitled: "Secessionists hopeful despite odds." The photograph of the man in the jacket appeared under the title. The article described the Republic of Texas as a "volunteer group," that maintained "executive, legislative and judicial branches of government," and which "call their monthly meetings joint sessions of congress." The article stated the group refer to themselves as "Texians — citizens of the Republic of Texas," and their mission was "plotting a legalistic escape from Uncle Sam." According to the Print article, Republic of Texas members "believe Texas never legally became part of the United States and, therefore, remains a sovereign nation."

The article continued on another page with the caption "Texians grapple with question: What next?" Above this caption was a photograph of Joe Fallin, "the youngest and newest member of the Texian congress" and on whom the article focused much of its attention. Under the caption, the article noted that interest in the group's cause had been spurred, at least in part, by "anti-federalism at the state Capitol" and by "popular opposition to Washington." The article then stated:

> Even the Russian media, at Vladimir Putin's behest, have cheered the independence movement and a rival secessionist group, the Texas National Movement, since the United States brought aggressive sanctions against Russia last fall for its activities in the Ukraine, according to a recent Politico story: "Putin's plot to get Texas to secede."

The article next described a state and federal raid on a meeting hall in Bryan, Texas, which targeted two individuals who were wanted "for filing fraudulent legal documents summoning a Kerr County judge to a Republic of Texas court to face judgment for permitting the foreclosure of" the home of one of the individuals. The article stated the Kerr County sheriff said the "large

force [was] an abundance of caution," because in 1997 persons with ties to the Republic of Texas engaged authorities in a seven-day standoff that ended in gunfire and the death of one Texian. Although the article stated, "The group now forswears violence," the article also noted "an uneasy tension between law enforcement and anti-government groups." The article went on to discuss a report generated in 2015 by the Department of Homeland Security that "highlighted concern with a growing number of people who deny the legitimacy of the government."

The Print article then discussed the April 2015 meeting, at which Fallin asked, "What do we actually do to make this happen?" He was answered with "nothing, yet." The article mentioned a University of Houston professor who explained that filing a document with the International Court at The Hague would not work because only recognized nations can be parties in the world court, and the only path to recognition for the Republic would be a statewide vote. The article also mentioned a Rice University professor who stated a state legislator must propose a constitutional convention to discuss secession, and a new constitution must be written to appear on the ballot. The article ended by returning its focus to Fallin, how he became disillusioned with the U.S. government and found hope of a better future for himself and his family when he was introduced to the Republic of Texas, and that he brings his children, one-by-one, to meetings.

The Web article was entitled: "Ever hopeful and determined, Texas secessionists face long, long odds." The photograph of the man in the jacket appeared under the title. Another photograph in the Web article identified Avery as the man standing at a microphone and included the caption:

> In April, the Texian congress assembled beneath the blue-and-yellow flag of the Republic of Texas, on the dance floor of the shuttered Silver Eagle Taphouse near the banks of the Guadalupe River in McQueeny. They follow a speaker list, and members take turns at the microphone. In this photo, Ronald Avery lists grievances with the U.S., including the 2008 bank bailout, NSA surveillance, the "police state" and "immoral wars."

The Web article is substantially the same as the Print article, but contains hyperlinks to the *Politico* article, the Department of Homeland Security report, and a *New York Times* article entitled "Growing Right Wing Terror Threat." Although copies of the linked pages are not in the record, Avery does not contend the links mention him by name.

We conclude Avery did not satisfy his prima facie burden. Even if the captions incorrectly identified Avery as a secessionist, falsely implied Avery renounced his U.S. citizenship, incorrectly identified the Texians as secessionists, and falsely implied Avery was a member of a secessionist organization, the gist of the articles is substantially true: the Republic of Texas is a volunteer, non-violent organization premised on the belief that Texas is a sovereign nation and whose goal it is to legally extricate itself from the United States. No reasonable reader would conclude—as argued by Avery—that either he or the Republic of Texas is a "far-right fascist, neo-Nazi, part of the growing right-wing terrorist threat." The only evidence of such a conclusion is Avery's own allegations. However, "[b]are, baseless opinions [are not] a sufficient substitute for the clear and specific evidence required to establish a prima facie case under the [Act]." *In re Lipsky*, 460 S.W.3d at 592.

Because Avery did not satisfy his burden of showing that the gist of the two articles was not substantially true, the Act requires that his action be dismissed. Therefore, the trial court did not err in granting appellees' motion to dismiss Avery's defamation clam.[5]

[5] Avery also asserts, for the first time on appeal, that the Act violates the Texas Constitution and is "internally flawed." Avery cites to no authority for either argument; therefore, they are waived as inadequately briefed. *See* TEX. R. APP. P. 38.1(i); *WorldPeace v. Comm'n for Lawyer Discipline*, 183 S.W.3d 451, 460 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) (concluding issue was inadequately briefed and thus waived). Furthermore, because Avery did not raise these complaints before the trial court, his issue is not preserved on appeal. *Better Bus. Bureau of Metro. Houston, Inc. v. John Moore Services, Inc.*, 441 S.W.3d 345, 352 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (complaint that the Act was unconstitutional waived because raised for first time on appeal); *see also* TEX. R. APP. P. 33.1(a); *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 222 (Tex. 2002) ("A litigant must raise an open-courts challenge in the trial court."); *In re Doe 2*, 19 S.W.3d 278, 284 (Tex. 2000) (attacks on the presumption that a statute is constitutional should be raised as an affirmative defense through appropriate pleadings before the trial court).

COSTS, FEES, AND EXPENSES

In their cross-appeal, appellees assert the trial court erred by not awarding them their court costs, attorney's fees, and other expenses because such an award is mandatory under the Act.

The Act provides in relevant part:

> If the court orders dismissal of a legal action under this chapter, the court shall award to the moving party: (1) court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require; and (2) sanctions . . . .

TEX. CIV. PRAC. & REM. CODE § 27.009(a).

Recently, the Texas Supreme Court held that "[b]ased on the statute's language and punctuation, we conclude that the [Act] requires an award of 'reasonable attorney's fees' to the successful movant." *Sullivan v. Abraham*, No. 14-0987, 2016 WL 1513674, at *4 (Tex. Apr. 15, 2016) (citing to TEX. CIV. PRAC. & REM. CODE § 27.009(a)(1)). In that case, Sullivan moved for dismissal of Abraham's defamation claim, and asked for $67,290.00 in attorney's fees, $4,381.01 in costs and expenses, and sanctions. *Id.* at *1. The trial court granted the dismissal, but announced in a letter "that justice and equity necessitate [Sullivan's] recovery of reasonable attorney's fees in the amount of $6,500.00 and costs in the amount of $1,500.00." *Id.*

The court of appeals affirmed the trial court's award of attorney's fees and expenses, but reversed and remanded for the trial court to reconsider its decision to deny sanctions. The appellate court concluded the Act required an award of "reasonable attorney's fees" but also allowed the trial court discretion to award a lesser amount if "justice and equity" so required.

On appeal before the Texas Supreme Court, Sullivan agreed the fee award was mandatory, but argued a fee award under the Act is measured by reasonableness alone. *Id.* at *2. The Supreme Court held that "[a] 'reasonable' attorney's fee 'is one that is not excessive or extreme, but rather moderate or fair,'" and such a "determination rests within the court's sound discretion, but that

discretion, under the [Act], does not also specifically include considerations of justice and equity." *Id.* at *4. The Court concluded the "trial court accordingly erred by including these considerations in its attorney's fee award, and the appellate court likewise erred in recognizing them as part of its standard of review." *Id.*

Based on the Supreme Court's analysis in *Sullivan*, we hold that—in addition to reasonable attorney's fees—the award of court costs and other expenses incurred in defending against the legal action is mandatory. Therefore, the trial court erred in denying appellees' an opportunity to recover their reasonable attorney's fees, costs, and other expenses incurred in defending against Avery's legal action.

CONCLUSION

We affirm that portion of the trial court's order dismissing Avery's defamation claim with prejudice. We reverse that portion of the order denying appellees an opportunity to recover their reasonable attorney's fees, court costs, and other expenses, and we remand the cause to the trial court for the limited purpose of determining an appropriate award of reasonable attorney's fees, costs, and other expenses pursuant to section 27.009(a)(1) of the Act.

Rebeca C. Martinez, Justice