

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION
Case No. 4:12-cv-00083-BR

ASCEND HEALTH CORPORATION, *et al.*,

Plaintiffs,

v.

BRENDA WELLS, *et al.*,

Defendants.

**DEFENDANT BRENDA WELLS' REPLY
BRIEF IN SUPPORT OF SPECIAL
MOTION TO DISMISS AND MOTION
TO DISMISS**

Plaintiffs primarily respond to Ms. Wells' Motions by voicing objections to application of the Texas anti-SLAPP statute that forms the basis of her Special Motion to Dismiss. As set out below, those objections are meritless. Aside from contesting application of the statute, Plaintiffs make little effort to demonstrate that they have carried their burden under it of showing "by clear and specific evidence a *prima facie* case for each essential element" of their claims. As a result, when Plaintiffs' substantive response to Ms. Wells' Motions is considered, it is clear that their claims are fatally deficient as both an evidentiary and a pleading matter, which subjects the Complaint to dismissal under the CPA and under Rule 12(b)(6).

I. The CPA Is Substantive, Not Procedural, And It Applies In This Case

Plaintiffs baldly assert that the CPA is procedural and therefore should not be applied by the Court. They make this argument without citing a single federal case interpreting a state anti-SLAPP statute, instead focusing their discussion entirely on ancillary features of the statute related to timing. Although not discussed in Plaintiffs' brief, the proper treatment of anti-SLAPP statutes has been addressed by multiple federal courts across the country, and the vast majority of them have held that anti-SLAPP statutes are substantive because they allocate burdens of proof, establish a substantive defense, and provide for fee recovery. *See, e.g., Godin v. Schencks*, 629 F.3d 79, 89 (1st Cir. 2010); *Henry v. Lake Charles Am. Press, LLC*, 566 F.3d 164, 168-69 (5th Cir. 2009); *Farah v. Esquire Magazine, Inc.*, No. 11-cv-1179 (RMC), 2012 U.S. Dist. LEXIS 76577, at *17-18 n.10 (D.D.C. June 4, 2012).

The Ninth Circuit has examined this question in detail and held that California's anti-SLAPP statute is substantive. Applying *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and its progeny, the Ninth Circuit noted that the anti-SLAPP "provisions and Rules 8, 12, and 56 'can exist side by side . . . each controlling its own intended sphere of coverage without conflict.'" *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972 (9th Cir. 1999) (quoting *Walker v. Armco Steel*, 446 U.S. 740, 752 (1980)). The Court went on to hold:

We also conclude that the twin purposes of the *Erie* rule—"discouragement of forum-shopping and avoidance of inequitable administration of the law"—favor application of California's Anti-SLAPP statute in federal cases. Although Rules 12 and 56 allow a litigant to test the opponent's claims before trial, California's "special motion to strike" adds an additional, unique weapon to the pretrial arsenal, a weapon whose sting is enhanced by a entitlement to fees and costs. Plainly, if the anti-SLAPP provisions are held not to apply in federal court, a litigant interested in bringing meritless SLAPP claims would have a significant incentive to shop for a federal forum. Conversely, a litigant otherwise entitled to the protections of the Anti-SLAPP statute would find considerable disadvantage in a federal proceeding. This outcome appears to run squarely against the "twin aims" of the *Erie* doctrine.

Id. at 973 (citations omitted). That same analysis applies here. Plaintiffs, whose claims arise in Texas, seek to avoid application of substantive Texas state-law provisions that mandate dismissal of their claims by bringing their claims in a North Carolina federal court. Such an outcome would promote just the kind of forum-shopping that *Erie* sought to discourage.

Plaintiffs also suggest, without citation to any legal authority, that the result under *Erie* should somehow be different here because a federal court situated in one state would be applying an anti-SLAPP statute from another state. (Pl. Br. at 11). This suggestion is baseless. In fact, federal courts across the country have not hesitated to apply anti-SLAPP statutes from other states, where the circumstances call for such application. See, e.g., *Neuralstem, Inc. v. Stemcells, Inc.*, Civil No. AW-08-CV-1173, 2009 U.S. Dist. LEXIS 67587 (D. Md. Aug. 4, 2009) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 150); *Bible & Gospel Trust v. Twinam*, No. 1:07-CV-17, 2008 U.S. Dist. LEXIS 103674 (D. Vt. July 18, 2008); *USANA Health Scis., Inc. v. Minkow*, No. 2:07-cv-159 TC, 2008 U.S. Dist. LEXIS 16613 (D. Utah Mar. 4, 2008). Strikingly, Plaintiffs fail to cite a single case in which a federal court refused to apply an anti-SLAPP statute, whether enacted in the forum state or otherwise. In short, Plaintiffs offer no

answer to the great weight authority holding that anti-SLAPP statutes such as the CPA are indeed substantive and therefore are to be applied in federal court under the circumstances presented here.

II. Texas Law Applies To Plaintiffs' Tort Claims

Plaintiffs next argue that North Carolina's choice-of-law rules require application of North Carolina law. This assertion is contradicted by their own Complaint, which includes two Texas state-law claims, and it is inconsistent with the balance of their brief, in which they continue to press those Texas claims and make a number of arguments under Texas law. In any event, as set out below and in Ms. Wells' opening brief, the case law is clear that Texas law governs Plaintiffs' claims.

Plaintiffs base their argument entirely on a faulty conception of the "place of publication," which they contend is North Carolina. It is the case that if a claim arises from the dissemination of a tangible writing in a particular locale or one person's oral statement to another, the doctrine of *lex loci delicti* typically calls for application of the law of the state in which the newspaper, book, or magazine was distributed or in which the person spoke. However, as the Fourth Circuit has recognized, that rule simply does not work in the context of allegedly "defamatory content [that] is published simultaneously in multiple state jurisdictions." *Wells v. Liddy*, 186 F.3d 505, 527 (4th Cir. 1999). Of course, Internet speech of the sort at issue here represents the purest example of multistate publication—the websites referred to in the Complaint can be accessed any place in the country where there is an online connection.

The Fourth Circuit applied the "most significant relationship" test in *Wells*, holding that "multistate defamation is a tort for which the *lex loci delicti* rule fails to reach a satisfactory result on the choice of applicable substantive law." *Id.* at 528. Although Plaintiffs cite *Wells*, they fail to acknowledge its import and instead treat Internet speech as if it were equivalent for choice-of-law purposes to handing out leaflets. Plaintiffs also ignore the Fourth Circuit's observation that, under Section 150 of the Restatement, the state exhibiting the "most significant relationship" is usually the state in which the plaintiff resides. Applying that holding here, Texas law plainly governs because any impact Plaintiffs felt from the alleged defamation was felt in Texas. Plaintiffs—a Texas hospital, a Texas doctor who treated Ms. Wells and practices there, and the hospital's corporate owner and CEO—not only do not dispute this

fact, other arguments they make affirmatively show it to be the case. In particular, Plaintiffs' lone assertion of harm is that they lost two potential patients at the Texas hospital as a result of online content about the hospital. (Young Decl. at ¶ 8). This allegation, along with the facts of Plaintiffs' residence or presence in Texas (or both), confirms that Texas law controls.

Plaintiffs also confuse "place of publication" with the author's location while writing a statement; what matters for purposes of reputational harm is where a defamatory statement was heard or read, not where it was written. 2 ROBERT D. SACK, SACK ON DEFAMATION § 15:3.1, at 15-48 (4th ed. 2011). They then compound this error by asserting throughout their brief that Ms. Wells was in North Carolina when she wrote the blog posts they allege she wrote. (Pl. Br. at 8, 10). In fact, no such allegation is made in the Complaint, and Ms. Wells admits nothing of the sort in her Declaration. Although she is a North Carolina resident, that says nothing about where she might have been when she wrote the blog posts she is alleged to have written. In any event, the answer to that question has nothing to do with the place of publication—i.e., where a statement was disseminated—and serves only to underscore that the choice-of-law analysis Plaintiffs advance is flawed and unworkable with respect to Internet speech.

In sum, the Fourth Circuit's multistate defamation analysis applies here and requires application of Texas law, and Plaintiffs cannot demonstrate otherwise. Notably, Plaintiffs do not back up their claim that North Carolina's courts have addressed choice of law in the context of multistate defamation. (Pl. Br. at 8). In fact, the only case cited in Plaintiffs' brief applying North Carolina's choice-of-law rules is a decision from this Court, and it did not involve multistate Internet speech. *See Verona v. U.S. Bancorp*, No. 7:09-CV-057-BR, 2011 U.S. Dist. LEXIS 33160 (E.D.N.C. Mar. 29, 2011). Moreover, in that case the Court specifically noted that it "could not locate a North Carolina case directly on point" and applied Fourth Circuit's holding in *Wells*. *Id.*, 2011 U.S. Dist. LEXIS 33160, at *30 n.6. Finally, Plaintiffs make no attempt to address the authority set out in Ms. Wells' opening brief showing that when *lex loci delicti* is applied in this context the same result obtains—Texas law governs. (Wells Br. at 4-5).¹

¹ Plaintiffs also make a passing attempt to argue that the Court should not apply the CPA because it would contravene an unstated North Carolina public policy. A case Plaintiffs cite specifies the types of

III. Plaintiffs Have Failed To Meet Their Burden Of Proof Under The CPA

Plaintiffs make only the barest effort to argue that they have met their burden of proof under the CPA, and indeed the pleadings and declarations submitted confirm that when the CPA is applied, Plaintiffs' state-law causes of action must be dismissed. The self-serving and conclusory Declaration of Susan Young does little more than re-state the allegations of the Complaint, which is insufficient to carry Plaintiffs' burden in response to an anti-SLAPP motion. *See Albergo v. Immunosyn Corp.*, No. 09CV2653 DMS(AJB), 2011 U.S. Dist. LEXIS 5455, at *11 (S.D. Cal. Jan. 19, 2011) ("In opposing an anti-SLAPP motion, 'declarations that lack foundation or personal knowledge, or that are argumentative, speculative, impermissible opinion, hearsay, or conclusory are to be disregarded.'") (quoting *Gilbert v. Sykes*, 147 Cal. App. 4th 13, 26, 53 Cal. Rptr. 3d 752 (2007)).

Among other problems, the Young Declaration is not competent "clear and specific" evidence that anything Ms. Wells is alleged to have said is false or was published with the requisite level of constitutional fault. Simply asserting without evidence that the statements at issue were false, or that Ms. Wells "knew or should have known" the statements attributed to her in the Complaint were false, does not suffice. (Pl. Br. at 15, 19). Moreover, the Young Declaration is laden with sweeping and categorical assertions that do not hold up in the face of documents Ms. Wells has placed in the record. For example, Ms. Young contends that "at all times Brenda Wells was a patient at UBH, she was voluntarily admitted." (Young Decl. at ¶ 7(a)). However, the medical records for Ms. Wells reflect the following entry: "PT. [patient] requests AMA [against medical advice] discharge. HOLD for further evaluation for court commitment." (Second Wells Decl. at ¶ 5, Ex. A). Ms. Wells informed Ms. Young in writing shortly after her stay that she had been held against her will. (*Id.* at ¶ 6, Ex. B). Similarly, Ms. Young asserts

foreign laws that may be viewed as contrary to public policy (i.e., "prohibited marriages, wagers, lotteries, racing, contracts for gaming or the sale of liquor"), none of which is at issue here. *Davis v. Davis*, 269 N.C. 120, 125, 152 S.E.2d 306, 311 (1967). In this case, Ms. Wells spoke out on the Internet after visiting Plaintiffs' Texas hospital, describing her experience, offering her opinions, and providing a platform for others to do the same. Rather than respond with speech of their own, Plaintiffs responded by suing Ms. Wells, claiming that essentially every statement she has made on the Internet relating to her experience at their hospital is defamatory. Plaintiffs fail to explain why applying the Texas anti-SLAPP statute, the express purpose of which is to screen out meritless claims such as Plaintiffs' here that are brought to chill speech on matters of public interest, would offend any North Carolina public policy.

that “I have not seen anything to indicate any inaccuracies in Brenda Wells’ records” (Young Decl. at ¶ 7(d)), yet in that same letter Ms. Wells specifically informed Ms. Young that her discharge papers erroneously indicate she was “transferred from ER after OD [overdose] attempt.” (Second Wells Decl. at ¶ 8, Exs. B, C). Finally, Ms. Young asserts “there is no evidence to support” allegations that a rape took place at Plaintiffs’ hospital (Young Decl. at 7(l)), even though, three days before Ms. Young signed her declaration, UBH received via certified mail a Notice of Claim from an attorney representing the family of an individual who indeed alleges she was sexually assaulted while a patient at UBH. (Second Wells Decl. at ¶ 10, Ex. D). These facts not only call into question Ms. Young’s veracity,² they also underscore that Plaintiffs have fallen far short of producing competent evidence that Ms. Wells stated any falsehoods, much less any knowing falsehoods. These failures alone warrant dismissal of Plaintiffs’ tort claims.

Plaintiffs also incorrectly claim that Ms. Wells, in her opening brief, did “not address each of the allegations made in the Complaint.” (Pl. Br. at 15). Every substantive allegation is addressed at least once in Ms. Wells’ opening brief, and she provided the Court with multiple grounds for dismissing every claim Plaintiffs raise. In contrast, it is Plaintiffs who have failed to acknowledge, much less rebut, a range of arguments Ms. Wells has made. For example, Plaintiffs do not counter her arguments that many of the statements referenced in the Complaint are non-actionable because they constitute rhetorical hyperbole or opinion, or are simply not defamatory. (Wells Br. at 11-15).

In addition, Plaintiffs misunderstand the evidentiary burden the CPA places upon them, repeatedly casting the statute’s requirements as mere “heightened pleading requirements.” (Pl. Br. at 6, 11). In fact, the CPA says nothing about the pleading standard required of a plaintiff. Rather, it specifies the burden of proof required to overcome a motion brought pursuant to the CPA. Under the CPA, once the moving party “shows by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party’s exercise of,” in relevant part, “the right of free speech,” the plaintiff can

² As a leading scholar has noted: “It has always been understood—the inference indeed is one of the simplest in human experience—that a party’s falsehood or other fraud in the preparation and presentation of his cause . . . is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause’s lack of truth and merit.” 2 WIGMORE ON EVIDENCE § 278(2) (Chadbourne Rev. 1991).

avoid dismissal only if he “establishes by clear and specific evidence a prima facie case for each essential element of the claim in question.” TEX. CIV. PRAC. & REM. CODE § 27.005. Plaintiffs concede that Ms. Wells has satisfied her burden under the first prong of Section 27.005(a), as they do not dispute that she has established that this lawsuit “is based on, relates to, or is in response to the party’s exercise of . . . the right of free speech.” Because Ms. Wells discharged her burden under the CPA, the statute requires that Plaintiffs demonstrate the bona fides of their claims “with clear and specific evidence”—not with mere allegations and not with a declaration that simply adopts the allegations of the Complaint in conclusory fashion. In short, to equate the evidentiary burden Plaintiffs must carry under the CPA with a Rule 8 or Rule 9 pleading standard simply disregards the statute’s text.

And, as Ms. Wells has shown, Plaintiffs have failed to carry their burden under the CPA, which warrants dismissal. In addition to the deficiencies outlined above in and in Ms. Wells’ opening brief, Plaintiffs incorrectly claim that Ms. Wells is not entitled to Section 230 immunity for any of the blog posts at issue. (Pl. Br. at 12-13). This argument runs afoul of Plaintiffs’ own Complaint, which alleges in paragraphs 59(g) and 59(r) that Ms. Wells simply posted content sent to her by someone else. Thus, Plaintiffs’ allegations line up exactly with *Batzel v. Smith*, 333 F.3d 1018, 1031-32 (9th Cir. 2003), which Ms. Wells detailed in her opening brief (at 16). Plaintiffs’ Section 230 argument also contradicts their conspiracy claims, which are predicated, it appears, on Ms. Wells’ posting of material on her website prepared and supplied by third parties. (Pl. Br. at 20-21). Under Section 230, Ms. Wells simply cannot be liable for posting third-party content.³

Plaintiffs next argue that the relevant statutes of limitations do not bar their claims. Plaintiffs admit, however, and Ms. Young affirms in her Declaration, that many of the statements at issue were first published more than one year prior to May 3, 2012, when the Complaint was filed. (Pl. Br. at 13-14; Young Decl., ¶¶ 9, 10, 11, 12, 13). That the statute of limitation for Texas business disparagement is two

³ Plaintiffs also fail to confront the multiple flaws of their conspiracy claim, including the fact that their Complaint does not even allege who the members of the alleged conspiracy were or whether Ms. Wells was part of that alleged conspiracy, much less that there was a specific agreement to engage in some particular wrong and that the wrong was committed.

years is irrelevant. *First*, as Plaintiffs admit, they have not adequately pleaded this claim by failing to allege special damages, and therefore it fails as a matter of law. (Pl. Br. at 19). Incredibly, Plaintiffs make a belated attempt at shoring up this deficiency by arguing that Young's Declaration "specifically allege[s]" special damages. (Pl. Br. at 19). Of course, statements in the Young Declaration, though deficient in their own right because they do not tie any allegedly defamatory statement by Ms. Wells to specific pecuniary loss on the part of Plaintiffs, cannot satisfy Plaintiffs' pleading requirements under Rule 8 and are therefore irrelevant. *Second*, Plaintiffs do not even attempt to explain how this Texas state-law claim co-exists with their argument that North Carolina law governs.

Plaintiffs' argument that the four-year limitations period for claims brought under N.C. GEN. STAT. § 75-1.1 somehow revives their time-barred defamation allegations (Pl. Br. at 14) is also without basis. Plaintiffs' Chapter 75 claim rises and falls with their defamation claims; indeed it is predicated solely on allegations of "false and defamatory statements" by Ms. Wells. (Compl. ¶ 72). If Plaintiffs' defamation claims are time-barred, then by definition there is no defamation and nothing to support a Chapter 75 claim. *See Craven v. Cope*, 188 N.C. App. 814, 820, 656 S.E.2d 729, 734 (2008) ("Plaintiff's claim for unfair and deceptive trade practices necessarily depends on the validity of his defamation claim. In the absence of other alleged tortious conduct by defendant, the trial court properly dismissed this claim."). In sum, Plaintiffs offer no authority for their suggestion that they can breathe life into an expired defamation claim simply by recasting it as a Chapter 75 claim.

Finally, ignoring their burden of establishing by "clear and convincing evidence" the elements of their claims, Plaintiffs resort to arguing that their pleadings are sufficient to withstand a Rule 12(b)(6) motion. Even this argument falls short, however. Plaintiffs assert, without support in the case authorities, that the requirement under Texas (and North Carolina) state law that defamation allegations be set out "*in haec verba*" has been replaced by statute. That is not the case; *Perkins v. Welch*, 57 S.W.2d 914 (Tex. Ct. App.—San Antonio 1933), is still good law in Texas. The sole case cited by Plaintiffs, *In re Shaw*, No. 13-10-487-CV, 2010 Tex. App. LEXIS 8744 (Tex. Ct. App.—Corpus Christi – Edinburg Oct. 27, 2010), discusses the "fair notice" standard in the context of questions about the damages allegations.

However, in that case, the court noted that the defendants had “concede[d] that the pleadings contain factual allegations which set out the allegedly defamatory statements.” *Id.* at *10. Here, by contrast, the Complaint is replete with broad summaries, characterizations, and paraphrases of statements Plaintiffs allege are defamatory. This is inadequate to survive a motion to dismiss. *See RDLG, LLC v. RPM Group, LLC*, No. 1:10cv204, 2010 U.S. Dist. LEXIS 142881, at *29 (W.D.N.C. Dec. 21, 2010) (dismissing as insufficient under Rule 8 a claim that did not allege “to whom such statements were made and include some description of the statements *in haec verba*”).

Moreover, as set out above and in the opening brief, many of the deficiencies in Plaintiffs’ claims are legal in nature and are fatal even if the allegations of the Complaint are taken as true—such as that the statements at issue are non-actionable opinion or hyperbole, are not defamatory, are time-barred, or are not supported by sufficient allegations of falsity or fault. For these reasons, in addition to dismissal under the CPA, Plaintiffs’ Complaint is also subject to dismissal under Rule 12(b)(6) for failure to state a claim.

IV. Plaintiffs’ Copyright Claims Fail As A Matter Of Law

Plaintiffs acknowledge that when they filed the Complaint they had not received registration of the required copyrights. (Pl. Br. at 21). While neither the Fourth Circuit nor this Court has ruled on the specific question, Ms. Wells cited substantial authority for the proposition that a plaintiff must plead and prove both the application for, and registration of, the copyright at issue. (Wells. Br. at 25-26). These cases follow the plain text of 17 U.S.C. § 411(a), which provides that “no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title.” Plaintiffs’ admission that they did not hold a valid copyright at the time the Complaint was filed calls for dismissal under Section 411(a) and is not made “moot” by a conversation with the Copyright Office recounted in their brief. (Pl. Br. at 22).

As to fair use, the Fourth Circuit case Plaintiffs cite held as follows:

[W]e ask “whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning or message; [we] ask[], in other words, whether and to what extent the new work is transformative.” “A ‘transformative’ use is one that

‘employ[s] the [copyrighted work] in a different manner or for a different purpose from the original,’ thus transforming it.”

Bouchat v. Baltimore Ravens Ltd. P’ship, 619 F.3d 301, 308-309 (4th Cir. 2010) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) and *A.V. v. iParadigms, LLC*, 562 F.3d 630, 638 (4th Cir. 2009)) (emphasis added). Although the Fourth Circuit in *Bouchat* held that there was no transformative use because the team logo was being used for the same essential purpose, without anything new added, in this case the Complaint shows that Ms. Wells added commentary to each of the pictures she is alleged to have copied. (Compl. Exs. A-E). Her purpose was not to promote UBH, but rather to comment on the pictures and the image of UBH they purport to present. In short, she both added commentary to the pictures and used them “for a different purpose from the original.” For these reasons, Plaintiffs’ allegations reveal that Ms. Wells’ use was transformative and therefore constitutes fair use.

CONCLUSION

For the reasons set out above and in Ms. Wells’ opening brief, Plaintiffs’ claims are legally and factually deficient and should be dismissed with prejudice and without leave to amend pursuant to the CPA and Rule 12(b)(6).

Respectfully submitted, this the 23rd day of July, 2012.

/s/ John A. Bussian
John A. Bussian
N.C. State Bar No. 15487
Texas Bar. No. 00785625
E-mail: jbussian@bellsouth.net
THE BUSSIAN LAW FIRM, PLLC
Wells Fargo Capitol Center, Suite 1600
150 Fayetteville Street
Raleigh, NC 27601
Telephone: 919-829-4900
Facsimile: 919-829-2165

/s/ Mark J. Prak
Mark J. Prak
N.C. Bar No. 9420
E-mail: mprak@brookspierce.com
/s/ Charles E. Coble
Charles E. Coble
N.C. Bar No. 25342
E-mail: ccoble@brookspierce.com
/s/ Eric M. David
Eric M. David
N.C. Bar No. 38118
E-mail: edavid@brookspierce.com
BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.
P.O. Box 1800
Raleigh, NC 27602
Telephone: 919-839-0300
Facsimile: 919-839-0304