COLORADO COURT OF APPEALS

Court of Appeals No. 20CA0830
El Paso County District Court No. 19CV32063
Honorable Gregory R. Werner, Judge

Susan Schroeder and Perfect Skin Dermatology P.C.,

Plaintiffs-Appellants,

v.

John Doe,

Defendant-Appellee.

ORDER REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division V
Opinion by JUDGE GOMEZ
Richman and Harris, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced November 4, 2021

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¶ 1 Plaintiffs Dr. Susan Schroeder and Perfect Skin Dermatology P.C. appeal the trial court's order quashing a subpoena that sought information to help them identify the unknown defendant John Doe, against whom they alleged claims for defamation and trade libel/product disparagement. Because we agree that the trial court erred in quashing the subpoena, we reverse and remand the case for further proceedings.

I. Background

¶ 2 Plaintiffs alleged in their complaint that in September 2019, they noticed a series of negative reviews about them on Vitals.com, a website that touts itself as the largest online database of patient reviews for doctors and facilities. The more than thirty reviews, dated from 2015 to 2018, consisted of similar ratings by a "[s]elf-verified patient of Dr. Susan S. Schroeder." Some provided no information other than an overall one-star rating while others purported to comment negatively on the ease of making an appointment; the friendliness of the staff; the accuracy of their diagnosis; and/or Dr. Schroeder's promptness, bedside manner, time spent with the patient, and appropriate follow-up. For instance, one of the reviews appeared as follows:

Self-verified patient of Dr. Susan S Schroeder - Posted on May 3rd, 2015

Promptness	★☆☆☆☆	Friendly Staff	★★☆☆☆
Accurate Diagnosis	★☆☆☆☆	Bedside Manner	★☆☆☆☆
Spends Time with Me	★☆☆☆☆	Appropriate Follow-up	★☆☆☆☆

(The star ratings appear only when the image is viewed in color.)

¶ 3 In September 2019, shortly after they allege to have discovered the negative reviews, plaintiffs brought this action against John Doe, whom plaintiffs alleged was "an individual, or a group of individuals acting in concert, whose identity, capacity, and residence is unknown to Plaintiffs."[1] Plaintiffs further alleged that Doe had "concealed [his] true identity and capacity while masquerading as dozens of patients purporting to express widespread dissatisfaction with the services and care provided by Plaintiffs"; that "the [r]eviews are false and defamatory, do not represent actual customer experiences, complaints, or opinions, and were published with the intent of harassing Plaintiffs and causing injury to their economic interests and otherwise good

[1] As the parties do, we refer to Doe using the pronouns he and him.

standing in the community and profession"; and that the reviews had caused plaintiffs to suffer reputational harm, loss of revenue, and other injuries. Based on these allegations, plaintiffs asserted claims for defamation and trade libel/product disparagement.

¶ 4 Plaintiffs obtained the trial court's authorization to serve subpoenas on Vitals.com and on any Internet service providers identified through the Internet Protocol (IP) addresses supplied by Vitals.com, so that they could discover the identity of and serve a copy of the complaint on Doe. In response to its subpoena, Vitals.com supplied records indicating that twenty-three of the reviews had been uploaded from the same three Comcast IP addresses: ten reviews in 2016 and 2018 from a single IP address; six in 2017 from another IP address within the same limited "net range"; and seven in 2015 and early 2016 from a third IP address. Plaintiffs then served a subpoena on Comcast, which alerted Doe.

¶ 5 In response, Doe retained counsel and filed a motion to quash the subpoena. The motion asserted, among other things, that the reviews didn't contain any "statements" to support the claims and that all but two of the reviews were published beyond the statute of

limitations period. The trial court granted the motion before plaintiffs had an opportunity to respond.

¶ 6 Plaintiffs moved to reconsider. The court denied that motion, stating two bases for its decision: "Plaintiff[s] sought information regarding claims that could not be pursued" because (1) "the statute of limitations had expired regarding the matter that had been published"; and (2) "the matter which serves as the basis for publication was a statement of opinion rather than fact."

¶ 7 Plaintiffs then filed a motion seeking certification of the order quashing the subpoena under C.A.R. 4.2, urging that the order had effectively foreclosed their ability to pursue their claims. The trial court granted the motion, but a division of this court denied plaintiffs' petition for interlocutory appeal.

¶ 8 Shortly thereafter, the trial court administratively closed the case. Plaintiffs filed a C.R.C.P. 60 motion seeking clarification to determine whether the closure was a final order. The trial court issued an order indicating its willingness to enter an order dismissing the case but requesting plaintiffs' preference as to whether the dismissal should be with or without prejudice. In

response, plaintiffs requested a dismissal without prejudice, which the court promptly entered.

¶ 9 After plaintiffs filed this appeal, this court issued an order to show cause why the appeal shouldn't be dismissed for lack of a final order since the dismissal had been entered without prejudice. In response, plaintiffs asserted, among other things, that the order of dismissal qualifies as a final judgment because they couldn't pursue their claims within the one year limitations period that applied under section 13-80-103(1)(a), C.R.S. 2021. The motions division discharged the order to show cause, determining that the court has jurisdiction over the appeal because, "although the [trial] court dismissed the matter without prejudice, the refiling of any of the claims asserted in the underlying action would be barred by the one-year statute of limitations under § 13-80-103."

II. Analysis

¶ 10 Doe argues that we lack jurisdiction over this appeal due to the lack of a final, appealable order. Plaintiffs argue that the trial court erred in quashing their subpoena to Comcast on the basis that (1) the statute of limitations barred their claims and (2) the reviews in question were statements of opinion. And Doe argues

that the trial court's decision quashing the subpoena is supported by other bases not addressed by the trial court. We address each of these arguments in turn.

A. Jurisdiction

¶ 11 We first consider our jurisdiction to consider this appeal. Doe contends that we lack jurisdiction over the appeal because there is no final judgment. Specifically, he contends that (1) the dismissal order isn't final because the dismissal was without prejudice and (2) even if the dismissal order is final, that wouldn't help plaintiffs because they are seeking review not of that order but of the order quashing the Comcast subpoena. We disagree.

¶ 12 Our jurisdiction is generally limited to the review of final judgments. *AA Wholesale Storage, LLC v. Swinyard*, 2021 COA 46, ¶ 8. "A final judgment is one that ends the particular action in which it is entered, leaving nothing further for the court pronouncing it to do in order to completely determine the rights of the parties involved in the proceedings." *Id.* at ¶ 9 (quoting *State ex rel. Suthers v. CB Servs. Corp.*, 252 P.3d 7, 10 (Colo. App. 2010)).

¶ 13 Generally, the dismissal of claims without prejudice doesn't constitute a final judgment for purposes of appeal because the legal

and factual issues underlying the dispute remain unresolved. *Wilson v. Kennedy*, 2020 COA 122, ¶ 9. Nonetheless, such a dismissal is a final judgment if the limitations period has expired or if the dismissal otherwise results in prohibiting further proceedings. *Spiremedia Inc. v. Wozniak*, 2020 COA 10, ¶ 14.

¶ 14 Although we are not bound by the decision of the motions division, *see Chavez v. Chavez*, 2020 COA 70, ¶ 13, we agree with it. The parties agree that plaintiffs' claims are governed by the one-year statute of limitations set forth in section 13-80-103(1)(a).[2] The claims accrued on the date both the injury and its cause were known or should have been known to plaintiffs by the exercise of reasonable diligence. *See Burke v. Greene*, 963 P.2d 1119, 1121

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[2] We disagree with Doe's contention that plaintiffs are judicially estopped from relying on a one-year limitations period now when previously in this case they argued for a two-year limitations period. Judicial estoppel, a narrow doctrine that precludes a party from taking inconsistent positions in the same or related proceedings in an intentional effort to mislead the court, applies only where the party was successful in and received a benefit from maintaining the first position. *Tuscany Custom Homes, LLC v. Westover*, 2020 COA 178, ¶ 35. Because plaintiffs didn't prevail in their earlier efforts to assert a two-year limitations period, judicial estoppel doesn't preclude them from now relying on a one-year period. *See id.* at ¶ 36. It would, however, preclude them from asserting a two-year limitations period on remand.

(Colo. App. 1998); § 13-80-108(1), C.R.S. 2021. Since plaintiffs allege that they discovered the negative reviews in September 2019, the limitations period expired at the latest in September 2020. Therefore, the claims are now time barred and the dismissal order is final. *See Spiremedia*, ¶ 14; *Pham v. State Farm Mut. Auto. Ins. Co.*, 70 P.3d 567, 572 (Colo. App. 2003) (order dismissing claims without prejudice was final because any future claims "would be barred now by the [applicable] statute of limitations").

¶ 15 And upon entry of the final order, the trial court's earlier orders — including the orders on the motion to quash — became final and appealable. *See Town of Monument v. State*, 2018 COA 148, ¶ 6, *aff'd sub nom. Forest View Co. v. Town of Monument*, 2020 CO 52; *Prefer v. PharmNetRx, LLC*, 18 P.3d 844, 848 (Colo. App. 2000). Accordingly, we have jurisdiction over the issues raised in this appeal.

B. Statute of Limitations

¶ 16 Plaintiffs argue that the trial court erred in quashing the Comcast subpoena on the basis that the claims were barred by the statute of limitations. We agree.

¶ 17 Ordinarily, we review a trial court's ruling on a motion to quash a subpoena for an abuse of discretion. *See In re Marriage of Dauwe*, 148 P.3d 282, 286 (Colo. App. 2006). But here the trial court's decision was based on a question of law, which we review de novo. *See Morin v. ISS Facility Servs., Inc.*, 2021 COA 55, ¶ 9; *see also Jackson v. Am. Fam. Mut. Ins. Co.*, 258 P.3d 328, 332 (Colo. App. 2011) (whether a court properly applied a statute of limitations and the date of accrual of a limitations period under undisputed facts are questions of law that we review de novo). At any rate, a decision that is contrary to law constitutes an abuse of discretion. *State Farm Mut. Auto Ins. Co. v. Steul*, 2020 COA 146, ¶ 17. Therefore, we review de novo the trial court's decision to quash the subpoena based on the statute of limitations.

¶ 18 As a preliminary matter, Doe acknowledges on appeal, as he did in his motion to quash, that plaintiffs' claims as to the two most recent reviews were within the limitations period.

¶ 19 As to the earlier reviews, the parties agree that the one-year limitations period of section 13-80-103(1)(a) applies to both of plaintiffs' claims. They disagree, however, on the issue of when the claims accrued. Plaintiffs argue that under section 13-80-108(8)

the accrual date is the date they knew or should've known about the injury and its cause; that they alleged in the complaint they first discovered the reviews in September 2019; and that any factual question as to whether they should've discovered the reviews earlier cannot be resolved at this stage of the proceedings. Doe, in response, argues that the limitations period began to run on the date of publication of each statement and that it isn't plausible that plaintiffs didn't know about the reviews previously since they were posted on a public website.

¶ 20 We agree with plaintiffs. In arguing that the claims accrued upon publication, Doe cites a federal case (*Conrad v. The Education Resources Institute*, 652 F. Supp. 2d 1172, 1186 (D. Colo. 2009)) that is based on outdated state law. As another division of this court has explained, "the accrual rule stated in [earlier] decisions has been superseded by the General Assembly's enactment in 1986 of [section] 13-80-108(1)." *Taylor v. Goldsmith*, 870 P.2d 1264, 1265 (Colo. App. 1994); *accord Burke*, 963 P.2d at 1121. And, under section 13-80-108(1), claims accrue only when both the injury and its cause are known or should have been known by the exercise of reasonable diligence. Thus, the claims didn't accrue

upon publication unless plaintiffs knew or should've known about them at the time.

¶ 21 Moreover, we must accept as true plaintiffs' well-pleaded factual allegation in the complaint that they didn't know about the reviews until September 2019, regardless of whether that allegation is arguably implausible or not. *See Warne v. Hall*, 2016 CO 50, ¶¶ 9, 24; *Burke*, 963 P.2d at 1121-22; *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (*even if doubtful in fact*)." (emphasis added) (citations and footnote omitted)). And the timing of when plaintiffs should have known about the reviews and their resulting injury is a factual question that can't be resolved based just on the allegations in the complaint. *See Wagner v. Grange Ins. Ass'n*, 166 P.3d 304, 308 (Colo. App. 2007); *Burke*, 963 P.2d at 1121-22.

C. Statements of Opinion

¶ 22 Plaintiffs also argue that the trial court erred in quashing the Comcast subpoena on the basis that the negative reviews were

statements of opinion that couldn't support plaintiffs' claims. Again, we agree.

¶ 23 As with the last issue, while we ordinarily review a trial court's ruling on a motion to quash a subpoena for an abuse of discretion, the basis for the trial court's ruling was a question of law, which we review de novo. *See Morin*, ¶ 9; *see also Lawson v. Stow*, 2014 COA 26, ¶ 32 (we review de novo a trial court's decision whether a statement is one of pure opinion).

¶ 24 "Statements of pure opinion are constitutionally protected" and, thus, cannot support a libel or defamation claim. *Lawson*, ¶ 30. But "[t]o be entitled to full constitutional protection, the statement must not contain a provably false factual connotation or, if it does, it must not be such that it could reasonably be interpreted as stating actual facts." *Id.* In determining whether a statement is one of pure opinion — and thus constitutionally protected — we consider (1) whether the statement is sufficiently factual to be susceptible of being proved true or false and (2) whether reasonable people would conclude that the assertion is one of fact. *Id.* at ¶ 31. In considering the second question, we look to the phrasing, the context, and the circumstances surrounding

the publication of the statement. *Id.* at ¶ 34; *see also Zueger v. Goss*, 2014 COA 61, ¶ 16.

¶ 25 We conclude that the reviews could be interpreted to contain at least one statement that is sufficiently factual to be susceptible of being proved true or false and that reasonable people could conclude is an assertion of fact — that the speaker was a patient of Dr. Schroeder. Each review states that it is offered by a "[s]elf-verified patient of Dr. Susan S. Schroeder" and purports to rate Dr. Schroeder's services as a dermatologist. It's unclear from the record, however, exactly where the words "[s]elf-verified patient of Dr. Susan S. Schroeder" came from, whether the website populated that language itself, and, if so, what options a reviewer might have clicked that would have made this language appear. Thus, some factual development may be needed to fully assess the claims.

¶ 26 But if the reviews purport to have been submitted by a patient based on patient experiences but in fact they were not, then they may not be protected, as the question of whether the speaker was actually a patient of Dr. Schroeder can be proved or disproved after

investigation of the facts.[3] *See, e.g.*, *RingCentral, Inc. v. Nextiva, Inc.*, No. 19-CV-02626-NC, 2020 WL 2065701, at *2 (N.D. Cal. Apr. 29, 2020) (negative reviews purporting to be from actual clients, and the statements in those reviews, were susceptible of being proved true or false and gave the impression that the speakers "intended to convey objective truths about their experience with [the plaintiff's] services"; therefore, they were not statements of opinion); *Grasshopper House, LLC v. Clean & Sober Media, LLC*, No. 218CV00923SVWRAO, 2018 WL 6118440, at *8 (C.D. Cal. July 18, 2018) (whether one-star ratings came from customers, as represented, was not an unprovable opinion and therefore could support plaintiff's libel claims).

¶ 27 Moreover, the well-pleaded factual allegations in the complaint indicate that the reviews may have been posted by a single individual or a group of individuals acting in concert. That, too, can

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[3] We accept as true plaintiffs' allegation in the complaint that Doe is "a business competitor and/or has ulterior motivations unrelated to any legitimate marketplace interaction," notwithstanding Doe's insistence that he is a former patient of Dr. Schroeder. To the extent that the allegation is speculative, as plaintiffs haven't been able to identify exactly who Doe is, that is a direct result of the subpoena to Comcast having been quashed.

be proved or disproved after investigation of the facts. And if the reviews purport to have been submitted by different patients (a question we needn't and don't resolve at this stage of the case) but in fact they were not, then they may not be protected. *See, e.g.*, *Romeo & Juliette Laser Hair Removal, Inc. v. Assara I LLC*, No. 08CV0442(DLC), 2016 WL 815205, at *2, *9 (S.D.N.Y. Feb. 29, 2016) (plaintiff's defamation claim was supported by allegations that defendants posted a series of fictitious reviews posing as customers who had used its services).

¶ 28 We reject Doe's related argument that the reviews cannot as a matter of law be "statements" because they "consist solely of star-based ratings" without any words. As Doe points out, several courts have concluded that a star-based rating by an individual customer may be a constitutionally-protected expression of opinion. But a series of dozens of reviews, if each purports to have been submitted by a different patient, may communicate an objective, potentially false fact: that the speakers are multiple separate patients who each had a negative patient experience with the provider. *See, e.g.*, *RingCentral*, 2020 WL 2065701, at *2; *Grasshopper House*, 2018 WL 6118440, at *8; *Romeo & Juliette*,

2016 WL 815205, at *9; *see generally Knapp v. Post Printing & Pub. Co.*, 111 Colo. 492, 496, 144 P.2d 981, 984 (1943) (noting that "signs and pictures," as well as writings, can support a libel claim) (citation omitted); *Lawson*, ¶ 15 (describing defamation as "a *communication* that holds an individual up to contempt or ridicule thereby causing him to incur injury or damage") (quoting *Keohane v. Stewart*, 882 P.2d 1293, 1297 (Colo. 1994)) (emphasis added).

D. Other Bases for Affirmance

¶ 29 Finally, Doe argues that two other bases support affirmance of the trial court's decision. We consider and reject each in turn.

¶ 30 First, Doe argues that the Comcast subpoena infringed on his First Amendment right to anonymity in Internet speech. He cites cases from other states applying varying tests to consider whether to allow discovery that seeks to identify anonymous Internet users. *See, e.g.*, *Doe v. Cahill*, 884 A.2d 451, 460-61 (Del. 2005); *Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756, 760-61 (N.J. App. Div. 2001); *see generally* Nathaniel Plemons, "Weeding Out Wolves: Protecting Speakers and Punishing Pirates in Unmasking Analyses," 22 Vand. J. Ent. & Tech. L. 181, 196-99 (2019).

¶ 31 Whatever test might be applied here, we conclude that plaintiffs have satisfied it. Plaintiffs have stated a prima facie case as to both of their claims, and we have rejected Doe's arguments challenging the viability of the claims at this stage of the litigation, including as to timeliness and the existence of actionable factual statements. Plaintiffs also have alleged sufficient evidence in their complaint supporting their claims — including providing screen shots of the various reviews, summarizing IP address data that indicates the reviews may have been posted by the same individual or individuals acting in concert with one another, and describing their resulting damages. And plaintiffs have explained the steps they have taken to identify Doe, as well as the reasons why they cannot proceed with their claims without the disclosure of Doe's identity.

¶ 32 Second, Doe argues that plaintiffs' claims are barred by the libel-proof plaintiff doctrine, which "precludes a plaintiff's recovery for libel if his or her reputation up to the time of the challenged publication has been 'irreparably strained by prior publications.'" *Tonnessen v. Denver Pub. Co.*, 5 P.3d 959, 965 (Colo. App. 2000) (quoting *Liberty Lobby, Inc. v. Anderson,* 746 F.2d 1563, 1568 (D.C.

Cir. 1984), *vacated on other grounds*, 477 U.S. 242 (1986)). This doctrine has been widely criticized; when it is applied, it is more often in cases involving criminal convictions for actions similar to those in the challenged statement, *see Lamb v. Rizzo*, 391 F.3d 1133, 1139 (10th Cir. 2004); and it's unclear whether it applies in Colorado, *see Tonnessen*, 5 P.3d at 965-96 (citing criticism of the doctrine but ultimately concluding it wasn't at issue in the case).

¶ 33 Even assuming the doctrine does apply, it doesn't bar plaintiffs' claims at this stage of the case. Doe points to twenty-seven one-star reviews of plaintiffs on the Vitals.com site from 2009 through 2014, predating the reviews at issue in this case. But those negative reviews don't conclusively establish that plaintiffs' reputations were so irreparably damaged by prior publications that any further negative comments could not have damaged them any further. *See Liberty Lobby*, 746 F.2d at 1568; *see also Guccione v. Hustler Mag., Inc.*, 800 F.2d 298, 303 (2d Cir. 1986) ("The libel-proof plaintiff doctrine is to be applied with caution, since few plaintiffs will have so bad a reputation that they are not entitled to obtain redress for defamatory statements, even if their damages cannot be quantified and they receive only nominal damages." (citation

omitted)). And plaintiffs have suggested, based on information received from Vitals.com, that Doe may have been responsible for some or all of those earlier negative reviews — a fact plaintiffs can try to confirm through discovery. Accordingly, this doctrine doesn't support the quashing of the Comcast subpoena.

III. Conclusion

¶ 34 The order is reversed and the case is remanded for further proceedings consistent with this opinion.

JUDGE RICHMAN and JUDGE HARRIS concur.