

89 S.W.3d 732, 19 IER Cases 417  
(Cite as: 89 S.W.3d 732)

**H**

Court of Appeals of Texas,  
Houston (1st Dist.).  
John NEWSOM, Appellant,  
v.  
Cyndi BROD, Appellee.

No. 01-02-00365-CV.  
Oct. 17, 2002.

Former employee brought slander and libel action against coemployee. The 400th District Court, Fort Bend County, J. [Bradley Smith](#), J., granted coemployee's summary judgment motion, and employee appealed. The Court of Appeals, [Sherry J. Radack](#), J., held that: (1) employee's claim was for defamation, to which one year statute of limitations applies, rather than for business disparagement, to which two year statute of limitations applies, and (2) employee learned of, or in exercise of reasonable diligence should have learned of, coemployee's alleged slander and libel more than one year before he filed action.

Affirmed.

West Headnotes

**[1] Libel and Slander 237 ↪68**

[237](#) Libel and Slander  
[237IV](#) Actions  
[237IV\(A\)](#) Right of Action and Defenses  
[237k68](#) k. Nature and Form of Remedy.  
[Most Cited Cases](#)

**Libel and Slander 237 ↪76**

[237](#) Libel and Slander  
[237IV](#) Actions  
[237IV\(A\)](#) Right of Action and Defenses  
[237k76](#) k. Time to Sue and Limitations.  
[Most Cited Cases](#)

**Libel and Slander 237 ↪139**

[237](#) Libel and Slander

**[237V](#) Slander of Property or Title  
[237k139](#) k. Actions. [Most Cited Cases](#)**

Former employee's claim against coemployee was for defamation, to which one year statute of limitations applies, rather than for business disparagement, to which two year statute of limitations applies; employee failed to plead or prove that he suffered harm to business or property interest separate and apart from personal harm allegedly suffered. [V.T.C.A., Civil Practice & Remedies Code §§ 16.002\(a\), 16.003](#).

**[2] Libel and Slander 237 ↪68**

[237](#) Libel and Slander  
[237IV](#) Actions  
[237IV\(A\)](#) Right of Action and Defenses  
[237k68](#) k. Nature and Form of Remedy.  
[Most Cited Cases](#)

**Libel and Slander 237 ↪76**

[237](#) Libel and Slander  
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[Most Cited Cases](#)

**Libel and Slander 237 ↪139**

[237](#) Libel and Slander  
[237V](#) Slander of Property or Title  
[237k139](#) k. Actions. [Most Cited Cases](#)

To determine nature of appellant's complaints, Court of Appeals must review factual allegations contained within pleadings, evidence adduced in support of those allegations, and type of damages alleged to decide whether one year statute of limitations applicable to libel and slander claim or two year statute of limitations applicable to business disparagement is appropriate; if damages alleged are primarily personal and general, then cause of action is one for libel or slander, even though incidental or consequential professional losses are also pleaded and proved, and claim is for business disparagement when

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plaintiff alleges interference with commercial or economic relations. [V.T.C.A., Civil Practice & Remedies Code §§ 16.002\(a\), 16.003](#).

### **[3] Libel and Slander 237 ↪ 130**

#### [237](#) Libel and Slander

##### [237V](#) Slander of Property or Title

##### [237k130](#) k. Nature and Elements in General.

#### [Most Cited Cases](#)

General elements of claim for business disparagement are publication by defendant of disparaging words, falsity of those words, defendant's malice, defendant's lack of privilege, and plaintiff's special damages.

### **[4] Libel and Slander 237 ↪ 68**

#### [237](#) Libel and Slander

##### [237IV](#) Actions

##### [237IV\(A\)](#) Right of Action and Defenses

##### [237k68](#) k. Nature and Form of Remedy.

#### [Most Cited Cases](#)

### **Libel and Slander 237 ↪ 139**

#### [237](#) Libel and Slander

##### [237V](#) Slander of Property or Title

##### [237k139](#) k. Actions. [Most Cited Cases](#)

Purpose of action for defamation is to protect personal reputation of injured party, whereas purpose of action for injurious falsehood or business disparagement is to protect economic interests of injured party against pecuniary loss.

### **[5] Limitation of Actions 241 ↪ 95(6)**

#### [241](#) Limitation of Actions

##### [241II](#) Computation of Period of Limitation

[241II\(F\)](#) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action

##### [241k95](#) Ignorance of Cause of Action

##### [241k95\(4\)](#) Injuries to the Person

##### [241k95\(6\)](#) k. Libel and Slander. [Most](#)

#### [Cited Cases](#)

Former employee learned of, or in exercise of

reasonable diligence should have learned of, co-employee's alleged slander and libel more than one year before he filed action, for purpose of determining under discovery rule whether employee filed action within applicable one year limitations period; employee was terminated two years before he filed action and, when he was terminated, employee knew that coemployee made complaints against him and general nature of those complaints. [V.T.C.A., Civil Practice & Remedies Code § 16.002\(a\)](#).

### **[6] Limitation of Actions 241 ↪ 43**

#### [241](#) Limitation of Actions

##### [241II](#) Computation of Period of Limitation

[241II\(A\)](#) Accrual of Right of Action or Defense

##### [241k43](#) k. Causes of Action in General.

#### [Most Cited Cases](#)

Passing of statute of limitations depends on when appellant's cause of action accrued. [V.T.C.A., Civil Practice & Remedies Code § 16.002\(a\)](#).

### **[7] Limitation of Actions 241 ↪ 55(1)**

#### [241](#) Limitation of Actions

##### [241II](#) Computation of Period of Limitation

[241II\(A\)](#) Accrual of Right of Action or Defense

##### [241k55](#) Torts

[241k55\(1\)](#) k. In General. [Most Cited Cases](#)

Generally, defamation claim accrues when matter is published or circulated, for purpose of determining whether applicable one year statute of limitations expired. [V.T.C.A., Civil Practice & Remedies Code § 16.002\(a\)](#).

### **[8] Limitation of Actions 241 ↪ 95(1)**

#### [241](#) Limitation of Actions

##### [241II](#) Computation of Period of Limitation

[241II\(F\)](#) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action

##### [241k95](#) Ignorance of Cause of Action

[241k95\(1\)](#) k. In General; What Constitutes Discovery. [Most Cited Cases](#)

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When discovery rule applies, it defers accrual of cause of action until plaintiff discovers or, through exercise of reasonable care and diligence, should discover nature of injury, for statute of limitations purposes.

\*733 [Glendon Bryan Adams](#), Stafford, for Appellant.

[Mark J. Oberti](#), Houston, for Appellee.

Panel consists of Justices [NUCHIA](#), [JENNINGS](#), and [RADACK](#).

### OPINION

[SHERRY J. RADACK](#), Justice.

Appellant, John Newsom, brought suit for wrongful termination of his employment against Fluor Daniel, Inc. (Fluor). Subsequently, he amended his petition to add Florence Hughes and appellee, Cyndi Brod. The trial court granted appellee's motion for summary judgment. Appellant appeals from the rendition of summary judgment against him. Appellant's claims are barred by the statute of limitations. Accordingly, we affirm.

#### \*734 Background Facts

On May 25, 1999, Fluor terminated Newsom for making violent and misogynistic statements at work. On April 12, 2000, appellant sued Fluor for slander and libel, as well as other torts. Appellant based his slander and libel claims against Fluor on Florence Hughes's and appellee's allegedly false complaints against him. In the original suit, appellant stated that Hughes and appellee were "somehow involved" in the complaints that led to his termination, and he named Hughes and appellee in the lawsuit as agents of Fluor. Fluor then removed the suit to federal court.

On August 21, 2000, appellant sought to amend his lawsuit to add Hughes and appellee as additional defendants. In his amended petition, appellant stated that he "has learned the complaining parties against him were [Hughes] and appellee." The trial court denied appellant's motion for leave to amend. On May 24, 2001, appellant sued appellee, Hughes, and Janet Newsom in state court. He alleged slander and libel causes of action. On November 15, 2001, appellant voluntarily dismissed the federal lawsuit, and appellee moved for summary judgment in the state court. On February 19, 2002, the trial court granted appellee's motion for summary judgment. Appellee's case was

subsequently severed from the other defendants, and the trial court entered a final judgment.

#### Standard of Review

When reviewing a traditional motion for summary judgment, we follow these well-established rules: (1) The movant has the burden of showing that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law; (2) in deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the nonmovant will be taken as true; and (3) every reasonable inference must be indulged in favor of the nonmovant. [Nixon v. Mr. Prop. Mgmt. Co.](#), 690 S.W.2d 546, 548-49 (Tex.1985). Summary judgment for a defendant is proper if the defendant negates at least one element of each of the plaintiff's claims. *See Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 476-77 (Tex.1995). A defendant may also obtain summary judgment by establishing all elements of an affirmative defense to each claim. *See Montgomery v. Kennedy*, 669 S.W.2d 309, 310-11 (Tex.1984).

#### Statute of Limitations

[1] In his first point of error, appellant contends that the trial court erred by not applying the two-year statute of limitations to his claims. *See TEX. CIV. PRAC. & REM CODE ANN. § 16.003* (Vernon Supp.2002). Appellant claims the appropriate statute of limitations in this case is the two-year statute because the tort is the gravamen of his claim is business slander. Appellee claims that appellant seeks to avoid the one-year limitations period for slander by alleging a business disparagement, which has a two-year statute of limitations.

[2] To determine the nature of appellant's complaints, we must review the factual allegations contained within the pleadings, the evidence adduced in support of those allegations, and the type of damages alleged. *See Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762, 767 (Tex.1987). If the damages alleged are primarily personal and general-e.g. injury to personal reputation, humiliation, or mental anguish-then the cause of action is one for libel or slander, even though incidental or consequential professional losses are also pleaded and proved. *Id.*

[3] A claim for business slander or disparagement is appropriate when a plaintiff \*735 alleges interference with commercial or economic relations. *Id. at*

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[766](#). The general elements of a claim for business disparagement are publication by the defendant of the disparaging words, falsity, malice, lack of privilege, and special damages. *Id.* (citations omitted). The tort is part of the body of law concerned with the subject of interference with commercial or economic relations. The Restatement identifies the tort by the name “injurious falsehood” and notes its application “in cases of the disparagement of property in land, chattels, or intangible things or of their quality.” *Id.* (quoting [RESTATEMENT \(SECOND\) OF TORTS § 623A](#), cmt. a (1977)).

[4] An action for injurious falsehood or business disparagement is similar in many respects to an action for defamation. [Gulf Atl. Life Ins. Co., 749 S.W.2d at 767](#). Both involve the imposition of liability for injury sustained through publication to a third party of a false statement affecting the plaintiff. *Id.* The two torts, however, protect different interests. The purpose of an action for defamation is to protect the personal reputation of the injured party, whereas the purpose of an action for injurious falsehood or business disparagement is to protect the economic interests of the injured party against pecuniary loss. *Id.* More stringent requirements have always been imposed on the “plaintiff seeking to recover for injurious falsehood in three important respects—falsity of the statement, fault of the defendant and proof of damage.” *Id.* (quoting [RESTATEMENT \(SECOND\) OF TORTS § 623A](#), cmt. g (1977)).

Pecuniary loss refers to loss that has been realized or liquidated, as in the case of specific loss of sales. [Gulf Atl. Life Ins. Co., at 766-67](#); (citing W. Keeton, *Prosser and Keeton on the Law of Torts*, § 128 at 971 (5th Ed.1984)). Further, the communication must play a substantial part in inducing others not to deal with a plaintiff, with the result that special damage, in the form of the loss of trade or other dealings, is established. *Id.* (citations omitted).

Our review of the record reveals no evidence of the direct, pecuniary loss necessary to satisfy the special damage element of a claim for business disparagement. Appellant's claim is clearly one for defamation, as it focuses on his damages to his reputation. Appellant does not claim he lost business or suffered any disparagement of property in land, chattels, or intangible things or of their quality. The only facts and damages alleged in appellant's pleadings are for the

personal harm, if any, he suffered as a result of the alleged libelous and slanderous publications. Thus, because appellant failed to plead or prove that he suffered harm to a business or property interest separate and apart from the personal harm he allegedly suffered, we conclude that he is not entitled to pursue his claim for business disparagement under the two-year statute of limitations. *Id.* Thus, we hold that the trial court did not err in applying the one-year limitations period to appellant's claims.

We overrule appellant's first point of error.

#### Application of the Discovery Rule

[5] In his second point of error, appellant contends the trial court erred by misapplying the discovery rule. Appellant claims that November 3, 2000, was the first day he actually knew the identity of the complainants and the contents of their written libels. He claims that the issue of when the statute of limitations commenced is a fact issue for the jury to decide because Fluor allegedly concealed from appellant the names of the complainants and the substance of their complaints.

[6][7][8] As noted, the statute of limitations applicable to this slander and libel \*736 claim is one year. [TEX. CIV. PRAC. & REM.CODE ANN. § 16.002\(a\)](#) (Vernon 2001). The passing of the statute of limitations depends on when appellant's cause of action accrued. Generally, a defamation claim accrues when the matter is published or circulated. [Roe v. Walls Reg'l Hosp., Inc., 21 S.W.3d 647, 651 \(Tex.App.-Waco 2000, no pet.\)](#). The discovery rule applies to a defamation claim if the matter is not public knowledge. See [Kelley v. Rinkle, 532 S.W.2d 947, 949 \(Tex.1976\)](#). When the discovery rule applies, it defers the accrual of a cause of action until a plaintiff discovers or, through the exercise of reasonable care and diligence, should discover the nature of the injury. [Childs v. Haussecker, 974 S.W.2d 31, 40 \(Tex.1998\)](#); [Wilson v. John Daugherty Realtors, Inc., 981 S.W.2d 723, 726-27 \(Tex.App.-Houston \[1st Dist.\] 1998, no writ\)](#).

In its recent [KPMG Peat Marwick v. Harrison County Housing Finance Corp.](#) decision, the Texas Supreme Court held that, in applying the discovery rule, the claim accrues “when the plaintiff knew or should have known of the wrongfully caused injury.” [988 S.W.2d 746, 749 \(Tex.1999\)](#). The plaintiff need

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not know the specific nature of each wrongful act that may have caused the injury. *Id.*

In *KPMG*, the plaintiff sued the trustee of the plaintiff's capital reserve fund on February 1, 1993. *Id.* at 747. The reserve fund was to be used to redeem bonds that the plaintiff had issued. *Id.* The plaintiff sued the trustee after learning that the trustee had sold capital reserve fund assets at a loss. *Id.* The plaintiff later sued KPMG Peat Marwick ("KPMG"), alleging that KPMG had negligently or intentionally failed to disclose the trustee's mismanagement of the trust. *Id.* at 748. The plaintiff claimed that its cause of action against KPMG did not accrue until October 1, 1993, when it first learned that KPMG had failed to report irregularities to the plaintiff. *Id.* at 749. The court concluded that the injury to the plaintiff was the premature sale of trust assets and that on the date that the plaintiff sued the trustee, the plaintiff was "aware ... of its injury and that its injury was caused by the wrongful conduct of another." *Id.* As for the plaintiff's failure to discover KPMG's involvement until later, the court stated that the plaintiff should have investigated the possibility that KPMG may not have reported the mismanagement. *Id.* The court found that the latest date that the cause of action against KPMG could have accrued was the date that the plaintiff sued the trustee. *Id.*

Appellant filed suit against appellee on May 24, 2001. The one-year statute of limitations period bars his claim if he learned of, or in the exercise of reasonable diligence should have learned of, appellee's alleged slander/libel statements before May 23, 2000. See *Akin v. Santa Clara Land Co., Ltd.*, 34 S.W.3d 334, 340-41 (Tex. App.-San Antonio 2000, pet. denied). Appellant contends his defamation claim accrued on November 3, 2000, when he first *actually knew* who his complainants were and the substance of their false statements. He also claims that Fluor concealed the names of the complainants and the substance of their complaints from appellant.

When appellant was terminated on May 25, 1999, appellant knew that appellee had made complaints against him and knew the general nature of those complaints. Appellant also knew that the investigation of those complaints resulted in his termination. In his deposition, appellant admitted he was warned by a co-worker on May 20, 1999 that appellee was involved in the complaints against him-this occurring

just days *before* he was terminated. Appellant testified:

\*737 Q: Okay. So Gutierrez did tell you that he thought Cindy Brod was involved [in the complaints against appellant], correct?

A: He did say that, I believe. I think he did. It's been a long time, like I say.

Q: So, as of the afternoon of May 20th, you had one possible name for who was involved, correct?

A: Yes. I guess. I suppose so.

Secondly, on February 6, 2000, appellant gave his lawyer a signed statement about the facts that surrounded his termination. In his statement, appellant stated he believed appellee gave allegedly false complaints against him, and gave him a "hard stare." Finally, when appellant filed his suit against Fluor on April 12, 2000, he specifically identified appellee as being "somehow involved." In fact, appellant founded his original lawsuit against Fluor on the defamation complaints appellee allegedly made against appellant. He specifically named appellee in the lawsuit as an agent of Fluor.

Even if appellant did not discover the detailed substance of appellee's complaints against him until November 3, 2000, appellant became aware of his injury, at the latest, upon his termination. In *KPMG*, the court found that the cause of action against KPMG accrued when the plaintiff discovered the loss, not when the plaintiff became aware of KPMG's involvement. 988 S.W.2d at 749. Just as the plaintiff in *KPMG* should have used more diligence in finding the potential contributors to its loss, appellant, likewise, should have used more diligence in pursuing his claims against those parties who may have contributed to his injury.

The summary judgment evidence shows that appellant learned of, or in the exercise of reasonable diligence should have learned of, appellee's alleged slander and libel before May 23, 2000. Thus, his claim is barred. We overrule appellant's second point of error.

## Conclusion

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We affirm the trial court's judgment.

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