

CASE NO. 03-12-00579-CV

IN THE COURT OF APPEALS
THIRD DISTRICT OF TEXAS
AUSTIN, TEXAS

ROBERT KINNEY,

Appellant and Cross-Appellee,

v.

BCG ATTORNEY SEARCH, INC. and
PROFESSIONAL AUTHORITY, INC., d/b/a LEGAL AUTHORITY,

Appellees and Cross-Appellants.

On Appeal from the 353rd Judicial District Court,
Travis County, Texas

**BRIEF AND APPENDIX
OF APPELLANT ROBERT KINNEY**

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STATEMENT OF THE CASE

Plaintiffs-Appellees and Cross-Appellants BCG Attorney Search, Inc. and Professional Authority, Inc. d/b/a Legal Authority sued Robert Kinney seeking damages for breach of contract, breach of fiduciary duty, and violation of the Lanham Act, 15 U.S.C. § 1051 *et seq.* App. Tab 2 (CR 9-10).¹ Kinney moved to dismiss the case under TEX. CIV. PRAC. & REM. CODE § 27.003(a). CR 12-54. The district court granted the motion as to plaintiffs' Lanham Act claim but denied it as to the contract and fiduciary duty claims. App. Tab 1 (SCR). The court also ordered BCG and Legal Authority to pay sanctions under § 27.009(a)(2) for bringing the claims to harass Kinney. *See id.*

The district court ruled on the motion by a rendition issued on July 3, 2012, and an amended rendition on July 5, 2012. CR 555-56, 565-67. The court then memorialized its ruling in an order issued on November 9, 2012. App. 1 (SCR). Kinney filed a notice of appeal following the rendition on August 31, 2012, CR 568-69, and a second notice of appeal following the order on December 13, 2012. (SCR). Both were filed within the statutorily prescribed sixty-day period following the rendition and order, respectively.

¹ "App." refers to the appendix attached to this brief. "CR ___" refers to the designated page in the clerk's record. "RR ___" refers to the designated page in the reporter's record. "SCR" refers to a supplemental clerk's record to be filed with this Court pursuant to Kinney's request under TEX. R. APP. P. 34.5(c).

See TEX. CIV. PRAC. & REM. CODE § 27.008(c). BCG and Legal Authority have noticed a “conditional” cross-appeal of the portion of the order granting Kinney’s motion as to the Lanham Act claim and imposing sanctions.²

² TEX. CIV. PRAC. & REM. CODE §§ 27.008(b) and (c) permit an accelerated interlocutory appeal of an order ruling on a motion to dismiss under § 27.003. However, one court has held that such an interlocutory appeal is limited to denials of such motions by operation of law under § 27.008(a). See *Jennings v. Wallbuilder Presentations, Inc.*, ___ S.W.3d ___, 2012 WL 3500715 (Tex. App. – Ft. Worth, Aug. 16, 2012). In this case, both parties agree that an interlocutory appeal may also be taken from an order affirmatively disposing of the motion. See CR 577-78 (Plaintiffs’ notice of cross-appeal). Moreover, the express text of §§ 27.008(b) and (c) acknowledges the permissibility of such appeals, which are also consistent with the statute’s purpose to facilitate early resolution of lawsuits targeting the exercise of free speech. This Court recently ordered briefing on appellate jurisdiction over interlocutory appeals under § 27.008 in another case. See *Tex. Allergy, Asthma and Immunology Society v. United Biologics, LLC*, 2012 WL 5494282 (Tex. App. – Austin, November 08, 2012). Kinney stands ready to brief the issue if the Court would find it useful. If, without additional briefing, the Court concludes it lacks jurisdiction over this appeal, it should treat the appeal as an application for a writ of mandamus. See *Lipsky v. Range Production Co.*, 2012 WL 3600014 (Tex. App. – Ft. Worth, August 23, 2012).

STATEMENT REGARDING ORAL ARGUMENT

Kinney respectfully asks the Court to hear oral argument in this appeal. Because Texas's SLAPP statute is relatively new, there is a dearth of applicable case law to guide the court's decision. Moreover, the factual background of the case is relatively complex, involving a prior litigation in California adjudicating some of the matters at issue here. Thus, this case is not routine or simple, and the Court would benefit from the opportunity to explore the issues and sharpen the points of disagreement with counsel for the parties.

ISSUES PRESENTED

1. Whether res judicata bars a suit based on a post on a consumer website when a previous case brought by the same plaintiffs based on the same post was dismissed on the merits, and the present claims could have been asserted in the first case.
2. Whether plaintiffs have satisfied Texas's rigorous SLAPP law by establishing by clear and specific evidence a prima facie case supporting their claim for damages when they have provided no proof that any decrease in business they experienced was caused by the online post.
3. Whether shorter statutes of limitations for libel and business disparagement bar claims styled as breach of contract and fiduciary duty when the nature of the conduct challenged in the suit is really libel and business disparagement, and plaintiffs have simply recast the claims to avoid a shorter limitations period.

INTRODUCTION

This case is the third attempt by Harrison Barnes, owner of over 100 employment search companies including the plaintiffs, to sue his former employee Robert Kinney for a single unflattering statement Kinney posted on a consumer website over four years ago. Barnes sued Kinney in California over the post but lost that case and had to pay nearly \$45,000 in attorneys' fees to Kinney. He then instituted an arbitration against Kinney but discontinued it, choosing to file this case instead. He now admits that some of the negative things Kinney posted are true, but claims they divulged confidential information in violation of a purported employment contract. As in his unsuccessful California case, Barnes complains that the post harmed his companies' image and drove away potential clients.

In 2011, Texas followed the example of many other states and enacted a statute to combat what are called "strategic lawsuits against public participation," or "SLAPP." *See* TEX. CIV. PRAC. & REM. CODE § 27.001, *et seq.* SLAPP laws protect the right of free speech by enabling citizens to obtain expedited dismissal of meritless lawsuits filed to punish them for speaking their minds. They exist precisely to prevent the sort of harassment exemplified by Barnes's latest suit against Kinney merely for expressing his personal opinions.