MODIFY and AFFIRM; and Opinion Filed March 3, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00444-CV

BRADLEY B. MILLER, Appellant
V.
TALLEY DUNN GALLERY, LLC AND TALLEY DUNN, Appellees

On Appeal from the 191st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-15-01598

MEMORANDUM OPINION

Before Justices Fillmore, Stoddart, and O'Neill[1]
Opinion by Justice Fillmore

Appellees Talley Dunn and the Talley Dunn Gallery, LLC (the Gallery) sued Bradley Miller, who is Dunn's former spouse, based on communications he sent to customers, artists, and employees of the Gallery as well as to other individuals. Appellees requested not only monetary damages but injunctive relief. Miller filed a motion to dismiss the suit under the Texas Citizens Participation Act (the TCPA).[2]

After an evidentiary hearing, the trial court granted appellees' request for a temporary injunction. The trial court denied Miller's motion to dismiss and awarded appellees reasonable attorney's fees and court costs pursuant to section 27.009(b) of the civil practice and remedies code. Miller appeals both the granting of the temporary injunction and the award of reasonable

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[1] The Hon. Michael J. O'Neill, Justice, Assigned.

[2] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.001–.011 (West 2015).

attorney's fees and costs, asserting in five issues that the temporary injunction is void on its face due to lack of specificity as to any irreparable injury appellees will likely suffer while this case is pending; paragraph 7 of the temporary injunction is an unconstitutional prior restraint on his right to free speech; appellees failed to meet their burden of establishing either a probable, imminent, and irreparable injury for which they have no adequate remedy at law or a likelihood of success on the merits of their causes of action; and the trial court erred by awarding appellees reasonable attorney's fees and costs under section 27.009(b). We affirm the trial court's order awarding appellees reasonable attorney's fees and costs. We modify the temporary injunction to delete paragraphs 6 and 7 and, as modified, affirm the temporary injunction.

Background

Dunn and Miller, who started dating in 1985 when they were both teenagers, began living together in 1993. In 1999, Dunn opened Dunn and Brown Contemporary (DBC), an art gallery, with Lisa Brown. Dunn and Miller married in 2004 and subsequently had a daughter. In 2011, Dunn and Brown dissolved DBC, and Dunn opened the Gallery. Miller performed work for the Gallery, including setting up and maintaining its computers and telephones, editing its business plan, and editing its catalogs. According to Miller, he was not paid for much of this work, but viewed the Gallery as a "family business."

In January 2012, Miller began accessing Dunn's cell phone while she was asleep and taking photographs of text messages between Dunn and David Bates, an artist Dunn represented. Miller testified he did so because Dunn was lying to him and he suspected she was romantically involved with Bates.[3] Miller also placed a digital recording device in Dunn's car to record any conversations she had while in the car and began recording conversations he had with Dunn in

[3]At the temporary injunction hearing, Miller testified he had no proof Dunn was romantically involved with Bates and, at the time of the hearing, suspected Dunn's relationship with Bates was more in the nature of a "crush."

their home. Miller kept a log of information contained on the recordings as well as of Dunn's daily activities. By the time Dunn discovered the log, it was approximately 150 pages in length. On February 13, 2013, Dunn filed for divorce.

During the divorce proceedings, Dunn produced the Gallery's general ledger for the time period between January and October of 2013 (the General Ledger). The General Ledger listed all of the Gallery's receipts and expenses and contained information pertaining to the Gallery's customers during that time period, the specific piece of art purchased by each customer, the price the customer paid for each piece of art, whether a discount on the purchase price was provided to the customer, and how much the artist was paid after a piece of art was sold. The General Ledger also contained information on the Gallery's bank accounts, vendors the Gallery used, how much each vendor was paid, and how much the Gallery's employees were paid. According to Dunn, the General Ledger was a "recipe" for how she runs the Gallery and contains confidential information pertaining to operation of the Gallery and the Gallery's customers. According to Miller, when he worked at the Gallery, the general ledger was kept in a binder. However, Dunn testified the General Ledger was maintained electronically, was password protected, and was accessible only by certain employees of the Gallery.

A confidentiality order signed by an associate judge was in place at the time Dunn produced the General Ledger to Miller during the divorce proceedings. The district court judge later vacated the confidentiality order, and enjoined the parties from disparaging each other. Dunn produced the General Ledger so that Miller could obtain a valuation of the Gallery and for use in a mediation. Dunn and Miller agreed to a property distribution at mediation, but Miller was dissatisfied with the settlement. He testified he received only $36,000 of what he thought was a four million dollar business because the Gallery's value was based on Dunn's goodwill

and the law basically gives "one spouse virtually no interest in a business that was assumed to be attached primarily to the goodwill of the other spouse." The divorce was final on April 2, 2014.

On February 11, 2015, appellees sued Miller, alleging Miller was "wag[ing] a public campaign to disparage" Dunn and the Gallery and to interfere with the Gallery's business. Appellees ultimately asserted claims against Miller based on violations of the Texas Uniform Trade Secrets Act (UTSA),[4] the Interception of Communications Act (ICA),[5] the Texas Theft Liability Act,[6] and the Harmful Access by Computer Act (HACA);[7] tortious interference with business relations; defamation and business disparagement; invasion of privacy; and intentional infliction of emotional distress. Appellees' claims were all based on letters and emails sent by Miller to various clients of the Gallery and community leaders, members of the board of directors of the school Dunn and Miller's daughter attended, artists that Dunn represented, an employee of the Gallery, the parents of another employee of the Gallery, and a writer who, among other things, reviewed exhibitions at art galleries. In these communications, Miller made a number of negative statements about Dunn, including that she committed perjury during the divorce proceedings and had an inappropriate romantic relationship with Bates, had ousted Brown from DBC without any compensation, had not treated him fairly in the divorce, and would not deal fairly with her employees and artists. Miller stated Dunn had a number of mental health conditions, including being a narcissist, a sociopath, a psychopath, and having a borderline personality disorder. Miller compared Dunn to Bernie Madoff, Bill Cosby, Ray Rice, and Adrian Peterson, all of whom he characterized as "abusers," and stated "abusers must be held accountable for their actions. If there are no consequences, they will continue to do harm."

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[4] *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 134A.001–.008 (West Supp. 2015).

[5] *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 123.001–.004 (West 2011).

[6] *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 134.001–.005 (West 2011 & Supp. 2015).

[7] *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 143.001–.002 (West 2011).

Miller encouraged members of the Board of Directors at the school attended by his and Dunn's daughter to remove Dunn from the Board stating, "[a]s we saw in the NFL this year, at ESD a few years ago, and at Penn State, institutions sometimes reflexively react to abuse allegations by attempting to sweep them under the rug. This kind of cowardice is indefensible." Although not all items were attached to each of the communications, Miller attached to certain of the communications the photographs of Dunn's text messages with Bates, clips of recordings of conversations he had with Dunn in their home, a photograph of his father in intensive care,[8] and the General Ledger. He also included links to websites for a movie which he represented was "a portrayal of malignant narcissism" by a woman, an article entitled "Rethinking Female Sociopathy," an article that he claimed showed Dunn had lied to the press about the reason for closing the DBC, and the Wikipedia definition of "victim playing." As relevant to this appeal, appellees requested that Miller be enjoined from using and disclosing the Gallery's confidential information and from improperly interfering with appellees' business, employees, customers, and artists.

Miller filed a motion to dismiss under the TCPA, arguing he was entitled to the dismissal of the lawsuit because appellees were public figures and his communications were related to a good, product, or service in the marketplace, economic or community well-being, or a judicial proceeding.[9] Miller relied on appellees' pleadings, the pleadings surrounding Dunn's request for a confidentiality order in the divorce proceedings, the order of the divorce court vacating the confidentiality order, a letter he wrote to "Betsy and Kate," and an email he sent to members of

[8] Miller's father had a heart attack that Miller believed was caused by the stress of the divorce proceedings. Miller attached the photograph of his father to one of his communications to a customer of the Gallery and informed Bates about his father's heart attack because he wanted them to know that, by providing the Gallery income that had allegedly given Dunn the resources to continue the "legal onslaught" against him, the customer and the artist were indirectly responsible for his father's heart attack.

[9] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(3)–(4), (7) (defining communications covered by the TCPA).

the board of trustees of the school Dunn and Miller's daughter attended. Appellees opposed the motion and requested sanctions.

The trial court held an evidentiary hearing on appellees' request for injunctive relief. During the hearing Miller admitted sending all of the complained-about letters and emails, but claimed he sent the communications to protect his reputation and to show that Dunn had made false statements about him. Dunn testified Miller's communications to artists she represented, employees of the Gallery and their relatives, and the Gallery's customers were interfering with the Gallery's contractual and employment relationships. She also testified the harm to her reputation caused by the communications was affecting her and the Gallery's goodwill.

The trial court granted appellees' request for a temporary injunction. The trial court found appellees had established a probable right to relief with respect to their claims under the UTSA, the HCA, and the ICA, and for tortious interference with business relations, defamation and business disparagement, and invasion of privacy. The trial court also found appellees were threatened with irreparable harm from Miller's conduct because the:

> wrongful conduct has been repetitive and ongoing and has jeopardized [appellees] Confidential Information, employment relations, existing and prospective business relationships, reputation and the goodwill of Dunn and the [Gallery]; [Miller] has engaged in these activities knowing their exacerbating effect on Dunn's health and her physical ability to work and operate the [Gallery]; an imminent and irreparable harm to the judicial process will deprive [appellees] of a just resolution of their dispute; this judicial action represents the least restrictive means to prevent the threatened harm; [Miller's] wrongful, damaging conduct has occurred and will continue to occur if not enjoined; and [appellees] will suffer immediate and irreparable harm for which they have no adequate remedy at law.

The trial court specifically ordered:

> Miller, and his agents[,] servants, employees and anyone in active concert or participation with him who receive actual notice of this Order ("Enjoined Parties") is/are hereby enjoined as follows:
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> 1. Enjoined Parties shall not use, disclose, publish, copy, reproduce or distribute, directly or indirectly, the Confidential Information and/or Trade Secrets of [appellees] (including the General Ledger), in whole or in part, for any reason,

including any information derived from such Confidential Information or Trade Secrets, including the General Ledger;

2. Enjoined Parties shall not use, disclose, publish, copy, reproduce or distribute, directly or indirectly, any information obtained by Defendant Miller in violation of the Harmful Access by Computer Act and/or Chapter 33 of the Texas Penal Code, including any emails, voice mail messages, text messages, phone logs or other data originating from Plaintiff Dunn's mobile or smart phone;

3. Enjoined Parties shall not intercept the contents of Plaintiff Dunn's communication(s) through the use of an electronic, mechanical, or other device without the consent of a party to the communication as provided in Section 123.004(1) of the Interception of Communications Act or use or divulge information that Defendant Miller obtained by intercepting or recording the private conversation(s) between Dunn and other third parties in Defendant's absence;

4. Enjoined Parties shall not use, disclose, publish, copy or distribute, directly or indirectly, any information, including recordings or audio clips, obtained by Defendant Miller as a result of an invasion of Dunn's privacy, specifically including the contents, in whole or in part, of the surreptitiously recorded conversations that occurred of Plaintiff Dunn in the privacy of the parties' residence;

5. Enjoined Parties shall not willfully and intentionally interfere with the consignment agreements or employment relationships between artists and employees who are known by Enjoined Parties to be artists and employees of Dunn and/or the [Gallery] by: (a) using Confidential Information; (b) attempting to divert such artists to another art consultant or dealer; (c) using information obtained in violation of the Texas Harmful Access by Computer Act; (d) using information that Enjoined Parties obtained by intercepting private conversations between Dunn and other third parties' [sic] in Defendant's absence; and/or (e) disclosing surreptitiously recorded conversations that occurred of Plaintiff Dunn in the privacy of the parties' residence[;]

6. Enjoined Parties shall not intentionally and maliciously interfere with prospective business relationships between artists, collectors, curators, clients, [or] customers known to Enjoined Parties to be a prospective artist, client, collector, curator, or customer of Dunn and/or the [Gallery] by: (a) using Confidential Information; (b) using information obtained in violation of the Texas Harmful Access by Computer Act; (c) using information that Enjoined Parties obtained by intercepting private conversations between Dunn and other third parties' [sic] in Defendant's absence; and/or (d) disclosing surreptitiously recorded conversations that occurred of Plaintiff Dunn in the privacy of the parties' residence [;]

7. Enjoined Parties shall not communicate to any client or collector, or prospective client or collector, who is known by Enjoined Parties to be a client or

> collector, or prospective client or collector, of Dunn and/or the [Gallery], that Dunn (a) committed perjury in the divorce proceedings between Dunn and Miller; (b) committed sexual misconduct or adultery while married to Miller; and/or (c) forced her former business partner out of the gallery "without any compensation" [;]
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> 8. The provisions of Paragraphs 5, 6, and 7 do not apply to The Hockaday School Board Leadership or parents of students attending The Hockaday School.

At the hearing on Miller's motion to dismiss under the TCPA, appellees relied on the testimony from the hearing on their request for injunctive relief. The trial court denied Miller's motion to dismiss under the TCPA, found the motion was frivolous within the meaning of section 27.009(b) of the civil practice and remedies code, and awarded costs and reasonable attorney's fees incurred by appellees in opposing the motion.[10]

Standard of Review and Applicable Law

A temporary injunction is an extraordinary remedy and does not issue as a matter of right. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). The purpose of a temporary injunction is to preserve the status quo of the litigation's subject matter pending trial on the merits. *Id.* The status quo is defined as, "the last, actual, peaceable, non-contested status which preceded the pending controversy." *In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004) (orig. proceeding). To obtain a temporary injunction, the applicant must plead and prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *Butnaru*, 84 S.W.3d at 204. An injury is irreparable if the injured party cannot be adequately compensated in damages or if the damages cannot be measured by any certain pecuniary standard. *Id.*

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[10] The trial court instructed appellees' counsel to file an affidavit reflecting the costs and reasonable attorneys' fees incurred. Although appellees filed the ordered affidavit, the trial court did not make a finding regarding the amount of costs and fees awarded to appellees prior to Miller filing this interlocutory appeal of the trial court's order denying the motion to dismiss under the TCPA. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(12) (West Supp. 2015) (party may file interlocutory appeal of order denying motion to dismiss filed under section 27.003 of civil practice and remedies code); *Id.* § 51.014(b) (an interlocutory appeal under section 51.014(a)(12) stays all other proceedings in trial court pending resolution of appeal).

We review a trial court's order granting a request for a temporary injunction under an abuse of discretion standard. *Id.*; *Marketshare Telecom, L.L.C. v. Ericsson, Inc.*, 198 S.W.3d 908, 916 (Tex. App.—Dallas 2006, no pet.). In reviewing the trial court's decision, we view the evidence in the light most favorable to the trial court's order and indulge every reasonable inference in its favor. *Graham Mortg. Corp. v. Hall*, 307 S.W.3d 472, 478 (Tex. App.—Dallas 2010, no pet.). We may not substitute our judgment for the trial court's unless the trial court's action was so arbitrary that it exceeded the bounds of reasonable discretion. *Butnaru*, 84 S.W.3d at 204. The trial court does not abuse its discretion by making a decision based on conflicting evidence. *Marketshare Telecom, L.L.C.*, 198 S.W.3d at 916 (citing *Tom James of Dallas, Inc. v. Cobb*, 109 S.W.3d 877, 883 (Tex. App.—Dallas 2003, no pet.)). However, the trial court abuses its discretion when it misapplies the law to established facts or when the evidence does not reasonably support the trial court's determination of the existence of probable injury or probable right to recovery. *Id.* We review de novo any determinations on questions of law that the trial court made in support of the order. *Id.*

Compliance with Rule 683

In his second issue, Miller asserts the temporary injunction is void because it fails to meet the requirements of rule of civil procedure 683. Miller specifically argues the order fails to adequately describe the imminent, irreparable harm appellees stand to suffer and why they do not have an adequate remedy at law.

A temporary injunction must comply with the requirements of rule of civil procedure 683. *See* TEX. R. CIV. P. 683; *Interfirst Bank San Felipe, N.A. v. Paz Constr. Co.*, 715 S.W.2d 640, 641 (Tex. 1986) (per curiam) ("The requirements of Rule 683 are mandatory and must be strictly followed."). In relevant part, rule 683 requires every order granting a temporary injunction to state the reasons for its issuance, be specific in terms, and describe with reasonable

detail and not by reference to the complaint or other document, the acts sought to be restrained. TEX. R. CIV. P. 683; *Reliant Hosp. Partners, LLC v. Cornerstone Healthcare Grp. Holdings, Inc.*, 374 S.W.3d 488, 495 (Tex. App.—Dallas 2012, pet. denied). The purpose of rule 683's specificity requirement is to ensure that parties are adequately informed of the acts they are enjoined from doing and the reasons for the injunction. *El Tacaso, Inc. v. Jireh Star, Inc.*, 356 S.W.3d 740, 744 (Tex. App.—Dallas 2011, no pet.); *see also Lasser v. Amistco Separation, Prods., Inc.*, No. 01-13-00690-CV, 2014 WL 527539, at *3 (Tex. App.—Houston [1st Dist.] Feb. 6, 2014, no pet.) (mem. op.).

The trial court's order stating its reasons for granting a temporary injunction must be specific and legally sufficient on the face of the order. *Reliant Hosp. Partners, LLC*, 374 S.W.3d at 495. To comply with rule 683, the trial court must set out in the order the reasons the court deems it proper to issue the injunction, including the reasons why the applicant will suffer injury if the injunctive relief is not ordered. *Id.* (citing *El Tacaso, Inc.*, 356 S.W.3d at 744); *In re Chaumette*, 456 S.W.3d 299, 305 (Tex. App.—Houston [1st Dist.] 2014, no pet.). The explanation must include specific reasons and not merely conclusory statements. *In re Chaumette*, 456 S.W.3d at 305. Mere recitals regarding harm are insufficient. *Id.* "When a temporary injunction order does not adhere to the requirements of Rule 683 the injunction order is subject to being declared void and dissolved." *Interfirst Bank San Felipe N.A.*, 715 S.W.2d at 641; *see also Qwest Commc'ns Corp. v. AT&T Corp.*, 24 S.W.3d 334, 337 (Tex. 2000) (per curiam).

The trial court found in the temporary injunction that the General Ledger was a trade secret and confidential information of the Gallery and that Miller had distributed the General Ledger without appellees' knowledge or consent; Miller had communicated with employees of the Gallery or their relatives with the intent to disrupt the employment relationship between the

Gallery and its employees; Miller had communicated with artists represented by Dunn and customers of the Gallery with the intent to interfere with those business relationships; and appellees had suffered, and would continue to suffer, irreparable harm for which there was no adequate remedy at law because Miller's conduct jeopardized appellees' confidential information, employment relations, existing and prospective business relationships, reputation, and goodwill.

"An injury is irreparable if the injured party cannot be adequately compensated in damages or if the damages cannot be measured by any certain pecuniary standard." *Butnaru*, 84 S.W.3d at 204. The interruption of business relations and the disclosure of trade secrets can constitute irreparable harm that entitles the applicant to injunctive relief. *See Dickerson v. Acadian Cypress & Hardwoods, Inc.*, No. 09-13-00299-CV, 2014 WL 1400659, at *5 (Tex. App.—Beaumont Apr. 2014, no pet.) (mem. op.) (impact of interruption of relationships with clients is difficult, if not impossible, to fully measure); *Salas v. Chris Christensen Sys., Inc.*, No. 10-11-00107-CV, 2011 WL 4089999, at *8 (Tex. App.—Waco Sept. 14, 2011, no pet.) (mem. op.) (disclosure and misuse of trade secrets are examples of irreparable harm entitling an applicant to injunctive relief). We conclude the trial court's findings of the probable imminent and irreparable harm that appellees will suffer if injunctive relief is not granted are sufficiently specific to comply with the requirements of rule 683. We resolve Miller's second issue against him.

Prior Restraint on Right To Free Speech

In his first issue, Miller argues that paragraph 7 of the temporary injunction, which enjoins him from communicating to any client or collector, or prospective client or collector, that Dunn committed perjury in the divorce proceedings, committed sexual misconduct or adultery while married to Miller, or forced Brown out of the DBC "without any compensation," is an

unconstitutional prior restraint on his right to free speech under the Texas and United States Constitutions.

The trial court found the enjoined comments constituted defamation that tended to injure Dunn's reputation and expose her to public hatred, contempt, or ridicule; cause financial injury; and impeach Dunn's honesty, integrity, virtue, or reputation. The trial court further found the statements were false and misleading and tended to injure appellees in their office, business, profession, or occupation. Finally, the trial court found the statements that Dunn committed perjury and adultery were defamatory per se.

A judicial order that forbids certain communications before they occur constitutes a prior restraint on speech. *Dibon Solutions, Inc. v. Nanda*, No. 05-12-01112-CV, 2013 WL 3947195, at *2 (Tex. App.—Dallas July 29, 2013, no pet.) (mem. op.) (citing *Alexander v. United States*, 509 U.S. 544, 550 (1993)). Prior restraints on the right to free speech under the United States and Texas Constitutions are heavily disfavored and are presumptively unconstitutional. *Kinney v. Barnes*, 443 S.W.3d 87, 89, 90 (Tex. 2014), *cert. denied*, 135 S. Ct. 1164 (2015); *Davenport v. Garcia*, 834 S.W.2d 4, 9 (Tex. 1992). The proponent seeking such a restraint therefore "carries a heavy burden of showing justification for the imposition of such a restraint." *Kinney*, 443 S.W.3d at 94 (quoting *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

"The traditional rule of Anglo-American law is that equity has no jurisdiction to enjoin defamation." *Id.* at 95 (quoting Edwin Chemerinsky, *Injunctions in Defamation Cases*, 57 SYRACUSE L. REV. 157, 167 (2007)). Further, a trial court generally may not prevent a person from referring negatively about a business. *Hajek v. Bill Mowbray Motors, Inc.*, 647 S.W.2d 253, 255 (Tex. 1983) (per curiam). Rather, the remedy for defamation is an award of damages, not the prevention of the right to speak freely. *Kinney*, 443 S.W.3d at 95, 99; *see also Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 22–23 (1990) ("[I[mperfect though it is, an action for

damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored.”). Injunctive relief in defamation or business disparagement actions may be permissible “only when essential to the avoidance of an impending danger,” and when it is the least restrictive means of preventing that harm. *Kinney*, 443 S.W.3d at 95; *Davenport*, 834 S.W.2d at 9; *Ex parte Tucci*, 859 S.W.2d 1, 5–6 (Tex. 1993).

There is no evidence in this case that Miller’s speech presents any impending danger. *See Davenport*, 834 S.W.2d at 10 (“[O]nly an imminent, severe harm can justify prior restraint.”); *see also Kinney*, 443 S.W.3d at 95. Accordingly, the broad language of paragraph 7 of the temporary injunction constitutes an unconstitutional prior restraint on free speech, to which no exception applies. We resolve Miller’s first issue in his favor and modify the temporary injunction to delete paragraph 7. *See Marketshare Telecom, L.L.C.*, 198 S.W.3d at 917 (“Courts will modify a temporary injunction by deleting the language from the injunction that constitutes an unconstitutional prior restraint.”).

Harm

In his third issue, Miller asserts the trial court erred by granting injunctive relief because appellees failed to meet their burden of establishing a probable, imminent, irreparable injury for which they have no adequate remedy at law. Miller specifically argues appellees were not entitled to injunctive relieve because they delayed seeking the temporary injunction and failed to offer any evidence of an irreparable injury.

Relying on federal authority,[11] Miller first argues that Dunn knew about his letters and emails by at least November 2014, but appellees did not file suit until February 11, 2015, and this delay “rebuts any presumption of imminent, irreparable harm.” “However, Texas caselaw

[11] *See Tough Traveler, Ltd. v. Outbound Prod.*, 60 F.3d 964, 968 (2d Cir. 1995); *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985); *Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1193 (5th Cir. 1975); *Gonannies, Inc. v. Goaupair.com, Inc.*, 464 F.Supp.2d 603, 609 (N.D. Tex. 2006).

does not prevent injunctive relief merely because a potential plaintiff did not file a claim as quickly as possible." *Garth v. Staktek Corp.*, 876 S.W.2d 545, 550 (Tex. App.—Austin 1994, writ dism'd w.o.j.); *see also K&G Oil Tool & Serv. Co. v. G&G Fishing Tool Serv.*, 314 S.W.2d 782, 790–91 (Tex. 1958) (under facts of case, one-year delay between discovery of defendant's conduct and seeking injunctive relief did not bar relief). Rather, the issue is whether the plaintiff's delay in seeking the relief placed the party to be restrained in a worse position than if there had been prompt action. *Huff v. Tippitt*, 452 S.W.2d 523, 525 (Tex. App.—San Antonio 1970, no writ) ("Nor can [plaintiff's] delay in seeking judicial relief [through, in part, a temporary injunction] support a plea of laches or waiver, since there is no evidence that the delay, while plaintiff was seeking extra-judicial means of dissuading defendant from continuing his actions, resulted in any injury to defendant."); *Los Angeles Heights Indep. Sch. Dist. v. Chestnut*, 287 S.W. 693 (Tex. Civ. App.—San Antonio 1926, no writ) ("Whether a delay in seeking equitable redress will estop a party from obtaining redress does not depend upon the lapse of time alone, but upon all the circumstances attending the case.").

In this case, there is no evidence that appellees' three-month delay in filing suit harmed Miller or placed him in a worse position than if suit had been filed in November 2014. Accordingly, we cannot conclude appellees' delay in filing suit prohibited them from seeking injunctive relief.

Miller also contends appellees failed to offer evidence of an irreparable injury for which they did not have an adequate remedy at law. An injury is irreparable if damages would not adequately compensate the injured party or if they cannot be measured by any pecuniary standard. *Butnaru*, 84 S.W.3d at 204. However, an injunction is not proper when the claimed injury is merely speculative. *Lynd v. Bass Pro Outdoor World, Inc.*, No. 05-12-00968-CV, 2014 WL 1010120, at *8 (Tex. App.—Dallas Mar. 12, 2014, pet. denied) (mem. op.); *Frequent Flyer*

Depot, Inc. v. Am. Airlines, Inc., 281 S.W.3d 215, 227 (Tex. App.—Fort Worth 2009, pet. denied). Moreover, fear and apprehension of injury are insufficient to support a temporary injunction. *Frequent Flyer Depot, Inc.*, 281 S.W.3d at 227.

Dunn testified the value of the Gallery was based on her relationships with artists, museums, and collectors. The Gallery could not be maintained without the goodwill associated with Dunn's reputation and the trust and confidence placed in her by the employees and customers of the Gallery and the artists she represents. In Dunn's opinion, Miller's communications to the artists she represents as well as to the employees and customers of the Gallery were impairing her relationships with those individuals. Although Dunn did not know his reason for doing so, one artist terminated his relationship with appellees after receiving a communication from Miller. Dunn believed Miller was attempting to destroy her business through the communications and his conduct had impaired the goodwill she had built over a period of twenty-five years. The trial court found that Miller's conduct had jeopardized existing business relationships, reputation, and goodwill of appellees.

Disruption to a business can constitute irreparable harm. *Id.* at 228; *David v. Bache Halsey Stuart Shields, Inc.*, 630 S.W.2d 754, 757 (Tex. App.—Houston [1st Dist.] 1982, no writ) ("This harm would not only disrupt the organized business dealings of [plaintiff] but would also threaten customer confidence in [plaintiff's] handling of their private affairs, and probably cause [plaintiff] to lose not only customers but profits as well."). Further, "assigning a dollar amount to such intangibles as a company's loss of clientele, goodwill, marketing techniques, and office stability, among others, is not easy." *Frequent Flyer Depot, Inc.*, 281 S.W.3d at 228; *see also Martin v. Linen Sys. for Hosps., Inc.*, 671 S.W.2d 706, 710 (Tex. App.—Houston [1st Dist.] 1984, no writ).

Dunn also testified the General Ledger is a trade secret of the Gallery and was a confidential document that showed exactly how the Gallery operates. It contained confidential information pertaining to the Gallery and its customers and artists. According to Dunn, the information in the General Ledger could be used to the Gallery's competitive disadvantage and it would be harmful to the Gallery for the information in the General Ledger to be made publicly available. The trial court found that Miller's conduct had jeopardized appellees' confidential information.

The owner of a trade secret may be granted injunctive relief to prevent disclosure of the information. *K & G Oil Tool & Serv. Co.*, 314 S.W.2d at 790 (stating protection of trade secrets is well-recognized objective of equity); *Halliburton Energy Servs., Inc. v. Axis Technologies, LLC*, 444 S.W.3d 251, 257 (Tex. App.—Dallas 2014, no pet.). This relief is intended to protect more than just secrecy; it is also intended to protect against violence to the confidential relationship governing the acquisition of confidential information. *Mabrey v. SandStream, Inc.*, 124 S.W.3d 302, 310–11 (Tex. App.—Fort Worth 2003, no pet.); *see also Keystone Life Ins. Co. v. Marketing Mgmt., Inc.*, 687 S.W.2d 89, 92 (Tex. App.—Dallas 1985, no writ) ("The use of confidential information to gain access to customers of a competitor has been recognized as a ground for injunctive relief because of the difficulty of establishing the amount of damages.").

We conclude the evidence that Miller was disrupting appellees' business relationships and disclosing appellees' trade secrets and confidential information was sufficient to support the trial court's finding of probable imminent, irreparable injury to appellees. We resolve Miller's third issue against him.

Probable Right to Recovery

In his fourth issue, Miller asserts the trial court erred by granting injunctive relief because appellees failed to meet their burden of proving a probable right of recovery on any of their

pleaded causes of action. As the applicants for injunctive relief, appellees had the burden of establishing they had a probable right to the relief sought. *Butnaru*, 84 S.W.3d at 204. They were, therefore, required to allege a cause of action and offer evidence that tends to support the right to recover on the merits. *Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993) (per curiam); *see also Dallas Anesthesiology Assocs., P.A. v. Tex. Anesthesia Grp., P.A.*, 190 S.W.3d 891, 896–97 (Tex. App.—Dallas 2006, no pet.) ("A probable right to recover may be proven by alleging the existence of a right and presenting evidence tending to show that right is being denied."). However, appellees were not required to establish they will prevail on final trial because the ultimate merits of the case were not before the trial court. *Walling*, 863 S.W.2d at 58; *Graham Mortg. Corp.*, 307 S.W.3d at 477. Rather, the question before the trial court was whether appellees were entitled to preservation of the status quo pending trial on the merits. *Walling*, 863 S.W.2d at 58.

Violations of ICA

Miller first challenges paragraph 3 of the temporary injunction, which enjoined him from intercepting Dunn's communications in violation of the ICA or using or divulging information that he obtained by intercepting or recording communications between Dunn and other third parties in Miller's absence. As relevant to this appeal, a party to a communication may sue a person who: (1) intercepts, attempts to intercept, or employs or obtains another to intercept or attempt to intercept the communication; or (2) uses or divulges information that he knows or reasonably should know was obtained by interception of the communication. TEX. CIV. PRAC. & REM. CODE ANN. § 123.002(a)(1)–(2). Interception of a communication is defined by the ICA to mean "the aural acquisition of the contents of a communication through the use of an electronic, mechanical, or other device that is made without the consent of a party to the communication." *Id.* § 123.001(2).

Miller admitted during the temporary injunction hearing that he placed a recording device in Dunn's car and recorded Dunn's conversations on that device. Dunn testified she did not consent to the recordings and there was no evidence that any third-party who was involved in those conversations consented to those recordings. Accordingly, Dunn established she had a probable right to recover on her claims that Miller violated the ICA by intercepting communications through the use of a recording device without the consent of any party to the communication.

Miller next argues paragraph 3 of the temporary injunction exceeds the scope of the pleadings and appellees were unable to show imminent harm because there was no evidence he possessed any recordings between Dunn and any third-party or ever transmitted any recording of a conversation between Dunn and a third-party to anyone. However, appellees pleaded that Miller violated the ICA by attempting to intercept and intercepting Dunn's communications by concealing a digital recorder in her car and, using the digital recorder, Miller intercepted and acquired contents of Dunn's communications through the use of an electronic, mechanical, or other device without the consent of any party to the communications. Dunn testified the information from the recording device placed in her car was transcribed onto the log she found on Miller's computer, supporting a finding that Miller possessed these recordings. An injunction prohibiting further interception, attempted interception, or divulgence or use of the information obtained by an intercepted communication is specifically authorized by the ICA. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 123.004(1). On this record, we cannot conclude the trial court abused its discretion by enjoining Miller from intercepting Dunn's communications in violation of the ICA or by transmitting any recording of Dunn's communications that he obtained by violating the ICA.

Invasion of Privacy

Miller next contends the trial court abused its discretion by enjoining him, in paragraph 4 of the temporary injunction, from disclosing, publishing, copying, or distributing any information, specifically including the contents of surreptitiously recorded conversations between Miller and Dunn, obtained as a result of an invasion of Dunn's privacy. As relevant to paragraph 4 of the temporary injunction, appellees alleged Miller invaded Dunn's privacy by surreptitiously recording his conversations with Dunn in the privacy of their home. Miller argues he consented to the recording of his conversations with Dunn and, therefore, the recordings did not violate the ICA and there was no evidence to support a common law invasion of privacy claim.

Texas recognizes several forms of invasion of privacy, including intrusion upon a person's seclusion and public disclosure of private facts. *Cain v. Hearst Corp.*, 878 S.W.2d 577, 578 (Tex. 1994); *Blanche v. First Nationwide Mortg. Corp.*, 74 S.W.3d 444, 454 (Tex. App.—Dallas 2002, no pet). The trial court found appellees established a probable right to recover based on both these means of invasion of privacy.[12] We turn first to the trial court's determination that appellees established a probable right to recover on an invasion of privacy claim based on Miller's intentional intrusion on Dunn's seclusion.

A common law right to privacy exists under Texas law. *Billings v. Atkinson*, 489 S.W.2d 858, 860 (Tex. 1973); *Webb v. Glenbrook Owners Ass'n, Inc.*, 298 S.W.3d 374, 387 (Tex. App.—Dallas 2009, no pet.). The Texas Constitution protects personal privacy from unreasonable intrusion. *Tex. State Emps. Union v. Tex. Dep't of Mental Health & Mental*

[12] The trial court also found that Miller committed an invasion of privacy by publicly communicating a matter that placed Dunn in a false light in the public eye in a manner that would be highly offensive to a reasonable person of ordinary sensibilities. The Texas Supreme Court has refused to recognize an independent claim for invasion of privacy by placing a person in a false light, and instead addressed these claims under a defamation cause of action. *See Cain.*, 878 S.W.2d at 579; *Pyle v. Hebrank*, No. 01-12-00276-CV, 2013 WL 269121, at *3 n.1 (Tex. App.—Houston [1st Dist.] Jan. 24, 2013, no pet.) (mem. op.).

Retardation, 746 S.W.2d 203, 205 (Tex. 1987); *Webb*, 298 S.W.3d at 387. The elements of a claim for invasion of privacy by intrusion upon a person's seclusion are: (1) an intentional intrusion upon the seclusion, solitude or private affairs of another, which (2) would be highly offensive to a reasonable person. *Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex. 1993); *Webb*, 298 S.W.3d at 387. The intrusion must be unjustified or unwarranted. *Billings*, 489 S.W.2d at 860; *Vaughn v. Drennon*, 202 S.W.3d 308, 320 (Tex. App.—Tyler 2006, no pet.). This type of invasion of privacy is generally associated with either a physical invasion of a person's property or eavesdropping on another's conversation with the aid of wiretaps, microphones, or spying. *Vaughn*, 202 S.W.3d at 320; *Clayton v. Wisener*, 190 S.W.3d 685, 696 (Tex. App.—Tyler 2005, pet. denied). "The core of this claim is the offense of prying into the private domain of another, not publication of the results of such prying." *Blanche*, 74 S.W.3d at 455.

"[N]othing in the Texas Constitution or our common law suggests that the right of privacy is limited to unmarried individuals." *Clayton v. Richards*, 47 S.W.3d 149, 155 (Tex. App.—Texarkana 2001, pet. denied); *see also Collins v. Collins*, 904 S.W.2d 792, 797 (Tex. App.—Houston [1st Dist.] 1995) (en banc), *writ denied*, 923 S.W.2d 569 (Tex. 1996) (per curiam). A spouse's actions, whether personally or through an agent, in making a surreptitious recording of the other spouse, who believes she is in a state of complete privacy, could be an invasion of privacy. *Richards*, 47 S.W.3d at 156 ("[T]he videotaping of a person without consent or awareness when there is an expectation of privacy goes beyond the rights of a spouse because it may record private matters, which could later be exposed to the public eye."). The fact that a recording can be retained, reproduced, and distributed may be considered in determining whether an invasion of privacy occurred. *Baugh v. Fleming*, No. 03-08-00321-CV, 2009 WL 5149928, at *3 (Tex. App.—Austin Dec. 31, 2009, no pet.) (mem. op.)

Miller admits he recorded conversations with Dunn in the privacy of their home and that Dunn was unaware the conversations were being recorded. Miller asserts, however, that because he consented to the conversations being recorded, he did not violate the ICA by making the recording. The ICA creates a statutory cause of action for an individual whose communications are intercepted in violation of the ICA. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 123.002(a). However, there is nothing in the ICA that precludes a common law claim for invasion of privacy for communications not covered by the ICA.[13] "The right of privacy is a right distinctive in itself and not incidental to some other recognized right for breach of which an action for damages will lie. A violation of the right is a tort." *Billings*, 489 S.W.2d at 861.

We conclude the trial court did not abuse its discretion by determining appellees have established a probable right to recover on their invasion of privacy claim based on Miller's intrusion upon Dunn's seclusion. Accordingly, we need not consider whether appellees also established a probable right to recover on their invasion of privacy claim based on Miller's public disclosure of private facts. *See* TEX. R. APP. P. 47.1.

HACA

Miller next challenges paragraph 2 of the temporary injunction in which the trial court enjoined him from using, disclosing, publishing, copying, reproducing, or distributing any information he obtained in violation of the HACA and/or chapter 33 of the penal code, including any emails, voice mail messages, text messages, phone logs or other data originating from Dunn's mobile or smart phone. Miller admits he took screen shots of information contained on Dunn's cell phone, but asserts taking screen shots does not qualify as "access" under the

[13] In *In re Bates*, 555 S.W.2d 420, 431 (Tex. 1977), the supreme court concluded there was not an unlawful intrusion onto a person's right to privacy when one party to a recorded conversation disclosed that recording to law enforcement officials. However, that opinion dealt with the person's rights under the Fourth and Fourteenth Amendments to the United States Constitution, not on the availability of a common law cause of action for invasion of privacy. Further, unlike this case, the plaintiff was not in the privacy of his own home at the time the conversation was recorded, *id.* at 433, and there was no evidence the plaintiff thought he was in a state of complete privacy.

statutory scheme and, even if he did access Dunn's cell phone, he had effective consent to do so because the cell phone was community property.

Section 33.02(a) of the penal code provides that a person commits an offense by knowingly accessing a computer without the effective consent of the owner. TEX. PENAL CODE ANN. § 33.02(a) (West Supp. 2015). A "computer" is defined as:

> [A]n electronic, magnetic, optical, electrochemical, or other high-speed data processing device that performs logical, arithmetic, or memory functions by the manipulations of electronic or magnetic impulses and includes all input, output, processing, storage, or communication facilities that are connected or related to the device.

Id. § 33.01(4). Neither party disputes that Dunn's cell phone qualifies as a "computer" under the statute. *See State v. Granville*, 423 S.W.3d 399, 405 n.16 (Tex. Crim. App. 2014) ("In reality, 'a modern cell phone is a computer. . . .'" (quoting *United States v. Wurie*, 728 F.3d 1, 8 (1st Cir. 2013), *aff'd by Riley v. California*, 134 S. Ct. 2473 (2014)). The HACA establishes a civil cause of action for a person who has been injured as a result of a violation of chapter 33, if the conduct constituting the violation was committed knowingly or intentionally. TEX. CIV. PRAC. & REM. CODE ANN. § 143.001(a).

A person "accesses" a computer under the statute by approaching, instructing, communicating with, storing data in, retrieving or intercepting data from, altering data or computer software in, or otherwise making use of any resource of a computer. TEX. PENAL CODE ANN. § 33.01(1). Although Miller argues looking at Dunn's cell phone and photographing the text messages he found on the phone does not meet the definition of "accessing" under the statute, the evidence shows Miller examined both Dunn's phone log and text messages from the cell phone. To examine this information, Miller was required to retrieve the data on the phone. Once he retrieved Dunn's text messages, he photographed some of them. Accordingly, Miller "accessed" Dunn's cell phone within the meaning of chapter 33 of the penal code.

Miller finally argues that his conduct did not violate chapter 33 of the penal code because Dunn's cell phone was community property and, therefore, he had effective consent to access the data on the cell phone.[14] Nothing in chapter 33 of the penal code incorporates community property law for the purpose of establishing ownership of the computer. Rather, the statute defines "owner" as a person who: (1) has title to the property, possession of the property, whether lawful or not, or a greater right to possession of the property than the actor; (2) has the right to restrict access to the property; or (3) is the licensee of data or computer software. *Id.* § 33.01(15). Both Miller and Dunn testified the cell phone belonged to Dunn. Dunn used the cell phone on a daily basis and testified it was the "only way to reach" her. Further, Dunn had the right to place a password on the cell phone and had, at various times, restricted access to the cell phone by use of a password. Miller accessed the cell phone at night, when Dunn was asleep and not using it. Accordingly, the evidence established Dunn had a greater right to possession of the cell phone than did Miller. We conclude the trial court did not abuse its discretion by determining appellees established a probable right to recover on their claims under the HACA.

Misappropriation of Trade Secrets

Miller next contends the trial court erred by enjoining him, in paragraph 1 of the temporary injunction, from using, disclosing, publishing, copying, reproducing, or distributing, appellees' confidential information and/or trade secrets, including the General Ledger, in whole or in part, for any reason, including any information derived from the confidential information and/or trade secrets, because appellees failed to show they owned a trade secret or that he misappropriated a trade secret. Miller also argues that, even if appellees established a likelihood

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[14] As relevant to this appeal, "effective consent" includes "consent by a person legally authorized to act for the owner." TEX. PENAL CODE ANN. § 33.01(12).

of success on this cause of action, the temporary injunction is overbroad and exceeds the scope of the pleadings and the evidence.

A trade secret misappropriation is established by showing a trade secret existed, the trade secret was acquired through a breach of a confidential relationship or was discovered by improper means, and the defendant used the trade secret without the plaintiff's authorization.[15] *Avera v. Clark Moulding*, 791 S.W.2d 144, 145 (Tex. App.—Dallas 1990, no writ); *IAC, Ltd. v. Bell Helicopter Textron, Inc.*, 160 S.W.3d 191, 197 (Tex. App.—Fort Worth 2005, no pet.). When deciding whether to grant a request for a temporary injunction, the trial court does not decide whether the information sought to be protected is a trade secret. *Fox v. Tropical Warehouses, Inc.*, 121 S.W.3d 853, 858 (Tex. App.—Fort Worth 2003, no pet.). Rather, it determines whether the applicant has established the information is entitled to trade secret protection until a trial on the merits. *Id.*; *Ctr. for Econ. Justice v. Am. Ins. Ass'n*, 39 S.W.3d 337, 343 (Tex. App.—Austin 2001, no pet.). That an order is issued granting trade secret protection does not mean the protected information is a trade secret. *Fox*, 121 S.W.3d at 858. Relevant criteria the trial court should consider in determining whether information is entitled to trade secret protection includes: (1) the extent to which the information is known outside the holder's business; (2) the extent to which it is known by employees and others involved in the holder's business; (3) the extent of the measures taken by the holder to guard the secrecy of the information; (4) the value of the information to the holder and its competitors; (5) the amount of effort or money expended by the holder in developing the information; and (6) the ease or

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[15] The UTSA defines a "trade secret" as:

> [I]nformation, including a formula, pattern, compilation, program, device, method, technique, process, financial data, or list of actual or potential customers or suppliers, that:
>
> (A) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
>
> (B) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

TEX. CIV. PRAC. & REM. CODE ANN. § 134A.002 (6).

difficulty with which the information could be properly acquired or duplicated by others. *In re Bass*, 113 S.W.3d 735, 739 (Tex. 2003); *Reliant Hosp. Partners, LLC*, 374 S.W.3d at 499 (applying factors in context of trade secret protection pending trial on merits). A party seeking protection for a trade secret is not required to produce evidence to satisfy all six factors because trade secrets do not fit neatly into each factor every time. *Reliant Hosp. Partners, LLC*, 374 S.W.3d at 499.

According to Dunn, the General Ledger contained confidential information about the Gallery's customers, artists, and vendors. It contained information about the amount a customer paid for any piece of art; whether a particular customer was given a discount and, if so, the amount of the discount; the proportion of the sales proceeds distributed to each artist; and the amounts the Gallery paid to the vendors of certain services. The General Ledger also contained information relating to the Gallery's bank accounts and how much the employees of the Gallery were paid. Dunn testified the General Ledger was not disclosed to anyone who was not associated with the Gallery, the Gallery took steps to protect access to the General Ledger, and only one employee had the password for electronically accessing the document. According to Dunn, the General Ledger provided a "recipe" as to how to operate an art gallery in Dallas, and the Gallery would be placed at a competitive disadvantage if the information in it was obtained by a competing art gallery. We conclude the trial court did not abuse its discretion by determining the General Ledger was entitled to trade secret protection pending trial on the merits. *See id.* at 499 (company's customer lists, pricing information, client information, and marketing strategies have all been recognized as trade secrets); *Waste Mgmt. of Tex., Inc. v. Abbott*, 406 S.W.3d 626, 631 (Tex. App.—Eastland 2013, pet. denied).

Miller next argues appellees failed to establish he misappropriated the General Ledger.[16] The General Ledger was produced to Miller during his and Dunn's divorce proceedings under a confidentiality order entered by the associate judge to allow Miller to obtain a valuation of the Gallery and participate in mediation. Miller argues that, after the confidentiality order was vacated, he was under no duty to keep the General Ledger secret.

However, Miller received the General Ledger knowing it was being produced pursuant to a confidentiality order. There was also evidence Miller performed work for the Gallery, had access to the Gallery's general ledger when he was working there, and knew it contained information that was not publicly available and that the Gallery viewed as confidential. An employee has a duty to not use trade secret information acquired during the employment relationship in a manner adverse to the employer. *Reliant Hosp. Partners, LLC*, 374 S.W.3d at 499; *Fox*, 121 S.W.3d at 858. This obligation survives the termination of the employment. *Reliant Hosp. Partners, LLC*, 374 S.W.3d at 499. Although the General Ledger contained information from a time period when Miller was not employed by the Gallery, he had the requisite relationship with the Gallery that prohibited him from disclosing or using information that he knew was a trade secret of the Gallery. We conclude there was sufficient evidence Miller acquired the General Ledger under circumstances which gave rise to a duty to maintain its secrecy or limit it use, and disclosed that information without appellees' consent, to support the

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[16] The UTSA defines "misappropriation" as:

> (A) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
> (B) disclosure or use of a trade secret of another without express or implied consent by a person who:
>> (i) used improper means to acquire knowledge of the trade secret;
>> (ii) at the time of the disclosure or use, knew or had reason to know that the person's knowledge of the trade secret was:
>>> (a) derived from or through a person who had utilized improper means to acquire it;
>>> (b) acquired under circumstances giving rise to a duty to maintain its secrecy or limit is use; or
>>> (c) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
>>
>> (iii) before a material change of the person's position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

TEX. CIV. PRAC. & REM. CODE ANN. § 134A.002(3).

trial court's determination Miller misappropriated the Gallery's trade secrets or confidential information.

Miller also contends appellees failed to establish a probable right to recover on their misappropriation of trade secrets claim because he never shared the General Ledger with a competitor of the Gallery and his intent in disclosing the General Ledger was to have Dunn removed from the board of trustees at his and Dunn's daughter's school. Miller has cited no authority to support the argument that he may be enjoined only from disclosing a trade secret of the Gallery to a competitor of the Gallery. Further, the UTSA provides that the actual or threatened misappropriation of a trade secret may be enjoined, TEX. CIV. PRAC. & REM. CODE ANN. § 134A.003(a), and in no way limits injunctive relief based on the person to whom the trade secret is being disclosed.

Miller finally argues paragraph 1 of the temporary injunction is overbroad and exceeds the scope of the pleadings and the evidence because it encompasses not only the General Ledger but other undefined "confidential information" and "trade secrets." The temporary injunction does not specifically define every item comprising a trade secret or confidential information of the Gallery. However, this level of detail is not required. *See Lockhart v. McCurley*, No. 10–09–00240–CV, 2010 WL 966029, at *4 (Tex. App.—Waco Mar. 10, 2010, no pet.) (mem.op.). To satisfy the requirement in rule 683 that an injunction order be "specific in terms," the order "must be as definite, clear and precise as possible and when practicable it should inform the defendant of the acts he is restrained from doing. . . ." *San Antonio Bar Ass'n v. Guardian Abstract & Title Co.*, 291 S.W.2d 697, 702 (Tex. 1956); *see also* TEX. R. CIV. P. 683. This is balanced with the practicality that an injunction "must be in broad enough terms to prevent repetition of the evil sought to be stopped." *San Antonio Bar Ass'n*, 291 S.W.2d at 702.

Here, the temporary injunction states that "confidential information" of the Gallery includes client lists, clients' purchase history and pricing information, and the Gallery's general ledgers. The specific examples of the items comprising "trade secrets" and "confidential information," when read in the context of the suit, provided Miller with adequate notice of the information that he is prohibited from using or disclosing. *See Lockhart*, 2010 WL 966029, at *4; *IAC, Ltd.*, 160 S.W.3d at 201–02 (concluding order which prohibited defendant from using "Bell trade secrets and confidential information" was sufficiently specific because injunction as a whole made it clear that this phrase meant "information pertaining to Bell's 206B and OH–58 helicopter blades"). The order leaves nothing to conjecture. *See Lockhart*, 2010 WL 966029, at *4 (concluding injunction adequately informed defendant of prohibited conducted even though terminology used in order was not defined). We conclude paragraph 1 of the temporary injunction is not overbroad by failing to inadequately describe the confidential information that Miller is prevented from disclosing.

Tortious Interference with Business Relations

In paragraphs 5 and 6 of the temporary injunction, the trial court enjoined Miller from interfering with (1) consignment agreements with individuals that Miller knows to be artists represented by appellees, (2) employment relationships with individuals Miller knows to be employed by appellees, and (3) prospective business relations with an artist, collector, curator, client, or customer that Miller knows to be a prospective artist, client, collector, curator, or customer of the Gallery by using confidential information as defined by the temporary injunction, using information obtained in violation of the HACA or the ICA, or by disclosing surreptitiously recorded conversations between Miller and Dunn that occurred in the privacy of the parties' residence. Miller was also enjoined from attempting to divert artists represented by appellees to another art consultant or dealer.

Miller first argues that paragraph 5 of the temporary injunction, which enjoined him from interfering with appellees' existing business relations, should be reversed because appellees failed to establish their right to injunctive relief based on misappropriation of trade secrets, violation of the HACA and the ICA, and invasion of privacy. As set out above, we have concluded the trial court did not abuse its discretion by determining appellees established they had a probable right to recover on these claims.

Miller next attacks paragraph 5 of the temporary injunction on the ground appellees failed to offer evidence of an existing contract with which he allegedly interfered or that he attempted to divert any artist to another consultant or dealer. A party alleging tortious interference with an existing contract must prove that (1) a contract exists that is subject to interference, (2) another person committed a willful and intentional act of interference with the contract, (3) the willful and intentional act was a proximate cause of injury, and (4) actual damages or loss has occurred. *Prudential Ins. Co. of Am. v. Fin. Review Servs, Inc.*, 29 S.W.3d 74, 77 (Tex. 2000). Here, Dunn offered evidence that she had existing agreements with various artists to represent them in selling their art. Miller communicated with Bates and other artists represented by the Gallery, attaching copies of text messages between Dunn and Bates. Miller also attached clips of recordings of conversations he had with Dunn to his communication with Bates. The substance of these communications was that Dunn was a liar, could not be trusted, and eventually would treat the artists unfairly. Miller also implied Dunn was having an affair with Bates. Dunn testified this could cause other artists to believe she was she was giving Bates preferential treatment. Miller encouraged Bates to contact Brown, who Miller represented had been cheated by Dunn, and "make amends" and indicated to two other artists that Brown could use their support. These statements support a finding that Miller was attempting to divert these artists to Brown. Dunn testified that, although she did not know his reason for doing so, one of

the artists contacted by Miller subsequently terminated his relationship with the Gallery, and that her relationship with Bates, whom she described as the Gallery's most important artist, had changed since Miller's communication with him.

Miller also sent letters to one of the Gallery's employees and to the parents of another Gallery employee. Attaching clips of recordings of his conversations with Dunn, Miller represented in these communications that Dunn was a liar, could not be trusted, and eventually would treat the employees unfairly. Although neither of these employees resigned, Dunn believed these communications had impacted her relationship with them.

At this stage of the proceedings, appellees were required only to present evidence tending to support a probable right to recover on the merits. *See Walling*, 863 S.W.2d at 58. Appellees presented evidence of agreements with artists and employees and that Miller attempted to interfere with those agreements. We conclude the trial court did not abuse its discretion by determining appellees had demonstrated a probable right to recover on their claim for tortious interference with existing business relations.

Miller finally argues, as to paragraph 5 of the temporary injunction, that the injunction is overbroad because it defines neither "artist" nor "confidential information." We have addressed Miller's complaint about "confidential information" above. As to the term "artist," the term is well-understood and not ambiguous. We conclude paragraph 5 of the temporary injunction is not overbroad.

Paragraph 6 of the temporary injunction enjoined Miller from interfering with prospective business relationships between appellees and prospective artists, clients, collectors, curators, or customers of appellees. The elements of a claim for tortious interference with prospective business relationships are: (a) a reasonable probability the plaintiff would have entered into a business relationship with a third party; (2) the defendant acted with a conscious

desire to prevent the relationship from occurring or knew the interference was certain or substantially certain to occur as a result of the conduct; (3) the defendant's conduct was an independently tortious or unlawful act; (4) the interference proximately caused the plaintiff injury; and (5) the plaintiff suffered actual damage or loss as a result. *Coinmach Corp. v. Aspenwood Apt. Corp.*, 417 S.W.3d 909, 923 (Tex. 2013). "Independently tortious" conduct is conduct that would violate some other recognized tort duty. *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 713 (Tex. 2001).

Miller contends appellees failed to present any evidence of any business relationships they would have been substantially certain to enter into but for his independently tortious act and did not identify any actual harm resulting from his conduct. We agree there is no evidence of a specific party with whom appellees would have, with a reasonable probability, entered into a business relationship absent Miller's conduct. *See Coinmach Corp.*, 417 S.W.3d at 924 (plaintiff required to not only establish independently tortious conduct, but that the "conduct actually interfered with a reasonably probable contract"). By failing to offer evidence of any business relationship that appellees, with reasonable probability, would have entered into without Miller's interference, appellees failed to establish a likelihood of success on the merits of their claim for tortious interference with prospective business relationships. Accordingly, we modify the temporary injunction to delete paragraph 6. *See Reliant Hosp. Partners, LLC*, 374 S.W.3d at 503 (modifying temporary injunction by deleting paragraph that was overbroad).

Defamation/Business Disparagement

Miller finally challenges paragraph 7 of the temporary injunction, arguing appellees failed to establish a likelihood of success on the merits of their defamation and business disparagement claims because all of his statements were either true or statements of opinion and that the injunction is overbroad. We have already deleted paragraph 7 of the temporary

injunction as an unconstitutional prior restraint on free speech. Accordingly, we need not address these arguments. *See* TEX. R. APP. P. 47.1

Conclusion

We resolve Miller's fourth issue in his favor as to paragraph 6 of the temporary injunction, and modify the temporary injunction to delete paragraph 6. We resolve the remainder of Miller's fourth issue against him.

Attorney's Fees

Miller filed a motion to dismiss appellees' claims under the TCPA. Appellees responded, and moved for attorney's fees and costs as sanctions under chapter 10 of the civil practice and remedies code on the basis Miller's counsel falsely certified "the legal contentions in the motion were warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law" and that the factual allegations in the motion had evidentiary support. The trial court denied Miller's motion, found the motion to be frivolous within the meaning of section 27.009 of the civil practice and remedies code, and awarded appellees costs and reasonable attorney's fees.

In his fifth issue, Miller first contends the trial court erred by awarding appellees attorney's fees under section 27.009 of the civil practice and remedies code because appellees failed to meet their burden of showing the motion was not filed in good faith or was frivolous. The trial court awarded attorney's fees and costs to appellees pursuant to section 27.009 of the civil practice and remedies code, which provides:

> If the court finds that a motion to dismiss filed under this chapter is frivolous or solely intended to delay, the court may award court costs and reasonable attorney's fees to the responding party.

TEX. CIV. PRAC. & REM. CODE ANN. § 27.009(b). The trial court determined Miller's motion was frivolous within the meaning of section 27.009. Miller's brief contains no substantive

analysis or citations to the record to support a contention the trial court erred by making this determination. Accordingly, he has waived this argument on appeal. *See* TEX. R. APP. P. 38.1.

Alternatively, Miller argues, the award of attorney's fees and costs must be reversed because the trial court's order fails to (1) meet the requirements of chapter 10 of the civil practice and remedies code because it does not describe the conduct the trial court determined violated section 10.001 of code and does not explain the basis for the sanction imposed, *see* TEX. CIV. PRAC. & REM. CODE ANN. § 10.005, or (2) describe the conduct, the relationship between the conduct and the award, and the necessity for the severity of the award as required by *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991) (addressing sanctions imposed for discovery abuse under rule of civil procedure 215). However, the trial court did not sanction Miller under chapter 10 of the civil practice and remedies code or pursuant to rule of civil procedure 215. Rather, it awarded appellees attorney's fees and costs after determining Miller's motion to dismiss pursuant to the TCPA was frivolous within the meaning of section 27.009(b). The statute requires no further findings. We resolve Miller's fifth issue against him.

Conclusion

We modify the temporary injunction to delete paragraphs 6 and 7 and, as modified, affirm the temporary injunction. We affirm the trial court's order awarding attorney's fees and costs to appellees under section 27.009(b) of the civil practice and remedies code.

/Robert M. Fillmore/
ROBERT M. FILLMORE
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

BRADLEY B. MILLER, Appellant No. 05-15-00444-CV V. TALLEY DUNN GALLERY, LLC AND TALLEY DUNN, Appellees	On Appeal from the 191st Judicial District Court, Dallas County, Texas, Trial Court Cause No. DC-15-01598. Opinion delivered by Justice Fillmore, Justices Stoddart and O'Neill participating.

In accordance with this Court's opinion of this date, the trial court's March 19, 2015 Temporary Injunction is **MODIFIED** as follows:

Paragraph 6 on page 12 of the Temporary Injunction is deleted.

Paragraph 7 on pages 12 and 13 of the Temporary Injunction is deleted.

It is **ORDERED** that, as modified, the March 19, 2015 Temporary Injunction of the trial court is **AFFIRMED**.

It is **ORDERED** that the trial court's March 18, 2015 Order Denying Miller's Motion to Dismiss is affirmed.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered this 3rd day of March, 2016.