Affirm and Opinion Filed November 19, 2021

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-20-00769-CV

AMIR MIRESKANDARI, Appellant
V.
KEVAN CASEY, Appellee

On Appeal from the 68th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-20-05795

OPINION

Before Justices Molberg, Goldstein, and Smith
Opinion by Justice Molberg

In this accelerated, interlocutory appeal, Amir Mireskandari challenges the trial court's July 23, 2020 order denying his TCPA[1] motion to dismiss Kevan Casey's declaratory judgment claim[2] regarding disparaging statements Casey alleges

[1] "TCPA" refers to the Texas Citizens Participation Act, which is embodied in Chapter 27 of the Texas Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE §§ 27.001–.011. The legislature amended the TCPA effective September 1, 2019, for actions filed on or after that date, as Casey's action was. *See* Act of May 17, 2019, 86th Leg., R.S., ch. 378, § 11, 2019 Tex. Sess. Law Serv. 684, 687. All citations to the TCPA are to the current version unless otherwise indicated.

[2] Mireskandari describes in several ways the matter he seeks to dismiss, referring interchangeably to Casey's "legal action," "legal claim," "action," "lawsuit," "claim," and "claims." We use "claim," both for clarity and consistency, and to convey our view that Casey's pleading includes only a single cause of action—a declaratory judgment action under chapter 37 of the civil practice and remedies code. *See* TEX.

Mireskandari made about him in a separate lawsuit. Casey alleges these statements violated a non-disparagement clause in a prior settlement agreement between the parties, which Mireskandari disputes. In two issues, Mireskandari argues the trial court erred by denying his TCPA motion to dismiss Casey's claim and by not awarding him attorneys' fees. We affirm.

I. BACKGROUND

According to Casey's verified petition, the parties entered into an October 16, 2019 settlement agreement in connection with another lawsuit, in which Mireskandari agreed not to make any public statement that maligns, criticizes, denigrates, or disparages Casey. Both parties attached a copy of that agreement to their TCPA filings in the trial court.

The non-disparagement provision provides:

> Neither Party shall directly or indirectly publish, issue or communicate with any public statement that maligns, criticizes, denigrates, or disparages the other Party. Each Party shall remove any statement about the other Party currently posted on the Internet to the extent it is in control. This section shall not prohibit any Party from truthfully testifying in any court proceeding or pursuant to other legal process.

Casey alleges Mireskandari breached the parties' prior settlement agreement on April 13, 2020, by publicly filing a petition against Mireskandari's former

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CIV. PRAC. & REM. CODE § 37.001–.011. In connection with that cause of action, Casey seeks attorneys' fees, *see id.* § 37.009, as well as ancillary temporary and permanent injunctive relief. *See id.* §§ 65.001, 65.011; TEX. R. CIV. P. 681, 683.

attorney in a separate lawsuit and including in that petition "a whole host of statements that malign, criticize, denigrate or disparage Casey."

Both parties attached to their TCPA filings a copy of Mireskandari's original pleading in that separate lawsuit. Among other statements, that pleading avers that Casey "engaged in what is commonly known as a 'pump-and-dump' scheme in an effort to make millions off of [a company's] stock that he aggressively marketed, then quickly dumped shares."

Casey alleges that "a justiciable controversy exists with respect to the rights and status of the parties to the settlement agreement" because "Mireskandari contends that the agreement allows him to file publicly disparaging statements" and "Casey contends that the agreement clearly and unambiguously does not." Casey also alleges that "[t]his controversy will be resolved by a declaration that the public filing of disparaging statements constitutes a breach of the settlement agreement."

In terms of relief, Casey's pleading requests a declaration with certain language from the trial court—language we include in the table below—as well as his reasonable and necessary attorneys' fees and expenses, and temporary and permanent injunctive relief "enjoin[ing] Mireskandari from continuing to make public disparaging statements about Casey."

In connection with his requests for injunctive relief, Casey alleges he has a probable right to relief on his claim because "Mireskandari has authorized public

statements that malign, criticize, denigrate or disparage Casey, which constitutes a breach of the settlement agreement." He also alleges that if Mireskandari is not enjoined, Casey "will suffer imminent and irreparable harm in the form of, among other things, reputational harm and the loss of business opportunities" and that he has no adequate remedy at law "because the damages to his reputation and business are difficult if not impossible to quantify with any pecuniary standard, and because, on information and belief, Mireskandari will be unable to pay any damages capable of being calculated." Despite his reference to damages, Casey does not request damages in his pleading but does request attorneys' fees.

Mireskandari filed an answer and amended it twice. In his live pleading, Mireskandari includes, among other things, a general denial and counterclaims against Casey for declaratory judgment and breach of contract. In their declaratory judgment claims, in one respect, the relief each party seeks mirrors the other's, in practical effect.

Specifically, the parties request these declarations:

Casey's request:	Mireskandari's request:
"[T]he public filing of disparaging statements *constitutes a breach* of the parties' prior settlement agreement." (emphasis added)	"Mireskandari's filing [of] a meritorious suit in an unrelated matter *does not constitute a breach* of the parties' prior settlement agreement." (emphasis added)

In other respects, Mireskandari's counterclaims differ from Casey's claims, and Mireskandari requests damages and other relief. Because those counterclaims are not before us, we need not discuss them further.

Four weeks after he was served with Casey's lawsuit, Mireskandari filed a TCPA motion to dismiss, arguing that Casey's claim should be dismissed because (1) Casey's action is "based on, related to, or in response to" Mireskandari's right to petition, (2) Casey could not establish a prima facie case with clear and specific evidence, and, in any event, (3) Mireskandari established a defense based on the judicial proceedings privilege, a privilege he includes as a defense in his live pleading.

Casey responded and disputed these arguments. With their TCPA-related filings, both parties submitted evidence that included, but was not limited to, the parties' prior agreement and Mireskandari's pleading in his separate lawsuit.

Roughly two weeks after Mireskandari filed his TCPA motion, Casey filed a traditional motion for partial summary judgment on his claim, requesting all of the relief he sought in his pleading other than attorneys' fees. Mireskandari filed a response in opposition, and in it he argued, in part, that Casey's claims were barred by the judicial proceedings privilege, the same defense Mireskandari relied upon in his TCPA motion. Both parties submitted evidence, and once again, both attached their prior settlement agreement and Mireskandari's pleading in his separate lawsuit.

On July 23, 2020, the trial court denied Mireskandari's TCPA motion by written order. Then, on August 20, 2020—more than twenty days later—the trial court issued a "Judgment for Declaratory and Injunctive Relief" in Casey's favor, granting his motion for partial summary judgment, declaring, in essence, that Mireskandari violated the non-disparagement clause in the parties' prior settlement agreement, and permanently enjoining Mireskandari from doing so. The judgment provided that the court "shall retain jurisdiction to enforce this judgment," and stated:

> [T]he Court, having considered the motion, all related briefing, all admissible summary judgment evidence, and the argument of counsel, finds that the motion should be GRANTED. Specifically, the Court finds that the parties entered into a settlement agreement (the "Settlement Agreement") on October 16, 2019. The Settlement Agreement provides that [Mireskandari] shall not make any public statements that malign, criticize, denigrate, or disparage [Casey]. On April 13, 2020, [Mireskandari filed] a lawsuit against his former lawyer in the 151st District Court of Harris County, Texas, in which [Mireskandari] made statements that malign, criticize, denigrate, or disparage [Casey]. The Court finds that these statements constitute statements that are specifically prohibited by the Settlement Agreement. It is therefore,
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> DECREED that [Mireskandari] breached the Settlement Agreement by making public statements that malign, criticize, denigrate, or disparage [Casey]; it is further,
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> ORDERED, ADJUDGED, AND DECREED that [Mireskandari], and [his] agents, servants, employees, attorneys, and all persons in active concert or participation with [him], are hereby permanently enjoined from making public statements that malign, criticize, denigrate, or disparage [Casey].

On August 24, 2020, four days after that judgment, and thirty-two days after the court's July 23, 2020 order denying Mireskandari's TCPA motion, Mireskandari filed a notice of appeal "relate[d] to the Order denying Mireskandari's Motion to Dismiss Pursuant to the Texas Citizens' Participation Act signed on July 23, 2020." The notice of appeal did not refer to the August 20, 2020 judgment and stated the appeal was accelerated, interlocutory, and timely.

Despite his reference to timeliness, Mireskandari's notice of appeal implicitly acknowledged that his time to file an accelerated, interlocutory appeal had passed, barring an extension,[3] as he indicated a motion for extension of time would be filed within fifteen days after the original deadline. *See* TEX. R. APP. P. 10.5, 26.3.

On August 26, 2020, fourteen days after the original deadline, Mireskandari filed a motion to extend his time to file a notice of appeal. We granted the motion and deemed his notice of appeal timely for jurisdictional purposes.

Mireskandari also filed an "Emergency Motion to Enforce Stay of Trial Court Proceedings and for Sanctions." We granted that motion "to the extent that we clarify the automatic stay under TEX. CIV. PRAC. & REM. CODE § 51.014(b) has been triggered."

[3] *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(12) (denials of TCPA motions may be pursued as accelerated appeals); TEX. R. APP. P. 26.1(b) (in accelerated appeal, notice of appeal must be filed within twenty days after the judgment or order is signed).

II. ISSUES AND ANALYSIS

Mireskandari raises two issues in this appeal, arguing the trial court erred by denying his TCPA motion to dismiss Casey's claim and by not awarding him attorneys' fees. Before we turn to those issues, however, we must first consider whether the procedural history affects our interlocutory jurisdiction.

A. Interlocutory Jurisdiction

We are presented with an unusual situation here: an interlocutory appeal of an order denying a request to dismiss a claim of Casey's that the trial court has now adjudicated in Casey's favor. In this appeal, Mireskandari asks us to reverse the trial court's order, order the trial court to dismiss Casey's claim, and award Mireskandari attorneys' fees. In light of that requested relief, Mireskandari is asking us, at least practically, to undo the effect of the trial court's August 20, 2020 partial summary judgment. The problem, however, is that the judgment is not yet before us or appealable, as we discuss below.

This causes us, in turn, to consider our interlocutory jurisdiction, an issue that neither party questions. Because appellate jurisdiction is never presumed, we are obligated to conduct a sua sponte, de novo review of any issues affecting our jurisdiction. *See Saleh v. Hollinger*, 335 S.W.3d 368, 370 (Tex. App.—Dallas 2011, pet. denied).

"As a general rule, subject only to 'a few mostly statutory exceptions,' parties may only appeal a final judgment." *Elec. Reliability Council of Tex., Inc. v. Panda Power Generation Infrastructure Fund, LLC*, 619 S.W.3d 628, 632 (Tex. 2021) (citation omitted); *see also Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001) (stating same general rule and noting that a "judgment is final for purposes of appeal if it disposes of all pending parties and claims in the record, except as necessary to carry out the decree") (footnotes and related citations omitted).

Among other types of interlocutory orders, a person may appeal an interlocutory order denying a TCPA motion. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(12) (a person may appeal from an interlocutory order of a district court, county court at law, statutory probate court, or county court that denies a motion to dismiss filed under section 27.003 of the TCPA). Doing so triggers an automatic stay of the commencement of a trial and all other proceedings in the trial court pending resolution of the appeal. *See id.* § 51.014(b).

In this case, the automatic stay was not triggered until after the trial court had already issued its August 20, 2020 judgment in Casey's favor.[4]

[4] *See* TEX. CIV. PRAC. & REM. CODE § 51.014(b) (providing that certain interlocutory appeals, including appeals of denials of TCPA motions to dismiss under section 51.014(a)(12), stay the commencement of trial and all other proceedings in the trial court pending resolution of the appeal). The automatic stay provision in section 51.014(b) is triggered by perfection of an interlocutory appeal. *See Goldberg v. EMR (USA Holdings) Inc.*, 594 S.W.3d 818, 824 (Tex. App.—Dallas 2020, pet. denied) (op. on reh'g) ("When a party appeals the denial of its motion to dismiss under the TCPA, the appeal stays the commencement of the trial and 'all other proceedings in the trial court pending resolution of that appeal.'")

Because the August 20, 2020 judgment did not actually dispose of all claims and parties or state with unmistakable clarity that it was a final judgment as to all claims and all parties, the judgment is interlocutory, not final. *See Lehmann*, 39 S.W.3d at 192–93 (without a conventional trial on the merits, an order or judgment is not final for purposes of appeal unless it "actually disposes of every pending claim and party or unless it clearly and unequivocally states that it finally disposes of all claims and all parties").

The August 20, 2020 judgment is not yet appealable, and it will not become appealable unless it is severed from the remaining portion of the case or a final judgment determining the remaining portion of the case is signed. *See Estate of James Tenison v. Brookshire Grocery Co.*, No. 05-21-00455-CV, 2021 WL 3160522, at *1 (Tex. App.—Dallas July 26, 2021, no pet.) (mem. op.) (citing *Loy v. Harter*, 128 S.W.3d 397, 409 (Tex. App.—Texarkana 2004, pet. denied)). Thus, at this stage, the trial court retains plenary power over the August 20, 2020 judgment and may grant a new trial or vacate, modify, correct, or reform that judgment until it becomes final. *In re Panchakarla*, 602 S.W.3d 536, 539–40 (Tex. 2020) (original proceeding).

(quoting TEX. CIV. PRAC. & REM. CODE § 51.014(b)); *In re Univ. of the Incarnate Word*, 469 S.W.3d 255, 257 (Tex. App.—San Antonio 2015, orig. proceeding) (citing section 51.014(b) and stating, in a case involving an interlocutory appeal under section 51.014(a)(8), "An interlocutory appeal under this section triggers a stay of all proceedings in the trial court pending final determination of the appeal.").

This brings us, finally, to the question of mootness. "[A] court cannot decide a case that has become moot during the pendency of the litigation." *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 162 (Tex. 2012) (citation omitted). "[A] case is moot when the court's action on the merits cannot affect the parties' rights or interests." *Id.* (citation omitted). Also, "[a] case becomes moot if, since the time of filing, there has ceased to exist a justiciable controversy between the parties—that is, if the issues presented are no longer 'live,' or if the parties lack a legally cognizable interest in the outcome." *Id.* (citation omitted); *see also Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 586 (Tex. 2017). If a case is or becomes moot, we "must vacate any order or judgment previously issued and dismiss the case for want of jurisdiction." *Heckman*, 369 S.W.3d at 162 (citation omitted).

We have found few authorities addressing the unusual procedural history this case presents. However, *Sinkin & Barretto, P.L.L.C. v. Cohesion Props., Ltd.*, No. 04-20-00106-CV, 2021 WL 1649525, at *2 (Tex. App.—San Antonio Apr. 28, 2021, no pet.) (mem. op.), addresses a similar situation, and our sister court concluded that the interlocutory appeal of an order denying a TCPA motion was not moot when the trial court had already granted an interlocutory judgment on claims that were the subject of the TCPA appeal. In reaching that conclusion, the court distinguished our prior decision in *Kennedy v. Harber*, No. 05-17-01217-CV, 2018 WL 3738091, at *2 (Tex. App.—Dallas Aug. 7, 2018, no pet.) (mem. op.), where we reached the

opposite conclusion regarding mootness in a case involving a final, not interlocutory judgment.[5] We agree that, in a case involving an interlocutory judgment, as we have here, *Kennedy* is distinguishable, and we conclude the appeal is not moot, as a controversy still exists between the parties, who still have a legally cognizable interest in the case outcome. *See Sinkin & Barretto*, 2021 WL 1649525, at *2.

Thus, because the interlocutory judgment does not make this appeal moot, *see id.*, and because our interlocutory jurisdiction over the appeal of a denial of a TCPA motion is clear, *see* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(12), we conclude we have interlocutory jurisdiction to consider this appeal.

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[5] In *Kennedy*, we stated, in part:

> [The TCPA movant] acknowledges that the court's summary judgment addressed the same counterclaims at issue in his motion to dismiss. He cites no legal authority that would allow him to complain of the trial court's failure to dismiss counterclaims that were already defeated by summary judgment. The [nonmovants] argue that [the movant's] chapter 27 claims are moot. A case or an issue becomes moot if a controversy ceases to exist between the parties at any stage of the legal proceedings. *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 586 (Tex. 2017). We are prohibited from deciding moot controversies. *Klein v. Hernandez*, 315 S.W.3d 1, 3 (Tex. 2010). Consequently, we will not opine on the merits of Kennedy's motion to dismiss.
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> We conclude that the trial court's denial of Kennedy's motion to dismiss was proper, that no part of it remains pending, and that Kennedy is not entitled to an award of any kind under chapter 27.

2018 WL 3738091, at *2.

B. Denial of TCPA Motion

We turn, finally, to the two issues before us: whether the trial court erred in denying Mireskandari's TCPA motion to dismiss Casey's claims and in failing to award him attorneys' fees. We conclude it did not, based on the record here.

1. TCPA Purposes and Review Standards

As an anti-SLAPP statute,[6] the TCPA "protects citizens who petition or speak on matters of public concern from retaliatory lawsuits that seek to intimidate or silence them." *In re Lipsky*, 460 S.W.3d 579, 584 (Tex. 2015) (orig. proceeding). The TCPA has a dual purpose: "to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury." TEX. CIV. PRAC. & REM. CODE § 27.002; *see Youngkin v. Hines*, 546 S.W.3d 675, 680 (Tex. 2018) (TCPA is intended to safeguard the constitutional rights of speech, petition, and association "without foreclosing the ability to bring meritorious lawsuits"). We are to construe the TCPA "liberally to effectuate its purpose and intent fully," TEX. CIV. PRAC. & REM. CODE § 27.011(b), but the TCPA "does not abrogate or lessen any other defense, remedy, immunity, or privilege available under

[6] The TCPA is an anti-SLAPP statute. "SLAPP" is an acronym for "Strategic Lawsuits Against Public Participation." *Krasnicki v. Tactical Entm't, LLC*, 583 S.W.3d 279, 282 (Tex. App.—Dallas 2019, pet. denied).

other constitutional, statutory, case, or common law or rule provisions." *Id.* § 27.011(a).

We review de novo a trial court's ruling on a TCPA motion to dismiss. *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 132 (Tex. 2019); *Goldberg*, 594 S.W.3d at 827 (citing *Youngkin*, 546 S.W.3d at 680).

Our review of a TCPA ruling generally involves three steps. First, at step one, the TCPA movant has the burden to demonstrate the nonmovant's legal action is based on or in response to the moving party's exercise of the right of association, right of free speech, or the right to petition. *See* TEX. CIV. PRAC. & REM. CODE §§ 27.003(a), 27.005(b); *Creative Oil*, 591 S.W.3d at 132 (citing prior version of section 27.005(b)).

Second, if the movant meets its step-one burden, the analysis proceeds to step two, where the burden of proof shifts to the nonmovant to establish by clear and specific evidence a prima facie case for each essential element of the claim. *See* TEX. CIV. PRAC. & REM. CODE § 27.005(c); *Creative Oil*, 591 S.W.3d at 132. While "clear and specific" is not defined in the TCPA or at common law, in the context of the TCPA, "clear" has been interpreted to mean "unambiguous, sure, or free from doubt," and "specific" has been interpreted to mean "explicit or related to a particular thing." *Lipsky*, 460 S.W.3d at 590 (cleaned up). A "prima facie case" "refers to evidence sufficient as a matter of law to establish a given fact if it is not rebutted or

contradicted" and "is the minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true." *Id.* (cleaned up).

Third, and finally, if the nonmovant meets its step-two burden, the analysis proceeds to step three, where the burden of proof shifts back to the movant to establish an affirmative defense or other grounds on which the moving party is entitled to judgment as a matter of law, resulting in dismissal if the movant does so. *See* TEX. CIV. PRAC. & REM. CODE § 27.005(d); *Creative Oil*, 591 S.W.3d at 132 (citing prior version of section 27.005(d)).

In conducting our review, we consider, in the light most favorable to the nonmovant, the pleadings, evidence a court could consider under civil procedure rule 166a,[7] and any supporting and opposing affidavits stating the facts on which the liability or defense is based. *See* TEX. CIV. PRAC. & REM. CODE § 27.006(a); *Riggs & Ray, P.C. v. State Fair of Tex.*, No. 05-17-00973-CV, 2019 WL 4200009, at *4 (Tex. App.—Dallas Sept. 5, 2019, pet. denied) (mem. op.) (citation omitted); *Reed v. Centurion Terminals, LLC*, No. 05-18-01171-CV, 2019 WL 2865281, at *3 (Tex. App.—Dallas July 3, 2019, pet. denied) (mem. op.) (citation omitted); *Dyer v. Medoc Health Servs., LLC*, 573 S.W.3d 418, 424 (Tex. App.—Dallas 2019, pet. denied) (citing, in part, the prior version of § 27.006(a)) (other citation omitted).

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[7] *See* TEX. R. CIV. P. 166a.

2. Application and Analysis

In his first issue, Mireskandari argues the trial court erred in denying his TCPA motion. He bases his arguments on the same general sub-issues raised in his original TCPA motion, namely, that (1) "Casey's claims are based on, related to, or in response to Mireskandari's right to petition," (2) "Casey did not establish by clear and specific evidence a prima facie case against Mireskandari for each challenged claim," and (3) "[e]ven if Casey satisfied his burden and established a prima facie case for each challenged claim, dismissal was still required because Mireskandari established that the judicial proceedings privilege applied." Those sub-issues correspond to our usual three-step TCPA analysis.

a. Mireskandari's Step-One Burden

Mireskandari argues Casey's claim was "based on, related to,[8] or in response to" his exercise of a right to petition under section 27.001(4)(A)(i). *See* TEX. CIV.

[8] Although Mireskandari uses the phrase "related to," the current TCPA requires a showing that a legal action is "based on or in response to" a party's exercise of certain TCPA-protected rights—a more narrow standard than the prior version of the TCPA. *See* TEX. CIV. PRAC. & REM. CODE §§ 27.003(a), 27.005(b) (language is now "based on or in response to"); Act of May 17, 2019, 86th Leg., R.S., ch. 378, §§ 2–3, 2019 Tex. Sess. Law Serv. 684, 685 (noting removal of "relates to" in sections 27.003(a) and 27.005(b) in the 2019 amendments); *Union Pac. R.R. Co. v. Chenier*, No. 01-21-00073-CV, 2021 WL 3919216, at *5 (Tex. App.—Houston [1st Dist.] Sept. 2, 2021, no pet. h.) (noting that removal of "relates to" in the 2019 amendments "narrowed the 'categories of connections a claim could have to the exercise' of one of three First Amendment rights that allowed a TCPA movant to seek dismissal") (quoting *ML Dev, LP v. Ross Dress For Less, Inc.*, No. 01-20-00773-CV, 2021 WL 2096656, at *2 (Tex. App.—Houston [1st Dist.] May 25, 2021, no pet. h.)); *Black v. Woodrick*, No. 07-20-00083-CV, 2021 WL 1113149, at *2 (Tex. App.—Amarillo Mar. 23, 2021, no pet.) (mem. op.) ("The TCPA was amended effective September 1, 2019, to narrow its application."); *Smith v. Arrington*, No. 07-19-00393-CV, 2021 WL 476339, at *3 (Tex. App.—Amarillo Feb. 9, 2021, no pet.) (mem. op.) ("the TCPA was amended . . . to narrow its application"); *see also Vaughn-Riley v. Patterson*, No. 05-20-00236-CV, 2020 WL 7053651, at *3 (Tex. App.—Dallas Dec.

PRAC. & REM. CODE § 27.001(4)(A)(i) (defining the exercise of the right to petition as including "a communication in or pertaining to . . . a judicial proceeding").

While in the trial court, the parties disputed whether step one was met, but on appeal, the parties no longer dispute this.[9] As a result, we need not further address it and will assume for purposes of this appeal that Mireskandari met his step-one burden. *See Dallas Morning News, Inc. v. Hall*, 579 S.W.3d 370, 377 (Tex. 2019) (assuming TCPA applied where neither party disputed its application); *see also Caracio v. Doe*, No. 05-19-00150-CV, 2020 WL 38827, at *5 (Tex. App.—Dallas Jan. 3, 2020, no pet.) (mem. op.) (same); *see also* TEX. R. APP. P. 47.1.

b. Casey's Step-Two Burden

For step two, we consider whether Casey established by clear and specific evidence a prima facie case for each essential element of his claim. *See* TEX. CIV. PRAC. & REM. CODE § 27.005(c); *Creative Oil*, 591 S.W.3d at 132 (citing prior

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2, 2020, no pet.) (mem. op.) (noting that legislative history of definition of "matter of public concern" reflected legislature's intent to narrow TCPA's scope in 2019 amendments); *Enter. Crude GP LLC v. Sealy Partners, LLC*, No. 14-19-00818-CV, 2020 WL 6741546, at *6 (Tex. App.—Houston [14th Dist.] Nov. 17, 2020, no pet.) (applying prior version of TCPA but stating, "We presume that the legislature intended to narrow the Act's reach by removing the 'relates to' language during the last legislative session[.]").

[9] In a section addressing Casey's step-one arguments, Casey's brief on appeal states, in its entirety:

> Casey does not contend that the TCPA does not apply to Mireskandari's claims. Instead, the Court properly denied the TCPA motion because it found that Casey established a prima facie case and Mireskandari failed to establish any affirmative defense.

We interpret Casey's reference to "Mireskandari's claims" as simply a typographical error, when the only claims considered in this TCPA appeal are Casey's, not Mireskandari's, and when Casey's statements, taken as a whole, convey his belief that the trial court properly denied the TCPA motion based on the parties' burdens under steps two and three.

version of section 27.005(c)). Mireskandari argues Casey failed to do so, but his arguments on appeal differ in certain respects from those raised in the trial court.[10]

In the TCPA motion filed in the trial court, Mireskandari's arguments regarding Casey's step-two burden did not challenge or identify any specific, essential elements of Casey's claim for which Casey was unable to establish a prima facie case. Instead, in the step-two portion of his TCPA motion, Mireskandari challenged Casey's proof of the claim's underlying premise—that Mireskandari breached the parties' settlement agreement—by arguing his statements were not covered by the parties' agreement, on the theory that the statements (1) were not "public statements" and (2) constituted testimony in a court proceeding or pursuant to other legal process.

Casey responded and disputed these arguments. Unlike Mireskandari, Casey focused on the two elements involved in his declaratory judgment claim. Specifically, Casey argued he had met the step-two burden with clear and specific evidence showing that (1) a justiciable controversy exists between the parties and (2) the controversy would be solved by the declaration he seeks. *See Sw. Elec.*

[10] Despite the change in his arguments, we assume, but do not decide, that Mireskandari adequately preserved the issues he presents on appeal. *See Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 896 (Tex. 2018) (stating that party was not required on appeal or at trial to rely on precisely the same case law or statutory subpart that court now found persuasive); *Greene v. Farmers Ins. Exch.*, 446 S.W.3d 761, 764 n.4 (Tex. 2014) ("We do not consider issues that were not raised in the courts below, but parties are free to construct new arguments in support of issues properly before the Court."); *Marino v. King*, 355 S.W.3d 629, 634 (Tex. 2011) ("Constitutional imperatives favor the determination of cases on their merits rather than on harmless procedural defaults.").

Power Co. v. Lynch, 595 S.W.3d 678, 685 (Tex. 2020) ("[A] declaratory judgment is appropriate only if a justiciable controversy exists as to the rights and status of the parties and the controversy will be resolved by the declaration sought.") (quoting *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995)); *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 163–64 (Tex. 2004) ("A declaratory judgment requires a justiciable controversy as to the rights and status of parties actually before the court for adjudication, and the declaration sought must actually resolve the controversy.").

The trial court denied the motion, but the order did not explain why.

On appeal, Mireskandari still argues Casey has not satisfied his step-two burden, but his reasoning has shifted and expanded into two other arguments. First, apparently taking the cue from Casey's prior response, Mireskandari now argues that Casey has not established a prima facie case on the two elements in Casey's declaratory judgment claim because, he maintains, the parties' actual controversy is whether Mireskandari's statements were "truthful testimony in a court proceeding or pursuant to other legal process," a controversy Casey's requested declaration does not resolve. Second, Mireskandari argues that Casey must present prima facie proof on the elements required for a temporary and permanent injunction and has failed to do so. Casey disputes these arguments.

We are not persuaded by Mireskandari's latest arguments. While the parties describe their controversy slightly differently,[11] the parties' present dispute boils down to the same issue: did Mireskandari's statements in the pleading he filed in his other lawsuit violate the parties' prior settlement agreement? Casey argues "yes," while Mireskandari argues "no," and the declaration Casey sought not only could resolve that question but has, in fact, already done so on this record, at least on an interlocutory basis.

Viewing, as we must, the pleadings and other evidence under section 27.006(a) in the light most favorable to Casey, *see* TEX. CIV. PRAC. & REM. CODE § 27.006(a), we conclude Casey satisfied his step-two prima facie burden on both elements of his declaratory judgment claim based on the record before us. *See Choudri v. Lee*, No. 01-20-00098-CV, 2020 WL 4689204, at *4 (Tex. App.—Houston [1st Dist.] Aug. 13, 2020, pet. denied) (affirming denial of TCPA motion based, in part, on conclusion that prima facie case for declaratory judgment claim was established where dispute about the validity and enforceability of the parties' agreement could be resolved by a declaration construing the agreement in light of

[11] Casey describes the controversy in terms of breach by Mireskandari, who, in turn, describes the controversy as falling within an exception to the non-disparagement agreement, citing the portion of the agreement that states, "This section shall not prohibit any Party from truthfully testifying in any court proceeding or pursuant to other legal process."

the parties' conduct);[12] *Perez v. Quintanilla*, No. 13-17-00143-CV, 2018 WL 6219627, at *4 (Tex. App.—Corpus Christi–Edinburg, Nov. 29, 2018, no pet.) (mem. op.) (affirming denial of TCPA motion based, in part, on conclusion that prima facie case for declaratory judgment claim was established where pleadings and evidence reflected a justiciable controversy existed regarding enforceability and scope of the parties' agreement and where trial court was left to determine whether

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[12] In addition to *Choudri*'s conclusions regarding the nonmovant's step-two burden, which we apply here, we also note that *Choudri* reached an issue regarding the movant's step-one burden that we have not reached, as the parties no longer dispute that Mireskandari met his step-one burden. In *Choudri*, the parties disputed that issue, and, similar to Mireskandari's step-one argument, the TCPA movant argued that the nonmovant's declaratory judgment action was based on or in response to his exercise of his right to petition. *See Choudri*, 2020 WL 4689204, at *2–3. Our sister court rejected that argument, stating:

> Although [the nonmovant's] pleadings reference the filing of various legal actions by both parties as factual background, the declaration sought by [the nonmovant] does not implicate "a communication in or pertaining to . . . a judicial proceeding." *See* TEX. CIV. PRAC. & REM. CODE § 27.001(4)(A)(i). Rather, it involves the legal rights and obligations of the parties under the Agreement in connection with the various litigation involving the Property and the parties' other interests. [The nonmovant] does not seek to prohibit [the movant] from petitioning the courts, but instead to obtain a declaration of the effect of the parties' prior Agreement on the ongoing litigation."

Id. at *3. *Choudri* also states:

> [T]o interpret the TCPA as essentially forbidding [the nonmovant] from seeking a declaration of the parties' rights and obligations under the Agreement would undermine the clear directive that the TCPA does not abrogate or lessen any other defense, remedy, immunity, or privilege available under other constitutional, statutory, case, or common law or rule provisions, such as the Declaratory Judgment Act.

Id. (cleaned up). Under the circumstances here, we need not further comment on *Choudri*'s step-one conclusions except to reiterate that we have made no conclusions on step one in this case and have instead assumed, without deciding, that Mireskandari met his step-one burden here, when the parties no longer dispute that issue. Finally, given the parties' agreement that Mireskandari has met his step-one burden, we need not determine whether the non-disparagement agreement waived Mireskandari's right-to-petition challenge, or otherwise estopped Mireskandari's reliance on the TCPA's right-to-petition element. *See generally Monster Energy Co. v. Schechter*, 444 P.3d 97, 107 (Cal. 2019) ("[A] defendant who in fact has validly contracted not to speak or petition has in effect 'waived' the right to the anti-SLAPP statute's protection in the event he or she later breaches that contract.") (quoting *Navellier v. Sletten*, 52 P.3d 703, 712 (Cal. 2002), and considering California's anti-SLAPP statute).

or not to grant the declaratory relief sought in order to resolve it); *see also Sw. Elec. Power Co.*, 595 S.W.3d at 685 (declaratory judgment elements); *Lipsky*, 460 S.W.3d at 590 (TCPA review standards); *Brooks*, 141 S.W.3d at 163–64 (same).

Moreover, on this record, we conclude Casey's step-two burden did not require him to establish by clear and specific evidence the prima facie elements required for a temporary and permanent injunction because his request for injunctive relief is ancillary to his declaratory judgment claim. *See Ruder v. Jordan*, No. 05-14-01265-CV, 2015 WL 4397636, at *6 (Tex. App.—Dallas July 20, 2015, no pet.) (mem. op.) (declining, in part, to separately review prima facie case regarding injunctive relief because the injunctive relief was "ancillary to" the other claim already reviewed) (citing, in part, *Howell v. Tex. Workers' Comp. Comm'n*, 143 S.W.3d 416, 432–33 (Tex. App.—Austin 2004, pet. denied)).[13]

c. Mireskandari's Step-Three Burden

Finally, Mireskandari argues that even if Casey met his step-two burden, "dismissal was still required because Mireskandari established that the judicial proceedings privilege applied."

[13] *Howell* involved questions regarding jurisdiction and the mandatory venue statute, not a TCPA issue, but in considering those questions, the court concluded that a request for injunctive relief was ancillary to the requested declaratory relief where it sought to protect and enforce the rights established by the declaratory relief. 143 S.W.3d at 432–33. We reach a similar conclusion regarding Casey's requested injunctive relief here.

In *Marble Ridge Capital, LP v. Neiman Marcus Group, Inc.*, we discussed the history of this privilege in Texas, stating:

> In 1889, the Texas Supreme Court described the general concepts and policies behind the judicial-proceedings privilege, stating, "[F]or any defamatory matter in a pleading in a court of civil jurisdiction no action for libel may be maintained" and "proceedings in civil courts are absolutely privileged. Citizens ought to have the unqualified right to appeal to the civil courts for redress, without the fear of being called to answer for damages in libel." *Runge v. Franklin*, 72 Tex. 585, 10 S.W. 721, 724 (1889).

611 S.W.3d 113, 128 (Tex. App.—Dallas 2020, pet. dism'd).

The parties dispute whether the privilege applies here, with Mireskandari arguing it does, and Casey arguing it does not. As support, Mireskandari cites, in part, *Laub v. Pesikoff*, 979 S.W.2d 686, 691 (Tex. App.—Houston [1st Dist.] 1998, pet. denied), but his own description of *Laub* shows that the case is distinguishable and that the privilege does not apply here. He states, "The privilege should be applied no matter the type of cause of action alleged *whenever 'the essence of a claim is damages* that flow from communications made in the course of a judicial proceeding.'" (emphasis added). Here, where the essence of Casey's claim was not damages but declaratory relief, we conclude the privilege does not apply. *See Kyle v. Strasburger*, No. 13-13-00609-CV, 2019 WL 1487357, at *8 (Tex. App.—Corpus Christi–Edinburg Apr. 4, 2019, no pet.) (mem. op. on remand) (stating circumstances in which privilege may apply in non-defamation cases "are limited to cases in which a plaintiff, though asserting a non-defamation claim, seeks

'defamation damages'—i.e., damages for loss of reputation and mental anguish" and concluding the privilege did not bar various claims when claims did not seek relief akin to reputational or mental anguish damages) (citing cases, including *Laub*); *see also Sun Life Assurance Co. of Canada v. Imperial Premium Fin., LLC*, 904 F.3d 1197, 1219 (11th Cir. 2018) (stating the privilege's applicability "must be assessed in light of the specific conduct for which the defendant seeks immunity" and concluding that the privilege did not immunize a defendant from a breach of contract claim where the act that allegedly breached the contract was the filing of lawsuit; the court also noted, "[T]he true source of any chilling effect will be the parties' duly-entered contract, which itself bars the filing of the lawsuit.")

We overrule Mireskandari's first issue.[14]

C. Attorneys' Fees

In his second issue, Mireskandari argues the trial court abused its discretion when it declined to award him attorneys' fees under section 27.009(a)(1), which states, "Except as provided by [s]ubsection (c), if the court orders dismissal of a legal action under this chapter, the court . . . shall award to the moving party court costs and reasonable attorney's fees incurred in defending against the legal action." *See*

[14] Had we reached the opposite conclusion, we might be presented with other unusual procedural questions, such as whether any potential conflict would exist between our ruling and the trial court's interlocutory judgment, and if so, how and whether we could reconcile it in the context of this appeal. In light of our conclusions, no such questions arise, and we need not consider them here.

TEX. CIV. PRAC. & REM. CODE § 27.009(a)(1). This language requires an award of reasonable attorney's fees to the successful movant. *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016); *see* TEX. CIV. PRAC. & REM. CODE § 27.009(a)(1)).

Mireskandari was not a successful TCPA movant in the trial court, and that fact has remained unchanged in this appeal. Thus, section 27.009(a)(1) does not entitle Mireskandari to an award of attorneys' fees, and the trial court did not abuse its discretion in failing to award them. *See* TEX. CIV. PRAC. & REM. CODE § 27.009(a)(1); *Sullivan*, 488 S.W.3d at 299.

We overrule Mireskandari's second issue.

III. CONCLUSION

We affirm the trial court's July 23, 2020 order.

/Ken Molberg/
KEN MOLBERG
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

AMIR MIRESKANDARI, Appellant No. 05-20-00769-CV V. KEVAN CASEY, Appellee	On Appeal from the 68th Judicial District Court, Dallas County, Texas Trial Court Cause No. DC-20-05795. Opinion delivered by Justice Molberg. Justices Goldstein and Smith participating.

In accordance with this Court's opinion of this date, the trial court's July 23, 2020 order is **AFFIRMED.**

In **ORDERED** that appellee KEVAN CASEY recover his costs of this appeal from appellant AMIR MIRESKANDARI**.**

Judgment entered this 19th day of November, 2021.