

Opinion issued March 31, 2016



In The  
**Court of Appeals**  
For The  
**First District of Texas**

---

NO. 01-14-00880-CV

---

**THEAOLA ROBINSON, Appellant**

**V.**

**KTRK TELEVISION, INC., Appellee**

---

---

**On Appeal from the 234th District Court  
Harris County, Texas  
Trial Court Case No. 2011-54895**

---

---

**MEMORANDUM OPINION**

In September 2011, appellant Theaola Robinson filed a defamation suit against appellee KTRK Television, Inc. KTRK subsequently filed a motion to

dismiss the action pursuant to the Texas Citizens' Participation Act.<sup>1</sup> The trial court denied the motion and KTRK filed an interlocutory appeal. On July 11, 2013, this Court issued its opinion in *KTRK Television, Inc. v. Robinson*, 409 S.W.3d 682 (Tex. App.—Houston [1st Dist.] 2013, pet. denied), reversed the trial court's order denying KTRK's motion to dismiss, and remanded the case to the trial court for further proceedings as required by the TCPA. On October 8, 2014, in accordance with this Court's mandate, the trial court issued its final judgment dismissing the case with prejudice and awarding attorney's fees, costs, and sanctions to KTRK.

Robinson raises six issues on appeal. In her first and second issues, she contends that this Court erred in (1) concluding that it had jurisdiction to hear KTRK's interlocutory appeal from the trial court's written order denying KTRK's motion to dismiss, and (2) failing to safeguard her constitutional rights to substantive due process under the United States and Texas Constitutions. In her third issue, she argues that the trial court's award of fees to KTRK was punitive and in violation of the open courts provision of the Texas Constitution. In her fourth issue, Robinson asserts that the *Noerr-Pennington* doctrine precludes an award of attorney's fees

---

<sup>1</sup> TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001–.011 (West Supp. 2015). Chapter 27 is an anti-SLAPP (“Strategic Lawsuits Against Public Participation”) statute whose express purpose is “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.” *Id.* § 27.002.

against her under the TCPA. In her fifth and sixth issues, she argues that the TCPA does not apply to this case. We uphold our July 11, 2013 opinion and affirm the trial court's October 8, 2014 order awarding attorney's fees, costs, and sanctions to KTRK, and dismissing the case.

### **Background**

On September 14, 2011, Robinson sued KTRK<sup>2</sup> for defamation based on a series of news broadcasts reporting on allegations of Robinson's financial mismanagement as executive director of Benji's Special Education Academy, a charter school.<sup>3</sup> On February 29, 2012, KTRK filed a motion to dismiss pursuant to the TCPA. Following a hearing, KTRK's motion was denied by the trial court, and KTRK timely filed an interlocutory appeal.

On July 11, 2013, in *KTRK Television, Inc.*, we reversed the trial court's denial of KTRK's motion and remanded the case to the trial court to order dismissal of the suit and for final proceedings as required by section 27.009(a) of the TCPA. 409

---

<sup>2</sup> Although named as defendants in Robinson's suit, The Walt Disney Company ("TWDC"), CC Texas Holding Co., Inc. ("CCTHC"), and ABC Television Network are not parties to this appeal. TWDC and CCTHC filed special appearances which the trial court sustained in an order signed on October 8, 2014, and which Robinson has not appealed. ABC Television Network, which is not a corporate entity and was never served, was dismissed through the filing of Robinson's second amended petition.

<sup>3</sup> The factual background of this case is detailed in our prior opinion. *See KTRK Television, Inc. v. Robinson*, 409 S.W.3d 682, 684–87 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).

S.W.3d 682 at 692. Robinson filed a motion for rehearing which was denied on August 21, 2013. Robinson then filed a petition for review with the Texas Supreme Court which was denied on January 17, 2014, and a petition for rehearing of the denial, which was denied on March 7, 2014. Robinson thereafter filed a petition for writ of mandamus with the Texas Supreme Court which was denied on June 6, 2014, followed by a motion for rehearing of the petition which was also denied.

On August 14, 2014, in accordance with this Court's opinion and mandate<sup>4</sup> and Chapter 27, KTRK moved the trial court to award attorney's fees, costs, and sanctions, and to enter final judgment dismissing the case.<sup>5</sup> Following a hearing, the

---

<sup>4</sup> This Court's mandate stated, in pertinent part:

Accordingly, the Court **reverses** the trial court's judgment and **remands** the case with instructions for the trial court to dismiss the case, to award court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require to the appellant, KTRK Television, Inc., and to award sanctions against the appellee, Theaola Robinson, as the court determines sufficient to deter her from bringing similar actions, as required by section 27.009(a) of the Civil Practice and Remedies Code.

<sup>5</sup> In support of its motion and brief, KTRK submitted extensive billing records as proof of its fees and expenses incurred. Robinson did not present any evidence to contradict or refute KTRK's evidence of attorney's fees and costs.

trial court signed its final judgment in which it dismissed the case with prejudice, and awarded attorney's fees, costs, and sanctions to KTRK.<sup>6</sup> This appeal followed.<sup>7</sup>

## Discussion

### A. Jurisdiction

In her first issue, Robinson contends that this Court erred when it concluded that it had jurisdiction to hear KTRK's interlocutory appeal of the trial court's order denying KTRK's Chapter 27 motion to dismiss. Robinson argues that, at the time of KTRK's appeal, the TCPA did not authorize an interlocutory appeal of a trial court's written order denying a motion to dismiss.<sup>8</sup> We previously addressed and rejected this argument, concluding that "section 27.008 permits an interlocutory appeal from the trial court's written order denying a motion to dismiss under the TCPA." *KTRK Television, Inc.*, 409 S.W.3d at 688.<sup>9</sup> Having decided the

---

<sup>6</sup> KTRK was awarded \$251,689.29 in attorney's fees, \$3,895.80 in expenses, \$3,123.23 in court costs, and \$100 in sanctions.

<sup>7</sup> After filing her appellant's brief on June 10, 2015, Robinson filed an amended appellant's brief with this Court on June 19, 2015.

<sup>8</sup> In this case, the trial court denied KTRK's motion to dismiss by written order.

<sup>9</sup> Further, we note that "the Legislature has since clarified that an interlocutory appeal is permitted from *any* interlocutory order denying a motion to dismiss under the TCPA." *In re Lipsky*, 460 S.W.3d 579, 585 n.2 (Tex. 2015) (emphasis added); TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(12) (West Supp. 2015) (amended by Texas Legislature in 2013).

jurisdictional issue in our previous opinion, we will not address it here. Accordingly, we overrule Robinson’s first issue.

## **B. Due Process**

In her second issue, Robinson contends that this Court erred when it did not safeguard her constitutional rights to substantive due process under the United States and Texas Constitutions when it interpreted the TCPA. She argues that “[i]n providing for interlocutory appeal here . . . [this Court took] away or impaired her vested rights.”

Texas Rule of Appellate Procedure 33.1(a) provides that, as a prerequisite to presenting a complaint for appellate review, the record must show that the complaint was made to the trial court in a timely manner, and that the trial court ruled on the request, or refused to do so. *See* TEX. R. APP. P. 33.1(a). Even constitutional complaints must be raised below or they are not preserved for appellate review. *See In re L.M.I.*, 119 S.W.3d 707, 711 (Tex. 2003). Robinson does not cite, nor have we found, any place in the record where she argued that hearing KTRK’s interlocutory appeal violated her constitutional rights to substantive due process. *See In re L.M.I.*, 119 S.W.3d at 710–11 (rejecting due process challenge where petitioner only made mention of constitutional claim in passing); *Ratsavong v. Menevilay*, 176 S.W.3d 661, 671 (Tex. App.—El Paso 2005, pet. denied) (holding due process arguments waived when they were not brought to trial court’s attention). Having failed to do

so, she has not preserved this issue for our review. We overrule Robinson’s second issue.

### **C. Attorney’s Fees**

In her third issue, Robinson contends that the trial court’s judgment awarding attorney’s fees, costs, and sanctions to KTRK was punitive<sup>10</sup> and violated the open courts provision of the Texas Constitution.<sup>11</sup>

As we previously noted, the record must show that a complaint was made to the trial court in a timely manner, and that the trial court ruled on the request, or refused to do so, to preserve the complaint on appeal. *See* TEX. R. APP. P. 33.1(a). Robinson has not preserved error as to this issue because she failed to present any argument about the open courts doctrine or otherwise challenge the constitutionality of the TCPA in the trial court. *See id.*; *Drum v. Calhoun*, 299 S.W.3d 360, 370 (Tex. App.—Dallas 2009, pet. denied) (concluding appellant did not preserve constitutional complaint where he failed to raise argument about open courts doctrine to trial court with sufficient specificity to apprise trial court of his complaint).

---

<sup>10</sup> Robinson does not challenge the amount of attorney’s fees or the methodology used to calculate the fees.

<sup>11</sup> The Texas Constitution provides that “[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.” TEX. CONST. art. I, § 13.

However, even absent waiver, Robinson’s argument is still unavailing because the TCPA has been held constitutional and not a violation of the open courts doctrine. *See Combined Law Enforcement Ass’ns. of Tex. v. Sheffield*, No. 03-13-105-CV, 2014 WL 411672 at \*9–11 (Tex. App.—Austin Jan. 31, 2014, pet. denied) (mem. op). In *Sheffield*, the appellant contended, as Robinson does here, that the following provisions of the TCPA unreasonably restricted his ability to pursue his defamation claim: (1) provisions that purport to impose a higher standard of proof than would ordinarily be required for the plaintiff/respondent to prevail at trial; (2) unreasonable prohibitions, limitations, or restrictions on discovery prior to the hearing on the motions to dismiss; and (3) mandatory fee awards and sanctions upon dismissal. *See id.* at \*9. The court of appeals rejected these arguments and concluded that none of the challenged provisions violated the open courts provision on their face. *See id.* at \*9–11. Accordingly, we overrule Robinson’s third issue.

#### **D. The *Noerr-Pennington* Doctrine**

In her fourth issue, Robinson contends that the *Noerr-Pennington* doctrine<sup>12</sup> precludes the imposition of an award of attorney’s fees under the TCPA upon a

---

<sup>12</sup> The *Noerr-Pennington* doctrine arose out of two United States Supreme Court cases: *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965). *See RRR Farms, Ltd. v. Am. Horse Protection Ass’n, Inc.*, 957 S.W.2d 121, 126 (Tex. App.—Houston [14th Dist.] 1997, pet. denied). The doctrine is a principal of constitutional law that bars litigation arising from injuries received as a consequence of First Amendment petitioning activity. *See RRR Farms, Ltd.*, 957



citizen who exercised her rights to petition under the First Amendment. Specifically, she argues that this Court's July 11, 2013 opinion "conflicts with the First Amendment Petition Clause jurisprudence that prohibits punishing a person for having exercised, in good faith, his or her rights to sue or appeal to the courts for the resolution of legal disputes." As Robinson did not raise any argument related to the *Noerr-Pennington* doctrine at the trial court level, she has not preserved this issue for our review. *See* TEX. R. APP. P. 33.1(a). We overrule her fourth issue.

#### **E. Applicability of the TCPA**

In her fifth and sixth issues, Robinson argues that this Court erred in reversing the trial court's denial of KTRK's motion to dismiss under the TCPA because (1) all of Robinson's claims are based on, relate to, or are in response to pleadings filed by her in other ongoing federal and state lawsuits and (2) the trial court properly determined that the TCPA does not apply to this case because KTRK did not timely file its motion to dismiss. Thus, she argues, reversal of this Court's July 11, 2013 judgment is mandatory.

Under Texas Rule of Appellate Procedure 19.1, an appellate court's plenary power over its judgment expires thirty days after the court overrules all timely filed

---

S.W.2d at 129. Although the *Noerr-Pennington* doctrine originally arose in connection with anti-trust cases, it is fundamentally based on First Amendment principles. *See id.* A claim of immunity based on the doctrine is an affirmative defense. *Id.*

motions for rehearing. *See* TEX. R. APP. P. 19.1(b). “After its plenary power expires, the court cannot vacate or modify its judgment.” TEX. R. APP. P. 19.3. After this Court issued its judgment in *KTRK Television, Inc.* on July 11, 2013, Robinson filed a motion for rehearing on July 25, 2013. This Court overruled Robinson’s motion for hearing on August 21, 2013, and therefore, its plenary power to vacate or modify its judgment expired on September 30, 2013.<sup>13</sup> Accordingly, we overrule Robinson’s fifth and sixth issues.

### **Conclusion**

We uphold our July 11, 2013 opinion and affirm the trial court’s October 8, 2014 order awarding attorney’s fees, costs, and sanctions to KTRK, and dismissing the case.

---

<sup>13</sup> Contrary to Robinson’s assertion, neither the trial court’s order denying KTRK’s motion to dismiss nor its findings of fact state that KTRK failed to timely file its motion to dismiss or that the TCPA was inapplicable. Instead, the trial court found, pursuant to Texas Civil Practice and Remedies Code section 27.007, that “the underlying lawsuit was not brought to deter or prevent the moving party from exercising constitutional rights and was not brought for improper purpose, nor to harass or delay or increase the cost of litigation.”

The record further reflects that KTRK timely filed its motion to dismiss. Under section 27.003(b), KTRK had to file its motion within sixty days of service of the lawsuit. *See* TEX. R. APP. P. 27.003(b). Robinson asserts that KTRK was served on September 20, 2011, but does not provide citation to the record to support her assertion. The record instead shows that KTRK was served on October 31, 2011, thereby making its December 11, 2011 motion timely.

Russell Lloyd  
Justice

Panel consists of Justices Higley, Brown, and Lloyd.