Opinion issued December 20, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00079-CV

DEREK GASKAMP, JONATHAN MILLER, AND

ANDREW HUNTER, Appellants

V.

WSP USA, INC., WSP USA BUILDINGS, INC., AND WSP USA ADMINISTRATION, INC., Appellees

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On Appeal from the 270th District Court
Harris County, Texas
Trial Court Case No. 2017-66686

O P I N I O N

WSP USA Administration, Inc., WSP USA Buildings, Inc., and WSP USA, Inc. (collectively, "WSP") sued former employees Derek Gaskamp, Jonathan Miller, and Andrew Hunter for conduct related to their alleged misappropriation of

WSP's trade secrets and confidential information. Gaskamp, Miller, and Hunter filed a motion to dismiss WSP's claims pursuant to the Texas Citizens' Participation Act ("TCPA").[1] The trial court denied the motion, and Gaskamp, Miller, and Hunter filed this interlocutory appeal, raising three issues challenging the trial court's denial.[2]

We affirm, in part, and reverse, in part, and remand.

Background

In early October 2017, WSP filed suit against Infinity MEP, a limited liability company, and against former employees, Derek Gaskamp, Jonathan Miller, Andrew Hunter, and David Sinz. A week later, WSP filed its First Amended Petition. The amended petition described WSP as "a leader in civil engineering, fire protection and risk, bridge engineering, analysis and strategy, construction design, environment and sustainability, and . . . electrical, IT, telecommunications, automation, and HVAC systems[.]" The petition averred that WSP had "developed several sophisticated, challenging, and substantial projects

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[1] *See* TEX. CIV. PRAC. & REM. CODE § 27.005 (providing right to dismissal after meeting certain statutory conditions required to justify dismissal of action under TCPA).

[2] *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(12) (authorizing interlocutory appeal of order denying motion to dismiss filed under TCPA Section 27.003); *see also* TEX. CIV. PRAC. & REM. CODE § 27.008 (providing that "appellate court shall expedite an appeal or other writ, whether interlocutory or not, from a trial court order on a motion to dismiss a legal action under Section 27.003 . . . .").

for clients that include hospitals, universities, corporations, hotels, and other large-scale commercial and residential facilities."

The petition alleged that David Sinz had been an office manager for one of WSP's Houston offices. Sinz's duties included "developing business, contacts, and opportunities for WSP" and "delegat[ing] the work to engineers in the office." Sinz resigned from WSP in late April 2017.

WSP alleged that, a couple weeks before his resignation, Sinz founded Infinity MEP, a business providing "mechanical, electrical, plumbing, fire protection, commissioning, and low voltage/security/IT services." WSP averred that these "are the very same services provided by WSP."

After Sinz's resignation, Gaskamp, Miller, and Hunter also resigned from WSP. They then joined Sinz at Infinity MEP. WSP stated that "Sinz is the managing member and president of Infinity MEP, Gaskamp is the associate principal of Infinity MEP, and Miller is the principal of Infinity MEP. Hunter is an Infinity MEP employee."

After the employees resigned, WSP learned that Infinity MEP's website identified 14 different "featured projects," which Infinity MEP represented were "from Infinity MEP staffs' previous career at WSP and other firms." By posting the information on its website, WSP alleged that Infinity MEP was "attempting to leverage WSP's successful projects and WSP's association with high-profile

clients—without WSP's consent—into business opportunities, relationships, and contracts of its own."

WSP conducted an "an internal investigation and a forensic analysis of Sinz, Gaskamp, Miller, and Hunter's computer hard drives to determine whether . . . they had taken any trade secret, confidential, or proprietary information." WSP claimed that the analysis had revealed that "seven USB devices were plugged into Sinz's WSP-issued computer between January and April 2017, none of which were WSP-issued devices." WSP noted that the last USB device had been connected to Sinz's hard drive after Sinz had registered Infinity MEP with the Texas Secretary of State.

The analysis had shown that, the afternoon before he had resigned, Sinz had accessed a folder on the computer titled "Potential Projects." The folder contained "files, data, and information regarding projects and customers that WSP is actively pursuing." WSP claimed that "Sinz was retrieving information about prospective customers—without WSP's consent—in order to use it to Infinity MEP, Sinz, Gaskamp, Miller, and Hunter's advantage and in unfair competition with WSP."

WSP stated that its forensic analysis also revealed that, not long before he resigned, Sinz had opened 14 different "project files for projects long-since completed or otherwise inactive and, for most of them, projects with which Sinz had no involvement." WSP claimed that "[t]he folders include customer

information, pricing data, and the project Revit files, among other data and information." WSP explained that "Revit is an electronic design software that WSP uses to create architectural designs embellished with its proprietary mechanical, electrical, and plumbing standard details, and any other project requirements per customer specifications."

WSP averred that "the Revit file for each project incorporates WSP's proprietary approach to these services that make it a leader in the field." WSP claimed that was the reason it "protects its Revit files as trade secret, proprietary, and confidential information." It asserted that "unauthorized access to and use of Revit files allows competitors to capitalize on WSP's cache of expertise as competitors can use WSP's Revit data to create as-built drawings and renderings for customers, without the burden of time, expenses, and technical knowhow or experience."

WSP also alleged that Sinz had posted information to Infinity MEP's website to demonstrate Infinity MEP's qualifications "to engage in work identical to that comprising the core of WSP's business." WSP asserted that "Sinz also accessed files relating to projects between WSP and its current and potential clients . . . including confidential and proprietary data relating to those projects." WSP claimed that "Sinz also publicly used the information to his, Gaskamp, Miller,

Hunter, and Infinity MEP's benefit, advertising the projects as evidence of Infinity MEP's 'experience' and ostensibly to attract clients."

WSP further alleged that its internal investigation "showed [the former employees] engaged in off-book projects with WSP resources, in contravention of their fiduciary duties to WSP and the ethical rules applicable to professional engineers." WSP asserted that the "internal investigation also determined that Sinz, Gaskamp, Miller, and Hunter have interfered with WSP's current contractual relations and have stolen funds from WSP."

Based on its factual allegations, WSP asserted common law and statutory causes of action against the four former employees, including a claim based on the Texas Uniform Trade Secrets Act ("TUTSA").[3] WSP maintained that the former employees violated TUTSA by using and disclosing WSP's "valuable trade secret, proprietary, and confidential information in competition with WSP" for the former employees' "own financial gain at Infinity MEP." WSP also claimed that former employees had violated the Uniform Fraudulent Transfer Act ("UFTA").[4] *See* WSP alleged that the former employees had fraudulently transferred WSP's trade secret, proprietary, and confidential information to Infinity MEP.

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3 *See* TEX. CIV. PRAC. & REM. CODE §§ 134A.001–.008.

4 *See* TEX. BUS. & COM. CODE §§ 24.001–.013.

In addition, WSP asserted common-law causes of action against the former employees and against Infinity MEP. Against the former employees, WSP brought claims for breach of loyalty, breach of fiduciary duty, tortious interference with existing contacts and prospective business relations, unjust enrichment, unfair competition, and civil conspiracy.

WSP claimed that the former employees had breached their duty of loyalty "by purposefully obtaining, disclosing, and using the trade secret, proprietary, and confidential information of WSP to establish a competing engineering firm, all while still employed by WSP[.]" WSP asserted that Appellants had breached their fiduciary duties by using and disclosing WSP's confidential and trade secret information to their benefit and to WSP's detriment. With respect to tortious interference with existing contacts, WSP alleged that the former employees had had "induced" parties, with whom WSP had contracts, "to reduce" their business with WSP. WSP also alleged that the former employees' "taking, sharing, and use of WSP's confidential, proprietary, and trade secret information has enabled [the former employees] to purposefully interfere with these prospective contracts and business relationships." WSP further claimed that the former employees' improper conduct had unjustly enriched them and constituted unfair competition.

To support its civil conspiracy claim, WSP alleged that the former employees had "act[ed] in collusion" (1) to "misappropriate WSP's trade secrets,

proprietary, and confidential information;" (2) to "fraudulently transfer assets and WSP's trade secrets, proprietary, and confidential information"; (3) to "tortiously interfere with WSP's existing contracts and prospective business relationships;" and (4) "to engage in unfair competition with WSP." WSP also alleged that the former employees had "associated together through a meeting of their minds and for a common purpose of engaging in a course of conduct, and as an ongoing and continuing organization or unit, to conduct the unlawful and tortious conduct[.]" WSP alleged that the former employees had

> secretly conspired among themselves, and possibly with others currently unknown to WSP, to devise and implement wrongful and unlawful schemes to misappropriate WSP's trade secrets, proprietary, and confidential information, fraudulently transfer WSP assets and trade secrets, proprietary, and confidential information, engage in unfair competition, and tortiously interfere with WSP's existing contracts and prospective business relationships.

WSP requested actual and exemplary damages as well as attorneys' fees. WSP also sought injunctive relief to restrain Infinity MEP and the former employees from using, transferring, and disclosing WSP's trade secret, confidential, and proprietary information.

The former employees answered the suit, denying WSP's claims and asserting affirmative defenses and counter-claims, alleging that WSP filed its misappropriation claims in bad faith. Gaskamp, Miller, and Hunter (but not Sinz or Infinity MEP) filed a motion to dismiss the suit pursuant to the TCPA. They

asserted, "While framed as a case to protect confidential information and trade secrets, [WSP's] lawsuit is little more than an attempt to stifle competition and impede the growth of a new competitor some six months after its formation."

Citing the TCPA, Gaskamp, Miller, and Hunter claimed that WSP's suit should be dismissed because it is a "legal action . . . based on [their] exercise of the right of free association."[5] They also asserted that WSP's claims were based on their "exercise of the right to free speech." Gaskamp, Miller, and Hunter further claimed that WSP could not "establish by clear and specific evidence each element of their claims" against them.[6] They requested the trial court to dismiss the suit and to award them the statutorily-required attorneys' fees, costs, and sanctions.[7]

A few days later, WSP USA Buildings, Inc. ("WSP Buildings") and WSP USA Administration, Inc. ("WSP Administration") filed a Second Amended Petition. The petition differed from the First Amended Petition in several ways.

The Second Amended Petition omits WSP USA, Inc. as a plaintiff. A footnote in the petition stated, "WSP's Second Amended Petition nonsuit[s] Plaintiff, WSP USA, Inc." It also avers that WSP Buildings, not WSP Administration, owns the trade mark, confidential, and proprietary information that

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5 *See* TEX. CIV. PRAC. & REM. CODE § 27.005(b).

6 *See id.* § 27.005(c).

7 *See id.* § 27.009.

is the subject of the litigation. Concomitant with this ownership, only WSP Buildings (but not WSP Administration) asserts causes of action dependent on ownership in the Second Amended Petition. The petition states that WSP Administration had been the WSP entity that employed Sinz, Gaskamp, Miller, and Hunter. WSP Administration drops six of the causes of action it had asserted but continues to assert claims for unjust enrichment, breach of loyalty, and breach of fiduciary duty.

The Second Amended Petition adds detailed allegations, averring that WSP's forensic analyses of the former employees' computers had not only indicated that Sinz had accessed and removed WSP Buildings's trade secret and confidential information before his resignation but so had Gaskamp, Miller, and Hunter.

The Second Amended Petition also provides details about an "off-books" project called "ME Global." The petition alleges that WSP learned that Sinz, Gaskamp, Miller, and Hunter, while still employed by WSP Administrators, bid on the ME Global project without WSP's knowledge by sending a proposal to the prospective client, Kirksey Architecture. In making the bid, they had represented themselves as WSP employees, who were making the bid on behalf of WSP. Kirksey ostensibly awarded ME Global to WSP, however, the four employees never informed WSP about the project, keeping it "off the books."

WSP Administration and WSP Buildings allege that Sinz, Gaskamp, Miller, and Hunter worked on the ME Global project using WSP resources, including WSP Buildings's trade secret and confidential information, but never informed WSP of the project or recorded WSP's resources used on the project. Ultimately, Kirksey paid WSP Buildings for work completed at "the 10% milestone" on the project. However, WSP was then told that another firm would be completing the project. WSP Administration and WSP Buildings allege that they received information indicating that Sinz, Gaskamp, Miller, and Hunter continued to work on the project after they left WSP and had gone to work for Infinity MEP.

The Second Amended Petition was verified by Mike Brueggerhoff, as "Vice President Operations Manager—Houston" for WSP Buildings.[8] He attested that he had read the Second Amended Petition and "the contents thereof are based on my personal knowledge and are true and correct."

The same day that the Second Amended Petition was filed, WSP Buildings and WSP Administration also filed their response to Gaskamp, Miller, and Hunter's TCPA motion to dismiss. WSP USA, Inc.—which had effectively nonsuited its claims after the motion was filed by not joining in the Second Amended Petition—did not file a response to the motion.

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[8] Brueggerhoff also verified WSP's First Amended Petition.

In their response, WSP Buildings and WSP Administration offered four arguments why the TCPA motion to dismiss should be denied. First, they asserted that the motion to dismiss was moot because the motion was based on WSP's First Amended Petition, which had been superseded by the filing of the Second Amended Petition. Second, they also asserted that the motion should be denied because their lawsuit was not based on Gaskamp, Miller, and Hunter's right to freely associate or right of free speech as required under the TPCA. Instead, they asserted that the suit was based on the alleged theft and use of WSP's trade secrets. Third, WSP Buildings and WSP Administration argued that the motion should be denied because the TPCA's commercial-speech exemption applied to their claims.[9] They asserted that their causes of action "arose from Defendants' [Sinz, Gaskamp, Hunter, and Miller's] conduct of representing that WSP's trade secret information (e.g., Revit models, designs, and data) were Defendants' own work product in the provision of Defendants' services to actual and potential clients." Finally, WSP Buildings and WSP Administration asserted that the TCPA motion to dismiss should be denied because they offered "clear and specific evidence to present a prima facie showing as to each element of their claims."[10]

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9 *See id.*§ 27.010(b).

10 *See id.* § 27.005(c).

To support their response, WSP Administration and WSP Buildings relied on the verified allegations in their Second Amended Petition. Gaskamp, Miller, and Hunter replied to the response, offering a rebuttal to each of the arguments raised in WSP Buildings and WSP Administration's response.

The trial court denied Gaskamp, Miller, and Hunter's TCPA motion to dismiss. The trial court's order did not specify the reason for the denial other than stating that the motion is "*not* meritorious."

Gaskamp, Miller, and Hunter ("Appellants" hereinafter) appeal the trial court's order denying their TCPA motion to dismiss. Appellants raise three issues on appeal. In the first issue, Appellants question "[w]hether the two-sentence verification to WSP Buildings's and WSP Administration's amended petition satisfied their evidentiary burden in response to Appellants' motion to dismiss." Included in the discussion of this issue is whether Appellants met their burden to show that the TCPA applies to WSP's claims. In the second issue, Appellants contend that "the trial court erred in not awarding attorneys' fees against WSP USA, Inc. after it failed to file a response to Appellants' motion to dismiss." Appellants third issue questions "[w]hether WSP Buildings and WSP Administration presented clear and specific evidence sufficient to state a prima facie case as to each of its claims."

ANALYSIS

A. Principles of Law and Standard of Review

The TCPA "protects citizens . . . from retaliatory lawsuits that seek to intimidate or silence them." *In re Lipsky*, 460 S.W.3d 579, 584 (Tex. 2015). The stated purpose of the act "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." TEX. CIV. PRAC. & REM. CODE ANN. § 27.002 ("Purpose"). "To effectuate the statute's purpose, the Legislature has provided a two-step procedure to expedite the dismissal of claims brought to intimidate or to silence a defendant's exercise of these First Amendment rights." *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 898 (Tex. 2017); *see also* TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.003 ("Motion to Dismiss"), .005 ("Ruling").

Under the first step, a defendant must first show by a preponderance of the evidence that the TCPA applies. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b). The TCPA applies if the plaintiff's "legal action," defined as "a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief," is based on, relates to, or is in response to the movant's exercise of (1) the right of free speech;

(2) the right to petition; or (3) the right of association. *Id.*; *In re Lipsky*, 460 S.W.3d at 586–87.

If the first step is met, then the burden shifts to the plaintiff under the second step to establish by "clear and specific evidence a prima facie case for each essential element" of his claim. TEX. CIV. PRAC. & REM. CODE § 27.005(c); *In re Lipsky*, 460 S.W.3d at 587. "The legislature's use of 'prima facie case' in the second step of the inquiry implies a minimal factual burden: '[a] prima facie case represents the minimum quantity of evidence necessary to support a rational inference that the allegation of fact is true.'" *Schimmel v. McGregor*, 438 S.W.3d 847, 855 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (quoting *KTRK Television, Inc. v. Robinson*, 409 S.W.3d 682, 688 (Tex. App.—Houston [1st Dist.] 2013, pet. denied)).

When determining whether a legal action should be dismissed, "the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based." TEX. CIV. PRAC. & REM. CODE § 27.006(a) ("Evidence"). In making this determination, a court views the pleadings and evidence in a light favorable to the plaintiff. *Schimmel*, 438 S.W.3d at 856. If the defendant meets the first step, and the plaintiff has not met the required showing of a prima facie case, the trial court must dismiss the plaintiff's claim. *See* TEX. CIV. PRAC. & REM. CODE § 27.005. Even if the plaintiff satisfies

the second step, the court will nonetheless dismiss the action if the defendant "'establishes by a preponderance of the evidence each essential element of a valid defense' to the plaintiff's claim." *Coleman*, 512 S.W.3d at 899 (quoting TEX. CIV. PRAC. & REM. CODE § 27.005(d)).

A plaintiff can avoid the act's burden-shifting requirements by showing that one of the act's several exemptions applies. *See id.* § 27.010. For instance, as asserted in this case, the commercial-speech exemption removes certain commercial speech from the act's protections. *See id.* § 27.010(b).

If the trial court dismisses the legal action under the TCPA, the court "shall award" to the moving party:

> (1) court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require; and
>
> (2) sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.

Id. § 27.009(a).

We review de novo a trial court's ruling on a motion to dismiss under the TCPA. *Better Bus. Bureau of Metro. Hous., Inc. v. John Moore Servs., Inc.*, 441 S.W.3d 345, 353 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). To the extent resolution of this appeal turns on construction of the TCPA, we also review these issues de novo. *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015) (citing *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011)). When construing

the TCPA, as with any other statute, our objective is to give effect to the legislative intent, looking first to the statute's plain language. *Id.* (citing *Leland v. Brandal*, 257 S.W.3d 204, 206 (Tex. 2008)). If that language is unambiguous, "we interpret the statute according to its plain meaning." *Id.* "We must construe the TCPA 'liberally to effectuate its purpose and intent fully.'" *State ex rel. Best v. Harper*, No. 16-0647, 2018 WL 3207125, at *6 (Tex. June 29, 2018) (quoting TEX. CIV. PRAC. & REM. CODE § 27.011(b)).

B. WSP Buildings and WSP Administration's Claims Against Appellants

1. Evidentiary Challenge

In their first issue, Appellants assert that WSP Buildings and WSP Administration "did not submit any evidence" in support of their response to Appellants' TCPA motion. Instead, in their response, they "merely referenced their Second Amended Petition, to which they attached the two-sentence, conclusory Brueggerhoff verification." Appellants contend that the TCPA required WSP Buildings and WSP Administration to support their response to Appellants' motion to dismiss with more than a verified pleading. *See* TEX. CIV. PRAC. & REM. CODE § 27.006(a).

TCPA Subsection 27.006(a) provides, "In determining whether a legal action should be dismissed under this chapter, the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the

liability or defense is based." Subsection 27.006(b) further provides, "On a motion by a party or on the court's own motion and on a showing of good cause, the court may allow specified and limited discovery relevant to the motion." *Id.* § 27.006(b). Thus, while Section 27.006 contemplates that the movant and the non-movant may offer affidavits and, if permitted, other evidence obtained through discovery, nothing in the TPCA requires either party to offer evidence beyond the pleadings. *See In re Elliott*, 504 S.W.3d 455, 462 (Tex. App.—Austin 2016, orig. proceeding) ("Under Section 27.006(a) of the Act, the trial court may consider pleadings when determining whether to dismiss a legal action—the Act does not require a movant to present testimony or other evidence to satisfy his evidentiary burden. . . . . Similarly, while Section 27.006(b) of the Act provides that, '[o]n a motion by a party or on the court's own motion and on a showing of good cause, the court may allow specified and limited discovery relevant to the motion,' nothing in the Act requires a party to seek discovery relevant to the motion."). Rather, a party's decision not to offer evidence beyond the pleadings may have a bearing on whether that party successfully meets its respective burden under the TPCA. *See Watson v. Hardman*, 497 S.W.3d 601, 607–08 (Tex. App.—Dallas 2016, no pet.) (holding that, because plaintiffs' live pleading alleged facts demonstrating that defendant's statements were covered by TPCA, defendant was not required to adduce additional evidence beyond pleadings to carry his Section

27.005(b) burden). In short, a party that relies only on its pleadings does so at its own risk of being found not to have satisfied its TCPA burden under the circumstances of the case, but the act does not require parties to always offer evidence in addition to the pleadings.

We overrule Appellants first issue to the extent that they contend that the TPCA requires parties to offer evidence beyond the pleadings.

2. No Error Assigned to Commercial-Speech Exemption

Appellants also contend, as a subpoint in their first issue, that they met their burden to show, by a preponderance of the evidence, that the TCPA applied to the WSP entities claims. As a ground to deny the TCPA motion to dismiss, WSP Administration and WSP Buildings argued, in their response to the motion, that the TCPA does not apply to their suit because the suit is based on statements or conduct by Appellants that constitutes "commercial speech," which is not protected under the act. *See* TEX. CIV. PRAC. & REM. CODE § 27.010(b). Under the commercial-speech exemption, the TPCA does not

> apply to a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer.

Id.; *see Castleman v. Internet Money Ltd.*, 546 S.W.3d 684, 688 (Tex. 2018) (setting out four factors that must be satisfied for commercial-speech exemption to apply).

In its order, the trial court did not specify the ground on which it relied to deny the motion. Thus, we do not know whether the trial court based its ruling on the commercial-speech exemption.

To succeed on appeal, an appellant must attack all independent grounds that fully support an adverse ruling.[11] *See Britton v. Tex. Dep't of Criminal Justice*, 95 S.W.3d 676, 681 (Tex. App.—Houston [1st Dist.] 2002, no pet.); *see also Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993) ("We have held repeatedly that the courts of appeals may not reverse the judgment of a trial court for a reason not raised in a point of error."). If the appellant fails to do so, the appellate court must "accept the validity of that unchallenged independent ground" and affirm the challenged ruling. *Britton*, 95 S.W.3d at 681–82. Here, the commercial-speech exemption is an independent ground that fully supports the trial court's denial of

[11] This rule has been applied in many different contexts. *See Britton v. Tex. Dep't of Criminal Justice*, 95 S.W.3d 676, 681–82 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (plea to the jurisdiction); *Oliphant Fin. L.L.C. v. Hill*, 310 S.W.3d 76, 78 (Tex. App.—El Paso 2010, pet. denied) (judgment dismissing for want of prosecution); *A New Hope Health Care, Inc. v. Garcia*, No. 13–16–00201–CV, 2016 WL 4578410, at *2 (Tex. App.—Corpus Christi Sept. 1, 2016, no pet.) (mem. op.) (order denying a motion to dismiss for failure to file an expert report).

the motion as it relates to WSP Administration's and WSP Buildings's claims. *See* TEX. CIV. PRAC. & REM. CODE § 27.010(b).

In their opening appellants' brief, Appellants did not present an issue, or otherwise address, the commercial-speech exemption. After the exemption was addressed by Appellees in their brief, Appellants asserted for the first time in their reply brief that motion's denial could not be based on the commercial-speech exemption. This, however, is insufficient to preserve the challenge. *See Wright v. City of Houston*, No. 01-10-00941-CV, 2011 WL 5100905, at *2 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (mem. op.).

An appellant may file a reply brief addressing any matter in the appellee's brief, TEX. R. APP. P. 38.3, but "[a]n issue raised for the first time in a reply brief is ordinarily waived." *N.P. v. Methodist Hosp.*, 190 S.W.3d 217, 225 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). Instead, "[a]n appellant is required to present all issues to be considered on appeal in [an] appellant's brief." *Brockman v. Tyson*, No. 01-03-01335-CV, 2005 WL 2850128, at *4 n.2 (Tex. App.—Houston [1st Dist.] Oct. 27, 2005, pet. denied); *see also* TEX. R. APP. P. 38.1(i) (providing that appellant's brief "must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record").

"The rules of appellate procedure do not allow appellant to raise a new issue that was not discussed in his original brief, even if the new issue is raised in

response to a matter in the appellee's brief." *Gadekar v. Zankar*, No. 12-16-00209-CV, 2018 WL 2440393, at *15 (Tex. App.—Tyler May 31, 2018, no pet.); *accord Marsh v. Livingston*, No. 14-09-00011-CV, 2010 WL 1609215, at *4 (Tex. App.—Houston [14th Dist.] Apr. 22, 2010, pet. denied) (mem. op.) ("This rule holds true even if the new issue is raised [in the reply brief] in response to a matter in the appellee's brief but not raised in appellant's original brief.") (citing *Howell v. Tex. Workers' Comp. Comm'n*, 143 S.W.3d 416, 439 (Tex. App.—Austin 2004, pet. denied); *Barrios v. State*, 27 S.W.3d 313, 322 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd) ("Pointing out the *absence* of an appellant's argument does not raise the argument or entitle appellant to assert that argument for the first time in his reply brief. If the rule were construed otherwise, an appellee could never point out matters not raised by an appellant for fear of reopening the door."')); *Quick v. Plastic Sols. of Tex., Inc.*, 270 S.W.3d 173, 186 (Tex. App.—El Paso 2008, no pet.) ("The rules of appellate procedure do not permit an appellant to add a new issue in a reply brief in response to some matter pointed out in the appellee's brief, but not raised in the appellant's original brief."); *State v. Vavro*, 259 S.W.3d 377, 380 (Tex. App.—Dallas 2008, no pet.) (declining to address limitations argument raised for first time in reply brief even though raised in appellee's brief as ground to support judgment).

We hold that Appellants' failure to raise the issue of the commercial-speech exemption in its original appellant's brief waives the issue. Because Appellants have not attacked an independent ground that supports the trial court's order denying the motion to dismiss, we affirm the denial of the motion as it relates to WSP Administration's and WSP Buildings's claims. Accordingly, we overrule Appellants' remaining subpoints and issues as they relate to WSP Administration's and WSP Buildings's claims. *See Britton,* 95 S.W.3d at 682.

We next determine whether the trial court correctly denied Appellants' motion to dismiss as it relates to WSP USA, Inc.'s claims made in the First Amended Petition. As mentioned, WSP USA, Inc. nonsuited its claims after Appellants filed the TCPA motion to dismiss and, unlike WSP Administration and WSP Buildings, WSP USA, Inc. did not file a response to the motion.

B. TCPA Motion to Dismiss Relating to WSP USA, Inc.'s Claims

In their second issue, Appellants contend that "the trial court erred in not awarding attorney's fees against WSP USA, Inc. after it failed to file a response to Appellants' motion to dismiss." *See* TEX. CIV. PRAC. & REM. CODE § 27.009 (providing that court shall award attorneys' fees if TCPA motion granted). We agree.

1. TCPA Motion Not Moot

On appeal, WSP USA, Inc. asserts that Appellants' TCPA motion, which was filed based on the First Amended petition, became moot when the Second Amended Petition was filed. We disagree.

As discussed, WSP USA, Inc. asserted claims against Appellants in the First Amended Petition but ceased to be a plaintiff in the Second Amended Petition, effectively nonsuiting its claims. *See Smith v. CDI Rental Equip., Ltd.*, 310 S.W.3d 559, 565 (Tex. App.—Tyler 2010, no pet.) ("Parties to a suit, including plaintiffs, are just as effectively dismissed from a suit by omitting their names from an amended pleading as where a formal order of dismissal is entered."); *Fraud–Tech, Inc. v. Choicepoint, Inc.*, 102 S.W.3d 366, 375 (Tex. App.—Fort Worth 2003, pet. denied) (recognizing general rule that parties to a suit, including plaintiffs, are dismissed from the suit by omitting their names from an amended pleading). Although it has an absolute right to a nonsuit before resting its case-in-chief, a party's decision to nonsuit does not affect an adverse party's right to continue to pursue independent claims for affirmative relief. *Abatecola v. 2 Savages Concrete Pumping, LLC*, No. 14-17-00678-CV, 2018 WL 3118601, at *13 (Tex. App.—Houston [14th Dist.] June 26, 2018, no pet) (mem. op.) (citing *CTL/Thompson Tex., LLC v. Starwood Homeowner's Ass'n, Inc.*, 390 S.W.3d 299, 300 (Tex. 2013); *Villafani v. Trejo*, 251 S.W.3d 466, 467 (Tex. 2008); *James v.*

Calkins, 446 S.W.3d 135, 142–44 (Tex. App.—Houston [1st Dist.] 2014, pet. denied)); *see also* TEX. R. CIV. P. 162 (providing that a nonsuit "shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief" and "shall have no effect on any motion for sanctions, attorney's fees or other costs, pending at the time of the dismissal").

A motion to dismiss that affords more relief than a nonsuit provides constitutes a claim for affirmative relief, which survives nonsuit. *Abatecola*, 2018 WL 3118601, at *14 (citing *Rauhauser v. McGibney*, 508 S.W.3d 377, 381 (Tex. App.—Fort Worth 2014, no pet.), *overruled on other grounds by Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017)). "TCPA motions to dismiss survive nonsuit because, unlike a nonsuit, the TCPA motion to dismiss might also allow the movant to obtain a dismissal with prejudice, attorney's fees, and sanctions." *Id.*; *see also The Iola Barker v. Hurst*, No. 01-17-00838-CV, 2018 WL 3059795, at *5 (Tex. App.—Houston [1st Dist.] June 21, 2018, no pet.) (mem. op.) (holding that TPCA motion to dismiss, seeking dismissal with prejudice and attorney's fees, costs, and sanctions, constituted a "pending claim for affirmative relief" within meaning of Rule 162); *Walker v. Hartman*, 516 S.W.3d 71, 80 (Tex. App.—Beaumont 2017, pet. denied) (recognizing that TCPA motion to dismiss survives a nonsuit).

Here, Appellants' TCPA motion requested, not only dismissal, but also costs, attorneys' fees, and sanctions. Thus, Appellants' motion was not "moot" but remained pending as to WSP USA, Inc.'s claims even after those claims were nonsuited. *See Abatecola*, 2018 WL 3118601, at *14; *The Iola Barker*, 2018 WL 3059795, at *5.

2. Application of TCPA to WSP USA, Inc.'s Claims

Applying the de novo standard of review, we examine whether Appellants met their initial burden of proving that the TCPA applies to WSP USA, Inc.'s claims. To satisfy this burden, Appellants were required to demonstrate by a preponderance of the evidence that (1) WSP USA, Inc.'s "legal action" (2) "is based on, relates to, or is in response to" (3) Appellants' exercise of their right of free speech, petition, or association. *See* TEX. CIV. PRAC. & REM. CODE § 27.005(b).

Here, no one disputes that the WSP USA, Inc.'s claims, seeking damages and injunctive relief, constitute a "legal action," a term defined to include "a cause of action." TEX. CIV. PRAC. & REM. CODE § 27.001(6). The remaining elements of Appellants' initial burden are met if WSP USA, Inc.'s causes of action are based on, relate to, or are in response to either Appellants' exercise of their right of association or right of free speech, as defined by the TCPA.[12]

[12] The right of petition is not involved in this case.

The TCPA defines both the exercise of right of free speech and the exercise of the right of association as involving communications. *Id.* § 27.001(2)–(3). "Exercise of the right of association" is "a communication between individuals who join together to collectively express, promote, pursue, or defend common interests." *Id.* § 27.001(2). "Exercise of the right to free speech" is "a communication made in connection with a matter of public concern." *Id.* § 27.001(3). A "'[m]atter of public concern' includes an issue related to . . . a good, product, or service in the marketplace." *Id.* § 27.001(7).

"Communication" is defined as including "the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic." *Id.* § 27.001(1). The plain language of this definition extends the application of the TCPA to "[a]lmost every imaginable form of communication, in any medium." *Adams v. Starside Custom Builders, LLC,* 547 S.W.3d 890, 894 (Tex. 2018).

We note that two theories primarily underlie WSP USA, Inc.'s claims against Appellants: (1) Appellants took WSP's trade secret and proprietary information, transferred it to their new business venture, Infinity MEP, and then used the trade secret information to operate Infinity MEP in competition with WSP, and (2) Appellants, both while employed with WSP and after joining Infinity

MEP, interfered with existing and potential business relationships between WSP and its customers.

Appellants contend that the legal action is based on, relates to, or is response to their exercise of their right of association and right of free speech. *See* TEX. CIV. PRAC. & REM. CODE § 27.001(2), (3). They indicate that the lawsuit is based on, relates to, or is response to their "communications in the formation, promotion, and pursuit of their common interest—Infinity [MEP]—and involves alleged communications among [them, Sinz, and Infinity MEP] in allegedly misappropriating information and conspiring to breach alleged fiduciary duties." Appellants rely on allegations in the First Amended Petition to support application of the TCPA to WSP USA, Inc.'s claims.

Based on the language of the TCPA, the following allegations in the First Amended Petition support a conclusion that WSP USA, Inc.'s claims against Appellants are, at a minimum, related to the exercise of Appellants' rights of association and free speech:

- WSP's review of Appellants' computers revealed correspondence, indicating that Appellants had been engaging in "off the books" projects in violation of their fiduciary duties.

- WSP's "internal investigation also determined that Sinz, Gaskamp, Miller, and Hunter have interfered with WSP's current contractual relations . . . ."

- Appellants violated TUTSA by using and disclosing WSP's "valuable trade secret, proprietary, and confidential information in competition

with WSP" for the former employees' "own financial gain at Infinity MEP."

- Appellants violated UFTA by fraudulently transferring WSP's trade secret, proprietary, and confidential information to Infinity MEP.

- Appellants breached their duty of loyalty "by purposefully obtaining, disclosing, and using the trade secret, proprietary, and confidential information of WSP to establish a competing engineering firm, all while still employed by WSP[.]"

- Appellants had breached their fiduciary duties by using and disclosing WSP's confidential and trade secret information to their benefit and to WSP's detriment.

- Regarding tortious interference with existing contacts, Appellants "induced" parties, with whom WSP had contracts, "to reduce" their business with WSP.

- Appellants' "taking, sharing, and use of WSP's confidential, proprietary, and trade secret information has enabled [the former employees] to purposefully interfere with these prospective contracts and business relationships."

- Regarding civil conspiracy, Appellants and Sinz "act[ed] in collusion" (1) to "misappropriate WSP's trade secrets, proprietary, and confidential information;" (2) to "fraudulently transfer assets and WSP's trade secrets, proprietary, and confidential information"; (3) to "tortiously interfere with WSP's existing contracts and prospective business relationships;" and (4) "to engage in unfair competition with WSP."

- The former employees had "secretly conspired among themselves." They "devise[d] and implement[ed] wrongful and unlawful schemes to misappropriate WSP's trade secrets, proprietary, and confidential information, fraudulently transfer WSP assets and trade secrets, proprietary, and confidential information, engage in unfair competition, and tortiously interfere with WSP's existing contracts and prospective business relationships."

- Appellants' "continued fraudulent transfer of WSP's trade secret, proprietary, and confidential information" should be restrained, and they should be enjoined from "further" disclosure of WSP's trade secrets and confidential information.

WSP USA, Inc. asserts that Appellants did not meet their initial burden to show TCPA coverage because Appellants "only cite to WSP's legalese (i.e., the recitation of the elements of each claim), never identifying the facts in WSP's petition that Appellants contend invokes the TCPA." WSP USA, Inc. contends that "Appellants give no cogent, factual basis to conclude that WSP's legal claims are factually predicated on 'communications' in Appellants' exercise of their rights to free speech and of association, thereby failing to invoke the TCPA." We disagree.

When determining whether claims are covered under the TCPA, neither the TCPA nor the supreme court prohibits considering the portion of a plaintiff's petition identifying the causes of action. Instead, the Supreme Court of Texas has recognized that "the unique language of the TCPA directs courts to decide its applicability based on a holistic review of the pleadings." *Adams*, 547 S.W.3d at 897. "When it is clear from the plaintiff's pleadings that the action is covered by the Act, the defendant need show no more." *Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017). Here, the First Amended Petition does not simply list the generic, bare elements of WSP USA, Inc.'s causes of action. Rather, as listed above, the

elements are stated in a manner that incorporates Appellants' conduct to demonstrate that the conduct satisfies the elements. In this respect, the cited allegations provide a factual basis for the claims and are not merely "legalese."

As alleged in the petition, Appellants' transfer and disclosure of WSP's trade secret and proprietary information to Infinity MEP required a communication; that is, it required "the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic." *See* TEX. CIV. PRAC. & REM. CODE § 27.001(1); *see also Morgan v. Clements Fluids S. Tex., LTD.*, No. 12-18-00055-CV, 2018 WL 5796994, *3 (Tex. App.—Tyler Nov. 5, 2018, no pet. h.) (indicating that defendants' sharing and use of their former employers' trade secrets were TCPA "communications"). In addition, "inducing" parties, with whom WSP had contracts, "to reduce" their business with WSP and "sharing" "WSP's confidential, proprietary, and trade secret information" to "interfere with these prospective contracts and business relationships" would necessarily involve communications as defined by the TCPA. *See id.*; *see also Abatecola*, 2018 WL 3118601, at *7 (stating that interfering with customers would necessarily have required "communications" as defined by TCPA). Similarly, allegations that Appellants "secretly conspired among themselves" to "devise and implement wrongful and unlawful schemes" to misappropriate WSP's trade secrets, fraudulently transfer WSP assets and trade

secrets, engage in unfair competition, and tortiously interfere with WSP's existing contracts and prospective business relationships" also necessarily involved a "communication." *See* TEX. CIV. PRAC. & REM. CODE § 27.001(1); *see also Craig v. Tejas Promotions, LLC*, 550 S.W.3d 287, 296–97 (Tex. App.—Austin 2018, pet. filed) (determining that conspiring to misappropriate trade secrets involved a TCPA communication).

All these communications were made by individuals who "join[ed] together to collectively express, promote, pursue, or defend common interests," the common interest being the business of Infinity MEP, operating as WSP's competitor. *See* TEX. CIV. PRAC. & REM. CODE § 27.001(2). With respect to Appellants alleged interference with customers, the communication was "made in connection with a matter of public concern" because the communications with customers would have had been made in connection with one of the listed matters of public concern—a "service in the marketplace." *See id.* § 27.001(7)(E); *Abatecola*, 2018 WL 3118601, at *8.

We conclude that WSP USA, Inc.'s claims were, at a minimum, related to communications "between individuals who join together to collectively express, promote, pursue, or defend common interests" or communications "made in connection with a matter of public concern," which, respectively, constitute the "[e]xercise of the right of association" and the "[e]xercise of the right of free

speech" under the TCPA. *See* TEX. CIV. PRAC. & REM. CODE §§ 27.001(2), (3), 27.003(a). Thus, WSP USA, Inc.'s claims related to Appellants' exercise of their rights of association and free speech, as broadly defined by the TCPA. *See Abatecola*, 2018 WL 3118601, at *8. We hold that Appellants met their initial burden to show that the TCPA applied to WSP USA, Inc.'s claims. *See* TEX. CIV. PRAC. & REM. CODE § 27.005(b); *see also Morgan*, 2018 WL 5796994, *3 (holding—in case in which company alleged former employees took and shared trade secrets with new employers—that misappropriation-of-trade secrets claim was "based on, relates to, or is in response to," at least in part, former employees' "communications" among themselves and others within their new employers' enterprise through which they had allegedly shared or utilized information to which plaintiff company claimed trade secret protection); *Abatecola*, 2018 WL 3118601, at *8 (holding that tortious-interference-of-customer claim related to defendant's exercise of the right of free speech and right of association).

Because Appellants met their initial burden as to WSP USA, Inc.'s claims, we may affirm the trial court's order denying TCPA relief if WSP USA, Inc. presented a prima facie case as to each essential element of their claims. *See* TEX. CIV. PRAC. & REM. CODE § 27.005(c). WSP USA, Inc. did not meet this burden because it did not file a response to the motion to dismiss. *See id.* § 27.005(c); *see also Craig*, 550 S.W.3d at 297. For this reason, we hold that the trial court erred

when it did not grant Appellants' TCPA motion to dismiss WSP USA, Inc.'s claims. *See Craig*, 550 S.W.3d at 297.

When a trial court dismisses a legal action under the TCPA, the statute requires the court to award the successful movant its costs, reasonable attorneys' fees, other expenses as justice and equity may require, and sanctions "sufficient to deter the party who brought the legal action from bringing similar actions." *See* TEX. CIV. PRAC. & REM. CODE § 27.009(a). Appellants correctly assert in their brief that they are entitled to attorneys' fees, costs, sanctions, and possibly expenses, relating to the dismissal of WSP USA, Inc.'s claims. *See id.*

We sustain Appellants' second issue.

Conclusion

We affirm the portion of the trial court's order denying Appellants' motion to dismiss WSP Buildings's and WSP Administration's claims, but we reverse the portion of the order denying the motion with respect to WSP USA, Inc.'s claims. With respect to WSP USA, Inc.'s claims, we remand for the trial court to grant the motion to dismiss as to WSP USA, Inc.'s claims and to determine and award attorneys' fees, costs, other expenses as justice and equity may require, and sanctions consistent with the TCPA. *See id.*

Laura Carter Higley
Justice

Panel consists of Justices Jennings, Higley, and Massengale.

Jennings, J., joining the majority opinion and separately concurring.

Massengale, J., concurring, in part, and dissenting, in part.