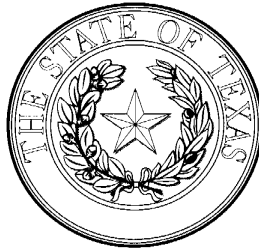


Opinion issued January 6, 2022



In The
Court of Appeals
For The
First District of Texas

NO. 01-20-00659-CV

**ANTHONY G. BUZBEE AND ANTHONY G. BUZBEE, LP D/B/A THE
BUZBEE LAW FIRM, Appellants**

V.

TERRY & THWEATT, P.C., Appellee

**On Appeal from the 334th District Court
Harris County, Texas
Trial Court Case No. 2020-31793**

MEMORANDUM OPINION

In this case, appellee Terry & Thweatt, P.C. sued appellants Anthony G. Buzbee and Anthony G. Buzbee, LP *d/b/a* The Buzbee Law Firm (collectively, “the Buzbee parties”) for tortious interference with contract and sought exemplary

damages. The Buzbee parties moved to dismiss Terry & Thweatt’s lawsuit pursuant to the Texas Citizens Participation Act (“TCPA”). *See* TEX. CIV. PRAC. & REM. CODE §§ 27.001–.011. The trial court denied the Buzbee parties’ motion to dismiss.

On appeal, the Buzbee parties argue that the trial court erred by denying their motion to dismiss because (1) Terry & Thweatt’s claims do not fall within a statutory exemption to the TCPA; (2) the TCPA applies to Terry & Thweatt’s claims because the claims are based on or in response to the Buzbee parties’ exercise of their right of free speech, right to associate, and right to petition; (3) Terry & Thweatt did not present clear and specific evidence demonstrating a *prima facie* case on each essential element of its claims; and (4) the Buzbee parties presented evidence establishing two affirmative defenses as a matter of law.

We affirm.

Background

Terry & Thweatt, P.C., and Anthony G. Buzbee, LP *d/b/a* The Buzbee Law Firm (“the Buzbee Law Firm”) are both law firms with offices located in Houston. The underlying dispute between them arose after Jade James and her ex-husband, John Luengas, approached both firms seeking representation following the death of their eighteen-year-old daughter, Alanna.

Alanna had worked at the Splendor Gentleman’s Club (“Splendor”). On the night of Alanna’s death, Splendor had allegedly provided her with alcohol and

allowed her to leave the premises in her vehicle even though she was intoxicated. On her way home, Alanna was in a car accident. Her car was then hit by another vehicle driven by someone who had been drinking. Alanna died at the scene of the accidents.

On October 10, 2017, James and Luengas met with attorneys at Terry & Thweatt to discuss the possibility of filing a wrongful death lawsuit against Splendor and the customer with whom Alanna had been drinking. During the meeting, Luengas mentioned that he was already represented by another attorney. Terry & Thweatt declined to represent Luengas. James denied being represented by Luengas's counsel, but she informed the firm that she had spoken with Luengas's counsel about Alanna's death. Terry & Thweatt did not present a representation agreement to either James or Luengas.

Two days later, on October 12, 2017, James and Luengas met with Lee Thweatt, one of the firm's partners. Luengas allegedly informed Thweatt that he had verbally terminated the attorney-client relationship with his counsel, but he did not present any written proof. Thweatt informed Luengas that, under Texas law, if he had terminated his prior counsel without cause, counsel could later assert their full fee interest in Luengas's case, and Luengas could potentially be liable for two sets of attorney's fees. Thweatt again declined to represent Luengas.

James, however, informed Thweatt that she had not hired Luengas's counsel. She signed a representation agreement with Terry & Thweatt and agreed to pay attorney's fees on a contingency basis. Under the contract, Terry & Thweatt would be entitled to 33 1/3% of James's recovery "[i]f settled before suit or arbitration is filed" and 40% of the recovery "[i]f settled before trial begins." The contract included a provision stating:

Client has the right to discharge Attorneys for any reason upon giving reasonable notice. Unless Client has good cause to discharge Attorneys, Attorneys are entitled to retain any fees based on recoveries before the date of discharge as well as Attorneys' fee, as set forth herein, to be paid out of any future recoveries. . . .

The day after James signed the representation agreement, James sent Thweatt an email terminating the agreement. In the email, James stated:

I apologize for any inconvenience but John and I have decided to go with a different attorney. We thank both you and [J]oe [Terry] for your time but we think that a different lawyer is the best for winning for our daughter. I am terminating our agreement.

Thweatt responded that because James had terminated the agreement without cause, she should inform her new counsel that Terry & Thweatt would not relinquish its fee interest in her case. On October 16, 2017, the Buzbee Law Firm filed a wrongful death lawsuit against Splendor on behalf of James and Luengas.

On July 10, 2019, the parties in the wrongful death lawsuit reached a confidential settlement agreement. The next day, an associate at the Buzbee Law Firm contacted Terry & Thweatt, informed the firm of the settlement agreement, and

offered payment to the firm “that was far less than the Firm’s 40% contingency fee agreement with James.” Terry & Thweatt rejected the offer and stated that it intended to seek recovery of the full amount of the contingent fee interest under the representation agreement that James had signed. Terry & Thweatt also sought “an equivalent amount to address Buzbee’s suspected tortious interference with the prospective client contract for Luengas.”

Several days later, the Buzbee Law Firm, on James’s behalf, initiated an arbitration proceeding against Terry & Thweatt under the representation agreement. James asserted that the 40% contingency fee interest was unconscionable and that, because she terminated the representation agreement after only one day, an award of anything more than \$5,000 to Terry & Thweatt would also be unconscionable.

On the same day, the Buzbee Law Firm also filed a lawsuit on Luengas’s behalf against Terry & Thweatt. In this suit, Luengas alleged that Terry & Thweatt had claimed that Luengas must pay it hundreds of thousands of dollars in attorney’s fees. Luengas sought a declaration that he did not owe any attorney’s fees to Terry & Thweatt. In an article that appeared in the *Texas Lawyer* about the lawsuit, Luengas was quoted as stating that he “never even considered” hiring Terry & Thweatt. Luengas ultimately non-suited this lawsuit without prejudice.

James and Luengas both filed separate grievances against Thweatt with the State Bar of Texas. Terry & Thweatt alleged that, at the hearing before the grievance

committee in February 2020, James testified under oath that Buzbee had assured her that she would not be responsible for paying the fee to Terry & Thweatt; instead, the Buzbee Law Firm would pay any fees that James owed to Terry & Thweatt. James then terminated her representation agreement, and she and Luengas hired the Buzbee Law Firm.

During the arbitration proceeding between James and Terry & Thweatt, the Buzbee Law Firm stipulated that it had agreed to pay any breach of contract damages that James owed to Terry & Thweatt. Ultimately, the arbitrator awarded \$5,000 in fees to Terry & Thweatt. The State Bar of Texas dismissed both James's and Luengas's grievances against Thweatt.

In May 2020, Terry & Thweatt sued the Buzbee parties for tortious interference with an existing contract—the representation agreement with James. It alleged that the Buzbee parties knew of James's contract with Terry & Thweatt and “actively encouraged” her to discharge Terry & Thweatt without cause and hire the Buzbee Law Firm instead. To encourage James to terminate her contract, “Tony Buzbee personally assured James that if she ended up owing any fees to Terry & Thweatt, P.C., the Buzbee Law Firm would pay those fees for James.” Terry & Thweatt alleged that, due to the Buzbee Law Firm's interference, it lost “the full 40% contingency fee that would have been earned on the settlement of James's case.”

Terry & Thweatt also sought exemplary damages, alleging that the Buzbee parties acted with malice or gross negligence.

The Buzbee parties moved to dismiss the lawsuit under the TCPA. In this motion, the Buzbee parties argued that the TCPA applied because Terry & Thweatt's tortious interference claim was based on or in response to the Buzbee parties' exercise of their right of free speech, right of association, and right to petition. The Buzbee parties also argued that the trial court should dismiss Terry & Thweatt's claims because it could not present clear and specific evidence raising a prima facie case on each element of its tortious interference and exemplary damages claims. The Buzbee parties further argued that even if Terry & Thweatt could present evidence raising a prima facie case, the court must dismiss Terry & Thweatt's claims because the Buzbee parties could establish two affirmative defenses as a matter of law: statute of limitations and payment. The Buzbee parties requested that the trial court award them attorney's fees and costs, and they also requested sanctions against Terry & Thweatt.

As supporting evidence, the Buzbee parties attached several exhibits to their TCPA motion. These exhibits included a July 2019 affidavit from Crystal Del Toro, an associate who met with Buzbee, James, and Luengas in October 2017; a July 2020 affidavit from James; a July 2020 affidavit from Buzbee; the final award in the arbitration proceeding between James and Terry & Thweatt; a \$5,000 check from

the Buzbee Law Firm to Terry & Thweatt, dated April 21, 2020; and news articles concerning the lawsuit against Splendor, Luengas's declaratory judgment lawsuit against Terry & Thweatt, and the underlying lawsuit.

In response, Terry & Thweatt argued that its claims were not based on the Buzbee parties' exercise of their free speech, association, or petition rights but were instead based on a private fee dispute between two law firms. Terry & Thweatt also argued that its claims should not be dismissed because they fell within two statutory exemptions to the TCPA: (1) the exemption for legal actions seeking recovery for wrongful death or statements regarding such a legal action, and (2) the commercial speech exemption. Additionally, Terry & Thweatt argued that if the TCPA applied, the trial court should not dismiss the claims because it could present evidence demonstrating a prima facie case on each element of its claims. Finally, Terry & Thweatt argued that the Buzbee parties could not prove their affirmative defenses as a matter of law.

As supporting evidence, Terry & Thweatt relied upon its original petition against the Buzbee parties and a declaration from Lee Thweatt. Thweatt attached several exhibits to his declaration, including the representation agreement with James; correspondence between James and Thweatt concerning termination of the agreement; a July 2019 affidavit executed by James; and a July 2019 affidavit executed by Del Toro.

The trial court denied the Buzbee parties' motion to dismiss without stating the grounds on which it ruled. This interlocutory appeal followed. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(12) (authorizing interlocutory appeal from order denying motion to dismiss under TCPA).

TCPA Motion to Dismiss

In their sole issue on appeal, the Buzbee parties argue that the trial court erred by denying their motion to dismiss Terry & Thweatt's claims under the TCPA.

A. Standard of Review and Governing Law

The purpose of the TCPA 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 § 27.002; *In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015) (orig. proceeding) (stating that TCPA “protects citizens from retaliatory lawsuits that seek to intimidate or silence them on matters of public concern”). The TCPA provides a mechanism for the early dismissal of a legal action that is based on or in response to certain statutorily defined rights.¹ TEX. CIV. PRAC. & REM. CODE

¹ The Texas Legislature amended the TCPA in the 2019 legislative session and provided that the amendments apply to legal actions filed after September 1, 2019. Terry & Thweatt's lawsuit was filed in May 2020. We therefore apply the version of the TCPA currently in effect.

§ 27.003. The basis of a legal action is determined by the plaintiff's allegations. *Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017).

The TCPA employs a burden-shifting framework. The party moving for dismissal bears the initial burden to demonstrate that the legal action is based on or in response to the party's exercise of the right of free speech, the right of association, or the right to petition. TEX. CIV. PRAC. & REM. CODE §§ 27.003(a), 27.005(b)(1). Each of these rights are statutorily defined in the TCPA.

Even if the legal action is based on or in response to the movant's exercise of statutorily protected rights under the TCPA, the motion to dismiss must be denied if the claimant establishes the applicability of a statutory exemption. *See State ex rel. Best v. Harper*, 562 S.W.3d 1, 11 (Tex. 2018) (stating that if statutory exemption applies, movant cannot invoke TCPA's protections); *Morrison v. Profanchik*, 578 S.W.3d 676, 680 (Tex. App.—Austin 2019, no pet.) (“If an action falls under a TCPA exemption, the TCPA does not apply and may not be used to dismiss the action.”). In ruling on the motion, the trial court may consider the pleadings, evidence that could be considered in a summary judgment proceeding, and affidavits stating the facts on which the liability or defense is based. TEX. CIV. PRAC. & REM. CODE § 27.006(a).

We review de novo a trial court's ruling denying a TCPA motion to dismiss. *Dallas Morning News, Inc. v. Hall*, 579 S.W.3d 370, 377 (Tex. 2019); *Dolcefino v.*

Cypress Creek EMS, 540 S.W.3d 194, 199 (Tex. App.—Houston [1st Dist.] 2017, no pet.). We view the evidence in the light most favorable to the nonmovant. *Dolcefino*, 540 S.W.3d at 199; *Cheniere Energy, Inc. v. Lotfi*, 449 S.W.3d 210, 214 (Tex. App.—Houston [1st Dist.] 2014, no pet.). We must construe the TCPA liberally to effectuate its purpose and intent fully. *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 898 (Tex. 2017) (per curiam).

B. Commercial Speech Exemption

Below, the Buzbee parties argued that Terry & Thweatt’s legal action was based on or in response to the exercise of their right of free speech, right of association, and right to petition. Assuming without deciding that the Buzbee parties satisfied this initial burden, we examine whether Terry & Thweatt established that its legal action was exempt from the TCPA’s coverage. *See, e.g., Hieber v. Percheron Holdings, LLC*, 591 S.W.3d 208, 211 (Tex. App.—Houston [14th Dist.] 2019, pet. denied) (assuming *arguendo* that TCPA movant satisfied initial burden to show lawsuit was based on right of free speech and association and addressing whether suit fell within commercial speech exemption, which was dispositive of appeal). We address only the commercial speech exemption because it is dispositive.

1. Basis of tortious interference claim

In its original petition, Terry & Thweatt asserted a claim for tortious interference with an existing contract—its representation agreement with James.

Terry & Thweatt alleged that James and Luengas had approached the firm and sought representation following the death of their eighteen-year-old daughter. Their daughter had worked at Splendor Gentleman's Club. On the night of her death, Splendor allegedly provided her with alcohol and allowed her to drive home. She was involved in two car accidents on her way home, and she died at the scene.

Terry & Thweatt alleged that James—not Luengas—signed a representation agreement with the firm on October 12, 2017. However, James terminated the agreement one day later, informing the firm that she and Luengas had decided to hire different counsel. Terry & Thweatt informed James that, because she terminated the agreement without cause, their firm had a contractual fee interest in any recovery that she obtained. On October 16, 2017, the Buzbee parties filed suit against Splendor on behalf of James and Luengas.

Here, Terry & Thweatt's tortious interference theory is that, at the initial meeting on October 13, 2017, the Buzbee parties knew of James's existing contract with Terry & Thweatt "and actively encouraged her to terminate Terry & Thweatt, P.C. without cause and hire [the Buzbee parties] instead." The Buzbee parties then contracted with James for a 40% contingency fee. Terry & Thweatt alleged:

Most importantly, despite the affidavit testimony submitted by James and Del Toro in July 2019 which essentially denied any tortious interference by Buzbee and his firm, on February 12, 2020, the Firm learned and discovered for the first time that to encourage James to terminate Terry & Thweatt, P.C., Tony Buzbee personally assured

James that if she ended up owing any fees to Terry & Thweatt, P.C., the Buzbee Law Firm would pay those fees for James.

Buzbee's assurance to James in this regard was concealed from the Firm by two misleading affidavits submitted by James and Del Toro in July 2019. Nonetheless, after James' February 12, 2020 testimony in the grievance proceeding, it was quite clear that with Buzbee's assurance in place, James terminated Terry & Thweatt, P.C. without cause. She and Luengas both then hired the Buzbee Law Firm to pursue wrongful death claims arising from their daughter's death.

Terry & Thweatt alleged that, due to these actions, it was deprived of "the full 40% contingency fee that would have been earned on the settlement of James's case." Instead, Terry & Thweatt only received \$5,000 at arbitration.

In light of these pleadings, we conclude that Terry & Thweatt's tortious interference claim is factually based on Buzbee's alleged promise to James, made at their initial meeting on October 13, 2017, that his law firm would personally pay any fees that James owed to Terry & Thweatt. This is the operative statement that allegedly caused James to terminate her representation agreement with Terry & Thweatt without cause and hire the Buzbee parties instead. Consequently, this is the operative statement that we analyze in determining the applicability of the commercial speech exemption.

2. Elements of commercial speech exemption

The TCPA 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.” TEX. CIV. PRAC. & REM. CODE § 27.010(a)(2). The Texas Supreme Court has held that this exemption applies when:

(1) the defendant was primarily engaged in the business of selling or leasing goods [or services], (2) the defendant made the statement or engaged in the conduct on which the claim is based in the defendant’s capacity as a seller or lessor of those goods or services, (3) the statement or conduct at issue arose out of a commercial transaction involving the kind of goods or services the defendant provides, and (4) the intended audience of the statement or conduct were actual or potential customers of the defendant for the kind of goods or services the defendant provides.

Castleman v. Internet Money Ltd., 546 S.W.3d 684, 688 (Tex. 2018) (per curiam).

The party asserting the commercial speech exemption bears the burden to prove its application. *Gaskamp v. WSP USA, Inc.*, 596 S.W.3d 457, 479 (Tex. App.—Houston [1st Dist.] 2020, pet. dism’d) (en banc). We consider the pleadings and record evidence in determining whether the party met its burden. *Id.*; *Hawkins v. Fox Corp. Housing, LLC*, 606 S.W.3d 41, 46 (Tex. App.—Houston [1st Dist.] 2020, no pet.) (“We may rely on the factual allegations in a plaintiff’s petition, alone, to meet the elements [of an exemption].”).

a. Defendants are primarily engaged in the business of selling or leasing goods or services

With respect to the first element—whether the defendant was primarily engaged in the business of selling or leasing goods or services—Terry & Thweatt alleged that the Buzbee parties are in the business of providing legal services in

Houston. In his affidavit in support of the TCPA motion, Buzbee acknowledged that he is a practicing attorney and owns the Buzbee Law Firm. Consequently, Terry & Thweatt established that the Buzbee parties are primarily engaged in the business of selling legal services. *See* TEX. CIV. PRAC. & REM. CODE § 27.010(a)(2); *Castleman*, 546 S.W.3d at 688; *see also Hieber*, 591 S.W.3d at 212 (stating that commercial speech exemption can apply when TCPA movant is employee of business entity).

b. Defendants made the statement in the capacity as sellers of goods or services

The next question is whether the TCPA movant made the statement on which the claim is based in the defendant's capacity as a seller or lessor of goods or services. *See Castleman*, 546 S.W.3d at 688. Here, the relevant communication is Buzbee's alleged statement to James that the Buzbee Law Firm would pay any fees James ended up owing to Terry & Thweatt, which caused James to terminate her representation agreement with Terry & Thweatt and hire the Buzbee parties.²

To determine whether the Buzbee parties made the challenged statement in the capacity as sellers of goods or services, we consider the context in which the

² Terry & Thweatt's tortious interference claim is not based on Del Toro's July 2019 affidavit, James's testimony before the State Bar grievance committee in February 2020, or the Buzbee parties' stipulation made to the arbitrator in March 2020 concerning its payment of James's fees. All of these statements occurred well after James terminated her contract with Terry & Thweatt in October 2017 and thus could not have served as the act or conduct that allegedly interfered with the contract. James's testimony before the grievance committee is how Terry & Thweatt allegedly learned of Buzbee's promise to James. It is not the statement upon which the tortious interference claim is based.

Buzbee parties made the statement. *See Gaskamp*, 596 S.W.3d at 481; *Hawkins*, 606 S.W.3d at 47 (“We review the context of the statements to determine whether the challenged statements propose a commercial transaction.”). Here, the pleadings supply the relevant context: James signed an agreement to Terry & Thweatt’s representation on October 12, 2017. The next day, James and Luengas met with Buzbee and Del Toro. James emailed Thweatt and informed him that she was terminating the representation agreement. James and Luengas then hired the Buzbee parties as their counsel. The Buzbee parties filed suit on James and Luengas’s behalf and negotiated a settlement agreement. Terry & Thweatt alleged that it became aware at James’s grievance hearing in February 2020 that Buzbee promised James that his firm would pay any fees James owed to Terry & Thweatt. It alleged that the Buzbee parties made this promise to encourage James to terminate her contract with Terry & Thweatt and hire the Buzbee parties instead.

In connection with the TCPA motion to dismiss, both James and Buzbee provided affidavits in which they disputed that this promise occurred before James terminated her relationship with Terry & Thweatt. Instead, both James and Buzbee averred that Buzbee promised James that his law firm would pay her fees after Terry & Thweatt informed her that, despite her termination of the representation agreement, it would still seek its fees from her recovery. In reviewing the trial court’s denial of a TCPA motion to dismiss, we view the evidence in the light most favorable

to the nonmovant. *Dolcefino*, 540 S.W.3d at 199. Moreover, even when the defendant denies making the challenged statement, we must assume the defendant made the statement for purposes of determining whether a TCPA exemption applies. *See Morrison*, 578 S.W.3d at 683. Here, the non-movant is Terry & Thweatt, which alleged in its pleadings and in Thweatt's declaration that Buzbee made this alleged promise at his initial meeting with James and that this promise led to her terminating her relationship with Terry & Thweatt.

Terry & Thweatt complain about alleged conduct by the Buzbee parties that occurred during a meeting with James, a client of Terry & Thweatt's who nevertheless spoke with the Buzbee parties about obtaining representation for a wrongful death lawsuit. Buzbee, Del Toro, and James all averred that the purpose of this meeting was to discuss possible representation of James and Luengas by the Buzbee Law Firm. It is also undisputed that James terminated her attorney-client relationship with Terry & Thweatt during this meeting and that she hired the Buzbee parties.

Reviewing the pleadings and the evidence in the light most favorable to the non-movant, we conclude that the alleged promise—if made—was made in the Buzbee parties' capacity as sellers of legal services. *See* TEX. CIV. PRAC. & REM. CODE § 27.010(a)(2); *Castleman*, 546 S.W.3d at 688; *Gaskamp*, 596 S.W.3d at 481 (concluding that defendants—former employees—sent advertising brochures to

plaintiff's clients "in the context of furthering [competitor's] business for the purpose of securing sales for [competitor]" and thus acted in their capacity as sellers of new employer's services). The commercial speech exemption "applies when communications involve business pursuits for oneself or a business stands to profit from the statements at issue." *Staff Care, Inc. v. Eskridge Enters., LLC*, No. 05-18-00732-CV, 2019 WL 2121116, at *8 (Tex. App.—Dallas May 15, 2019, no pet.) (mem. op.). The alleged promise would alleviate any potential concerns about the financial detriment from terminating the representation agreement with Terry & Thweatt. Communications made in furtherance of the business satisfy the second prong of the commercial speech analysis. *Gaskamp*, 596 S.W.3d at 481.

c. The statement arose out of a commercial transaction involving the kinds of services that defendants provide

Related to the second element of the commercial speech exemption is the third element: the complained-of statement or conduct must arise out of a commercial transaction involving the kind of goods or services the defendant provides. *See Castleman*, 546 S.W.3d at 688; *Gaskamp*, 596 S.W.3d at 481. Here, Terry & Thweatt asserted that the Buzbee parties made the alleged promise to James during a meeting in which Buzbee and James discussed whether the Buzbee parties would represent James in her wrongful death lawsuit. This is a commercial transaction involving the kinds of services the Buzbee parties provide: legal services. "[E]mploying a lawyer is one type of commercial transaction[.]" *Buzbee v. Canales*,

621 S.W.3d 802, 808 (Tex. App.—El Paso 2021, pet. denied) (internal quotations omitted).

The Buzbee parties argue that the commercial speech exemption does not apply in this case because, for the exemption to apply, the statements must be about the defendant's goods or services. They argue that all statements attributed to the Buzbee parties in Terry & Thweatt's petition—the Buzbee parties' letter to Terry & Thweatt offering to pay it a portion of James's recovery; the stipulation to the arbitrator about payment of James's fees; and statements in Luengas's declaratory judgment action against Terry & Thweatt—are statements about Terry & Thweatt's services, not the Buzbee parties' services. However, the key communication is Buzbee's alleged promise to James that the Buzbee Law Firm will pay her fees owed to Terry & Thweatt.

In construing the commercial speech exemption in *Castleman*, the Texas Supreme Court noted that “‘the sale or lease of goods or services’ must refer to *the defendant's* sale or lease of goods or services.” 546 S.W.3d at 688; *Toth v. Sears Home Improvement Prods., Inc.*, 557 S.W.3d 142, 154 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (“Even before *Castleman*, courts have held that the exemption is not established unless the challenged statement was ‘about’ the speaker's particular goods or services, or the speaker's business of selling them. As *Castleman* acknowledges, the mere fact that a person sells goods or services does not deny him

the TCPA’s protections when he speaks of ‘other goods’ in the marketplace.”); *see also Hawkins*, 606 S.W.3d at 48 (concluding that this element of exemption was established because claims arose out of sales services defendant provided). Additionally, “the only reasonable construction of the exemption’s reference to ‘the statement or conduct’ is as a reference back to ‘the defendant’s’ statement or conduct ‘on which the claim is based.’” *Castleman*, 546 S.W.3d at 688 (emphasis added).

Here, the challenged statement that forms the basis of Terry & Thweatt’s tortious interference claim refers to the Buzbee parties’ sale of services. Buzbee allegedly promised James that if she ended up owing any fees to Terry & Thweatt, the Buzbee Law Firm would pay those fees. This is a promise concerning an act that the Buzbee Law Firm would undertake as part of its representation of James and its provision of legal services to her. This statement refers to the Buzbee parties’ services, not to Terry & Thweatt’s services.

The Buzbee parties further argue that the commercial speech exemption cannot apply because no commercial transaction existed between the Buzbee Law Firm and Terry & Thweatt. Instead, the only commercial transactions involved were between James and Terry & Thweatt and between the Buzbee parties and James and Luengas. However, nothing in the text of the commercial speech exemption or in *Castleman* requires the existence of a commercial transaction between the plaintiff and the defendant. *See Morrison*, 578 S.W.3d at 683. Instead, the statute requires

only that the statement arise “out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction.” TEX. CIV. PRAC. & REM. CODE § 27.010(a)(2). Here, the alleged statement arises out of Buzbee’s sale of legal services to James. We conclude that the alleged statement arises out of a commercial transaction involving the kind of services the Buzbee parties provide. See TEX. CIV. PRAC. & REM. CODE § 27.010(a)(2); *Castleman*, 546 S.W.3d at 688; *Gaskamp*, 596 S.W.3d at 481.

d. The intended audience of the statement was actual or potential customers of defendants for the kind of services that defendants provide

The final element of the commercial speech exemption requires that “the intended audience of the statement or conduct” be “actual or potential customers of the defendant for the kind of goods or services the defendant provides.” *Castleman*, 546 S.W.3d at 688. Terry & Thweatt alleged that James—the audience for Buzbee’s promise to pay any fees owed to Terry & Thweatt—was a potential customer of the Buzbee parties’ legal services. Terry & Thweatt alleged that, based on this promise, James became an actual customer of the Buzbee parties.

The Buzbee parties argue that none of the statements attributed to it in Terry & Thweatt’s petition were made to an audience of actual or potential customers. They point out that Del Toro’s affidavit and James’s testimony were made to the State Bar grievance committee; their stipulation concerning payment of James’s fees

was made to the arbitrator; and their letter offering a portion of James’s settlement agreement was made to Terry & Thweatt itself. The audience for these statements—the grievance committee, the arbitrator, and Terry & Thweatt—were not actual or potential customers of the Buzbee parties. These are not the pertinent communications. Rather, Terry & Thweatt’s tortious interference claim was based on the Buzbee parties’ alleged promise to James made at the October 13, 2017 meeting. James was a potential customer of the Buzbee parties’ legal services, and she became an actual customer after this meeting.

We conclude that Terry & Thweatt have satisfied this element of the commercial speech exemption. *See* TEX. CIV. PRAC. & REM. CODE § 27.010(a)(2); *Castleman*, 546 S.W.3d at 688; *Gaskamp*, 596 S.W.3d at 481 (concluding that by sending advertising materials to plaintiff’s clients, former employees were seeking to market competitor’s services to potential customers).

We conclude that Terry & Thweatt established that its tortious interference claim—based on Buzbee’s alleged promise to James, a client of Terry & Thweatt’s and potential client to the Buzbee Law Firm—falls within the commercial speech exemption. *See* TEX. CIV. PRAC. & REM. CODE § 27.010(a)(2); *Castleman*, 546 S.W.3d at 688.

3. Exemplary damages

In its original petition, Terry & Thweatt also pleaded that it was entitled to recovery of exemplary damages. Exemplary damages are not a standalone cause of action; instead, exemplary damages are a remedy that is potentially recoverable for certain claims if the claimant meets specific standards of pleading and proof. *See* TEX. CIV. PRAC. & REM. CODE §§ 41.001(5) (defining “exemplary damages” as “any damages awarded as a penalty or by way of punishment but not for compensatory purposes”), 41.003 (setting out standards for recovering exemplary damages, including requirement that claimant establish that harm results from fraud, malice, or gross negligence, which must be proved by clear and convincing evidence and, if in jury trial, must be found by unanimous verdict); *Van Der Linden v. Khan*, 535 S.W.3d 179, 202 (Tex. App.—Fort Worth 2017, pet. denied) (noting, in TCPA case, that heightened standards for exemplary damages do not alter elements of underlying tort claim but are instead “a potential barrier” to damages plaintiff might be able to recover should plaintiff prevail on underlying tort claim at trial).

The TCPA “applies to the dismissal of causes of action, not remedies,” and although recovering exemplary damages at trial might require the plaintiff to provide additional proof, seeking exemplary damages does not alter the elements that the plaintiff must prove to recover general damages for an underlying tort claim. *Van Der Linden*, 535 S.W.3d at 202; *see also* TEX. CIV. PRAC. & REM. CODE § 27.001(6)

(defining “legal action” as “a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal, declaratory, or equitable relief”).

Exemplary damages are a potential remedy if Terry & Thweatt proves its tortious interference claim. *See Seelbach v. Clubb*, 7 S.W.3d 749, 757 (Tex. App.—Texarkana 1999, pet. denied) (stating that plaintiff can recover exemplary damages for tortious interference with contract claim if plaintiff establishes that interference was malicious); *see also Tex. Beef Cattle Co. v. Green*, 921 S.W.2d 203, 210 (Tex. 1996) (noting that plaintiff is not required to prove actual malice to recover compensatory damages for tortious interference with existing contract, but such finding is required to recover exemplary damages for claim). Exemplary damages are not, however, an independent claim that is separate from Terry & Thweatt’s tortious interference claim. Terry & Thweatt is therefore not required to demonstrate that the request for exemplary damages also falls within the commercial speech exemption. *See Van Der Linden*, 535 S.W.3d at 202.

Because Terry & Thweatt established the applicability of an exemption to the TCPA, we hold that the trial court did not err by denying the Buzbee parties’ TCPA motion to dismiss.³

³ Because we hold that Terry & Thweatt’s sole claim falls within an exemption to the TCPA, we need not address whether Terry & Thweatt established a prima facie case

Conclusion

We affirm the order of the trial court.

April L. Farris
Justice

Panel consists of Justices Hightower, Rivas-Molloy, and Farris.

on each essential element of its tortious interference claim or whether the Buzbee parties established an affirmative defense to this claim.