Opinion issued December 29, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-21-00161-CV

SIX BROTHERS CONCRETE PUMPING, LLC AND JOSEPH LOWRY, Appellants

V.

MARTIN TOMCZAK, Appellee

On Appeal from the 333rd District Court
Harris County, Texas
Trial Court Case No. 2021-07817

MEMORANDUM OPINION ON REHEARING

Appellants Six Brothers Concrete Pumping LLC ("Six Brothers") and Joseph Lowry filed a motion for rehearing of our August 2, 2022 opinion and

judgment. We deny the motion for rehearing, withdraw our opinion and judgment of August 2, 2022, and issue this memorandum opinion and judgment in their stead. Our disposition remains the same.

Appellee Martin Tomczak sued his former employer, Six Brothers Concrete Pumping LLC ("Six Brothers"), and its managing member, Joseph Lowry, for declaratory judgment that a "Non-Compete Contract" was unenforceable and for damages due to alleged tortious interference with Tomczak's prospective employment opportunities. The trial court entered a temporary injunction, and later it denied the appellants' motion to dismiss under the Texas Citizens Participation Act ("TCPA") and awarded Tomczak attorney's fees and costs.[1] Six Brothers and Lowry appealed both the injunction and the denial of their motion to dismiss. Tomczak filed a notice of cross-appeal of the temporary injunction.

We dissolved the temporary injunction because it does not comply with Texas Rule of Civil Procedure 683. We affirm the denial of the motion to dismiss and the award of attorney's fees and costs because the TCPA does not apply to Tomczak's claims and the record supports a finding that the TCPA motion was frivolous.

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[1] *See* TEX. CIV. PRAC. & REM. CODE §§ 27.001–.011 (Texas Citizens Participation Act).

Background

Martin Tomczak worked as an operational manager for Joseph Lowry's company, Six Brothers Concrete Pumping ("Six Brothers"), which has its principal office in La Marque, Texas. On May 5, 2020, two days after Tomczak began work, he and a representative of Six Brothers signed a document called "Six Brothers Concrete Pumping, LLC Non-Compete Contract," which stated:

> {Marty Tomczak} agrees that, during the term of **{employment, relationship, sub-contract etc.}** he/she will not engage in competing business in the industry of **{concrete pumping}**, or with any other business that can in any way be deemed a competitor of {Six Brothers Concrete Pumping, LLC}, during {employment, relationship, sub-contract etc.}, and for a period of {1} year(s) after {employment, relationship, sub-contract etc.}.
>
> Specifically, {Marty Tomczak} may not, directly or indirectly, operate, participate in, provide concrete pumping services to established customers or by any business that competes with {Six Brothers Concrete Pumping, LLC} in any way.
>
> For the purposes of this contract, a "competitor" or "competing business" is defined as one that operates, in any capacity, in the {Concrete Pumping Industry} industry, within a {50} mile radius of {Six Brothers Concrete Pumping, LLC}.
>
> [Signed by Tomczak and Sarah Daugherty for Six Brothers]
>
> [Handwritten below signature line]
>
> If laid off or furloughed, this contract null & void. This excludes an operator position & only applies to management & sales position.
>
> [Signed again by Tomczak and Daugherty]

On December 29, 2020, Tomczak resigned from Six Brothers. Tomczak alleges that Lowry disparaged him on social media and threatened him and potential employers with litigation based on the non-compete contract. A week after Tomczak resigned from Six Brothers, he began working for STAR Concrete Pumping Company ("STAR Concrete"), but, on January 29, 2021, STAR Concrete terminated Tomczak from that position "solely because of a looming threat" of litigation by Lowry and Six Brothers regarding the non-compete contract. In an email, Kenneth Melton, chief executive officer of STAR Concrete told Tomczak that he "look[ed] forward to the day we can work together without threat of litigation or any other interference."

Less than two weeks after Tomczak was fired, he filed suit against Lowry and Six Brothers seeking a declaratory judgment that the non-compete contract was unenforceable due to lack of consideration and because the prohibitions were not reasonable in terms of the scope of the activity to be restrained, the duration of the restriction, and the geographical territory included in the restrictions. In addition to the request for declaratory judgment, Tomczak sought money damages for tortious interference with prospective employment and attorney's fees. Finally, Tomczak included an application for a temporary restraining order and a request for injunctive relief in his original petition.

The day after Tomczak filed suit, the trial court entered a temporary restraining order enjoining Six Brothers and Lowry from "attempting to enforce" the non-compete contract "to prevent Tomczak from being employed by any other entity in the concrete pumping business." The TRO also enjoined Six Brothers and Lowry "from causing others to enforce this document as well."

Lowry was served with the suit two days after the TRO was entered. Six Brothers and Lowry filed answers and motions to dismiss under the Texas Citizens Participation Act.

A month after Tomczak filed suit, the trial court held a hearing on his application for a temporary injunction. Tomczak testified that he was unemployed at that time, but he had previously worked in the concrete pumping industry for 16 years. Tomczak said that he lived in Spring, Texas, which was not within a 50-mile radius of Six Brothers's principal location in La Marque. Tomczak testified that Lowry told him that the non-compete contract prohibited Tomczak from working within 50 miles of a concrete pumping operation that Six Brothers had in Tomball, Texas.

Tomczak testified that, when he went to work for Six Brothers, he had an agreement regarding compensation, which included salary, truck allowance, and incidental costs of using his truck. He also testified that he was not given anything in return for signing the non-compete contract. Aside from the email from STAR

Concrete, Tomczak presented no evidence that any other employer was prepared to hire him but for the non-compete contract.

Although the parties argued about whether the non-compete contract was enforceable and supported by consideration, the trial court admonished the parties to "stay on the TI," saying:

> Let me remind both counselors to stay on the TI. We are not arguing the merits today, whether or not it is unenforceable or not. Obviously, it's going to be up to either the Judge or the jury, whichever one you decide at that point, but we are not on the merits. We are just here for the TI today.

After the hearing, the trial court signed a temporary injunction that made no mention of consideration of whether the non-compete was enforceable.[2] The temporary injunction ordered:

> That Defendants Six Brothers and Lowry are immediately enjoined and must refrain from attempting to enforce the document entitled *Six Brothers Concrete Pumping LLC Non-Compete Contract* to prevent Tomczak from being employed by any other entity in the concrete pumping business.* see note below Defendants Six Brothers and Lowry are enjoined from causing others to enforce this document as well.

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[2] The temporary injunction included language proposed by Tomczak regarding whether the agreement was supported by consideration, but the trial court struck through that provision before signing:

> The evidence presented shows that Defendants Six Brothers Concrete Pumping, LLC and Joseph Lowry have attempted to enforce a purported non-competition agreement that does not meet the legal requisites of the Texas Covenant Not to Compete Act in that there was no consideration provided to Tomczak in exchange for his purported post-employment agreement not to compete, rendering it invalid and unenforceable.

Below the trial court's signature was the following note:

> *Six Brothers and Lowery [sic] are NOT enjoined from enforcement of the Non-Compete against any concrete pumping business headquartered within a 50 mile radius of Six Brothers' principle [sic] place of business located at . . . La Marque, Texas . . . . Further, the Court finds that Star Concrete pumping, located in Tomball, Texas, is outside of the 50 mile radius for enforcement.

Two days after the trial court entered the temporary injunction, Tomczak amended his petition, adding a claim for defamation per se based on Lowry's alleged "callous and vicious posts" that "demean[ed] Tomczak's professional integrity." Six Brothers and Lowry did not file an amended motion to dismiss under the TCPA.

Six Brothers and Lowry filed a notice of interlocutory appeal from the temporary injunction. They maintain that the non-compete contract is supported by consideration and enforceable and that the temporary injunction is vague and overly broad. Tomczak also filed a notice of appeal. He maintains that the non-compete contract is unenforceable due to lack of consideration and that the temporary injunction is sufficiently specific and not overly broad.

While the interlocutory appeal of the temporary injunction was pending, the trial court denied the motion to dismiss under the TCPA. Six Brothers and Lowry filed a notice of appeal from that order, and, in accordance with the Rules of Appellate Procedure, it was docketed in the same cause number as the appeal from the temporary injunction. *See* TEX. R. APP. P. 12.2(c). On appeal, Six Brothers and

Lowry maintain that Tomczak's suit was based on, related to, or in response to their exercise of free speech and the right to petition. They also maintain that Tomczak cannot establish by clear and specific evidence each element of his claim for tortious interference with a prospective employment relationship.

Analysis

This case is a combination of two interlocutory appeals: an appeal and cross-appeal from the temporary injunction and an appeal from the denial of the motion to dismiss under the TCPA.

I. Appeal from the temporary injunction

On appeal, the parties argue about whether the non-compete contract was supported by consideration and enforceable. Six Brothers and Lowry also argue that the temporary injunction was not specific enough to inform them of what acts were prohibited. In this interlocutory appeal, we do not need to determine whether the non-compete contract was supported by consideration and enforceable because assuming without deciding that it is, the temporary injunction is nevertheless void because it is not specific, and it fails to describe in reasonable detail the act or acts sought to be restrained.

A. Standard of review

We review a trial court's order granting a temporary injunction for an abuse of discretion. *Abbott v. Anti-Defamation League Austin, Sw., & Texoma Regions,*

610 S.W.3d 911, 916 (Tex. 2020); *cf.* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(4) (authorizing interlocutory appeal from order that grants or refuses a temporary injunction). We review the evidence in the light most favorable to the trial court's ruling, draw all legitimate inferences from the evidence, and defer to the trial court's resolution of conflicting evidence. *INEOS Grp. Ltd. v. Chevron Phillips Chem. Co., LP*, 312 S.W.3d 843, 848 (Tex. App.—Houston [1st Dist.] 2009, no pet.). "Abuse of discretion does not exist if the trial court heard conflicting evidence, and evidence appears in the record that reasonably supports the trial court's decision." *Id.*

B. Temporary injunction

In general, "[a] temporary injunction is an extraordinary remedy and does not issue as a matter of right." *Abbott*, 610 S.W.3d at 916 (quoting *Walling v. Metcalfe*, 863 S.W.2d 56, 57 (Tex. 1993)). "The function of a preliminary injunction is to maintain the status quo rather than adjudicate the matter on the merits." *In re M-I L.L.C.*, 505 S.W.3d 569, 576 (Tex. 2016); *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). "The 'status quo' is the 'last, actual, peaceable, non-contested status which preceded the pending controversy.'" *Clint Indep. Sch. Dist. v. Marquez*, 487 S.W.3d 538, 555 (Tex. 2016) (quoting *In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004)).

"The party applying for a temporary injunction 'must plead and prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable imminent, and irreparable injury in the interim.'" *Abbott*, 610 S.W.3d at 916 (quoting *Butnaru*, 84 S.W.3d 198, 204 (Tex. 2002)). The applicant has the burden to establish each element. *Abbott*, 610 S.W.3d at 916. "An injury is irreparable if the injured party cannot be adequately compensated in damages or if the damages cannot be measured by any certain pecuniary standard." *Butnaru*, 84 S.W.3d at 204.

At a hearing on an application for a temporary injunction, "the applicant is not required to establish that she will prevail on final trial . . . [T]he only question before the trial court is whether the applicant is entitled to preservation of the status quo pending trial on the merits." *Walling*, 863 S.W.2d at 58. An applicant can show a probable right to relief by demonstrating that he is likely to succeed on final determination of the merits. *See Abbott*, 610 S.W.3d at 917 (stating that Texas Supreme Court "need not resolve the ultimate merits of the plaintiffs' claims in order to determine whether they established a probable right to relief," and concluding that temporary injunction was an abuse of discretion because plaintiffs' claims were likely to fail). "To show a probable right of recovery, an applicant need not establish that it will finally prevail in the litigation, but it must, at the very least, present some evidence that, under the applicable rules of law, tends to

support its cause of action." *INEOS Grp.*, 312 S.W.3d at 848; *see Tanguy v. Laux*, 259 S.W.3d 851, 857 (Tex. App.—Houston [1st Dist.] 2008, no pet.) ("A probable right to the relief sought is shown by alleging a cause of action and presenting evidence that tends to sustain it.").

Rule 683 of the Texas Rules of Civil Procedure sets out the requirements for a temporary injunction:

> Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.
>
> Every order granting a temporary injunction shall include an order setting the cause for trial on the merits with respect to the ultimate relief sought. The appeal of a temporary injunction shall constitute no cause for delay of the trial.

TEX. R. CIV. P. 683. "These procedural requirements are mandatory, and an order granting a temporary injunction that does not meet them is subject to being declared void and dissolved." *Qwest Commc'ns Corp. v. AT & T Corp.*, 24 S.W.3d 334, 337 (Tex. 2000).

"The purpose of the rule is to adequately inform the enjoined party of what he is enjoined from doing and the reason why he is enjoined." *Wright v. Liming*, No. 01-19-00060-CV, 2019 WL 3418516, at *4 (Tex. App.—Houston [1st Dist.]

July 30, 2019, no pet.) (mem. op.); *In re Chaumette*, 456 S.W.3d 299, 305 (Tex. App.—Houston [1st Dist.] 2014, no pet.). It "must be as definite, clear and precise as possible and when practicable it should inform the defendant of the acts he is restrained from doing, without calling on him for inferences or conclusions about which persons might well differ and without leaving anything for further hearing." *San Antonio Bar Ass'n v. Guardian Abstract & Title Co.*, 291 S.W.2d 697, 702 (Tex. 1956). An injunction should leave "the person enjoined in no doubt about his duties, and should not be such as would call on him for interpretations, inferences, or conclusions." *Vaughn v. Drennon*, 202 S.W.3d 308, 316 (Tex. App.—Tyler 2006, pet. denied); *see Tex. Health & Hum. Servs. Comm'n v. Advocs. for Patient Access, Inc.*, 399 S.W.3d 615, 629 (Tex. App.—Austin 2013, no pet.). Injunctions must be narrowly drawn and not "so broad as to enjoin a defendant from activities which are a lawful and proper exercise of his rights." *Holubec v. Brandenberger*, 111 S.W.3d 32, 39–40 (Tex. 2003); *accord Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53, 65 (Tex. 2016). "An injunction so broad that it enjoins a defendant from a lawful and proper exercise of his rights is an abuse of discretion." *Midway CC Venture I, LP v. O&V Venture, LLC*, 527 S.W.3d 531, 534 (Tex. App.—Houston [1st Dist.] 2017, no pet.).

C. The temporary injunction is not specific in terms and does not describe in reasonable detail the act or acts to be restrained.

The temporary injunction required Six Brothers and Lowry to "refrain from attempting to enforce the [non-compete contract] to prevent Tomczak from being employed by any other entity in the concrete pumping business."

Six Brothers and Lowry also argues that the temporary injunction does not comply with Rule 683 because it does not describe the acts to be restrained in reasonable detail and because it refers to another document. Six Brothers and Lowry argue that the temporary injunction prohibits them from mentioning the non-compete contract to others and from preparing for and pursuing litigation. At the hearing on the temporary injunction, counsel for Six Brothers and Lowry argued:

> The last thing I'll say, Judge, is people file lawsuits every day involving contractual terms, some of which are enforceable or ultimately determined to be unenforceable. *And if you are going to enjoin my client from attempting to enforce his noncompete agreement, does that mean he can't continue the other litigation that currently exists*? Does that mean he couldn't file a lawsuit that signed the agreement violated it? [sic] We can't close the courthouse doors, your Honor. *And candidly, I'm not sure what that means*. If it means he can't tell anybody that there's a pending lawsuit or that litigation may be commenced, that['s] a prior restrain[t] on speech, which is presumptively unconstitutional. (Emphasis added.)

Six Brothers and Lowry assert that the temporary injunction is an improper restriction on their access to the courts. Access to the courts in Texas is protected by the Open Courts provision of our Texas constitution, which provides: "All

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. Typically, a covenant not to compete is enforceable by the promisee's filing of a suit for damages or injunctive relief. *See* TEX. BUS. & COM. CODE § 15.51. Thus, an injunction prohibiting "attempting to enforce" a contract necessarily enjoins the filing of a lawsuit to enforce the contract. Although it is rare, the Supreme Court of Texas has held that an "anti-suit injunction is appropriate in four instances: 1) to address a threat to the court's jurisdiction; 2) to prevent the evasion of important public policy; 3) to prevent a multiplicity of suits; or 4) to protect a party from vexatious or harassing litigation." *Golden Rule Ins. Co. v. Harper*, 925 S.W.2d 649, 651 (Tex. 1996). None of these instances apply in this case. *Golden Rule* involved an issue of competing litigation in a foreign jurisdiction. *Id.* at 650. This case involves a covenant not to compete and Tomczak's need to protect the status quo and earn a living during the pendency of litigation.

Six Brothers and Lowry have argued on appeal about their interpretation of what prohibitions may be included in the language of the temporary injunction, but the temporary injunction does not specifically prohibit them from talking about the existence of the non-compete contract, speaking to Tomczak's potential employers, or filing or litigating a breach of contract suit for damages. That is the problem. It may be that the trial court intended to prohibit Six Brothers and Lowry from

interfering with Tomczak's ability to obtain and retain employment in his chosen field while the case proceeded. It may be that the court meant to end Lowry's communication with potential or actual employers of Tomczak, particularly those outside the 50-mile radius to which the non-compete contract allegedly applied. But the temporary injunction does not actually restrain Lowry from such communications. Instead, it restrains Six Brothers and Lowry from "attempting to enforce" the non-compete without specifying what actions are prohibited.

Because it fails to specify what actions are prohibited, we conclude that the temporary injunction does not comply with Rule 683, and it is void.[3] *Cooper Valves, LLC v. ValvTechnologies, Inc.*, 531 S.W.3d 254, 265–66 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (holding that injunction was vague, overly broad, and failed to give enjoined party notice of the specific acts that were prohibited).

II. Appeal from denial of TCPA motion to dismiss

Six Brothers and Lowry appealed from the trial court's denial of their motion to dismiss. On appeal, they argue that Tomczak failed to establish, by clear and specific evidence, a prima facie case for each element of his claim for tortious interference with an employment relationship. They also argue that the trial court

[3] We will dissolve the injunction and remand to the trial court. We note, however, that to the extent the non-compete contract is enforceable, it expired by its own terms in December 2021, which was one year after Tomczak resigned from Six Brothers.

abused its discretion by awarding Tomczak attorney's fees and costs without an express finding that the TCPA motions were frivolous or solely intended to delay the litigation.

A. Standards of review and the TCPA

We review a trial court's ruling on a TCPA motion to dismiss de novo. *Kassab v. Pohl*, 612 S.W.3d 571, 577 (Tex. App.—Houston [1st Dist.] 2020, pet. denied). We consider the pleadings and evidence in the light most favorable to the nonmovant. *Id.*; *Schimmel v. McGregor*, 438 S.W.3d 847, 855–56 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). Whether the TCPA applies is an issue of statutory interpretation that we also review de novo. *Youngkin v. Hines*, 546 S.W.3d 675, 680 (Tex. 2018).

The TCPA "is a bulwark against retaliatory lawsuits meant to intimidate or silence citizens on matters of public concern." *Dall. Morning News, Inc. v. Hall*, 579 S.W.3d 370, 376 (Tex. 2019); *see In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015). 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.

The TCPA includes an early dismissal procedure, which is intended "to identify and summarily dispose of lawsuits designed only to chill First Amendment rights, not to dismiss meritorious lawsuits." *Lipsky*, 460 S.W.3d at 589. A party may file a motion to dismiss a legal action that is "based on or is in response to" certain statutorily defined rights, including the right to petition and the right to free speech.

The TCPA movant has the initial burden to demonstrate by a preponderance of the evidence that the TCPA applies to the challenged legal action. *Id.* § 27.005(b). "In determining whether a legal action . . . should be dismissed under [the TCPA], the court shall consider the pleadings . . . and supporting and opposing affidavits stating the facts on which the liability or defense is based." *Id.* § 27.006(a). Once the movant shows that the TCPA applies to the challenged legal action, the burden shifts to the nonmovant to establish "by clear and specific evidence a prima facie case for each essential element of the claim in question." *Id.* § 27.005(c). If the nonmovant makes this showing, the burden again shifts to the movant to establish "an affirmative defense or other grounds on which the moving party is entitled to judgment as a matter of law." *Id.* § 27.005(d); *see, e.g.*, *id.* § 27.010 (Exemptions).

B. Six Brothers and Lowry did not show that the TCPA applies.

On appeal, Six Brothers and Lowry conclude that they demonstrated the applicability of the TCPA and begin their argument with the second step of the TCPA's burden-shifting test, which requires the nonmovant to make a prima facie case for each element of his claim with clear and specific evidence. Because we apply a de novo standard of review, we must consider first whether the TCPA applies.

In the trial court and on appeal, Six Brothers and Lowry argued that the TCPA applied to the tortious inference cause of action because it was based on an exercise of their right to petition. On appeal, but not in the trial court, they also assert that it was based on an exercise of their right to free speech. In particular, they argued that Tomczak's claims are based on their "threatening to file a lawsuit." They argued that this "conclusively establish[ed]" or "implicates" their right to petition.

In the trial court and on appeal, Six Brothers and Lowry rely on the prior version of the TCPA, which provided that a legal action that "is based on, relates to, or is in response to the party's exercise of: (1) the right of free speech, (2) the right to petition, or (3) the right of association," is subject to the early dismissal mechanism of the TCPA. *See* TEX. CIV. PRAC. & REM. CODE § 27.005 (former). 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. This revision eliminated the words "relates to" from section 27.005 (former). Tomczak's lawsuit was filed in February 2021. We therefore apply the version of the TCPA currently in effect. In February 2021, the TCPA provided that a legal action that "is based on or is in response to" a party's exercise of the right to free speech, the right to petition, or the right of association is subject to the early dismissal mechanism of the TCPA. TEX. CIV. PRAC. & REM. CODE § 27.005.

As relevant to this appeal, the TCPA defines "exercise of the right to petition" as

> (A) a communication in or pertaining to:
>
> (i) a judicial proceeding;
>
> . . .
>
> and
>
> (E) any other communication that falls within the protection of the right to petition government under the Constitution of the United States or the constitution of this state.

TEX. CIV. PRAC. & REM. CODE § 27.001(4)(A)(i), (E).

In the trial court and in their brief on appeal, Six Brothers and Lowry argued that the tortious interference cause of action was an exercise of the right to petition as provided by section 27.001(4)(A)(i), and they made no argument that their communication fell within the protection of the right to petition under the United

States or Texas Constitutions, as provided by section 27.001(4)(E). Instead, they argued that their threats to sue STAR Concrete constituted "a communication in or pertaining to . . . a judicial proceeding." TEX. CIV. PRAC. & REM. CODE § 27.001(4)(A)(i). With respect to this statutory definition, a communication "in or pertaining to a judicial proceeding," refers to an actual, pending judicial proceeding.[4] *Mattress Firm, Inc. v. Deitch*, 612 S.W.3d 467, 486 (Tex. App.—Houston [1st Dist.] 2020, pet. denied) (collecting cases); *see Long Canyon Phase II & III Homeowners Ass'n, Inc. v. Cashion*, 517 S.W.3d 212, 219–20, 220 & n.27 (Tex. App.—Austin 2017, no pet.) (holding that pre-suit demand letter was not communication in or pertaining to judicial proceeding under section 27.001(4)(A)(i) because there no actual judicial proceeding was pending at time of communication). "Thus, to establish applicability of the TCPA using this definition of 'exercise of the right to petition,' courts have required the movant to present evidence that a pending judicial proceeding existed at the time of the communication and that the communication was made in connection with such a

[4] The phrase "judicial proceeding" is not defined by the TCPA. "When a statute does not define a term, we look to its common, ordinary meaning unless a contrary meaning is apparent from the statute's language." *Powell v. City of Houston*, 628 S.W.3d 838, 843 (Tex. 2021). Black's Law Dictionary defines "judicial proceeding" by reference to "proceeding." PROCEEDING, Black's Law Dictionary (11th ed. 2019). "Proceeding" is defined as "the regular and ordinary progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment." *Id.* The entry notes that "judicial proceeding" refers to "[a]ny court proceeding; any proceeding initiated to procure an order or decree, whether in law or equity." *Id.*

proceeding." *Mattress Firm*, 612 S.W.3d at 486. Here, Six Brothers and Lowry presented no evidence that a judicial proceeding was pending when it made the alleged communications to STAR Concrete. *See id.*

On rehearing, Six Brothers and Lowry argue that their pre-suit communication was an exercise of the right to petition based on precedent interpreting section 27.001(E), which defines the exercise of the right to petition to include "any other communication that falls within the protection of the right to petition government under the Constitution of the United States or the constitution of this state." TEX. CIV. PRAC. & REM. CODE § 27.001(4)(E). In *Long Canyon*, the Austin court of appeals explained that a pre-suit demand was traditionally part of the exercise of the right to petition under constitutional jurisprudence:

> Subsection (E) reflects legislative intent that the definition be consistent with and incorporate the nature and scope of the "right to petition" that had been established in constitutional jurisprudence. The established understanding under First Amendment jurisprudence, both now and at the time of the TCPA's enactment, was that presuit demand letters generally fall within the "right to petition," although there is a federal circuit court case holding otherwise in the view that the petition right embraces only communications made to or toward government and not those between private parties. While the majority rule indeed appears to be founded on a policy-laden notion of courts providing "breathing space" for the underlying right as opposed to specific support in constitutional text, we must presume that the Legislature intended this view of the protection's scope to control nonetheless.

Long Canyon, 517 S.W.3d at 220–21; *see also Moricz v. Long*, No. 06-17-00011-CV, 2017 WL 3081512, at *4 (Tex. App.—Texarkana July 20, 2017, no pet.) (mem. op.) (following analysis in *Long Canyon*).

This is not, however, the end of the analysis for Six Brothers and Lowry. As movants, they had the initial burden to demonstrate the applicability of the TCPA. *See* TEX. CIV. PRAC. & REM. CODE § 27.005(b). The record on appeal does not include the specific statements that Six Brothers and Lowry made to STAR Concrete. The record includes screen shots of text messages from Lowry and printouts of Facebook posts including comments from Lowry. Many of the text messages and the social media comments from Lowry are derogatory, inflammatory, threatening, and sometimes vulgar. The record also includes an email from STAR Concrete to Tomczak informing him that he had been terminated due to "a looming threat that [he] and STAR would be sued for breach of an alleged non-compete agreement with [his] former employer." But the record does not include a specific communication or a pre-suit demand letter from Six Brothers and Lowry to STAR Concrete. *Compare Mattress Firm*, 612 S.W.3d at 487 (holding that movant failed to meet initial TCPA burden because record did not include pre-suit demand letter), *with Long Canyon*, 517 S.W.3d at 221 (holding that demand letter that was in record was exercise of right to petition), *and Moricz*, 2017 WL 3081512, at *4 (same). The record on appeal in this case does not

indicate whether the "looming threat" arose from a communication in which Six Brothers and Lowry stated that they intended to file a lawsuit or whether it was based on more general and derogatory statements that Lowry made in an online forum or directly to STAR Concrete. Because there is no evidence of specific communications made by Six Brothers and Lowry to STAR Concrete, we conclude that Six Brothers and Lowry failed to carry their burden to establish by a preponderance of the evidence that Tomczak's tortious interference claim is based on or in response to their exercise of the right to petition. *See Mattress Firm*, 612 S.W.3d at 487.

On appeal, Six Brothers and Lowry also argue, for the first time, that Tomczak's suit was based on their exercise of the right to free speech. First, we note that in the trial court, they challenged only the claim for tortious interference, not the entire lawsuit, including Tomczak's defamation claim. Second, they waived this argument about the exercise of free speech by failing to timely raise it in the trial court. *See* TEX. R. APP. P. 33.1(a). Third, even if the issue was preserved, their argument lacks merit. The TCPA defines "exercise of the right of free speech" as "a communication made in connection with a matter of public concern." TEX. CIV. PRAC. & REM. CODE § 27.001(3). The statute defines "matter of public concern" as

A statement or activity regarding:

> (A) a public official, public figure, or other person who has drawn substantial public attention due to the person's official acts, fame, notoriety, or celebrity;
>
> (B) a matter of political, social, or other interest to the community; or
>
> (C) a subject of concern to the public.

Id. § 27.001(7).

Under the plain language of the amended statute now in effect, Lowry's threats to file suit against Tomczak and his potential or actual employers do not fit the definition of a "matter of public concern" because they concerned only the private pecuniary interests of the parties involved.

Six Brothers and Lowry base their arguments on a prior version of the TCPA that does not apply to this case and on Supreme Court of Texas authority interpreting the prior statute. *See Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 894 (Tex. 2018). In *Adams*, the Supreme Court of Texas said: "The TCPA casts a wide net. Among other things, it covers any legal action that is 'based on, relates to, or is in response to' a party's 'exercise of the right of free speech.'" *Id.* (citing former TEX. CIV. PRAC. & REM. CODE § 27.005(b)). The Legislature amended section 27.005(b) in 2019, eliminating the words "relates to." *See* TEX. CIV. PRAC. & REM. CODE § 27.005(b).

"Although '[t]he TCPA casts a wide net,' the statute's scope is not as expansive and far reaching as once thought." *Panton Inc. v. Bees360, Inc.*, No. 01-

20-00267-CV, 2021 WL 3868773, at *7 (Tex. App.—Houston [1st Dist.] Aug. 31, 2021, no pet.) (mem. op.) (citing *Adams*, 547 S.W.3d at 894). The Supreme Court of Texas explained that "not every communication related somehow to one of the broad categories set out in [the pre-2019 amendment TCPA] always regards a matter of public concern." *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 137 (Tex. 2019). The Court noted that it had previously held that private communications were covered by the TCPA in cases that "involved environmental, health, or safety concerns that had public relevance beyond the pecuniary interests of the private parties involved." *Id.* at 136. But the Court also stated: "A private contract dispute affecting only the fortunes of the private parties involved is simply not a 'matter of public concern' under any tenable understanding of those words." *Id.* at 137. Similarly, this court has previously held that communications among former employees regarding misappropriation and use of their former employers' trade secrets was not an exercise of the employees' right to free speech because the communications "had no public relevance beyond the pecuniary interests of the private parties." *Gaskamp v. WSP USA, Inc.*, 596 S.W.3d 457, 477 (Tex. App.—Houston [1st Dist.] 2020, pet. dism'd).

In this case, the alleged communications were Lowry's threats to sue Tomczak and his potential and actual employers based on the non-compete contract. These statements had no public relevance beyond the pecuniary interests

of the private parties and did not involve matters of public concern. *See Creative Oil & Gas*, 591 S.W.3d at 137; *Gaskamp*, 596 S.W.3d at 477.

We hold that Six Brothers and Lowry did not carry their burden to show that the TCPA applies.

C. The trial court did not abuse its discretion by awarding Tomczak attorney's fees and costs.

Finally, Six Brothers and Lowry argue that the trial court abused its discretion by awarding attorney's fees and costs to Tomczak. Under the TCPA, "[i]f the court finds that a motion to dismiss filed under this chapter is frivolous or solely intended to delay, the court may award court costs and reasonable attorney's fees to the responding party." TEX. CIV. PRAC. & REM. CODE § 27.009(b). "A party seeking attorney's fees and costs bears the burden to put forth evidence regarding its right to the award." *Sullivan v. Tex. Ethics Comm'n*, 551 S.W.3d 848, 857 (Tex. App.—Austin 2018, pet. denied). Although the trial court did not make express findings that appellants' motion was frivolous or solely intended to delay, we review the record to determine whether it supports an implied finding under either prong. *See, e.g., BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002) (absent findings of fact and conclusions of law, appellate court implies findings necessary to support trial court's order or judgment that are supported by the record).

"An attorney's fees award under section 27.009(b) is entirely discretionary and requires the trial court to find the motion was frivolous or solely intended to delay." *Breakaway Prac., LLC v. Lowther*, No. 05-18-00229-CV, 2018 WL 6695544, at *4 (Tex. App.—Dallas Dec. 20, 2018, pet. denied) (mem. op.). We review a trial court's decision to award attorney's fees for an abuse of discretion. *Keane Frac, LP v. SP Silica Sales, LLC*, 608 S.W.3d 416, 432 (Tex. App.—Houston [1st Dist.] 2020, no pet.); *accord Marrujo v. Wisenbaker Builder Servs., Inc.*, No. 01-19-00056-CV, 2020 WL 7062318, at *11 (Tex. App.—Houston [1st Dist.] Dec. 3, 2020, no pet.) (mem. op.).

The TCPA does not define "frivolous." *Keane Frac*, 608 S.W.3d at 432. Courts that have addressed this issue have considered the TCPA's text, and dictionary definitions, and they have concluded that a TCPA motion to dismiss is frivolous if it has no basis in law or fact and lacks a legal basis or legal merit. *Id.* at 433; *see Marrujo*, 2020 WL 7062318, at *11; *Lei v. Nat. Polymer Int'l Corp.*, 578 S.W.3d 706, 717 (Tex. App.—Dallas 2019, no pet.); *Caliber Oil & Gas, LLC v. Midland Visions 2000*, 591 S.W.3d 226, 243 (Tex. App.—Eastland 2019, no pet.); *Sullivan*, 551 S.W.3d at 857.

The fact that a TCPA motion is denied is not, alone, sufficient to show that the motion was frivolous. *Keane Frac*, 608 S.W.3d at 433. But a TCPA movant has an obligation to determine whether there is a legal basis to assert that the

TCPA applies to the claim challenged in the motion. *Id.* (must be "colorable" basis in law and fact for motion). Our court has refused to hold that a motion was frivolous when the law was unclear when the motion was filed. *E.g.*, *Marrujo*, 2020 WL 7062318, at *12; *Keane Frac*, 608 S.W.3d at 433. Other courts have held that a TCPA motion was frivolous when evidence presented at an injunction hearing established a prima facie case for the nonmovant's claim, *Lei*, 578 S.W.3d at 717, and when nothing in the record indicated that the movant had analyzed whether there was a legal basis upon which to assert that the TCPA applied. *Caliber Oil & Gas*, 591 S.W.3d at 243.

In this case, there was a contested hearing on the temporary injunction, at which Tomczak provided evidence that supported his tortious interference case. *See Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 588 (Tex. 2017) ("A claim for tortious interference with a contract consists of four elements: (1) the existence of a contract subject to interference; (2) willful and intentional interference; (3) the willful and intentional interference caused damage; and (4) actual damage or loss occurred."). In addition, Six Brothers and Lowry argued for the application of the pre-amendment TCPA, which did not apply to this case. The arguments were not for an extension of existing law: they were for application of law that does not

apply. We conclude that the trial court did not abuse its discretion by awarding court costs and reasonable and necessary attorney's fees to Tomczak.[5]

Conclusion

Having concluded that the temporary injunction does not comply with Rule 683 and is void, we dissolve the injunction and remand the case to the trial court. We affirm the trial court's order denying the motion to dismiss under the TCPA and awarding attorney's fees and costs to Tomczak.

Peter Kelly
Justice

Panel consists of Justices Kelly, Goodman, and Guerra

[5] Six Brothers and Lowry did not raise an issue on appeal about the amount of court costs and attorney's fees.