COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-17-00274-CV

MIDWESTERN CATTLE MARKETING, LLC	APPELLANT
V.	
NORTHWEST CATTLE FEEDERS, LLC; RILEY LIVESTOCK, INC.; AND JEFF COX	APPELLEES

FROM THE 271ST DISTRICT COURT OF JACK COUNTY
TRIAL COURT NO. 16-06-052

MEMORANDUM OPINION[1]

I. INTRODUCTION

Appellant Midwestern Cattle Marketing, LLC (MCM) perfected this interlocutory appeal from a temporary injunction granted by the trial court on the motion of Appellees Northwest Cattle Feeders, LLC; Riley Livestock, Inc.; and

[1]*See* Tex. R. App. P. 47.4.

Jeff Cox (collectively Appellees[2]). The temporary injunction contains what the parties have labeled as "two prongs." The first prong enjoins MCM from spending, transferring, or disposing of up to $1 million of funds it collects on an approximately $20 million-dollar judgment in favor of MCM. The second prong requires MCM to deposit up to $1 million of funds collected pursuant to the same judgment into the registry of the trial court. Because the second prong of the temporary injunction is not subject to an interlocutory appeal we will dismiss for want of jurisdiction the portion of this appeal challenging the second prong of the temporary injunction. We will overrule MCM's complaints concerning the first prong of the temporary injunction.

II. STANDARD OF REVIEW

The decision to grant or deny a temporary injunction lies within the trial court's sound discretion. *Butnaru v. Ford Motor Co.,* 84 S.W.3d 198, 204 (Tex. 2002). "A reviewing court should reverse an order granting injunctive relief only if the trial court abused that discretion." *Id.* Our review does not include "the merits of the underlying case" but is "strictly limited to a determination of whether there has been a clear abuse of discretion by the trial court in determining whether the applicant is entitled to a preservation of the status quo pending trial on the merits[.]" *Brooks v. Expo Chem. Co., Inc.*, 576 S.W.2d 369, 370 (Tex.

[2]We recognize that each individual Appellee played different roles in the events leading up to the underlying lawsuit; however, those distinctions are not relevant for purposes of this temporary injunction appeal. Accordingly, we group them together as "Appellees" for purposes of this appeal.

1979). Indeed, because "the effect of a premature review of the merits is to deny the opposing party the right to trial by a jury . . . it will not be assumed that the evidence taken at a preliminary hearing on temporary injunction will be the same as the evidence developed at a trial on the merits." *Id.*

When we review the trial court's order, we view the evidence in the light most favorable to the trial court's order, indulging every reasonable inference in its favor, and determine whether the order is so arbitrary that it exceeds the bounds of reasonable discretion. *Amend v. Watson*, 333 S.W.3d 625, 627 (Tex. App.—Dallas 2009, no pet.); *Tri–Star Petroleum Co. v. Tipperary Corp.,* 101 S.W.3d 583, 587 (Tex. App.—El Paso 2003, pet. denied). Our review is confined to the validity of the order, and if the trial court makes no findings of fact and conclusions of law, we must uphold the trial court's order on any legal theory supported by the record. *Davis v. Huey,* 571 S.W.2d 859, 862 (Tex. 1978).[3] If some evidence reasonably supports the trial court's decision, the trial court does not abuse its discretion. *Butnaru,* 84 S.W.3d at 211 (citing *Davis,* 571 S.W.2d at 862). A trial court does not abuse its discretion if it bases its decision on conflicting evidence in the record. *N. Cypress Med. Ctr. Operating Co., Ltd. v.*

[3]Even when a trial court does make findings of fact and conclusions of law in connection with a temporary-injunction order, those findings and conclusions may be helpful in determining whether the trial court exercised its discretion in a reasonable and principled fashion, but they are not binding. *Tom James of Dallas, Inc. v. Cobb*, 109 S.W.3d 877, 884 (Tex. App.–Dallas 2003, no pet.)

St. Laurent, 296 S.W.3d 171, 175 (Tex. App.—Houston [14th Dist.] 2009, orig. proceeding).

III. FACTUAL AND PROCEDURAL BACKGROUND[4]

MCM was a cattle broker. The underlying dispute arose from what Appellees characterize as "a cattle fraud scheme operated by Tony Lyon in Jack County, Texas." Appellees' third amended original petition alleges that as a result of the cattle fraud scheme, "Tony Lyon pleaded guilty to fraud charges, and has been sentenced to federal prison." Appellees allege that they were victims of Lyon's fraud scheme.

According to Appellees' pleading, Tony Lyon was acting as MCM's agent cattle buyer in Texas.[5] After several successful deals with MCM, Appellees agreed to purchase 544 head of cattle located in Perrin, Texas, from MCM via its agent in Texas—Lyon. Lyon showed Appellees cattle he claimed to be part of the 544 heads being sold. Thereafter, MCM, via Lyon, invoiced Appellees $798,351.19 for the 544 head of cattle. Appellees' paid the $798,351.19 invoice but never received the cattle. After uncovering Lyon's fraud scheme, Appellees

[4]We recite the factual background of this appeal in light of the standard of review we apply—viewing the evidence in the light most favorable to the trial court's order and indulging in every reasonable inference in its favor. The evidence presented by MCM contradicts some of Appellees' evidence, but the trial court was not required to resolve the merits of the suit at the temporary-injunction stage. *See Brooks*, 576 S.W.2d at 370.

[5]Appellees pleaded various aspects of this agency, including that Lyon possessed an MCM checkbook and a signature stamp authorizing him and enabling him to do business as MCM's agent.

spoke with MCM, and MCM purportedly agreed to assist Appellees in recovering its loss by selling the cattle found on Lyon Farms in Texas and using the money to assist those customers damaged by Lyon's fraudulent scheme. But instead, according to Appellees, MCM put the approximately 850 cattle seized from Lyon Farms into its own name, sold them at auction, and retained all of the proceeds. Appellees sued MCM in the underlying lawsuit in the 271st District Court in Jack County, Texas.

In the meantime, MCM had sued Tony Lyon d/b/a Lyon Farms, Owen Lyon, and Monna Lyon in a different lawsuit, also in the 271st District Court in Jack County (MCM/Lyon Lawsuit), and had obtained a final judgment against Lyon. The final judgment (Lyon Judgment) in that suit recited that before trial

> the Court granted summary judgment against Defendant Tony E. Lyon d/b/a Lyon Farms on Plaintiff Midwestern Cattle Marketing, LLC's claims for fraud, civil theft, negligent misrepresentation, money had and received, conversion, breach of contract, unjust enrichment, and constructive trust. At trial, as a jury had been previously requested, the Court impaneled and swore twelve jurors, which heard the evidence and arguments of counsel. The Court submitted questions, definitions, and instructions to the jury. The jury thereafter rendered its verdict, finding against Defendant Owen Lyon and Defendant Mona Lyon on Plaintiff Midwestern Cattle Marketing, LLC's claims for fraud, negligent misrepresentation, civil theft, breach of contract, and money had and received.

The judgment awarded MCM approximately $20 million in damages.[6]

[6]Appellees Northwest Cattle and Riley Livestock were permitted to intervene in the MCM/Lyon lawsuit, which MCM sought to have reversed in a petition for writ of mandamus. MCM eventually dismissed its mandamus proceeding, and Northwest Cattle and Riley Livestock apparently nonsuited their claims in the MCM/Lyon lawsuit. *See In re Midwestern Cattle Mktg., LLC*, No.

Following the Lyon Judgment, Appellees filed a third amended petition in the underlying suit alleging a cause of action for fraud and seeking imposition of a constructive trust. Appellees pleaded that in 2016, because MCM recognized its potential exposure to creditors and potential judgment creditors, including Appellees, MCM stopped doing business as MCM and changed its name to O'Connell Cattle Company and OC Cattle Brokers. Appellees pleaded that MCM and its principals were attempting to recover cattle and funds pursuant to the Lyon Judgment and to then transfer those assets outside the State of Texas or to use the obtained assets to pay off other creditors and that this, in conjunction with MCM's prior assurances of assisting Appellees to regain their losses, constituted an attempt to defraud Appellees. Appellees alleged that because MCM's principals apparently decided to form a new company rather than "rebuild" MCM, funds collected by MCM pursuant to the Lyon Judgment will be transferred to the new company, precluding Appellees from recovering the monies promised from MCM.

Appellees thus filed an application for temporary injunction and asked the trial court to enjoin MCM from transferring, spending, or disposing of funds

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02-16-00128-CV, 2016 WL 3364845, at *1 (Tex. App.—Fort Worth June 16, 2016, orig. proceeding) (mem. op.). At the hearing in the trial court on Appellees' motion for a temporary injunction, Appellees' counsel explained to the trial court that "[w]e intervened [in MCM/Lyon Lawsuit] and they [MCM] moved to get us out of the intervention because they said we wouldn't be prejudiced by pursuing our own case. So we dismissed our case, filed our own case, against the -- excuse me, against Midwestern Cattle and we proceeded."

collected in full or partial satisfaction of the Lyon Judgment. Appellees requested that the trial court order MCM to deposit into the registry of the court up to $1 million in funds MCM collected pursuant to the $20 million Lyon Judgment.

The trial court conducted a hearing on Appellees' application for temporary injunction and both sides presented evidence. We have thoroughly reviewed the evidence and exhibits presented by both Appellees and MCM.[7] At the conclusion of the hearing, the trial court signed a temporary-injunction order that was subsequently amended to include a trial setting, but otherwise remained unchanged. That order provides, in part, that

> [h]aving considered the Application, and the facts supporting the Application, the Court finds and concludes it is necessary to protect the status quo by preventing Defendant Midwestern Cattle Marketing, LLC from spending, transferring or disposing of any funds collected for the full or partial satisfaction of the [Lyon] Judgment attached hereto as Exhibit A up to $1,000,000.

[7]Appellees compiled their evidence into a notebook and presented it to the trial court, attaining admission on the record of each of the items contained in the notebook. The notebook included: the Lyon Judgment; excerpts from the testimony of Jason O'Connell at the January 17, 2017 trial resulting in the Lyon Judgment; the invoice from MCM to Appellees for $ 798,351.16 for 554 head of cattle with a gross weight of 362,870 pounds; deposition excerpts from Tim Correll, Darold Hamilton, and Jeffrey Cox, respectively; and copies of checks from Ogallala Livestock Auction Market, Inc. made payable jointly to Appellees and MCM. Appellees claim they fed and cared for some of the cows removed by MCM from Lyon Farms pending the sale of those cows but that MCM has refused to endorse the checks to pay Appellees for the feed and care provided. MCM tendered deposition experts of Jeffrey Scott Cox, Tony Lyon, and Gabriel Platt, which were played for the trial court and admitted into evidence, obtained admission of the Lyon Judgment, and read lines 7–20 of Jason O'Connell's trial testimony.

The temporary injunction restrains MCM "from spending, transferring or disposing of any funds collected for the full or partial satisfaction of the [Lyon] Judgment attached hereto as Exhibit A up to $1,000,000" and orders MCM to "deposit all funds collected for the full or partial satisfaction of the [Lyon] Judgment attached hereto as Exhibit A up to $1,000,000 into the registry of the Court until the final disposition of the above-styled matter."

MCM perfected this interlocutory appeal.[8] Appellees filed a motion to dismiss the appeal for want of jurisdiction arguing that the second prong of the temporary injunction grants relief not subject to an interlocutory appeal.

IV. THE SECOND PRONG OF THE TEMPORARY INJUNCTION IS NOT SUBJECT TO AN INTERLOCUTORY APPEAL

The main issue we must address is whether the second prong of the temporary injunction order, requiring MCM to deposit up to $1 million into the trial court's registry, constitutes a temporary, mandatory injunction that is immediately appealable.

A. The Law Concerning Appealability of Injunctive Orders

By statute, injunctive orders are reviewable by interlocutory appeal. Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(4) (West Supp. 2017); *Markel v. World Flight, Inc.*, 938 S.W.2d 74, 78 (Tex. App.—San Antonio 1996, no writ). The jurisdiction of courts of appeals over an interlocutory order depends on whether it

[8]MCM originally challenged the temporary injunction order for failing to provide a trial date. After the trial court entered its amended order including a trial date, MCM conceded in its reply brief that issue is now moot.

can properly be characterized as a temporary injunction. *Del Valle ISD v. Lopez*, 845 S.W.2d 808, 809 (Tex. 1992). In determining whether a particular order constitutes a temporary injunction that is subject to an interlocutory appeal, the Supreme Court of Texas has explained that "it is the character and function of an order that determine its classification" and has thus rejected the notion that "matters of form control the nature of the order itself." *Id.*; *see also In re Estate of Skinner*, 417 S.W.3d 639, 642 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (recognizing that "although an order may lack features of a typical temporary injunction, those deficiencies do not control the classification"). Therefore, when an order grants both injunctive relief and noninjunctive relief, a court of appeals possesses interlocutory appellate jurisdiction over only the injunctive portion of the order. *See Alexander Dubose Jefferson & Townsend LLP v. Chevron Phillips Chem. Co., L.P.*, No. 16–1018, 2018 WL 1022475, at *7 (Tex. Feb. 23, 2018) ("[P]ortions of an order can be injunctive in nature and, thus, final and appealable, while other provisions of the same order can be interlocutory and unreviewable because they do not resemble injunctive relief."); *Markel*, 938 S.W.2d at 78 ("[W]e may review the portion of an order which is appealable and refuse to consider the portion which is non-appealable. If a portion of an order is injunctive, then that part is reviewable, even though a[nother] portion of the order may be interlocutory and unappealable."); *Prodeco Expl., Inc. v. Ware*, 684 S.W.2d 199, 201 (Tex. App.—Houston [1st Dist.] 1984, no writ) (resolving "threshold question" of jurisdiction by determining whether order is interlocutory,

then "dismiss[ing] for want of jurisdiction that part of the appeal related to the portion of the order requiring [appellant] to deposit the disputed funds into the registry of the court[,]" and then reviewing injunctive part of order).

B. The Parties' Positions

The parties take opposite positions on this issue. MCM contends in its appellate brief that the second prong of relief granted to Appellees in the temporary injunction is appealable because

> [Appellees] have not alleged that their claims against MCM are related in any way to the subject matter of the claims MCM had against the Lyons in the prior case. Put another way, the subject matter of this lawsuit is not the same as the subject matter of the prior lawsuit.

MCM further contends that "[Appellees] filed an application for a temporary injunction for the purposes of securing any proceeds of MCM's collection of the Lyon judgment to pay damages that [Appellees] may recover in this case" and that the trial court's temporary injunction requiring them to deposit a portion of funds collected on the Lyon Judgment into the registry constitutes a mandatory appealable temporary injunction.[9] Appellees, on the other hand, assert that the second prong of relief granted by the trial court's temporary injunction is an order

[9]In support of its position, MCM cites *Skinner*, 417 S.W.3d at 644–45; *In re Radiant Darkstar Prods. LLC*, No. 05–13–00586–CV, 2013 WL 3718065 at *2 (Tex. App.—Dallas July 12, 2013, orig. proceeding) (mem. op. on reh'g); *Greathouse Ins. Agency Inc. v. Tropical Invs.*, 718 S.W.2d 821 (Tex. App.—Houston [14th Dist.] 1986, no writ); *Lane v. Baker*, 601 S.W.2d 143, 145 (Tex. Civ. App.—Austin 1980, no writ); *Perryton Feeders, Inc. v. Feldmann*, 483 S.W.2d 386 (Tex. Civ. App.—Amarillo 1972, writ ref'd n.r.e.); and *Garland v. Shepherd*, 445 S.W.2d 602, 604 (Tex. Civ. App.—Dallas 1969, no writ).

to deposit money into the court's registry that is not subject to an interlocutory temporary-injunction appeal. Appellees claim that "a pretrial order, whatever the label, to deposit funds into the registry of the court to satisfy a potential judgment is not a temporary injunction for which an interlocutory appeal lies."[10]

As argued by MCM, a trial court does abuse its discretion by granting a temporary injunction enjoining a party's use of assets or funds belonging to the party that are completely unrelated to the subject matter of the underlying suit. *See, e.g.*, *Nowak v. Los Patios Inv'rs*, 898 S.W.2d 9, 10–11 (Tex. App.—San Antonio 1995, no writ) (holding trial court abused its discretion by entering temporary injunction in employer's suit against employee-defendant that restrained employee's use of monies awarded to employee in "completely unrelated" personal-injury judgment). And also as argued by MCM, some courts have held that a temporary injunction requiring a party to deposit funds into the court's registry of the court is subject to an interlocutory appeal. *See, e.g*., *Skinner*, 417 S.W.3d at 644–45 (holding order that required party to deposit negotiable instruments into the registry of the court was an order granting temporary injunction subject to interlocutory appeal).

As argued by Appellees, numerous courts have held that a trial-court order requiring funds—that are the disputed subject of the litigation—to be deposited

[10]In support of their position, Appellees cite *Zhao v. XO Energy LLC*, 493 S.W.3d 725, 735 (Tex. App.—Houston [1st Dist.] 2016, orig. proceeding) and the numerous cases cited therein.

into the registry of the court is not subject to an interlocutory appeal because the trial court possesses inherent authority to make such an order. *See, e.g.*, *Alexander Dubose*, 2018 WL 1022475, at *7 (explaining that "when analyzing orders directing funds deposited into the court's registry of the court pending a final adjudication of ownership, most courts deem these orders as interlocutory and not subject to appeal"); *Structured Capital Res. Corp. v. Arctic Cold Storage, LLC*, 237 S.W.3d 890, 894 (Tex. App.—Tyler 2007, no pet.) ("An order requiring the deposit of funds into the registry of a court cannot be characterized as an appealable temporary injunction."); *Faddoul, Glasheen & Valles, P.C. v. Oaxaca*, 52 S.W.3d 209, 212 (Tex. App.—El Paso 2001, no pet.) (same); *Diana Rivera & Assocs., P.C. v. Calvillo*, 986 S.W.2d 795, 798 (Tex. App.—Corpus Christi 1999, pet. denied) (same); *cf. Castilleja v. Camero*, 414 S.W.2d 431, 433 (Tex. 1967) (holding that when ownership of fund was subject of litigation between the parties, court possessed authority to order fund deposited into registry of the court); *Zhao*, 493 S.W.3d at 735 (stating that "a pretrial order, whatever the label, to deposit funds into the registry of the court to satisfy a potential judgment is not a temporary injunction for which an interlocutory appeal lies"); *Prodeco*, 684 S.W.2d at 200 (holding trial court possessed inherent authority to order payment of future royalties into registry of the court in parties' competing declaratory-judgment claims over entitlement to certain monies under an oil and gas lease).

The rationale of Appellees' cited cases—holding that an order requiring a party to deposit monies into the registry of the court is not subject to an

interlocutory appeal—is that because a trial court may, under its inherent authority, order monies that form the basis of the underlying lawsuit deposited into the registry of the court, such an order is not subject to an interlocutory appeal, even when it is included in a document labeled "temporary injunction." *See, e.g.*, *Zhao*, 493 S.W.3d at 736 (explaining that in exercise of its inherent authority the court may order a party to pay disputed funds into the court's registry "if there is evidence the funds are in danger of being lost or depleted") (internal quotation marks omitted); *In re Reveille Res. (Tex.), Inc.*, 347 S.W.3d 301, 304 (Tex. App.—San Antonio 2011, orig. proceeding) (same) (citing *Castilleja*, 414 S.W.2d at 433); *N. Cypress Med. Ctr.*, 296 S.W.3d at 178 (recognizing same). This rationale is logical because a trial court possessing inherent authority to order such monies deposited into the registry of the court, does not abuse its discretion by doing so—even when a temporary injunction is not sought—so long as there is evidence that the funds to be deposited are in danger of being lost or depleted. *See, e.g.*, *N. Cypress Med. Ctr.*, 296 S.W.3d at 178 (granting mandamus relief because the "record does not indicate that disputed funds are likely to be 'lost or depleted'"). Consequently, a trial court's exercise of its inherent authority to order disputed funds forming the basis of the underlying lawsuit deposited into the registry of the court because those funds are likely to be lost or depleted, is not subject to an interlocutory appeal as a temporary injunction.

C. Analysis

MCM contends that the portion of the Lyon Judgment ordering monies deposited into the registry of the court does not constitute the disputed funds forming the basis of the underlying litigation and that, therefore, the injunction constitutes an attempt to freeze assets unrelated to the subject matter of the suit simply to ensure there are funds available to pay a potential, future judgment. But Appellees' motion for a temporary injunction specifically pleaded, in part, as follows:

> As the Court will recall, [Appellees] originally intervened in Cause No. 15-07-061 [MCM/Lyon Lawsuit]. [MCM] opposed intervention, and among other things argued [that] [Appellees] would suffer no prejudice from filing their own lawsuit and proceeding to trial on [Appellees'] own claims. However, [MCM] now seeks to do precisely that - impose prejudice on [Appellees] for pursuing their own claims in a separate lawsuit by seizing assets of the Lyons and dissipating those assets or removing those assets from the State of Texas.

Additionally, the evidence offered by both Appellees and MCM at the temporary-injunction hearing focused on proving or disproving Appellees' entitlement to monies awarded to MCM in the MCM/Lyon Lawsuit by virtue of the Lyon Judgment.[11] Appellees introduced into evidence excerpts from testimony at the trial of the MCM/Lyon Lawsuit by Jason O'Connell, Tim Correll, Darold Hamilton, and Jeffrey Cox. Likewise, MCM opposed Appellees' request for a temporary injunction by offering into evidence excerpts from testimony at the trial of the MCM/Lyon Lawsuit by Jeffrey Scott Cox, Tony Lyon, Gabriel Platt, and Jason

[11] *See*, *supra*, n.7.

O'Connell. Thus, the issue—of whether the portion of the monies collected Lyon Judgment and ordered by the second prong of the temporary injunction order to be deposited into the registry of the court constituted, in fact, the same disputed monies forming the basis of the underlying litigation—was litigated in and determined by the trial court. That issue is not reviewable in this interlocutory temporary-injunction appeal. *See, e.g.*, *Alexander Dubose*, 2018 WL 1022475, at *7; *Castilleja*, 414 S.W.2d at 433; *Zhao*, 493 S.W.3d at 735; *Structured Capital,* 237 S.W.3d at 894; *Faddoul, Glasheen*, 52 S.W.3d at 212; *Diana Rivera*, 986 S.W.2d at 798; *Prodeco*, 684 S.W.2d at 200.

D. MCM's Attempted, Alternative Claim for Mandamus Relief

While not reviewable in a statutory interlocutory appeal, a trial court's exercise of its inherent authority to order a party to deposit monies into the registry is reviewable via an original proceeding. *See, e.g.*, *N. Cypress Med. Ctr.*, 296 S.W.3d at 178 (conditionally granting mandamus relief from trial-court order entered under its inherent authority to order the deposit of monies into registry of court); *O'Brien v. Baker*, No. 05-15-00489-CV, 2015 WL 6859581, at *2–4 (Tex. App.—Dallas Nov. 9, 2015, orig. proceeding) (mem. op.) (holding order to pay monies into registry was subject to interlocutory appeal, but consolidating interlocutory appeal with simultaneously filed petition for writ of mandamus before reviewing).

MCM, for the first time in its reply brief, alternatively requests mandamus relief if we determine that we lack jurisdiction over MCM's appeal of the second

prong of the temporary-injunction order. The law is well-settled that a party cannot raise new issues in a reply brief. *See Hutchison v. Pharris*, 158 S.W.3d 554, 564 & n.11 (Tex. App.—Fort Worth 2005, no pet.) (noting this well-established principle and listing supporting cases); *see also Fox v. City of El Paso*, 292 S.W.3d 247, 249 (Tex. App.—El Paso 2009, pet. denied) (citing Tex. R. App. P. 38.3) ("The Rules of Appellate Procedure do not allow an appellant to raise an issue in a reply brief which was not included in his original brief."). Because MCM seeks mandamus relief solely in its reply brief, the request is not properly before us. *See* Tex. R. App. P. 52.1–.3 (providing requirements for seeking mandamus relief); *In re Shugart*, 528 S.W.3d 794, 796 (Tex. App.—Texarkana 2017, orig. proceeding) ("Compliance with [Tex. R. App. P. 53] is mandatory.").

Moreover, even if MCM's assertion of entitlement to mandamus relief were properly before us, MCM's asserted contention fails. As set forth above, conflicting evidence was presented to the trial court on this point. No abuse of discretion occurs when a trial court bases its decision on conflicting evidence in the record. *N. Cypress Med. Ctr.*, 296 S.W.3d at 175. Because some evidence exists reasonably supporting the trial court's decision that Appellees' claims against MCM were related to, if not the same subject matter as, MCM's claims against the Lyons forming the basis of the Lyon Judgment, the trial court did not abuse its discretion by preserving a portion of that asset. *See Butnaru,* 84 S.W.3d at 211 (citing *Davis,* 571 S.W.2d at 862).

V. AN APPEAL OF ONLY THE FIRST PRONG PROVIDES MCM NO RELIEF

The parties agree that the first prong of the temporary injunction is immediately appealable. *See, e.g.*, *RP&R, Inc. v. Territo*, 32 S.W.3d 396, 400 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (explaining that "[a] prohibitive injunction forbids conduct"); *Markel*, 938 S.W.2d at 78 (holding that injunctive portions of orders are reviewable by interlocutory appeal). MCM concedes in its brief, however, that "[t]o dissolve the first prong but deny appealability of the second would render the appeal useless." Because MCM pointed out that the two prongs are so intertwined that our dismissal of MCM's appeal of the second prong renders any decision from us on the first prong a useless act, we need not address MCM's appellate challenge to the first prong. *See* Tex. R. App. P. 47.1.

In the interest of thoroughness, however, we note that MCM's first issue challenging the temporary injunction's failure to contain a trial date was remedied by the trial court's amended temporary injunction, which was provided to this court via a supplemental clerk's record, and that MCM has conceded the issue in its briefing. We therefore overrule MCM's first issue. MCM's issues 2a and 2b both challenge the second prong of the trial court's order, which we have held is not subject to an interlocutory appeal, so we dismiss these two issues. And MCM's issues 2c and 2d complain, respectively, that Appellees failed to establish a likelihood of success on the merits and failed to establish a probable, imminent, and irreparable injury. Based on the facts set forth above, however, viewing the evidence in the light most favorable to the trial court's order when reasonable

and indulging in every reasonable inference therefrom, the trial court did not abuse its discretion by believing evidence showing that the Lyon Judgment attained by MCM against the Lyons for claims including fraud overlaps with or includes the subset of Appellees claims against MCM for Tony Lyon's fraud directed toward Appellees via MCM. *See Tri–Star Petroleum,* 101 S.W.3d at 587. We are not permitted to substitute our judgment concerning the propriety of the first prong of the temporary injunction entered by the trial court unless the trial court's action was so arbitrary that it exceeded the bounds of reasonable discretion, which it did not for the reasons previously discussed. *See Butnaru,* 84 S.W.3d at 204; *See Benefield v. State*, 266 S.W.3d 25, 30 (Tex. App.—Houston [1st Dist.] 2008, no pet.). We overrule MCM's issues 2c and 2d.

VI. CONCLUSION

Having determined that MCM's appeal of the second prong of the temporary injunction order is not subject to an interlocutory appeal, that MCM's alternative request for mandamus relief in its reply brief is not properly before us, that MCM conceded any relief granted to it concerning the appealable first prong would be meaningless if this Court ruled that it lacked jurisdiction over the second prong, and that MCM, in any event, is not entitled to relief from the first prong of the injunction, we grant Appellees' motion to dismiss this appeal concerning the second prong of the purported temporary injunction, we dismiss MCM's issues 2a and 2b for want jurisdiction. We overrule MCM's remaining

issues and affirm the first prong of the trial court's temporary injunction. *See* Tex. R. App. P. 42.3(a), 43.2(a), (f).

/s/ Sue Walker
SUE WALKER
JUSTICE

PANEL: WALKER, MEIER, and BIRDWELL, JJ.

DELIVERED: March 22, 2018