NUMBER 13-18-00364-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

MADHAVAN PISHARODI, **Appellant,**

v.

COLUMBIA VALLEY HEALTHCARE SYSTEM, L.P. D/B/A VALLEY REGIONAL MEDICAL CENTER, **Appellee.**

On appeal from the 138th District Court of Cameron County, Texas.

OPINION

Before Justices Benavides, Perkes, and Tijerina
Opinion by Justice Perkes

Appellant, Madhavan Pisharodi, M.D. appeals the trial court's order of dismissal pursuant to the Texas Citizens Participation Act (TCPA) in favor of appellee Columbia

Valley Healthcare System, L.P. d/b/a Valley Regional Medical Center (Valley Regional). *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.003–.008(b).[1] By three issues, Pisharodi contends that the trial court erred in (1) granting the motion to dismiss, (2) awarding attorney's fees in contravention of his constitutional right to have a jury assess the reasonableness of fees, and (3) imposing sanctions absent evidence of his income. We affirm in part and reverse and remand in part.

I. BACKGROUND

On February 14, 2016, at approximately 1:30 am., a patient arrived intoxicated to the emergency room at Valley Regional Medical Center, where Pisharodi was working as an on-call neurosurgeon. Pisharodi was called to examine the patient. Upon Pisharodi's arrival to the hospital, Valley Regional employees accused him of being intoxicated, and the chief of surgery provided Pisharodi with two options; Pisharodi could take a blood test or delay the start of surgery. Pisharodi refused the blood test and left the hospital, intending to return in three hours to perform the surgery. In the interim, the patient was transferred to a nearby facility for surgery without Pisharodi's knowledge or approval. Surgery was performed by another on-call physician, Dr. Alejandro Betancourt, an individual Pisharodi claims has "been engaged in protracted litigation for tortious conduct toward [him] over the course of many years."

On March 18, 2016, during a deposition in an unrelated case involving Pisharodi and Betancourt, Pisharodi was questioned regarding the February 14th incident.

[1] The legislature recently amended the TCPA, but the amendments do not apply to this case. *See* Act of May 17, 2019, 86th Leg., R.S., ch. 378, § 11, 2019 Tex. Sess. Law Serv. 684, 687 (providing that the amendments apply only to an action filed on or after September 1, 2019). We will cite the prior version where it materially differs from the current version.

Betancourt's attorneys inquired whether Pisharodi "was under a medical board review, or had a complaint pending for review over being reprimanded."

Five months later, on August 16, 2016, Valley Regional initiated a peer review to determine (1) whether Pisharodi was under the influence of alcohol while working on-call and whether his condition delayed care to the patient, and (2) what, if any, action should be taken. During the peer review hearing, Pisharodi claimed he was "informed by a member of the panel that the family of the patient involved in the alleged incident had been informed he was under the influence of alcohol." Pisharodi was notified of the results of the peer review by Valley Regional on December 1, 2016. The hospital's Medical Executive Committee (MEC) declined to recommend "any action or formal investigation of the matter."[2]

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[2] The letter in its entirety reads as follows:

> Thank you for meeting with the [MEC] of [Valley Regional] in connection with its evaluation of the events during the early morning hours of February 14, 2016, when you were called to the hospital to perform surgery on a patient. The MEC has evaluated concerns that when you arrived [at] the Hospital you were observed to act and make remarks consistent with being under the influence of alcohol, including for example, staggering and stumbling, using slurred speech, smelling of alcohol, and dropping mints you were attempting to insert in your mouth. During a communication with two people at the Hospital, it was reported you admitted to having one alcoholic drink before arriving at the Hospital. Rather [than] undergo a drug screen, which would have been required before you could have proceeded with the surgery, you decided to wait until later in the morning to perform the surgery. After you left the Hospital, a decision was made that there was a need to proceed with the surgery and another neurosurgeon was called and performed the surgery.
>
> During your interview with the MEC, you vigorously denied that you had an alcoholic drink prior to the surgery. When asked if you had health problems which could explain your physical conduct, you stated you did not. You submitted statements from your family which stated, among other things, that you would not drink alcohol. You also submitted a statement from your ex-wife who works for your practice as a nurse practitioner, who was with you at certain points during the morning of the events. She stated that you did not have a drink, but did state that you have health issues for which she administers injections.
>
> As this is the first time the Hospital has received a report of conduct consistent with your being under the influence of alcohol at the Hospital, and no drug screen was conducted because you decided to wait until later in the morning to perform the surgery, the MEC is not recommending any action or formal investigation of the matter at this time. The MEC,

On March 17, 2017, Pisharodi filed suit against Valley Regional, alleging breach of contract and malicious civil prosecution. Pisharodi argues that Valley Regional breached its contract with him "by violating the confidentiality clause of the bylaws," citing two provisions in the hospital's medical staff bylaws in his petition. Pisharodi, in his claim of malicious prosecution, asserts that "[a] civil proceeding was instituted against Pisharodi," and it was "instituted or continued by or at the insistence of [Valley Regional], which "acted with malice." As evidence of special damages, Pisharodi claimed the cancelled surgery "cost [him] approximately $5,000.00."

Following the submission of an appearance and general denial, Valley Regional filed a motion to dismiss pursuant to the TCPA on June 9, 2017. The trial court held a hearing on the motion on September 5, 2017, and the court took the matter under advisement before granting Valley Regional's motion on September 11, 2017.

On October 25, 2017, Valley Regional filed a "Motion for Attorney's Fees, Costs, Expenses, And Sanctions Pursuant to The Texas Citizens Participation Act." Valley Regional sought $91,789 in attorney's fees, costs, and expenses incurred, as well as an additional $91,789 in sanctions. Prior to a hearing on Valley Regional's motion, Pisharodi submitted a jury demand. Pisharodi raised the issue once more at the hearing, asserting his constitutional-based entitlement to a jury trial "on the issue of the reasonableness of these [attorney] rates." The trial court denied Pisharodi's request for a jury trial.

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however, reminds you that the Medical Staff Bylaws require all Practitioners to conduct themselves in a professional manner, and any conduct communicated via a third[-]party report regarding a physician's health must be evaluated. Please note any future report of a similar nature concerning you will result in a further evaluation or a formal investigation.

Please contact me with any questions.

Valley Regional was ultimately awarded $55,000 in reasonable and necessary attorney's fees and expenses, as well as $20,000 in sanctions.

This appeal followed.

II. TCPA

"The TCPA's purpose is to identify and summarily dispose of lawsuits designed only to chill First Amendment rights, not to dismiss meritorious lawsuits." *In re Lipsky*, 460 S.W.3d 579, 589 (Tex. 2015) (orig. proceeding) (citing TEX. CIV. PRAC. & REM. CODE Ann. § 27.002). Under the TCPA, a defendant may move to dismiss a suit "based on, relate[d] to, or . . . in response to a party's exercise of the right of free speech, right to petition, or right of association." Act of May 21, 2011, 82nd Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws 961, 962 (amended 2019) (current version at TEX. CIV. PRAC. & REM. CODE Ann. § 27.003(a)); *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 131 (Tex. 2019). The defendant, however, must show by a preponderance of the evidence that the conduct that forms the basis of the claim against it is protected by the TCPA—that is to say, that the suit is based on, relates to, or is in response to its exercise of its right to free speech, association, or petition. Act of May 21, 2011, 82nd Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws 961, 962 (amended 2019) (current version at TEX. CIV. PRAC. & REM. CODE Ann. § 27.005(b)); *S & S Emergency Training Sols., Inc. v. Elliott*, 564 S.W.3d 843, 847 (Tex. 2018). Whether a legal action is based on, related to, or in response to the exercise of a protected right is determined based on the claims made in the non-movant's petition, pleadings, and affidavits. TEX. CIV. PRAC. & REM. CODE Ann. § 27.006; *Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017); *Erdner v. Highland Park Emergency Ctr., LLC*, 580 S.W.3d 269, 275 (Tex. App.—Dallas 2019, pet. filed).

If the defendant meets this burden, then the burden shifts to the plaintiff to establish "by clear and specific evidence a prima facie case for each essential element of the claim in question." TEX. CIV. PRAC. & REM. CODE Ann. § 27.005(c); *Lona Hills Ranch*, 591 S.W.3d at 127; *In re Lipsky*, 460 S.W.3d at 587. "Clear" means "unambiguous, sure or free from doubt," and "specific" means "explicit or relating to a particular named thing." *In re Lipsky*, 460 S.W.3d at 590. A "prima facie case" is "the minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true." *Id.* The "clear and specific evidence" requirement requires more than mere notice pleading. *Id.* at 590–91. It refers to evidence sufficient as a matter of law to establish a given fact if it is not rebutted or contradicted. *Id.* Dismissal of the case is required if the plaintiff fails to meet its burden or if the defendant "establishes by a preponderance of the evidence each essential element of a valid defense to the [plaintiff's] claim." TEX. CIV. PRAC. & REM. CODE Ann. § 27.005(d)); *Lona Hills Ranch*, 591 S.W.3d at 127.

We review de novo a trial court's ruling on a TCPA motion to dismiss. *Dall. Morning News, Inc. v. Hall*, 579 S.W.3d 370, 377 (Tex. 2019). In conducting our review, we consider the pleadings and evidence in a light favorable to the nonmovant. *TV Azteca, S.A.B. de C.V. v. Trevino Ruiz*, No. 13-18-00287-CV, ___ S.W.3d. ___, ___, 2020 WL 103852, at *2 (Tex. App.—Corpus Christi–Edinburg Jan. 9, 2020, no pet. h.); *Dyer v. Medoc Health Servs., LLC*, 573 S.W.3d 418, 424 (Tex. App.—Dallas 2019, pet. denied).

A. TCPA Applicability

Pisharodi brings a breach of contract claim and malicious prosecution claim against Valley Regional. Regarding the breach of contract claim, Pisharodi asserts that Valley Regional breached the confidentiality terms of its medical staff bylaws when it

relayed allegations of his intoxication to local attorneys and the involved patient's family. With respect to his malicious prosecution claim, Pisharodi argues Valley Regional acted with malice and without probable cause when it instituted peer review actions based on the intoxication allegations. Valley Regional asserts that Pisharodi's claims are based on, related to, or in response a "matter of public concern," and such communications—including those stemming from the peer review process—are protected under the TCPA.

The TCPA defines the "[e]xercise of the right of free speech" as a "communication made in connection with a matter of public concern." TEX. CIV. PRAC. & REM. CODE Ann. § 27.001(3). A "[c]ommunication includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic." *Id.* § 27.001(1). It includes both private and public communications. *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015) (per curiam). A "[m]atter of public concern" is defined to include, among other things, an issue related to "health or safety." Act of May 21, 2011, 82nd Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws 961, 962 (amended 2019) (former TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(7)(A)). The TCPA does not require that alleged communications explicitly "mention" health or safety concerns; a "tangential relationship" is sufficient. *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 900 (Tex. 2017) (per curiam) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(3), (7)); *Cavin v. Abbott*, 545 S.W.3d 47, 62 (Tex. App.—Austin 2017, no pet.).

The Texas Supreme Court and our sister courts have uniformly held that "the provision of medical services by a health care professional constitutes a matter of public concern." *Lippincott*, 462 S.W.3d at 509–10; *Batra v. Covenant Health Sys.*, 562 S.W.3d 696, 709 (Tex. App.—Amarillo 2018, pet. denied) (providing that private communications

relating to a physician's "handling of specific cases, his medical competence, and disciplinary action" were "matters of public concern"); *cf. U.S. Anesthesia Partners of Tex., P.A. v. Mahana*, 585 S.W.3d 625, 629 (Tex. App.—Dallas 2019, pet. denied) (reasoning that the TCPA was not implicated where the communications alleged "do not address [the plaintiff's] job performance or relate to whether she properly provided medical services to patients"). As in *Lippincott* and *Batra*, and unlike in *Mahana*, the alleged communication here relates to Pisharodi's ability to provide competent medical services. *See Lippincott*, 462 S.W.3d at 509–10; *Batra*, 562 S.W.3d at 709; *Mahana*, 585 S.W.3d at 629.

We additionally note that this is the third time Pisharodi is before this Court on a TCPA-related appeal. *See Columbia Valley Healthcare Sys., L.P. v. Pisharodi*, No. 13-18-00660-CV, 2020 WL 486491, at *1, 10 (Tex. App.—Corpus Christi–Edinburg Jan. 30, 2020, no pet. h.) (mem. op.) (*CVHS II*) (affirming the trial court's denial of the hospital's TCPA motion to dismiss as it relates to Pisharodi's malicious prosecution claim and reversing the trial court's denial of the hospital's TCPA motion to dismiss Pisharodi's civil conspiracy claim); *Columbia Valley Healthcare Sys., L.P. v. Pisharodi*, No. 13-16-00613-CV, 2017 WL 4416334, at *3 (Tex. App.—Corpus Christi–Edinburg Oct. 5, 2017, no pet.) (mem. op.) (*CVHS I*) (holding the trial court should have dismissed Pisharodi's breach of contract and negligence claims because Pisharodi failed to produce clear and specific evidence to establish a prima facie case on each essential element of those claim). In *CVHS I* and *CVHS II*, Pisharodi's claims also involved statements made during the peer review process. We hold now as we did then that "any statements made during the peer review process constitute protected free speech" because "the provision of medical

services by a health care professional constitutes a matter of public concern." *CVHS II*, 2020 WL 486491, at *3; *see also CVHS I*, 2017 WL 4416334, at *2.

Because Valley Regional successfully demonstrated the applicability of the Act, we next consider whether Pisharodi met the prima facie burden the Act requires.[3] *See* Act of May 21, 2011, 82nd Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws 961, 962 (amended 2019).

B. Clear and Specific Evidence

Pisharodi was required to establish "by clear and specific evidence a prima facie case for each essential element" of each of his claims. *See id.* § 27.005(c). To make this determination, we consider the pleadings and any supporting and opposing affidavits. Act of May 21, 2011, 82nd Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws 961, 962 (amended 2019) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a)).

1. Breach of Contract

Pisharodi first claims Valley Regional breached its contract by disclosing confidential peer-review matters in contravention of its medical staff bylaws, which Pisharodi contends creates the aforementioned contract. As Pisharodi points out in his brief, he "also presented his actual contract with [Valley Regional]." Pisharodi, however, only cites to language in the bylaws in support of his breach of contract claim.

To recover on a breach of contract claim, a claimant must prove: (1) the existence of a valid contract; (2) the claimant performed or tendered performance; (3) the other

[3] Valley Regional additionally asserts that the TCPA applies under the TCPA's "right of association" and "right to petition" prongs. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(2). Because we hold that, on this record, the communications were made in the exercise of the right of free speech under the TCPA, we need not reach Valley Regional's alternative arguments for TCPA applicability. *See ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 901–02 (Tex. 2017) (per curiam).

party breached the contract; and (4) the claimant was damaged as a result of the breach. *USAA Texas Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 502 n. 21 (Tex. 2018); *UMLIC VP LLC v. T & M Sales & Envtl. Sys., Inc.*, 176 S.W.3d 595, 615 (Tex. App.—Corpus Christi–Edinburg 2005, pet. denied).

Generally, medical staff bylaws—unlike hospital bylaws—do not constitute contractional and binding rights on the healthcare system. *Park v. Mem'l Health Sys. of E. Tex*., 397 S.W.3d 283, 293 (Tex. App.—Tyler 2013, pet. denied); *Marlin v. Robertson*, 307 S.W.3d 418, 433 (Tex. App.—San Antonio 2009, no pet.); *Stephan v. Baylor Med. Ctr.*, 20 S.W.3d 880, 887 (Tex. App.—Dallas 2000, no pet.); *Gonzalez v. San Jacinto Methodist Hosp.*, 880 S.W.2d 436, 438 (Tex. App.—Texarkana 1994, writ denied); *see also Johnson v. Christus Spohn*, No. C–06–138, 2008 WL 375417, at *64 n.90 (S.D. Tex. Feb. 8, 2008) (mem. op.), *aff'd by* 334 Fed. Appx. 673 (5th Cir. 2009) ("Courts in the Fifth Circuit consistently find that *medical staff bylaws* do not create a contract between a hospital and a doctor and thus do not give rise to contractual rights of contract-based causes of action."). Medical staff bylaws that do not "define or limit the power of a hospital" as it acts through its governing board do not create contractual obligations for the hospital. *Park*, 397 S.W.3d at 288; *Marlin*, 307 S.W.3d at 433–34; *Stephan*, 20 S.W.3d at 888; *see also Powell v. Brownwood Reg'l Hosp., Inc.*, No. 11-03-00171-CV, 2004 WL 2002929, at *3 (Tex. App.—Eastland Sept. 9, 2004, pet. denied) (mem. op.).

"The Bylaws of the Medical Staff of Valley Regional Medical Center" is a 104-page document that defines itself as "the written set of documents that describe the organizational structure of the Medical Staff and the rules for its self-governance which create a system of rights, responsibilities, and describe the manner in which the Medical

Staff functions and operates." The bylaws define "Medical staff" as "all physicians, dentists, and podiatrists that have been granted the right to exercise Clinical Privileges within the Hospital." Pisharodi points to two provisions within the medical staff bylaws in support of his breach of contract claim—both subsections located under "11.1. Staff Rules and Regulations and Policies"—and quotes them as follows:

> 11.8. [No Contract Intended.]
> . . . Notwithstanding the foregoing, the provisions of Article XII and other provisions containing undertakings in the nature of an agreement or an indemnity or a release shall be considered contractual in nature, and not a mere recital and shall be binding upon practitioners, Staff members and those granted Clinical Privileges in the Hospital . . .
>
> 11.9. [Confidentiality.]
> Members of the Staff shall respect and preserve the confidentiality of all communications and information relating to credentialing, Peer Review and quality assessment and improvement activities. Any breach of this provision, except as required by law, shall subject the Staff member to corrective action . . .

Pisharodi quotes the "11.8 No Contract Intended" provision in his pleadings and brief only in part, excluding the following:

> Notwithstanding anything herein to the contrary, it is understood that these Bylaws and the Rules and Regulations do not create, nor shall they be construed as creating, in fact, by implication or otherwise a contract of any nature between or among the Hospital or the Board or the Staff and any member of the Staff or any person granted Clinical Privileges or entitled to perform specified services. Any Clinical or other Privileges are simply privileges which permit conditional use of the Hospital facilities, subject to the terms of these Bylaws and the Rules and Regulations. Any provisions of these Bylaws may be amended, altered, modified or repealed at any time as provided herein. . . .

Neither of these proffered provisions produce evidence of a contractional obligation that binds Valley Regional. The confidentiality provision, which Pisharodi claims Valley Regional breached, only applies to "Members of the Staff." *See Batra*, 562 S.W.3d at 713 (noting the distinction between a plaintiff's reliance on hospital bylaws and medical

staff bylaws for purposes of indemnifying a hospital in a breach of contract suit); *Wheeler v. Methodist Hosp.*, 95 S.W.3d 628, 647 (Tex. App.—Houston [1st Dist.] 2002, no pet.) ("The medical staff and the hospital are not one and the same."). More persuasive, however, is the language of the "No Contract Intended" provision, which unequivocally states: "these Bylaws and the Rules and Regulations do not create, nor shall they be construed as creating, in fact, by implication or otherwise a contract of any nature between or among the Hospital or the Board or the Staff. . . ."

Although Pisharodi additionally points to several other bylaw provisions,[4] we find them to be uniformly problematic: none produce evidence of the requisite contractual language binding on Valley Regional. *See Marlin*, 307 S.W.3d at 434 (holding that language recognizing the authority of the hospital, but not acting to limit said authority, could not be then held to be contractually binding on the hospital); *Wheeler*, 95 S.W.3d at 647–48 (concluding the same where "medical staff bylaws do not attempt to define or limit [the hospital's] powers; rather, their purpose states in part that they present a means whereby the staff may present concerns to the board of directors"); *Stephan*, 20 S.W.3d at 888 (finding the same where medical staff bylaws "recognize[] that the staff 'is subject to the ultimate authority of the board[,]'" but did not otherwise limit the hospital). Thus, Pisharodi has failed to offer clear and specific evidence of the existence of a valid contract. *See* TEX. CIV. PRAC. & REM. CODE Ann. § 27.005(c); *Lona Hills Ranch*, 591 S.W.3d at 127; *In re Lipsky*, 460 S.W.3d at 587–90. The trial court did not abuse its

[4] Pisharodi, in part, claims: "Hospital's Board is specifically required to monitor and care for the patients. . . . Hospital's CEO is appraised of all investigations performed pursuant to the bylaws. . . . All peer reviews are 'performed on behalf of the Hospital'. . . . "

discretion in granting Valley Regional's motion to dismiss. *See In re Lipsky*, 460 S.W.3d at 593.

2. Malicious Prosecution

The burden was also on Pisharodi to establish by clear and specific evidence a prima facie case for each essential element of his malicious prosecution cause of action. *See id.*

To prevail on a suit alleging malicious prosecution of a civil claim, Pisharodi must have shown that: (1) Valley Regional instituted or continued a civil proceeding against him; (2) the proceeding was by or at the insistence of Valley Regional; (3) the commencement of the proceeding was with malice; (4) Valley Regional lacked probable cause for the proceeding; (5) termination of the proceeding was in his favor; and (6) he suffered special damages. *See Tex. Beef Cattle Co. v. Green*, 921 S.W.2d 203, 207 (Tex. 1996) (discussing the six elements required to prove malicious prosecution of a civil claim); *S. Tex. Freightliner, Inc. v. Muniz*, 288 S.W.3d 123, 132 (Tex. App.—Corpus Christi–Edinburg 2009, pet. denied); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c).

Finding the sixth element of "special damages" dispositive, we address it alone. *See Tex. Beef*, 921 S.W.2d at 207. "Special damages," also referred to as "special injury," requires evidence of "actual interference with the defendant's person (such as an arrest or detention) or property (such as an attachment, an appointment of receiver, a writ of replevin or an injunction)." *Airgas-Sw., Inc. v. IWS Gas & Supply of Tex., Ltd*., 390 S.W.3d 472, 479 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (citing *Sharif–Munir–Davidson Dev. Corp. v. Bell*, 788 S.W.2d 427, 430 (Tex. App.—Dallas 1990, writ denied)).

Alleged damages must also be more than "ordinary losses incident to defending a civil suit, such as inconvenience, embarrassment, discovery costs, and attorney's fees." *Tex. Beef*, 921 S.W.2d at 208; *see also Brent Bates Builders, Inc. v. Malhotra*, No. 11-13-00119-CV, 2014 WL 1030708, at *3 (Tex. App.—Eastland Mar. 14, 2014, pet. denied) (mem. op.).

Pisharodi's pleadings summarily claim that he "suffered special injury as a result of the proceeding." Yet, Pisharodi provides no evidence of any injury following the civil proceeding—alleged here as the peer review. Via an affidavit, Pisharodi argues he was unable to perform the surgery and "lost income of approximately $5,000.00." However, lost earnings cannot support a special injury claim. *See Finlan v. Dall. Indep. Sch. Dist.*, 90 S.W.3d 395, 406 (Tex. App.—Eastland 2002, pet. denied) (holding that claims of damage to reputation, pecuniary losses, adverse tax losses, personal injuries, loss of ability to obtain credit, and loss of property interests do not satisfy special injury requirement for malicious prosecution claims); *Moiel v. Sandlin*, 571 S.W.2d 567, 570 (Tex. App.—Corpus Christi–Edinburg 1978, no writ) (determining that an increase in a doctor's professional liability insurance did not qualify as special damages); *Martin v. Trevino*, 578 S.W.2d 763, 766 (Tex. App.—Corpus Christi–Edinburg 1978, writ ref'd n.r.e.) (holding that evidence of lost revenue from medical practice did not satisfy the special injury element); *see also Malhotra*, 2014 WL 1030708, at *4 (providing that claims of "injury to [a plaintiff's] reputation or credit rating; the value of use of property during the time period [a plaintiff] was denied use; physical and emotional distress; . . ." do not satisfy the special injury requirement); *Haygood v. Chandler*, No. 12-02-00239-CV, 2003 WL 22480560, at *5 (Tex. App.—Tyler Oct. 31, 2003, pet. denied) (mem. op.) (determining

that evidence of "lost fees, increased malpractice insurance costs, lost employment contracts, embarrassment, and mental anguish" did not qualify as special damages). Moreover, Pisharodi's asserted injury cannot be considered to have been suffered as a result of the peer review because it is based on lost income from a surgery which preceded it. *See Tex. Beef*, 921 S.W.2d at 207; *Trevino*, 578 S.W.2d at 766; *see also Malhotra*, 2014 WL 1030708, at *4; *Haygood*, 2003 WL 22480560, at *5; *cf. CVHS II*, 2020 WL 486491, at *8 (determining that the suspension of Pisharodi's admitting privileges following an unfavorable peer review proceeding "constitutes interference with a property right, akin to an injunction, and therefore satisfies the special damages requirement"). Because Pisharodi failed to offer clear and specific evidence of special damages, his malicious prosecution claim fails, and the trial court did not abuse its discretion in granting Valley Regional's motion to dismiss. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c); *In re Lipsky*, 460 S.W.3d at 593.

We overrule Pisharodi's first issue.

II. ATTORNEY'S FEES

Pisharodi next asserts that the trial court (1) violated his state constitutional rights in determining that judges as opposed to juries decide attorney's fees under TEX. CIV. PRAC. & REM. CODE ANN. § 27.009; and (2) erred in assessing excessive, unsupported attorney's fees.

A. Standard of Review

"We review the 'denial of a jury demand for an abuse of discretion.'" *In re A.L.M.-F.*, 593 S.W.3d 271, 282 (Tex. 2019) (quoting *Mercedes-Benz Credit Corp. v. Rhyne*, 925 S.W.2d 664, 666 (Tex. 1996)). "A trial court abuses its discretion when a 'decision is

arbitrary, unreasonable, and without reference to guiding principles.'" *Id.* (quoting *Rhyne*, 925 S.W.2d at 666). Moreover, "a trial court 'has no discretion in determining what the law is or applying' law to facts." *Pressley v. Casar*, 567 S.W.3d 327, 333 (Tex. 2019) (per curiam) (quoting *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992)). Accordingly, "a trial court abuses its discretion if it fails to correctly analyze or apply the law." *In re Dawson*, 550 S.W.3d 625, 628 (Tex. 2018) (orig. proceeding) (per curiam) (citing *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135 (Tex. 2004) (orig. proceeding)).

Meanwhile, statutory construction is a legal question that we review de novo. *City of Conroe v. San Jacinto River Auth.*, No. 18-0989, ___ S.W.3d ___, ___, 2020 WL 1492411, at *3 (Tex. Mar. 27, 2020). Our primary focus in statutory interpretation is to give effect to legislative intent, considering the language of the statute, as well as its legislative history, the objective sought, and the consequences that would flow from alternate constructions. *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 383 (Tex. 2000). We consider the statutory language in context and not in isolation, *see In re Office of the Attorney Gen. of Tex.*, 456 S.W.3d 153, 155 (Tex. 2015) (per curiam), and we must presume that every word in a statute has been used for a purpose and that every word excluded was excluded for a purpose. *Bosque Disposal Sys., LLC v. Parker Cty. Appraisal Dist.*, 555 S.W.3d 92, 94 (Tex. 2018) (noting "the Legislature expresses its intent by the words it enacts and declares to be the law."); *Emeritus Corporation v. Blanco*, 355 S.W.3d 270, 276 (Tex. App.—El Paso 2011, pet. denied).

B. Applicable Law and Analysis

Under Texas law, each party pays their own attorney's fees unless a statute or contract dictates otherwise. *In re Nat'l Lloyds Ins. Co.*, 532 S.W.3d 794, 809 (Tex. 2017)

(orig. proceeding). "When fee-shifting is authorized, whether by statute or contract, the party seeking a fee award must prove the reasonableness and necessity of the requested attorney's fees." *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 484 (Tex. 2019). "In general, the reasonableness of statutory attorney's fees is a jury question."[5] *City of Garland v. Dall. Morning News*, 22 S.W.3d 351, 367 (Tex. 2000); *see* TEX. CONST. art. I, §15; TEX. CONST. art. V, § 10; *Kinsel v. Lindsey*, 526 S.W.3d 411, 427 (Tex. 2017); *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998); *see also Bill Miller Bar–B–Q Enters. Ltd. v. Gonzales*, No. 04–13–00704–CV, 2014 WL 5463951 (Tex. App.—San Antonio Oct. 29, 2014, no. pet.) (mem. op.). However, any award of fees, including attorney's fees, "is limited by the wording of the statute or contract that creates an exception to the American Rule." *JCB, Inc. v. Horsburgh & Scott Co.*, No. 18-1099, ___ S.W.3d ___, ___, 2019 WL 2406971, at *8 (Tex. June 7, 2019); *Meyers v. 8007 Burnet Holdings, LLC*, ___ S.W.3d ___, ___, No. 08-19-00108-CV, 2020 WL 359733, at *11 (Tex. App.—El Paso Jan. 22, 2020, pet. filed) (citing examples of when Texas legislature has abrogated the American Rule).

The applicable provision of the TCPA here provides that "the court shall award to the moving party . . . court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require." Act of May 21,

[5] The right to a jury trial for attorney's fees, however, is not self-executing; the Texas Rules of Civil Procedure require affirmative action to obtain a jury trial. *See Green v. W.E. Grace Mfg. Co.*, 422 S.W.2d 723, 725–26 (Tex. 1968). A party must demand a jury trial and timely pay the required fee. TEX. CONST. art. V, § 10; TEX. R. CIV. P. 216. Here, Pisharodi submitted a written request for a jury trial on the issue of reasonable attorney's fees, paid the jury fee, and re-urged his objection to proceeding without a jury trial prior to the hearing on attorney's fees. Pisharodi has, therefore, preserved this issue for review. *See generally Landry's, Inc. v. Animal Legal Def. Fund*, 566 S.W.3d 41, 67 (Tex. App.—Houston [14th Dist.] 2018, pet. filed).

2011, 82nd Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws 961, 962 (amended 2019) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 27.009(a)(1)).[6]

The Supreme Court of Texas, however, has yet to interpret whether § 27.009 precludes a jury from determining the amount of "reasonable attorney's fees," and at least two sister courts have declined to engage in a related constitutionality analysis, instead determining that the alleged error was waived. *See Baumgart v. Archer*, 581 S.W.3d 819, 830–31 (Tex. App.—Houston [1st Dist.] 2019, pet. denied) (mem. op.) (finding that in failing to preserve the argument that "Section 27.009(a)'s language authorizing a trial court to award reasonable attorney's fees violates the right to a jury trial guaranteed by Article V, Section 10," appellant waived error); *see also Breitling Oil & Gas Corp. v. Petroleum Newspapers of Alaska, LLC*, No. 05-14-00299-CV, 2015 WL 1519667, at *5 (Tex. App.—Dallas Apr. 1, 2015, pet. denied) (mem. op.) (providing the same). In *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016), the court declared that an attorney's fees "determination rests within the [trial] court's sound discretion" in its analysis of whether the "reasonableness" determination required considerations of justice and equity:

> Based on the statute's language and punctuation, we conclude that the TCPA requires an award of "reasonable attorney's fees" to the successful movant. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.009(a)(1). A "reasonable" attorney's fee "is one that is not excessive or extreme, but rather moderate or fair." *Garcia v. Gomez*, 319 S.W.3d 638, 642 (Tex. 2010). That determination rests within the court's sound discretion, but that discretion, under the TCPA, does not also specifically include considerations of justice and equity.

[6] The Texas Legislature has provided for similar language in other acts as well. *See* TEX. BUS. & COM. CODE ANN. § 17.50 ("[T]he court shall award to the defendant reasonable and necessary attorneys' fees and court costs."); TEX. INS. CODE ANN. § 541.159 (d)(2) ("The court shall award . . . attorney's fees as required . . .").

Sullivan, 488 S.W.3d at 299.[7] We are cautious to interpret the court's language in *Sullivan* as an exclusive bestowment of the authority to assess fees on the trial court when the Texas Supreme Court has consistently held that the issue of a "reasonable" amount of attorney's fees recoverable under a statute is a question of fact for a jury to resolve. *See* TEX. GOV'T CODE § 311.023 ("In construing a statute, . . . a court may consider among other matters the . . . common law or former statutory provisions, including laws on the same or similar subjects.").

We find guidance in three oft cited supreme court cases. *See Transcon. Ins. Co. v. Crump*, 330 S.W.3d 211, 227 (Tex. 2010) (discussing award of attorney's fees under the Texas Labor Code § 408.221(a), (b), which dictates that "attorney's fees . . . must be approved by the commissioner or court," and approved attorney's fee must be based on "written evidence presented to the . . . court"); *City of Garland*, 22 S.W.3d at 367 (discussing award of attorney's fees under Texas Public Information Act, which provides that the "court may assess costs of litigation and reasonable attorney fees incurred by a plaintiff or a defendant who substantially prevails"); *Bocquet*, 972 S.W.2d at 20–21 (discussing award of attorney's fees under the Declaratory Judgments Act, which states that "the court may award costs and reasonable and necessary attorney's fees as are equitable and just").

In all three cases, the Supreme Court of Texas determined that though the statutes seemingly designated the trial court with the responsibility of awarding or assessing

[7] After the Supreme Court remanded "the cause . . . to the trial court for further proceedings consistent with this opinion," *Sullivan v. Abraham*, 488 S.W.3d 294, 300 (Tex. 2016), the plaintiff filed a "jury demand for a jury to try all issues of fact" including "the reasonableness and necessity of any attorney's fees." *Sullivan v. Abraham*, No. 07-17-00125-CV, 2018 WL 845615, at *3–4 (Tex. App.—Amarillo Feb. 13, 2018, no pet.) (mem. op.). The plaintiff thereafter waived the issue, submitting the question of reasonableness to the trial court. *See id.*

attorney's fees, the statutes were "silent on the critical judge-or-jury question." *Crump*, 330 S.W.3d at 229. Moreover, a question of fact existed on the reasonableness of fees; thus, if requested, a jury determination was required. *See id.*; *City of Garland*, 22 S.W.3d at 367–68; *Bocquet*, 972 S.W.2d at 21; *see also Tex. Mut. Ins. Co. v. Boetsch*, 307 S.W.3d 874, 881 (Tex. App.—Dallas 2010, pet. denied) (noting a distinction between statutes that "merely require trial courts to 'assess' or 'award' reasonable fees," from a statute which "requires the trial court consider specified factual issues," with the latter permitting the amount of attorney's fees awarded to be decided by the trial court). In concluding that reasonableness is a question that may be determined by a jury, the court further resolved the statutes in a manner that did not disturb the presumption of constitutional compliance.[8] *See In re Allcat Claims Serv., L.P.*, 356 S.W.3d 455, 468 (Tex. 2011) ("When construing statutes we presume the Legislature intended them to comply with the Texas Constitution."); *Trapnell v. Sysco Food Services, Inc.*, 850 S.W.2d 529, 544 (Tex. App.—Corpus Christi–Edinburg 1992), *aff'd*, 890 S.W.2d 796 (Tex. 1994)

[8] The Texas Constitution contains two separate provisions addressing the right of trial by jury. *See* TEX. CONST. art. I, § 15; art. V, § 10; *State v. Credit Bureau of Laredo, Inc.*, 530 S.W.2d 288, 291 (Tex. 1975) (setting out the text and history of Article I, Section 15 and Article V, Section 10). Article I, Section 15 states, "The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency." TEX. CONST. art. I, § 15. However, Article I, Section 15 only provides a right to trial by jury for those actions, or analogous actions, which were tried by jury under common law when the Texas Constitution was adopted in 1876. *Barshop v. Medina Cty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 636 (Tex. 1996); *Roper v. Jolliffe*, 493 S.W.3d 624, 631 (Tex. App.—Dallas 2015, pet. denied).

"The right to a jury trial reserved to the people in [Article] V[,] § 10 is significantly broader," and it affords this right "in all 'causes' in a Texas District Court, regardless of whether the cause existed at common law." *Trapnell v. Sysco Food Services, Inc.*, 850 S.W.2d 529, 544 (Tex. App.—Corpus Christi–Edinburg 1992), *aff'd*, 890 S.W.2d 796 (Tex. 1994) (citing *Credit Bureau of Laredo, Inc.*, 530 S.W.2d at 292–93); *see Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 526 (Tex. 1995). The term "cause" is defined as "a ground or cause for legal action." *Cause*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see Kruse v. Henderson Tex. Bancshares, Inc.*, 586 S.W.3d 118, 124–25 (Tex. App.—Tyler 2019, no pet.) (compiling a list of cases in which courts have determined do not qualify as a "cause" under Article V, Section 10).

("Laws which diminish the right to a jury trial are unconstitutional."); *see also Gonzales*, 2014 WL 5463951, at *5 (construing a statute as permitting a "jury to determine the amount of attorney's fees to award" to avoid "any possible constitutional infirmity").

Having reviewed the applicable law, we conclude similarly. Section 27 does not dictate the manner in which to determine the amount of attorney's fees, providing only that the award must be "reasonable." *See Crump*, 330 S.W.3d at 230–31; *City of Garland*, 22 S.W.3d at 367; *Bocquet*, 972 S.W.2d at 21; *Discover Prop. & Cas. Ins. Co. v. Tate*, 298 S.W.3d 249, 256 (Tex. App.—San Antonio 2009, pet. denied) (analyzing the attorney's fees provision in Texas Labor Code § 408.221, and concluding, "in the context of the whole statute, and along with Supreme Court precedent on the issue, . . . a jury determination as to the amount of 'reasonable and necessary' attorney's fees, when requested, is not prohibited by the statute" because the statute did not affirmatively provide the manner of determining the amount of fees); *see also Gonzales*, 2014 WL 5463951, at *4 (holding that because the statute examined "does not dictate how to determine the attorney's fees amount, except that the award must be 'reasonable,'" the parties were "entitle[d] to have a jury determine the reasonableness"). Reasonableness remains a fact issue that a jury, upon proper request, may resolve. *See Crump*, 330 S.W.3d at 230–31; *City of Garland*, 22 S.W.3d at 367; *Bocquet*, 972 S.W.2d at 21.

Moreover, § 27.009 does not contain language prohibiting the parties from having a jury determine the reasonableness of the amount of attorney's fees to award. *See generally Better Bus. Bureau of Metro. Hous., Inc. v. John Moore Services, Inc.*, 500 S.W.3d 26, 34 (Tex. App.—Houston [1st Dist.] 2016, pet. denied) (discussing where on remand, after the cause returned to the trial court for the required assessment of

attorney's fees and costs under the TCPA, "the parties tried the issue of attorney's fees to a jury," "[t]he trial court awarded attorney's fees based on the jury's verdict and entered a final judgment," and said judgment was appealed and affirmed). Therefore, we hold that the trial court abused its discretion in denying Pisharodi's request for a jury trial on the issue of the amount of reasonable attorney's fees. *See City of Garland,* 22 S.W.3d at 367–68; *Tate*, 298 S.W.3d at 256*.* To this extent, we sustain Pisharodi's second issue, and we do not address Pisharodi's subsequent issue on appeal of whether the assessed fees were unreasonable. *See* TEX. R. APP. P. 41.1.

IV. SANCTIONS

Pisharodi next asserts that (1) his income was a required factor to be considered in a sanctions determination, and (2) because Valley Regional failed to present evidence of his income, "the trial court did not possess sufficient information on which to make a decision, which constitutes an abuse of discretion."

We review the trial court's decision to award sanctions under the TCPA for an abuse of discretion. *Caliber Oil & Gas, LLC v. Midland Visions 2000*, 591 S.W.3d 226, 242 (Tex. App.—Eastland 2019, no pet.); *see also Sullivan v. Tex. Ethics Comm'n*, 551 S.W.3d 848, 857 (Tex. App.—Austin 2018, pet. denied). "A trial court abuses its discretion when it acts arbitrarily or unreasonably or without regard to guiding principles." *Caliber Oil & Gas*, 591 S.W.3d at 242–43; *see also Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985).

Chapter 27 sanctions are mandatory, and the proper amount of the sanction is left to the trial court's discretion. TEX. CIV. PRAC. & REM. CODE ANN. § 27.009(a) (providing that the trial court "shall" award sanctions to successful moving party); *see Sullivan*, 488

S.W.3d at 299; *Kawcak v. Antero Res. Corp.*, 582 S.W.3d 566, 573 (Tex. App.—Fort Worth 2019, pet. denied). The only evidentiary consideration mandated by statute is that evidence be brought for the court to determine an amount "sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter." TEX. CIV. PRAC. & REM. CODE ANN. § 27.009(a)(2).

Pisharodi cites to cases from our sister courts for the proposition that "sanctions must bear some relationship to the plaintiff's income." *See McGibney v. Rauhauser*, 549 S.W.3d 816, 835–36 (Tex. App.—Fort Worth 2018, pet. denied); *Am. Heritage Capital, LP v. Gonzalez*, 436 S.W.3d 865, 881 (Tex. App.—Dallas 2014, no pet.), disapproved of by *Hersh*, 526 S.W.3d at 467. Although the courts in each case were provided with and considered evidence of a plaintiff's income, neither court necessitated that evidence of income be required in all TCPA sanction hearings. *See Rauhauser*, 549 S.W.3d at 835–36; *Gonzalez*, 436 S.W.3d at 881. We have found no case which would support necessitating such evidentiary requirement, and we decline to impose such requirement now. Therefore, we conclude the trial court did not abuse its discretion in awarding sanctions absent evidence of Pisharodi's income. *See Sullivan*, 488 S.W.3d at 299. We overrule Pisharodi's last issue on appeal.

V. CONCLUSION

We affirm the trial court's judgment in part and reverse it in part, and we remand the cause for a new trial on attorney's fees.

GREGORY T. PERKES
Justice

Delivered and filed the
7th day of May, 2020.