In The
Court of Appeals
Fifteenth Appellate District of Texas at Arlington

No. 15-13-00053-CR

SOPHIE STARK
Appellant // Cross-Appellee

V.

JENNIFER JOFFREY and LINDSAY LANNISTER
Appellees // Cross-Appellants

On Appeal from the 202nd Judicial District Court
Tarrant County, Texas
The Honorable Richard Cockrell
Trial Court No. 40120

Before Tucker, S., Wright, D. and Franks, L.
Opinion by Tucker, Chief Justice, in which Wright, D. joins

OPINION

Sophie Stark, a nurse practitioner, is the owner and president of ScrubSafe, Inc., a company with an exclusive contract to provide nursing services for Sacred Heart Assisted Living Facility. Stark is also a part-owner of Sacred Heart and sits on the board as the Director of Nursing. In January 2013, Sacred Heart hired Jennifer Joffrey as its Chief Executive Officer and Lindsay Lannister as the Director of Resident Services. The relationship between Joffrey and Lannister, on the one hand, and Stark, on the other, was strained from the beginning. The relationship deteriorated quickly, and by May 2013, Stark had sued Joffrey and Lannister alleging defamation, tortious interference with "existing and prospective business relationships," and civil conspiracy. The trial court dismissed Stark's tortious interference and civil conspiracy claims pursuant to the Texas Citizen's Participation Act (TCPA), but allowed Stark's defamation claim to proceed. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001–.011 (West Supp. 2014). The TCPA is designed to prevent plaintiffs from bringing frivolous lawsuits against defendants based on their exercise of free speech. *Id.* § 27.002. It provides a pre-discovery dismissal mechanism and awards attorney's fees to successful defendants. *Id.* §§ 27.003, 27.009.

Stark appeals the dismissal of her tortious interference and civil conspiracy claims. On appeal, Stark argues that: (1) the trial court erred in applying the TCPA; (2) the statutory commercial-speech exemption applies; (3) the trial court erred in finding that she failed to establish a prima facie cases of tortious interference and civil conspiracy; and (4) the

TCPA violates the Open Courts provision of the Texas Constitution. Joffrey and Lannister cross-appeal, arguing that the trial court erred in allowing Stark's defamation claims to proceed and in failing to assess mandatory TCPA sanctions against Stark.

We affirm the trial court's judgment dismissing Stark's tortious interference and civil conspiracy claims and its $0 award of sanctions. However, because we find error in the trial court's conclusion that Stark established a prima facie case of defamation, we reverse the trial court's judgment on this issue, render a judgment dismissing the defamation claim, and remand the issue of attorney's fees and sanctions with respect to this claim to the trial court.

I. Factual And Procedural History

ScrubSafe independently recruits, employs, and trains high-quality nurses who serve as independent contractors for a variety of local health care providers. In 2011, Sacred Heart and ScrubSafe entered into a four-year contract that makes ScrubSafe its independent contractor and exclusive provider of nursing services. In addition, Sacred Heart made Stark its Director of Nursing. In this position, Stark was charged with developing and implementing nursing policy and procedure, overseeing the nursing staff, managing compliance with charting regulations, ensuring adequate nursing staff, assessing the health needs of each of Sacred Heart's residents in the assisted living facility, and communicating the needs of these residents to Sacred Heart's on-staff physicians.

In January 2013, Sacred Heart hired Joffrey and Lannister as administrators. Joffrey's and Lannister's husbands are nurses who co-own NiteNurse, a company that provides night-shift nurses to hospice patients throughout the county. Stark's petition alleges that "immediately upon being hired, Joffrey and Lannister began talking about NiteNurse and their husbands with certain Sacred Heart board members despite the exclusive contract with ScrubSafe." Stark claimed that "Joffrey and Lannister entered into a civil conspiracy to defame her, possibly with the intent of promoting NiteNurse's services to the board." Stark's petition alleged the "defamatory statements [were] made to third parties and to those potentially seeking to do business with her."

In April 2013, Stark discovered through a mutual friend and ScrubSafe customer, Jon Baelish, that Lannister posted the following comment to her Facebook page, which was visible only to her Facebook friends: "Another complaint of improper nurse documentation. So tired of cleaning up someone else's mess! Wish Stark would do her job managing instead of berating me for raising legit issues. Oh well, just another day at work."

On March 3, 2013, Lannister sent the following e-mail to Sacred Heart co-administrators:

> Dear co-administrators,
>
> I regret to inform you that several reports have been made to me which could potentially require action. I do not know if these should be treated as unsubstantiated claims or if

there is some protocol requiring us to handle them a certain way. Below is a summary of some of these reports:

- Report 1 – I was told that Stark represented herself to be a physician
- Report 2 – A witness claimed there was an obstruction of a reporting process and corrective action was not taken
- Report 3 – There have been complaints of inadequate nurse staffing
- Report 4 – There have been several instances of improper nurse documentation, some which were allegedly not corrected. For example, it was reported that a nurse administered a different medication through an IV, but the patient's chart does not reflect that the incident occurred. Another chart had the wrong name for the treating physician in one spot.
- Report 5 – There have been reports that Stark was unavailable to answer nurse questions during business hours
- Report 6 – There were some reports that Stark did not complete patient chart reviews in a timely manner

This information should be kept confidential until we have developed a plan. I can provide additional details if some action needs to be taken, including an investigation. Please advise.

After discovering this e-mail, Stark filed suit on May 7, 2013. Joffrey and Lannister's answer invoked the Texas Citizen's Participation Act, an anti-SLAPP statute.[1] The Act seeks "to encourage and safeguard the constitutional rights of persons to … speak freely" and requires a court to "dismiss a legal action against the moving party if the moving party shows by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of: (1) the right of free

[1] SLAPP stands for Strategic Lawsuit Against Public Participation. *See Rehak Creative Servs., Inc. v. Witt*, 404 S.W.3d 716, 719 (Tex. App. –Houston [14th Dist.] 2013, pet. denied).

speech." TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.003, 27.005(b)(1) (West Supp. 2014). The "[e]xercise of the right to free speech" is defined as "a communication made in connection with a matter of public concern." *Id.* § 27.001(3). A "[m]atter of public concern" is an issue that is "related to" health or safety; environmental, economic, or community well-being; a public official or public figure; or a good, product, or service in the marketplace. *Id.* § 27.001(7). Joffrey and Lannister moved to dismiss under the TCPA on July 25, 2013. Stark responded by stating that defamatory speech is not protected by the First Amendment, and the alleged free speech in this case was "private, malicious defamation for personal gain" and not a matter of public concern. She also argued that the defamatory statements were not publicly made and thus could not be a matter of public concern.

Alternatively, Stark claimed that if the statute applied, her suit fell into the TCPA's commercial-speech exception:

> This chapter does not apply to a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product of a commercial transaction in which the intended audience is an actual or potential buyer or customer.

Id. § 27.010(b). She argued that Joffrey and Lannister "were engaged in promoting and encouraging sales of Sacred Heart's assisted living facility services," the defamatory statements arose "out of business interactions with Stark and with the sale of nursing services," and the "intended

audience of the allegedly defamatory statements included Sacred Heart employees, board members and physicians, parties interested in conducting business with Stark, or could have influence over the decisions of other health care providers who do business with ScrubSafe."

Lastly, Stark argued that the action should not be dismissed because she established "by clear and specific evidence a prima facie case for each essential element of the claim in question." *See id.* § 27.005(c).

At the hearing on the motion to dismiss, held on August 5, 2013, Stark introduced an affidavit of a Sacred Heart board member, Robert Tyrell stating:

> Sacred Heart has been pleased with ScrubSafe's performance of its exclusive contract to provide nursing services. Prior to Lannister's e-mail, I was not aware of any complaints personally against Stark. There have been some cut-backs due to budgeting issues, but Sacred Heart intends to honor its term contract with ScrubSafe. We believe Stark is very professional.

Stark also introduced her own affidavit swearing that Lannister's email was "rank defamation designed to compromise her exclusive contract with Sacred Heart." During the hearing, Stark argued that the statements in her petition should be taken as true for purposes of determining whether a prima facie case had been met. She also moved the

court to grant her leave to conduct "preliminary discovery prior to the court considering the motion to dismiss."[2]

On August 15, the trial court found that the TCPA applied, that Stark made a prima facie case of defamation but failed to make a prima facie case for her other claims, awarded $3,015.00 in court costs and $10,500.00 in attorney's fees to Joffrey and Lannister, and entered a $0.00 award for sanctions.

II. The TCPA Applies To Stark's Suit

Joffrey and Lannister bore the initial burden of demonstrating the TCPA's applicability. *Wholesale TV & Radio Advertising, LLC v. Better Bus. Bureau of Metro. Dallas, Inc.*, No. 05-11-01337-CV, 2013 WL 3024692, at *2 (Tex. App.–Dallas Jun. 14, 2013, no pet.) (mem. op.); *Better Bus. Bureau of Metro. Dallas, Inc. v. BH DFW, Inc.*, 402 S.W.3d 299, 307–08 (Tex. App.–Dallas May 15, 2013, pet. denied). We review de novo the trial court's initial determination that they showed by a preponderance of the evidence that the legal action was based on their exercise of free speech. *KTRK Television, Inc. v. Robinson*, 409 S.W.3d 682, 688–89 (Tex. App.–Houston [1st Dist.] 2013, pet. denied). *But see In re Lipsky*, 411 S.W.3d 530, 539 (Tex. App.–Fort Worth 2013, orig. proceeding); *Rehak Creative Servs., Inc. v. Witt,* 404 S.W.3d 716, 724–25

[2] On a motion by a party or on the court's own motion and on a showing of good cause, a court may allow specified and limited discovery relevant to a TCPA motion to dismiss. TEX. CIV. PRAC. & REM. CODE § 27.006(b) (West Supp. 2014). Stark argues that the trial court erroneously denied her motion for discovery. The record indicates that she did not obtain a ruling from the trial court on the motion. Accordingly, we find Stark's point of error unpreserved.

(Tex. App.–Houston [14th Dist.] 2013, pet denied) (discussing *Lipsky*'s unique procedural posture and choosing to employ the de novo standard).

Each party believes the rules of statutory construction support her position. We review questions of statutory construction de novo. *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011); *R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 624 (Tex. 2011). When construing a statute, our primary objective is to ascertain and give effect to the Legislature's intent. TEX. GOV'T CODE ANN. § 312.005 (West 2005); *Molinet*, 356 S.W.3d at 411. "We look first to the statute's language to determine that intent, as we consider it 'a fair assumption that the Legislature tries to say what it means, and therefore the words it chooses should be the surest guide to legislative intent.'" *Leland v. Brandal*, 257 S.W.3d 204, 206 (Tex. 2008) (quoting *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 866 (Tex. 1999)); *see Molinet*, 356 S.W.3d at 411. We consider the statute as a whole rather than focusing upon individual provisions. *TGS–NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011). If a statute is unambiguous, we adopt the interpretation supported by its plain language unless such an interpretation would lead to absurd results. *Id*. (citing *Tex. Dep't of Protective & Regulatory Servs. v. Mega Child Care*, 145 S.W.3d 170, 177 (Tex. 2004)).

The bill's sponsor's statement of intent, made on May 10, 2011, notes:

> Citizen participation is the heart of our democracy. Whether petitioning the government, writing a traditional news article, or commenting on the quality of a business, involvement of citizens in the exchange of ideas benefits our society.
> …
>
> The Internet age has created a more permanent and searchable record of public participation as citizen participation in democracy grows through self-publishing, citizen journalism, and other forms of speech. Unfortunately, abuses of the legal system, aimed at silencing these citizens, have also grown. These lawsuits are called Strategic Lawsuits Against Public Participation or "SLAAP" suits.

Senate Comm. on State Affairs, Bill Analysis Tex. HB 2973, 82nd Leg., RS (2011). Here, the Legislature's intent is clear:

> The purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.

TEX. CIV. PRAC. & REM. CODE ANN. § 27.002 (West Supp. 2014). The TCPA is construed liberally to effectuate its intent and purpose. *Id.* § 27.011.

Joffrey and Lannister argue that any statements made in this case were simply comments about Stark's business, were not originated by them, and were made for the purpose of investigating her actions "in order to ensure that the best care was being provided to Sacred Heart patients." They urge that because Stark's petition complains of a statement made on Lannister's Facebook page, which is information on the Internet about the quality of her performance, the comment was made in a public forum (and

therefore the TCPA applies), despite Lannister's privacy settings on her Facebook account. Joffrey and Lannister assert that because Stark is still the director of nursing, and ScrubSafe still has its exclusive contract with Sacred Heart until the term expires, there has been no "demonstrable injury." They urge that "the liberal application of the statute yields the result that Stark's suit is one that the Legislature intended to inhibit."

Stark contends that because the TCPA protects a person's right to "speak freely, associate freely, and otherwise participate in government" that participation in government or some public statement is a prerequisite to the TCPA's application. *Id.* § 27.002. We disagree. As stated by our sister court:

> The Legislature could have limited the protection provided by the TCPA to the exercise of free speech relating to participation in government, but did not do so. Because the statutory definition of issues representing a "matter of public concern" is not ambiguous, we must enforce it as written.

BH DFW, Inc., 402 S.W.3d at 308. The sponsor's statement of intent indicates that protections should be afforded to those commenting on the quality of a business, and Section 27.001(7)(E), specifies that "public concern" includes issues related to health or safety or a service in the marketplace. "[T]he First Amendment protects speech conveying information about products and transactions in the commercial marketplace." *Better Bus. Bureau of Metro. Houston v. John Moore Servs., Inc.*, No. 01-12-00990-CV, 2013 WL 3716693, at *4 (Tex. App.–Houston [1st Dist.] Jul. 16, 2013, pet. filed) (citing *44 Liquormart, Inc. v.*

R.I., 517 U.S. 484, 503–04 (1996); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc*., 425 U.S. 748, 762 (1976)). In a recent case, the First Court of Appeals found that "[t]he business of operating an assisted living facility is a highly regulated one;" that the Assisted Living Facility Act "not only permits, but encourages an open airing of information relating to an assisted living facility's quality of care;" and that allegedly defamatory statements published about assisted living facilities are subject to dismissal under the TCPA. *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, No. 01–12–00581–CV, 2013 WL 5761051, at *7 (Tex. App–Houston [1st Dist.], Oct. 24, 2013, n.p.h.).

Citing to *Martinez v. Metabolife International, Inc.*, 113 Cal. App. 4th 181 (Cal. App. 4 Dist. 2003), Stark argues that her complaint merely presents an ordinary private dispute. The court in *Martinez* wrote:

> A defendant in an ordinary private dispute cannot take advantage of the anti-SLAPP statute simply because the complaint contains some references to speech or petitioning activity by the defendant.… We conclude it is the principal thrust or gravamen of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies, and when the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute.

Id. at 188. We disagree with Stark's assessment that this is an ordinary private dispute. It appears that the thrust of Stark's complaint was to silence a possible investigation into her practices. In any event, we note that California courts have found that their anti-SLAPP statute can apply

to events that transpire between private individuals. *Navellier v. Sletten*, 52 P.3d 703, 710 (Cal. 2000) (breach of contract cases and fraud claims can invoke the statute). While the TCPA excludes actions for bodily injury, wrongful death, or survival statements, it does not exclude other causes of action. TEX. CIV. PRAC. & REM. CODE ANN. § 27.010(c) (West Supp. 2014). We thus reach the same conclusion about the TCPA. *See also Crazy Hotel*, 2013 WL 5761051, at *14–15 (noting similarity of California anti-SLAPP statute and TCPA).

We conclude that the plain meaning of this statute yields the result suggested by Joffrey and Lannister. In order for the TCPA to apply, Stark's legal action[3] must have been based on, related to, or in response to the exercise of free speech, which is defined as "a communication made in connection with a matter of public concern." TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001(3), 27.003, 27.005(b)(1). A communication "includes the making or submitting of a statement or document in any form or medium, including oral, visual, audiovisual, or electronic." *Id.* § 27.001(1). There is no requirement that the communication be made in a public forum, but we believe that the comment posted on Lannister's Facebook page constituted such a forum.[4] The exercise of free speech means "a communication made in connection with a matter of public

[3] A legal action is a "lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim…." TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(6) (West Supp. 2014).

[4] Although Lannister's Facebook settings were set to "private," we believe that her posting her statement on the Internet distinguishes our case from *Whisenhunt v. Lippincott*, No. 06-13-00051-CV, 2013 WL 5539368, at *7 (Tex. App.–Texarkana Oct. 9, 2013, pet. filed).

concern." *Id.* § 27.001(3). Public concern is defined as an issue related to "health or safety" or "a good, product, or service in the marketplace." *Id.* § 27.001(7)(A), (E). The actionable statements here are "related to matters of public concern in the areas of health and safety, community well-being and a service in the marketplace."

We find that this construction promotes the spirit of the TCPA, since any other construction would lead to the absurd result of permitting defamation suits against those commenting on a business as a part of the daily function of their employment. Because we find that the TCPA applies to Stark's suit, we overrule her first point of error.[5]

III. The Claims Are Not Related To Commercial Speech

The TCPA:

> does not apply to a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product of a commercial transaction in which the intended audience is an actual or potential buyer or customer.

Id. § 27.010 (b).

[5] *In re Lipsky* is distinguishable. There, property owners filed complaints with the EPA against Range Resources Corporation, alleging it was responsible for contaminating their water well through oil and gas drilling activities. 411 S.W.3d 530, 536 (Tex. App—Fort Worth 2013, no pet.). While the EPA's investigation found that Range's activities contaminated the water, the Texas Railroad Commission found that the contamination was not caused by Range. *Id*. at 536–37. The property owners eventually sued Range. *Id.* at 537. Range counterclaimed for defamation (and other causes of action) and contended that their deep shale fracking could not have contaminated the shallow water well. *Id*. The property owners moved to dismiss the company's counterclaims under the TCPA, but the trial court denied the motions. *Id.* at 537-38. The court held that Range's claims fit within the TCPA because they were based on the property owners' right to petition and encourage review of the issue by the EPA, a governmental body. *Id* at 543. It also held that the environmental effects of fracking are a matter of public concern. *Id.* at 542–43. Here, the email appears to be compiled for the purpose of encouraging review of Stark's nursing practices relating to healthcare or the provision of a service.

Stark argues that the commercial-speech exemption applies to the communications made. Generally, "[t]he burden of proving a statutory exception rests on the party seeking the benefit from the exception." *BH DFW, Inc.*, 402 S.W.3d at 309 (quoting *City of Houston v. Jones*, 679 S.W.2d 557, 559 (Tex. App.–Houston [14th Dist.] 1984, no writ)); *Crazy Hotel*, 2013 WL 5761051, at *15.

We agree with the *Crazy Hotel* court that in applying the exemption we should consider whether:

> (1) the cause of action is against a person primarily engaged in the business of selling or leasing goods or services;
> (2) the cause of action arises from a statement or conduct by that person consisting of representations of fact about that person's or a business competitor's business operations, goods, or services;
> (3) the statement or conduct was made either for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services or in the course of delivering the person's goods or services; and
> (4) the intended audience for the statement or conduct [is an actual or potential buyer or customer].

2013 WL 1867104, at *14–15.

Stark argues that: (1) Joffrey and Lannister are administrators of Sacred Heart, and that selling Sacred Heart services includes selling ScrubSafe's exclusive nursing services; (2) that Joffrey and Lannister's husbands are engaged in a selling nursing services as well; (3) the allegedly defamatory statements made by them to third parties "were intended to compromise Stark's and ScrubSafe's contract with Sacred Heart;" (4) the statements were made "so that the nursing business could

potentially go to Joffrey and Lannister's husbands and to NiteNurse;" and (5) the audience was Sacred Heart and other potential customers of ScrubSafe's business.

This commercial-speech exemption is designed to protect salespeople who have been sued by competitors due to statements made in the marketplace promoting their products and services. We find that Joffrey and Lannister's titles as administrators do not suggest that they were primarily responsible for the sales of Sacred Heart services. Next, the e-mail and Facebook page did not contain statements of fact about Sacred Heart or NiteNurse; they concerned only Stark and ScrubSafe. If Joffrey and Lannister's business was to sell Sacred Heart and ScrubSafe business, the allegedly defamatory statements would be contrary to their sales interests, and would not have been made to obtain approval from consumers. In fact, the statements in the e-mail and on Facebook would likely turn consumers away from Sacred Heart and ScrubSafe.

Also, Stark was required to show that the statements were made to a potential customer. *See Crazy Hotel,* 2013 WL 1867104, at *16; *BH DFW, Inc.*, 402 S.W.3d at 309. The reason for this fourth factor appears to be the commercial-speech exception should apply if the statement is made with the intention of its being heard by a limited audience, "not the consumer public at large[.]" *See John Moore,* 2013 WL 3716693, at *5; *BH DFW, Inc.*, 402 S.W.3d at 309. The statements here were not made to the public at large, but only to Lannister's Facebook friends and other

Sacred Heart administrators. We conclude that the commercial-speech exception does not apply.

IV. Stark Failed to Establish a Prima Facie Case of Tortious Interference and Civil Conspiracy

"The court may not dismiss a legal action under this section if the party bringing the legal action establishes 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) (West Supp. 2014). '"Prima facie evidence is evidence that, until its effect is overcome by other evidence, will suffice as proof of a fact in issue' … [and] 'will entitle a party to recover if no evidence to the contrary is offered by the opposing party.'" *Witt*, 404 S.W.3d at 726 (quoting *Duncan v. Butterowe, Inc.*, 474 S.W.2d 619, 621 (Tex. Civ. App.–Houston [14th Dist.] 1971, no writ)). "'Clear and specific evidence' has been described as evidence that is 'unaided by presumptions, inferences, or intendments.'" *Id.* (explaining that this is a higher burden than the "some evidence" requirement of a no-evidence summary judgment) (quoting *McDonald v. Clemens*, 464 S.W.2d 450, 456 (Tex. Civ. App.–Tyler 1971, no writ)); *see In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 223 (Tex. 2004).

The elements of tortious interference with existing business relationship are (1) the existence of a contract subject to interference; (2) a willful and intentional act of interference; (3) such intentional act was a proximate cause of plaintiff's damages; and (4) actual damage or loss occurred. *Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 926 (Tex.

1993); *Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931, 939 (Tex. 1991).

To establish tortious interference with prospective business relationships, a plaintiff must show that (1) there was a reasonable probability that the parties would have entered into a business relationship; (2) the defendant committed "an independently tortious or unlawful act" that prevented the relationship; (3) the defendant either acted with a conscious desire to prevent the relationship from occurring or knew the interference was certain or substantially certain to occur as a result of the conduct; and (4) the plaintiff suffered actual harm or damages as a result of the defendant's interference." *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 713 (Tex. 2001); *Plotkin v. Joekel*, 304 S.W.3d 455, 487 (Tex. App.–Houston [1st Dist.] 2009, pet. denied) (citing *Richardson–Eagle, Inc. v. William M. Mercer, Inc*., 213 S.W.3d 469, 475 (Tex. App.–Houston [1st Dist.] 2006, pet. denied)). Independently tortious means "conduct that would violate some other recognized tort duty." *Sturges*, 52 S.W.3d at 713.

Stark argues that ScrubSafe had an exclusive contract with Sacred Heart that was subject to renewal after expiration of the term and that Joffrey and Lannister willfully interfered with the contract by "defaming Stark and ScrubSafe and casting doubts on their ability to fulfill the contract professionally," with the intention of promoting their husbands' company, NiteNurse. She alleged that Joffrey and Lannister's acts

included defamatory communications to "Sacred Heart employees, board members and physicians, parties interested in conducting business with Stark, or [those who] could have influence over the decisions of other health care providers who do business with ScrubSafe." Her affidavit stated that the acts "proximately caused Stark and ScrubSafe's loss of reputation and goodwill, and led to rumors among other customers about the quality of service." As an example, Stark's affidavit stated that a ScrubSafe customer, Baelish, had inquired about the statement Lannister had posted on her Facebook page. She alleged in her petition that her damages were "more than $50,000."

Both of Stark's claims for tortious interference require a showing of actual damage or loss by clear and specific evidence. Stark argues that at this stage in the proceedings, her pleadings must be taken as true due to the wording of Section 27.006. We disagree. The Section states, "In determining whether a legal action should be dismissed under this chapter, the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based." TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a). This does not stand for the idea that the pleadings should be taken as true, but rather, that they should be considered in providing a framework for the evidence.[6] The term "consider" implies that the trial court can either reject or accept them.

[6] The petition was not verified.

This type of dismissal is analogous to a plea to the jurisdiction in that both proceedings require specific proof to continue the suit, the proceedings are (typically) held pre-discovery, and limited discovery focused on the issue requiring resolution is available. In a plea to the jurisdiction, the question is whether the pleading alleges facts, which if taken as true, establish subject matter jurisdiction in the court. *See Tex. Dept. of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226–27 (Tex. 2004) (citing *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). In a TCPA dismissal, jurisdiction has already been established and the question is whether a prima facie case has been shown by clear and specific evidence. A plea to the jurisdiction is a dilatory plea, without regard of the merits, which is why courts must take the pleadings as true. *See Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000) (citing *Jud v. City of San Antonio*, 184 S.W.2d 821, 823 (1945)). However, a dismissal under the TCPA specifically involves whether a prima facie case on the merits can be established. Unlike in a plea to the jurisdiction, in a TCPA dismissal, the burden is on the plaintiff to establish a prima facie case. We find that Section 27.006 gives the court discretion in that it does not require the court to take the pleadings as true.

In any event, conclusory statements such as the ones included in the petition and affidavit here regarding damages are not evidence and are insufficient to raise a fact issue. *See Coastal Transp. Co. v. Crown Cent. Petroleum*, 136 S.W.3d 227, 232 (Tex. 2004); *Ryland Group v. Hood*, 924

S.W.2d 120, 122 (Tex. 1996); *Wholesale TV & Radio* 2013 WL 3024692, at *4 (finding conclusory statement insufficient evidence of essential element in a TCPA case); *Witt*, 404 S.W.30 at 734 ("In his affidavit, Rehak states: 'Recently, Halliburton chose another agency to handle a project that RCS would normally have handled. The lost fee was $100,000.' This conclusory assertion does not rise to the level of "clear and specific" evidence sufficient to make out a prima facie case of damages caused by and attributable to the alleged misappropriation."); *Zanfardino v. Jeffus*, 117 S.W.3d 495, 497–98 (Tex. App.–Texarkana 2003, no pet.), *see also Or. Educ. Ass'n v. Parks*, 291 P.3d 789, 793–94 (Or. App. 2012, no pet.).

Next, "[a]n actionable civil conspiracy is a combination by 'two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means.'" *In re Lipsky*, 411 S.W.3d at 549 (quoting *Cotten v. Weatherford Bancshares, Inc*., 187 S.W.3d 687, 701 (Tex. App.–Fort Worth 2006, pet. denied)). "The essential elements of a civil conspiracy are '(1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result.'" *Id.* (quoting *Cotton*, 187 S.W.3d at 701). A defendant's liability for conspiracy depends on "participation in some underlying tort for which the plaintiff seeks to hold at least one of the named defendants liable." *Id*. "Recovery for civil conspiracy is not based on the conspiracy

but on the underlying tort." *Id.* (citing *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996) (orig. proceeding) (op. on reh'g)). "A civil conspiracy claim may be proved by circumstantial evidence and reasonable inferences from parties' actions." *Id.* (citing *Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 581 (Tex. 1963)).

However, a civil conspiracy claim cannot be proven by mere conjecture. In addition to a lack of evidence on damages, Stark cannot show that the statement made on Lannister's Facebook page and in the e-mails can be attributed to Joffrey. Although Stark has raised a motive for Joffrey to participate in some underlying tort, she has failed to bring forth prima facie evidence showing that Joffrey engaged in such participation.

We conclude that the trial court properly found that Stark failed to bring forth clear and specific evidence establishing a prima facie case with respect to her tort claims.

V. The TCPA Does not Violate the Open Courts Provision

Finally, Stark argues that even if the TCPA does apply to her claims, the statute violates the Open Courts provision of the Texas Constitution. We disagree. The Texas Constitution provides that "[a]ll 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. "This provision assures that a person bringing a well-established common-law cause of action will not suffer unreasonable or arbitrary denial of access to the courts." *Yancy v. United Surgical Partners Int'l, Inc.*, 236 S.W.3d 778, 783 (Tex. 2007) (citing *Jennings v.*

Burgess, 917 S.W.2d 790, 793 (Tex. 1996)). "A statute has the effect of denying access to the courts if it unreasonably abridges a plaintiff's right to obtain redress for injuries caused by the wrongful acts of another." *Id*. (citing *Sax v. Votteler*, 648 S.W.2d 661, 665 (Tex. 1983)). An open courts violation requires proof of two elements: (1) a cognizable, common-law claim that is statutorily restricted, and (2) that the restriction is unreasonable or arbitrary when balanced against the statute's purpose and basis. *Id*.

"In determining the constitutionality of a statute, we begin with a presumption that it is constitutional." *Enron Corp. v. Spring Indep. Sch. Dist.*, 922 S.W.2d 931, 934 (Tex. 1996). The party challenging the constitutionality of a statute bears the burden of demonstrating that the enactment fails to meet constitutional requirements. *Id*. Stark has failed to satisfy that burden here. Assuming without deciding that all of Stark's claims are cognizable at common law (a point that Joffrey and Lannister contest in their briefing), Stark has nevertheless failed to demonstrate that the restrictions imposed by the TCPA are unreasonable or arbitrary when balanced against the statute's purpose and basis.

The purpose of the TCPA is to protect an individual's First Amendment rights and, at the same time, "protect the rights of a person to file meritorious lawsuits for demonstrable injury." TEX. CIV. PRAC. & REM. CODE ANN. § 27.002. The requirement that a party establish a prima facie case before moving forward is consistent with that balance. It

protects defendants' right to free speech by shielding them from the costly process of discovery if the plaintiff cannot produce enough evidence to meet the minimal burden that a prima facie showing requires. If a plaintiff meets that burden, discovery is allowed. The dismissal mechanism provided for in the TCPA is similar to other statutes that require a measure of proof early in a lawsuit, such as the expert-report requirement in Chapter 74 of the Civil Practice and Remedies Code, which Texas courts have repeatedly upheld. *See, e.g.*, *Stockton v. Offenbach*, 336 S.W.3d 610, 617–19 (Tex. 2011); *Powell v. Clements*, 220 S.W.3d 138, 140 (Tex. App. –Waco 2007, pet. denied); *Smalling v. Gardner*, 203 S.W.3d 354, 370–71 (Tex. App.–Houston [14th Dist.] 2005, pet. denied). Texas courts have also upheld similar statutes. *See, e.g., Dolenz v. Dallas Cent. Appraisal Dist.*, 259 S.W.3d 331, 334 (Tex. App.–Dallas 2008, pet. denied) (upholding Tax Code deadline to file appeal from administrative holding); *Hughes v. Massey*, 65 S.W.3d 743, 745 (Tex. App.–Beaumont 2001, no pet.) (upholding requirement that inmate furnish proof of pauper status); *Cent. Appraisal Dist. of Rockwall Cty. v. Lall*, 924 S.W.2d 686, 690 (Tex. 1996) (upholding requirement that property owner pay uncontested tax before suing on disputed amount). We believe a similar analysis applies here.

VI. We Have Jurisdiction Over The Cross-Appeal

Joffrey and Lannister have raised several points of error in their cross-appeal. Citing to *Jennings v. WallBuilder Presentations, Inc. ex rel.*

Barton, Stark argues that there is no right to an interlocutory appeal from an order denying a motion to dismiss under the TCPA. 378 S.W.3d 519, 522 (Tex. App.–Fort Worth 2012, no pet.). Given the more recent rulings from the First, Fifth, Thirteenth, and Fourteenth courts of appeals, which have since declined to follow *Jennings*, we reject Stark's argument. *See Robinson*, 409 S.W.3d at 688; *BH DFW, Inc.,* 402 S.W.3d at 306; *San Jacinto Title Servs. of Corpus Christi, LLC v. Kingsley Props., LP*, No. 13–12–00352–CV, 2013 WL 1786632, at *3 (Tex. App.─Corpus Christi Apr. 25, 2013, pet. filed); *Direct Commercial Funding, Inc. v. Beacon Hill Estates, LLC*, No. 14-12-00896-CV, 2013 WL 407029, at *3 (Tex. App.–Houston [14th Dist.] Jan. 24, 2013, order).

Next, Stark argues that Joffrey and Lannister's notice of cross-appeal from the trial court's August 15 order was untimely because it was filed on October 18. The Legislature wrote that appeal can be taken "from a trial court order on a motion to dismiss," and must occur within sixty days after the order is signed, without regard for the disposition of the order. TEX. CIV. PRAC. & REM. CODE ANN. § 27.008(b),(c) (West Supp. 2014). The Fourteenth Court of Appeals has found that even where an appeal is timely filed, it must dismiss a cross-appeal that is untimely filed for want of jurisdiction. *Charette v. Fitzgerald*, 213 S.W.3d 505, 509 (Tex. App.–Houston [14th Dist.] 2006, no pet.).

Stark relies on *Jain v. Cambridge Petroleum Group, Inc.*, a case in which the Dallas Court of Appeals found it lacked jurisdiction to address

the merits of the TCPA appeal because the extensions for filing an appeal under Texas Rule of Appellate Procedure 26 do not apply when a statute governs the time for perfecting an appeal. 395 S.W.3d 394, 396 n.3 (Tex. App.–Dallas 2013, no pet.) (citing TEX. R. APP. P. 28.1(b)). This is because "[s]tatutes authorizing interlocutory appeals are strictly construed because they are a narrow exception to the general rule that interlocutory orders are not immediately appealable." *Id.* at 396 (citing *CMH Homes v. Perez*, 340 S.W.3d 444, 447 (Tex. 2011)); *see also In re D.B.*, 80 S.W.3d 698, 701–02 (Tex. App.–Dallas 2002, no pet.) (mailbox rule cannot apply to extend statutory deadline for filing appeal found in Texas Civil Practice and Remedies Code). We agree with the result in *Jain*, but it is easily distinguished since it dealt only with whether to extend a deadline to file the appellant's notice of appeal.

The rule governing our jurisdiction reads:

> **(b)** ***Jurisdiction of appellate court.*** The filing of a notice of appeal by any party invokes the appellate court's jurisdiction over all parties to the trial court's judgment or order appealed from. Any party's failure to take any other step required by these rules, including the failure of another party to perfect an appeal under (c), does not deprive the appellate court of jurisdiction but is ground only for the appellate court to act appropriately, *including dismissing the appeal*.

TEX. R. APP. P. 25.1(b) (emphasis added). Here, Stark's notice of appeal was timely filed. Thus, the cross-appeal, if untimely, does not present a question of jurisdiction, but a question of whether we should address the merits of the cross-appeal.

"[I]f any party timely files a notice of appeal, another party may file a notice of appeal within the applicable period stated above of 14 days after the first filed notice of appeal, whichever is later." TEX. R. APP. P. 26.1(d). Section 26.1 and the TCPA can be read together to require a notice of appeal within 60 days of an order but allowing another party 14 days after that notice to cross-appeal. We thus conclude that we may address the merits of the cross-appeal.

VII. Stark's Defamation Claim Should Have Been Dismissed

To maintain a defamation claim, Stark must show that Joffrey and Lannister negligently published a defamatory statement without regard to the truth of the statement. *Robinson*, 409 S.W.3d at 689 (citing *WFAA–TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998)). "Whether words are capable of the defamatory meaning the plaintiff attributes to them is a question of law for the court," subject to de novo review. *Id.* (citing *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989); *In re Humphreys*, 880 S.W.2d 402, 404 (Tex. 1994)).

Stark alleges only defamation per se. In cases involving defamation per se, damages are presumed to flow from the nature of the defamation itself and, in most situations, a plaintiff injured by a defamatory per se communication is entitled to recover general damages without specific proof of the existence of harm. *Bentley v. Bunton*, 94 S.W.3d 561, 604 (Tex. 2002); *Robinson*, 409 S.W.3d at 689-90. The law presumes certain categories of statements, if false, are defamatory per se,

including statements that are falsehoods that injure one in his office, business, profession, or occupation. *Robinson*, 409 S.W.3d at 690.

We need not consider any defense made in analyzing whether a prima facie case was made. However, Lannister claims that the e-mail demonstrates she was simply passing along information that was reported to her and that no statements of fact were made in the emails or on her Facebook page.[7] The following statements of fact were contained in the emails: "several reports have been made"; Lannister "was told that Stark represented herself to be a physician," a "witness claimed" obstruction of a "reporting process," "there have been several instances of improper nurse documentation," "there have been reports that Stark was unavailable … during business hours," "there were some reports that Stark did not complete patient chart reviews in a timely manner." Lannister published the e-mail, which could injure Stark's business reputation. Whether these reports were made and whether Lannister was "told" of certain events are representations that were objectively verifiable, as were the underlying accusations.

The allegations and information contained in the e-mail, if false, were defamatory per se. However, Lannister alone wrote the email. Thus

[7] Although a party is generally not liable for a republication of a defamatory statement by another, "[i]f a reasonable person would recognize that an act creates an unreasonable risk that the defamatory matter will be communicated to a third party, the conduct becomes a negligent communication, which amounts to a publication just as effectively as an intentional communication." *Wheeler v. Methodist Hosp.*, 95 S.W.3d 628, 639–40 (Tex. App.–Houston [1st Dist.] 2002, no pet.); *see Stephan v. Baylor Med. Ctr. at Garland*, 20 S.W.3d 880, 889–90 (Tex. App.–Dallas 2000, pet. denied). Lannister also argues that the statement that she "wish[ed] Stark would do her job" was a statement of opinion and not fact.

Joffrey argues that there was no evidence that she made any defamatory statements against Stark. Stark has no response to this argument aside from arguments relating to the civil conspiracy claims.

Joffrey and Lannister argue that Stark failed to bring forth clear and specific evidence that the statements were false. Stark points to her affidavit alleging the statements were "rank defamation," and the affidavit of Tyrell in support of her argument that she made a prima facie case. As we previously noted, Stark's affidavit is conclusory and cannot be considered as clear and specific evidence under the TCPA. While Tyrell's affidavit states, "Sacred Heart has been pleased with ScrubSafe's performance," and that Tyrell was not aware "of any complaints personally against Stark" "[p]rior to Lannister's e-mail," the affidavit does not state whether documentation of the reports was available to support the claims in the email or whether reports of Stark's conduct were actually made to Lannister. In this case, there was no evidence that the reports were not made to Lannister or that the documentation to support the reports did not exist. Thus, Stark did not meet her burden to demonstrate the falsity of the statements by clear and specific evidence.

The trial court should have dismissed the defamation claim as well. We sustain Joffrey and Lannister's first point of error raised in their cross-appeal.

VIII. The Trial Court's Award of Attorney's Fees and Sanctions was Proper

Joffrey and Lannister prayed for an award of sanctions in their motion to dismiss Stark's claims. Section 27.009 states:

> If a court orders dismissal of a legal action under this chapter, the court shall award to the moving party:
>
> ….
>
> (2) sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.

TEX. CIV. PRAC. & REM. CODE ANN. § 27.009(a)(2) (West Supp. 2014). Joffrey and Lannister argue that a sanction is mandatory and remand is required.

We review the denial of sanctions for an abuse of discretion. *See Low v. Henry*, 221 S.W.3d 609, 614 (Tex. 2007). The record shows that the trial court clearly considered sanctions in this case, but determined that "$-0-" would be sufficient to deter Stark from bringing similar legal actions. To determine if the sanctions were just, there must be a direct nexus between the improper conduct and the sanction imposed. *Id.* "Generally, courts presume that pleadings and other papers are filed in good faith." *Id.* "The party seeking sanctions bears the burden of overcoming this presumption of good faith." *Id.*

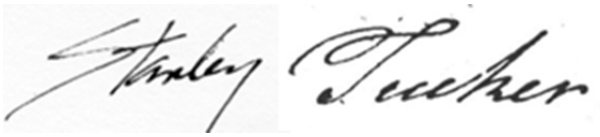
Stark argues that a zero-dollar sanctions award was within the trial court's discretion. Due to the its obvious consideration and denial of sanctions, the trial court could have determined the suit was filed in good

faith, but that a prima facie case could not be made with clear and specific evidence at the time of filing the lawsuit without the benefit of discovery. While the statute requires broad interpretation in line with its purpose, the trial court could have determined that its award of $10,500.00 in attorney's fees would ensure the statute's purpose of protecting free speech rights while also "protecting the rights of a person to file meritorious lawsuits for demonstrable injury." TEX. CIV. PRAC. & REM. CODE ANN. § 27.002 (West Supp. 2014). We decline to find the award of $0.00 in sanctions a clear abuse of the trial court's discretion in this case.

However, the plain language of the statute mandates an award of attorney's fees and sanctions for dismissal of a legal action. A "legal action" under the statute is defined as both a "lawsuit" and a "cause of action." *Id.* § 27.001(6). Because we determine that the trial court erred in allowing Stark's defamation action to continue, we remand the issue of attorney's fees and sanctions to the trial court for further proceedings.

IX. Conclusion

We affirm the trial court's judgment dismissing Stark's tortious interference and civil conspiracy claims and its $0 award of sanctions. However, because we conclude the trial court erred in finding that Stark made a prima facie case with respect to her defamation claim, we reverse the trial court judgment on this matter, render judgment that this claim be dismissed, and remand the issue of attorney's fees and sanctions with respect to this claim to the trial court.



Stanley Tucker
Chief Justice

FRANKS, Justice (Dissenting)

With all due respect to the majority, I strongly disagree with virtually every aspect of its decision. As an initial matter, I do not believe the TCPA applies to the facts of this case. The TCPA was not designed to apply to all speech. I believe the Legislature intended it to apply only to speech related to participation in government. At least one other appellate court has reached this conclusion, *see Whisenhunt v. Lippincott*, No. 06-13-00051-CV, 2013 WL 5539368, at *6–7 (Tex. App.–Texarkana Oct. 9, 2013, pet. filed), and I would adopt the reasoning of that court—and of the many other states who read their anti-SLAPP statutes similarly—here.

Even if I were inclined to hold that the TCPA was intended to do more than permit Texas citizens to participate in their government, I would not stretch the concept of "citizen participation" in the marketplace so far as to immunize false statements circulated solely within one small company's internal emails. *See Whisenhunt*, 2013 WL 5539368, at *7. Nothing about Lannister's Facebook comment or her e-mail rises to the level of "a matter of public concern." Stark's job performance is a private

matter, relevant only to her and those who employ or otherwise do business with her. Public concerns involve matters such as elections, laws, and affairs of state. If a case concerning false statements by one co-worker about another does not qualify as an "ordinary private dispute," I cannot fathom a case that would. *See Martinez v. Metabolife International, Inc.*, 113 Cal. App. 4th 181, 188 (Cal. App. 2003).

Moreover, I think the majority is embarking down a dangerous path when it holds that Lannister's Facebook page "constituted [a public] forum." As the majority notes, Lannister's Facebook settings were set to "private." Thus, the public could not see Lannister's comment. If a closed-off Facebook profile constitutes a public forum, then that term no longer has any real meaning. It has been said that Facebook and other social media represent the "digital town square." That may be true in some circumstances, but not here.

However, even assuming that the TCPA does apply here, I agree with Stark that the statute violates the Open Courts provision of the Texas Constitution. Stark has satisfied both requirements to show an open-courts violation: (1) her cognizable, common-law claim has been statutorily restricted (2) in a way that is unreasonable or arbitrary when balanced against the statute's purpose and basis. *See Yancy v. United Surgical Partners Int'l, Inc.*, 236 S.W.3d 778, 783 (Tex. 2007). Even the majority does not dispute that the first element is satisfied, as Stark's common-law defamation and tortious-interference claims have been statutorily

restricted by the TCPA. That restriction—a hurried dismissal with no chance to discover additional facts to support her case—is unreasonable and arbitrary when balanced against Stark's right to recover for a demonstrable injury. I consider the TCPA to be analogous to other laws that have been found to violate the Open Courts provision. *See, e.g.*, *Sax v. Votteler*, 648 S.W.2d 661, 667 (Tex. 1983); *Waites v. Sondock*, 561 S.W.2d 772, 775 (Tex. 1977) (orig. proceeding); *Hanks v. City of Port Arthur*, 48 S.W.2d 944, 948 (Tex. 1932); *In re Hinterlong*, 109 S.W.3d 611, 630-33 (Tex. App.–Fort Worth 2003, orig. proceeding). We should hold that it violates the Open Courts provision, too.

But, even if the TCPA were constitutional, I disagree with how the majority applies it—procedurally, substantively, and remedially. Procedurally, we lack jurisdiction over Joffrey and Lannister's cross appeal. Unlike the majority, I believe the reasoning in *Jain v. Cambridge Petroleum Group, Inc.*, 395 S.W.3d 394 (Tex. App.–Dallas 2013, no pet.), is dispositive. Giving cross-appellants additional time to file their notice of appeal, as the rules of appellate procedure would otherwise allow, "defeat[s] the legislature's public policy objective" in "an expedited resolution" of issues decided under the TCPA. *See id*. at 396–97.

Substantively, Stark's defamation claim should not have been dismissed. All Stark had to do to avoid dismissal on this claim was establish a "prima facie case" of defamation. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c) (West Supp. 2014). The Legislature's use of the

term "prima facie case" implies a "minimal factual burden." *KTRK TV, Inc. v. Robinson*, 409 S.W.3d 682, 688 (Tex. App.–Houston [1st Dist.] 2013, pet. filed). "In cases unrelated to motions to dismiss under chapter 27, Texas courts have defined 'prima facie' evidence as the 'minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true.'" *In re Lipsky*, 411 S.W.3d 530, 539 (Tex. App.–Fort Worth 2013, orig. proceeding) (citing *In re E. I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 223 (Tex. 2004)). Given that minimal burden, I think that Stark, in her affidavit, provided enough evidence to avoid dismissal.

As to remedies, I cannot agree with the majority's conclusion that the trial court had the discretion to impose no sanctions. If the majority were right that the TCPA required the dismissal of Stark's claim, then the TCPA requires the trial court to award sanctions to Joffrey and Lannister. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.009(a)(2) (West Supp. 2014). We must construe the word "shall" as mandatory, unless legislative intent suggests otherwise. *See Albertson's, Inc. v. Sinclair*, 984 S.W.2d 958, 961 (Tex. 1999). Here, there is no suggestion from the language or the structure of the TCPA that the Legislature intended sanctions to be optional. Although the trial court had discretion to decide the amount of the sanction, it did not have discretion to avoid sanctioning Stark altogether. It nonetheless awarded zero dollars in sanctions. If I believed the TCPA applied here, I would find this disregard of the Legislature's

mandate to be a clear abuse of discretion.[8] I would reverse and would require the trial court, on remand, to award *some* amount of sanctions.

For the above reasons, I respectfully dissent.

Lisa Franks
Justice

Date Submitted: November 11, 2013
Date Decided: November 16, 2013

[8] In this regard, I believe the TCPA sanctions provision is analogous to the mandatory sanctions provision under the former version of the Medical Liability and Insurance Improvement Act. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01(e) (1995 version) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 74.351); *see also Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 877–78 (Tex. 2001); *Abilene Diagnostic Clinic v. Downing*, 233 S.W.3d 532, 534–35 (Tex. App.–Eastland 2007, pet. denied).