

AFFIRMED and Opinion Filed December 15, 2020



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-19-01476-CV

IN THE INTEREST OF C.T.H. AND H.V.H., CHILDREN

**On Appeal from the 302nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DF-14-07021**

OPINION

Before Justices Schenck, Osborne, and Partida-Kipness
Opinion by Justice Osborne

The maternal grandparents of C.T.H. and H.V.H. (“Grandparents”) intervened in this suit affecting the parent-child relationship. The children’s mother (“Mother”) filed an application for injunctive relief to prevent Grandparents from contacting or communicating with the children. Grandparents moved to dismiss Mother’s application under the Texas Citizens Participation Act. *See* TEX. CIV. PRAC. & REM. CODE §§ 27.001–.011 (“TCPA”).¹ The trial court denied Grandparents’ motion. Because Grandparents’ motion to dismiss was not timely filed, we affirm.

¹ The TCPA was amended in 2019 to expressly exempt certain actions brought under the Texas Family Code, but Mother’s application was filed before the amendments’ effective date. Consequently, this appeal is “governed by the law in effect immediately before” September 1, 2019. *See* Act of May 17, 2019, 86th Leg., R.S., ch. 378, § 11, 2019 TEX. SESS. LAW SERV. Ch. 378 § 11.

BACKGROUND

Under TCPA section 27.003(b), “[a] motion to dismiss a legal action under this section must be filed not later than the 60th day after the date of service of the legal action.” Because this provision is dispositive of this appeal, we set forth only those facts bearing on the timeliness of Grandparents’ motion.

Mother and the children’s father (“Father”) were divorced in 2016. The court appointed Mother and Father as Joint Managing Conservators of C.T.H. and H.V.H. in the final decree of divorce signed on October 28, 2016. Grandparents subsequently intervened in a modification proceeding by Mother and Father, also seeking to modify the decree and to be appointed sole managing conservators of the children.

On June 10, 2019, Mother filed an “Application for Temporary Restraining Order and Request for Injunctive Relief.” Citing family code section 105.001(b), Mother requested a temporary restraining order and, after notice and hearing, a permanent injunction prohibiting Grandparents from “[c]ontacting or communicating directly with the Children” and “disturbing the peace of the Children” and Mother, among other relief. *See* TEX. FAM. CODE § 105.001(a)(3) (court may make temporary order for safety and welfare of child, including order “restraining a party from disturbing the peace of the child or another party”). Mother filed a supporting affidavit detailing Grandparents’ acts “on at least forty-two (42) different occasions, causing us stress, anxiety and fear.”

On August 27, 2019—77 days later—Grandparents filed “Petitioner’s Motion to Dismiss.” They sought dismissal of Mother’s application for temporary restraining order and request for injunctive relief on the ground that it violated their rights of free speech and association. Grandparents did not, however, cite or mention the TCPA or seek dismissal pursuant to the TCPA.

On September 5, 2019—86 days after the motion was filed and served—Associate Judge Jean C. Lee heard Grandparents’ motion to dismiss and requests for temporary orders. Grandparents’ attorney argued that Mother’s requested relief was “an unconstitutional infringement on my client’s right to freedom of speech and of association.”² Apparently acknowledging that Grandparents’ motion to dismiss was not timely under the TCPA, Grandparents’ counsel argued, “And Judge, this would be grounds for an almost automatic dismissal had I filed this within 60 days of the original filing and we would be entitled to attorney fees.” Judge Lee denied the motion to dismiss and proceeded to hear the parties’ other pending matters. The appellate record does not include a written order on Grandparents’ motions.

Next, Grandparents filed their “Third Amended Petition to Modify Order in Suit Affecting the Parent-Child Relationship” on July 18, 2019. They requested appointment as the children’s joint managing conservators, or in the alternative, appointment as possessory conservators with orders restricting Mother’s and

² Although Grandparents argued in the trial court that their right of association was implicated, they do not assert that ground on appeal. Their arguments are limited to their exercise of the right of free speech.

Father's access to and visitation with the children. The petition does not reference Mother's request for injunctive relief. On September 23, 2019, Mother filed a second amended answer to Grandparents' petition and an original counterpetition. Mother's counterpetition included a request for a permanent injunction seeking the same or similar relief that she sought in her June 10 application, including enjoining Grandparents from contacting or communicating directly with the children and disturbing the peace of Mother and the children.

On October 21, 2019, Grandparents filed their "Supplemental Motion to Dismiss." In this motion, Grandparents cited, relied on, and sought relief under the TCPA. They argued that Mother's requests for injunctive relief violated the exercise of their right to freedom of speech and their right of association. The following day, October 22, 2019, the trial court heard the parties' de novo appeal of the associate judge's rulings as well as Mother's motion for temporary injunction and Grandparents' motions for continuance of the trial date and to dismiss. The next day, the trial court signed an order providing that:

On October 22, 2019, the Court considered the Petitioners' [Grandparents'] Motion to Dismiss [Mother's] Application for Temporary Restraining Order and Request for Injunctive Relief and Original Counterpetition, and after considering the Motion to Dismiss, Supplemental Motion to Dismiss and Petitioner's Affidavit attached to the Supplemental Motion to Dismiss, DENIES the Petitioner's Motion to Dismiss.

Grandparents filed their notice of appeal of the trial court's October 23 order "deny[ing] Counterrespondents' TCPA Motion to Dismiss" the same day.

Grandparents raise two issues in this appeal. They contend the trial court erred by denying their motion to dismiss because (1) they established that Mother’s counterpetition and application for injunctive relief are impermissible prior restraints on their right to free speech, and (2) Mother did not meet her burden of providing clear and specific evidence of imminent and irreparable harm “or that the requested injunction represented the least restrictive means to prevent harm.”

TCPA

The TCPA “protects citizens . . . from retaliatory lawsuits that seek to intimidate or silence them.” *In re Lipsky*, 460 S.W.3d 579, 584 (Tex. 2015) (orig. proceeding); *Forget About It, Inc. v. BioTE Med., LLC*, 585 S.W.3d 59, 63–64 (Tex. App.—Dallas 2019, pet. denied). The stated purpose of the statute 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.” TCPA § 27.002; *see also ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 898 (Tex. 2017) (per curiam).

To effectuate the statute’s purpose, the Legislature has provided a procedure to expedite dismissing claims brought to intimidate or to silence a defendant’s exercise of the rights protected by the statute. *Coleman*, 512 S.W.3d at 898; *see also* TCPA §§ 27.003(a), 27.005(b); *Youngkin v. Hines*, 546 S.W.3d 675, 679 (Tex. 2018). The movant bears the initial burden of showing by a preponderance of the

evidence that the legal action is based on, relates to, or is in response to the movant's exercise of the right of free speech, the right of association, or the right to petition. TCPA § 27.005(b); *see also S&S Emergency Training Sols., Inc. v. Elliott*, 564 S.W.3d 843, 847 (Tex. 2018). If the movant makes this showing, the burden shifts to the nonmovant to establish by clear and specific evidence a prima facie case for each essential element of its claims. TCPA § 27.005(c); *see Elliott*, 564 S.W.3d at 847. Circumstantial evidence is proper for us to consider in a TCPA review. *See Lipsky*, 460 S.W.3d at 591.

The TCPA provides deadlines for this expedited procedure. *See id.* at 589 (to accomplish its purpose “to identify and summarily dispose of lawsuits designed only to chill First Amendment rights,” the TCPA “endorses a summary process, requiring judicial review of the pleadings and limited evidence, typically within 150 days following service”). “A motion to dismiss a legal action under this section must be filed not later than the 60th day after the date of service of the legal action.” TCPA § 27.003(b). A hearing on the motion must be set “not later than the 60th day after the date of service of the motion” unless good cause is shown or the parties agree. TCPA § 27.004(a). As this Court has explained, “[t]he statute requires a defendant seeking its protections to move for dismissal and obtain a hearing on the motion within certain clearly defined periods. The failure to meet these requirements results in the defendant forfeiting the statute’s protections.” *Braun v. Gordon*, No.

05-17-00176-CV, 2017 WL 4250235, at *3 (Tex. App.—Dallas Sept. 26, 2017, no pet.) (mem. op.).

We review de novo the trial court’s ruling on a motion to dismiss under the TCPA. *See Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 894 (Tex. 2018); *Dyer v. Medoc Health Servs., LLC*, 573 S.W.3d 418, 424 (Tex. App.—Dallas 2019, pet. denied). “In conducting this review, we consider, in the light most favorable to the non-movant, the pleadings and any supporting and opposing affidavits stating the facts on which the claim or defense is based.” *Dyer*, 573 S.W.3d at 424 (internal quotation omitted); *see also* TCPA § 27.006(a).

DISCUSSION

Grandparents’ motions were not filed within 60 days of Mother’s June 10, 2019 application for injunctive relief. On appeal, Mother argues that the motions’ untimeliness was sufficient basis for the trial court’s ruling denying them. *See, e.g., Jordan v. Hall*, 510 S.W.3d 194, 199 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (trial court did not err by denying as untimely a TCPA motion filed after the 60-day deadline). Grandparents argue, however, that because Mother failed to object in the trial court on this basis, she waived her complaint and cannot rely on it now to support the trial court’s ruling.

We first note that our review of the record does not reveal a time when Mother could have raised an objection based on timeliness under the TCPA. Grandparents’ initial motion to dismiss did not reference the TCPA. Grandparents did not file their

supplemental motion until the day before the hearing, and at the hearing the trial court denied the motion based on a review of “the brief and the transcripts and . . . the merits” without argument on the subject by Mother’s counsel. The following day, the trial court signed the order and Grandparents filed their notice of appeal.³

We also note that Grandparents’ supplemental motion was not timely even though it was filed less than 60 days after Mother renewed her request for injunctive relief in her answer to Grandparents’ amended petition. Mother’s request for injunctive relief was essentially unchanged in her two pleadings. In both, she requested that Grandparents be enjoined from contacting or communicating directly with the children and disturbing the peace of the children, and she did not allege any new factual allegations in her answer to support her request. “An amended pleading that does not add new parties or claims does not restart the deadline for filing a motion to dismiss under the TCPA.” *Mancilla v. Taxfree Shopping, Ltd.*, No. 05-18-00136-CV, 2018 WL 6850951, at *3 (Tex. App.—Dallas Nov. 16, 2018, no pet.) (mem. op.). “[T]he filing of an amended pleading that does not alter the essential nature of an action does not restart the deadline.” *Id.*; *see also Borderline Mgmt., LLC v. Ruff*, No. 11-19-00152-CV, 2020 WL 1061485, at *8 (Tex. App.—Eastland Mar. 5, 2020, pet. denied) (mem. op.) (where amended petition did not

³ We note that we lack jurisdiction over this appeal to the extent Grandparents complain about the denial of their initial motion because that motion was not “filed under Section 27.003” as the interlocutory appeal statute requires. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(12); *see also Interest of A.E.*, 580 S.W.3d 211, 218 (Tex. App.—Tyler 2019, pet. denied) (motion that did not “mention, refer to, or present any argument regarding the TCPA” is not a timely-filed TCPA motion).

assert new claims and “did not contain new factual allegations that changed the essential nature of the existing claims,” amendment “did not reset the time period” for filing TCPA motion). Consequently, unless Mother has waived her timeliness objection, the trial court did not err by denying Grandparents’ motion.

To support their contention that Mother has not preserved her timeliness objection, Grandparents rely on appellate procedure rule 33.1 that states the prerequisites to presenting a complaint for appellate review. *See* TEX. R. APP. P. 33.1(a) (complaint must be timely made to trial court and trial court must rule or refuse to rule). Grandparents also cite two cases in support of their waiver argument. They argue that in *American Heritage Capital, LP v. Gonzalez*, 436 S.W.3d 865, 874 (Tex. App.—Dallas 2014, no pet.),⁴ we held that “failing to object in the trial court to the timing of a TCPA hearing waives that objection for appeal.” And citing *In re Panchakarla*, 602 S.W.3d 536, 540 (Tex. 2020) (per curiam) (orig. proceeding), Grandparents argue that the TCPA’s deadlines are not jurisdictional and therefore may be waived.

We agree with Grandparents that if Mother were seeking reversal of the trial court’s ruling, she would have been required to object in the trial court and obtain a ruling, as rule 33.1 and *Gonzalez* require and explain. *See* TEX. R. APP. P. 33.1(a);

⁴ As Grandparents note, the supreme court disapproved of this opinion on other grounds in *Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017).

Gonzalez, 436 S.W.3d at 874 (TCPA nonmovant sought reversal of trial court’s order dismissing its claims). Here, however, Mother’s argument is that Grandparents did not carry their initial burden to file their TCPA motion timely.⁵ The TCPA movant bears the burden to file a motion to dismiss “not later than the 60th day after the date of service of the legal action” or to make “a showing of good cause” for extending the deadline. TCPA § 27.003(b). Section 27.003(b) provides that a motion “must” be filed by the deadline, a term the Legislature has defined in the Code Construction Act as “creat[ing] or recogniz[ing] a condition precedent.” TEX. GOV’T CODE § 311.016(3). Whether Mother filed a response or not, Grandparents still bore the burden to meet this condition precedent by filing their motion timely. *See* TCPA § 27.003(b). We conclude that they did not do so.

Through its procedural requirements, the TCPA balances the exercise of constitutional rights with “the rights of a person to file meritorious lawsuits for demonstrable injury.” TCPA § 27.002 (purpose). As we explained in *Braun*,

The statute requires a defendant seeking its protections to move for dismissal and obtain a hearing on the motion within certain clearly defined periods. The failure to meet these requirements results in the defendant forfeiting the statute’s protections. This result is consistent with the TCPA’s second purpose, to “protect the rights of a person to file meritorious lawsuits for demonstrable injury.” If the defendant fails in its responsibility to obtain a timely hearing on the motion to dismiss,

⁵ We note that Grandparents themselves raised the timeliness question in the trial court by filing a motion to dismiss that did not reference the TCPA and was not timely under the TCPA, and explaining to the court that the motion had not been filed within the TCPA’s 60-day deadline.

then the case can proceed to trial on the plaintiff's claims without the delay of an interlocutory appeal.

Braun, 2017 WL 4250235, at *3 (citations and footnote omitted).

In TCPA cases, courts have held that the movant's failure to meet the TCPA's requirements "within certain clearly defined periods . . . results in the defendant's forfeiting the statute's protections." *Walker v. Pegasus Eventing, LLC*, No. 05-19-00252-CV, 2020 WL 3248476, at *5 (Tex. App.—Dallas June 16, 2020, pet. filed) (mem. op.); *see also Braun*, 2017 WL 4250235, at *3 ("Because the movant has the burden of obtaining a timely setting on the motion to dismiss . . . the movant's failure to have the case set for a timely hearing results in the movant forfeiting the TCPA's protections, and the case should continue as if the motion to dismiss was never filed.").

Similarly, courts have held that a trial court does not err by denying an untimely TCPA motion to dismiss. *See, e.g., Romero v. D.R. Kidd Co., Inc.*, No. 14-18-00057-CV, 2019 WL 2939253, at *7 (Tex. App.—Houston [14th Dist.] July 9, 2019, no pet.) (mem. op.); *Interest of A.E.*, 580 S.W.3d at 218. Grandparents have not cited authority for the proposition that a trial court errs by denying an untimely TCPA motion to dismiss unless the non-movant has objected on that basis.

In *Panchakarla*, the other case Grandparents cite, the court held that "the TCPA does not impose a 30-day restriction on a trial court's authority to vacate a ruling on a TCPA motion to dismiss." *In re Panchakarla*, 602 S.W.3d at 540. Consequently, the trial court did not abuse its discretion by vacating its initial ruling

on a TCPA motion after the statutory deadline for ruling on the motion had expired. *Id.* at 541. The court’s conclusion, however, was based on its reasoning that “[w]hile the TCPA imposes myriad deadlines, no statutory provision speaks to this issue.” *Id.* at 540. Here, in contrast, one of the TCPA’s “myriad deadlines” is the 60-day time period for filing a motion to dismiss. TCPA § 27.003(b).

Because Grandparents’ supplemental motion to dismiss was not filed or heard within the TCPA’s 60-day deadlines, we conclude that the trial court did not err by denying it. *See* TCPA §§ 27.003(b), 27.004(a). We decide Grandparents’ first issue against them. Given this conclusion, we need not discuss Grandparents’ second issue challenging Mother’s prima facie case on the essential elements of her request for an injunction. *See, e.g., Chandni, Inc. v. Patel*, No. 08-18-00108-CV, 2019 WL 6799759, at *8 (Tex. App.—El Paso Dec. 13, 2019, pet. denied) (pretermittting discussion of nonmovant’s prima facie case where TCPA motion was not timely filed).

CONCLUSION

We affirm the trial court’s order denying Grandparents’ motion to dismiss.

/Leslie Osborne/
LESLIE OSBORNE
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

IN THE INTEREST OF C.T.H. AND
H.V.H., CHILDREN,

No. 05-19-01476-CV

On Appeal from the 302nd Judicial
District Court, Dallas County, Texas
Trial Court Cause No. DF-14-07021.

Opinion delivered by Justice
Osborne. Justices Schenck and
Partida-Kipness participating.

In accordance with this Court's opinion of this date, the trial court's October 23, 2019 Order Denying Petitioner's Motion to Dismiss is **AFFIRMED**.

It is **ORDERED** that appellee Christina Chapman Edmiston recover her costs of this appeal from appellants Tina Chapman and Vincent Chapman.

Judgment entered December 15, 2020