

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-19-00168-CV

Wylie Cavin and Lillian Cavin, Appellants

v.

Kristin Abbott, Appellee

**FROM THE 98TH DISTRICT COURT OF TRAVIS COUNTY
NO. D-1-GN-16-000201, THE HONORABLE AMY CLARK MEACHUM, JUDGE PRESIDING**

CONCURRING OPINION

In reaching its holding, the Court concludes: (i) Kristin Abbott’s application for permanent injunction under Section 65.011 of the Texas Civil Practice and Remedies Code is not a “legal action” as that term is defined in the Texas Citizens Participation Act (TCPA)¹ but a “remedy” and (ii) Abbott’s Section 65.011 application for injunctive relief is not separately challengeable under the TCPA because it “is dependent upon her claim for the wrongful act of

¹ References in this opinion to the TCPA are to its provisions as they existed prior to the 2019 amendments. *See* Act of May 17, 2019, 86th Leg., R.S., ch. 378, §§ 11, 12, 2019 Tex. Gen. Laws 684, 687 (stating that amendments to TCPA apply “only to an action filed on or after” September 1, 2019).

Whether Abbott’s application for permanent injunction “is based on, relate[d] to, or is in response to a party’s exercise of the right of free speech, right to petition, or right of association” is not at issue in this appeal. *See* Tex. Civ. Prac. & Rem. Code § 27.003(a). In the prior interlocutory appeal, this Court analyzed the factual allegations underpinning Abbott’s claims—which generally have remained the same—and concluded that they were. *See generally Cavin v. Abbott*, 545 S.W.3d 47, 60–64 (Tex. App.—Austin 2017, no pet.) (*Cavin I*).

assault.” See Tex. Civ. Prac. & Rem. Code §§ 27.001(6) (defining “legal action”), .010(c) (exempting “legal action seeking recovery for bodily injury”), 65.011 (stating grounds for granting writ of injunction).

Abbott’s Section 65.011 application for permanent injunction, however, falls within the plain language of the TCPA’s definition of “legal action,” and Abbott did not show that this “legal action” sought “recovery for bodily injury” such that it would fall within the TCPA exemption at issue. See *id.* §§ 27.001(6), .010(c); *Cavin v. Abbott*, 545 S.W.3d 47, 56 (Tex. App.—Austin 2017, no pet.) (*Cavin I*) (explaining that “Texas Supreme Court has emphasized that we are to look first to the [TCPA]’s ‘plain language,’ and if unambiguous, ‘interpret the statute according to its plain meaning’” (quoting *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 899 (Tex. 2017))). To the contrary, Abbott’s application for permanent injunction seeks equitable relief—to enjoin Wylie Cavin’s “unwanted contact toward [her].”

Accordingly, I conclude that the TCPA applies to Abbott’s Section 65.011 application for permanent injunction. See Tex. Civ. Prac. & Rem. Code §§ 27.001(6), 65.011. Nevertheless, I would affirm the trial court’s order denying the Cavins’ motion to dismiss under the TCPA’s burden-shifting mechanism because Abbott established a prima facie case for her application for permanent injunction and the Cavins did not establish an affirmative defense as a matter of law. See Tex. Civ. Prac. & Rem. Code §§ 27.005 (setting out burden-shifting mechanism), .006 (addressing proof); see also *Youngkin v. Hines*, 546 S.W.3d 675, 679–80 (Tex. 2018); *Cavin I*, 545 S.W.3d at 59. Thus, I concur in the Court’s judgment.

Background

Abbott has filed four petitions in the underlying case. In January 2016, Abbott filed an original petition against her parents Wylie and Lillian Cavin and, shortly after the Cavins filed a motion to dismiss under the TCPA, a first amended petition.² *See Cavin I*, 545 S.W.3d at 54. Abbott's asserted liability theories included defamation, intentional infliction of emotional distress, conversion, tortious interference with existing contract, abuse of power, intrusion upon seclusion, and an assault claim that she asserted only against Wylie. *Id.* In the "Assault" section of both petitions, Abbott alleged that "Defendant Wylie Cavin acted intentionally, knowingly, or recklessly when he assaulted Kristin in her apartment" and that she was "entitled to damages based on mental anguish, and medical expenses for the injury to Kristin's tailbone and need for continued physical therapy." *Id.* at 56–57. She also sought monetary damages and injunctive relief based on her other liability theories. Exhibits attached to her petitions included copies of emails, text messages, letters between the Cavins and Abbott and the Cavins and third parties, and a no-contact letter dated November 10, 2014, from the police to the Cavins. *See id.* at 50–54 (detailing factual allegations of continuous communications, contact, and "campaign of harassment and retribution" and exhibits attached to pleadings including numerous "texts, emails, letters, and other writings generated by the parents").

In November 2018, Abbott filed her second amended petition after this Court reversed the trial court's denial of the Cavins' motion to dismiss in part and dismissed all of Abbott's claims except her assault claim against Wylie. *See id.* at 56–58, 72. Abbott's second amended petition added assault claims against Lillian, expanded on the assault claim against

² Abbott's husband William Abbott was a plaintiff in the underlying proceeding and an appellee in *Cavin I*. *See* 545 S.W.3d at 50. He is not a party in this appeal.

Wylie, and sought an “Application for Permanent Injunction.” In the “Causes of Action” section of her petition, Abbott asserted two counts of assault—intentional infliction of bodily injury and offensive physical contact—against Lillian and Wylie and alleged that she was entitled to unliquidated damages. In the “Application for Permanent Injunction” section, Abbott alleged that the Cavins had continued “to this day” their “psychological campaign of uninvited interference in Plaintiff’s private life through unwanted contact and harassment” and “efforts to control and influence Kristin.” She also alleged that she was in “constant fear for her safety” because of the Cavins’ “decision to interfere with Kristin’s life by engaging in a psychological and financial warfare against her and William” and that the harm to her was imminent “because [she] continues to get harassed by Lillian and/or Wylie Cavin to this very day, thus causing emotional anguish.” Based on these allegations, Abbott requested a permanent injunction as follows: “Pursuant to Section 65.011 of the Texas Civil Practice and Remedies Code, Plaintiff requests a permanent injunction restraining and enjoining Defendants’ unwanted contact towards Plaintiff.”

The exhibits attached to her second amended petition included the 2014 no-contact police letter to the Cavins and a 2016 and 2018 letter from Abbott’s counsel addressing the Cavins’ continuing attempts to communicate with Abbott. In the 2018 letter, Abbott’s counsel documents that the Cavins had “continued their campaign to contact Kristin at her home and at her workplace by sending her numerous letters, emails, unwanted gifts, and by leaving her voicemail messages” and that there were “over 50 unwanted contacts in the past year.” Counsel also refers to the no-contact letter from the police, explains that Abbott considers the Cavins’ continued efforts to communicate with her “harassment,” and repeats her request that they cease “any efforts to communicate with [her].”

In February 2019, Abbott filed a third amended petition, which was the live petition at the time that the trial court considered the Cavins' TCPA motion seeking dismissal of Abbott's claims for injunctive relief. In the third amended petition, Abbott removed her assault claim against Lillian and revised the section of her petition addressing her application for permanent injunction to seek "an equitable remedy in the form of a permanent injunction in response to the assault and continuous harassment by Wylie Cavin." Abbott requested "a permanent injunction restraining and enjoining Defendant Cavin's unwanted contact towards Plaintiff" pursuant to Section 65.011 of the Texas Civil Practice and Remedies Code. She continued to include allegations of contact and harassment by Lillian and Wylie, such as "Wylie and Lillian Cavin continue to this day their psychological campaign of uninvited interference in Plaintiff's private life through unwanted contact and harassment."

Abbott also filed a response to the Cavins' motion to dismiss with evidence including her own affidavit. Abbott averred about the Cavins' "unwanted contact" and communications, including that they "continued their unwanted contact through calls, letters, voice messages, and unwanted gifts." She listed "every attempt [her] parents have made" "to contact her" after she and "the Police Department made it abundantly clear that their stalking only causes [her] pain." The list provided details of the Cavins' attempts to communicate with Abbott between November 2016 through February 2019, such as the date of phone messages, emails, and gifts. She concluded: "[I]f Wylie Cavin and Lillian Cavin are not permanently enjoined from contacting [her] then [she] will suffer immediate and irreparable harm in the form of severe mental anguish."

In its order denying the Cavins’ motion to dismiss, the trial court determined that the TCPA did not apply to Abbott’s “request for injunctive relief” because this request was “an election of a remedy” to her assault claim against Wylie “rather than a new legal action.”

Analysis

Glossing over the plain meaning of the TCPA’s definition of “legal action,” the Court similarly concludes that Abbott’s request for injunctive relief may not be separately challenged because it is a “remedy” for the “legal action” of assault. In doing so, the Court relies on sister courts’ opinions, *see Thang Bui v. Dangelas*, No. 01-18-01146-CV, 2019 Tex. App. LEXIS 9077, at *14–16 (Tex. App.—Houston [1st Dist.] Oct. 15, 2019, no pet.) (mem. op.); *Van Der Linden v. Khan*, 535 S.W.3d 179, 203 (Tex. App.—Fort Worth 2017, pet. denied), and distinguishes an opinion from this Court, *see Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*, 520 S.W.3d 191, 197, 206 (Tex. App.—Austin 2017, pet. dismiss’d) (stating that “[t]here is no question that Autocraft’s lawsuit seeking injunctive and monetary relief, or alternately each of its component claims for such relief, is a ‘legal action’” and dismissing claims “to the extent founded on appellants’ ‘communications’”).³

³ The cited opinions from sister courts do not address whether an application for permanent injunction brought under Section 65.011 of the Texas Civil Practice and Remedies Code falls within the definition of a “legal action” and, if so, whether the application falls within the TCPA’s “bodily injury” exemption. *See Thang Bui v. Dangelas*, No. 01-18-01146-CV, 2019 Tex. App. LEXIS 9077, at *14–16 (Tex. App.—Houston [1st Dist.] Oct. 15, 2019, no pet.) (mem. op.) (explaining that plaintiff filed original petition asserting single cause of action for defamation seeking injunctive relief and concluding that “under these facts, the request and grant of (temporary) injunctive relief is not separately challengeable as its own legal action” under TCPA); *Van Der Linden v. Khan*, 535 S.W.3d 179, 187–88, 203 (Tex. App.—Fort Worth 2017, pet. denied) (explaining, in context of suit seeking damages and injunctive relief for tortious interference with contract and defamation, that “chapter 27 challenge to a request for injunctive relief should be directed at the underlying legal action, not at the requested remedy”).

The TCPA definition of a “legal action,” however, “is broad enough to encompass a request for injunctive relief.” *Better Bus. Bureau of Metro. Dall., Inc. v. BH DFW, Inc.*, 402 S.W.3d 299, 311 (Tex. App.—Dallas 2013, pet. denied); *see Hawxhurst v. Austin’s Boat Tours*, 550 S.W.3d 220, 226 (Tex. App.—Austin 2018, no pet.) (discussing meaning of “legal action” in context of TCPA); *Elite Auto Body LLC*, 520 S.W.3d at 197 (same); *see also Cavin I*, 545 S.W.3d at 56 (“Having sued [the Cavins] seeking monetary and injunctive relief under multiple liability theories, the Abbotts have unquestionably asserted one or more ‘legal actions’ within the TCPA definition.”). The TCPA defines a “legal action” as a “lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief.” Tex. Civ. Prac. & Rem. Code § 27.001(6). Applying the definition’s plain language, I conclude that Abbott’s application for a permanent injunction is a “judicial pleading or filing that requests legal or equitable relief,” and therefore a “legal action” for purposes of the TCPA. *See id.* §§ 27.001(6), 65.011 (stating grounds for granting writ of injunction); *Cavin I*, 545 S.W.3d at 56.

Abbott, however, has not shown how her “legal action” of an application for permanent injunction seeks “recovery for bodily injury” to exempt it from the TCPA’s applicability. *See* Tex. Civ. Prac. & Rem. Code § 27.010(c) (exempting “legal action seeking recovery for bodily injury” from TCPA); *Cavin I*, 545 S.W.3d at 56 & n.25 (placing burden on nonmovant claimant to establish applicability of TCPA exemption under section 27.010); *Kirkstall Rd. Enters. v. Jones*, 523 S.W.3d 251, 253 (Tex. App.—Dallas 2017, no pet.) (“The non-movant bears the burden of proving a statutory exemption [to the applicability of TCPA].”). As this Court’s explained in *Cavin I*, “[b]odily injury’ commonly denotes ‘[p]hysical damage to a person’s body.’” 545 S.W.3d at 57 & n.26 (collecting authorities defining “bodily injury” as

physical injury to body, as compared with mental or emotional harm); *see Forbes v. Lanzi*, 9 S.W.3d 895, 900 (Tex. App.—Austin 2000, pet. denied) (“‘Bodily injury’ means ‘physical pain, illness, or any impairment of physical condition.’” (quoting Tex. Penal Code § 1.07(a)(8))).

Applying the plain meaning of “bodily injury,” this Court concluded in *Cavin I* that Abbott’s assault claim—which was based on Wylie’s alleged assault in 2014—was exempt because she sought “recovery for alleged injuries that [were] plainly of this character—medical expenses for physical damage and compensation for physical pain.” 545 S.W.3d at 57. In reaching this conclusion, this Court further explained that the Cavins had not suggested that “this ‘legal action’ could somehow be divided to exclude any additional components of the sought-after damages that would arguably fall outside ‘bodily injury.’” *Id.*; *see Kirkstall Rd. Enters.*, 523 S.W.3d at 253 (concluding that negligence claim was exempt from TCPA because it sought “to recover for the bodily injuries—four gunshot wounds”). Applying this analysis here, Abbott’s application for permanent injunction does not fall within the “bodily injury” exception because it does not seek recovery for physical injury. *See Cavin I*, 545 S.W.3d at 57; *see also Livingston v. Livingston*, 537 S.W.3d 578, 595 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (recognizing that “‘the writ of injunction is used to prevent injuries, and not to afford remedy for injury inflicted’” (quoting *Whitaker v. Dillard*, 16 S.W. 1084, 1085 (Tex. 1891))); *Texas Health Care Info. Council v. Seton Health Plan, Inc.*, 94 S.W.3d 841, 853 (Tex. App.—Austin 2002, pet. denied) (explaining that generally “purpose of injunctive relief is to halt wrongful acts that are threatened or in the course of accomplishment, rather than to grant relief against past actionable wrongs or to prevent the commission of wrongs not imminently threatened”).

Further, I do not agree that Abbott’s application for permanent injunction “is dependent upon her claim for the wrongful act of assault.” *See Risner v. Harris Cty. Republican*

Party, 444 S.W.3d 327, 339 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (“Permanent injunctive relief may be granted upon a showing of (1) the existence of a wrongful act, (2) the existence of imminent harm, (3) the existence of irreparable injury, and (4) the absence of an adequate remedy at law.”); *Seton Health Plan*, 94 S.W.3d at 853 (same).⁴ In her live petition, Abbott seeks injunctive relief in response to Wylie’s assault and “continuous harassment” and her substantive factual allegations in support of her request for a permanent injunction include the Cavins’ “wrongful act[s]” of stalking and “continuing harassing conduct,” including identified “unwanted” contacts from November 2016 to February 2019.

In her briefing to this Court, Abbott similarly summarizes her lawsuit as follows:

The crux of this entire lawsuit has always been and continues to be the Cavins’ unwanted contact, harassment and interference with their adult-daughter’s personal life following two separate assaults by her parents.

Abbott also cites “over seventy examples of repeated unwanted contact” by the Cavins, contends that “the Cavins’ relentless stalking and harassment has continued uninterrupted for over four-and-a-half years through unwanted communication despite repeated attempts by Kristin Abbott demanding them to stop,” and quotes the police’s no-contact letter to the Cavins in which the police reference Texas Penal Code provisions for the offenses of stalking and harassment. *See*

⁴ That Abbott ultimately will be required to prove a wrongful act to obtain a permanent injunction does not impact whether the TCPA applies. *See Etan Indus., Inc. v. Lehmann*, 359 S.W.3d 620, 625 n.2 (Tex. 2011) (noting that remedy of permanent injunction is only available if “liability is established under a cause of action”); *Livingston v. Livingston*, 537 S.W.3d 578, 594 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (explaining that permanent injunction cannot be granted absent finding of liability of underlying cause of action and observing that trial court had discretion to award equitable remedy of permanent injunction based on jury finding of intentional infliction of emotional distress even though no damages were awarded).

Tex. Penal Code §§ 42.07 (listing elements for offense of harassment), .072 (listing elements for offense of stalking).

Based on my review of the parties' pleadings and evidence, I conclude that Abbott established a prima facie case for her Section 65.011 application for injunctive relief and the Cavins did not establish an affirmative defense in response. *See* Tex. Civ. Prac. & Rem. Code §§ 27.005, .006.

Conclusion

Applying the plain language of the relevant statutory provisions, I conclude that Abbott's application for permanent injunction is a "legal action" subject to the TCPA and that she did not meet her burden to prove the "bodily injury" exemption. Because Abbott's factual allegations and evidence establish a prima facie case for her Section 65.011 application for injunctive relief and the Cavins did not establish an affirmative defense in response, I would affirm the trial court's order denying the Cavins' motion to dismiss under the TCPA's burden-shifting mechanism.

Melissa Goodwin, Justice

Before Justices Goodwin, Baker, and Triana

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