

No. 18-0495

In the
Supreme Court of Texas

NEAL RAUHAUSER,

Petitioner,

v.

JAMES MCGIBNEY and VIAVIEW, INC.,

Respondents

**On Petition for Review From the Second Court of Appeals
Cause No. 02-16-00244-CV**

PETITION FOR REVIEW

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IDENTITY OF PARTIES AND COUNSEL

Petitioner certifies that the following is a complete list of parties and their trial and appellate attorneys. TEX. R. APP. P. 53.2(a).

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Respondents

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JAMES MCGIBNEY and VIAVIEW, INC.,

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PETITION FOR REVIEW

Petitioner Neal Rauhauser submits his petition for review. Petitioner, the defendant-appellee below, will be referred to as “petitioner,” or “Rauhauser.” Respondents James McGibney and ViaView, Inc., the plaintiffs-appellants below, will be referred to collectively as “plaintiffs,” as they were designated in the trial court, or individually by name.

STATEMENT OF THE CASE

Nature of the case. Plaintiffs sued Rauhauser and nine other defendants for claims of defamation, “blackmail,” “extortion,” harassment, stalking, intentional infliction of emotional distress, tortious interference with “business relations,” business disparagement, and “gross negligence *per se* in violation of TEX. PEN. CODE §§ 22.07, 42.07, and 42.072” arising from Internet postings plaintiffs claimed were “unlawful verbal acts.” (CR I:12-17.)

Trial judge. Hon. Donald J. Cosby

Trial court. The 67th District Court of Tarrant County, Texas.

Trial court disposition. After the court of appeals reversed the trial court’s denial of Rauhauser’s TCPA motion to dismiss in 2014 and remanded for awards of TCPA attorney’s fees and sanctions, *Rauhauser v. McGibney*, 508 S.W.3d 377 (Tex. App.—Fort Worth 2014, no pet.), *disapproved on other grounds, Hersh v. Tatum*, 526 S.W.3d 462, 467 & n.23 (Tex. 2017), the trial court awarded Rauhauser (i) attorney’s fees of \$300,383.84, through trial; (ii) conditional appellate attorney’s fees of \$75,000.00; (iii) monetary sanctions of \$150,000.00; and (iv) nonmonetary sanctions in the form of a “written apology” to Rauhauser and his attorney; and (v) nonmonetary sanctions in the form of turnover of Internet domain names plaintiffs had purchased in various forms of the names of both Rauhauser and his attorney. (**Tab 3.**) Plaintiffs appealed these awards.

Parties in court of appeals Appellants: James McGibney and ViaView Files, Inc.
Appellee: Neal Rauhauser

District of court of appeals. Second District Court of Appeals.

Names of the justices.

The panel that decided the case consisted of Chief Justice Bonnie Sudderth and Justices Meier and Kerry Fitzgerald (Senior Justice, Retired, Sitting By Assignment). The author of the court’s opinion was Chief Justice Sudderth. No separate opinions were written.

Citation for court of appeals opinion

McGibney v. Rauhauser, 2018 WL 1866080 (Tex. App.—Fort Worth 2018, pet. filed). (**Tab 1.**)

Disposition in court of appeals.

The court of appeals reversed the trial court’s awards of attorney’s fees and sanctions in all things, holding the monetary amounts to be based “insufficient evidence” and holding nonmonetary sanctions not to be authorized by the TCPA. (**Tab 1.**) No motion for *en banc* reconsideration was filed.

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction over this interlocutory appeal on at least two distinct grounds:

(i) *Construction of a statute.* The court of appeals' misinterpretation of the TCPA essentially adds restrictive language to TEX. CIV. PRAC. & REM. CODE § 29.009(a)(2) that the Legislature chose not to add (that "sanctions" awarded under the TCPA can only be monetary). This Court has jurisdiction to construe a statute necessary to determination of a case. TEX. GOV'T CODE § 22.001(a)(3); TEX. R. APP. P. 56.1(a)(3); *Texas DPS v. McClendon*, 35 S.W.3d 632, 633 (Tex. 2000).

(ii) *Importance to jurisprudence of the state.* The court of appeals commits an error of law of such importance to the jurisprudence of the state that it requires correction by this Court. TEX. GOV'T CODE § 22.001(a)(6); TEX. R. APP. P. 56.1(a)(5), (a)(6); *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 643 (Tex. 1995).

ISSUES PRESENTED FOR REVIEW

Issue 1: Can a court award nonmonetary sanctions under TCPA § 27.009(a)(2)?

Issue 2: Was the evidence of Rauhauser’s attorney’s fees sufficient to support the trial court’s award?

Issue 3: Can an appellate court order a trial court to reconsider its award of TCPA attorney’s fees using a factor that is expressly provided by TEX. R. CIV. P. 162 to “have *no effect*” on an award of attorney’s fees after a nonsuit?

—Not Briefed—

Issue 4: Can an appellate court raise points of error *sua sponte*—that a party never:

- (i) objected to in the trial court; or
- (ii) complained of on appeal?

Issue 5: What factors or evidence may a court consider in determining the nature or amount of a monetary TCPA sanction award?

WHY THIS COURT SHOULD GRANT REVIEW

In this case of first impression, the court of appeals reads TEX. CIV. PRAC. & REM. CODE (“TCPA”) § 27.009(a)(2) (**Tab 5**) as not authorizing courts to award *nonmonetary* sanctions to successful TCPA movants. Ignoring the common meaning of the English word “award” in favor of a strained argument that the Legislature would have used the word “impose” if it meant to authorize *nonmonetary* sanctions, the court of appeals reverses the trial court’s court order that plaintiffs to (i) turn over Internet domains purchased in the names of Rauhauser and his counsel to harass them; and (ii) apologize for, among other things, Tweeting that Rauhauser’s counsel was a “dangerous pedophile with an insatiable appetite for young hairless boys.”¹ (CR IV:1167.) The court of appeals thus surgically implants the word “monetary” into TCPA § 27.009(a)(2) before the word “sanctions.” This violates well-settled canons of statutory construction that this Court has admonished Texas courts to observe in at least two recent TCPA decisions. *See ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 900 (Tex. 2017); *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015). This case presents the Court with its first opportunity to address the issue of nonmonetary sanctions under the TCPA.

¹ Arguing that the trial court should modify the April 14, 2016, judgment on June 3, 2016, plaintiffs’ counsel implicitly conceded that the Tweets were McGibney’s. “[H]e cannot be deprived of property for—for this—for his tweets.” (RR VI:23.)

STATEMENT OF FACTS

The opinion of the court of appeals correctly states the nature and facts of the case in most material respects. This baseless suit was filed on February 19, 2014, (CR-I:7) and is now in its fifth year of litigation. This is the second appeal.² Rauhauser’s attorney’s fees now exceed \$350,000.00. (CR-IV:1020-21.) Plaintiffs asserted at least eleven separately-denominated claims, some of which are not even recognized civil causes of action:

- (i) Defamation; (CR-I:13, ¶ 17.)
- (ii) Defamation *per se*; (*Id.*)
- (iii) Business disparagement; (CR I:16, ¶ 20.)
- (iv) Intentional infliction of emotional distress; (CR I:14-15, ¶ 19.)
- (v) “Gross negligence *per se* in violation of TEX. PEN. CODE §§ 22.07, 42.07, and 42.072;”³ (CR I:17, ¶ 21)
- (vi) “Unlawful verbal acts;”⁴ (CR I:18, ¶ 22.)
- (vii) Tortious interference with “business relationships;” (CR I:15-16, ¶ 20.)
- (viii) Harassment; (*Id.*)

² The first was *Rauhauser v. McGibney*, 508 S.W.3d 377 (Tex. App.—Fort Worth 2014, no pet.), which resulted in a remand for the trial court to award the TCPA attorney’s fees and sanctions that are now the subject of the instant appeal.

³ TEX. PENAL CODE § 22.07 is an assaultive offense captioned “Terroristic Threat” of which *intent* to “place the public or a substantial group of the public in fear of serious bodily injury,” *inter alia*, is a required element. TEX. PENAL CODE § 22.07(a)(5). TEX. PENAL CODE § 42.07, captioned “Harassment,” also requires intent. TEX. PENAL CODE § 22.07(a). There is no provision for a private cause of action under these statutes. Furthermore, it is unclear how a person could “negligently” violate a penal statute of which intent is a required element.

⁴ What a “verbal act” is—unlawful or otherwise—was never explained.

- (ix) Stalking; (*Id.*)
- (x) Blackmail; (*Id.*) and
- (xi) Extortion. (*Id.*)

On remand, the trial court initially awarded attorney’s fees of \$300,383.84, nonmonetary relief, and sanctions of \$1,000,000.00. After granting a new trial, the trial court signed a new order and awarded the *same* **\$300,383.84** in attorney’s fees and the same nonmonetary relief—but reduced the sanctions awarded to **\$150,000.00**. (**Tab 3.**) Plaintiffs appealed the amounts of the new order’s awards of attorney’s fees and sanctions.

The court of appeals reversed all of the awards, holding that the trial court abused its discretion by awarding TCPA attorney’s fees supported by “insufficient evidence,” that there was insufficient evidence of the monetary sanction award of \$150,000.00, and that TCPA § 27.009(a)(2) did not authorize an award of any kind of nonmonetary sanctions. (**Tab 1.**)

SUMMARY OF THE ARGUMENT

First, petitioner shows that TCPA § 27.009(a)(2) allows courts to award nonmonetary sanctions to TCPA movants. The court of appeals employs a constricted, strained analysis to hold that if the Legislature had intended to authorize nonmonetary sanctions, it would have used the word “impose” instead of the word “award.” But courts look to an undefined statutory word’s “plain meaning” to construe a statute. Under both the dictionary definition and usage in several Texas statutes, an “award” can be of nonmonetary things such as a “prize,” an “honorary doctorate,” a “Purple Heart,” contracts, child custody, insurance policies, and control of a business. The word “award” in TCPA § 27.009(a)(2) cannot fairly be construed so narrowly as to mean only monetary damages.

Second, petitioner shows that his extensive evidence of attorney’s fees was sufficient to support the trial court’s award of \$300,838.84 in attorney’s fees. The detailed testimony and time logs of Rauhauser’s attorney were admitted into evidence without objection, and plaintiffs offered no evidence or testimony to contradict it. The trial court’s seven-page judgment awarding TCPA attorney’s fees and sanctions extensively discussed, explained, and referred to guiding rules and principles as the basis for the its decision.

Third, the court of appeals' direction that the trial court consider Rauhauser's knowledge of the "upcoming nonsuit" in determining the amount of TCPA attorney's fees to which he is now entitled is irreconcilable with TEX. R. CIV. P. 162, which provides that a nonsuit "shall have no effect on any motion for sanctions, attorney's fees or other costs...." If plaintiffs' nonsuit could have "no effect" on Rauhauser's entitlement to TCPA attorney's fees, the trial court would be wrong to consider it. The court of appeals' instruction to the contrary was error.

ARGUMENT

Argument and Authorities—Issue 1

Issue 1: Can a court award nonmonetary sanctions under TCPA § 27.009(a)(2)?

Yes. The TCPA provides:

(a) If the 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.

TCPA § 27.009(a)(2). Nothing in the TCPA limits what kind of sanction a court may award. The Legislature vests Texas courts with discretion to sanction as is “sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.” *Id.*

On April 14, 2016, the trial court awarded Rauhauser monetary TCPA sanctions of \$150,000.00. (Tab 3, CR IV:1405.) The trial court also wrote:

Furthermore, in view of plaintiffs’ history of filing numerous lawsuits with the willful, malicious intent to injure those who have spoken critically of plaintiffs, the Court finds that monetary sanctions alone will not be sufficient to deter plaintiffs from filing similar such suits in the future. Therefore, in addition to the monetary sanctions awarded above, the Court orders the following nonmonetary sanctions....

(Tab 3, CR IV:1406.) The nonmonetary sanctions included that plaintiffs (i) disclose and turn over to Rauhauser six specific domain names registered in various forms of Rauhauser’s name; (ii) disclose “all domain names

plaintiffs or their agents have registered in any form of the name of [Rauhauser's] attorney [Dorrell];” and (iii) publish written apologies to Rauhauser for calling him a “woman beater” and “pedophile supporter,” and to Dorrell for calling him a “pedophile.” (*Id.*, CR IV 1406-07.)

The court of appeals concluded that the key to whether a court may award nonmonetary sanctions under the TCPA is found in the Legislature’s choice of the word “award.” (**Tab 1**, at *11.) When a statute does not define a term, courts look to its plain meaning. *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011). The dictionary definition of “award” is:

<p>award 'ə'wôrd </p> <p>verb [<i>with two objects</i>]</p> <p>give or order the giving of (something) as an official payment, compensation, or prize to (someone): <i>he was awarded the Purple Heart</i> <i>the 3.5 percent pay raise was awarded to the staff.</i></p> <ul style="list-style-type: none">• grant or assign (a contract or commission) to (a person or organization). <p>noun</p> <p>a prize or other mark of recognition given in honor of an achievement: <i>the company's annual award for high-quality service</i> [<i>as modifier</i>] : <i>an award ceremony.</i></p> <ul style="list-style-type: none">• an amount of money paid to someone as an official payment, compensation, or grant: <i>a generous award given to promising young dancers.</i>• the action of giving a payment, compensation, or prize: <i>the award of an honorary doctorate</i> <i>an award of damages.</i>

New Oxford American Dictionary, 3rd ed., 2010, Oxford University Press [emphasis added]. In various Texas statutes, too, the Legislature uses the word “award” to mean many things other than money. *See, e.g.*, TEX. GOV’T CODE § 437.351 (Texas Legislative Medal of Honor); TEX. GOV’T

CODE § 437.355 (various other medals); TEX. LOCAL GOV'T CODE §262.027 (contracts); TEX. FAM. CODE § 7.002 (property in a divorce decree); TEX. FAM. CODE § 7.005 (rights to insurance policies); TEX. FAM. CODE § 6.502 (residence or exclusive control of a business). Thus, under both the dictionary definition and many Texas statutes, an “award” can be of several things other than money—a “prize,” an “honorary doctorate” degree, a “Purple Heart” medal, contracts, child custody, insurance policies, and control of a business.

Instead of considering these various meanings and usages of the word “award,” the court of appeals constricted its analysis to only the Texas Civil Practice & Remedies Code, an examination of which yielded this:

In the code, the word “award” is used exclusively in circumstances where a monetary remedy is available. [Citations omitted.] In the sections of the code where the legislature specifically empowered courts to levy non-monetary sanctions, it chose a different word—“impose”—to describe the remedy. [Citations omitted.]

(**Tab 1**, at *12.) Because the Legislature chose the word “award,” rather than the word “impose,” the court of appeals held that “[TCPA] § 27.009 does not authorize the imposition of nonmonetary sanctions.” (*Id.*, at *14.) This narrow statutory construction was an error of such importance to the jurisprudence of the state that this Court should correct it.

Argument and Authorities—Issue 2

Issue 2: Was the evidence of Rauhauser’s attorney’s fees sufficient to support the trial court’s award?

Yes. Appellate courts review a trial court’s decision to grant or deny attorney’s fees under the TCPA for an abuse of discretion. *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016).

The fixing of a reasonable attorney’s fee is a matter within the sound discretion of the trial court, and its judgment will not be reversed on appeal absent a clear abuse of discretion.

Spector Gadon & Rosen, P.C. v. Sw. Secs., Inc., 372 S.W.3d 244, 251 (Tex. App.—Dallas 2012, no pet.). A trial court abuses its discretion if it rules without reference to guiding rules and principles. *Van Ness v. ETMC First Physicians*, 461 S.W.3d 140, 142 (Tex. 2015). An abuse of discretion does not occur if a trial court bases its decision on some evidence of substantive and probative character. *Unifund CCR Partners v. Villa*, 299 S.W.3d 92, 97 (Tex. 2009). The reasonableness of attorney’s fees is ordinarily left to the factfinder—the trial judge in the case at bar—and a reviewing court may not substitute its judgment in the matter merely because the appellate court would have ruled differently in the same circumstance. *Barker v. Eckman*, 213 S.W.3d 306, 314 (Tex. 2006); *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 558 (Tex. 1995).

If testimony from trial counsel is clear, direct, positive, uncontroverted, and incapable of being discredited or impeached, testimony