

08-0014

No. _____

FILED
IN SUPREME COURT
OF TEXAS

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TO THE
SUPREME COURT OF TEXAS
BLAKE HAWTHORNE, Clerk
BY _____ Deputy

OMDA OIL & GAS, INC., Petitioner

v.

ARTHUR J. PORCARI, Respondent

PETITION FOR REVIEW

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No. _____

**IN THE
SUPREME COURT OF TEXAS**

OMDA OIL & GAS, INC., Petitioner

v.

ARTHUR J. PORCARI, Respondent

IDENTITY OF PARTIES AND COUNSEL:

PETITIONER: OMDA Oil & Gas, Inc.

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I.

STATEMENT OF THE CASE

This is an appeal from a temporary injunction in a business disparagement, defamation, and breach of fiduciary duty case. Judge Emily Tobolowsky, presiding judge of the 298th Judicial District Court, Dallas County, Texas entered the temporary injunction order (the “TI Order”) in favor of Petitioner OMDA Oil & Gas, Inc. (“OMDA”) and against Respondent Arthur J. Porcari (“Porcari”)(App. tab 1). Porcari appealed to the Court of Appeals for the Fifth District of Texas at Dallas, complaining that the TI Order constituted an impermissible prior restraint on his constitutional right of free speech, among other things. In response, OMDA asserted that the speech in question is commercial speech and is subject to prior restraint if it is false and misleading, or potentially misleading.

Petitioner OMDA was the appellee in the Court of Appeals, and Respondent Porcari was the appellant. The Court of Appeals panel consisted of Justices Morris, Moseley, and O’Neill, with Justice O’Neill authoring the court’s opinion. The Court of Appeals affirmed in part and reversed in part the TI Order. (App. tab 2) Petitioner filed a Motion for Rehearing, which was denied on November 21, 2007. (App. tab 4) The opinion was released for publication on December 3, 2007, but has not yet been published.

II.

STATEMENT OF JURISDICTION

The Supreme Court of Texas has jurisdiction over this appeal under Tex. Gov’t Code § 22.001(a)(6) because the Court of Appeals has committed an error of law of such importance to

the state's jurisprudence that it should be corrected. This is not a case where the jurisdiction of the Court of Appeals has been made final by statute.

III.

ISSUE PRESENTED

Does the broader scope of protection afforded to free speech under Article I, Section 8 of the Texas Constitution include a commercial speech exception to the prior restraint doctrine, similar to that recognized under the First Amendment to the United States Constitution?

IV.

STATEMENT OF FACTS

The Court of Appeals correctly stated the nature of this case, and Petitioner relies on that statement, with the following additions:

In addition to being a major shareholder and taking over corporate communications for OMDA, Porcari provided advice and management expertise to OMDA for strategic growth of the company, including its capitalization, and he handled due diligence for OMDA's acquisition of oil and gas properties. (RR at 45:12-52:18) He also served as liaison between OMDA and its attorneys in connection with litigation in which OMDA is involved. (RR at 59:17-62:21) He was considered a key member of OMDA's management team (RR at 47:16-16; 51:23-25) and had access to confidential information. (RR at 52:19-53:2; 53:10-54:10; 55:5-13) When Porcari began making the subject posts on various Internet message boards, in addition to posting disparaging and defamatory comments about the company and its chairman (RR at 30:78-32:4; 76:3-93:16), he also disclosed confidential information, including privileged information he obtained in his role as liaison with legal counsel. (RR at 60:3-62:5; 63:5-10) Porcari's statements had considerable impact on the economic interest of OMDA and its shareholders,

including Porcari. (RR at 76:12-77:8; 80:4 – 83:10; 94:18 – 96:2; 185:6 – 190:7).

The TI Order made the following findings (App. tab 1):

1. . . . that Defendant will continue to publish disparaging statements on the Internet, attempt to affect OMDA Oil & Gas, Inc. stock prices and other actionable conduct described in the Petition and Application. The harm complained of is therefore imminent.

2. . . . Defendant’s conduct is directed towards and adversely impacts Plaintiff’s personal property interests, such as its share price and its abilities to successfully conduct ongoing business.

4. Plaintiff has also shown a likelihood of success on the merits as to its defamation and disparagement claims, at the very least, in that a substantial number of the statements giving rise to those claims are clearly defamatory or disparaging, or both.

5. . . . A temporary injunction is the least restrictive means to prevent the imminent and irreparable harm described herein.

V.

SUMMARY OF ARGUMENT

The Court of Appeals recognized this Court’s previous decision in *Davenport v. Garcia*, 834 S.W.2d 4 (Tex. 1992), stating that Article I, Section 8 of the Texas Constitution provides broader free speech protections for individuals than does the federal constitution. *Id.* at 8-9. Relying on the *Davenport* decision, the Court of Appeals ruled that the TI Order constituted an impermissible prior restraint of free speech, in violation of Porcari’s constitutionally protected free speech rights. In doing so, the Court of Appeals incorrectly concluded that the broader grant of protection afforded under the Texas Constitution, in effect, abrogates the well-recognized commercial speech exception to prior restraint doctrine, specifically holding that the TI Order constituted an unconstitutional prior restraint of free speech, “to which no exception applies.”

(App. tab 2, p. 6). The *Davenport* decision, however, was a non-commercial speech case. This Court has not answered the question of whether a commercial speech exception to the doctrine of prior restraint on free speech exists under the Texas Constitution, given the broader grant of protection afforded thereunder.

VI.

ARGUMENT

The Texas Rules of Appellate Procedure outline various factors that the Supreme Court considers in determining whether to grant a petition for review. This case presents two of those factors: “Whether a case involves constitutional issues” and “whether the court of appeals appears to have committed an error of law of such importance to the state’s jurisprudence that it should be corrected.” (TRAP 56.1(a)(4)-(5)).

The very fact that this case presents constitutional issues relating to something as fundamental as free speech makes it a matter of great importance to the state’s jurisprudence. The Court of Appeals declined to recognize that there is a distinction to be made between commercial and non-commercial speech, specifically holding that the TI Order constituted an unconstitutional prior restraint of free speech “to which no exception applies.” (App. tab 2) The Court of Appeals relied upon the Texas Constitution’s free speech provision, determined by the *Davenport* decision, among others, to be more expansive than the protection afforded under the federal constitution, concluding that no exception to the prior restraint doctrine applies under this broader grant of protection. *Davenport*, 834 S.W.2d at 8 (stating that “we have recognized that in some aspects our free speech provision is broader than the First Amendment”).¹

¹ The Supreme Court of Texas has clearly determined that Texas’ free speech right is broader than its federal equivalent. *O’Quinn v. State Bar of Texas*, 763 S.W.2d 397, 402 (Tex. 1988)(stating that “it is quite obvious that the Texas Constitution’s affirmative grant of free speech is more broadly worded
Petition for Review

This conclusion illuminates the considerable confusion that exists in Texas courts regarding the scope of free speech protection granted by Article I, Section 8 of the Texas Constitution. Some Texas courts have recognized a commercial speech exception to prior restraint under the Texas Constitution, but rely upon federal case law, including United States Supreme Court decisions interpreting the First Amendment to the United States Constitution. See, e.g., *Marketshare Telecom, L.L.C. v. Ericsson, Inc.*, 198 S.W.3d 908, 918 (Tex. App. – Dallas 2006, no pet.); *Brammer v. KB Home Lone Star, L.P.*, 114 S.W.3d 101 (Tex. App. – Austin 2003, no pet.); *Amalgamated Acme Affiliates, Inc. v. Minton*, 33 S.W.3d 387 (Tex. App. – Austin 2000, no pet.). The reliance of these appellate courts on federal constitutional standards calls into question whether the broad scope of protection afforded to non-commercial speech under the Texas Constitution extends just as broadly to commercial speech, as the Court of Appeals in the instant case apparently concluded, or whether that protection encompasses a commercial speech exception to the prohibition of prior restraint, as recognized under the First Amendment to the United States Constitution.

Under federal principles, commercial speech does, in fact, present an exception to the prior restraint doctrine – and it is a different exception than that posed by non-commercial speech. While the Texas Supreme Court has previously addressed the standard for imposing prior restraints on non-commercial speech, it should now clearly address the standard for imposing prior restraints on commercial speech and eliminate any room for confusion on this fundamental constitutional issue in the state’s jurisprudence.

than the first amendment”). See also *Channel 4, KGBT v. Briggs*, 759 S.W.2d 939, 944 (Tex. 1988) (Gonzalez, J., concurring) (the state provision is “more expansive than the United States Bill of Rights”); *Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989) (noting that “our state free speech guarantee may be broader than the corresponding federal guarantee”).

All speech is subject to prior restraint under certain conditions; there are two different standards that may apply, depending upon whether the speech is commercial or non-commercial. If the speech is non-commercial, the party seeking a prior restraint must show that the speech will likely result in imminent and irreparable harm and that judicial action is the least restrictive means to prevent harm. *Davenport v. Garcia*, 834 S.W.2d at 10.

Commercial speech, however, operates under a different standard, at least under federal principles: prior restraint is appropriate if the commercial speech is false or misleading, or even merely potentially misleading. *Marketshare Telecom, L.L.C.*, at 918 (Tex. App. – Dallas 2006, no pet.) (stating that “[c]ourts may take measures to prevent deception and confusion *even if the speech is not inherently misleading but only potentially misleading.*”)(emphasis added). See also *Owens v. State*, 820 S.W.2d 912, 914 (Tex. App. – Houston [1st Dist.] 1991, writ ref’d.) (holding that “intentionally false or misleading statements made in a commercial context are not protected by the first amendment.”)

These Texas appellate court holdings are consistent with the United States Supreme Court’s constitutional interpretations of the First Amendment. “Because of the nature of commercial speech, however, certain types of restrictions are tolerable.” *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976); *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 566 (1980)(holding that commercial speech that is false or misleading may be restrained.) As the Court elaborated in *Virginia State Bd. of Pharmacy* :

“There are commonsense differences between speech that does ‘no more than propose a commercial transaction’ . . . and other varieties. Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a *different degree of protection is necessary* to insure that the flow of truthful and legitimate commercial information is unimpaired.”

Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. at 770 (emphasis added) (citation omitted). *See also, Friedman v. Rogers*, 440 U.S. 1, 9-10 (1979):

“Untruthful speech, commercial or otherwise, has never been protected for its own sake. . . Obviously, much commercial speech is not provably false, but only deceptive or misleading. We foresee no obstacle to a State’s dealing with this problem. The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.” (citations omitted)

The Court of Appeals in the instant case noted that prior restraints on free speech come with a “heavy presumption” against their validity. The Court of Appeals also noted that prior restraints only pass constitutional muster if the trial court makes specific findings, supported by evidence, that “(1) an imminent and irreparable harm will deprive litigants of a just resolution of their dispute, and (2) the judicial action represents the least restrictive means to prevent that harm.” *Davenport*, 834 S.W.2d at 10.

While that statement is correct as to non-commercial speech, it is not correct as regards commercial speech under federal standards. The Court of Appeals declined to make the distinction, and concluded that no exception to the prior restraint doctrine applies. The confusion of the Court of Appeals is reflected in its reliance on the *Davenport* decision, in addition to *Hajek v. Mowbray*, 647 S.W.2d 253 (Tex. 1983), and *Brammer v. KB Home Lone Star, L.P.*, 114 S.W.3d 101, 108-109 (Tex. App. – Austin 2003, no writ), as controlling authorities, although they involve non-commercial speech. In *Brammer*, the appellee argued that the speech in question was commercial, but the court said, “We disagree. Neither the Brammers’ speech nor the speech involved in *Hajek* can be classified as commercial speech.” 114 S.W. 3d at 108. The clear implication is that, had commercial speech been involved, there might have been a different result in that case.

Marketshare Telecom, L.L.C. v. Ericsson, Inc., *supra*, cited to *Hajek v. Mowbray* for the proposition that “defamation alone is not a sufficient justification for restraining an individual’s right to speak freely.” 198 S.W. 3d at 918. But while defamation *alone* under the Texas Constitution’s free speech provision is not sufficient justification for restraint, defamation coupled with some other element may be. While the federal parameters of this issue are well-established, it is not clear whether those parameters apply under the Texas Constitution. The Court of Appeals in the case at bar answered that question in the negative by declining to apply a commercial speech exception to the prohibition of prior restraint. It is this question that the Supreme Court of Texas should decide.

The United States Supreme Court defines commercial speech as “expression related solely to the economic interests of the speaker and its audience.” *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. at 566. In *Amalgamated Acme Affiliates, Inc. v. Minton*, 33 S.W.3d 387 (Tex. App. – Austin 2000, no pet.), a post-*Davenport v. Garcia* case, the appellant attempted to broaden the concept of commercial speech from that enunciated in *Cent. Hudson*, contending that commercial speech must promote a commercial transaction. The Austin court, recognizing that a different analysis was required depending upon whether it was dealing with commercial as opposed to non-commercial speech, said, “We decline to define commercial speech as narrowly as University Sports suggests.” Citing to *ES Dev., Inc. v. RWM Enters., Inc.*, 930 F.2d 547 (8th Cir. 1991), a case in which “communications opposing a proposed automobile mall were held clearly to be commercial speech because *they related solely to the economic interests of the speaker and its audience*,” the court found that, under that definition, University Sports’ speech was commercial. 33 S.W.3d at 394 (emphasis added).

The Court then went on to state:

“To enjoy any protection, commercial speech must not be false or misleading. *Burzynski*, 917 S.W.2d at 370 (quoting *Central Hudson*, 447 U.S. at 566); *Owens v. State*, 820 S.W.2d 912, 914 (Tex. App. – Houston [1st Dist.] 1991, writ ref’d) (‘Intentionally false or misleading statements made in a commercial context are not protected . . .’). ‘There can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it. . . .’ *Burzynski*, 917 S.W.2d at 371 (quoting *Central Hudson*, 447 U.S. at 563-64). Measures may be taken to prevent deception and confusion even if the speech is not inherently misleading but only potentially misleading. *Gonzalez v. State Bar of Tex.*, 904 S.W.2d 823, 829 (Tex. App. – San Antonio 1995, writ denied).”

33 S.W.3d at 394.

The confusion that exists in Texas courts is apparent from these decisions, as these courts necessarily assumed that the free speech protection afforded under the federal and Texas constitutions were coterminous, thereby applying federal constitutional standards. The Supreme Court of Texas, however, has clearly stated that the Texas Constitution’s free speech provision affords broader protection. The Court of Appeals in the instant case has apparently interpreted that to mean that the more expansive state protection of free speech requires that it not recognize the commercial speech exception to prior restraint. By granting review, this Court can eliminate this confusion, and answer the question of whether the expansive protection of free speech provided by Article 1, Section 8 of the Texas Constitution includes an exception to the prior restraint doctrine that should apply in commercial speech cases.

VII.

PRAYER

For the reasons stated herein, Petitioner requests that the Supreme Court of Texas grant its Petition for Review and that, upon full consideration of the merits, order the Dallas Court of

RESPECTFULLY SUBMITTED,

TIPTON JONES

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**ATTORNEYS FOR PETITIONER OMDA
OIL & GAS, INC.**

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Petition for Review was served on January 4, 2008 via certified mail, return receipt requested, on the attorney of record for Respondent Arthur J. Porcari as follows:

David Morris, Esq.

David Morris Law Firm

14785 Preston Road, Ste. 550

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ATTORNEY FOR RESPONDENT


Murray W. Camp

APPENDIX

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CAUSE NO. 07-01850-M

OMDA OIL & GAS, INC.

Plaintiff,

v.

ARTHUR J. PORCARI

Defendant.

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IN THE DISTRICT COURT

DALLAS COUNTY, TEXAS

298th JUDICIAL DISTRICT

TEMPORARY INJUNCTION

CAME ON FOR HEARING Plaintiff's Application for Temporary Injunction (the "Application"), as contained in Plaintiff's Original Petition, Verified Application for Temporary Restraining Order, Application for Temporary and Permanent Injunctions, Request for Disgorgement and Other Relief, Request for Disclosures and Motion to Shorten Time for Discovery (the "Petition"). After considering the Application, the evidence admitted at the hearing, the arguments of counsel and the applicable authorities, the Court finds and concludes that Plaintiff is entitled to a temporary injunction as requested inasmuch as legally and factually sufficient grounds have been established.

I.

FINDINGS AND CONCLUSIONS

The Court finds as follows:

1. Plaintiff has established that, absent injunctive relief, there is an extreme risk and likelihood that Defendant will continue to publish disparaging statements on the Internet, attempt to affect OMDA Oil & Gas, Inc. stock prices and other actionable conduct described in the Petition and Application. The harm complained of is therefore imminent.
2. A temporary injunction is also appropriate because Plaintiff has shown that Defendant's conduct is directed towards and adversely impacts Plaintiff's personal property interests, such as its share price and its abilities to successfully conduct ongoing business.
3. Plaintiff has shown that that it will suffer imminent and irreparable harm absent the entry of this injunction because the Plaintiff's damages will be difficult to calculate with certainty, given the nature of the conduct giving rise to Plaintiff's claims and the type of damages suffered, including Plaintiff's market capitalization and other factors. Additionally, Plaintiff has shown that its constructive trust and disgorgement remedies would be rendered ineffectual absent the injunctive relief granted herein, among other reasons.
4. Plaintiff has also shown a likelihood of success on the merits as to its defamation and disparagement claims, at the very least, in that a substantial number of the statements giving rise to those claims are clearly defamatory or disparaging, or both.

5. A temporary injunction is appropriate under TEX. CIV. PRAC. & REM. CODE § 65.011(1) because Plaintiff has established that it is entitled to the relief demanded, and all or part of the relief requires the restraint of certain conduct prejudicial to the applicant. A temporary injunction is also appropriate under TEX. CIV. PRAC. & REM. CODE § 65.011(3) because Plaintiff has established entitlement to a writ of injunction under principles of equity and the laws of Texas relating to injunctions. A temporary injunction is also appropriate under TEX. CIV. PRAC. & REM. CODE § 65.011(5) because injury to Plaintiff's personal property interests are threatened, irrespective of any adequate remedy at law. A temporary injunction is the least restrictive means to prevent the imminent and irreparable harm described herein.

6. The basic purpose of a temporary injunction is to preserve the status quo, which is consistently defined as the last actual, peaceful, non-contested status between the parties. A temporary injunction will preserve the status quo until the trial on the merits.

II.

ORDER

It is therefore ORDERED that Arthur J. Porcari, individually or through any business entity he controls or operates, and all persons or entities acting in concert with him or at his direction, suggestion or control, who receive actual notice of this order by service or otherwise, SHALL NOT commit the following acts and that they are hereby ENJOINED and PROHIBITED from doing any of the following:

- a. Making, publishing, posting, stating, or communicating, by any means whatsoever, through electronic, written, oral, or any other means, to any party or entity, any statement which tends to defame, disparage, cast aspersion on, or refer negatively to OMDA Oil & Gas, Inc. or any officer,

director, member, shareholder, subsidiary or affiliate of OMDA Oil & Gas, Inc.

- b. Disclosing, making, publishing, posting, stating, or communicating, by any means whatsoever, through electronic, written, oral, or any other means, to any party or entity, any information relating to OMDA Oil & Gas, Inc., or its subsidiaries or affiliates, that Porcari obtained or became aware of between June 1, 2004 and March 31, 2006.
- c. Transferring any asset, real or personal, tangible or intangible, liquid or unliquidated, of any kind or character, traceable to any profits made on the trading of OMDA Oil & Gas, Inc. stock, whether by purchase, sale, short selling, warrant, option, securitization, hypothecation, or alienation, or by any other means, including any such profits made by any person or entity at his direction, insistence, suggestion, or control.
- d. Erasing, deleting, encrypting, destroying or otherwise damaging any papers, documents, computer files, hard disks, electronic storage media, or any other information source that consists of or relates to any of the actionable statement or Internet posts described herein or the trading, sale, or purchase of any OMDA Oil & Gas, Inc. stock.

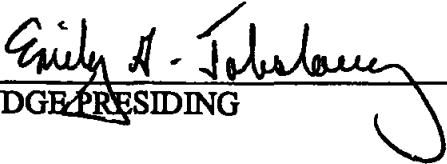
It is further ORDERED that this Order shall be and hereby is binding upon Arthur J. Porcari, individually or through any business entity he controls or operates, directly or indirectly, as well as his agents, servants, employees, and attorneys, and all persons or entities acting in concert with him ~~or at his direction, suggestion or control~~ ^{ECT} who receive actual notice of this Order by personal service or otherwise.

It is further ORDERED that the trial of this action is hereby set for the 2nd day of Oct., 2007, at 9:00 o'clock A.m.

It is further ORDERED that this Order shall not be effective unless and until Plaintiffs execute and file a bond, or make a cash deposit in lieu of such bond, in the amount of \$ 1,000.00 in conformity with applicable law or further order of this Court. In the event that Plaintiff has already posted bond in that amount in connection

with the temporary restraining order entered in this case, such bond may continue in effect for the purpose of this temporary injunction.

SIGNED: March 26, 2007 at 6:06 o'clock p.m.



JUDGE PRESIDING

AFFIRM in part and REVERSE in part and Opinion Filed October 23, 2007



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

No. 05-07-00390-CV

ARTHUR J. PORCARI, Appellant

V.

OMDA OIL & GAS, INC., Appellee

**On Appeal from the 298th District Court
Dallas County, Texas
Trial Court Cause No. 07-01850-M**

MEMORANDUM OPINION

**Before Justices Morris, Moseley, and O'Neill
Opinion By Justice O'Neill**

Appellant Arthur J. Porcari appeals from the trial court's grant of a temporary injunction. The temporary injunction enjoins four types of actions. The first two involve restrictions on speech, and the second two involve restrictions on property rights. Because Porcari challenges only the restrictions to his free speech, we address these arguments and not the propriety of the court's restrictions on property rights.

In seven points, Porcari alleges (1) the trial court abused its discretion by terminating the temporary injunction hearing before he presented his case; (2) the trial court abused its discretion by allowing OMDA Oil & Gas, Inc. to present expert testimony; (3) the trial court erred in granting an injunction that constituted a prior restraint of constitutionally protected speech; (4) the trial court

erred in finding Porcari's statements were commercial speech; (5) the trial court erred in finding a fiduciary relationship between the parties; (6) the trial court erred in finding Porcari's statements were based on confidential information; and (7) the trial court erred in finding OMDA made a showing of a probable right to permanent relief for defamation and business disparagement. We reverse in part and affirm in part the trial court's temporary injunction order.

Factual Background

OMDA is a publicly traded corporation that invests in oil and gas development projects throughout the United States. Porcari first purchased one million shares of OMDA stock in June 2004. Over the next few months, Porcari and several acquaintances purchased over one hundred million shares of stock. Because of his position as a large shareholder, Porcari contacted OMDA's chairman Adam Barnett and told Barnett he believed the stock was undervalued. Porcari then explained his substantial experience in the oil and gas industry and offered to help the company expand. Barnett accepted his offer, and Porcari took over corporate communications, which included preparing press releases, newsletters, and correspondence to investors. However, Porcari did not become an officer, director, or employee of the company. Porcari and Barnett later disagreed about Barnett's management of OMDA. As a result, Barnett no longer asked Porcari for advice regarding the company.

Both before and after Porcari's involvement with Barnett, Porcari routinely posted messages on private investor boards including the Yahoo! OMDA Investor Chat Board. This particular board consisted of two hundred members who applied for membership and then received access through a particular password.¹ In some cases, Porcari either criticized OMDA's management or replied to Barnett's posts.

¹ Of the approximate ten thousand OMDA shareholders, only a small percentage had access to the board.

On March 1, 2007, OMDA filed suit alleging certain posts on the board by Porcari constituted actionable defamation and business disparagement. It further alleged certain posts disclosed confidential information received by Porcari while in a fiduciary relationship. OMDA further requested and received an ex parte temporary restraining order restricting Porcari's speech and property rights involving stock. At a later temporary injunction hearing, the court granted a temporary injunction and specifically ordered the following:

It is therefore ORDERED that Arthur J. Porcari, individually or through any business entity he controls or operates, and all persons or entities acting in concert with him or at his direction, suggestion or control, who receive actual notice of this order by service or otherwise, SHALL NOT commit the following acts and that they are hereby ENJOINED and PROHIBITED from doing any of the following:

- a. Making, publishing, posting, stating, or communicating, by any means whatsoever, through electronic, written, oral, or any other means, to any party or entity, any statement which tends to defame, disparage, cast aspersion on, or refer negatively to OMDA Oil & Gas, Inc. or any officer director, member, shareholder, subsidiary or affiliate of OMDA Oil & Gas, Inc.
- b. Disclosing, making, publishing, posting, stating, or communicating, by any means whatsoever, through electronic, written, oral, or any other means, to any party or entity, any information relating to OMDA Oil & Gas, Inc., or its subsidiaries or affiliates, that Porcari obtained or became aware of between June 1, 2004 and March 31, 2006.
- c. Transferring any asset, real or personal, tangible or intangible, liquid or unliquidated, of any kind or character, traceable to any profits made on the trading of OMDA Oil & Gas, Inc. stock, whether by purchase, sale, or short selling, warrant, option, securization, hypothecation, or alienation, or by any other means, including any such profits made by any person or entity at his direction, insistence, suggestion, or control.
- d. Erasing, deleting, encrypting, destroying, or otherwise damaging any papers, documents, computer files, hard disks, electronic storage media, or any other information source that consists of or relates to any of the actionable statement or Internet posts described herein or the trading, sale, or purchase of any OMDA Oil & Gas, Inc. stock.

Porcari appeals from this temporary injunction.

Termination of Temporary Injunction Hearing Prior to Presentment of Defense

In his first point, Porcari alleges the trial court abused its discretion by terminating the temporary injunction hearing before he presented his defenses and rested his case. OMDA responds Porcari waived his argument by failing to file a bill of exception or make an offer of proof on the excluded evidence. Alternatively, the trial court acted within its discretion in limiting testimony.

We conclude Porcari has waived his argument. To challenge exclusion of evidence by the trial court on appeal, the complaining party must present the excluded evidence to the trial court by offer of proof or bill of exception. TEX. R. APP. P. 33.2 (“To complain on appeal about a matter that would not otherwise appear in the record, a party must file a formal bill of exception.”); TEX. R. EVID. 103(a)(2); *Langley v. Comm’n for Lawyer Discipline*, 191 S.W.3d 913, 915 (Tex. App.—Dallas 2006, no pet.). Here, Porcari has not cited us to the record nor does the record show he made a bill of exception, formal or informal, regarding the excluded evidence. Because the excluded evidence is not preserved in the record, Porcari has waived his complaint. *Langley*, 191 S.W.3d at 915. We overrule Porcari’s first point.

Use of Expert Testimony

In his second point, Porcari contends the trial court abused its discretion in allowing expert testimony because he learned of the expert the evening before the temporary injunction hearing, which came as a complete surprise, and he had inadequate time to prepare a cross examination. OMDA responds the testimony was relevant to an essential element of its claim, and Porcari fails to establish how he was in fact unfairly surprised.

Before obtaining a temporary injunction, one of the elements OMDA had to prove was a probable, imminent, and irreparable injury. *Tom James of Dallas, Inc. v. Cobb*, 109 S.W.3d 877,

883 (Tex. App.—Dallas 2003, no pet.). To establish this element, OMDA retained an expert the day before the temporary injunction hearing and then notified Porcari. OMDA offered the expert's testimony for the limited purpose of showing damages would be hard to ascertain.

Because OMDA notified Porcari about its expert within a reasonable time of retaining him and Porcari could have anticipated testimony regarding a necessary element of the temporary injunction claim, we cannot conclude the trial court abused its discretion in allowing the expert's testimony. Further, Porcari failed to identify any prejudice or harm in his ability to cross examine the expert or how such cross examination was affected by any alleged surprise. Thus, the trial court did not abuse its discretion in allowing expert testimony. We overrule Porcari's second point.

Restraining Constitutionally Protected Speech

In his third point, Porcari asserts the trial court erred in granting an injunction that constituted a prior restraint of constitutionally protected speech. The purpose of the temporary injunction is to preserve the status quo until the case can be tried on its merits. *Tom James of Dallas, Inc.*, 109 S.W.3d at 883. An applicant for a temporary injunction must plead and prove: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *Id.*

We reverse a temporary injunction order only if we determine the record shows the trial court clearly abused its discretion. *Id.* In making this determination, we do not substitute our judgment for that of the trial court, but determine only whether the court's action was so arbitrary as to exceed the bounds of reasonable discretion. *Id.* When the trial court bases its decision on conflicting evidence, there is no abuse of discretion. *Id.* However, the trial court abuses its discretion when it misapplies the law to established facts or when the evidence does not reasonably support the trial court's determination of the existence of probable injury or probable right of recovery. *Id.*

Paragraphs (a) and (b) of the temporary injunction enjoins the content of Porcari's speech. According to the district court's order, OMDA is entitled to the injunction in part because Porcari's internet postings are "clearly defamatory or disparaging, or both."

A temporary injunction that constitutes a prior restraint on free speech comes before a court with a "heavy presumption" against its constitutional validity. *Davenport v. Garcia*, 834 S.W.2d 4, 10 (Tex. 1992) (noting a prior restraint will withstand scrutiny only under the most extraordinary circumstances); *Brammer v. KB Home Lone Star, L.P.*, 114 S.W.3d 101, 107 (Tex. App.—Austin 2003, no pet.). It is well-settled Texas courts will not grant injunctive relief in defamation or business disparagement actions if the language enjoined evokes no threat of danger to anyone, even though the injury suffered cannot easily be reduced to specific damages. *Hajek v. Bill Mowbray Motors, Inc.*, 647 S.W.2d 253, 255 (Tex. 1983) (holding language enjoined evoked no threat of danger to anyone and defamation alone is not sufficient justification for restraining an individuals right to speak freely); *Brammer*, 114 S.W.3d at 107; *see also* TEX. CONST. art. I, § 8.

Prior restraints may withstand constitutional scrutiny only when a trial court makes specific findings supported by the evidence that (1) an imminent and irreparable harm will deprive litigants of a just resolution of their dispute, and (2) the judicial action represents the least restrictive means to prevent that harm. *Davenport*, 834 S.W.2d at 10. Here, the broad language of paragraphs (a) and (b) constitutes an unconstitutional prior restraint of free speech, to which no exception applies.

Paragraph (a) enjoins Porcari from "making, publishing, posting, stating, or communicating, by many means whatsoever, . . . , any statement which tends to defame, disparage, cast aspersion on, or refer negatively to OMDA Oil & Gas, Inc. . . ." Defamation alone is not sufficient justification for restraining an individual's right to speak freely. *Hajek*, 647 S.W.2d at 255. Further, a trial court may not prevent a person from referring negatively about a company. *Id.* at 254

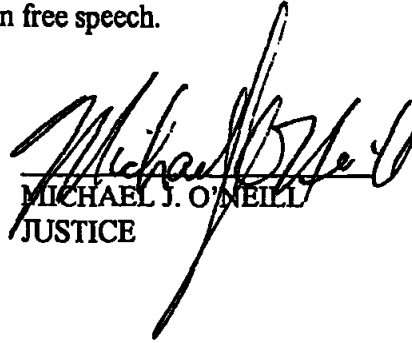
(holding trial court could not prevent a party from driving a vehicle with a defamatory message that the car company sold him a "lemon"). Thus, the trial court abused its discretion by failing to narrow the language in paragraph (a) to the least restrictive means to prevent any imminent and irreparable harm. *See* TEX. R. CIV. P. 683 (noting order granting temporary injunction should be specific in terms).

Paragraph (b) is likewise an unconstitutional prior restraint of free speech. By enjoining Porcari from "disclosing, making, publishing, posting, stating or communicating, by any means whatsoever, . . . , any information relating to OMDA Oil & Gas, Inc. . ." that Porcari obtained between June 1, 2004 and March 31, 2006, the trial court limited all speech, regardless of whether such information was known by the general public. Such broad restraints on speech will not pass constitutional muster. *See Davenport*, 834 S.W.2d at 11 ("By stopping not only the purported miscommunications but *any* communications, the broadly worded injunction certainly fails the second part of our test.") (emphasis added). Therefore, by including the expansive language in paragraph (b) of the temporary injunction order, the trial court again failed to use the least restrictive means to prevent harm. Thus, the trial court abused its discretion.

Because these two paragraphs constitute unconstitutional prior restraints of free speech and the trial court's order does not represent the least restrictive means to prevent harm, we sustain Porcari's third point. Having sustained Porcari's third point, we need not address points 4, 5, 6, and 7. TEX. R. APP. P. 47.1.

Conclusion

We affirm the injunctive provisions in paragraphs (c) and (d) of the district court's order because Porcari did not challenge them. We reverse the order as to paragraphs (a) and (b) because they constitute an unconstitutional prior restraint on free speech.



MICHAEL J. O'NEILL
JUSTICE

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

JUDGMENT

ARTHUR J. PORCARI, Appellant

No. 05-07-00390-CV V.

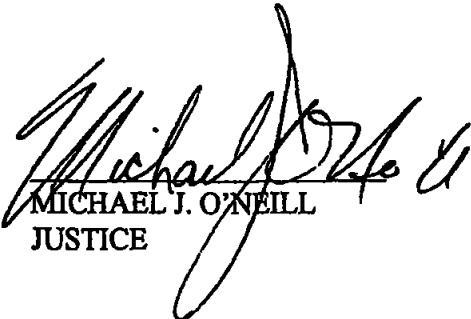
OMDA OIL & GAS, INC., Appellee

Appeal from the 298th District Court of
Dallas County, Texas. (Tr.Ct.No. 07-01850-
M).

Opinion delivered by Justice O'Neill,
Justices Morris and Moseley, participating.

In accordance with this Court's opinion of this date, the order of the trial court is **AFFIRMED in Part and Reversed in Part**. It is **ORDERED** that appellant Arthur J. Porcari recover his costs of this appeal from appellee OMDA Oil & Gas, Inc.

Judgment entered October 23, 2007.


MICHAEL J. O'NEILL
JUSTICE

Order issued November 21, 2007



In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-07-00390-CV

ARTHUR J. PORCARI, Appellant

V.

OMDA OIL & GAS, INC., Appellee

ORDER

Before Justices Morris, Moseley, and O'Neill

We **DENY** appellee's motion for rehearing.


MICHAEL J. O'NEIL
JUSTICE

Article 1, Section 8 of Texas Constitution

Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. . . .

First Amendment to United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.