Affirmed and Opinion Filed January 17, 2024

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-22-00991-CV

PATRICK DAUGHERTY, Appellant
V.
SCOTT BYRON ELLINGTON, Appellee

On Appeal from the 101st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-22-00304

MEMORANDUM OPINION

Before Justices Partida-Kipness, Reichek, and Miskel
Opinion by Justice Partida-Kipness

Appellant Patrick Daugherty appeals a temporary injunction entered against him. Daugherty maintains the temporary injunction should be vacated because appellant Scott Byron Ellington presented insufficient evidence to show he is likely to prevail on his stalking and invasion of privacy claims and to show his injuries are imminent and irreparable. After reviewing the parties' briefs and the record, we conclude the trial court did not abuse its discretion by issuing the temporary injunction in relation to the invasion of privacy claim. Accordingly, we overrule Daugherty's appellate issues and affirm the temporary injunction.

BACKGROUND

Daugherty resigned from his employment at Highland Capital Management, LP (Highland) in 2011.[1] Ellington was Highland's General Counsel at that time. Highland sued Daugherty in 2012 for alleged breaches of contract and fiduciary duty. After a jury trial in 2014, that court awarded Highland $2.8 million and issued a permanent injunction against Daugherty, which barred him from using or disseminating Highland's confidential information. The court also awarded $2.6 million to Daugherty against a Highland affiliate called Highland Employee Retention Assets LLC (HERA). This Court affirmed the 2014 Judgment. *See Daugherty v. Highland Cap. Mgmt., L.P.*, No. 05-14-01215-CV, 2016 WL 4446158, at *1 (Tex. App.—Dallas Aug. 22, 2016, no pet.) (mem. op.). According to Daugherty, HERA funded an escrow account to pay Daugherty the $2.6 million awarded to him in the 2014 Judgment. He contends Ellington transferred the assets from the escrow account before Daugherty could seize the assets to satisfy the 2014 Judgment.

Since 2012, several lawsuits have been filed in different forums across the United States. One of those lawsuits was filed in 2019 by Daugherty against Ellington in Delaware Chancery Court. In that lawsuit, Daugherty accused Ellington

[1] This is the latest in a long line of cases stemming from Daugherty's employment with Highland Capital Management, LP (Highland). *See Daugherty v. Highland Cap. Mgmt., L.P.*, No. 05-17-01115-CV, 2019 WL 2223593, at *1 (Tex. App.—Dallas May 23, 2019, no pet.) (listing cases). We will limit our discussion to the facts necessary to resolve this current dispute.

and others of fraud and conspiracy to commit fraud in relation to the escrow account. Highland filed for Chapter 11 bankruptcy protection in December 2019. Daugherty asserts Highland's former Chief Executive Officer, Jim Dondero, admitted during a January 8, 2021, bankruptcy hearing that Dondero and Ellington destroyed their Highland-issued cell phones. Dondero's testimony caused Daugherty to become concerned "Ellington had committed spoliation." Because of that concern and hearing Ellington removed money from the escrow account, Daugherty contends he decided to investigate where Highland and HERA's assets may have been transferred. To conduct that investigation, Daugherty admits he drove by Ellington's residence, his office, and his parents' and sister's houses and photographed the license plates of the vehicles that were parked at those locations. He then used public sources to identify the vehicles' owners and the entities to which they were purportedly connected. Daugherty maintains he "didn't do anything wrong" by conducting the investigation.

Ellington, however, viewed Daugherty's conduct as harassing and threatening. In the underlying proceeding, Ellington asserted a Chapter 85[2] stalking claim and an invasion-of-privacy claim against Daugherty. He sought actual damages, exemplary damages, and injunctive relief. Daugherty and Ellington

[2] TEX. CIV. PRAC. & REM. CODE §§ 85.001–.006.

testified at the temporary injunction hearing. Greg Brandstatter, a private investigator and security consultant hired by Ellington, also testified.

The record shows on several occasions during January 2021, Ellington's fiancé,[3] Stephanie, thought she was being followed by a black SUV. On February 2, 2021, she noticed someone in a black SUV actively taking pictures of her. She confronted the person and took a photograph of the vehicle and license plate number. On February 3, 2021, Ellington was in his office at 120 Cole Street when he noticed a tan vehicle resembling a Toyota 4 Runner stopped in front of his office. Ellington observed the driver taking pictures and/or a video of his office and the vehicles parked in front of the office. Ellington obtained the license plate number of the vehicle and noticed the driver looked a lot like Daugherty. After those incidents, Ellington asked Brandstatter to find out who had surveillance on Ellington and his family. Brandstatter opened an investigation on February 4, 2021.

When Brandstatter ran the license plate numbers of the vehicles Stephanie and Ellington saw the prior two days, he determined Daugherty was the registered owner of the black SUV and was listed on the title of the tan SUV. Brandstatter also drove by Daugherty's residence and confirmed the black SUV that followed Stephanie was parked at the home and the tan SUV Ellington saw was across the street from the property.

[3] Stephanie and Ellington are now married.

After confirming the vehicles' connection to Daugherty, Brandstatter set up a "counter-surveillance program." First, Brandstatter sat in a car outside of Ellington's office on Cole Street and waited for Daugherty to drive by. When one of Daugherty's vehicles drove by, Brandstatter took notes of what the vehicles would do. He then decided to move inside the office to watch and wait. Brandstatter testified he "really didn't have to wait for" Daugherty because Daugherty "was so obvious about what he was doing." Brandstatter took pictures of Daugherty out of the office window and then decided to set up static cameras to cover times Brandstatter could not be there watching. He set up cameras at Ellington's Cole Street office and the homes of Ellington's sister, father, and fiancé. He also set up a camera at Ellington's home on Potomac when Ellington moved there in September 2021. Brandstatter testified the cameras "showed a consistent and consolidated effort by Mr. Daugherty to gather information on Scott and his family." Between February 2, 2021, and November 23, 2021, Brandstatter's cameras captured Daugherty drive by the cameras 144 times. He testified, however, that Daugherty likely drove by more often than the cameras showed because discovery produced by Daugherty included photos and meta data Brandstatter's cameras did not catch. The meta data showed December 11, 2021, was "the most recent time" he had "a record of Mr. Daugherty making a pass by an Ellington property."

Brandstatter prepared a 67-page PowerPoint as the investigation summary. He testified about the PowerPoint and his findings and conclusions. For example, one

of the slides showed pictures of Daugherty driving by the Cole Street office three separate times on March 29, 2021. Brandstatter testified that example showed typical behavior he witnessed during his surveillance. According to Brandstatter, Daugherty "would drive by very slowly or stop and stare in the building." Brandstatter also noted Daugherty did not always drive the same vehicle. Brandstater concluded Daugherty "switched cars" because "he didn't want anybody to know it's him doing the surveillance." Brandstatter also documented Daugherty taking photos of the office through his open car window. Surveillance cameras also showed Daugherty driving away from the office immediately after Ellington's personal assistant left the building "in an apparent attempted to follow her." On April 21, 2021, Daugherty stopped his vehicle in front of the office and stayed there for ten or fifteen seconds. He made nine passes by the office that day. Brandstatter concluded the multiple passes "might be to intimidate" Ellington or his friends.

On April 23, 2021, Daugherty stopped and rolled down his windows and stared at the building again. On May 3, 2021, Brandstatter documented Daugherty driving a third vehicle, a Lincoln Navigator. Then, on May 4, 2021, Daugherty parked outside the Cole Street office, videotaped the office for twenty-eight minutes, and then followed Ellington's vehicle when Ellington left the office. During May and June 2021, Daugherty continued to drive by the Cole Street office and the homes of Marcia, Byron, and Stephanie. In July 2021, Daugherty began taking photos from his moving vehicle through a closed window. Brandstatter believes this change

occurred because Daugherty became aware of the surveillance. That methodology continued through November 2021. Ellington moved to a new home in Highland Park on Potomac in late September 2021. Daugherty drove the vehicle by Ellington's new home "close to when" Ellington moved in. Brandstatter told the court the cameras caught Daugherty making "seven passes in four days" by Ellington's new home.

Brandstatter's cameras also caught Daugherty driving by the homes of Ellington's sister, father, and fiancé. Ellington's father, Byron, lives in Parker, Texas, which is about 45 minutes from Dallas. Daugherty drove by Byron's house on three different days. On one of those days, Daugherty drove by Byron's house seven times. Ellington's sister, Marcia Maslow, lives in Murphy, Texas, which is also about 45 minutes from Dallas. Daugherty drove by Marcia's house on eight different days and parked outside of her home on one of those days. Marcia documented drive-bys on March 25, 2021, and April 14, 2021. On March 25, 2021, someone in a black Denali took multiple pictures of her house and driveway. At 3:00 p.m. on April 14, 2021, the same black Denali stopped to take pictures of Marcia's driveway. Ellington's car was parked in the driveway.

Marcia told Brandstatter how these incidents affected her and her children. She told Brandstatter her daughter was crying and upset at 10:35 p.m. on April 14, 2021, because she overheard her parents "talking about someone repeatedly stopping and taking pictures of the house, driveway, etc." The child was "hysterically afraid

he's going to break in her home and hurt her and [her sister]." That evening, Marcia's husband, Adam, told the children the home alarm was on and he "would sleep on the couch, so if anyone comes in downstairs for us, he'd be right there." According to Marcia, her oldest daughter told her that she has "so much anxiety" from "the man taking pictures of the house and was trying to find Uncle Bubba" i.e., Ellington. Marcia told Brandstatter she felt "defeated as a mother" because her children "feel unsafe in their own home."

Based on his experience, Brandstatter concluded Daugherty's behavior was a "pre-attack indicator" and "a precursor to a violent crime." Brandstatter concluded Daugherty was "conducting surveillance in succession of an attack." He explained what he meant by pre-attack surveillance:

> It goes back to the attack cycle again where the person picks the target. Mr. Daugherty already did that. And then the first thing an attacker does or a terrorist does is conduct surveillance. They make their plan from surveillance. They rehearse their plan, and then they'll execute their plan and have an escape route. It's the cycle of attack.

It appeared to Brandstatter that Daugherty was trying to determine Ellington's and his family's habits and patterns to make it easier to execute his plan and find an escape route.

Ellington testified he filed the underlying lawsuit in January 2022 because Daugherty's behavior appeared to "escalate" after Ellington moved into his new home in September 2021. He saw photographic evidence of Daugherty outside of the home taking pictures of random cars. He considered this to be an escalation

because Daugherty was outside the new home before Ellington's new address was publicly available. Ellington told the trial court he has "absolutely" been injured by Daugherty's conduct:

> The consequences of this are 24 hours a days, 7 days a week I'm looking over my shoulder. I'm worried about what can happen. I have no idea what Mr. Daugherty is capable of. Every noise in my home I have to go check it out. Every car that passes by myself and my now wife -- I got married last week -- and we got to go check who's outside. My family members are terrified, especially young nieces, that they had a run-in with Mr. Daugherty who we believe was filming or taking pictures outside their house when they were outside playing and saw him do so.
>
> So it's torture almost to not know what is around the corner from someone who's obsessed with my family's whereabouts, what cars are parked in front of our homes. It's troubling at every level.

Ellington asserted those injuries and feelings "absolutely" continued at the time of the injunction hearing.

Ellington also testified he fears for his own safety and for the safety of his family because:

> Again, if someone is taking this amount of effort into my life, just escalating, showing up at homes and warehouses that have no relation to my name at the time that he did so, I have to tell people like Mr. Brandstatter and others. And this is something that seemed to be escalating and only stopped at the Court's intervention, and I'm afraid of what he's capable of.

When Ellington reported the conduct to the Highland Park police department, the detective expressed concern because children were involved. The detective asked Ellington if he "was proficient in defending [himself] with a firearm because these

kinds of things escalate quickly." Ellington told the trial court a temporary injunction would be helpful because Daugherty has admitted he will abide by a court order:

> It would be someone doing something about it, taking action. As Mr. Daugherty just testified, he'd listen to Judge Williams' orders and follow them. I hope he means that.

After hearing the testimony, reviewing the evidence, and considering the parties' arguments, the trial court signed a temporary injunction enjoining Daugherty from being within 250 feet of Ellington, Stephanie, Marcia, Byron, their residences, and the Cole Street office. The injunction also enjoined Daugherty from taking photos, videos, or audio recordings of Ellington, Stephanie, Marcia, Byron, their vehicles, residences, or places of business, and from directing any communications toward Ellington, Stephanie, Marcia, or Byron. This appeal followed.

STANDARD OF REVIEW

We review a trial court's decision to grant a temporary injunction for abuse of discretion. *RWI Constr., Inc. v. Comerica Bank*, 583 S.W.3d 269, 274 (Tex. App.—Dallas 2019, no pet.). In the temporary-injunction context, a trial court abuses its discretion if it misapplies the law to established facts or if the evidence does not reasonably support the trial court's determination that the applicant satisfied the requisite elements. *See id.* at 274–75. We draw all legitimate inferences from the evidence in the light most favorable to the trial court's order. *Id.* at 274; *Veterinary Specialists of N. Tex., PLLC v. King*, No. 05-21-00325-CV, 2022 WL 406095, at *2 (Tex. App.—Dallas Feb. 9, 2022, no pet.) (mem. op.). Our abuse-of-discretion

review requires that we "view the evidence in the light most favorable to the trial court's order, indulging every reasonable inference in its favor," and defer to the trial court's resolution of conflicting evidence. *Amend v. Watson*, 333 S.W.3d 625, 627 (Tex. App.—Dallas 2009, no pet.); *see also McGuire-Sobrino v. TX Cannalliance LLC*, No. 05-19-01261-CV, 2020 WL 4581649, at *6 (Tex. App.—Dallas Aug. 10, 2020, no pet.) (mem. op.) ("The trial court has broad discretion in determining whether the pleadings and evidence support a temporary injunction."); *Jowell v. BioTE Med., LLC*, No. 05-21-00166-CV, 2021 WL 4810361, at *7–8 (Tex. App.—Dallas Oct. 15, 2021, no pet.).

ANALYSIS

The purpose of a temporary injunction is to preserve the status quo of the litigation's subject matter pending trial on the merits. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). The party seeking a temporary injunction must plead and prove three elements: (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.* Daugherty argues Ellington failed to establish the second and third elements to obtain a temporary injunction. First, he maintains Ellington is unlikely to prevail on either his stalking or invasion of privacy claims. Second, he contends Ellington's alleged injuries are neither imminent nor irreparable. We will address each argument in turn.

I. Probable Right to Relief

The probable right to relief element requires the applicant to present enough evidence to raise a bona fide issue as to its right to ultimate relief. *Young Gi Kim v. Ick Soo Oh*, No. 05-19-00947-CV, 2020 WL 2315854, at *2 (Tex. App.—Dallas May 11, 2020, no pet.) (mem. op.). This requires the applicant to produce some evidence supporting every element of at least one valid legal theory. *Id.*; *Holdings I, LLC v. Argonaut Ins. Co.*, 640 S.W.3d 915, 923 (Tex. App.—Dallas 2022, no pet.). The probable right to relief element does not require the applicant to show that it will prevail at trial, nor does it require the trial court to evaluate the probability that the applicant will prevail at trial. *Young Gi Kim*, 2020 WL 2315854, at *2; *see also Dallas Anesthesiology Assocs. v. Tex. Anesthesia Grp.*, 190 S.W.3d 891, 896–97 (Tex. App.—Dallas 2006, no pet.) ("To establish a probable right to the relief sought, an applicant is required to allege a cause of action and offer evidence that tends to support the right to recover on the merits."); *Jowell*, 2021 WL 4810361, at *7–8. An applicant is not required to show he will prevail at the final trial because the ultimate merits of the case are not before the trial court. *See Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993); *Tom James of Dallas, Inc. v. Cobb*, 109 S.W.3d 877, 884 (Tex. App.—Dallas 2003, no pet.). A probable right to recovery may be proven by alleging the existence of a right and presenting evidence tending to show that right is being denied. *Dallas Anesthesiology Assocs.*, 190 S.W.3d at 896–97 (citing *Bureaucracy Online, Inc. v. Schiller*, 145 S.W.3d 826, 829 (Tex. App.—Dallas 2004, no pet.).

A. Chapter 85 stalking claim

To prevail on a statutory civil stalking claim, the claimant must show the following:

> (1) on more than one occasion the defendant engaged in harassing behavior;
>
> (2) as a result of the harassing behavior, the claimant reasonably feared for the claimant's safety or the safety of a member of the claimant's family; and
>
> (3) the defendant violated a restraining order prohibiting harassing behavior **or:**
>
> > (A) the defendant, while engaged in harassing behavior, by acts or words threatened to inflict bodily injury on the claimant or to commit an offense against the claimant, a member of the claimant's family, or the claimant's property;
> >
> > (B) the defendant had the apparent ability to carry out the threat;
> >
> > (C) the defendant's apparent ability to carry out the threat caused the claimant to reasonably fear for the claimant's safety or the safety of a family member;
> >
> > (D) the claimant at least once clearly demanded that the defendant stop the defendant's harassing behavior;
> >
> > (E) after the demand to stop by the claimant, the defendant continued the harassing behavior; and
> >
> > (F) the harassing behavior has been reported to the police as a stalking offense.

(b) The claimant must, as part of the proof of the behavior described by Subsection (a)(1), submit evidence other than evidence based on the claimant's own perceptions and beliefs.

TEX. CIV. PRAC. & REM. CODE § 85.003 (emphasis added). The statute defines "harassing behavior" as:

> (4) "Harassing behavior" means conduct by the defendant directed specifically toward the claimant, including following the claimant, that is reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass the claimant.

TEX. CIV. PRAC. & REM. CODE § 85.001(4). A claimant who prevails in a suit under this chapter may recover actual damages and, subject to Chapter 41, exemplary damages. TEX. CIV. PRAC. & REM. CODE § 85.004. The cause of action created by this chapter is cumulative of any other remedy provided by common law or statute. TEX. CIV. PRAC. & REM. CODE § 85.006.

Daugherty argues Ellington did not prove he is likely to prevail on his stalking claim because he offered no evidence supporting the following three elements of section 85.003:

> (A) Daugherty, while engaged in harassing behavior, by acts or words threatened to inflict bodily injury on Ellington or to commit an offense against Ellington, a member of Ellington's family, or Ellington's property. TEX. CIV. PRAC. & REM. CODE § 85.003(a)(3)(A).
>
> (D) Ellington at least once clearly demanded that Daugherty stop Daugherty's harassing behavior. *Id.* § 85.003(a)(3)(D).
>
> (E) After the demand to stop by Ellington, Daugherty continued the harassing behavior. *Id.* § 85.003(a)(3)(E).

We agree Ellington presented no evidence to support findings that (1) he clearly demanded Daugherty stop his harassing behavior, or (2) Daugherty continued the harassing behavior after Ellington demanded he stop. Ellington admitted he did not

personally demand Daugherty stop the harassing behavior. He instead contends the underlying lawsuit was his demand for Daugherty to stop. Assuming without deciding the filing of a lawsuit can constitute a demand under section 85.003(a)(3)(D), the record shows Daugherty's behavior stopped after Ellington filed suit and obtained a temporary restraining order. He, therefore, presented no evidence Daugherty continued the harassing behavior after Ellington demanded he stop.

Under this record, we conclude the trial court abused its discretion by finding Ellington presented sufficient evidence of a probable right of recovery on his statutory stalking claim. We sustain Daugherty's first issue. This does not end our inquiry, however, because the injunction may be upheld if Ellington presented sufficient evidence of a probable right of recovery on his second claim of invasion of privacy. *See Holdings I, LLC*, 640 S.W.3d at 923 (some evidence of each element of only one valid legal theory is necessary to support a temporary injunction).

B. Invasion of privacy claim

A common law right to privacy exists under Texas law. *Billings v. Atkinson*, 489 S.W.2d 858, 860 (Tex. 1973); *Webb v. Glenbrook Owners Ass'n, Inc.*, 298 S.W.3d 374, 387 (Tex. App.—Dallas 2009, no pet.). The Texas Constitution protects personal privacy from unreasonable intrusion. *Tex. State Emps. Union v. Tex. Dep't of Mental Health & Mental Retardation*, 746 S.W.2d 203, 205 (Tex. 1987); *Webb*, 298 S.W.3d at 387. Here, Ellington asserted a claim for invasion of privacy by

intrusion. The elements of that claim are an intentional intrusion, physically or otherwise, upon another's solitude, seclusion, or private affairs, which would be highly offensive to a reasonable person of ordinary sensibilities and result in injury because of the intrusion. *B.G.C. v. M.Y.R.*, No. 05-20-00318-CV, 2020 WL 5987913, at *5 (Tex. App.—Dallas Oct. 9, 2020, pet. denied), *overruled on other grounds by Steward Health Care Sys. LLC v. Saidara*, 633 S.W.3d 120 (Tex. App.—Dallas 2021, no pet.) (citing *Moricz v. Long*, No. 06-17-00011-CV, 2017 WL 3081512, at *5 (Tex. App.—Texarkana July 20, 2017, no pet.) (mem. op.) (citing *Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex. 1993))).

The intrusion must be unjustified or unwarranted. *Billings*, 489 S.W.2d at 860; *Vaughn v. Drennon*, 202 S.W.3d 308, 320 (Tex. App.—Tyler 2006, no pet.). This type of invasion of privacy is generally associated with either a physical invasion of a person's property or eavesdropping on another's conversation with the aid of wiretaps, microphones, or spying. *Vaughn*, 202 S.W.3d at 320; *Clayton v. Wisener*, 190 S.W.3d 685, 696 (Tex. App.—Tyler 2005, pet. denied). However, actual physical invasion onto property or the use of eavesdropping technology is not required to prove an invasion of privacy. Rather, "the right to privacy is broad enough to include the right to be free of those willful intrusions into one's personal life at home and at work which occurred in this case." *Kramer v. Downey*, 680 S.W.2d 524, 525 (Tex. App.—Dallas 1984, writ ref'd n.r.e.). "Further, this right to be left alone from unwanted attention may be protected, in a proper case, by

injunctive relief." *Id.* (citing *Hawks v. Yancey*, 265 S.W. 233 (Tex. Civ. App.—Dallas 1924, no writ)). "The core of this claim is the offense of prying into the private domain of another, not publication of the results of such prying." *Miller v. Talley Dunn Gallery, LLC*, No. 05-15-00444-CV, 2016 WL 836775, at *10 (Tex. App.—Dallas Mar. 3, 2016, no pet.) (quoting *Blanche v. First Nationwide Mortg. Corp.*, 74 S.W.3d 444, 455 (Tex. App.—Dallas 2002, no pet.)).

Daugherty first contends Ellington does not have a probable right of recovery on his invasion of privacy claim because everything Daugherty photographed was observable from a public place. He relies on three cases to support his argument that viewing or photographing persons or objects in plain sight does not establish an invasion of privacy by intrusion claim. *See Floyd v. Park Cities People, Inc.*, 685 S.W.2d 96, 97 (Tex. App.—Dallas 1985, no writ), *abrogated on other grounds by Cain v. Hearst Corp.*, 878 S.W.2d 577 (Tex. 1994); *Webb*, 298 S.W.3d at 387; *Vaughn v. Drennon*, 202 S.W.3d 308, 320 (Tex. App.—Tyler 2006, no pet.). Each of those cases, however, is distinguishable from this case.

First, in *Floyd v. Park Cities People*, the alleged invasion of privacy involved the defendants (a city newspaper and its managing editor) taking a picture of the plaintiff on his front porch. *Floyd*, 685 S.W.2d at 97. This Court affirmed a summary judgment against the plaintiff because the plaintiff's yard was itself the subject of a publicly debated, city-wide controversy, and the photograph was taken and published in a report on the controversy. *Id.* The defendants presented "sufficient

summary judgment proof that the information they published was already part of the public record and was a true and accurate account of a matter of public interest." *Id.* at 97–98. As such, the plaintiff did not raise a genuine issue of material fact as to any element of his invasion of privacy claim. *Id.* at 98.

Here, Ellington, his business, his residence, his wife, and his family members are not the subject of public debate or a city-wide controversy. And unlike the plaintiff and his yard in *Floyd*, the images of Ellington, his family, and their residences and business are not part of the public record. They are private citizens entitled to "the right to be free of those willful intrusions into one's personal life at home and at work. . . ." *Kramer*, 680 S.W.2d at 525. Daugherty's actions constitute the types of "willful intrusions" we found in *Kramer* to be subject to an invasion of privacy claim.

Webb is similarly distinguishable. To begin, the *Webb* court reversed the grant of an injunction because the injunction was overly broad. *Webb*, 298 S.W.3d at 387. The breadth of the injunction is not at issue here. Moreover, the Webbs did not follow individuals or take pictures of their homes and vehicles while following them. Rather, the Webbs installed movement-activated surveillance cameras on their own property. *Id.* at 386. Those cameras captured movement on their property and adjacent properties. *Id.* at 386. The trial court enjoined their use of those cameras, and the Webbs appealed the injunction as overbroad because it restricted them from

engaging in the legal activity of recording movement on their own property. *Id.* at 386. The *Webb* court agreed and reversed the injunction as overbroad. *Id.* at 387.

Here, the record supports a finding by the trial court that Daugherty's behavior was not incidental and tangential to otherwise legal activity. Although taking photos of people and places in public view is not inherently illegal or improper, Daugherty's other conduct when taking his photos and videos changes the inherent nature of that behavior. He was not merely taking photos of random items or people. Instead, he chose his subjects carefully and drove slowly by them multiple times to take photos and videos. Brandstatter documented Daugherty driving by Ellington-related locations 144 times over an eleven-month period. Daugherty also parked outside of the Cole Street office and Marcia's residence. In addition, he would sometimes stop and stare at the Cole Street office or slowly pass by the office multiple times a day. On one occasion, after being parked outside of the Cole Street office, he approached Ellington's assistant and asked if Ellington was out of town and when he would be back. When she asked Daugherty who he was, Daugherty gave her a false name. Daugherty changed vehicles to disguise himself, and eventually began taking photos through closed car windows. Daugherty's actions far exceed the Webbs' installation of motion-activated cameras on their own property. The record shows Daugherty engaged in an intentional campaign to capture hundreds of photographs of Ellington, his family, and many locations associated with them. The sheer number of drive-bys capture by Brandstatter's cameras and Daugherty's manner in conducting his

surveillance (i.e., slow drive-bys, switching vehicles, and surveilling for extended periods) could reasonably be viewed as intimidating and invasive. For these reasons, *Webb* is inapplicable here.

Finally, *Vaughn* is distinguishable. First, *Vaughn* involved the appeal of a permanent injunction entered after a trial on the merits. *Vaughn*, 202 S.W.3d at 313. Here, we are reviewing a temporary injunction before a trial on the merits. Second, the conduct in *Vaughn* was not as widespread as Daugherty's actions here, did not have a menacing undertone, and occurred from property the defendant owned and his brother's property. In *Vaughn*, the Drennons' property shares a boundary with property owned by the Vaughns. *Id.* at 312. The Vaughns' property is higher in elevation. *Id.* When Millard Vaughn made some changes to the topography of his property near its boundary with the Drennon property, water began draining from the Vaughn property onto the Drennon property. *Id.* After finding water damage to their property, the Drennons sued the Vaughns alleging nuisance, intentional infliction of emotional distress, and invasion of privacy. *Id.* They also sought a temporary restraining order and a temporary injunction. *Id.*

In support of their invasion of privacy claim, the Drennons complained Millard Vaughn watched them through binoculars. *Vaughn*, 202 S.W.3d at 320. Mary Drennon testified Vaughn watched them from his own property and from his brother's house, which is across the street from the Drennons' home. *Id.* According to Mary, her kitchen sink is by a big double window that looks out toward the front

yard and the road. *Id.* On one occasion, while standing at the sink and looking out, Mary saw Vaughn parked in his brother's driveway looking at her through the blinds with his binoculars. *Id.* At other times, Vaughn watched the Drennons while they were outside. *Id.* The Tyler Court of Appeals concluded the evidence did not support a finding the Vaughns were guilty of invasion of privacy because "[o]ne cannot expect to be entitled to seclusion when standing directly in front of a large window with the blinds open or while outside. Thus, the evidence does not show intrusions into the Drennons' seclusion or private affairs." *Id*.

Here, in contrast, Daugherty did not merely watch Ellington and his family in one location or from one location. Rather, Daugherty drove by multiple locations hundreds of times, sometimes with multiple passes in one day. He even drove to other cities to watch and photograph Marcia and Byron. Daugherty's conduct was planned, targeted, and intentional. The frequency of his drive-bys along with his decision to stop, stare, and sometimes park while taking pictures and videos added a level of invasiveness and intimidation not present in *Vaughn*.

Under this record, we conclude Daugherty engaged in conduct that violated the "right to be left alone from unwanted attention" and is properly protected by injunctive relief. *See Kramer*, 680 S.W.2d at 525. The trial court could reasonably conclude Ellington proved a probable right of recovery on his invasion of privacy claim even though Daugherty engaged in conduct while on public property.

Daugherty also argues this Court requires proof of a physical invasion or eavesdropping to support an invasion of privacy claim. Daugherty implies his conduct does not meet that standard because he stayed on public property and did not eavesdrop. We disagree. A person's privacy right is a broad one:

> [T]he right to privacy is broad enough to include the right to be free of those willful intrusions into one's personal life at home and at work which occurred in this case. Further, this right to be left alone from unwanted attention may be protected, in a proper case, by injunctive relief.

Kramer, 680 S.W.2d at 525. In *Kramer*, we did not limit "willful intrusions" to close-up physical altercations and did not require evidence of electronic surveillance or eavesdropping. The conduct at issue in *Kramer* was similar to and of the same type and level of intrusiveness present here.

In *Kramer*, Downey and Kramer had a brief extra-marital affair. 680 S.W.2d at 525. After Downey told Kramer he wanted to end the affair, Kramer "began a pattern of conduct to thrust herself into his presence and otherwise to disrupt his domestic and professional life." *Id.* The evidence showed for "[s]everal days a week, for several years" Kramer would sit outside of Downey's home or office on a motor scooter or bicycle and follow him when he left his home or office. *Id.* Kramer also followed Downey when he was out with his wife and children. *Id.* She was "often [] observed waiting in the park across the street from the Downey residence or outside the office entrance to the hospital where Downey worked." *Id.* Many times she wore unusual clothing "to attract the attention of Downey's acquaintances." *Id.* She was

sometimes overheard making sexually vulgar remarks to Downey. *Id.* She also had unwanted letters, cards and gifts delivered to Downey. *Id.* We concluded injunctive relief was appropriate under that record and affirmed judgment. *Id.* at 525, 526. In so holding, we rejected Kramer's contention the injunction impinged on the exercise of her constitutional rights. *Id.* at 526.

The cases cited by Daugherty do not conflict with *Kramer* and are distinguishable. For example, in *Morales v. Barnes*, the only alleged intrusion was a single cease and desist letter sent from Morales to Barnes's employer in which Morales "alleged that Barnes had 'maliciously and purposefully contacted third parties making false, misleading and/or defamatory statements'. . . ." No. 05-17-00316-CV, 2017 WL 6759190, at *5 (Tex. App.—Dallas Dec. 29, 2017, no pet.). We held a single, written communication to Barnes's employer was insufficient to establish a prima facie case that Barnes suffered an intrusion upon his seclusion. *Id.* at *6. This is consistent with *Kramer* because sending a letter to a third party involves no physical or visual contact between people; it is not a physically invasive act. Sending a letter to a third party is inherently different from the conduct at issue here and in *Kramer* because following a person in a vehicle or on a bike or photographing the person while in plain view are visible, physical, bodily acts the target sees for himself. *Morales* is inapplicable here.

Similarly, in *Soda v. Caney*, the alleged intrusion was based on conduct directed at a third party and not the plaintiff. No. 05-10-00628-CV, 2012 WL

1996923, at *2–3 (Tex. App.—Dallas June 5, 2012, pet. denied) (mem. op.). In *Soda*, Caney challenged Soda's intrusion upon seclusion claim on the basis there was no evidence he physically invaded Soda's property or eavesdropped on his conversations. *Id.* at *2. Soda maintained he established the invasion requirement with evidence Caney went to his step-grandmother Fusako's home and reviewed her financial records, which included records showing her financial relationship with Soda. *Id.* Soda asserted "Caney was eavesdropping in the private affairs of Fusako and Soda." *Id.* We rejected Soda's argument. *Id.* This does not conflict with *Kramer* because, as in *Morales*, the alleged intrusion occurred between Soda and a third party. No physical contact occurred between Soda and Caney. Moreover, reviewing financial records is significantly different from physically following and photographing a person. *Soda* is inapplicable here.

Daugherty also cites the Fifth Circuit case of *Cornhill Ins. PLC v. Valsamis, Inc.* to support his contention Ellington did not prove a physical intrusion. 106 F.3d 80, 85 (5th Cir. 1997). *Cornhill* was an insurance coverage case in which insurers and underwriters sought a declaration that insurance policies issued to Valsamis, Inc. did not cover claims of sexual harassment asserted by Cheryl Gisentaner. *Id.* at 83. In deciding whether the insurer on one of the policies had a duty to defend, the Fifth Circuit had to determine whether Gisentaner alleged facts that constituted a claim for invasion of privacy or false imprisonment under Texas law. *Id.* at 85. Gisentaner alleged her supervisor and the company president made offensive comments and

inappropriate advances toward her. *Id.* at 83. The Fifth Circuit concluded those alleged acts "would not be cognizable as a cause of action for invasion of privacy under Texas law" because Gisentaner did not allege either a physical invasion of her property or eavesdropping on her conversation with the aid of wiretaps, microphones or spying. *Id.* at 85.

Cornhill is distinguishable from this case because *Cornhill* did not involve a temporary injunction, and Ellington does not allege he was sexually harassed. Here, Daugherty physically intruded on Ellison and his family by following them, watching them, and taking photographs and videos of them while in plain view. That conduct constitutes the type of willful intrusion required to prove an invasion of privacy claim. *See Kramer*, 680 S.W.2d at 525.

After reviewing the record in the light most favorable to the trial court's order, we conclude there was sufficient evidence to support the trial court's finding that Ellington showed a probable right to relief on his invasion of privacy claim. We overrule Daugherty's second issue.

II. Probable, Imminent, and Irreparable Injury

Daugherty next argues Ellington did not face imminent or irreparable injury. We disagree.

A. Imminent injury

First, he maintains Ellington did not face imminent injury because Daugherty's investigation concluded a month before Ellington filed suit. An

injunction should issue only to prevent an immediate harm or injury—not an injury that may arise at some point in the future. *Seib v. Am. Sav. & Loan Ass'n of Brazoria Cnty.*, No. 05-89-01231-CV, 1991 WL 218642, at *3 (Tex. App.—Dallas Oct. 25, 1991, no writ) (not designated for publication) (citing *Crawford Energy, Inc. v. Texas Indus. Inc.*, 541 S.W.2d 463, 467 (Tex. Civ. App.—Dallas 1976, no writ)). Past acts and practices will not furnish a basis for injunctive relief absent a showing that they will probably recur. *Id.* (citing *Panola Cnty. Comm'rs Ct. v. Bagley*, 380 S.W.2d 878, 885 (Tex. Civ. App.—Texarkana 1964, writ ref'd n.r.e.)). Where the evidence shows that the activity complained of has been a settled course of conduct continuing to or near the time of trial, however, the court may assume that the activity will continue absent clear proof to the contrary and grant the injunction. *Id.*; *State v. Tex. Pet Foods, Inc.*, 591 S.W.2d 800, 804 (Tex. 1979) (citing *Tex. Pet Foods, Inc. v. State*, 529 S.W.2d 820, 827 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.)). "In determining imminent harm, 'the trial court may determine that, when violations are shown up to or near the date of trial, the defendant has engaged in a course of conduct[,] and the court may assume that it will continue, absent clear proof to the contrary.'" *Kirkland v. Kirkland*, No. 02-22-00469-CV, 2023 WL 3643642, at *12 (Tex. App.—Fort Worth May 25, 2023, no pet.) (mem. op.) (quoting *Hartwell v. Lone Star, PCA*, 528 S.W.3d 750, 764 (Tex. App.—Texarkana 2017, pet. dism'd).

Although Daugherty stated he had "no immediate plans" to continue driving by Ellington's home and office, he also told the trial court multiple times that he did not believe he had done anything wrong. The trial court could reasonably believe he would continue his surveillance activities by the frequency of his pre-suit actions and continued belief those actions were not improper. According to Brandstatter, Daugherty's past conduct is a precursor to a violent crime. Brandstatter also testified he views Daugherty's actions as threats to commit a crime against Ellington or his family. Brandstatter's testimony supports the finding of imminent harm.

Moreover, the parties have a long history of contentious litigation between them and litigation still pending. By his own admission, Daugherty began his "surveillance" activities because of ongoing litigation. The trial court could reasonably conclude Daugherty would continue those activities as long as litigation continued unless enjoined by the court. The trial court found that "even if those activities have since slowed, or ceased, due to this pending hearing on this temporary injunction, the issuance of a temporary injunction is still necessary to maintain the status quo." In reaching this decision, the trial court emphasized Daugherty had harassed Ellington and his family members on a "near daily basis" and expressed no remorse or belief that he was doing anything wrong. We agree with Ellington that the trial court was "well within its discretion, on this record, to conclude that Daugherty did not think he was doing anything wrong and would continue, absent the injunction." We overrule Daugherty's third issue.

B. Irreparable injury

Daugherty further argues Ellington did not face an irreparable injury because he admitted he can quantify his damages. "An injury is irreparable if the injured party cannot be adequately compensated in damages or if the damages cannot be measured by a certain pecuniary standard." *Holdings I, LLC*, 640 S.W.3d at 923 (quoting *RWI Constr.*, 583 S.W.3d at 275 (citing *Butnaru*, 84 S.W.3d at 204)). "Establishing probable, imminent, and irreparable injury requires proof of an actual threatened injury, as opposed to a speculative or purely conjectural one." *Tex. Dep't of Pub. Safety v. Salazar*, 304 S.W.3d 896, 908 (Tex. App.—Austin 2009, no pet.). "In other words, before an injunction issues there must be evidence that injury is threatened." *Holdings I,* LLC, 640 S.W.3d at 923 (quoting *Dall. Gen. Drivers, Warehousemen & Helpers v. Wamix, Inc.*, 156 Tex. 408, 295 S.W.2d 873, 879 (1956)).

A party proves irreparable injury for injunction purposes by proving damages would not adequately compensate the injured party or cannot be measured by any certain proper pecuniary standard. *Jowell v. BioTE Med., LLC*, No. 05-21-00166-CV, 2021 WL 4810361, at *7–8 (Tex. App.—Dallas Oct. 15, 2021, no pet.) (citing *Young Gi Kim*, 2020 WL 2315854, at *5); *Butnaru*, 84 S.W.3d at 204. It is the adequacy of the remedy, rather than the existence of a remedy, however, that establishes the right to injunctive relief; that is, the legal remedy must be as practical and efficient to the ends of justice as the equitable remedy. *Seib*, 1991 WL 218642,

at *3 (citing *Irving Bank & Tr. Co. v. Second Land Corp.*, 544 S.W.2d 684, 688 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.)). The purpose of a temporary injunction is to preserve the status quo of the litigation's subject matter pending a trial on the merits. *Dallas Anesthesiology Assocs.*, 190 S.W.3d at 896–97 (first citing *Butnaru*, 84 S.W.3d at 204; and then citing *Wilson N. Jones Mem'l Hosp.*, 188 S.W.3d at 218). The status quo is defined as, "the last, actual, peaceable, non-contested status which preceded the pending controversy." *Pierce v. State*, 184 S.W.3d 303, 308 (Tex. App.—Dallas 2005, no pet.) (quoting *In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004) (orig. proceeding)).

The trial court found Ellington would suffer irreparable harm if Daugherty is not restrained "from continuing to harass Plaintiff and his family" because:

> Plaintiff reasonably fears that Defendant may cause him or his family bodily harm, and the accompanying anxiety interferes with his ability to conduct his normal, daily activities. Plaintiff has also already suffered irreparable harm due to the harassment and invasions of privacy already suffered.

We conclude these effects satisfy the irreparable injury element of injunctive relief. *See*, *e.g.*, *Fischer v. Clifford Fischer & Co.*, No. 05-20-00196-CV, 2022 WL 3367559, at *6 (Tex. App.—Dallas Aug. 16, 2022, no pet.) (fear, panic, and anxiety caused by defendant's conduct sufficient to show irreparable injury). We overrule Daugherty's fourth issue.

CONCLUSION

The trial court had broad discretion in determining whether the pleadings and evidence support a temporary injunction. Viewing the evidence in the light most favorable to the temporary injunction and disregarding all evidence and inferences to the contrary, we conclude the trial court did not err when it rendered the temporary injunction. Accordingly, we affirm the temporary injunction.

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/Robbie Partida-Kipness/
ROBBIE PARTIDA-KIPNESS
JUSTICE