Conditionally Granted and Opinion Filed March 15, 2024.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-23-00768-CV

IN RE JOHN LEE, CODE BLUE SOLAR, LLC AND NXT LVL CONSULTING, LLC, Relators

Original Proceeding from the County Court at Law No. 4
Dallas County, Texas
Trial Court Cause No. CC-22-04389-D

OPINION

Before Justices Partida-Kipness, Carlyle, and Garcia
Opinion by Justice Partida-Kipness

In this original proceeding, relators seek mandamus relief from a gag order prohibiting them and anyone affiliated with them from posting on social media about the underlying lawsuit or the parties during the pendency of the litigation. Relators argue the gag order is unconstitutional. We agree. Gag orders are presumptively unconstitutional. To overcome this presumption, there must be an imminent and irreparable harm to the judicial process and the judicial action must represent the least restrictive means to prevent that harm. These elements must be supported by specific findings and evidence. Because the gag order before us lacks sufficient specific findings and evidence, we conditionally grant mandamus relief.

BACKGROUND

This original proceeding arises out of a commercial dispute, the particularities of which are not pertinent here. But, in short, John Lee, Code Blue Solar, LLC, and NXT LVL Consulting, LLC (relators) sued Dynamic SLR, Inc. and other related persons and entities, including its law firm, Verge Law PC, and attorney Kyle Kertz (Verge Law and Kertz are collectively referred to as Verge). Relators claim they partnered with Dynamic and obtained a 21.7% ownership share in the company, but Dynamic—with the help of Verge—defrauded relators and improperly ousted them from their purported ownership.

I. Disputes in the Trial Court

From the outset of the litigation, Verge and relators engaged in a series of contentious procedural disputes in the trial court, which culminated in the gag order at issue. Those disputes began when relators sought and obtained an order authorizing substitute service on Verge. Verge specially appeared and moved to quash service, arguing the affidavit on which relators' motion for substitute service was fraudulent. Verge maintained the affidavit predated relators' suit against them and was an altered version of another affidavit relators used in a separately filed, and allegedly identical, lawsuit. Verge further argued relators' multiple lawsuits were a blatant attempt to forum shop.

In support of its motion to quash, Verge inadvertently attached a privileged document. Verge contacted relators' counsel to snapback the privileged document,

and relators' counsel allegedly represented the document would be deleted. Receiving no written confirmation, however, Verge filed an emergency motion for the return of the privileged document and a motion for temporary and permanent sealing order. Verge asked the trial court to seal the privileged document filed with the court, order relators to return or delete it, and prohibit relators from further dissemination of it. The trial court issued an order temporarily sealing the privileged document and setting a hearing to determine whether to issue a permanent sealing order.

Days later, in an email to relators' counsel, Verge's counsel accused relators of violating the temporary sealing order by filing copies of the privileged document in two separate lawsuits despite previous representations it would be deleted. Verge demanded appropriate remedial action. Instead, relators moved to have the temporary sealing order vacated, arguing they were not afforded proper notice. Verge disputed the lack of notice and argued relators were blatantly disregarding the trial court's temporary sealing order by filing unredacted copies of the privileged document in multiple court proceedings. Verge also accused relators of posting the privileged document on social media with harassing and threatening messages.

In a subsequent hearing, the trial court instructed relators' counsel to comply with the temporary sealing order until the court decided whether to enter a permanent sealing order. The trial court further instructed relators' counsel to have relators, and anyone associated with them, take down the social media posts in question. Within

hours of the hearing, Verge filed an emergency motion for entry of a gag order against relators, alleging relators posted new harassing and threatening messages on social media despite the court's instructions and admonishments.

II. The Gag Order

In its emergency motion for a gag order, Verge accused relators, their attorneys, or both of multiple forms of inappropriate conduct, including (1) repeated violations of the trial court's temporary sealing order and open-court instructions, (2) "incessant harassing social media posts," (3) "nefarious, vindictive, retaliatory intentions and thinly-veiled threats," (4) "bullying and . . . ongoing unethical conduct," and (5) gamesmanship. Verge's motion, however, did not detail any specific conduct underlying these accusations, instead relying on the court's general familiarity with the case.

Verge alleged that immediately after the hearing at which the trial court instructed relators to comply with its temporary sealing order and to take down social media posts containing Verge's privileged document, relators went back to social media and publicly posted new harassing and threatening messages. Specifically, Verge alleged relators posted "a recording of their process server improperly attempting to serve [Verge's] counsel with a subpoena," tagging Kertz's social media account, and taunting him by accusing him of "conspiring to fraud and theft" and "trying to hide behind his secretary." Verge also alleged the video was reposted

by a purported employee of relators, who also tagged Kertz and called him a "bitch." Verge included purported screenshots of the two posts in the motion.

Based on the foregoing allegations, Verge requested the following:

> A gag order restraining [relators], their counsel, and any person and/or entity acting in concert with them, from posting on social media anything relating to this case for the pendency of this litigation, including but not limited to posts discussing or relating to [Verge], service of process on the same, confidential information related to privileged communications between [Verge] and [its] counsel, and any filings, rulings, and orders issued in this case.

Verge argued it has "suffered, and will continue to suffer, immediate and irreparable harm if [relators] are not restrained from their wrongful conduct," pointing to—but not explaining or citing any evidence—their reputations, their clients' privacy interests, and the "judicial system as a whole." Verge further argued relators would not be unduly harmed by a gag order because it is limited in scope and "only seeks to prohibit [relators] from creating posts on social media related to the ongoing case, and [Kertz] specifically, for the pendency of this litigation."

Relators did not file a written response but appeared at a hearing on the emergency motion. At the hearing, Verge offered no witnesses or exhibits as evidence, though Verge claimed the screenshots of the social media posts included in their motion constituted evidence. Verge's attorney described the alleged source and content of the social media posts and alleged relators posted additional harassing

social media after Verge's motion had been filed.[1] Verge also alluded to relators' history in the case, including their alleged submission of a false affidavit and public posting of Verge's privileged information. Verge claimed relators were harassing Verge, attempting to try the case in the court of public opinion, and polluting the potential jury pool.

In response, relators argued gag orders are presumed unconstitutional and Verge failed to meet the requirements of a gag order. Specifically, relators argued the alleged harm related to Verge as opposed to the judicial process, and Verge provided no evidence to support a gag order. Relators also objected to the trial court's consideration of the screenshots, arguing they had not been admitted into evidence and were inadmissible.

The trial court did not address or rule on relators' evidentiary objection. Instead, the judge explained she was not going to allow the case to be litigated outside the court and would be granting the gag order. She also admonished relators' counsel to "have a conversation with your client. This behavior is not appropriate and he needs to stop." After the hearing, the trial court issued a gag order prohibiting relators from posting on social media about the case or the parties during the pendency of the lawsuit. In the gag order, the trial court stated the court's findings and conclusions were "based on the Instagram posts by Plaintiff John Lee

[1] Verge alluded to having provided the court coordinator with "supplemental screenshots," but no copies are included in the record, including the supplemental record provided by Verge.

(@nxtlevel.john) and his affiliates (including but not limited to Juan Alba (@nxtlevel.juan)).” The gag order states the trial court found Verge “demonstrated that an imminent and irreparable harm to the judicial process will deprive [it] of a just resolution of this dispute” and “a gag order represents the least-restrictive means to prevent an imminent or irreparable harm to the judicial process.” The gag order restrains not only relators but also their employees, agents, representatives, independent contractors, and any other person affiliated with them. Specifically, the order prohibits these persons from “creating posts on social media related to the ongoing case, and Defendant Kertz specifically, for the pendency of this litigation.”

Relators filed this original proceeding seeking to have the gag order vacated. We requested a response to the petition. Verge filed a response and a supplemental record. Relators replied. Verge then filed a sur-response and a second supplemental record. We now review relators’ request for mandamus relief.

STANDARD OF REVIEW

Mandamus is the appropriate method by which to challenge a gag order. *In re State Farm Lloyds*, 254 S.W.3d 632, 634 (Tex. App.—Dallas 2008, orig. proceeding). To be entitled to mandamus relief, a relator generally must show (1) the trial court clearly abused its discretion and (2) the relator lacks an adequate remedy by appeal. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding). There is no adequate appellate remedy for an improper gag order; it is not a final order or an appealable interlocutory order. *Grigsby v. Coker*, 904

S.W.2d 619, 621 (Tex. 1995) (orig. proceeding) (per curiam); *State Farm Lloyds*, 254 S.W.3d at 636. Therefore, resolution of this mandamus petition turns on whether the trial court clearly abused its discretion in issuing the subject gag order.

APPLICABLE LAW

A judicial order that forbids certain communications before they occur, also known as a gag order, constitutes a prior restraint on speech. *State Farm Lloyds*, 254 at 634. The seminal case in Texas analyzing the constitutionality of gag orders in civil proceedings is *Davenport v. Garcia*. *See* 834 S.W.2d 4 (Tex. 1992) (orig. proceeding). In *Davenport*, the Texas Supreme Court recognized the Texas Constitution provides greater protection of speech than the United States Constitution and held that prior restraints on speech in a civil case are presumptively unconstitutional under Article I, Section 8 of the Texas Constitution. *Id.* at 7–10; *compare* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press.") *with* TEX. CONST. art. I, § 8 ("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; . . ."). A gag order in a civil proceeding will withstand state constitutional scrutiny only if there are specific findings supported by evidence that (1) an imminent and irreparable harm to the judicial process 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.

The supreme court intentionally set a high bar for a gag order to withstand constitutional scrutiny, explaining "a prior restraint will withstand scrutiny under this test only under the most extraordinary circumstances." *Id.* "[O]nly an imminent, severe harm can justify prior restraint, and in the context of gag orders, that harm must be to the judicial process." *Id.* The supreme court further explained our state constitution disfavors prior restraints on the right of free expression and strongly prefers post-speech remedies, such as sanctions, to address harmful or otherwise wrongful conduct and speech. *Id.* at 10–11.

Other courts have interpreted *Davenport* to require much more than conclusory or generalized findings supporting a gag order for it to pass constitutional muster. *See, e.g.*, *In re Nelson*, No. 08-22-00056-CR, 2022 WL 1284544, at *4–5 (Tex. App.—El Paso Apr. 29, 2022, orig. proceeding) (reviewing examples). In *Nelson*, for example, the El Paso Court of Appeals found a gag order to be unconstitutional under *Davenport* because its publicity finding was conclusory. *Id.* "When a gag order is based on pretrial publicity concerns, the order must 'make specific findings *detailing the nature or extent* of the pretrial publicity' and *show how* that publicity 'will impact the right to a fair and impartial jury.'" *Id.* (quoting *In re Graves*, 217 S.W.3d 744, 752–53 (Tex. App.—Waco 2007, orig. proceeding) (emphasis added).

Similarly, in *In re Benton*, the Houston Fourteenth Court of Appeals directed a trial court to vacate its gag order because its findings were too general. *See* 238 S.W.3d 587, 598 (Tex. App.—Houston [14th Dist.] 2007, orig. proceeding). The court of appeals held the trial court's generalized finding that publicity surrounding the case might jeopardize the court's ability to seat an impartial jury could not justify the gag order since there had been "no showing that such publicity is materially prejudicial" and "[e]ven pervasive and concentrated publicity is not prejudicial per se." *Id.*; *see also Graves*, 217 S.W.3d at 752 (concluding a gag order taking judicial notice of local and national newspaper coverage of criminal case did not satisfy *Davenport* standard because there were no specific findings detailing the nature or extent of the pretrial publicity or explaining how pretrial publicity would impact the right to a fair and impartial jury).

ANALYSIS

To pass constitutional muster, a gag order must include specific findings (1) detailing the nature and extent of the harm to the judicial process, and (2) explaining how no meaningful remedy exists short of a gag order. We conclude the gag order at issue here meets neither requirement. The gag order is, therefore, unconstitutional, and the trial court abused its discretion by issuing it.

I. Nature and Extent of the Harm to the Judicial Process

Harassing and offensive speech is not prejudicial per se to the judicial process. *See Benton*, 238 S.W.3d at 598. In the context of gag orders, harm to the judicial

process is key. *Davenport*, 834 S.W.2d at 10. A gag order must include specific findings *detailing the nature or extent* of the pretrial publicity and *show how* that publicity will impact the right to a fair and impartial jury. *See Nelson*, 2022 WL 1284544, at *4. Relevant to this showing is the size of the potential jury pool. *See id.* at *4–5. "[I]n a populous metropolitan area, the pool of potential jurors is so large that even in cases attracting extensive and inflammatory publicity, it is usually possible to find an adequate number of untainted jurors." *Benton*, 238 S.W.3d at 600 (quoting *Columbia Broad. Sys., Inc. v. U.S. Dist. Ct. for the Cent. Dist. of Cal.*, 729 F.2d 1174, 1181 (9th Cir. 1984)). "[P]ublicity about the case must be so pervasive, prejudicial, and inflammatory that there is a substantial likelihood that prospective jurors' initial opinions cannot be set aside." *Id.* at 598.

Here, the underlying proceeding is pending in Dallas County, which is the second most populous county in Texas. Thus, the pool of potential jurors is large. This population size generally lowers the need for any gag order and should also raise the degree of specificity required to show the nature and extent of harm to the judicial process that would occur without a gag order.

Further, although Verge and the trial court discussed the gag order as if the case were set for a jury trial, the record suggests the case had been set for a bench trial at the time the gag order was issued. We are not aware of any cases analyzing the constitutionality of a gag order addressing pretrial publicity in a case set for bench trial. The size of the potential jury pool and likelihood of juror bias were

irrelevant at the time of the order if the case was set for a bench trial. Thus, Verge and the trial court would need to demonstrate—and the gag order itself would need to explain—how the pretrial publicity affects other areas of the judicial process, such as the impartiality of the judge or the availability and testimony of potential witnesses. They failed to do this.

Moreover, the only harms identified in Verge's motion were general allegations of reputational damages, harassment, harm to its client's privacy interests, and "a blatant disregard of court orders and the judicial system as a whole." Relying on the screenshots of the social media posts, the trial court found Verge demonstrated that an imminent and irreparable harm to the judicial process will deprive Verge of a just resolution of this dispute. This finding is conclusory and does not detail specific facts as required to meet constitutional requirements.

Overall, the gag order lacks any specific findings supporting its conclusion there is an imminent and irreparable harm to the judicial process, such as findings showing the reach of the social media or its effect on potential jurors, potential witnesses, or the judge.

II. Existence of a Meaningful Remedy Short of a Gag Order.

Verge and the trial court gave little or no thought to determining whether any meaningful remedy exists to address the alleged harms short of a gag order. For example, a protective order can protect a party from harassment, invasion of privacy, and inappropriate dissemination of sensitive materials. *See* TEX. R. CIV. P. 192.6.

Improper statements, violations of court orders, and bad-faith abuse of the judicial process may be met with sanctions or contempt. *See Brewer v. Lennox Hearth Prods., LLC*, 601 S.W.3d 704, 707 & n.2 (Tex. 2020); *Davenport*, 834 S.W.2d at 10–11 (explaining that sanctions, rather than a gag order, may have been a better remedy to address relator's improper statements). Recusal can address a judge whose impartiality might reasonably be questioned. *See* TEX. R. CIV. P. 18b(b)(1). The list goes on. Here, it is not apparent based on the record before us, let alone the gag order itself, how post-speech remedies like these cannot meaningfully address the alleged harms identified in Verge's motion.

The scope of the gag order is also problematic. It restrains not merely relators but also anyone "affiliated" with them, specifically including, for example, any "independent contractor," someone over whom relators would naturally lack any control. Setting aside the issues of vagueness, enforceability, and due process, among others, we fail to see how a gag order this broad represents the least restrictive means to prevent the alleged harm to the judicial process. The trial court made no specific findings supported by evidence that there is a substantial likelihood that an unspecified independent contractor—or anyone else "affiliated" with relators—is a few keystrokes away from posting something on social media so pervasive, prejudicial, and inflammatory that it will cause irreparable harm to the judicial process and the just resolution of this lawsuit.

CONCLUSION

Pretrial publicity can potentially harm the judicial process. But to obtain a gag order prohibiting certain pretrial publicity, such as social media posts, there must be specific findings supported by evidence detailing the nature and extent of the harm, showing how the publicity will impact the right to a fair and impartial trial, and explaining how no other meaningful remedy exists, including a more narrowly tailored gag order. Considering gag orders are presumptively unconstitutional, a gag order without these specific findings fails to overcome the presumption and is necessarily an abuse of discretion.

Here, the trial court made none of these specific findings and, therefore, abused its discretion in issuing the gag order. However familiar the trial court may have been with the parties and their conduct, it was still required to support its gag order with specific findings and evidence rather than conclusory assertions. Regardless of whether this case is set for a jury trial or a bench trial, and assuming without deciding the screenshots of the social media posts were properly admitted as evidence, we conclude the trial court's gag order failed to overcome the presumption of unconstitutionality because it lacks sufficient specific findings supported by evidence that establishes the two necessary elements under *Davenport*.

We express no opinion on whether a different gag order or another remedy would be appropriate to address relators' alleged conduct. We simply conclude the gag order in its current form fails the *Davenport* test and, therefore, must be vacated.

Because we hold the gag order is unconstitutional, we need not address relators' other arguments in support of its requested mandamus relief.

Based on the foregoing, we conditionally grant the petition for writ of mandamus and direct the trial court to vacate its July 17, 2023 gag order. The writ will issue only if the trial court fails to act in accordance with this opinion.

/Robbie Partida-Kipness/
ROBBIE PARTIDA-KIPNESS
JUSTICE

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