COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

1ST AND TRINITY SUPER MAJORITY, LLC, and 3RD AND CONGRESS SUPER MAJORITY, LLC,	§	No. 08-20-00230-CV
Appellants,	§	Appeal from the
v.	§	250th Judicial District Court
GREGORY S. MILLIGAN, In His Individual Capacity And As Receiver For WC 1ST AND TRINITY LP and WC 3RD AND CONGRESS, LP; THE ROY F. & JOANN COLE MITTE FOUNDATION; STEPHEN WAYNE LEMMON; RAY CHARLES CHESTER; and RHONDA BEAR MATES,	§	of Travis County, Texas
	§	(TC# D-1-GN-20-003550)
	§	
	§	
	§	
Appellees.	§	

O P I N I O N

This appeal arises from a lawsuit filed by the majority owners in two limited partnerships against a court appointed receiver, the attorneys advising the receiver, a nonprofit entity that moved for the appointment of the receiver, and its attorney. The decision to appoint the receiver was separately challenged in a different case appealed to the Third Court of Appeals, which recently upheld the appointment. *See WC 1st & Trinity, LP v. Roy F. & JoAnn Cole Mitte Found.*, No. 03-

19-00799-CV, 2021 WL 4465995 (Tex.App.--Austin Sept. 30, 2021, pet. denied) (mem. op.).[1] In our case, the trial court dismissed the claims against all the defendants based on the Texas Citizens Participation Act (the TCPA) and Rule 91a of the Texas Rules of Civil Procedure. The trial court further awarded attorney's fees and sanctions to the named defendants. For the reasons explained below, we affirm the trial court in all respects.

I. FACTUAL BACKGROUND

We draw the following factual background from the record in our case, as well as that outlined in the Third Court's recent opinion in *WC 1st & Trinity, LP* and related cases.[2] And as we detail below, the same trial judge that entered the order here also heard the principal matters at issue in *WC 1st & Trinity, LP*. Accordingly, the several proceedings below cannot be considered in isolation of each other.

A. The Original Agreement

Nate Paul is a real estate investor who does business through a network of entities which used "World Class" or "WC" in their names. One such entity is the "World Class Capital Group," but he also owned and controlled two other entities, known as "WC 1st and Trinity, LP" and "WC 3rd and Congress, LP" (collectively, the Limited Partnerships). These two limited partnerships each owned properties in downtown Austin at the locations suggested by their names: "WC 1st

[1] Our case was also originally docketed with the Third Court of Appeals but was transferred as a part of the Texas Supreme Court's ongoing docket equalizations efforts. We apply that court's precedents to the extent they might conflict with our own. TEX.R.APP.P. 41.3.

[2] "It is well recognized that a trial court may take judicial notice of its own records in a cause involving the same subject matter between the same, or practically the same, parties." *Gardner v. Martin*, 345 S.W.2d 274, 276 (Tex. 1961). The same is true for an appellate court as well. *Hernandez v. Sommers*, 587 S.W.3d 461, 471 (Tex.App.--El Paso 2019, pet. denied); *WC 1st & Trinity, LP v. Roy F. & JoAnn Cole Mitte Found.*, No. 03-19-00799-CV, 2021 WL 4465995, at *1, n.1 (Tex.App.--Austin Sept. 30, 2021, pet. denied), *citing Reynolds v. Quantlab Trading Partners US, LP*, 608 S.W.3d 549, 558 n.3 (Tex.App.--Houston [14th Dist.] 2020, no pet.). Appellant conceded at oral argument that a transferee court may similarly take judicial notice of related proceedings before the transferor court. We do so in this case.

and Trinity, LP" owned property at the corner of First and Trinity Streets, and "WC 3rd and Congress, LP" owned property at the corner of Third Street and Congress Avenue.

The Limited Partnerships designated the World Class Capital Group as their limited partner and named the general partners and the majority interest holders as two limited liability corporations with almost the same name as the partnerships themselves: "WC 1st and Trinity GP, LLC" and "WC 3rd and Congress GP, LLC" (collectively, the World Class General Partners). Nate Paul also owns and controls these two entities. *WC 1st & Trinity, LP*, 2021 WL 4465995, at *1. In accordance with the limited partnership agreements, each general partner owned a controlling interest in its respective limited partnership and had sole authority to manage the respective limited partnership's affairs.

In 2011, Appellee, the Roy F. & Joann Cole Mitte Foundation (Mitte), a nonprofit organization that provides community grants and scholarships, invested a portion of its endowment with the Limited Partnerships. It acquired approximately 16% of the Trinity Limited Partnership, and approximately 6% of the Congress Limited Partnership. *Id.* Mitte signed agreements in which it acknowledged that the World Class General Partners would retain the sole authority to manage the partnerships.

B. The Document Production Lawsuit and the Arbitration Proceedings

The dispute between Mitte and the several World Class entities began in 2018, when the World Class General Partners allegedly refused Mitte's request to review financial information about the Limited Partnerships. Mitte sued in the 126th District Court of Travis County, naming as defendants the World Class General Partners and the Limited Partnerships (collectively, the World Class Entities). In response to the suit, the World Class Entities invoked an arbitration provision in the limited partnership agreements.

In July 2019, the parties reached a settlement agreement in the arbitration proceedings under which the World Class General Partners agreed to purchase Mitte's interests in the Limited Partnerships for $10.5 million. But four days before the payment was due, the FBI raided the World Class Entities' office, as well as Nate Paul's residence, in connection with a pending federal criminal investigation. On the day before the payment deadline, the World Class Entities informed Mitte that no payment would be made under the settlement agreement. The settlement agreement gave Mitte two options at that point: (1) end the arbitration and sue for breach of the settlement agreement; or (2) declare the agreement void and continue with the arbitration. Mitte chose the latter option, and the arbitration continued.

C. The Arbitrator Appoints a Receiver

In October 2019, Mitte filed a motion asking the arbitrator to appoint a receiver over the Limited Partnerships, asserting that their assets were "at imminent risk of being lost, removed, or materially injured." The motion cited the FBI raid, the World Class Entities' failure to pay the amount due under the settlement agreement, and other factors showing that the entities might be in financial distress. The arbitrator granted the motion and appointed Appellee Gregory S. Milligan as the receiver. But at the World Class Entities' request, the arbitrator delayed signing the receivership order over a weekend to accommodate their request for more time to review the order. By Monday, however, the World Class Entities represented to the arbitrator and Mitte's attorney that they had sold the two properties to unnamed "affiliates" of the World Class Entities; the Trinity property had purportedly sold for $23 million, and the Congress property for $25 million—a representation later found to be false.

The arbitrator, though, signed the order appointing Milligan as receiver over the properties. Less than a month later, Mitte filed a petition with the district court to confirm Milligan's

appointment as receiver, which Judge Joe Carroll, as presiding judge for the 126th district court, granted (the Confirmation Order). The World Class Entities then filed an interlocutory appeal from the Confirmation Order as well as a petition for mandamus relief with the Third Court of Appeals, seeking a stay of the order. The Third Court temporarily stayed the Confirmation Order, and "prohibit[ed] the alienation of the real property owned by the [Limited] Partnerships while the Court's stay is in place." *In re WC 1st & Trinity, LP*, No. 03-19-00798-CV, 2019 WL 5793123, at *1 (Tex.App.--Austin Nov. 6, 2019, order) (mem. op.) (per curiam).

D. The District Court Appoints a Receiver

In the meantime, Mitte petitioned the same district court to appoint a receiver over the Limited Partnerships and the partnership properties under section 64.001 of the Civil Practice and Remedies Code. *See* TEX.CIV.PRAC. & REM.CODE ANN. § 64.001 (enumerating circumstances under which "[a] court of competent jurisdiction may appoint a receiver"); *see also* TEX.BUS.ORGS.CODE ANN. § 11.404 ("Appointment of Receiver to Rehabilitate Domestic Entity"). The World Class Entities moved to stay the receivership proceedings in the district court, arguing that their interlocutory appeal of the Confirmation Order stayed further proceedings in the district court proceedings.

Judge Jan Soifer, sitting as presiding judge, held a hearing on both the stay motion and the motion for an appointment of the receiver. Testimony at the hearing outlined, among other things, the false representation the World Class Entities had made to the arbitrator about the sale of the properties. Judge Soifer then issued an order appointing Milligan as receiver over the Limited Partnerships and all their properties (the Appointment Order). The Appointment Order not only granted Milligan all powers to control the Limited Partnerships' assets, but also granted Milligan

the same authority to manage the Limited Partnerships that the general partners themselves possessed under the respective partnership agreements.

The World Class Entities subsequently filed an interlocutory appeal from the Appointment Order and sought emergency relief prohibiting the alienation of the properties, which the Third Court of Appeals granted. *WC 1st & Trinity, LP v. Roy F. & JoAnn Cole Mitte Found.*, No. 03-19-00905-CV, 2019 WL 6972679, at *1 (Tex.App.--Austin Dec. 19, 2019, order) (mem. op.) (per curiam). The Third Court of Appeals also abated the appeal and remanded the case to the district court to determine whether it should require the World Class Entities to file a supersedeas bond. Judge Soifer thereafter ordered the World Class Entities to post a $3,875,305 supersedeas bond that was ultimately due by April 21, 2020. *WC 1st & Trinity, LP v. Roy F. & JoAnn Cole Mitte Found.*, No. 03-19-00905-CV, 2020 WL 2832486, at *1 (Tex.App.--Austin May 29, 2020, order) (mem. op.) (per curiam).

No bond was posted by that date, but on April 21, 2020, Nate Paul created two Delaware corporate entities, which are our Appellants here: "1st and Trinity Super Majority, LLC" and "3rd and Congress Super Majority, LLC" (collectively, the Super Majority Entities). Also on April 21, the World Class General Partners transferred their interest in the Limited Partnerships to the Super Majority Entities. Nate Paul executed the documents on behalf of both transferor and transferee.

The World Class Entities never posted the bond, and Mitte thereafter informed the court of appeals of this fact. *WC 1st and Trinity, LP*, 2020 WL 2832486, at *1. In response, on May 29, 2020, the court of appeals lifted its previous stay of the Appointment Order, including the prohibition against alienating the real property owned by the Limited Partnerships. *Id.*

E. Disputes Arise Over Milligan's Authority

Also in May 2020, Milligan moved to supplement the Appointment Order in the district court, alleging that the World Class Entities had refused to comply with the Appointment Order's provisions, including turnover of the Limited Partnerships' financial records. Milligan asked the district court to sign an order: (1) clarifying that the receivership "is in effect and that the Receiver has full authority to act on behalf of the [Limited] Partnerships unless and until the [Limited] Partnerships post a supersedeas bond in the amount previously ordered," and (2) that Milligan "is the sole person authorized to operate, control, and manage any and all Partnership property without interference from [appellants]." *WC 1st & Trinity, LP.*, 2021 WL 4465995, at *3. In response, the World Class Entities moved to vacate the Appointment Order. After the Third Court of Appeals lifted its stay of the order, Judge Soifer denied the Limited Partnerships' motion to vacate and signed a supplemental receivership order granting Milligan's requested relief. Thereafter, the Third Court of Appeals granted the World Class Entities' request to add those two orders to the then-pending appeal. *Id.* at *3.

F. The Bankruptcy Proceedings

In the meantime, the World Class Entities informed the court of appeals that they had filed for bankruptcy, and the court of appeals therefore abated the interlocutory appeal. *WC 1st & Trinity, LP v. Roy F. & JoAnn Cole Mitte Found.*, No. 03-19-00905-CV, 2020 WL 5884288, at *1 (Tex.App.--Austin Oct. 2, 2020, no pet.) (mem. op.) (per curiam). The abatement was temporary, however, as the World Class Entities subsequently moved to reinstate the interlocutory appeal, informing the court of appeals that their bankruptcy petition had been dismissed on September 14, 2020.

G. The Lawsuit Before this Court

On July 8, 2020, the Super Majority Entities filed their original petition in the current proceeding, in which they sought a declaratory judgment over the lawfulness of both the Confirmation Order and Appointment Order, and further requested a declaration on the scope of Milligan's authority. The suit raises five other causes of action against: (1) Milligan; (2) his attorneys, Appellees Stephen Wayne Lemmon and Rhonda Bear Mates; (3) the Mitte Foundation; and (4) its attorney, Ray Charles Chester. Those other claims allege that Milligan, in collusion with the other named defendants (1) breached fiduciary duties owed to the Super Majority Entities; (2) breached the original limited partnership agreements; (3) converted assets to his own use or the use of Mitte; (4) engaged in tortious interference with the limited partnership agreements; and (5) engaged in a civil conspiracy with the other named defendants.

The suit was assigned to Judge Soifer, who had also entered the Appointment Order.[3]

In responding to the lawsuit, the defendants broke themselves into two separate groups: the Mitte Foundation and its attorney (the Mitte Entities); and Milligan and his two attorneys (the Milligan Entities). All defendants raised several affirmative defenses: (1) the Super Majority Entities lacked the capacity to sue because they failed to register to do business in this State; (2) the lawsuit was an impermissible collateral attack on the receivership order; (3) Milligan was entitled to derived judicial immunity for his actions in serving as a receiver; and (4) the attorneys involved in the lawsuit were entitled to immunity from claims brought by a nonclient. Later, both the Mitte and Milligan Entities moved to dismiss the lawsuit under Rule 91a of the Texas Rules of Civil Procedure asserting the claims lacked factual or legal support. They also sought dismissal

[3] Judge Soifer had assigned all related cases to her court under a local court rule. In addition to the hearings we note above, Judge Soifer also heard a number of other motions we do not recount here.

under the Texas Citizens Participation Act (the TCPA), alleging that the lawsuit violated the Appellees' right to petition, and that the claims lacked any merit.

Following a hearing on those motions, Judge Soifer dismissed the Super Majority Entities' lawsuit, and awarded attorney's fees to both sets of defendants ($42,890 to the Mitte Entities, and $39,058 to the Milligan Entities). These awards were to be paid jointly and severally by the Super Majority Entities and their trial attorney, Michael Wynne. Finally, the trial court awarded both the Milligan and Mitte Entities sanctions of $75,000 each under the TCPA, also to be paid jointly and severally by the Super Majority Entities and their attorney. Finally, the trial court awarded conditional appellate attorney's fees of $40,000 to the Mitte Entities and $30,000 to the Milligan Entities if the Super Majority Entities unsuccessfully appealed the final judgment.

After the trial court denied their motions for new trial, the Super Majority Entities and Wynne filed separate appeals. Wynne recently settled and we dismissed him as a party to the appeal. As explained below, the Super Majority Entities challenge the dismissal of their lawsuit, and the attorney's fees and sanctions assessed against them.

H. The Third Court of Appeals' Opinions

After the parties fully briefed their arguments in our Court, the Third Court of Appeals affirmed the district court's order appointing Milligan as the receiver over the Limited Partnerships. That court concluded that "the district court did not abuse its discretion by concluding that the Limited Partnerships were either insolvent or in imminent danger of insolvency, and that the actions of the governing persons of the Limited Partnerships were oppressive, illegal, or fraudulent." *WC 1st & Trinity, LP*, 2021 WL 4465995, at *12, *citing* TEX.BUS.ORGS.CODE ANN. § 11.404(a)(1)(A), (C). In particular, the court noted that the World Class General Partners had made misrepresentations to Mitte that they had sold the Properties, in

a disingenuous attempt to avoid the receivership and to "harm" Mitte by deceiving it into accepting "less than the true value of its interest in the Limited Partnerships." *Id*. at *11. The court also found that the general partner for the Trinity property had mismanaged its entrusted funds by transferring at least $2.5 million to the World Class Capital Group, even though there was no record that the general partner was indebted to that entity. *Id.* The court therefore concluded that this created an inference that the World Class Entities had engaged in "illegal" and possibly criminal conduct. *Id*. at *12, *citing* TEX.PENAL CODE ANN. § 32.45(b) (it is an offense under Chapter 32 of the Penal Code for a person to "misappl[y] property he holds as a fiduciary . . . in a manner that involves substantial risk of loss to the owner of the property or to a person for whose benefit the property is held").

And significant to the current appeal, the Third Court of Appeals noted that the receivership gave Milligan broad powers to control both the Limited Partnerships' properties and their affairs. *Id*. at *13.[4]

II. ISSUES ON APPEAL

On appeal, the Super Majority Entities argue that the trial court erred in dismissing their claims under both Rule 91a and the TCPA (Issues One and Two); that the trial court erred in awarding attorney's fees to the Mitte and Milligan Entities (Issue Three); that the trial court's award of sanctions under the TCPA was excessive (Issue Four); and that the trial court erred in ruling that post-judgment interest on the award of conditional attorney's fees on appeal should run

[4] In a separate opinion issued that same day, the Third Court of Appeals dismissed the World Class entities' petition for a writ of mandamus that similarly challenged the lawfulness of the arbitrator's receivership order (and the trial court's subsequent Confirmation Order) as moot, given the court's resolution of the interlocutory appeal. *See In re WC 1st & Trinity, LP*, No. 03-19-00798-CV, 2021 WL 4465988, at *1 (Tex.App.--Austin Sept. 30, 2021, no pet.) (mem. op.). The court also dismissed the World Class Entities' interlocutory appeal from the district court's Confirmation Order after concluding that it was not an appealable interlocutory order. *WC 1st & Trinity, LP*, 2021 WL 4465995, at *14.

from the date of entry of the trial court's judgment, rather than the judgment of this court (Issue Five).

III. THE SUPER MAJORITY ENTITIES' CAPACITY TO SUE

Before addressing the merits of the Super Majority Entities' issues, we resolve a preliminary issue that the Mitte Entities raise in their appellate briefing challenging the Super Majority Entities' capacity to file the current lawsuit.

In their answers to the Super Majority Entities' lawsuits, both the Mitte Entities and the Milligan Entities raised as one of their "Rule 93 Verified Defenses" that the Super Majority Entities, which are Delaware Corporations, had not registered to do business in Texas before filing their lawsuit. Thus, the answer asserted that they lacked the capacity to bring the current lawsuit. In addition, both entities argued in their motions to dismiss that the Super Majority Entities' claims should all be dismissed because of their alleged lack of capacity to sue. We disagree.

A foreign entity must register to do business in the State to have the capacity to file a lawsuit. *See* TEX.BUS.ORGS.CODE ANN. § 9.051(b). That said, a foreign entity's failure to register does not deprive the entity of "standing" to sue (a jurisdictional issue); instead, it only implicates the entity's "capacity" or authority to sue. *See Hunt v. City of Diboll*, 574 S.W.3d 406, 435-36 (Tex.App.--Tyler 2017, pet. denied), *citing Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 848 (Tex. 2005). And, in turn, a defendant wishing to challenge a plaintiff's capacity to sue must do so by filing either a verified plea in abatement or a verified motion to abate, which allows the plaintiff an opportunity to cure any defect—in this case to register with the State. *See generally Hunt*, 574 S.W.3d at 435 (recognizing that the law "favors abatement over dismissal because abatement affords corporations an opportunity to cure the defect."), *citing Duradril, L.L.C. v. Dynomax Drilling Tools, Inc.*, 516 S.W.3d 147, 156-57 (Tex.App.--Houston [14th Dist.]

2017, no pet). Thus, addressing a plaintiff's lack of capacity "in an answer, [a] plea to the jurisdiction, [a] motion for summary judgment, or [a] motion to dismiss does not properly raise the issue." *Id.*, *citing Duradril, L.L.C.*, 516 S.W.3d at 157 (same); *Haddox v. Fed. Nat'l Mortg. Ass'n*, No. 03-15-00350-CV, 2016 WL 2659695, at *4 (Tex.App.--Austin May 6, 2016, pet. dism'd) (defendants did not properly raise plaintiff's lack of capacity by raising it in their answer and plea to the jurisdiction, or in their motion to dismiss). Moreover, the failure to raise the issue in the proper manner waives the issue. *See Hunt*, 574 S.W.3d at 436, *citing Duradril, L.L.C.*, 516 S.W.3d at 157 (holding that defendants waived their complaint that unregistered foreign entity could not sue because it failed to raise the issue through a verified plea in abatement).

Neither the Milligan Entities nor the Mitte Entities filed a verified plea in abatement or a motion to abate based on the Super Majority Entities' lack of capacity to sue. Rather, they only raised the issue in their answers and their motions to dismiss. Although the trial court granted their motions to dismiss, it never expressly—or even impliedly—ruled on the issue of the Super Majority Entities' capacity to file their petition. To the contrary, the trial court appears to have assumed that the Super Majority Entities could bring the lawsuit, as its final judgment addressed the merits of their claims and found them wanting. Thus, the issue is not properly preserved for our review.

IV. DISMISSAL UNDER RULE 91A

In Issue One, the Super Majority Entities contend that the trial court erred in dismissing their causes of action under Rule 91a of the Texas Rules of Civil Procedure, asserting that the trial court did not apply the correct standard in reaching its determination. In particular, the Super Majority Entities contend that the trial court did not liberally construe their pleadings as required

by Rule 91a, and that one or more of their pleaded causes of action have a viable legal basis. We disagree.

A. Standard of Review and Applicable Law

Rule 91a provides that a party "may move to dismiss a cause of action on the grounds that it has no basis in law or fact." *San Jacinto River Auth. v. Medina*, 627 S.W.3d 618, 628 (Tex. 2021), *citing* TEX.R.CIV.P. 91a.1. The Rule further provides that "[a] cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought." TEX.R.CIV.P. 91a.1 Following along, the rule provides that "[a] cause of action has no basis in fact if no reasonable person could believe the facts pleaded." *Id.* To survive a Rule 91a challenge to its pleadings, a plaintiff must make more than "threadbare recitals of the elements of his cause of action, supported by mere conclusory statements." *Ruth v. Crow*, No. 03-16-00326-CV, 2018 WL 2031902, at *5 (Tex.App.--Austin May 2, 2018, pet. denied) (mem. op.); *see also Aguilar v. Morales*, 545 S.W.3d 670, 682 (Tex.App.--El Paso 2017, pet. denied) (same).

In addition, a court may grant a Rule 91a motion based on a defendant's affirmative defense, when that defense is "conclusively established by the facts in a plaintiff's petition," together with inferences reasonably drawn from them. *See Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, 595 S.W.3d 651, 656 (Tex. 2020) (trial court properly granted Rule 91a motion to dismiss based on defendant's affirmative defense of attorney immunity, where immunity was shown as a matter of law); *see also McDill v. McDill*, No. 03-19-00162-CV, 2020 WL 4726634, at *8 (Tex.App.--Austin July 30, 2020, pet. denied) (mem. op.) (based on the facts alleged in plaintiff's petition, the trial court properly dismissed lawsuit where the pleadings themselves established that defendant was entitled to attorney immunity from plaintiff's claims).

We review the merits of a Rule 91a motion de novo. *See Medina*, 627 S.W.3d at 628; *see also Aguilar*, 545 S.W.3d at 676-77. In conducting our review, we construe the pleadings liberally in favor of the plaintiff, look to the pleader's intent, and accept as true the factual allegations in the pleadings to determine whether the cause of action has a basis in law or fact. *Morales*, 545 S.W.3d at 677. With these principles in mind, we examine each of the Super Majority Entities' causes of action to determine whether the trial court properly dismissed them under Rule 91a.

B. The Request for Declaratory Judgment

In their first cause of action, the Super Majority Entities sought a declaratory judgment: (1) to "determine the lawfulness and scope, if any, of the receiverships involuntarily imposed" in the Confirmation and Appointment Orders; and (2) "to determine and define Milligan's authority, if any[.]" And in its prayer for relief, Appellants expressly asked the trial court to "declare the Receiverships null and void."

When the Super Majority Entities filed their lawsuit, these two issues were already pending in the Third Court of Appeals. Rather than wait for a ruling from that court, the Super Majority Entities chose to file a separate lawsuit raising these same issues. Recent opinions of the Third Court of Appeals addressed both issues, finding that the district court's appointment of the receiver was lawful, and that any issues pertaining to the arbitrator's appointment of the receiver had been rendered moot by the district court's appointment. *See WC 1st & Trinity, LP*, 2021 WL 4465995, at *10; *In re WC 1st & Trinity, LP*, 2021 WL 4465988, at *1. Moreover, in the first of the two opinions, the court of appeals expressly affirmed the broad authority that the district court's receivership order gave to Milligan. It recognized that the order gave him full authority to manage not only the properties at issue, but also to control the affairs of the Limited Partnerships.

Moreover, this broad delegation was necessary to protect Mitte from harm based on the Limited Partnerships' financial condition and the World Class Entities' prior fraudulent conduct. *WC 1st & Trinity, LP.*, 2021 WL 4465995, at *13.

Although the Super Majority Entities were not parties to the prior proceedings, we agree with the Mitte and Milligan Entities that the current lawsuit is an improper collateral attack. It challenges the lawfulness of the two receivership orders and the receiver's authority, when the proper venue to make those challenges was in the above proceedings. As the Texas Supreme Court has recognized, when a party initiates a separate lawsuit to attack a trial court's order that is otherwise appealable, the lawsuit constitutes an impermissible "collateral attack" on the order. *Browning v. Prostok*, 165 S.W.3d 336, 345-46 (Tex. 2005) (holding that where party failed to timely appeal confirmation order, its action in filing a separate lawsuit challenging the validity of the order constituted an impermissible collateral attack on the order); *see also Miller v. Meinhard-Commercial Corp*., 462 F.2d 358, 360 (5th Cir. 1972) ("[I]t is a collateral attack if it must in some fashion overrule a previous judgment."). As the *Browning* court recognized, "[c]ollateral attacks on final judgments are generally disallowed because it is the policy of the law to give finality to the judgments of the courts." *Browning*, 165 S.W.3d at 345. And as the court also recognized, a "collateral attack runs counter to this strong policy of finality because a collateral attack attempts to bypass the appellate process in challenging the integrity of a judgment." *Id.* at 346; *see also Davis v. West*, 317 S.W.3d 301, 309 (Tex.App.--Houston [1st Dist.] 2009, no pet.) (recognizing that when a party had the right to challenge a turnover order on direct appeal, he was estopped from filing a collateral attack on the order in a separate lawsuit). Moreover, the rule prohibiting collateral attacks applies to orders subject to interlocutory appeals, as well as final judgments. *See Arkla Expl. Co. v. Haywood, Rice & William Venture*, 863 S.W.2d 112, 116 (Tex.App.--Texarkana

1993, writ dism'd by agr.); *Cognata v. Down Hole Injection, Inc.*, 375 S.W.3d 370, 382 n.4 (Tex.App.--Houston [14th Dist.] 2012, pet. denied) ("rules against collateral attacks apply to protect interlocutory orders as well as final judgments").

When the Super Majority Entities filed their lawsuit, the trial court's receivership order was being challenged on appeal by the World Class Entities. And while they all may be distinct corporate entities, the Super Majority Entities were clearly in privity with the World Class General Partners, having been granted all the general partners' interests in that litigation. *See Sysco Food Services, Inc. v. Trapnell*, 890 S.W.2d 796, 801-03 (Tex. 1994) (recognizing that "privy is one who is connected in law with a party to the judgment as to have such an identity of interests that the party to the judgment represented the same legal right," and that the doctrine of collateral estoppel will apply "if the party against whom the doctrine is asserted was a party or in privity with a party in the first action"); *see also HECI Expl. Co. v. Neel*, 982 S.W.2d 881, 890 (Tex. 1998) (parties are in privity when they are, among other things, successors in interest, deriving their claims through a party to the prior proceeding); *see also Black v. 7-Eleven Convenience Stores*, No. 03-12-00014-CV, 2014 WL 902498, at *4 (Tex.App.--Austin Mar. 7, 2014, no pet.) (mem. op.) (recognizing that strict mutuality of parties is not required for the doctrine of collateral estoppel to apply, and that due process only requires that the party against whom the doctrine of collateral estoppel is asserted was a party or in privity with a party in the first action).

The Super Majority Entities respond that the prohibition against a collateral attack does not apply to a void judgment, which may be attacked at any time and in virtually any proceeding. *See Browning*, 165 S.W.3d 336, 345-46 (recognizing that a void judgment may be collaterally attacked). And the Super Majority Entities argue that the receivership order was "void" because Milligan allegedly failed to post a bond timely prior to undertaking his activities as a receiver.

But as the Mitte Entities point out, the Super Majority Entities never argued in the trial court that the receivership order itself was void, only that the actions taken by Milligan were void due to his alleged failure to timely post a bond. Nor could they legitimately advance such an argument. As the Texas Supreme Court has explained, a "judgment is void only when it is shown that the court had no jurisdiction of the parties or property, no jurisdiction of the subject matter, no jurisdiction to enter the particular judgment, or no capacity to act as a court." *Browning*, 698 S.W.2d at 363. The Super Majority Entities have made no claim that the trial court lacked jurisdiction over the receivership proceedings, or over the parties to the receivership, and therefore, their argument that the trial court's order was void and subject to collateral attack lacks merit.

We therefore conclude that the trial court properly dismissed the Super Majority Entities' cause of action for a declaratory judgment under Rule 91a as lacking any factual or legal basis.

C. Breach of Fiduciary Duties

In their second cause of action, the Super Majority Entities contend that Milligan, as receiver, owed them a fiduciary duty to act in their best interest while serving as the receiver over the Limited Partnerships. They allege that Milligan breached this duty by "(i) holding himself out as having the ability to control the affairs of the Limited Partnerships; (ii) supporting a clandestine effort by Mitte to purchase a loan securing one of the properties in order to manufacture a sham default and move precipitously to foreclose; (iii) conspiring to loot the Limited Partnerships of valuable assets; (iv) interfering with the Limited Partnerships' other business relationships; and (v) otherwise encumbering the Limited Partnerships with unnecessary litigation, expenses, and other obligations, including this lawsuit." In addition, the Super Majority Entities claim that Milligan's attorneys, Lemmon and Mates, "aided and abetted" Milligan in committing the alleged

breach of his fiduciary duties.[5] The flaw in the claim, however, is that the petition itself establishes all that Milligan needed to show for his affirmative defense of quasi-judicial immunity. Likewise, the petition establishes attorneys Lemmon and Mates were also immune from the Super Majority Entities' claims, as their actions were all taken in the course and scope of representing Milligan.

1. Court-appointed receivers and derived judicial immunity

Certain court-appointees, including court-appointed receivers who act as agents of the court, are generally entitled to quasi-judicial immunity (also known as derived judicial immunity) for actions taken in the course and scope of performing their duties. *See, e.g., Wilkinson v. USAA Fed. Sav. Bank Tr. Services*, No. 14-13-00111-CV, 2014 WL 3002400, at *9 (Tex.App.--Houston [14th Dist.] July 1, 2014, pet. denied) (mem. op) (a court-appointed receiver acting within the scope of his authority is entitled to derived judicial immunity); *Davis*, 317 S.W.3d at 307 (recognizing that a court-appointed receiver acts as an arm of the court and is therefore immune from liability for actions grounded in his conduct as receiver), *citing Rehabworks, LLC v. Flanagan*, No. 03-07-00552-CV, 2009 WL 483207 (Tex.App.--Austin Feb. 26, 2009, pet. denied) (mem. op.); *see generally Hawkins v. Walvoord*, 25 S.W.3d 882, 891 (Tex.App.--El Paso 2000, pet. denied) (recognizing that in Texas, judicial immunity applies to officers of the court who are integral parts of the judicial process, such as court-appointed receivers and trustees). In effect, this immunity derives from the absolute immunity to which judges are entitled when they act in their official judicial capacity, which serves to protect the interest of the judge as well as the public's interest in an independent judiciary. *See Dallas County v. Halsey*, 87 S.W.3d 552, 554 (Tex. 2002). So when a judge appoints an individual to perform services for the court, the same

[5] The Super Majority Entities do not name the Mitte Foundation or its attorney in this cause of action.

absolute immunity attaches to the appointee as well. *Id.* As our sister court has recognized, the policy underlying derived judicial immunity "guarantee[s] an independent, disinterested decision-making process" and "prevent[s] the harassment and intimidation that might otherwise result if disgruntled litigants could vent their anger by suing either the person who presented the decision maker with adverse information, or the person or persons who rendered an adverse opinion." *Alpert v. Gerstner*, 232 S.W.3d 117, 125-26 (Tex.App.--Houston [1st Dist.] 2006, pet. denied).

It is also generally recognized that a court-appointed receiver is entitled to immunity from civil claims, including claims for breach of fiduciary duty, poor performance of duties, and wrongful, dishonest, or even fraudulent conduct in performance. *See Logsdon v. Owens*, No. 02-15-00254-CV, 2016 WL 3197953, at *4-5 (Tex.App.--Fort Worth June 9, 2016, no pet.) (mem. op.) (receiver who was given broad authority to take control of the parties' property in a divorce proceeding had derived judicial immunity where wife sued him for breach of fiduciary duty, fraud, negligence, and gross negligence in performing his duties), *citing Ramirez v. Burnside & Rishebarger, LLC*, No. 04-04-00160-CV, 2005 WL 1812595, at *2 (Tex.App.--San Antonio Aug. 3, 2005, no pet.) (mem. op.) (receiver was entitled to derived judicial immunity from plaintiff's claim that he made false representations while performing his duties); *see also Wilkinson*, 2014 WL 3002400, at *8 (receiver was entitled to derived judicial immunity where plaintiff alleged claims for defamation, fraud, breach of fiduciary duty, and DTPA violations that he allegedly committed while performing his duties); *Davis*, 317 S.W.3d at 307 (once a court appointee is "cloaked" with derived judicial immunity, every action he takes in performing his assigned duties—whether good or bad, honest or dishonest, well-intentioned or not—is immune from suit).

The Super Majority Entities argue, however, that their pleadings leave open the question of whether Milligan was in fact acting within the scope of his assigned duties in conducting the affairs of the Limited Partnership, which in turn raised a question of whether he lost his entitlement to derived judicial immunity. A receiver may lose immunity while committing acts without jurisdiction "and outside the scope of his authority." *See Congleton v. Shoemaker*, No. 09-11-00453-CV, 2012 WL 1249406, at *2 (Tex.App.--Beaumont Apr. 12, 2012, pet. denied) (mem. op.) (holding that the trial court abused its discretion by issuing an order purporting to give receiver blanket immunity for all his actions, without limiting his immunity to "discretionary actions taken as an arm of the court and within the scope of his authority"). A receiver is also not entitled to derived judicial immunity even if he is fulfilling tasks assigned by the court, if those tasks cannot properly be categorized as those belonging to a receiver. *See, e.g.*, *Alpert v. Gerstner*, 232 S.W.3d 117, 131-32 (Tex.App.--Houston [1st Dist.] 2006, pet. denied) (where trial court appointed defendant to act as a receiver over various trusts, he was not entitled to derived judicial immunity for performing trustee duties beyond the scope of a receiver's duties). Thus, a court must take a "functional approach" in determining whether a person is entitled to derived judicial immunity, and should not just look at the label or title given to a court-appointee, but must instead consider their assigned duties, and whether they are in fact operating as an "arm of the court" in performing those duties. *Id.* at 126, *citing Delcourt*, 919 S.W.2d at 781 (recognizing that a court must look at the nature of the "function" performed not the identity of the actor in determining whether a person is entitled to derived judicial immunity).

Parsing out the Super Majority Entities' allegations in their pleadings, however, we find nothing in their claims that would support a finding that the trial court assigned any duties to Milligan outside his role as a receiver, or that Milligan exceeded his authority in performing his

duties. First, the Third Court of Appeals has already recognized the duties that the trial court assigned to Milligan—to control the assets and affairs of the Limited Partnerships—were within the prescribed duties of a receiver in accordance with Chapter 11 of the Texas Business and Organizations Code. *WC 1st & Trinity, LP*, 2021 WL 4465995, at *12, *citing* TEX.BUS.ORGS.CODE § 11.404(a)(1)(A), (C). Moreover, the actions about which the Super Majority Entities complain were all actions Milligan took in performing those duties. Given his express right to conduct the affairs of the Limited Partnerships, Milligan was entitled to "hold himself out" as having that authority when meeting with third parties, including third parties doing business with the Limited Partnerships. As well, given Milligan's express right to control the Limited Partnerships' assets, the Super Majority Entities' complaint that he mishandled those assets still relates solely to actions that fell within the scope of his authority. And finally, although the Super Majority Entities complain that Milligan subjected the Limited Partnerships to "unnecessary litigation, expenses, and other obligations, including this lawsuit," a receiver in Milligan's position is expressly authorized by statute to conduct and participate in litigation. TEX.BUS.ORGS.CODE ANN. § 11.406(a)(3) (a receiver appointed under this section may "sue and be sued in the receiver's name in any court"). Thus, the Super Majority Entities have failed to allege any conduct that exceeded Milligan's authority, and he was entitled to derived judicial immunity as a matter of law. For these reasons, the trial court properly dismissed the Super Majority Entities' claim against Milligan for breach of fiduciary duty under Rule 91a as having no basis in law or fact.

2. Attorney immunity for claims brought by non-clients

We also conclude that the trial court acted properly in dismissing the Super Majority Entities' companion claim against Milligan's attorneys, Lemmon and Mates, who are alleged to

have "aided and abetted" Milligan in committing the alleged breach of his fiduciary duties. Just as Milligan was entitled to immunity for his actions under the doctrine of derived judicial immunity, his attorneys were also entitled to immunity under the doctrine of attorney immunity for claims brought against them by non-clients.

Under this doctrine, an attorney is generally entitled to immunity from a civil lawsuit brought by a non-client for conduct taken within the scope of the attorney's representation of a client. *See Youngkin v. Hines*, 546 S.W.3d 675, 680-84 (Tex. 2018), *citing Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015). The doctrine of attorney immunity stems from the law's longstanding recognition that "attorneys are authorized to practice their profession, to advise their clients and interpose any defense or supposed defense, without making themselves liable for damages." *Landry's, Inc. v. Animal Legal Def. Fund*, 631 S.W.3d 40, 47 (Tex. 2021), *quoting Cantey Hanger*, 467 S.W.3d at 481. Attorney immunity is thus "intended to ensure 'loyal, faithful, and aggressive representation by attorneys employed as advocates.'" *Id. quoting Cantey Hanger*, 467 S.W.3d at 481. When applying attorney immunity, the Texas Supreme Court has recognized that "otherwise wrongful conduct by an attorney 'is not actionable if it is part of the discharge of the lawyer's duties in representing his or her client." *Id.*, *quoting Cantey Hanger*, 467 S.W.3d at 481. Accordingly, even when a non-client plaintiff claims an attorney has engaged in acts that were "fraudulent," "conspiratorial," or otherwise "wrongful," as long as the acts were committed while representing a client, the attorney is nevertheless still entitled to immunity. *See Youngkin*, 546 S.W.3d at 681-82 (finding that attorney was entitled to immunity in response to nonclient-plaintiff's allegations that he engaged in fraudulent and conspiratorial conduct by allegedly taking actions in contravention of the parties' Rule 11 agreement, as he was acting within the scope of his representation in doing so).

Attorneys, however, are not insulated from all liability to nonclients for all wrongdoing committed in the name of a client. *Youngkin*, 546 S.W.3d at 682. Instead, attorney immunity applies only when attorneys act in the uniquely lawyerly capacity of one who possesses "the office, professional training, skill, and authority of an attorney." *Landry's, Inc.*, 631 S.W.3d at 51. Stated conversely, "an attorney may only be liable to nonclients for conduct outside the scope of his representation of his client or for conduct foreign to the duties of a lawyer." *Youngkin*, 546 S.W.3d at 681, *citing Cantey Hanger*, 467 S.W.3d at 481. Thus, when attorney immunity is asserted, the focus is on the conduct at issue rather than the *alleged wrongfulness* of the conduct. *Id.* In that vein, the court has identified "several nonexhaustive examples of conduct that may fall outside the reach of the attorney-immunity defense—participation in a fraudulent business scheme with a client, knowingly helping a client with a fraudulent transfer to avoid paying a judgment, theft of goods or services on a client's behalf, and assaulting opposing counsel during trial." *Id.* at 682-83.

The Super Majority Entities failed to allege that the attorneys engaged in any conduct outside the scope of their representation of Milligan in the receivership proceedings. In other words, they seek to hold the attorneys liable based solely on the fact that they represented Milligan in the receivership proceedings. Accordingly, the original petition leads to the inescapable conclusion that Lemmon and Mates were entitled to immunity against the claims of the Super Majority Entities, a nonclient to whom they owed no duties.

We therefore conclude that the trial court properly dismissed the "aiding and abetting" claim against Lemmon and Mates under Rule 91a as having no basis in law or fact.

D. Conversion

In their claim for conversion, the Super Majority Entities allege that Milligan "assumed and exercised dominion and control over the Limited Partnerships' property in an unlawful and unauthorized manner to the exclusion of the Super Majority," and in a manner "inconsistent with their rights." In particular, the Super Majority Entities assert that they have vehemently opposed a liquidation plan proposed by Milligan, and that he has refused to honor their demands to not liquidate the property.[6] They allege that Milligan, with the participation or "insistence" of Mitte, Lemmon, Mates, and Chester, has thereby converted the property to "his and their own use."

The claim fails for two reasons. First, both Milligan and the attorney-defendants would have a right to immunity against this claim, as Milligan's actions were all taken in his capacity as the receiver, and there is no allegation that the attorney-defendants acted outside the scope of representing their clients. Second, the conversion claim fails as a matter of law, as the Super Majority Entities have failed to plead any facts that could support all the elements of the claim. To establish a claim for conversion of personal property, a plaintiff must allege and prove that: (1) the plaintiff owned or had legal possession of the property or entitlement to possession; (2) the defendant unlawfully and without authorization assumed and exercised dominion and control over the property to the exclusion of, or inconsistent with, the plaintiff's rights as an owner; (3) the plaintiff demanded return of the property; and (4) the defendant refused to return the property. *Smith v. Maximum Racing, Inc.*, 136 S.W.3d 337, 341 (Tex.App.--Austin 2004, no pet.), *citing Waisath v. Lack's Stores, Inc.*, 474 S.W.2d 444, 447 (Tex. 1971). The Super Majority Entities' pleading fails to allege facts to support all these elements.

[6] The record contains a supplemental report from Milligan labeled as a "preservation/liquidation plan," which presented the trial court with various options for restructuring the debts of the Limited Partnerships and included refinancing certain loans or soliciting offers for the sale of the properties. As the report points out, the trial court expressly authorized Milligan to prepare such a plan.

The Super Majority Entities have failed to allege any facts to support a finding that Milligan acted "unlawfully" in exercising "control" or "dominion" over the Limited Partnerships' assets, or in tendering his proposed liquidation plan to the court. To the contrary, the trial court expressly authorized Milligan to engage in those actions. Moreover, Milligan's proposed liquidation plan was just that, a plan, and could not be acted upon without court approval. *See Ruth*, 2018 WL 2031902, at *7 (trial court properly dismissed plaintiff's causes of action under Rule 91a where her pleadings lacked sufficient factual allegations to support the elements of her claims), *citing Weizhong Zheng v. Vacation Network, Inc.*, 468 S.W.3d 180, 186-87 (Tex.App.--Houston [14th Dist.] 2015, pet. denied) (trial court properly dismissed claim that failed to allege any facts to support the elements of the plaintiff's fraud claim).

We thus conclude that the trial court properly dismissed the claim for conversion against all of the named defendants under Rule 91a as having no basis in law or fact.

E. Breach of Contract

In their fourth cause of action, the Super Majority Entities allege that Milligan breached the respective limited partnership agreements, contending that Milligan squandered the assets of the Limited Partnerships "in pursuing frivolous litigation and in other acts of reckless spending."[7] And they also name Milligan's attorneys, Mitte and its attorney in this claim, stating that they "aided and abetted" Milligan's alleged breach of contract. Once again, aside from the immunity that both Milligan and the attorneys were entitled for their actions, this claim fails as a matter of law for all of the named parties.

[7] In addition, the Super Majority Entities again complain about the same actions that Milligan allegedly took in controlling the Limited Partnerships' assets, all of which we have concluded were taken in his capacity as the lawfully appointed receiver, and we need not repeat those allegations here.

First, in order to hold an individual liable on a claim for breach of contract, there must generally be privity between the party damaged and the party sought to be held liable. *See Chico Auto Parts & Serv., Inc. v. Crockett*, 512 S.W.3d 560, 569 (Tex.App.--El Paso 2017, pet. denied). Privity of contract is established by proving that the defendant was a party to an enforceable contract with either the plaintiff or a party who assigned its cause of action to the plaintiff. *See Schambacher v. R.E.I. Elec., Inc.*, No. 02-09-345-CV, 2010 WL 3075703, at *3 (Tex.App.--Fort Worth Aug. 5, 2010, no pet.) (mem. op.), *citing Conquest Drilling Fluids v. Tri-Flo Int'l, Inc.*, 137 S.W.3d 299, 308 (Tex.App.-Beaumont 2004, no pet.).

The Super Majority Entities seek to establish the necessary privity between Milligan—who did not sign the underlying limited partnership agreements—and the other signatories by alleging that Milligan, "in his capacity as putative receiver or in the guise of a putative receiver," stepped into the "shoes" of the World Class Entities as for their obligations under the agreements. The Super Majority Entities, however, cite no authority suggesting that a receiver appointed to take control of a partnership's assets somehow becomes a signatory to the partnership's contracts. To the contrary, a receiver is appointed to serve as an independent arm of the court in performing assigned duties and does not step into the shoes of any of the parties involved in the receivership, or otherwise take on their contractual duties.[8] *See generally Davis*, 317 S.W.3d at 307 (a court-appointed receiver acts as an arm of the court). We thus conclude that there was no basis in law or fact for holding Milligan liable on a claim for breach of contract.

We also conclude that there was similarly no basis for holding any of the attorney defendants liable for allegedly "aiding and abetting" Milligan's alleged breach of contract. Under

[8] It is true, however, that a receiver steps into the shoes of a party when *pursuing* a lawsuit on behalf of the party. *See In re Travelers Prop. Cas. Co. of Am.*, 485 S.W.3d 921, 927 (Tex.App.--Dallas 2016, no pet.).

Texas law, an individual may only be held civilly liable for aiding and abetting the commission *of a tort*. *See generall*y *Immobiliere Jeuness Establissement v. Amegy Bank Nat'l Ass'n*, 525 S.W.3d 875, 882 (Tex.App.--Houston [14th Dist.] 2017, no pet.) *citing Juhl v. Airington*, 936 S.W.2d 640, 643 (Tex. 1996). And in turn, because a claim for breach of contract is not a tort, a claim that an individual assisted or aided and abetted in another individuals' breach of contract is not actionable. *See Deaton v. United Mobile Networks, L.P.*, 926 S.W.2d 756, 760-61 (Tex.App.--Texarkana 1996), *aff'd in part, rev'd in part on other grounds*, 939 S.W.2d 146 (Tex. 1997) (assisting an individual with breaching a contract is not actionable because "breach of contract is not a tort."); *Amey v. Barrera*, No. 13-01-00130-CV, 2004 WL 63588, at *8 (Tex.App.--Corpus Christi Jan. 15, 2004, no pet.) (mem. op.) (recognizing that breach of contract is not a tort); *see generally Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 597 (Tex. 1992), *superseded by statute on other grounds as stated in Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 225-26 (Tex. 2002) (recognizing that in general, the mere breach of a contract is not a tort).

We therefore conclude that the trial court properly dismissed the Super Majority Entities' claim for breach of contract as for all of the named defendants under Rule 91a as having no basis in law or fact.

F. Tortious Interference with Contract

In their fifth cause of action, the Super Majority Entities allege that "Milligan, on his own behalf and at the instigation of the Foundation, Lemmon, Mates, and Chester willfully and intentionally interfered" with the limited partnership agreements, by "pursuing frivolous litigation and incurring unjustifiable expenses" that are being charged to the Limited Partnerships. We

conclude, however, that there is no factual or legal basis for holding any of the named defendants liable for tortious interference with the limited partnership agreements.

First, Milligan, in his capacity as receiver, had the express authority to pursue litigation. Regardless whether the litigation was "frivolous," Milligan was entitled to derived judicial immunity for his actions in conducting such litigation. Similarly, the attorney-defendants were entitled to immunity for their roles in representing their respective clients in any such litigation because representing a client in litigation is perhaps the most fundamental and traditional role that an attorney can play in discharging duties owed to a client.

And finally, we note that because Mitte was a signatory to the limited partnership agreements, there was no basis for holding it liable for a tortious inference with those agreements. As our sister courts have recognized, liability for tortious interference of a contract is based on the acts of an interfering third party. *See Four Bros. Boat Works, Inc. v. Tesoro Petroleum Companies, Inc.*, 217 S.W.3d 653, 668 (Tex.App.--Houston [14th Dist.] 2006, pet. denied) (a party could not tortiously interfere or conspire to tortiously interfere with a contract to which it was a party). As a result, a signatory to a contract cannot tortiously interfere with its own contract. *Id*.; *see also Cmty. Health Sys. Pro. Services Corp. v. Hansen*, 525 S.W.3d 671, 690 (Tex. 2017) ("To be legally capable of tortious interference, the defendant must be a stranger to the contract with which he allegedly interfered").

We thus conclude that the trial court properly dismissed this claim under Rule 91a as to all of the named parties as having no basis in law or fact.

G. Civil Conspiracy

In their sixth and final cause of action, the Super Majority Entities contend that Milligan, Mitte, Lemmon, Mates, and Chester all engaged in a civil conspiracy with the intent to "enrich

themselves" by engaging in "protracted and unnecessary litigation at the cost of the Limited Partnerships," while "diluting" their interests and "foiling" their rights and privileges under the limited partnership agreements. They also allege that Milligan took "multiple unlawful overt acts in furtherance of the civil conspiracy, including . . . contacting lenders, banks, tenants, and other third parties in connection with efforts to sell the assets prematurely and ill-advisedly and by pursuing frivolous litigation." This claim also fails.

Once again, we start with the recognition that Milligan and the attorney-defendants named in this claim were entitled to immunity for their actions, as they were all taken within the course and scope of their respective roles in the receivership action. Moreover, conspiracy is considered a "derivative tort," and is not an independent cause of action. *Four Bros. Boat Works, Inc.*, 217 S.W.3d at 668, *citing Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996) *see also Deaton*, 926 S.W.2d at 760 (holding that there is no independent basis for civil conspiracy). Thus, to prevail on a civil conspiracy claim, a plaintiff must show that the defendant was liable for some underlying tort. *Four Bros. Boat Works, Inc*., 217 S.W.3d at 668; *see also Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 581 (Tex. 1963) (an actionable conspiracy must consist of acts which would have been actionable against the conspirators individually). Having already concluded that the Super Majority Entities have not alleged any valid underlying tort action for which any of the named defendants could be held liable, we conclude that their conspiracy claim must also fail.

We therefore conclude that the trial court properly dismissed the Super Majority Entities' conspiracy claim for all of the named defendants under Rule 91a as having no basis in law or fact.

The Super Majority Entities' Issue One is overruled.

IV. THE TEXAS CITIZENS PARTICIPATION ACT

In Issue Two, the Super Majority Entities contend that the trial court erred in finding that the TCPA applied to their claims, and in dismissing their petition under the TCPA. Because we have already concluded that the trial court properly dismissed the lawsuit under Rule 91a, we would normally not need to address this contention, as we may uphold a trial court's judgment dismissing a plaintiff's claim on any legal theory before it, even if any of the other reasons provided were correct or not. *See Yazdchi v. Jones*, 499 S.W.3d 564, 568 (Tex.App.--Houston [1st Dist.] 2016, pet. denied). However, because the trial court expressly ordered the Super Majority Entities to pay sanctions to the Mitte and Milligan Entities under the TCPA, we address that dismissal ground as well.

A. Applicable Law and Standard of Review

The express purpose of the TCPA is "to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury." TEX.CIV.PRAC. & REM.CODE ANN. § 27.007; *see also Montelongo v. Abrea*, 622 S.W.3d 290, 295 (Tex. 2021) (recognizing the balance the TCPA seeks to achieve). The TCPA, which is to be liberally construed to effectuate its purpose, is intended to be a "bulwark against retaliatory lawsuits meant to intimidate or silence citizens on matters of public concern." *Dallas Morning News, Inc. v. Hall*, 579 S.W.3d 370, 376 (Tex. 2019); *see also* TEX.CIV.PRAC. & REM.CODE ANN § 27.011(b**)** ("This chapter shall be construed liberally to effectuate its purpose and intent fully."). To further this end, the TCPA provides that a defendant in a legal action that is "based on, or is in response to a party's exercise of the right of

free speech, right to petition, or right of association" may move for dismissal under the Act. *Id.* § 27.003(a).

The TCPA provides a three-step process that courts undertake in determining whether a dismissal is appropriate. *See Montelongo*, 622 S.W.3d at 295-96 (describing three-step process). First, the defendant must demonstrate that the legal action is "based on or is in response to" the defendant's exercise of the right of speech, petition, or association. TEX.CIV.PRAC. & REM.CODE §§ 27.003(a), 27.005(b). Second, if the defendant meets that burden, the claimant may avoid dismissal by establishing "by clear and specific evidence a prima facie case for each essential element of the claim in question." *Id.* § 27.005(c). Finally, if the claimant meets that burden, the court still must dismiss the "legal action" if the defendant "establishes an affirmative defense or other grounds on which the moving party is entitled to judgment as a matter of law." *Id.* § 27.005(d). In deciding whether a "legal action" should be dismissed under the TCPA, a court should consider all "pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based." *Id.* § 27.006(a); *Dallas Morning News, Inc.*, 579 S.W.3d at 377. In addition, the pleadings and evidence should be viewed in a light favorable to the non-movant. *MVS Int'l Corp. v. Int'l Advert. Sols., LLC*, 545 S.W.3d 180, 189-90 (Tex.App.--El Paso 2017, no pet.).

An appellate court applies a de novo standard in reviewing a trial court's ruling on a TCPA motion to dismiss, and we must therefore determine, as a matter of law, whether a plaintiff's claims fall within the scope of the TCPA. *See id.* at 190; *see also Youngkin*, 546 S.W.3d at 680 (applying de novo standard in determining TCPA's applicability to plaintiff's claims); *Dallas Morning News, Inc.*, 579 S.W.3d at 377 (appellate court reviews de novo the court of appeals' determinations that the parties met or failed to meet their burdens of proof under the TCPA).

B. Application of the TCPA

We begin with the threshold question of whether the TCPA applies to the claims set forth in the Super Majority Entities' lawsuit. The trial court expressly found that the Super Majority Entities' lawsuit was "factually and legally based on Defendants' right to petition, as that term is defined in the TCPA." The TCPA defines the "[e]xercise of the right to petition" as "a communication in or pertaining to . . . a judicial proceeding." TEX.CIV.PRAC. & REM.CODE ANN. § 27.001(4)(A)(i). The TCPA broadly defines a "communication" as "the making or submitting of a statement or document in any form or medium." *Youngkin*, 546 S.W.3d at 680, *citing* TEX.CIV.PRAC. & REM.CODE ANN. § 27.001(1) (defining "communication" to include the "making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic").

The Super Majority Entities contend that the trial court erred in finding that their lawsuit came within the parameters of the TCPA, arguing that their lawsuit did not complain about the Appellees' "right to petition per se." In particular, they contend that their claims do not center on Mitte's application for the receivership itself, and instead focus on the actions Milligan and the other Appellees took *after* the receivership was created, which they contend took place "outside of the litigation."

And true, claims made in response to communications between parties and actions taken by them outside of litigation do not fall under this component of the TCPA. *See generally Chandni I, Inc. v. Patel*, 601 S.W.3d 13, 22-23 (Tex.App.--El Paso 2019, pet. denied), *abrogated on other grounds by Montelongo v. Abrea*, 622 S.W.3d 290 (Tex. 2021) (recognizing that the "mere fact that the parties were involved in litigation does not mean every subsequent action between them that could result in further litigation relates to or arises out of the judicial

proceeding"); *Serafine v. Blunt*, 466 S.W.3d 352, 359-60 (Tex.App.--Austin 2015, no pet.) (where plaintiff's tortious-interference counterclaim was based in part on defendant's alleged harassing and threatening conduct outside the context of the lawsuit, that portion of the counterclaim was not subject to the TCPA). The Super Majority Entities' claims, however, all relate to communications that took place either in creating or administering the receivership, and therefore, their claims do in fact relate to a judicial proceeding.

First, the Super Majority Entities' request for declaratory relief complains about the creation of the receivership itself, and about communications that took place preceding the receivership's creation. In particular, the Super Majority Entities' lawsuit sought a declaration that the receivership proceedings themselves were unlawful in part because Milligan and the other Appellees engaged in "hundreds of communications" with each other before the creation of the receivership in which they were conspiring or colluding with each other to have Milligan appointed as the receiver. And the Super Majority Entities also alleged the failure to disclose these communications thereby rendered the receivership void. No doubt these communications were based on or related to the receivership proceeding itself.

Second, the rest of the Super Majority Entities' claims also relate, at least in part, to communications that took place throughout the receivership proceedings. In particular, the Super Majority Entities' lawsuit alleges that Milligan and the other defendants conspired or colluded with each other in filing frivolous litigation to deplete the resources of the Limited Partnerships; that they unlawfully "strategize[d]" with each other after court hearings; and that Milligan wrongfully "held himself out" as having control over the Limited Partnerships throughout the receivership. These claims necessarily involved communications between the various parties and were also made with respect to the management of the receivership itself. *See generally Robles*

v. Nichols, 610 S.W.3d 528, 534 (Tex.App.--El Paso 2020, pet. denied) (TCPA applied to plaintiff's claim that defendants wrongfully used or divulged information during a divorce proceeding that they knew, or should have known, was wrongfully obtained), *citing Youngkins*, 546 S.W.3d at 680-81 (finding that TCPA applied to tort claims brought by a nonclient against an attorney, based in part on statements the attorney made in open court on behalf of his clients during a judicial proceeding); *Tervita, LLC v. Sutterfield*, 482 S.W.3d 280, 283-85 (Tex.App.--Dallas 2015, pet. denied) (TCPA applied to legal action that was based on allegedly false testimony given at an agency hearing, as the testimony constituted a communication in, or pertaining to, a proceeding under the TCPA); *James v. Calkins*, 446 S.W.3d 135, 147-48 (Tex.App.--Houston [1st Dist.] 2014, pet. denied) (TCPA applied to plaintiff's claims for fraud and barratry that were filed against attorney for their alleged false representations made in a judicial proceeding).

In addition, at least a portion of the Super Majority Entities' claims centered on documents that Milligan and his attorneys filed during the receivership, alleging that Milligan and his attorneys launched or pursued frivolous litigation. Claims made in response to the filing of lawsuits and other documents filed during a judicial proceeding also fall under the TCPA, as such claims are based on or relate to the right to petition. *See, e.g.*, *Cavin v. Abbott*, 545 S.W.3d 47, 64 (Tex.App.--Austin 2017, no pet.) ("filing a lawsuit and transmitting documents relating to that proceeding" is an exercise of the right to petition under the plain-meaning of the TCPA); *Hawxhurst*, 550 S.W.3d at 227 (holding that the filing of a motion to dismiss during the course of a judicial proceeding is a communication within the meaning of the TCPA); *Quintanilla v. West*, 534 S.W.3d 34, 46 (Tex.App.--San Antonio) *rev'd on other grounds*, 573 S.W.3d 237 (Tex. 2019) (concluding that financial statements made and filed "in the context of impending litigation . . . were made in exercise of 'right to petition'"); *Serafine I*, 466 S.W.3d at 360 (concluding that

plaintiff's filing of suit and filing of lis pendens were exercises of plaintiff's "right to petition" as defined in TCPA).

We thus conclude that the trial court correctly found that the TCPA applied to the Super Majority Entities' claims. Because we have already concluded that their claims lacked any factual or legal basis under Rule 91a, either because of deficiencies in the pleadings themselves or because the Mitte and Milligan Entities established their affirmative defenses as a matter of law, we also conclude that the trial court had the authority to dismiss the claims under the TCPA as well.

C. Dismissal Under the TCPA

A plaintiff may successfully defend against a TCPA motion to dismiss by establishing through "clear and specific evidence a prima facie case for each essential element" of the pleaded claims. TEX.CIV.PRAC. & REM.CODE ANN. § 27.005(c). If that burden is met, the defendant must then establish "an affirmative defense or other grounds" which would entitle him to "judgment as a matter of law." *Id.* § 27.005(d).

In attempting to meet their burden of establishing a prima facie case to support their claims, the Super Majority Entities attached various exhibits including: (1) documents signed by Nate Paul assigning the interest of the World Class General Partners to the Super Majority Entities; (2) the underlying limited partnership agreements; (3) email communications between Milligan and the named attorneys on steps to be taken in the receivership proceedings; (4) a reporter's record from the hearing on the Mitte Foundation's emergency application for the receivership in which Milligan testified that he had communicated with Mitte's attorneys but had not yet spoken with any of the World Class Entities' representatives; (5) a reporter's record from a sanctions hearing in which Milligan again testified that he had communicated with Mitte and its attorneys; (6) an affidavit from the World Class Capital Group's attorney outlining the procedural history of the

litigation between the parties; and (7) a reporter's record from the supersedeas bond hearing in which an expert witness testified on the value of the properties and their liabilities, including the attorney's fees that had so far been incurred during the receivership litigation. The Super Majority Entities appear to rely on these exhibits to establish that they had controlling interests in the Limited Partnerships, which Milligan was ignoring in performing his duties, and that Milligan was instead favoring, if not colluding with, Mitte and its attorneys in performing his duties. Further, they appear to rely on them for their claim that Milligan was engaging in unnecessary and burdensome litigation at the behest of Mitte and its attorneys, which, in turn, was causing financial damage to the Super Majority Entities' interests.

But even if we were to assume that Milligan and the other named defendants engaged in the above-described conduct as reflected in the attached exhibits, it would not be enough to establish that they could be held liable to the Super Majority Entities for their conduct. As discussed above, Milligan was appointed as a receiver to act as an independent arm of the court, and he was therefore not constrained by the limited partnership agreements in performing his duties, nor was he required to follow the wishes of the Super Majority Entities about the disposition of the receivership's assets. As well, Milligan could pursue litigation as he saw fit to protect the assets in the receivership. Thus, at most, these exhibits demonstrate that the Super Majority Entities were dissatisfied with the actions of Milligan and the attorney-defendants, but they fail to establish a prima facie case in support of their claims of wrongdoing. More importantly, as explained above, Milligan—along with the named attorney-defendants—established their affirmative defenses of immunity, and therefore, no matter if they had communications with each other or engaged in unnecessary litigation, they could not be held liable to the Super Majority

Entities for such conduct. We thus conclude that the trial court properly dismissed the Super Majority Entities' lawsuit under the TCPA.

The Super Majority Entities' Issue Two is overruled.

V. ATTORNEY'S FEES AND SANCTIONS

In Issue Three, the Super Majority Entities argue that the trial court abused its discretion in ordering it to pay attorney's fees to the Mitte and Milligan Entities, asserting that the court had no basis for doing so. In this same issue, the Super Majority Entities contend that the trial court also abused its discretion in awarding sanctions to the Mitte and Milligan Entities under the TCPA, as no evidence supported a finding that sanctions were necessary to deter them from filing similar actions. And in Issue Four, the Super Majority Entities argue that even if sanctions were authorized by the TCPA, the trial court's award of $150,000 in sanctions award was "excessive" and "arbitrary." We combine our discussion of these issues and conclude that none have merit.

A. The Attorney's Fee Award

The trial court awarded attorney's fees to both the Mitte and Milligan Entities, citing Rules 91a.7 and 13 of the Texas Rules of Civil Procedure, and sections 27.009 and 10.004 of the Civil Practice & Remedies Code. The Super Majority Entities correctly point out, and the Mitte and Milligan Entities concede, that the trial court did not have the authority to require them to pay attorney's fees under either Rule 13 or under Chapter10 of the Civil Practice and Remedies Code.[9] However, the Super Majority Entities' fail to challenge the trial court's authority to award

[9] The trial court found that the Super Majority Entities' attorney, Michael Wynne, filed the Super Majority Entities' lawsuit in bad faith and for harassment, but the trial court made no such finding on the motives of the Super Majority Entities themselves. And that finding would be necessary to uphold any award under Rule 13. *See GTE Communications Sys. Corp. v. Tanner*, 856 S.W.2d 725, 731 (Tex. 1993) (to impose sanctions under Rule 13, the district court was also required to find that the sanctioned party's assertions were made in bad faith or for the purpose of harassment). Similarly, Chapter 10 expressly prohibits imposing monetary sanctions against a represented party based on the legal contentions in a pleading. TEX.CIV.PRAC. & REM.CODE ANN. § 10.004(d) ("The court may not award monetary sanctions against a represented party for a violation of Section 10.001(2)."). Thus, the Rule 13 and Chapter 10 grounds would apply, if at all, to the Super Majority Entities' attorney, who has settled.

attorney's fees under the TCPA or Rule 91a.7. As discussed below, the trial court had the authority, if not the duty, to award attorney's fees under those provisions. We conclude that both these provisions support the trial court's decision to award attorney's fees.

Rule 91a.7 gives a trial court the discretion to award a prevailing party "all costs and reasonable and necessary attorney's fees incurred with respect to the challenged cause of action in the trial court." TEX.R.CIV.P. 91a.7. The TCPA makes such an award mandatory, providing that when a trial court dismisses a legal action under the Act, it "shall award to the moving party court costs and reasonable attorney's fees incurred in defending against the legal action." TEX.CIV.PRAC. & REM.CODE ANN. § 27.009 (a) (1); *see also Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016) (recognizing that the TCPA requires an award of reasonable attorney's fees to a successful movant).

Although the Super Majority Entities argue that the trial court's award of attorney's fees was intended as a disguised sanction, we find no evidence of such. The trial court expressly stated that the attorney fee award was based on the "reasonable and necessary" attorney's fees and costs that the Milligan and Mitte Entities incurred in defending against the lawsuit, and the trial court included a separate section in its final judgment imposing sanctions against the Super Majority Entities under the TCPA. Moreover, the trial court's award of attorney's fees was in the exact amount that the Mitte and Milligan Entities requested in the trial court, and their requests were both supported by declarations from their respective attorneys, together with billing records detailing the work they performed in the case. The trial court's order therefore suggests that the award of attorney's fees was not intended as a sanction against the Super Majority Entities, but was instead intended to make the Milligan and Mitte Entities whole by reimbursing them for the

costs and fees they incurred in defending against the lawsuit.[10] *See generally Landry's, Inc. v. Animal Legal Def. Fund*, 566 S.W.3d 41, 70 (Tex.App.--Houston [14th Dist.] 2018), *aff'd in part, rev'd in part on other grounds*, 631 S.W.3d 40 (Tex. 2021) (recognizing that an award of reasonable attorney's fees and costs under the TCPA is not a sanction, but is instead intended to make the prevailing party in the litigation whole, serving the same purpose as compensatory damages).

Thus, we find no basis for the Super Majority Entities' challenge to the trial court's award of attorney's fees.

B. The Trial Court Properly Awarded Sanctions Under the TCPA

Along with providing for a mandatory award of attorney's fees to a successful movant, the applicable version of the TCPA gives a trial court the discretion to award "sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter." TEX.CIV.PRAC. & REM.CODE ANN. § 27.009(a)(2). Thus, the legislature has seen fit to not only ensure that a successful party is reimbursed for its expenses in vindicating its rights in court, but to give the trial court the authority to sanction the party who brought the dismissed legal action to deter similar conduct. *See Landry's, Inc.*, 566 S.W.3d at 70 (recognizing the separate purposes served by the statute).

The trial court expressly awarded sanctions under this provision, finding the Super Majority Entities liable to pay $75,000 to each set of defendants, for a total of $150,000, "in order to deter Plaintiffs and the sanctioned parties from bringing similar actions in the future." The

[10] The Super Majority Entities do not contend that the amount of the attorney fee awards were not based on sufficient evidence of the work performed by the parties. *See generally Robles v. Nichols*, 610 S.W.3d 528, 532 (Tex.App.--El Paso 2020, pet. denied) (recognizing that the party seeking an award of attorney's fees has the burden of producing sufficient evidence in support of the amount of the award, to allow a trial court to review the fee application).

Super Majority Entities contend that the record contains no evidence to support a finding that monetary sanctions were needed to deter them from filing any similar actions, and that with no such evidence, the trial court should have, at most, imposed a "nominal" sanction against them. We disagree with the Super Majority Entities' argument for three reasons.

First, in the cases cited by the Super Majority Entities, although the trial courts did in fact award only "nominal" sanctions to the successful party, the courts did so under a prior version of the TCPA that required them to award sanctions to the successful party in all cases. *See, e.g.*, *Rich v. Range Res. Corp.*, 535 S.W.3d 610, 613-14 (Tex.App.--Fort Worth 2017, pet. denied) (recognizing that the prior version of the TCPA required a trial court to award "some amount of sanctions" even if "only a nominal amount, such as $1.00."); *Tatum v. Hersh*, 559 S.W.3d 581, 587-88 (Tex.App.--Dallas 2018, no pet.) (under prior version of TCPA, which required a mandatory sanction award, the trial court's "nominal" award of $1 was not an abuse of discretion). However, effective September 2019, the legislature amended the TCPA to provide that an award of sanctions was discretionary.[11] Accordingly, there is no longer any need for a trial court to award "nominal" sanctions in a TCPA proceeding, as a trial court may simply decline to make an award of sanctions if it finds that no deterrent purpose will be served by such an award. Under the version of the TCPA applicable here, the trial court therefore had the discretion to decline to award sanctions. And the trial court expressly determined that a sanction award was in fact necessary to deter the Super Majority Entities from engaging in similar conduct. Contrary to the Super Majority Entities' argument, we find that there was sufficient evidence in the record to support this determination.

[11] *See* Act of May 17, 2019, 86th Leg., R.S., ch. 378, §§ 1-9, 12, sec. 27.001, 27.003, 27.005-.007, 27.0075, 27.009-.010 (to be codified at TEX.CIV.PRAC. & REM.CODE ANN. §§ 27.001, 27.003, 27.005-.007, 27.0075, 27.009-.010). The amendments became effective September 1, 2019.

In general, a trial court is justified in finding that a sanction serves a deterrent purpose under the TCPA when the sanctioned party has filed similar actions in the past. *See generally Jetall Companies, Inc. v. Johanson*, No. 01-19-00305-CV, 2020 WL 6435778, at *7 (Tex.App.--Houston [1st Dist.] Nov. 3, 2020, no pet.) (mem. op) (trial court properly found that sanctions were necessary for deterrence purposes, where the record established the plaintiff had a "penchant" for bringing lawsuits to chill a party's right to petition); *Johnson-Todd v. Morgan*, No. 09-17-00168-CV, 2018 WL 6684562, at *7 (Tex.App.--Beaumont Dec. 20, 2018, pet. denied) (mem. op) (trial court properly considered plaintiff's history of filing similar actions in awarding sanctions under the TCPA to deter plaintiff from filing similar actions in the future); *Kinney v. BCG Att'y Search, Inc.*, No. 03-12-00579-CV, 2014 WL 1432012, at *12 (Tex.App.--Austin Apr. 11, 2014, pet. denied) (mem. op.) (court properly considered the history of the parties' litigation which suggested that the current lawsuit was the "culmination of multiple actions" concerning claims brought by the plaintiffs for the same harm asserted under various legal theories).

While the Super Majority Entities themselves did not file any prior actions involving the receivership, their predecessors-in-interest filed multiple actions in both the district court and the Third Court of Appeals unsuccessfully challenging the lawfulness of the receivership and the receiver's authority, and engaged in various obstreperous actions in the trial court, refusing to cooperate with Milligan in his efforts to perform his duties. *WC 1st & Trinity, LP*, 2021 WL 4465995, at *1-3. And despite the pending legal actions, the Super Majority Entities brought this collateral attack on the receivership proceedings, in an attempt to get a second bite at the apple. Given the undisputed evidence that Nate Paul controlled both the Super Majority Entities and their predecessors-in-interest, the trial court could have reasonably concluded that it was necessary to

deter the Super Majority Entities from filing similar actions in the future challenging the receivership proceedings.

C. The Amount of the Sanctions Award was not Excessive

The Super Majority Entities also contend even if the trial court correctly concluded that a sanction was warranted, it abused its discretion in calculating the amount of the sanction, contending that the trial court's award was excessive. For many of the same reasons set forth above, we disagree.

An appellate court reviews sanction awards under the TCPA for an abuse of discretion, to ensure that an award was not arbitrary or unreasonable. *Landry's, Inc.*, 631 S.W.3d at 46; *see also Jetall Companies, Inc.*, 2020 WL 6435778, at *6 (recognizing that a trial court has "broad discretion to determine the amount that is sufficient to achieve the statutory goal of deterrence" under the TCPA). Although a trial court may consider several factors when determining the amount of a sanctions award under the TCPA, contrary to the Super Majority Entities' argument, the Act does not require the trial court to state the factors it considered in calculating the amount of a sanction.[12] *Kinney*, 2014 WL 1432012, at *12. Instead, the TCPA simply states that the trial court has the discretion to impose a sanction in an amount it believes will be sufficient to deter the sanctioned party from bringing similar actions in the future in violation of the Act. TEX.CIV.PRAC. & REM.CODE ANN. § 27.009(a)(2). And because the express purpose of a TCPA sanction award is to deter a party from engaging in similar conduct, the sanction award must be large enough to serve that purpose, and the mere fact that an award is large does not in itself render an award excessive. *Kinney*, 2014 WL 1432012, at *12.

[12] As the Mitte Entities point out, the cases cited by the Super Majority Entities for the proposition that a court must expressly state the factors it relied on in awarding sanctions did not involve sanctions awarded under the TCPA, and instead involved sanctions awarded under other statutes or court rules not at issue here.

In determining the amount of a sanction under the TCPA, a trial court should consider the parties' litigation history, just as it should in determining whether a sanction is warranted in the first place. In particular, the court may consider how extensive that history was, and the time and expenses involved in defending against both the prior lawsuits and the current one. *See Kinney*, 2014 WL 1432012, at *12-13 (upholding a sanction award of $75,000, where the evidence demonstrated that sanctioned party had engaged in multiple lawsuits spanning two states, causing considerable expense to the opposing party); *see also ADB Interest, LLC v. Wallace*, 606 S.W.3d 413, 440-43 (Tex.App.--Houston [1st Dist.] 2020, pet. filed) (upholding a $125,487.50 sanction award under the TCPA for bringing a baseless lawsuit, where the sanctioned party had filed similar lawsuits in the past against other individuals for criticizing its business products online); *Johnson-Todd v. Morgan*, No. 09-17-00168-CV, 2018 WL 6684562, at *7 (Tex.App.--Beaumont Dec. 20, 2018, pet. denied) (mem. op.) (upholding the trial court's award of $25,000 in sanctions, where sanctioned party had a history of filing similar suits in the past); *but see McGibney v. Rauhauser*, 549 S.W.3d 816, 835-36 (Tex.App.--Fort Worth 2018, pet. denied) (trial court abused its discretion in awarding $150,000 in sanctions under the TCPA when the plaintiffs nonsuited their lawsuit only weeks after filing it and where there was no evidence that the plaintiffs had engaged in similar litigation in the past). As the Mitte and Milligan Entities point out, the trial court judge who imposed the sanctions in the TCPA case was the same judge who had presided over the receivership itself, as well as the prior litigation brought by the World Class Entities' challenging the receivership, and observed first-hand their conduct in opposing the receiver's authority.

And finally, we note that the trial court knew about the value of the properties and could have considered that in determining the amount of the sanction. *See, e.g.*, *Low*, 221 S.W.3d at 621 (recognizing that a trial court may consider the effect of the sanction on the offender, including

the offender's ability to pay); *see also ADB Interest, LLC*, 606 S.W.3d at 440-43 (recognizing that court may consider the sanctioned party's "annual net profits" in determining the amount of sanctions to be awarded under the TCPA), *citing Am. Heritage Capital*, 436 S.W.3d at 881. In particular, as the Mitte Entities point out, the trial court had evidence in the record that the approximate combined value of the two properties owned by the Limited Partnerships was approximately $90 million, with the Super Majority Entities having the majority interest in those properties.

Thus, considering the value of the Super Majority Entities' interest in the properties, and the past litigation history, the trial court could have reasonably concluded that an award of $150,000 was a reasonable and necessary amount to deter the Super Majority Entities from filing similar actions in the future in violation of the Act. *See generally Johnson-Todd*, 2018 WL 6684562, at *7 (given the sanctioned party's history of litigation, the trial court could have reasonably determined that a lesser sanction would not have served the purpose of deterrence); *Kinney*, 2014 WL 1432012, at *12 (same).

The Super Majority Entities' Issues Three and Four are overruled.

VI. CALCULATION OF INTEREST ON THE AWARD OF APPELLATE ATTORNEY'S FEES

In their fifth and final issue, the Super Majority Entities contend that the trial court erred when it ordered post-judgment interest on its conditional award of appellate attorney's fees to begin accruing from the date the trial court's judgment was signed until paid.[13] Interest on a conditional award of attorney's fees for prosecuting an unsuccessful appeal begins to accrue from the time the appellate court renders its judgment, rather than the from the time when the trial court

[13] The Super Majority Entities do not challenge the amount of the conditional appellate attorney's fee award itself.

signs its judgment. *See Ventling v. Johnson*, 466 S.W.3d 143, 156-57 (Tex. 2015) ("[A]n award for conditional appellate attorney's fees accrues postjudgment interest from the date the award is made final by the appropriate appellate court's judgment."); *Raia v. Crockett*, No. 03-16-00562-CV, 2017 WL 2062268, at *9 (Tex.App.--Austin May 10, 2017, pet. denied) (mem. op.) (same).

But the Super Majority Entities did not raise this issue in the trial court and are instead raising it for the first time on appeal. As a general rule, to preserve error on appeal, a party must first complain to the trial court by a timely request, objection, or motion and obtain a ruling thereon, as a prerequisite for appellate review of that complaint. *See* TEX.R.APP.P. 33.1(a); *see also Wells Fargo Bank, N.A. v. Murphy*, 458 S.W.3d 912, 916 (Tex. 2015) ("Parties are restricted on appeal to the theory on which the case was tried."). A challenge to the calculation of interest in a judgment must be raised in the trial court in the first instance. *See Watts v. Oliver*, 396 S.W.3d 124, 133-34 (Tex.App.--Houston [14th Dist.] 2013, no pet.) (complaint that the trial court misapplied the law in awarding a six-percent rate of interest on the attorney's-fees award was not a challenge to the legal sufficiency of the judgment, and therefore had to be raised in the trial court in the first instance); *Morton v. Hung Nguyen*, 369 S.W.3d 659, 677 (Tex.App.--Houston [14th Dist.] 2012, pet. filed) (trial judge's error in failing to award prejudgment interest was not preserved where it was not raised in the trial court); *see generally Allright, Inc. v. Pearson*, 735 S.W.2d 240, 240 (Tex. 1987) (per curiam) (stating that error in prejudgment interest must be preserved).

Thus, as the Super Majority Entities failed to raise this issue in the trial court, it was not properly preserved for our review. The Super Majority Entities' Issue Five is overruled.

VII. CONCLUSION

The trial court's Judgment is affirmed. We award in our judgment the conditional appellate attorney's fees as found by the trial court.

JEFF ALLEY, Justice

July 14, 2022

Before Rodriguez, C.J., Palafox, and Alley, JJ.