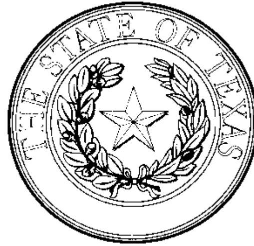
Opinion issued March 17, 2020



In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00008-CV

CROSSROADS HOSPICE, INC., Appellant

V.

FC COMPASSUS, LLC, CLP REGENCY OF TEXAS, LLC D/B/A HOSPICE COMPASSUS, AND ASPERION HOSPICE OF HOUSTON, LP D/B/A HOSPICE COMPASSUS—THE WOODLANDS, Appellees

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On Appeal from the 234th District Court
Harris County, Texas
Trial Court Case No. 2018-45292

OPINION

Appellees FC Compassus, LLC, CLP Regency of Texas, LLC, d/b/a Hospice Compassus, and Asperion Hospice of Houston, LP d/b/a Hospice Compassus—The

Woodlands (collectively, Compassus") sued appellant Crossroads Hospice, Inc. ("Crossroads"), alleging causes of action for knowing participation in breach of duty of loyalty/fiduciary duties, tortious interference with contract, and conspiracy. Crossroads filed a motion to dismiss pursuant to the Texas Citizens Participation Act ("TCPA").[1] Following a hearing, the trial court denied the motion. In one issue, Crossroads contends that the trial court erred in denying its motion to dismiss because Compassus failed to prove with clear and specific evidence a prima facie case for each essential element of its causes of action. We reverse and remand.

Background

A. Factual History

Compassus is a nationwide provider of hospice care and related services. In June 2016, Compassus hired Darla Clement as executive director of its two Houston programs. In that role, Clement was responsible for overseeing and managing both Houston programs, including all business operations, financial budgeting and performance, employee management, and regulatory compliance and accreditation.

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[1] The Texas Legislature amended certain provisions of the TCPA in 2019. *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 §§ 27.001, 27.003, 27.005–.007, 27.0075, 27.009–.010). The amendments became effective September 1, 2019. *Id.* at § 11. Because suit was filed before the effective date of the amendments, this case is governed by the statute as it existed before the amendments. *See id.* All of our citations and analyses are to the TCPA as it existed prior to September 1, 2019, unless otherwise noted.

In connection with her employment, Clement signed a Protective Covenants Agreement ("PCA") on June 9, 2016. Paragraph 3(a) of the PCA contains a non-interference with business relationships provision and paragraph 3(b) contains a non-solicitation of colleagues and contractors provision.[2] Both covenants were in effect during Clement's employment and for one year thereafter.

In early 2018, Clement and several colleagues discussed leaving the company and forming a startup competitor. Asserting that they were dissatisfied with Compassus's quality of care, they sought to provide a higher level of hospice care to the community. In early May, Clement was offered a new position at Compassus which she considered a demotion. On May 2, Clement emailed a business plan to

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[2] Paragraph 3(a) provides, in pertinent part:

> Colleague will not, directly or indirectly, contact, solicit, or communicate with a Covered Client or Covered Referral Source of Compassus for the purpose of encouraging, causing, or inducing such Covered Client or Covered Referral Source to cease or reduce doing business with Compassus, modify their relationship with Compassus to Compassus' detriment, or to divert hospice care or related opportunities to a Competing Business, nor will Colleague assist any other person or entity in so doing.

Paragraph 3(b) provides, in pertinent part:

> During Colleague's employment, and for a period of one year after Colleague ceases to be employed by Compassus, regardless of the manner or cause of termination: Colleague will not, directly or indirectly, evaluate, solicit, or communicate with, or help another person or entity evaluate, solicit, or communicate with, any Protected Colleague or Contractor for the purpose of causing the Protected Colleague or Contractor to terminate his or her employment or association with Compassus or to become employed by or associated with a Competing Business.

Debra Houser, a contact at Crossroads, one of Compassus's competitors which did not have a Houston office. In mid-May, Clement took a paid leave of absence to consider Compassus's job offer and evaluate her options.

On May 21, Houser put Clement in contact with Tony Chase, Crossroads's Chief Operating Officer. That same day, Houser emailed Chase stating that "[Clement] is the Administrator" and "[s]he can bring her whole team." On May 22, in response to Chase's request, Clement emailed Chase with salary range information of "identified staff," including Compassus Medical Director, Dr. Jeffrey Lee, whom Clement described as "a board certified geriatrician [who] is networked like you have no idea." Clement also described a group of Dr. Lee's patients who would follow Dr. Lee to Crossroads. On May 23, Clement sent an email to Chase and Dr. Lee for the purpose of introducing them to one another and to provide information regarding their respective backgrounds.

On May 25, Clement emailed Chase with a list of employees whom she identified as willing to join Crossroads as well as their salary requests and start dates. Clement also requested a draft contract for Dr. Lee's review. On May 26, Dr. Lee provided written notice to Compassus of his intent to resign from his role as Medical Director.

On May 28, Clements accepted a job offer from Crossroads. Chase prepared a series of offer letters for the individuals who had expressed an interest in joining

Crossroads and forwarded them to Clement to present to each prospective employee. In the ensuing days, Crossroads hired Dr. Lee and four other Compassus employees to establish and work in Crossroads's Houston office. Compassus Regional Vice-President Toby Radabaugh asked Clement if she knew what was going on, and Clement responded that she knew nothing about the departures.

On June 5, Clements resigned her position at Compassus and began her employment at Crossroads as Vice-President of Operations. She subsequently became Chief Operating Officer. Crossroads's Houston office opened its doors on June 11.

On June 19, Radabaugh sent an email to Clement reminding her that she had signed a protective covenant agreement with Compassus and attached a copy of the agreement to her email. Clement responded that the agreement was no longer applicable to her.

Sometime in June, Dawn Kindhart, Compassus's executive director in its Austin office and Clement's former supervisor, contacted Clement to ask if she was aware of any hospice employment opportunities because she was "being exited out of her role" at Compassus. On July 2, Clement offered Kindhart the position of Vice-President of Operations at Crossroads. Kindhart accepted the offer that same day.

B. Trial Court Proceedings

On July 6, 2018, Compassus filed suit against Clement, Dr. Lee, and Crossroads. Against Crossroads, Compassus alleged causes of action for knowing participation in breach of duty of loyalty/fiduciary duties, tortious interference with contract, and conspiracy.[3]

On September 7, 2018, Crossroads filed a motion to dismiss Compassus's lawsuit under the TCPA.[4] Crossroads contended that the TCPA applied because Compassus's claims were based on, related to, or in response to Crossroads's exercise of its right to association and right to free speech "because the crux of Compassus's claims against Crossroads center upon its communications with Clement and/or other former Compassus employees for the promotion and pursuit of their common interests in developing and providing hospice and palliative care" to the community. Crossroads further argued that Compassus could not establish by clear and specific evidence a prima facie case for each essential element of its claims. Crossroads argued that Compassus could not prove its tortious interference claim because Crossroads did not know of Clement's PCA with Compassus until

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[3] Against Clement, Compassus alleged causes of action for breach of duty of loyalty/fiduciary duties, breach of contract, and conspiracy, and sought a declaratory judgment. Against Dr. Lee, Compassus alleged claims for knowing participation in breach of duty of loyalty/fiduciary duties, business disparagement, and conspiracy. Compassus's claims against Clement and Dr. Lee do not form a part of this appeal.

[4] Neither Clement nor Dr. Lee filed a TCPA motion.

Crossroads received a copy of Compassus's petition. Crossroads argued that because it had no knowledge of Clement's agreement with Compassus, Compassus could not prove knowing participation with respect to Clement's alleged breaches of the agreement. It further argued that because Compassus could not prevail on either its tortious interference claim or its knowing participation in breach of fiduciary duty claim, there was no underlying tort upon which to base its conspiracy claim.

On October 11, 2018, the trial court granted, in part, Compassus's motion for discovery. The trial court ordered Clement and Crossroads to produce certain documents and allowed Compassus to depose Clement and a Crossroads's corporate representative.

On December 6, 2018, Compassus filed its response in opposition to Crossroads's motion to dismiss. In support of its response, Compassus attached as exhibits Clement's PCA with Compassus, excerpts (including exhibits) from Clement's deposition, excerpts from Chase's deposition, and several affidavits of Compassus employees. Compassus did not dispute that the TCPA was applicable to the lawsuit. Rather, it argued that it presented sufficient evidence to establish a prima facie case for each essential element of its claims.

With regard to its knowing participation in breach of fiduciary duty claim, Compassus argued that Clement held an informal fiduciary relationship with

Compassus as the executive director of its Houston programs and that she breached her fiduciary duties to Compassus while still employed when she:

- "hand-picked" a core team of Compassus employees to join her in establishing a direct competitor in the Houston market;
- introduced Crossroads to the hand-picked Compassus team (and vice versa) for purposes of those employees moving to Crossroads;
- developed and proposed to Crossroads's CEO the positions, salaries, start dates, and other employment terms for the Compassus team;
- presented Crossroads's job offers to that team of Compassus employees;
- solicited further Compassus employees to attempt to have them join Crossroads;
- solicited hospice business for Crossroads from healthcare facilities that were active Compassus referral sources;
- identified Compassus medical director, Dr. Lee, as a potential medical director for Crossroads and introduced him to Crossroads's CEO for that purpose;
- assisted in negotiating the terms of Dr. Lee's medical director agreement with Crossroads;
- had discussions with Dr. Lee (a Compassus referral source) regarding moving Compassus patients to Crossroads; and
- contacted vendors for Crossroads to secure contracts that mirrored Compassus's contracts.

In support of its contention that Crossroads knowingly participated in Clement's breaches, Compassus pointed to evidence showing that (1) "Crossroads

was made aware of Clement's fiduciary role with Compassus" when she was introduced to Crossroads's CEO as "the Administrator" who "can bring her whole team" to Crossroads and (2) Crossroads was aware that Clement had taken the actions above for Crossroads while she was still a Compassus employee. According to Compassus, the evidence also showed that Chase "worked in tandem with Clement and provided her the financial backing and platform to see her fiduciary breaches reach their intended conclusion" when he:

- provided her and the solicited Compassus team with a "very nice financial opportunity to brand our team in the Houston market";
- hired Dr. Lee as Crossroads's Medical Director at Clement's urging;
- permitted Clement to "hand-pick" the Compassus employees she sought to take with her to Crossroads;
- provided jobs to the solicited Compassus employees that he knew Clement had hand-picked; and
- provided Clement with offer letters to present to the Compassus team of employees.

Finally, Compassus contended that Clement's breaches harmed Compassus and benefitted her and Crossroads.

As to its tortious interference claim, Compassus contended that (1) Clement's agreement was subject to interference; (2) Crossroads willfully interfered with Clement's agreement; and (3) the interference proximately causes Crossroads's loss and damages. To establish the second element—Crossroads's willful interference

with Clement's agreement—Compassus argued that Clement breached her agreement with Compassus *after* she became a Crossroads employee when she (1) solicited off-limits Compassus employees and (2) aided Crossroads in securing hospice care business from off-limits Compassus referral sources. Specifically, Compassus pointed to evidence that Clement committed post-employment breaches by violating section 3(b) of her PCA—which prohibits solicitation of certain employees—when she:

- sent text messages to Compassus employees Jamie Pounds and Jennifer Henderson to encourage them to leave Compassus; and
- successfully induced Compassus manager, Dawn Kindhart, to join Crossroads as its new Vice-President of Operations.

Compassus further alleged that Clement interfered with referral sources because she interacted with Dr. Lee for the purpose of sending hospice care referrals to Crossroads instead of Compassus. Compassus alleged that because Clement is an officer and vice-principal of Crossroads, her knowledge of her PCA and her actions are Crossroads's knowledge and actions. Compassus argued that, alternatively, there were ample facts from which Crossroads should have concluded that the agreement existed. Specifically, it pointed to Chase's testimony that he knew of other Compassus employees who were subject to non-competition agreements and that Compassus had threatened to enforce one manager's agreement if he breached it. Compassus argued that these facts should have indicated to Chase that Clement

may have a non-competition agreement and should have caused him to raise those questions with Clement. Compassus also contended that Crossroads should have known of Clement's agreement when it received the PCA between Kindhart and Compassus in anticipation of her hire on July 2, 2018, because Kindhart's last position with Compassus was as executive director, the same position Clement held with Compassus before she resigned. Compassus alleged that these breaches and interference with Clements's compliance with her PCA caused losses to Compassus while unjustly enriching Crossroads, Clement, and Dr. Lee.

As to its civil conspiracy claim, Compassus argued that the evidence established that the agreed-upon object of the defendants' conspiracy was to gain an unfair competitive advantage in the Houston hospice industry through the alleged breaches of fiduciary duty and other tortious conduct, as shown by the following facts:

- the first contact between Crossroads and Clement in May 2018, where Chase and Clement discussed Clement using her position at Compassus to bring "her whole team" to Crossroads;

- Crossroads providing Clement and the wrongfully solicited Compassus team with a "very nice financial opportunity to brand [their] team in the Houston market;" and

- Crossroads hiring Dr. Lee to serve as Crossroads's Medical Director at Clement's urging and diverting his referrals to Crossroads instead of Compassus.

Compassus contended that the alleged unlawful acts caused damages to Compassus.

On December 7, 2018, Crossroads filed its reply in support of its motion to dismiss. Crossroads argued that it could not have knowingly participated in the violation of fiduciary duties because, under Texas law, at-will employees are permitted to secretly join with each other and prepare to compete against their employer. It also reasserted that it did not know about the non-solicitation covenant that formed the basis of Compassus's tortious interference claim until it was provided a copy of the petition on July 6, 2018. It also argued that Chase had no reason to believe that there was any type of non-solicitation covenant because he had never encountered any such type of agreement in his more than thirty years of management in the hospice industry. Crossroads also argued that Clement's knowledge of her own restrictive covenants could not be imputed to Crossroads to hold Crossroads liable for tortious interference.

On December 10, 2018, the trial court held a hearing on Crossroads's motion. On December 18, 2018, the trial court signed an order denying Crossroads's motion to dismiss. This interlocutory appeal followed.

Texas Citizens Participation Act

Chapter 27, also known as the Texas Citizens Participation Act, is an anti-SLAPP statute. *See KBMT Operating Co. v. Toledo*, 492 S.W.3d 710, 713 n.6 (Tex. 2016). "SLAPP" is an acronym for "Strategic Lawsuit Against Public Participation." *Id.* The purpose of the statute "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 § 27.002; *KTRK Television, Inc. v. Robinson*, 409 S.W.3d 682, 688 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). "The TCPA created 'an avenue at the early stage of litigation for dismissing unmeritorious suits that are based on the defendant's exercise' of certain constitutional rights." *Schimmel v. McGregor*, 438 S.W.3d 847, 854 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (quoting *In re Lipsky*, 411 S.W.3d 530, 539 (Tex. App.—Fort Worth 2013, orig. proceeding), *mand. denied*, 460 S.W.3d 579 (Tex. 2015)). The Legislature has directed courts to construe the statute liberally "to effectuate its purpose and intent fully." TEX. CIV. PRAC. & REM. CODE § 27.011(b); *Robinson*, 409 S.W.3d at 688.

Section 27.003 of the TCPA allows a litigant to seek dismissal of a "legal action" that is "based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association." *Id.* § 27.003(a). The TCPA imposes the initial burden on the movant to establish by a preponderance of the evidence "that the legal action is based on, relates to, or is in response to the party's exercise of . . . the right to petition." *Id.* § 27.005(b). If the trial court determines that the movant has met its burden, the burden then shifts to the nonmovant to

establish "by clear and specific evidence a prima facie case for each essential element of the claim in question." *Id.* § 27.005(c).

"The Legislature's use of 'prima facie case' in the second step of the inquiry implies a minimal factual burden: '[a] prima facie case represents the minimum quantity of evidence necessary to support a rational inference that the allegation of fact is true.'" *In re Estate of Calkins*, 580 S.W.3d 287, 297 (Tex. App.—Houston [1st Dist.] 2019, no pet.) (internal citations omitted). The TCPA requires that the plaintiff's proof address and support each "essential element" of every claim and that the proof constitute "clear and specific evidence." *Robinson*, 409 S.W.3d at 688. Because the statute does not define "clear and specific," we apply the ordinary meaning of these terms. *Id*. at 689. "Clear" means "unambiguous," "sure," or "free from doubt," and "specific" means "explicit" or "relating to a particular named thing." *Id*.

When determining whether to dismiss the legal action, the court must consider "the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based." TEX. CIV. & PRAC. REM. CODE § 27.006(a). We review the pleadings and evidence in the light most favorable to the plaintiff. *Cheniere Energy, Inc. v. Lotfi*, 449 S.W.3d 210, 214 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *see also Sloat v. Rathbun*, 513 S.W.3d 500, 504 (Tex. App.—Austin 2015,

pet. dism'd) ("Importantly here, we also view the [evidence] in the light most favorable to . . . the nonmovant[.]").

Discussion

In one issue, Crossroads contends that the trial court erred in denying its motion to dismiss because Compassus failed to establish with clear and specific evidence a prima facie case on each essential element of its claims against Crossroads for (1) knowing participation in breach of fiduciary duty; (2) tortious interference with contract; and (3) conspiracy.

A. Knowing Participation in Breach of Fiduciary Duty

"An employee has a duty to act primarily for the benefit of his employer in matters connected with his employment." *Wooters v. Unitech Int'l, Inc.*, 513 S.W.3d 754, 762–63 (Tex. App.—Houston [1st Dist.] 2017, pet. denied); *Abetter Trucking Co. v. Arizpe*, 113 S.W.3d 503, 510 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (citing *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 200 (Tex. 2002)). Consequently, an employee may not (1) appropriate the company's trade secrets; (2) solicit the former employer's customers while still working for his employer; (3) solicit the departure of other employees while still working for his employer; or (4) carry away confidential information. *Abetter Trucking*, 113 S.W.3d at 512. "When a third party knowingly participates in the breach of a fiduciary duty, the third party becomes a joint tortfeasor and is liable as such." *JSC Neftegas-Impex v. Citibank,*

N.A., 365 S.W.3d 387, 411 (Tex. App.—Houston [1st Dist.] 2011, pet. denied) (quoting *Kastner v. Jenkens & Gilchrist, P.C.*, 231 S.W.3d 571, 580 (Tex. App.—Dallas 2007, no pet.).

"But the basis for liability for breach of an employee's duty is limited: it is tempered by society's legitimate interest in encouraging competition." *Wooters*, 513 S.W.3d at 763 (quoting *Johnson*, 73 S.W.3d at 201). Thus, "'[a]n at-will employee may properly plan to go into competition with his employer and may take active steps to do so while still employed'" and may secretly do so with other employees, without disclosing his plans to his employer. *Johnson*, 73 S.W.3d at 201 (quoting *Augat v. Aegis, Inc.*, 565 N.E.2d 415, 419 (1991)); *Abetter Trucking*, 113 S.W.3d at 510. "An employee also may use his general skills and knowledge obtained through employment to compete with the former employer." *Wooters*, 513 S.W.3d at 763 (citing *Sharma v. Vinmar Int'l, Ltd.*, 231 S.W.3d 405, 424 (Tex. App.–Houston [14th Dist.] 2007, no pet.)).

Compassus contends that Crossroads knowingly participated in Clement's breaches of her fiduciary duty in two respects. First, Crossroads knew of and was inextricably involved in Clement's unlawful solicitation of Dr. Lee. Second, Crossroads knew of and was inextricably involved in Clement's unlawful solicitations of certain Compassus Houston employees.

In support of its argument that Crossroads knowingly participated in soliciting Dr. Lee, Compassus points to the following evidence: (1) Clement introduced Dr. Lee to Chase for the purpose of having Dr. Lee see Crossroads as the "alternative" to Compassus;[5] (2) Chase received Clement's email introducing Chase and Dr. Lee to each another and providing information on their respective backgrounds as well as the benefits to joining Crossroads; (3) Chase received Clement's email regarding Dr. Lee's requested contract terms; (4) Clement remained directly involved in negotiations with Chase regarding Dr. Lee's medical director contract; and (5) Clement directly updated Chase on her discussions with Dr. Lee toward reaching an agreement to leave Compassus for Crossroads. According to Compassus, the evidence establishes that "Clement successfully worked to persuade Dr. Lee to end his Compassus relationship in favor of a competitor, with Crossroads' direct knowledge and consistent involvement."

The question before us is not whether Clement breached her fiduciary duty to Compassus by soliciting Dr. Lee but, rather, whether there is sufficient evidence to

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[5] In his deposition, Chase testified:

> Q: And to go back to one of my previous questions, this is, as you read it, Ms. Clement trying to help get Dr. Lee comfortable with you as the CEO of Crossroads?
>
> A: Yes, because he had expressed a desire for a change as well. And she wanted him to potentially see me as that alternative, me being Crossroads.

establish a prima facie case that Crossroads *participated* in Clement's alleged breach. All of the actions described above are actions taken by Clement, not Crossroads. The fact that Crossroads received emails and updates from Clement is not evidence that Crossroads participated in the alleged solicitation of Dr. Lee. *See Kastner*, 231 S.W.3d at 580 (stating that third-party is liable as joint tortfeasor only if it knowingly participates in breach of fiduciary duty).

Compassus also argues that Crossroads was inextricably involved in Clement's solicitation of Compassus employees. In support of its argument, Compassus points to the following evidence: (1) Clement hand-picked which Compassus employees to approach to bring to Crossroads—and which to not—based on their fit within her Crossroads team; (2) Clement identified to Crossroads the Compassus Houston employees to whom it should offer a job; (3) Clement raised specific Crossroads job opportunities with the Compassus employees she had identified; (4) Clement served as the "conduit" for all communications and all steps in the selected employees' potential hire with Crossroads; (5) Clement specified what position, start date, and compensation terms to include in Crossroads's job offer to each employee; (6) Clement procured offers of promotions to present to each of the Compassus employees who departed for Crossroads; (7) Clement procured raises and incentive compensation to present to each of those Compassus employees as part of their job offers; and (8) Clement received the Crossroads job offer letters and

conveyed them to some of the hand-picked Compassus staff for purposes of securing their commitments to move to Crossroads. Compassus argues that "[n]owhere does Crossroads identify any Crossroads-related actions taken by Clement—including those above—that it did not know about, approve of, or benefit from."

Compassus's argument is unavailing for the same reason its argument regarding Dr. Lee fails. Every one of the actions enumerated above was taken by Clement. Indeed, Clement's name precedes every verb in the list. That Crossroads knew about Clement's actions, and even approved of and benefitted from them, does not constitute interference in the employment relationship or participation in the solicitation of these employees. "'An at-will employee may properly plan to go into competition with his employer and may take active steps to do so while still employed'" and may secretly do so with other employees, without disclosing his plans to his employer. *Johnson*, 73 S.W.3d at 201 (quoting *Augat*, 565 N.E.2d at 419); *Abetter Trucking*, 113 S.W.3d at 511. The fact that Crossroads hired at-will employees who secretly agreed to compete with their employer and took the necessary steps to do so is not, in and of itself, evidence that Crossroads knowingly participated in Clement's alleged solicitation of these employees in violation of her employment agreement.

Compassus has not established by clear and specific evidence a prima facie case that Crossroads knowingly participated in Clement's alleged unlawful

solicitations of Dr. Lee and the other Compassus at-will employees. *See* TEX. CIV. PRAC. & REM. CODE § 27.005(c); *S & S Emergency Training Sols., Inc. v. Elliott*, 564 S.W.3d 843, 847 (Tex. 2018) (citing *Lipsky*, 460 S.W.3d at 590). The trial court erred in denying Crossroads's motion to dismiss Compassus's knowing participation in breach of fiduciary duty claim against Crossroads.

B. Tortious Interference

The elements of a cause of action for tortious interference with a contract are (1) the existence of a contract subject to interference; (2) a willful and intentional act of interference; (3) the act was a proximate cause of the plaintiff's damage; and (4) actual damage or loss occurred. *Holloway v. Skinner*, 898 S.W.2d 793, 795–96 (Tex. 1995); *Cent. States Logistics, Inc. v. BOC Trucking, LLC*, 573 S.W.3d 269, 278 (Tex. App.—Houston [1st Dist.] 2018, pet. denied). "To establish a willful and intentional act of interference, there must be evidence that the defendant was more than a willing participant—the defendant must have knowingly induced one of the contracting parties to breach its obligations under a contract." *Ferrara v. Nutt*, 555 S.W.3d 227, 243 (Tex. App.—Houston [1st Dist.] 2018, no pet.) (quoting *Greenville Automatic Gas Co. v. Automatic Propane Gas & Supply, LLC*, 465 S.W.3d 778, 786–87 (Tex. App.—Dallas 2015, no pet.)).

Crossroads challenges the second element of Compassus's claim, i.e., that Crossroads willfully and intentionally interfered with Clement's agreement with

Compassus. To establish the element of willful and intentional interference, the interfering party must know of the existence of a contract between the plaintiff and a third party or have knowledge of facts that would lead a reasonable person to conclude that a contract existed. *See Abatecola v. 2 Savages Concrete Pumping, LLC*, No. 14-17-00678-CV, 2018 WL 3118601, at *12 (Tex. App.—Houston [14th Dist.] June 26, 2018, pet. denied) (mem. op.) (concluding no "clear and specific" evidence showing that new employer knew or should have known agreement existed between employee and former employer where evidence showed that new employer was not informed of non-compete agreement until day after it hired employee and counsel for former employer sent cease-and-desist letter to new employer day after hire); *see also Greenville Automatic Gas*, 465 S.W.3d at 787. Crossroads argues that (1) there is no evidence that Crossroads was aware of Clement's non-solicitation agreement prior to the lawsuit; (2) there is no evidence Crossroads should have known about the agreement; and (3) Clement's knowledge cannot be imputed to Crossroads in order to establish third-party tort liability for Clement's breach of her own agreement.

Crossroads contends that it did not know of Clement's non-solicitation agreement. In his affidavit, Chase averred that (1) Clement never provided Crossroads with the PCA between Crossroads and Clement; (2) neither the agreement not its terms was ever discussed with Crossroads; and (3) Crossroads did

not learn of the existence of the agreement until Crossroads received a copy of Compassus's petition. Crossroads also contends that there is no evidence that it should have known about the non-solicitation agreement. Crossroads points to Chase's testimony that he had never encountered a non-solicitation agreement in his thirty years in management in the hospice business.

In response, Compassus argues that Crossroads should have been aware that Clement had a non-solicitation agreement because Chase admitted that, before hiring Clement, he knew of other Compassus managers who were subject to non-competition agreements. Specifically, Chase testified that he had encountered one such covenant in connection with the purchase and sale of a hospice company in Pennsylvania, and that he also knew of another Compassus manager who had been subject to a non-competition agreement. However, in both instances, the agreements in question were non-competition agreements, not non-solicitation agreements. Further, knowledge that a company has non-compete agreements with some employees is not evidence that a third party has knowledge of the specific agreement which is the subject of the tortious interference claim. *See id.* at 787 ("Greenville contends Automatic Propane was aware—before it hired Anderson—that some of Greenville employees were bound by contractual covenants not to compete. But Greenville has failed to come forward with summary judgment evidence indicating

Automatic Propane had knowledge of *Anderson*'s covenant before he was hired.") (emphasis in original).

Compassus also argues that Crossroads must have known about Clement's non-solicitation agreement when it received Kindhart's PCA with Compassus in anticipation of her hire. This is so, Compassus argues, because Kindhart's last position with Compassus was as executive director in its Austin office, the same position that Clement held in Compassus's Houston office only weeks earlier. However, there is no evidence in the record showing that the terms of Kindhart's PCA were the same as Clement's or that Kindhart's PCA included a non-solicitation agreement. *See id.* (concluding competing employer's knowledge that some employees of former employer were bound by non-compete covenants was not summary judgment evidence that competing employer knew of hired employee's covenant before it hired him).

Compassus also contends that Clement is a vice-principal based on her position as Crossroads's Chief Operating Officer as well as the wide authority Crossroads delegated to her. Thus, it argues, Clement's knowledge of her own agreement and her actions are deemed to be the knowledge and actions of Crossroads for purposes of satisfying the requirement that Crossroads knew of Clement's contract.

A vice-principal includes four classes of persons whose actions and knowledge are deemed to be the actions and knowledge of the company itself: (a) corporate officers; (b) those who have authority to employ, direct, and discharge servants of the master; (c) those engaged in the performance of nondelegable or absolute duties of the master; and (d) those to whom a master has confided the management of the whole or a department or division of his business. *Bennett v. Reynolds*, 315 S.W.3d 867, 884 (Tex. 2010) (quoting *Chrysler Ins. Co. v. Greenspoint Dodge of Hous., Inc.*, 297 S.W.3d 248, 250 n.1 (Tex. 2009)). Compassus argues that "because Clement was acting in her corporate capacity, Crossroads owns Clement's approval of solicitations of Compassus employees in breach of her agreement."

However, the question is whether Clement's *knowledge* of her non-solicitation covenant can be imputed to Crossroads such that Crossroads can be held liable for knowingly inducing Clement to breach her own agreement with Compassus. *See Greenville Automatic Gas*, 465 S.W.3d at 786–87 ("To establish a willful and intentional act of interference, there must be evidence that the defendant . . . knowingly induced one of the contracting parties to breach its obligations under a contract."). Clement cannot simultaneously be (1) an officer of Crossroads to impute knowledge to Crossroads; (2) an agent of Crossroads who does the interfering; and (3) an individual who has a contract with which Crossroads can

interfere. *See Holloway*, 898 S.W.2d at 794–95 (recognizing longstanding principle that "a party to a contract has a cause of action for tortious interference against any third person (a stranger to the contract) who wrongly induces another contracting party to breach the contract," and that "[b]y definition, the person who induces the breach cannot be a contracting party").

Compassus failed to present clear and specific evidence establishing that Crossroads knew or should have known of Clement's non-solicitation agreement. The trial court erred in denying Crossroads's motion to dismiss Compassus's tortious interference claim against Crossroads.

C. Conspiracy

"In Texas, a civil conspiracy is a combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means." *Firestone Steel Prods. Co. v. Barajas*, 927 S.W.2d 608, 614 (Tex. 1996). The essential elements of a civil conspiracy are: "(1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result." *Tri v. J.T.T.*, 162 S.W.3d 552, 556 (Tex. 2005). Civil conspiracy is a "derivative tort," meaning it depends on some underlying tort or other illegal act. *Agar Corp., Inc. v. Electro Circuits Int'l, LLC*, 580 S.W.3d 136, 140–41 (Tex. 2019)

(“Our use of the word ‘derivative’ in this context means a civil conspiracy claim is connected to the underlying tort and survives or fails alongside it.”).

Because Compassus has not met its burden on its underlying claims of knowing participation of breach of fiduciary duty or tortious interference against Crossroads, its conspiracy claim fails. *See id.*; *Vertex Servs., LLC v. Oceanwide Hous., Inc.*, 583 S.W.3d 841, 857 (Tex. App.—Houston [1st Dist.] 2019, no pet.). (holding where plaintiff’s tortious interference with contract claim did not survive summary judgment, its civil conspiracy claim “fail[ed] alongside it”).

We hold that the trial court erred in denying Crossroads’s motion to dismiss because Compassus failed to establish with clear and specific evidence a prima facie case on each essential element of its claims against Crossroads for (1) knowing participation in breach of fiduciary duty; (2) tortious interference with contract; and (3) conspiracy. *See* TEX. CIV. PRAC. & REM. CODE § 27.005(c). Accordingly, we sustain Crossroads’s issue.

Conclusion

We reverse the trial court’s denial of Crossroads’s motion to dismiss and remand the case to the trial court to award costs, fees, expenses, and sanctions as required by the TCPA, and to order dismissal of the suit with prejudice. *See id.* § 27.009(a).

Russell Lloyd
Justice

Panel consists of Justices Lloyd, Goodman, and Landau.