Affirmed and Opinion filed May 28, 2020.

In The

Fourteenth Court of Appeals

NO. 14-19-00019-CV

HOUSTON TENNIS ASSOCIATION, INC., Appellant

V.

REBECCA THIBODEAUX, Appellee

On Appeal from the 157th District Court
Harris County, Texas
Trial Court Cause No. 2018-67764

OPINION

In this appeal, we are asked to decide whether the Texas Citizens Participation Act (TCPA) applies to a Texas Rule of Civil Procedure 202 petition seeking a pre-suit deposition.[1] Our Houston sister court has held it does not.[2] We

[1] Under Rule 202, a person may petition a trial court for "for an order authorizing the taking of a deposition on oral examination or written questions either . . . (a) to perpetuate or obtain the person's own testimony or that of any other person for use in an anticipated suit; or (b) to investigate a potential claim or suit." Tex. R. Civ. P. 202.1. The TCPA is codified in chapter 27 of the Civil Practice and Remedies Code. *See* Tex. Civ. Prac. & Rem. Code

agree.

Rebecca Thibodeaux filed a petition seeking the pre-suit deposition of a corporate representative of the Houston Tennis Association, Inc. (the Association) "to investigate potential claims or suit." The Association filed a motion to dismiss under the TCPA that was denied by operation of law. The Association filed this interlocutory appeal challenging the denial of its TCPA motion but asserted during oral argument that the appeal is moot because the statute of limitations had run on Thibodeaux's potential claims.[3]

The record does not show that the statute of limitations conclusively bars Thibodeaux's claims, and we conclude that this appeal is not moot. We further conclude that the Association has not shown Rule 202 petitions fall within the scope of the TCPA. We affirm.

Background

Rebecca Thibodeaux was a member of the Association. After an incident with another tennis team in 2017, the Association suspended Thibodeaux as a team captain for one season followed by a two-season probationary period. The Association subsequently expelled her for two years based on unspecified "sportsmanship and leadership concerns."

After Thibodeaux filed her petition "to investigate potential claims or suit," the Association filed its TCPA motion to dismiss. Thibodeaux alleges that she

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§§ 27.001-.011.

[2] *See Hughes v. Giammanco*, 579 S.W.3d 672, 685 (Tex. App.—Houston [1st Dist.] 2019), *judgment set aside, opinion not vacated*, No. 01-18-00771-CV, 2019 WL 3331124 (Tex. App.—Houston [1st Dist.] July 25, 2019, no pet.) (mem. op); *Caress v. Fortier*, 576 S.W.3d 778, 781 (Tex. App.—Houston [1st Dist.] 2019, pet. denied).

[3] *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(12) (authorizing appeal of interlocutory order denying TCPA motion to dismiss).

"does not desire to file a lawsuit naming non-culpable parties [but] seeks to identify potentially responsible parties" and "seeks to discover facts necessary to make an informed decision about whether a lawsuit would be meritorious." Thibodeaux argued that she cannot ascertain whether she has defamation or other claims and against whom without obtaining information withheld by the Association regarding (1) who made the complaints against her, (2) what was said, and (3) what prompted the actions taken by the Association against her.

Analysis

The Association filed this interlocutory appeal challenging the denial of its TCPA motion by operation of law. The Association subsequently argued that its appeal was moot because the statute of limitations on Thibodeaux's potential claims had run.[4] We first address whether the appeal is moot. Concluding it is not, we then address whether Thibodeaux's Rule 202 petition falls within the scope of the TCPA.

I. The Appeal is Not Moot.

During oral argument, the Association's counsel asserted that the appeal is moot because Thibodeaux's potential defamation claims are time-barred as a matter of law, citing *Glassdoor, Inc. v. Andra Group*, 575 S.W.3d 523, 527 n.3 (Tex. 2019). Thibodeaux contends that the statute of limitations is tolled by the discovery rule because she has not been able to discover the contents of the statements made against her and whether the statements are defamatory.

In the *Glassdoor* case, the supreme court held that "if the statute of limitations . . . conclusively bars . . . as-yet unfiled claims, then a court order allowing [a party] to investigate those claims serves no legal purpose" under Rule

[4] However, the Association would not voluntarily dismiss its appeal.

202 and is rendered moot. *Id*. at 527 & n.3. Glassdoor operated a job and recruiting website that allowed current and former employees to post anonymous reviews of employers. *Id*. at 525. Andra Group sought to investigate potential defamation and business disparagement claims based on negative online reviews posted on Glassdoor's website and filed a Rule 202 petition. *Id*. The high court noted the statute of limitations for defamation is one year and for business disparagement is two years. *Id*. at 527. The court presumed that Andra Group would have had the benefit of the discovery rule "until [Andra Group] learned of, or in the exercise of reasonable diligence should have learned of, the existence of the negative reviews." *Id*. at 528. But Andra Group undisputedly had known about the reviews for more than two years by the time of the appeal. *Id*. Based on the record, the supreme court held that the statute of limitations conclusively barred the potential claims and thus the Rule 202 proceeding was moot. *Id*. at 527, 530.

A case becomes moot during the pendency of litigation if, after filing, a justiciable controversy between the parties ceases to exist—in other words, "if the issues presented are no longer 'live,' or if the parties lack a legally cognizable interest in the outcome." *Id*. at 527. When a case becomes moot, the court must vacate all previously issued orders and judgments and dismiss the case for want of jurisdiction. *Id*.

Ordinarily, a defamation claim accrues when the matter that is the subject of the claim is published or circulated. *Deaver v. Desai*, 483 S.W.3d 668, 674 (Tex. App.—Houston [14th Dist.] 2015, no pet.). However, the discovery rule applies if the allegedly defamatory statement is inherently undiscoverable or not a matter of public knowledge. *Id*.; *see also Kelley v. Rinkle*, 532 S.W.2d 947, 949 (Tex. 1976) (applying discovery rule to defamatory credit report). When the discovery rule applies, the limitations period begins to run when the claimant discovers, or

through the exercise of reasonable diligence should have discovered, the existence of the defamatory statement. *Deaver*, 483 S.W.3d at 674–75. Thibodeaux asserted in the trial court that the Association obstructed her from discovering whether "statements about her are false and potentially defamatory" and attempted to "run out the clock" on Thibodeaux's potential claims. Thibodeaux contends that the discovery rule applies here because she has not been able to discover whether any defamatory statements have been made against her.

Thibodeaux's potential defamation claims are distinguishable from the claims in *Glassdoor* because the Andra Group knew about the defamatory statements when it filed the Rule 202 petition and more than two years had elapsed during the pendency of the Rule 202 proceeding. *See* 575 S.W.3d at 528. In today's case, the record does not show that the statute of limitations conclusively bars Thibodeaux's claims. Thus, the *Glassdoor* precedent is not on point. *See id*. at 527–30. We conclude that a justiciable controversy between the parties continues to exist and that this case is not moot. *See id*.

We turn to the merits of the appeal.

II. The TCPA Does Not Apply.

The TCPA is known as the Texas Anti-SLAPP statute; "SLAPP" is an acronym for "Strategic Lawsuits Against Public Participation." *Bandin v. Free & Sovereign State of Veracruz de Ignacio de la Llave*, 590 S.W.3d 647, 649 (Tex. App.—Houston [14th Dist.] 2019, pet. filed). Despite this moniker, the legislature did not impart the traditional remedies associated with SLAPP suits or use that term in the TCPA. *Id*. We previously have discussed the legislature's purpose in enacting the statute, which is to address the harm intended by baseless litigation that suppresses the exercise of First Amendment rights "to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent

permitted by law," and do not do so again here. *Id*. at 649-50 (citing Tex. Civ. Prac. & Rem. Code § 27.002). We construe the act liberally to effectuate its purpose and intent fully. *Id*. at 650 (citing Tex. Civ. Prac. & Rem. Code § 27.011(b)).

The statute establishes a mechanism for expedited summary dismissal of suits that seek to intimidate or silence citizens from exercising their constitutional rights to free speech, of association, and to petition. *In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015); *Bandin*, 590 S.W.3d at 650. A defendant invoking the statute's protections must show by a preponderance of the evidence that a plaintiff has brought a "legal action" that is "based on, relates to, or is in response to" the defendant's exercise of one or more of these rights. *Lipsky*, 460 S.W.3d at 586; *Bandin*, 590 S.W.3d at 650.

The Association challenges the denial of its motion to dismiss on the basis that Thibodeaux's Rule 202 petition implicates the Association's rights of free speech and association. Although Thibodeaux stated that "Rule 202 petitions are legal actions [subject to] the TCPA," the Association had the initial burden to demonstrate the applicability of the statute. *See* Tex. Civ. Prac. & Rem. Code § 27.005(b); *see also Krishna Fin. Ltd. v. Elvis B. Foster, P.C.*, No. 14-19-00038-CV, 2020 WL 1181840, at *1 (Tex. App.—Houston [14th Dist.] Mar. 12, 2020, no pet. h.) (mem. op.) ("[T]he movant must satisfy its initial burden of demonstrating . . . that the legal action is based on, relates to, or is in response to the movant's exercise of the right of free speech, the right to petition, or the right of association."). After the movant has met this initial burden, the burden shifts to the nonmovant to establish by clear and specific evidence a prima facie case for each essential element of the claim in question. Tex. Civ. Prac. & Rem. Code § 27.005(c); *see also Krishna Fin. Ltd.*, 2020 WL 1181840, at *1. We turn to

whether the Association met its burden.

As noted, our Houston sister court has held that the TCPA does not apply to petitions seeking Rule 202 pre-suit depositions. *Hughes v. Giammanco*, 579 S.W.3d 672, 685 (Tex. App.—Houston [1st Dist.] 2019), *judgment set aside, opinion not vacated*, No. 01-18-00771-CV, 2019 WL 3331124 (Tex. App.—Houston [1st Dist.] July 25, 2019, no pet.) (mem. op); *Caress v. Fortier*, 576 S.W.3d 778, 781 (Tex. App.—Houston [1st Dist.] 2019, pet. denied). The court concluded that such proceedings are not "legal actions" as defined by the statute. *Hughes*, 579 S.W.3d at 685; *Caress*, 576 S.W.3d at 781. The TCPA defines a "legal action" as "a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal, declaratory, or equitable relief." Tex. Civ. Prac. & Rem. Code § 27.001(6). In *Hughes*, the court addressed three issues—the meaning of "petition" under the statute, the meaning of a "judicial pleading or filing that requests legal or equitable relief," and whether, considering the TCPA as a whole, the legislature intended to include a discovery vehicle such as Rule 202 petitions within the scope of the statute. *Id*. at 679-85. We discuss each issue in turn.

Petition. Acknowledging that the Second and Third Courts of Appeals have concluded that a Rule 202 petition is a legal action subject to dismissal under the TCPA, *see In re Elliott*, 504 S.W.3d 455, 464 (Tex. App.—Austin 2016, no pet.), and *DeAngelis v. Protective Parents Coalition*, 556 S.W.3d 836, 849 (Tex. App.—Fort Worth 2018, no pet.), the *Hughes* court concluded otherwise. 579 S.W.3d at 679-81. The court concluded that "petition" under the TCPA means "a pleading through which a plaintiff brings a lawsuit and asserts substantive causes of action or claims for relief against another" and thus a Rule 202 petition is not a "petition" as envisioned by the legislature in enacting the TCPA. *Id*. at 681. Instead, it is "a

petition that asks only to be allowed use of a discovery tool." *Id.*

In reaching this conclusion, the *Hughes* court analyzed several dictionary definitions of the word "petition," which is not defined in the statute. *Id.* at 680; *see also Sunstate Equip. Co., LLC v. Hegar*, No. 17-0444, 2020 WL 1660036, at *8 (Tex. Apr. 3, 2020) ("When the Legislature leaves a word undefined, we will apply the 'common, ordinary meaning unless a contrary meaning is apparent from the statute's language.' [W]e consult dictionaries to discern the natural meaning of a common-usage term not defined by contract, statute, or regulation.") (citations omitted). Dictionaries suggest a broad definition, along the lines of "a formal written request presented to a court or other official." *Hughes*, 579 S.W.3d at 680. But the term "petition" also has a more narrow, technical meaning—"the pleading instrument prescribed under the Texas Rules of Civil Procedure through which a plaintiff initiates and maintains a civil suit." *Id.* at 681 (citing *In re Elliott*, 504 S.W.3d at 475 (Pemberton, J., concurring), and Tex. R. Civ. P. 47 ("An original pleading which sets forth a claim for relief, whether an original petition, counterclaim, cross-claim, or third party claim . . . .")).

The *Hughes* court concluded that the legislature intended the more narrow definition because it corresponds to the statute's references to "lawsuit" and "cause of action" and the statute further references "pleading devices through which parties in a lawsuit assert substantive claims or causes of action." *Id.* "Construing 'petition' more generically would render the Legislature's inclusion of the other procedural devices enumerated in the definition of a 'legal action' meaningless because those devices also are formal written requests presented to a court and, thus, would be 'petitions' in the broader sense of the word." *Id.* "The canons of construction counsel against such a result." *Id.*

Legal or Equitable Relief. The *Hughes* court also held that a Rule 202

petition does not seek legal or equitable relief in the traditional sense because it seeks only the right to obtain discovery. *Id.* at 682-83. We similarly have noted that Rule 202 does not require a petitioner to plead a specific claim when seeking to investigate a potential claim or suit. *See Houston Indep. Sch. Dist. v. Durrell*, 547 S.W.3d 299, 305 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

In *Hughes*, the court relied on an earlier opinion in which it had held that a countermotion to dismiss a TCPA motion to dismiss was not a "legal action" under the statute because under the doctrine of *ejusdem generis*, "the list of more specific terms preceding the catchall—'lawsuit,' 'cause of action,' 'petition,' 'complaint,' 'cross-claim,' and 'counterclaim'—reflected that 'each element of this class is a procedural vehicle for the vindication of a legal claim, in a sense that is not true for a motion to dismiss.'" *Hughes*, 579 S.W.3d at 681-82 (citing *Paulsen v. Yarrell*, 537 S.W.3d 224, 231–33 (Tex. App.—Houston [1st Dist.] 2017, pet. denied)); *see also Carress*, 576 S.W.3d at 781 ("A Rule 202 petition for pre-suit discovery, like the motion to dismiss in *Paulsen*, is not a legal claim on the merits. As a result, we hold that the TCPA does not apply to Rule 202 proceedings."). We previously agreed with the court's reasoning in *Paulsen* and held that a TCPA motion to dismiss is not a "legal action" envisioned by the TCPA. *Roach v. Ingram*, 557 S.W.3d 203, 218 (Tex. App.—Houston [14th Dist.] 2018, pet. denied).

Consideration of TCPA as a Whole. Considering the TCPA as a whole, the *Hughes* court further concluded that the legislature did not envision Rule 202 pre-suit depositions to be included under the TCPA umbrella. *Hughes*, 579 S.W.3d at 684-85. The statute references substantive causes of action, not a discovery vehicle—specifically, the statute requires the nonmovant to present clear and specific evidence of each essential element of her *claim* and then the burden shifts back to the movant to present evidence of each element of a *defense*. *Id.* at 684

(citing Tex. Civ. Prac. & Rem. Code § 27.005(c)). Trial courts are required to consider pleadings and affidavits "stating the facts on which the *liability* or *defense* is based." *Id*. at 684-85 (emphasis in original).

A party filing a Rule 202 petition does not assert a substantive claim or cause of action. *Id*. at 685. As Rule 202 petitions are often filed "because the operative facts are unclear to the petitioner," all such petitions would be subject to dismissal under the TCPA because the petitioner would be required to "have prima facie evidence of the claim [she] seeks to investigate before filing [her] petition." *Id*. That would render Rule 202 a nullity. *Id*.

Our Conclusion. We agree with our sister court's reasoning in *Hughes* and conclude that the TCPA does not apply to Rule 202 petitions. Our construction of the TCPA does not run afoul of the legislature's mandate to liberally construe the statute "to effectuate its purpose and intent fully." *See* Tex. Civ. Prac. & Rem. Code § 27.011(b). The express purpose of the statute is twofold: "to encourage and safeguard the [enumerated] constitutional rights" and to "protect the rights of a person to file meritorious lawsuits for demonstrable injury." *Bandin*, 590 S.W.3d at 650 (citing Tex. Civ. Prac. & Rem. Code § 27.002). Our construction of the statute allows a petitioner to file a Rule 202 petition to ascertain whether she can file a meritorious lawsuit for demonstrable injury. *See* Tex. R. Civ. P. 202.1 (allowing a person to petition the court for an order authorizing a deposition "to investigate a potential claim or suit").

We cannot extricate the definitions in the act from its express purpose. *See Bandin*, 590 S.W.3d at 653. To do so would be to ignore longstanding supreme court precedent prohibiting us from isolating certain words from the whole of a statute to reach a certain outcome. *Id*. at 653-54 (citing *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 19 (Tex. 2007) ("In determining [a statute's]

meaning, we must also consider the statute as a whole and construe it in a manner which harmonizes all of its various provisions.")). For all these reasons, we conclude that Rule 202 petitions seeking pre-suit depositions are not "legal actions" within the scope of the TCPA.

Conclusion

Thibodeaux's Rule 202 petition is not a legal action subject to the TCPA. We must decide the proper disposition of the appeal. We held in *Jardin v. Marklund* that when an appellant has not shown that the claims against it fall within the scope of the TCPA, this court lacks appellate jurisdiction over an interlocutory appeal challenging the denial of the appellant's TCPA motion to dismiss and must dismiss the appeal. 431 S.W.3d 765, 768, 774 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

The supreme court recently issued *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, in which a TCPA motion to dismiss certain counterclaims was denied by operation of law. 591 S.W.3d 127, 130 (Tex. 2019). The court of appeals reversed the order and rendered judgment dismissing the counterclaims. *Id*. at 131. The supreme court held that some of the counterclaims were not covered by the TCPA and reversed the portion of the court of appeals' judgment dismissing those counterclaims. *Id*. at 137. If the appellant's failure to show that the claims against it fell within the scope of the TCPA meant that the court of appeals lacked jurisdiction, the *Creative Oil & Gas* court would have reversed the court of appeals' judgment and dismissed the appeal for lack of jurisdiction. *See N.Y. Underwriters Ins. Co. v. Sanchez*, 799 S.W.2d 677, 678–79 (Tex. 1990). Instead, the supreme court reversed and remanded on the merits. *Creative Oil & Gas*, 591 S.W.3d at 137-38.

Because the disposition in *Jardin* and cases from this court that follow the

disposition in *Jardin* conflict with *Creative Oil & Gas*, we conclude that *Jardin* is no longer a binding precedent on this point. *See Creative Oil & Gas*, 591 S.W.3d at 137–38. In light of the holding in *Creative Oil & Gas*, we conclude that we have jurisdiction over the appeal. Because the Association did not meet its initial burden to establish the TCPA applies, we affirm.

/s/ Frances Bourliot
Justice

Panel consists of Chief Justice Frost and Justices Christopher and Bourliot.