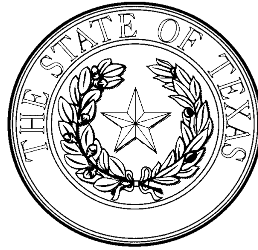
Opinion issued June 25, 2020



In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00651-CV

INDUSTRIAL WASTE SOLUTIONS LLC, TECHCORR USA MANAGEMENT, LLC, AND VISUALAIM LLC, Appellants

V.

JOSEPH R. SUMMA AND GREY SUMMA, Appellees

On Appeal from the 151st District Court
Harris County, Texas
Trial Court Case No. 2019-17341

MEMORANDUM OPINION

Industrial Waste Solutions LLC, TechCorr USA Management, LLC, and VisualAIM LLC appeal from the trial court's order denying their motion to dismiss

this lawsuit under the Citizens Participation Act.[1] We affirm.

BACKGROUND

Joseph R. Summa and Grey Summa sued the appellants and others based on a promissory note and an indemnity clause. Both the note and commitment to indemnify were made in connection with a purchase agreement in which Joseph's son, Vincent Summa, agreed to buy out his father's interest in Summa Group, LLC, which is an umbrella company that holds the membership interests of multiple other companies, including Industrial Waste, TechCorr, and VisualAIM.

The appellants moved to dismiss the suit under the Citizens Participation Act. The appellants argued that the Summas' claims are subject to dismissal under the Act because the claims are based on, relate to, or are in response to the appellants' exercise of their free-speech rights. In particular, the appellants argued that the purchase agreement and communications relating to it are a matter of public concern because the purchase agreement concerns the ownership of companies that operate

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[1] *See* TEX. CIV. PRAC. & REM. CODE §§ 27.001–.011. The Legislature amended certain provisions of the Citizens Participation Act in 2019. Act of May 17, 2019, 86th Leg., R.S., ch. 378, §§ 1–9, § 12 (codifying amendments 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 this suit was filed before the effective date of the amendments, it is governed by the Act as it existed before the amendments. *See id.* All our citations and analyses are to the Act as it existed before September 1, 2019, unless otherwise noted.

in an industry or industries occupied with health, safety, and environmental wellbeing and that offer services in the marketplace.

The trial court denied the motion to dismiss. The appellants then filed this interlocutory appeal. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(12).

DISCUSSION

The appellants argue that the trial court erred because they showed that the Summas' claims are subject to the Citizens Participation Act and the Summas failed to make a prima facie case in support of each element of their claims.

Standard of Review and Applicable Law

We review de novo a trial court's denial of a motion to dismiss under the Citizens Participation Act. *Holcomb v. Waller Cty.*, 546 S.W.3d 833, 839 (Tex. App.—Houston [1st Dist.] 2018, pet. denied). We likewise interpret the Act and decide whether it applies to a suit de novo. *See Youngkin v. Hines*, 546 S.W.3d 675, 680 (Tex. 2018); *Better Bus. Bureau of Metro. Houston v. John Moore Servs.*, 500 S.W.3d 26, 39 (Tex. App.—Houston [1st Dist.] 2016, pet. denied).

In assessing whether a suit or challenged claim comes within the Act's scope, we rely on the Act's language, interpreting it as a whole rather than reading its individual provisions in isolation from one another. *Youngkin*, 546 S.W.3d at 680. We interpret the Act according to the plain, common meaning of its words, unless a contrary purpose is evident from the context or a plain reading of its text leads to

absurd results. *Id.* We cannot judicially amend the Act by imposing requirements that the Act does not or by narrowing its scope contrary to its terms. *Cadena Comercial USA Corp. v. Tex. Alcoholic Beverage Comm'n*, 518 S.W.3d 318, 337 (Tex. 2017); *see ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 899 (Tex. 2017) (per curiam) (court presumes that Legislature purposely omitted words that are not included in Act). Nor can we substitute the words of the Act to give effect to what we think the Act should say. *Coleman*, 512 S.W.3d at 901.

The Act directs us to liberally interpret its provisions to fully effectuate its purpose, which "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, 27.011(b). To accomplish this purpose, the Act provides a summary procedure in which a party may move for dismissal on the basis that the claims made against it are based on, relate to, or are in response to the party's exercise of the right of free speech, right to petition, or right of association. *Id.* § 27.003(a); *see In re Lipsky*, 460 S.W.3d 579, 589–90 (Tex. 2015). This summary procedure requires a trial court to dismiss a suit, or particular claims within a suit, that demonstrably implicate these rights, unless the non-moving party can at the

threshold make a prima facie showing that its claims have merit. *Sullivan v. Abraham*, 488 S.W.3d 294, 295 (Tex. 2016).

A motion to dismiss made under the Act generally entails a three-step analysis. *Youngkin*, 546 S.W.3d at 679. The movant first must prove by a preponderance of the evidence that the challenged claims are based on, relate to, or are in response to its exercise of the right of free speech, right to petition, or right of association. TEX. CIV. PRAC. & REM. CODE § 27.005(b). The nonmovant's pleading is the best evidence of the nature of its claims. *Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017). When it is clear from the nonmovant's pleading that the claims are covered by the Act, the movant need not show more. *Adams v. Starside Custom Bldrs.*, 547 S.W.3d 890, 897 (Tex. 2018).

The Act defines the rights of free speech, petition, and free association. TEX. CIV. PRAC. & REM. CODE § 27.001(2)–(4). We are bound by these statutory definitions. *Youngkin*, 546 S.W.3d at 680. Relevant to this appeal, the exercise of free speech is defined as "a communication made in connection with a matter of public concern." TEX. CIV. PRAC. & REM. CODE § 27.001(3). Communications include statements or documents made or submitted in any form or medium. *Id.* § 27.001(1). Matters of public concern include issues relating to health or safety; environmental, economic, or community wellbeing; the government, a public official or figure; or a good, product, or service in the marketplace. *Id.* § 27.001(7).

Taken together, these statutory definitions safeguard an expansive right to free speech. *See Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015) (per curiam) (Act "broadly defines" free speech); *see also Adams*, 547 S.W.3d at 896 (Act's list of matters of public concern is non-exclusive). But the reach of these broad definitions is not without limit. To be a matter of public concern, a claim must have public relevance beyond the pecuniary interests of the parties. *Creative Oil & Gas v. Lona Hills Ranch*, 591 S.W.3d 127, 136 (Tex. 2019); *Gaskamp v. WSP USA*, No. 596 S.W.3d 457, 476 (Tex. App.—Houston [1st Dist.] 2020, pet. filed) (en banc). Private disputes that merely affect the fortunes of the litigants are not matters of public concern. *Creative Oil*, 591 S.W.3d at 137; *Newpark Mats & Integrated Servs. v. Cahoon Enters.*, No. 01-19-00409-CV, 2020 WL 1467005, at *8–9 (Tex. App.—Houston [1st Dist.] Mar. 26, 2020, no pet.).

If the movant carries its initial burden, the trial court must dismiss the claims unless the nonmovant establishes by clear and specific evidence a prima facie case for each element of the challenged claims. TEX. CIV. PRAC. & REM. CODE § 27.005(c); *Youngkin*, 546 S.W.3d at 679. If the nonmovant makes a prima facie case in support of the challenged claims, the burden then shifts back to the movant to prove by a preponderance of the evidence each element of a valid defense to these claims. TEX. CIV. PRAC. & REM. CODE § 27.005(d); *Youngkin*, 546 S.W.3d at 679–

80. If the movant carries this burden, the trial court must dismiss the claims. *Youngkin*, 546 S.W.3d at 681.

Analysis

The appellants in essence claim that any suit arising out of the purchase agreement necessarily implicates matters of public concern because the appellants' business operations involve health, safety, and environmental issues or because they offer services in the marketplace. We disagree.

This suit is contractual in nature. The Summas claim that they are owed money based on a promissory note and an indemnity clause. That the note and indemnity obligation arise out of a purchase agreement for companies that offer services in the marketplace concerning health, safety, or environmental wellbeing is not enough to transform this contract dispute between private parties into a matter of public concern within the scope of the Citizens Participation Act. *See Nobles v. U.S. Precious Metals*, No. 09-19-00335-CV, 2020 WL 1465980, at *4–5 (Tex. App.—Beaumont Mar. 26, 2020, no pet.) (mem. op.) (suit for damages based on buyout agreement and anti-disparagement clause was not matter of public concern despite company's provision of goods or services in marketplace); *see also Amend v. J.C. Penney Corp.*, No. 05-19-00723-CV, 2020 WL 1528497, at *4–5 (Tex. App.—Dallas Mar. 31, 2020, no pet.) (mem. op.) (suit for damages and injunctive relief based on non-compete agreement was not matter of public concern despite

company's provision of goods or services in marketplace). In short, the claims that the Summas have pleaded do not have any connection with the appellants' services in the marketplace or issues of health, safety, or environmental wellbeing.

The appellants do not argue that the purchase agreement, including its indemnity clause and corresponding promissory note, concerns the services that they offer in the marketplace or health, safety, or environmental wellbeing. *Cf. Coleman*, 512 S.W.3d at 898, 901 (private statements about alleged failure to gauge a storage tank related to matter of public concern due to "serious safety and environmental risks" associated with failure to do so). The appellants instead argue that any connection to marketplace services, health, safety, or environmental wellbeing makes the Act applicable no matter how indirect, tenuous, or remote the connection. The Texas Supreme Court has rejected this interpretation of the Act, holding that not every communication that is somehow related to these broad categories is a matter of public concern. *Creative Oil*, 591 S.W.3d at 137. In particular, the Court has rejected the argument that contract claims that affect only the fortunes of the litigants are a matter of public concern subject to the Act. *Id.*

Taken to its logical conclusion, the appellants' position would transform every claim that could conceivably be brought against them into a matter of public concern potentially subject to dismissal under the Act based solely on the services they offer within a particular industry regardless whether a given claim is based on, relates to,

or is in response to the appellants' communications about its marketplace services, health, safety, or environmental wellbeing. This is incompatible with the Act's plain language, which does not purport to insulate defendants from litigation solely because they offer services in the marketplace or are involved in an industry that focuses on health, safety, or environmental wellbeing. *See Goldberg v. EMR (USA Holdings)*, 594 S.W.3d 818, 828 (Tex. App.—Dallas 2020, no pet. h.) (communication at issue must relate to matter of public concern); *Dyer v. Medoc Health Servs.*, 573 S.W.3d 418, 428 (Tex. App.—Dallas 2019, pet. denied) (communications discussing tortious conduct were not related to matter of public concern simply because company was in healthcare industry).

We therefore hold that the Summas' claims are not within the scope of the Citizens Participation Act. As the Summas' claims are not within the scope of the Act, we need not address the parties' dispute as to whether the Summas established a prima facie case for the elements of their claims. *See* TEX. R. APP. P. 47.1.

CONCLUSION

We affirm the trial court's order denying the motion to dismiss.

Gordon Goodman
Justice

Panel consists of Chief Justice Radack and Justices Kelly and Goodman.