

Affirmed and Memorandum Opinion filed July 14, 2020.



In The

Fourteenth Court of Appeals

NO. 14-19-00686-CV

**TYLER BOWMAN, INDIVIDUALLY, TYLER BOWMAN, DC, LLC,
TYLER BOWMAN D/B/A CATALYST CHIROPRACTIC SPORTS
MEDICINE, AND TYLER BOWMAN D/B/A KINETIK CHIROPRACTIC
AND SPORTS REHAB, Appellants**

V.

**FORTITUDE CONSULTING GROUP, INC. D/B/A KINETIK AND
CRYSTAL ROARK, Appellees**

**On Appeal from the 56th District Court
Galveston County, Texas
Trial Court Cause No. 19-CV-0651**

M E M O R A N D U M O P I N I O N

In this interlocutory appeal, Tyler Bowman and associated entities appeal the denial of their motion to dismiss under the Texas Citizens Participation Act

(“TCPA”).¹ Appellees Fortitude Consulting Group, Inc. and Crystal Roark filed this lawsuit alleging in relevant part that appellants tortiously interfered with appellees’ business relationships by engaging in disparagement and slander. In their TCPA motion to dismiss, appellants asserted that the legal action is based on, relates to, or is in response to their exercise of free speech. Appellees opposed the motion on the grounds that (1) the TCPA does not apply, or alternatively (2) an exemption applies. The trial court denied the motion.

Based on the Supreme Court of Texas’s decision in *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 137 (Tex. 2019), we conclude that the TCPA does not apply to this legal action because the alleged communications at issue do not involve a matter of public concern. Accordingly, we affirm the trial court’s order.

Background

Roark and Fortitude Consulting Group, Inc. d/b/a Kinetik (collectively, “Roark Parties”) sued Bowman and three business entities (collectively, “Bowman Parties”). According to the original petition, Roark and Bowman were co-owners of a business entity operating as “Kinetik” from April 2017 to March 2019. Kinetik provided specialty services relating to preventative care, health, and wellness; Bowman provided chiropractic services at Kinetik.

The Roark Parties asserted a number of claims, but the only one relevant to this appeal is their cause of action for tortious interference with contracts or business

¹ See Tex. Civ. Prac. & Rem. Code §§ 27.001-.011 (West 2015). The TCPA was amended in 2019. See Act of May 17, 2019, 86th Leg., R.S., ch. 378, 2019 Tex. Gen. Laws 684. The 2019 amendments do not apply to this case, which was filed on April 10, 2019. See *id.* §§ 11-12, 2019 Tex. Gen. Laws at 687 (providing that amendments apply to actions filed on or after September 1, 2019). We refer to the TCPA version applicable to this dispute.

relations.² Allegedly, Bowman, through his own chiropractic business, competed with Kinetik, which the Roark Parties say damaged Kinetik in various ways. The Roark Parties contend that Bowman and/or his associated entities: (1) disparaged or slandered Roark to customers, clients, and providers, in an attempt to gain an advantage over Roark, to usurp Roark's authority as an officer, director, and shareholder of Kinetik, and to force Kinetik out of business and devalue Kinetik; (2) willfully and intentionally interfered with the Roark Parties' contracts by steering clients away from Kinetik to fraudulent scam entities utilizing the same name; and (3) tortiously interfered with contracts with tenants who subleased space from the Roark Parties.

The Bowman Parties filed a motion to dismiss the tortious interference claim under the TCPA. *See* Tex. Civ. Prac. & Rem. Code § 27.003(a). They alleged that claim was based on, related to, or was in response to Bowman's exercise of free speech rights under the TCPA, because all of the Roark Parties' allegations concerned communications made in connection with goods, products, or services in the marketplace. *Id.* § 27.001(3), (7)(E) (defining "exercise of the right of free speech" as a "communication made in connection with a matter of public concern," which includes issues related to a "good, product, or service in the marketplace"). The Roark Parties filed a response opposing dismissal, in which they disputed that Bowman's communications constituted an exercise of the right of free speech and, alternatively, argued that the TCPA's "commercial speech" exemption applied. *Id.*

² The Roark Parties also asserted claims for misappropriation of corporate funds, violation of the Texas Theft Liability Act, conversion, constructive fraud, breach of fiduciary duties, and fraudulent transfer of assets.

§ 27.010(b). After a hearing, the trial court denied the Bowman Parties' motion. The Bowman Parties timely perfected this interlocutory appeal.³

Analysis

A. Standard of Review and Applicable Law

The TCPA contemplates an expedited dismissal procedure when a “legal action” 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.” Tex. Civ. Prac. & Rem. Code § 27.003(a). Only the right of free speech is at issue here. The TCPA’s former version, applicable here, defined “the exercise of the right of free speech” as “a communication made in connection with a matter of public concern.” *Id.* § 27.001(3). A “matter of public concern” is defined in relevant part as including “an issue related to . . . a good, product, or service in the marketplace.” *Id.* § 27.001(7)(E). A “[c]ommunication” includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.” *Id.* § 27.001(1). The Texas Supreme Court has held that the Act may protect both public and private communications. *See ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 899 (Tex. 2016) (per curiam) (discussing *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015) (per curiam)).

In enacting the TCPA, the legislature explained that its overarching purpose 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

³ *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(12) (a person may appeal from an interlocutory order that denies a motion to dismiss under section 27.003).

§ 27.002. To effectuate the statute’s purpose, the legislature has provided a procedure to expedite the dismissal of claims brought to intimidate or to silence a defendant’s exercise of these First Amendment rights. *Creative Oil & Gas*, 591 S.W.3d at 132; *Coleman*, 512 S.W.3d at 898. In the first step, the party filing a motion to dismiss under section 27.003 of the TCPA bears the burden to show by a “preponderance of the evidence” that the “legal action” is “based on, relates to, or is in response to,” as relevant to this appeal, the party’s “exercise of the right of free speech.” Tex. Civ. Prac. & Rem. Code §§ 27.003(a), 27.005(b); *see also Coleman*, 512 S.W.3d at 898. If the movant satisfies this burden, the trial court must dismiss the lawsuit unless the nonmovant “establishes 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 Coleman*, 512 S.W.3d at 899. The movant can still obtain dismissal, however, if it establishes “by a preponderance of the evidence each essential element of a valid defense to the nonmovant’s claim.” Tex. Civ. Prac. & Rem. Code § 27.005(d). In determining whether to dismiss an action, the trial court must consider “the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based.” *Id.* § 27.006(a).

We construe the TCPA liberally to effectuate its purpose and intent fully. *See Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 894 (Tex. 2018); *Coleman*, 512 S.W.3d at 899; *Cox Media Grp., LLC v. Joselevitz*, 524 S.W.3d 850, 859 (Tex. App.—Houston [14th Dist.] 2017, no pet.); Tex. Civ. Prac. & Rem. Code § 27.011(b). A court’s determination of whether communications are matters of public concern under the TCPA is subject to a de novo standard of review. *See Adams*, 547 S.W.3d at 894. Under the de novo standard, we “make an independent determination and apply the same standard used by the trial court in the first instance.” *Joselevitz*, 524 S.W.3d at 859.

B. Application

The Bowman Parties argue that the Roark Parties' tortious interference claim is based on, relates to, or is in response to Bowman's exercise of his free speech rights because the alleged communications relate to a matter of public concern. *See* Tex. Civ. Prac. & Rem. Code § 27.001(3), (7). Specifically, the Bowman Parties contend that the Roark Parties' allegations that Bowman "'slandered' [Roark] in order to 'disparage' and cause others to 'cease doing business' with [Roark] constitute communications made in connection with goods, products, or services offered by [Roark] in the marketplace."

Several months after the Bowman Parties filed their motion to dismiss and the trial court denied it, the Supreme Court of Texas decided *Creative Oil & Gas*. There, the court explained what it means for a communication to be made in connection with a matter of public concern when the allegations relate to a good, product, or service in the marketplace. *Creative Oil & Gas*, 591 S.W.3d at 134-36. The court clarified that "not every communication related somehow to one of the broad categories set out in section 27.001(7) always regards a matter of public concern." *Id.* at 137. The TCPA's inclusion of "a good, product, or service in the marketplace" must be interpreted considering the common meaning of a "matter of public concern," which does not include "purely private matters." *Id.* at 135. "The phrase 'matter of public concern' commonly refers to matters 'of political, social, or other concern to the community.'" *Id.* (quoting *Brady v. Klentzman*, 515 S.W.3d 878, 884 (Tex. 2017)). Therefore, the supreme court reasoned, a communication regarding "a good, product, or service in the marketplace" does not constitute a matter of public concern unless the communication has "some relevance to a wider audience of potential buyers or sellers in the marketplace, as opposed to communications of relevance only to the parties to a particular transaction." *Id.* at 134; *see also id.* at

136 (dispute must have “relevance to the broader marketplace or otherwise . . . be characterized as involving public concerns”).

In *Methodist Hospital v. Harvey*, No. 14-18-00929-CV, 2020 WL 1060833, at *3 (Tex. App.—Houston [14th Dist.] Mar. 5, 2020, no pet.) (mem. op.), this court applied *Creative Oil & Gas* to hold that a trial court properly denied a defendant’s TCPA motion to dismiss because the communications there at issue did not relate to a matter of public concern. In that case, the plaintiff asserted claims for defamation and tortious interference with an employment relationship after his employer, Methodist Hospital, fired him for allegedly soliciting gifts from one of the hospital’s vendors. *Id.* at *1. The hospital moved to dismiss under the TCPA, arguing that the plaintiff’s alleged statements forming the basis of his claims concerned the public because, *inter alia*, they pertained to an issue related to a product or service in the marketplace—namely, the hospital’s vendor contracts, which are bid upon in an open market. *Id.* at *2. We said that that “the statements forming the basis of Harvey’s claims do not relate to products or services ‘in the marketplace.’” *Id.* at *3. This was because “Harvey’s alleged solicitation of gifts from Schindler [the vendor] do not involve a public audience of potential buyers or sellers. Instead, these matters relate to only Harvey’s, Houston Methodist’s, and (potentially) Schindler’s private concerns.” *Id.*

At least the First, Fifth, and Ninth Courts of Appeals also have applied *Creative Oil & Gas* in considering whether alleged communications pertaining to goods, products, or services in the marketplace were made in connection with matters of public concern for purposes of TCPA applicability. See *Newpark Mats & Integrated Servs., LLC v. Cahoon Enters., LLC*, ---S.W.3d---, 2020 WL 1467005, at *8 (Tex. App.—Houston [1st Dist.] Mar. 26, 2020, no pet. h.); *Gaskamp v. WSP USA, Inc.*, 596 S.W.3d 457, 479 (Tex. App.—Houston [1st Dist.] 2020, pet. filed)

(en banc); *Nobles v. U.S. Precious Metals, L.L.C.*, No. 09-19-00335-CV, 2020 WL 1465980, at *5 (Tex. App.—Beaumont Mar. 26, 2020, no pet. h.) (mem. op.); *Goldberg v. EMR (USA Holdings) Inc.*, 594 S.W.3d 818, 826-27, 830 (Tex. App.—Dallas 2020, no pet. h.) (op. on reh’g). In *Goldberg*, for example, the plaintiffs alleged that the defendants tortiously interfered with contracts by using confidential information to contact “purchasers and suppliers” of scrap metal. *Goldberg*, 594 S.W.3d at 829-30. But, importantly, the communications were “private communications between private parties about purely private economic matters.” *Id.* at 830. The court affirmed the trial court’s denial of the motion to dismiss. *Id.* at 833.

Similarly, in *Gaskamp*, our sister court in Houston held that communications made by a plaintiff’s former employees in soliciting and procuring business from a third party did not constitute an exercise of the employees’ free-speech rights because the communications did not have any “relevance to a public audience of buyers or sellers but instead were limited to ‘the pecuniary interests of the private parties involved.’” *Gaskamp*, 596 S.W.3d at 479 (quoting *Creative Oil & Gas*, 591 S.W.3d at 136). The court also held in a subsequent case that a defendant’s allegedly tortious communications made internally or to the plaintiff or the plaintiff’s employees did not implicate matters of public concern because the communications involved a private business dispute between the plaintiff and defendant. *Newpark Mats*, 2020 WL 1467005, at *8 (citing *Creative Oil & Gas*, 591 S.W.3d at 136-37).

To be sure, the Bowman Parties lacked the benefit of *Creative Oil & Gas* when they filed their motion to dismiss. But it compels affirmance nonetheless. The Roark Parties alleged that Bowman “engaged in contact with [Roark’s] customers/clients in order to disparage [Roark]” and to “steer[] clients away” from Roark’s business and that Bowman “interrupted and interfered with Tenants’

businesses who subleased space from [Roark].”⁴ This alleged conduct is similar to that at issue in *Creative Oil & Gas* and the other cases cited because the communications related solely to the pecuniary interests of Roark and Bowman and had no potential impact on the broader marketplace or a public audience of potential buyers or sellers. *See Creative Oil & Gas*, 591 S.W.3d at 136; *see also, e.g., Gaskamp*, 596 S.W.3d at 479; *Newpark Mats*, 2020 WL 1467005, at *8; *Goldberg*, 594 S.W.3d at 826-27, 830 (holding that emails sent by defendants to third parties were communications made in connection with an issue related to a good, product, or service in the marketplace, but nonetheless were not made in connection with a matter of public concern because they were “private communications between private parties about purely private economic matters”). As described in the pleadings, Bowman’s alleged communications were directed to “a limited business audience” of existing customers or tenants relating to a private business dispute between Bowman and Roark. *Creative Oil & Gas*, 591 S.W.3d at 136. We thus conclude that the legal action alleged is not based on, related to, or in response to Bowman’s exercise of his free speech rights as defined by the TCPA. Thus, the TCPA does not apply, and the trial court did not err in denying the motion.

The Bowman Parties rely on *McDonald Oilfield Operations, LLC v. 3B Inspection, LLC*, 582 S.W.3d 732 (Tex. App.—Houston [1st Dist.] 2019, no pet.) (op. on reh’g), but that case does not support reversal. In *McDonald*, a pipeline inspections company (3B) sued a competitor (McDonald), alleging that McDonald told one of 3B’s clients that 3B was “not a real company” and that 3B’s owner “did not know what he was doing.” *Id.* at 746. McDonald unsuccessfully moved to dismiss 3B’s claims under the TCPA, contending that McDonald’s communications

⁴ Neither side submitted evidence to further clarify the nature, extent, or reach of the alleged tortious communications, so we consider only the allegations contained in the pleadings. *See Tex. Civ. Prac. & Rem. Code* § 27.006(a).

were an exercise of the right of free speech. *Id.* at 740, 743. The court of appeals agreed that the statements at issue were free speech under the TCPA, because they related to “a good, product, or service in the marketplace” and thus constituted a matter of public concern. *Id.* at 747. But *McDonald* pre-dates *Creative Oil & Gas*.

McDonald is also distinguishable because the statements at issue concerned matters of community importance, health, or safety—issues independently included within the definition of a “matter of public concern.” Tex. Civ. Prac. & Rem Code § 27.001(7)(A), (B). 3B was responsible for “tasks that could impact environmental, health, safety, and economic concerns associated with noxious and flammable chemicals transported through pipelines.” *McDonald*, 582 S.W.3d at 746. Allegations that the company or its owner were deficiently performing pipeline inspections could impact a broader community, not just the private parties involved in the particular business dispute. *See Creative Oil & Gas*, 591 S.W.3d at 135 (matter concerning community generally, as opposed to purely private matter, is matter of public concern).

Here, in contrast, there is no indication that Bowman’s statements potentially were relevant to the health or safety concerns of a broader community. *See, e.g., Collaborative Imaging, LLC v. Zotec Partners, LLC*, No. 05-19-01256-CV, 2020 WL 3118614, at *3 (Tex. App.—Dallas June 12, 2020, no pet. h.) (mem. op.) (“Private communications are indeed sometimes covered by the TCPA . . . [b]ut to be covered by the TCPA, those communications must involve environmental, health, or safety concerns that have public relevance beyond the pecuniary interests of the private parties involved.”) (internal citation omitted). Nor did the Bowman Parties argue in their motion to dismiss that the communications involved a matter of public concern because they related to “health or safety,” Tex. Civ. Prac. & Rem. Code § 27.001(7)(A), or “community well-being.” *Id.* § 27.001(7)(B).

Accordingly, we hold that the Bowman Parties failed to prove by a preponderance of the evidence that the Roark Parties' tortious interference claim is based on, relates to, or is in response to Bowman's exercise of the right of free speech, as that term is defined by the TCPA and interpreted by the courts. *See Creative Oil & Gas*, 591 S.W.3d at 136-37; *Gaskamp*, 596 S.W.3d at 479; *Newpark Mats*, 2020 WL 1467005, at *8.

Conclusion

The TCPA does not apply to the Roark Parties' tortious interference claim, and the trial court did not err in denying the motion to dismiss. We affirm the trial court's order.

/s/ Kevin Jewell
Justice

Panel consists of Justices Christopher, Jewell, and Hassan.