

**TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN**

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**NO. 03-19-00476-CV**

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**Thomas Thoman, Appellant**

**v.**

**Roofing Contractors Association of Texas, Brad Jones, Larry Brown, AJ Huckaby, Craig Rainey, Shawn Michael, Adam Buttorff, Darlene Lee, Holly Green, Chris Evans, Paul Ramon, Dave Custable, Dean Torres, Dustin Guess, Emily Giffin, Health Hicks, Ronnie McGlothlin, Ty Smith, Sara Ramon Burns, Melissa Shaffer, and John Doe, Appellees**

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**FROM THE 250TH DISTRICT COURT OF TRAVIS COUNTY  
NO. D-1-GN-19-000657, THE HONORABLE LORA J. LIVINGSTON, JUDGE PRESIDING**

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**MEMORANDUM OPINION**

Appellant Thomas Thoman challenges the district court’s dismissal, pursuant to the Texas Citizens Participation Act, *see* Tex. Civ. Prac. & Rem. Code §§ 27.001–011<sup>1</sup>, of claims he filed against the Roofing Contractors Association of Texas and its directors (collectively, RCAT). We will affirm.

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<sup>1</sup> The TCPA was amended in the 2019 legislative session, but those amendments do not apply to this lawsuit, which was filed before the amendments’ effective date. *See* Act of May 17, 2019, 86th Leg., R.S., ch. 378, §§ 11, 12, 2019 Tex. Gen. Laws 684, 687 (amendments to TCPA apply “only to an action filed on or after” September 1, 2019).

## BACKGROUND

The Roofing Contractors Association of Texas is a non-profit corporation registered in Texas to represent the interests of those in the roofing industry. It allows roofing contractors and affiliated entities—i.e., suppliers, consultants, engineers, etc.—to purchase membership for an annual fee. According to Thoman, RCAT provides some members with a license that allows them to advertise as “licensed roofing contractors.” Thoman avers that this license and any resulting advertising are misleading to the “unsuspecting public” because licensure is a term of art associated with an administrative function of the State of Texas. *See, e.g.*, Tex. Occ. Code § 51.001(3) (“‘License’ means a license, certificate, registration, title, or permit issued by the [Department of Licensing and Regulation].”).

In February of 2019, Thoman sued RCAT and its directors in Travis County district court, alleging common law fraud, statutory fraud, and violations of the Deceptive Trade Practices Act, Tex. Civ. Prac. & Rem. Code §§ 17.01–.955. RCAT responded with a general denial and moved to dismiss under the TCPA, arguing that each of Thoman’s claims arises from RCAT’s exercise of the right to free speech or the right of association. After a hearing, the district court granted RCAT’s motion, dismissing each of Thoman’s claims with prejudice. The court also awarded RCAT attorneys’ fees and costs. On Thoman’s motion, the district court issued findings of fact and conclusions of law. These conclusions included that Thoman’s “legal action against Defendant is based on, relates to, or is in response to the RCAT Defendants’ exercise of free speech and right of association as defined by the TCPA in effect at the time of this lawsuit,” and that he had “produced no evidence, and, therefore, did not establish a prima facie case for each element of the claim[s] in question.” Thoman timely perfected this appeal, challenging the district court’s former conclusion but not the latter.

## DISCUSSION

The TCPA allows a party to move for dismissal of any “legal action that is based on, related to, or in response to [that] party’s exercise of the right of free speech, right to petition, or right of association.” *See id.* § 27.003. Its purpose is to “encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government,” while still “protect[ing] the rights of a person to file meritorious lawsuits for demonstrable injury.” *See id.* § 27.002. “To effectuate the statute’s purpose, the Legislature has provided a two-step procedure to expedite the dismissal of claims brought to intimidate or to silence a defendant’s exercise of these First Amendment rights.” *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 898 (Tex. 2017) (citing Tex. Civ. Prac. & Rem. Code § 27.003). “Under the first step, a movant seeking to prevail on a motion to dismiss under the TCPA has the burden to ‘show[ ] by a preponderance of the evidence that the [non-movant’s] legal action is based on, relates to, or is in response to the [movant’s] exercise of (1) the right of free speech; (2) the right to petition; or (3) the right of association.’” *Grant v. Pivot Tech. Sols., Ltd.*, 556 S.W.3d 865, 872 (Tex. App.—Austin 2018, pet. denied) (quoting Tex. Civ. Prac. & Rem. Code § 27.005(b)). In the second step, if the court “determines that the movant has met his burden to show that the TCPA applies, the burden shifts to the non[-]movant to establish ‘by clear and specific evidence a prima facie case for each essential element of the claim in question.’” *Id.* at 872–73 (quoting Tex. Civ. Prac. & Rem. Code § 27.005(c)). Even where the non-movant can do so, the court must dismiss the legal action “‘if the [movant] establishes by a preponderance of the evidence each essential element of a valid defense to the non[-]movant’s claim.’” *Id.* at 873 (quoting Tex. Civ. Prac. & Rem. Code § 27.005(c)).

Thoman contends the district court erred in dismissing his suit under the TCPA because the statute does not apply to his claims against RCAT. Specifically, while he concedes that his claims are “legal actions” for the purpose of the statute, he asserts that: 1) RCAT was not exercising any of “the rights defined in the TCPA” when it engaged in the complained-of conduct; 2) the TCPA does not reach claims brought under the DTPA; and 3) the First Amendment—and therefore, in Thoman’s understanding, the TCPA—does not reach deceptive commercial speech.<sup>2</sup> We review the TCPA’s applicability, like other questions of law, *de novo*. *Long Canyon Phase II & III Homeowners Ass’n v. Cashion*, 517 S.W.3d 212, 217 (Tex. App.—Austin 2017, no pet.).

On this record, RCAT satisfied its burden to show that Thoman’s claims arise from RCAT’s exercise of its right to free speech. The “exercise of the right of free speech” includes any “communication made in connection with a matter of public concern.” Tex. Civ. Prac. & Rem. Code § 27.001(7). A “communication” is “the making or submitting of a statement or document in any form or medium,” *id.* § 27.001(1), and “[a] matter of public concern” includes issues related to “community well-being” or “goods products or services in the market,” *id.* § 27.001(3). Here, the district court found that the alleged “wrongdoing resulted from communication the RCAT Defendants made in connection with its Licensing Program and licensure thereunder.” And indeed, Thoman’s petition alleges that RCAT “issues licenses” and describes certain construction contractors as “licensed roofing contractors.” He complains that

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<sup>2</sup> Thoman, appearing pro se, has filed a brief that includes only a cursory overview of his arguments and related authority. We will address his arguments to the extent we can construe them. *See* Tex. R. App. P. 38.1(h); *United Copper Indus., Inc. v. Grissom*, 17 S.W.3d 797, 805 n.6 (Tex. App.—Austin 2000, pet. dismissed) (holding pro se litigants to same standard as litigants represented by counsel).

RCAT's website publicizes the availability of these licenses. Thoman contends these licenses and the references on the website falsely imply the superiority of certain goods and services over competing options in the marketplace. Thus, Thoman's allegations are predicated on "statements" made by RCAT and therefore its "communication" for the purpose of the TCPA.

This alleged communication addresses matters of public concern. To begin with, the communication involves goods and services in the marketplace. *See id.* In addition, and as the Supreme Court of Texas has explained, "[A]ny allegation of malfeasance . . . by [a] developer . . . likely concerns the well-being of the community as a whole." *See Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 896 (Tex. 2018). This Court has similarly held that statements that potentially "undermine the ability to construct safe, stable housing" implicate matters of public concern and therefore "fall within the purview of the TCPA." *Woodhull Ventures 2015, L.P. v. Megatel Homes III, LLC*, No. 03-18-00504-CV, 2019 WL 3310509, at \*2 (Tex. App.—Austin July 24, 2019, no pet.) (mem. op.) (citing *Adams*, 547 S.W.3d at 896–97; *Craig v. Tejas Promotions, LLC*, 550 S.W.3d 287, 303 (Tex. App.—Austin 2018, pet. denied). Here, by purportedly undermining the public's ability to identify qualified construction contractors, RCAT's allegedly fraudulent communication was made in connection with a matter of public concern. Thoman's claims therefore arise from the exercise of the right to free speech.

Thoman's arguments to the contrary are not persuasive. Thoman first contends that defendants cannot use the TCPA to dismiss claims brought under the DTPA. But Thoman offers no authority for such an assertion, and courts have allowed defendants to use the TCPA dismissal mechanism against DTPA claims where the statutory criteria for dismissal are satisfied. *See, e.g., Smith Robertson, L.L.P. v. Hamlin*, No. 03-18-00754-CV, 2019 WL 3023304, at \*3 (Tex.

App.—Austin July 11, 2019, pet. denied) (mem. op.) (holding defendant entitled to dismissal of claim brought under DTPA); *cf. Ghrist v. MBH Real Estate LLC*, No. 02-17-00411-CV, 2018 WL 3060331, at \*5 & n.9 (Tex. App.—Fort Worth June 21, 2018, no pet.) (mem. op.) (distinguishing between DTPA claims predicated on speech—like Thoman’s claim here—and DTPA claims predicated exclusively on conduct).

Thoman further argues that because RCAT’s communication includes allegedly deceptive statements about goods or services, RCAT was not exercising a First Amendment right and therefore does not benefit from the protection of the TCPA. But regardless of whether deceptive commercial communication is afforded First Amendment protection, “[t]he TCPA provides its own definition of “exercise of the right of free speech” that ‘is not fully coextensive with the constitutional free-speech right protected by the First Amendment to the U.S. Constitution and article I, section 8 of the Texas Constitution.’” *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 133–34 (Tex. 2019) (quoting *Adams*, 547 S.W.3d at 892). As we have already explained, the complained-of communication flows from RCAT’s exercise of the right of free speech as that right is defined by the statute. We have no authority to look outside the statute to other definitions of free speech in drawing that conclusion. *See, e.g., In re Xerox Corp.*, 555 S.W.3d 518, 529 n.67 (Tex. 2018) (orig. proceeding) (declining to “engraft” foreign definition into statute).

And finally, to the extent we could construe Thoman’s arguments as asserting that the commercial-speech exemption should apply here, *see* Tex. Civ. Prac. & Rem. Code § 27.010(a)(2), we would deem that argument waived because the exemption was not raised below. *See Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*, 520 S.W.3d 191, 206 n.75 (Tex. App.—Austin 2017, pet. dism’d) (holding applicability of exemption waived where not first

presented to trial court). Thus, because we conclude RCAT satisfied its burden to show Thoman's claims arise from the exercise of a statutorily protected right, and because Thoman does not challenge the district court's conclusion that he failed to make a prima facie case of his claims, we overrule Thoman's arguments on appeal and affirm the judgment of the district court.

### **CONCLUSION**

Having rejected Thoman's arguments on appeal, we affirm the district court's final judgment dismissing his claims with prejudice.

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Edward Smith, Justice

Before Justices Goodwin, Kelly, and Smith

Affirmed

Filed: June 30, 2020