

Concurring and dissenting opinion issued December 20, 2018



**In The
Court of Appeals
For The
First District of Texas**

NO. 01-18-00079-CV

**DEREK GASKAMP, JONATHAN MILLER,
AND ANDREW HUNTER, Appellants**

V.

**WSP USA, INC. WSP USA BUILDINGS, INC.,
AND WSP USA ADMINISTRATION, INC., Appellees**

**On Appeal from the 270th District Court
Harris County, Texas
Trial Court Case No. 2017-66686**

CONCURRING AND DISSENTING OPINION

The court affirms the denial of a motion to dismiss under the Texas Citizens Participation Act as to two nonmovants, but it reverses in part to require the imposition of a sanction against a third nonmovant that was similarly situated, yet

failed to file a response due to a procedural anomaly. Respectfully, I disagree with the court’s interpretation of the TCPA in important respects. I also disagree with the conclusion that the nonsuited party should have an outcome different than the outcome for the ones who filed a formal response to the motion to dismiss and provided a legal reason to deny the motion that has not been challenged on appeal.

I. TCPA legal standards

It’s incorrect for the court to state generally that “nothing in the TCPA requires either party to offer evidence beyond the pleadings.” Yes, a court shall consider both “the pleadings and supporting and opposing affidavits.”¹ But when the TCPA applies, the way a nonmovant avoids dismissal is by establishing “by clear and specific evidence a prima facie case for each essential element of the claim in question.”² Thus when the TCPA applies, except to the extent a pleading is verified and itself constitutes evidence, evidence beyond the pleadings is required to avoid dismissal.

The context of the appellants’ first issue is not whether it could be determined from the face of the pleadings that the TCPA applied. It is, instead, whether a verified petition could constitute the evidence necessary to overcome a motion to dismiss

¹ TEX. CIV. PRAC. & REM. CODE § 27.006(a).

² *Id.* § 27.005(c).

when the TCPA does apply. The court errs by conflating the various decision points implicit in the consideration of a TCPA motion to dismiss. To the extent the question is whether a legal action should have been dismissed under the TCPA, evidence is indeed required to avoid dismissal when the statute applies, and the court errs by stating otherwise.

II. Denial of motion with respect to non-responding nonmovant

The court concludes that the appellants waived the substance of their appeal to the extent their opening brief failed to challenge the application of the TCPA's commercial-speech exemption, which was raised in the trial court by two of the three nonmovants as a proposed basis for denying the motion to dismiss. I agree with that aspect of the court's ruling.

But the court fails to explain why the trial court could not have applied the same legal reasoning that was before it, and that the movants had every opportunity to rebut, to support denial of the motion as to all nonmovants. The arguments for applying the commercial-speech exemption were focused on the conduct of the movants that gave rise to the nonmovants' claims, and they were not unique to any particular nonmovant. The movants did file a reply that primarily focused on procedural issues, and it ultimately did not make any argument about the commercial-speech exemption that was unique to any particular nonmovant.

The response to the TCPA motion to dismiss that was filed by the remaining parties after WSP USA's nonsuit expressly invoked the commercial-speech exemption. While as a matter of formality WSP USA was not made a party to the response (likely an oversight stemming from the decision to remove WSP USA as a plaintiff in the amended petition, which functioned as WSP USA's nonsuit), the appellants have suggested no reason why the commercial-speech exemption was not equally applicable to WSP USA, or why the trial court could not have so concluded. We should apply common sense to uphold a correct judgment on any legal theory that was before the trial court,³ rather than allowing a procedural anomaly to dictate the unnecessary imposition of a TCPA sanction when the appellants in this interlocutory appeal have not carried their implicit burden to demonstrate error in the trial court's ruling.

Michael Massengale
Justice

Panel consists of Justices Jennings, Higley, and Massengale.

Justice Massengale, concurring in part and dissenting in part.

³ See *Guar. Cty. Mut. Ins. Co. v. Reyna*, 709 S.W.2d 647, 648 (Tex. 1986) (per curiam).