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 OPINION

"The decisions of th[e] [Supreme] Court [of the United States] have repeatedly warned against the dangers of an approach to statutory

construction which confines itself to the bare words of a statute, for literalness may strangle meaning."[1]

I join the well-reasoned majority opinion of my learned colleague and good friend of sixteen years on this most Honorable Court. However, I write separately to warn of the inherent dangers to Texas Jurisprudence posed by a rigid adherence to the ideological doctrine of so-called "textualism" in construing our Constitution and statutes.

This Court, of course, has a duty to interpret the Texas Citizen Participation Act ("TCPA"), also known as the "anti-SLAPP" statute, in a manner consistent with its expressly stated purpose of protecting "constitutional rights." TEX. CIV. PRAC. & REM. CODE ANN. § 27.002 (Vernon 2015). However, the Texas Supreme Court, utilizing the doctrine of textualism, has recently interpreted the TCPA much more broadly than the Texas Legislature ever intended. *See Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 894 (Tex. 2018).

In *Adams*, the court stressed that the TCPA "assigns detailed definitions to many of the terms it employs, and we must adhere to statutory definitions." *Id*. at 894. And in applying the literal text of the TCPA's definitions, without considering, or even mentioning, the purpose of the statute, it reasoned that the allegedly

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1 *City of Chi. v. Int'l Coll. of Surgeons*, 522 U.S. 156, 176, 118 S. Ct. 523, 535 (1997) (Ginsburg, J., dissenting) (quoting *Lynch v. Overholser*, 369 U.S. 705, 710, 82 S. Ct. 1063, 1067 (1962) (Harlan, J., writing for the Court) (internal citations omitted)).

defamatory statements made by an individual that a homeowner's association had violated a city code implicates the TCPA. *Id*. at 896. And although applying the court's strictly texual interpretation of the pertinent definitions here, without regard for the expressly stated purpose of the TCPA, necessarily leads to a manifestly unjust and absurd result against appellee, WSP USA, Inc., we must apply them as instructed by our higher court.

I respectfully disagree with the Texas Supreme Court's unnecessarily broad interpretation and application of the TCPA to matters that exceed its expressly stated purpose to protect only the *constitutional rights* of free speech, to petition, and of association. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001–.011 (Vernon 2015). A reasonable interpretation of the TCPA, when read in its entirety, reveals that it was never intended to apply to any of the claims at issue in this case. It should go without saying that communications allegedly made in furtherance of a conspiracy to commit theft of trade secrets and breaches of fiduciary duties do not implicate "citizen participation."

However, we are bound by the decisions of the Texas Supreme Court regarding its interpretation of the TCPA, and, thus, I must concur in the judgment of this Court. *See Benge v. Williams*, 472 S.W.3d 684, 738 (Tex. App.—Houston [1st Dist.] 2014) (Jennings, J., dissenting from denial of en banc reconsideration) (although we, as intermediate appellate court justices "are not free to disregard

binding precedent, we . . . are certainly free to point out any flaws in the reasoning of the [binding] opinions"), *aff'd*, 548 S.W.3d 466 (Tex. 2018); *Jones v. State*, 962 S.W.2d 96, 99 (Tex. App.—Houston [1st Dist.] 1997) (Taft, J., concurring) (noting although "we are bound by precedent . . . , we are not gagged" by it), *aff'd*, 984 S.W.2d 254 (Tex. Crim. App. 1998).

Under Chapter 27 of the Texas Civil Practice and Remedies Code, entitled "Actions Involving the Exercise of Certain Constitutional Rights," a party may file a motion to dismiss a legal action that is "based on, relates to, or is in response to [the] party's exercise of the *right* of free speech, *right* to petition, or *right* of association." TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(a) (emphasis added). After a hearing on the motion, a trial court must dismiss the action if the moving party "shows by a preponderance of the evidence" that the legal action is "based on, relates to, or is in response to *the party's exercise* of:

(1) the *right* of free speech;

(2) the *right* to petition; or

(3) the *right* of association."

Id. § 27.005(b) (emphasis added).

In the TCPA itself, the legislature expressly stated its purpose:

> The purpose of this chapter 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.

Id. § 27.002 (emphasis added). Thus, the TCPA serves to encourage and protect only the "constitutional rights" of "free speech," to "petition," and of "association." *See* U.S. CONST. amend I; *see also* TEX. CONST. art. I, §§ 8, 27.

Moreover, by including the phrase "otherwise participate in government" in section 27.002, the legislature intended to protect only constitutionally-protected freedoms that rise to such a level that they can be considered participation in government. Indeed, in his statement of intent, the sponsor of the TCPA explained:

> *Citizen participation is the heart of our democracy.* Whether petitioning the government, writing a traditional news article, or commenting on the quality of a business, involvement of citizens in the exchange of idea[s] benefits our society.
>
> Yet frivolous lawsuits *aimed at silencing those involved in these activities are becoming more common, and are a threat to the growth of our democracy.* The Internet age has created a more permanent and searchable record of *public participation* as *citizen participation* in democracy grows through self-publishing, citizen journalism, and other forms of speech. Unfortunately, abuses of the legal system, *aimed at silencing these citizens,* have also grown. *These lawsuits are called Strategic Lawsuits Against Public Participation or "SLA[P]P" suits.*
>
> Twenty-seven states and the District of Columbia have passed similar acts, most commonly known as either "Anti-SLAPP" laws or "Citizen Participation Acts" that allow defendants in such cases to dismiss cases earlier than would otherwise be possible, thus limiting the costs and fees. The Texas Citizen Participation Act would allow defendants—who are sued as a result of exercising their right to free speech or their right to petition the government—to file a motion to dismiss the suit, at which point the plaintiff would be required to show by clear and specific evidence that he had a genuine case for each essential element

> of the claim. In addition, if the motion to dismiss is granted, the plaintiff who has wrongly brought the lawsuit may be required to pay attorney's fees of the defendant.
>
> C.S.H.B. 2973 amends current law relating to *encouraging public participation by citizens by protecting a person's right to petition, right of free speech, and right of association from meritless lawsuits arising from actions taken in furtherance of those rights*.

S. Comm. on State Affairs, Bill Analysis, Tex. H.B. 2973, 82nd Leg., R.S. (2011) (emphasis added). Thus, the broader purpose of the Texas *Citizen Participation* Act is to stop such Strategic Lawsuits Against *Public Participation*.

Here, the complained-of acts of appellants, Derek Gaskamp, Jonathan Miller, and Andrew Hunter (collectively, "appellants"), are that they stole trade secrets and propriety information for use in their new business venture in competition against appellees, WSP USA, Inc., WSP USA Buildings, Inc., and WSP USA Administration, Inc. (collectively, "appellees") and that they interfered with existing and potential business relationships between appellees and their customers. Appellants assert that the underlying lawsuit is based on, relates to, or is in response to exercise of their rights of association and free speech. Specifically, they allege that the lawsuit is based on, relates to, or is in response to their "communications in the formation, promotion, and pursuit of their common interest—[their new business]—and involves alleged communications among [them] in allegedly misappropriating information and conspiring to breach alleged fiduciary duties."

In the TCPA, the legislature defines the exercise of free speech as "a communication made in connection with a matter of public concern." TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(3). A "'[m]atter of public concern' includes an issue related to: (A) health or safety; (B) environmental, economic, or community well-being; (C) the government; (D) a public official or public figure; or (E) a good, product, or service in the marketplace." *Id.* § 27.001(7). And the right of association is defined as "a communication between individuals who join together to collectively express, promote, pursue, or defend common interests." *Id.* § 27.001(2). And the legislature broadly defines "[c]ommunication" to "include[] 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). Standing alone, these awkward definitions do appear to include communications that are not constitutionally protected, do not concern the exercise of the rights of free speech and association, and do not concern participation in government, i.e., citizen participation. However, we cannot read these definitions in isolation, and the TCPA necessarily contemplates that any "communication," as discussed in section 27.001, must involve constitutionally-protected rights, as discussed in section 27.002.

When construing a statute, our objective is to determine and give effect to legislative intent. *See Nat'l Liab. & Fire Ins. v. Allen*, 15 S.W.3d 525, 527 (Tex. 2000). Although the "plain meaning of the text is the best expression of legislative

intent," this is not true when "a different meaning is apparent from the context or the plain meaning leads to absurd or nonsensical results." *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011). And we "must not interpret the statute in a manner that renders any part of the statute meaningless or superfluous." *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 256 (Tex. 2008).

Reading the TCPA in its entirety, the broad definitions of "[e]xercise of the right of free speech" and "[e]xercise of the right of association" are necessarily restricted by the expressly-stated purpose of the TCPA "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*." TEX. CIV. PRAC. & REM. CODE ANN. § 27.002 (emphasis added). Importantly, the legislature expressly included within the stated purpose of the TCPA its intent to, "at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury." *Id.*

Here, unfortunately, the Texas Supreme Court, in construing the TCPA by focusing like a laser on the literalness of the bare words of its pertinent definitions, has effectively strangled the real meaning and purpose of the statute. *See City of Chi. v. Int'l Coll. of Surgeons*, 522 U.S. 156, 176, 118 S. Ct. 523, 535 (1997) (Ginsburg, J., dissenting) (quoting *Lynch v. Overholser*, 369 U.S. 705, 710, 82 S. Ct. 1063, 1067 (1962) (Harlan, J., writing for the Court) (internal citations omitted)).

To reach the real meaning and fulfill the expressly stated purpose of the TCPA, the court should read the literal text of its definitions in conjunction with the literal text of the statute's expressly-stated purpose in section 27.002.

To the extent that the definitions of "[e]xercise of the right of free speech" and "[e]xercise of the right of association" in section 27.001 can possibly be read as including communications not constitutionally protected, and, thus, be used by litigants to add expense and unnecessary delay to meritorious litigation, especially via interlocutory appeal, the legislature should revise the definitions to include qualifying language, repeating in the definitions the stated purpose of the TCPA to protect and encourage the use of "constitutional rights." Such a change would serve to further "protect the rights of a person to file meritorious lawsuits for demonstrable injury" from those who would otherwise abuse the Texas *Citizen Participation* Act and use it to unreasonably delay and add expense to claims for injuries resulting from their private, civil wrongs.

Conclusion

Although we are bound by the Texas Supreme Court's precedent, I continue to urge it to revisit and correct its overly-broad interpretation of the TCPA. *See* TEX. GOV'T CODE ANN. § 22.001(a) (Vernon Supp. 2018) ("The supreme court has appellate jurisdiction . . . if the court determines that the appeal presents a question of law that is important to the jurisprudence of the state."). And I again urge the Texas Legislature to amend or repeal the TCPA to correct the overly-broad misinterpretations of the statute by Texas courts. Regardless, Texas Courts, in construing our Constitution and statutes, should always be mindful:

> It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.

Holy Trinity Church v. United States, 143 U.S. 457, 459, 12 S. Ct. 511, 512 (1892).

Terry Jennings
Justice

Panel consists of Justices Jennings, Higley, and Massengale.

Jennings, J., joining the majority opinion and separately concurring.

Massengale, J., concurring, in part, and dissenting, in part.