

Affirmed and Memorandum Opinion filed May 18, 2021.



In The

Fourteenth Court of Appeals

NO. 14-19-00546-CV

**POST ACUTE MEDICAL, LLC; PAM PHYSICIAN ENTERPRISE; AND
CLEAR LAKE INSTITUTE FOR REHABILITATION, LLC, Appellants**

V.

MERIDIAN HOSPITAL SYSTEMS CORPORATION, Appellee

**On Appeal from the 11th District Court
Harris County, Texas
Trial Court Cause No. 2019-23790**

MEMORANDUM OPINION

In this interlocutory appeal, the appellants challenge the trial court's denial of their motion to dismiss under the Texas Citizens Participation Act (TCPA).¹ Because the appellants have not shown that the TCPA applies to the appellee's claims, we affirm.

¹ See Tex. Civ. Prac. & Rem. Code ch. 27; see also *In re Lipsky*, 460 S.W.3d 579, 584 & n.1 (Tex. 2015).

I. Legal Principles for TCPA

To be entitled to dismissal under the TCPA, a defendant has the initial burden to show by a preponderance of the evidence that the plaintiff’s claim “is based on, relates to, or is in response to” the defendant’s exercise of the right to petition, association, or speech. *See In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015); *see also* Act of May 18, 2011, 82d Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws 961 (codified as amended at Tex. Civ. Prac. & Rem. Code § 27.005(b)).² If the defendant satisfies this initial burden, the burden shifts to the plaintiff to establish by clear and specific evidence a prima facie case for each essential element of the claim in question. *See ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 899 (Tex. 2017).

Whether the parties have met their respective burdens is a question of law that we review de novo. *Nunu v. Risk*, 612 S.W.3d 645, 660 (Tex. App.—Houston [14th Dist.] 2020, pet. denied) (citing *Dall. Morning News, Inc. v. Hall*, 579 S.W.3d 370, 377 (Tex. 2019)). A court may determine the basis of the legal action by looking solely at the plaintiff’s allegations. *See Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017).

The purpose of the TCPA 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, to protect the rights of a person to file meritorious lawsuits for demonstrable injury.” Tex. Civ. Prac. & Rem. Code § 27.002. Thus, the purpose is to dispose of lawsuits that are designed to chill First Amendment rights, not to dismiss meritorious claims.

² The Legislature amended the TCPA in 2019, but the amendment does not apply to this case, which was filed before September 1, 2019. *See* Act of May 17, 2019, 86th Leg., R.S., ch. 378, §§ 3, 11–12, 2019 Tex. Sess. Law Serv. Ch. 378 (West). Any citations to the TCPA in this opinion are to the version of the statute in effect when Meridian filed suit.

In re Lipsky, 460 S.W.3d at 589. The TCPA should be construed liberally to effectuate its purpose. Tex. Civ. Prac. & Rem. Code § 27.001(b).

An “exercise of the right of association” means “a communication between individuals who join together to collectively express, promote, pursue, or defend common interests.” Tex. Civ. Prac. & Rem. Code § 27.001(2). The word “common” is not defined by statute, so this court has applied the term’s ordinary meaning derived from dictionary definitions. *See Rep. Tavern & Music Hall, LLC v. Lorenzo’s Midtown Mgmt., LLC*, 618 S.W.3d 118, 125 (Tex. App.—Houston [14th Dist.] 2020, no pet.) (citing *Kawcak v. Antero Res. Corp.*, 582 S.W.3d 566, 576 (Tex. App.—Fort Worth 2019, pet. denied)). The proper definition of “common” as used in the phrase “common interests” means “of or relating to a community at large: public.” *Id.* at 126 (quoting *Gaskamp v. WSP USA, Inc.*, 596 S.W.3d 457, 476 (Tex. App.—Houston [1st Dist.] 2020, pet. dism’d) (en banc)).³ Thus, the TCPA does not apply if the defendants’ communications concern a private transaction between private parties. *See id.* at 127.

II. Background

Appellee Meridian Hospital Systems Corporation (Meridian) sued Post Acute Medical, LLC, PAM Physician Enterprise, and Clear Lake Institute for Rehabilitation, LLC (collectively, PAM), alleging claims for misappropriation of trade secrets, breach of contract, conspiracy to misappropriate trade secrets, unfair competition, trademark dilution, quantum meruit, and promissory estoppel. In its

³ This court applies a narrow definition of “common” although some of this court’s prior decisions applied a broader definition. *See Reeves v. Harbor Am. Cent., Inc.*, No. 14-18-00594-CV, 2020 WL 2026527, at *4–5 (Tex. App.—Houston [14th Dist.] Apr. 28, 2020, pet. denied) (citing *Abatecola v. 2 Savages Concrete Plumbing, LLC*, No. 14-17-00678-CV, 2018 WL 3118601, at *6 (Tex. App.—Houston [14th Dist.] June 26, 2018, pet. denied) (mem. op.)). *See generally Rep. Tavern & Music Hall*, 618 S.W.3d at 126 n.17 (noting conflict but holding that the narrower definition applies).

original petition, Meridian alleged that it developed web-based software for use in the healthcare industry, and Meridian licensed this software to PAM. Through various agreements with PAM, Meridian retained ownership rights to the software and prohibited reverse-engineering of the software and providing login credentials to third parties.

Meridian alleged in its petition that PAM and another defendant in this case, Key Management Group, LLC (KMG),⁴ entered into a contract for the development of software for PAM that would ultimately replace the Meridian software. A PAM employee gave his login credentials to a KMG affiliate employee. The PAM employee admitted to “documenting” the software so PAM could build its own software. At the time, PAM was trying to create comparable software.

PAM filed a motion to dismiss under the TCPA, alleging that Meridian’s claims were based on PAM’s exercise of the right to association. In response, Meridian argued, among other things, that the trial court should apply the definition of “common” used by the Fort Worth Court of Appeals in *Kawcak*. Meridian argued that its claims related to PAM’s private communications among tortfeasors conspiring to act for their own selfish benefit, and the nature of the communications did not involve public or citizens’ participation.

The trial court denied the motion, and PAM appeals.

III. Analysis

In three issues, PAM contends that (1) the TCPA is constitutional; (2) the trial court erred by not dismissing claims against PAM Physician Enterprise and Clear Lake Institute for Rehabilitation, LLC; and (3) the trial court erred by not dismissing

⁴ KMG filed a special appearance, which was the subject of a separate appeal in *Key Management Group, LLC v. Meridian Hospital Systems Co.*, No. 14-19-00907-CV, 2021 WL 1538237 (Tex. App.—Houston [14th Dist.] Apr. 20, 2021, no pet. h.) (mem. op.).

claims against Post Acute Medical. Under the second and third issues, PAM contends that Meridian’s pleadings show its claims are based on, related to, or in response to PAM’s exercise of the right to association. Relying heavily on the now-withdrawn panel opinion in *Gaskamp*, PAM contends that its three entities made communications in the pursuit of a “common business interest.”

This court repeatedly has applied the rationale of the Second Court of Appeals in *Kawcak* and the en banc First Court of Appeals in *Gaskamp* regarding what qualifies as a “common interest” sufficient to show that claims relate to a defendant’s exercise of the right to association. See *Rep. Tavern & Music Hall*, 2020 WL 7626253, at *5; see also *TSA-Tex. Surgical Assocs., L.L.P. v. Vargas*, No. 14-19-00135-CV, 2021 WL 729862, at *3 (Tex. App.—Houston [14th Dist.] Feb. 25, 2021, no pet. h.) (mem. op.); *Huynh v. Francois-Le*, No. 14-19-00138-CV, 2021 WL 686291, at *4–5 (Tex. App.—Houston [14th Dist.] Feb. 23, 2021, no pet. h.) (mem. op.); *Marshall v. Marshall*, No. 14-18-00094-CV, 2021 WL 208459, at *8 (Tex. App.—Houston [14th Dist.] Jan. 21, 2021, pet. filed) (mem. op.); *Bandin v. Free & Sovereign State of Veracruz de Ignacio de la Llave*, 590 S.W.3d 647, 651–54 (Tex. App.—Houston [14th Dist.] 2019, pet. denied).

Like in those cases, the factual basis for the claims alleged in this case concern communications only about private transactions: PAM’s alleged failure to keep proprietary software confidential and its misappropriation in furtherance of PAM’s financial interests. As PAM contends, its communications regarding misappropriating Meridian’s software and breaching a contract with Meridian relate to the PAM entities’ “common business interest.” The PAM entities have not joined together to collectively express, promote, pursue, or defend community or public interests.

Because PAM has not shown by a preponderance of the evidence that Meridian's claims are based on, related to, or in response to PAM's exercise of the right to association, the trial court did not err by denying PAM's motion to dismiss under the TCPA. PAM's second and third issues on appeal are overruled. We do not reach PAM's first issue regarding the constitutionality of the statute. *See In re B.L.D.*, 113 S.W.3d 340, 349 (Tex. 2003).

IV. Conclusion

The trial court's order denying PAM's motion to dismiss under the TCPA is affirmed.

/s/ Ken Wise
Justice

Panel consists of Justices Wise, Bourliot, and Spain.