



**Fourth Court of Appeals**  
**San Antonio, Texas**

**MEMORANDUM OPINION**

No. 04-17-00692-CV

**COMAL AG OPERATIONS, LLC,**  
Appellant

v.

Justin **KELLEY**, Emily Kelley, Valmark Chevrolet, Federated Insurance,  
Appellees

From the 2nd 25th Judicial District Court, Guadalupe County, Texas  
Trial Court No. 17-0910-CV-A  
Honorable Jessica Richard Crawford, Judge Presiding

Opinion by: Sandee Bryan Marion, Chief Justice

Sitting: Sandee Bryan Marion, Chief Justice  
Marialyn Barnard, Justice  
Luz Elena D. Chapa, Justice

Delivered and Filed: February 14, 2018

**AFFIRMED**

Comal Ag Operations, LLC appeals the trial court's order granting the appellees' motion to dismiss<sup>1</sup> the underlying lawsuit pursuant to the Texas Citizens Participation Act,<sup>2</sup> asserting: (1) the Act was not applicable to its claims; (2) it established a prima facie case for each essential

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<sup>1</sup> Although the motion was filed by only two of the four appellees, Comal Ag does not challenge the dismissal of its claims against the other two appellees based on their failure to file a motion. The trial court's order unequivocally grants the motion "in all things, and as to all Defendants," states the order is a "final judgment," and further finds "no other claims remain" and the order "disposes of all matters before the Court and is appealable." Although two of the appellees did not file a motion to dismiss, the trial court's order "by its clear terms disposed of all claims and parties and was therefore final." See *In re Daredia*, 317 S.W.3d 247, 249 (Tex. 2010).

<sup>2</sup> Although a motion to dismiss pursuant to Rule 91a was also filed, the trial court only ruled on the motion filed pursuant to the Act.

element of its defamation claims by clear and specific evidence; and (3) the trial court could not consider any of the appellees' potential affirmative defenses in granting the appellees' motion to dismiss. We affirm the trial court's order.

### **BACKGROUND**

Comal Ag filed the underlying lawsuit alleging a defamation claim based on statements made by Justin and Emily Kelley in emails they sent to the Texas Commission on Environmental Quality. The emails expressed concerns regarding Comal Ag's application of septage, septic waste, or human waste to land Comal Ag owned adjacent to a residence owned by the Kelleys. Comal Ag alleged it applied only treated septage to its land,<sup>3</sup> and its application of the treated septage complied with the TCEQ requirements.<sup>4</sup> Because Justin and Emily sent the emails from their respective places of employment, Comal Ag also sued Valmark Chevrolet and Federated Insurance, their respective employers. As previously noted, the trial court dismissed Comal Ag's claims pursuant to the Act, and Comal Ag appeals.

### **THE TEXAS CITIZENS PARTICIPATION ACT AND STANDARD OF REVIEW**

“[T]he Texas Citizens Participation Act or TCPA protects citizens from retaliatory lawsuits that seek to intimidate or silence them on matters of public concern.” *In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015). “The Act provides a special procedure for the expedited dismissal of such suits.” *Id.*

When a defendant files a motion to dismiss under the TCPA, the defendant-movant has the initial burden to show by a preponderance of the evidence that the plaintiff's claim is based on,

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<sup>3</sup> At the hearing on the appellees' motion, Comal Ag's attorney explained, “Septic waste is the waste that is diluted that it is in the septic containers. It can contain human waste. ... Septage is actually — very importantly has been treated with lime, with other chemicals. It's also diluted and I — I wrote down somewhere the exact dilution percentage, but I want to say it's like 100 to 1 water to septic waste.”

<sup>4</sup> In their motion, the appellees acknowledged Comal Ag had been issued a permit by the TCEQ for the application of domestic septage, but asserted Comal Ag's application of the septage was in violation of the permit's restrictions.

relates to, or is in response to the defendant-movant's exercise of: (1) the right of free speech; (2) the right to petition; or (3) the right of association. TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b) (West 2015); *In re Lipsky*, 460 S.W.3d at 586-87. "If the movant is able to demonstrate that the plaintiff's claim implicates one of these rights, the [next] step shifts the burden to the plaintiff to 'establish [ ] by clear and specific evidence a prima facie case for each essential element of the claim in question.'" *In re Lipsky*, 460 S.W.3d at 587 (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c)). Finally, if the plaintiff meets its burden to establish a prima facie case, the trial court must still dismiss the claim if the defendant-movant "establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim." TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(d). We review a trial court's ruling on a motion to dismiss under the TCPA de novo. *Schlumberger Ltd. v. Rutherford*, 472 S.W.3d 881, 892 (Tex. App.—Houston [1st Dist.] 2015, no pet.); *Herrera v. Stahl*, 441 S.W.3d 739, 741 (Tex. App.—San Antonio 2014, no pet.).

#### APPLICATION OF THE ACT

Comal Ag contends the appellees failed to establish Comal Ag's claim is based on the appellees' exercise of a protected constitutional right because the right of free speech does not protect defamatory statements. This contention, however, ignores the provisions of the Act, including its definitions of the applicable terms.

As previously noted, the appellees had the initial burden to show by a preponderance of the evidence that Comal Ag's claim is based on, relates to, or is in response to the appellees' exercise of: (1) the right of free speech; (2) the right to petition; or (3) the right of association. TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b); *In re Lipsky*, 460 S.W.3d at 586-87. The Act defines "exercise of the right of free speech" to mean "a communication made in connection with a matter of public concern." TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(3). Similarly, the

“exercise of the right to petition” is defined to include a communication that is reasonably likely to encourage consideration of an issue by a governmental body. *Id.* at § 27.001(4)(C). Finally, the Act defines a matter of public concern to include an issue related to health or safety or environmental or community well-being. *Id.* at § 27.001(7).

In this case, the emails Comal Ag alleges to be defamatory were communications expressing concern about whether Comal Ag was applying septage to its property in compliance with TCEQ requirements. Because the communications related to an issue of health, safety, and environmental well-being and were sent in an effort to encourage TCEQ’s review of whether Comal Ag was in violation of its permit, the appellees met their burden to show Comal Ag’s claim was based on, related to, or was in response to the appellees’ exercise of the right of free speech and the right to petition.

#### **DISMISSAL OF CLAIM**

Because the Act applies, the trial court was required to dismiss Comal Ag’s defamation claim if: (1) Comal Ag failed to meet its burden to establish by clear and specific evidence a prima facie case for each essential element of its defamation claim; or (2) the appellees established by a preponderance of the evidence each essential element of a valid defense to Comal Ag’s claim. TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c), (d). In this case, the trial court found Comal Ag failed to satisfy its burden of establishing a prima facie case and also found the appellees met their burden by establishing the doctrine of quasi-judicial immunity as a defense to Comal Ag’s claim.

In its brief, Comal Ag contends the trial court erred in finding it failed to present sufficient evidence to establish a prima facie case for its claim; however, the only challenge Comal Ag makes to the trial court’s finding on the appellees’ quasi-judicial immunity defense is that the trial court could not consider any of the appellees’ potential affirmative defenses in granting the motion to dismiss. Section 27.005(d) of the Act, however, expressly authorized the trial court to consider

the appellees' defenses to Comal Ag's defamation claim. TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(d); *see also Fishman v. C.O.D. Capital Corp.*, No. 05-16-00581-CV, 2017 WL 3033314, at \*8 (Tex. App.—Dallas July 18, 2017, no pet.) (mem. op.) (holding defendant entitled to dismissal of defamation claim because he established a valid defense by a preponderance of the evidence); *Spencer v. Overpeck*, No. 04-16-00565-CV, 2017 WL 993093, at \*8 (Tex. App.—San Antonio Mar. 15, 2017, pet. denied) (analyzing whether defendants established defenses to defamation claim under section 27.005(d)); *Perdue, Brackett, Flores, Utt & Burns v. Linebarger, Goggan, Blair, Sampson & Meeks, L.L.P.*, 291 S.W.3d 448, 455 (Tex. App.—Fort Worth 2009, no pet.) (holding defamation claim barred by defense of quasi-judicial immunity). Because Comal Ag does not otherwise challenge the trial court's findings with regard to the appellees' establishment of quasi-judicial immunity as a valid defense, we affirm the trial court's order based on its finding that the appellees established quasi-judicial immunity as a valid defense to Comal Ag's claim.

#### CONCLUSION

The trial court's order is affirmed.

Sandee Bryan Marion, Chief Justice