

REVERSE and REMAND; and Opinion Filed July 11, 2017.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-16-01286-CV

**THE SAMUEL Y. DORFMAN, JR. ESTATE, THROUGH ITS
INDEPENDENT EXECUTOR, Appellant**

V.

**PROACTIVE INVENTORY, INC., ALISON WOOD SOLOMON, AND MARION
HAGGAR BRYAN, Appellees**

**On Appeal from the 134th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-16-05821**

MEMORANDUM OPINION

Before Justices Fillmore, Whitehill, and Boatright
Opinion by Justice Fillmore

Appellees Proactive Inventory, Inc., Allison Wood Solomon, and Marion Haggar Bryan sued The Estate of Samuel Y. Dorfman, Jr. (the Estate) for business disparagement, slander, and libel based on two allegedly defamatory communications about the quality of appellees' work for the Estate. The Estate sought dismissal of appellees' claims under the Texas Citizens Participation Act, TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001–.011 (West 2015) (the TCPA). The trial court denied the Estate's motion to dismiss, specifically citing case authority standing for the proposition that a defendant who denies making a complained-about communication is not entitled to invoke the dismissal procedure in the TCPA, and to a statement in the Estate's motion to dismiss in which it denied making the communications that form the bases of appellees' claims. After the Estate filed this appeal, the Texas Supreme Court held in *Hersh v.*

Tatum, No. 16-0096, 2017 WL 2839873, at *4 (Tex. June 30, 2017), that the fact a defendant denies making the communication that forms the basis of the plaintiff’s claim does not preclude the defendant from seeking dismissal of the claim under the TCPA. Accordingly, we reverse the trial court’s order denying the Estate’s motion to dismiss and remand this case to allow the trial court to consider the merits of the Estate’s motion.

Background

Grant Dorfman and Stacey Kivowitz are the children of Samuel Y. Dorfman, Jr. Following Samuel’s death, Grant was named the executor of the Estate. The Estate hired appellees to organize the Estate’s personal property in preparation for an estate sale. Solomon performed most, if not all, of the work. Kivowitz became dissatisfied with Solomon’s work and sent a number of emails and text messages to Grant and other individuals complaining about Solomon and some of her activities. Based on an email in which Kivowitz stated Solomon had committed an “incredible breach of ethics & trust” and a text in which Kivowitz “accused [appellees] of unlawful conduct directed toward the Estate,” appellees sued the Estate and Kivowitz.

The Estate filed a motion to dismiss under the TCPA, requesting dismissal of appellees’ claims, an award of its attorneys’ fees, and sanctions. The trial court denied the motion to dismiss, specifically citing in its order this Court’s opinions in *American Heritage Capital, LP v. Gonzalez*, 436 S.W.3d 865 (Tex. App.—Dallas 2014, no pet.) and *Pickens v. Cordia*, 433 S.W.3d 179 (Tex. App.—Dallas 2014, no pet); the Fifth Circuit’s opinion in *Culbertson v. Lykos*, 790 F.3d 608 (2015);¹ and footnote two of the Estate’s motion to dismiss in which the Estate stated it “did not make any of the allegedly defamatory statements – yet another reason why

¹ *Gonzalez*, *Pickens*, and *Culbertson* stand for the proposition that a party who denies making the allegedly defamatory communication that forms the basis of the plaintiff’s claim cannot invoke the procedure set out in the TCPA to obtain the dismissal of the claim. See *Gonzalez*, 436 S.W.3d at 882 n.5; *Pickens*, 433 S.W.3d at 188; *Culbertson*, 790 F.3d at 631–32. In *Hersh*, the supreme court disapproved of the conclusion reached in *Pickens* and *Gonzalez*. *Hersh*, 2017 WL 2839873, at *3 n.22 & 4.

[appellees'] claims against said Defendant must be dismissed." The Estate filed this interlocutory appeal from the trial court's denial of the motion to dismiss.

Analysis

In five issues, the Estate argues the trial court erred by denying the motion to dismiss, failing to award attorney's fees to the Estate, and refusing to impose sanctions on appellees. We address only the portion of the Estate's first issue in which it complains the trial court erred by failing to find the Estate could invoke the dismissal procedure in the TCPA.

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, protect the rights of a person to file meritorious lawsuits for demonstrable injury." TEX. CIV. PRAC. & REM. CODE ANN. § 27.002. To further this purpose, the TCPA provides a procedure for a party to move for dismissal of a cause of action if that claim is based on, relates to, or is in response to the party's exercise of an enumerated right, such as the right of free speech. *See* TEX. R. CIV. P. 27.003(a); *Bedford v. Darin Spassoff & 6 Tool, LLC*, No. 16-0229, 2017 WL 2492005, at *2 (Tex. June 9, 2017) (per curiam). The "exercise of the right of free speech" means a communication made in connection with a matter of public concern. TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(3). A "matter of public concern" includes an issue related to "a good, product, or service in the marketplace." *Id.* § 27.001(7)(E).

The movant seeking dismissal under the TCPA has the initial burden to show by a preponderance of the evidence that the plaintiff's "legal action is based on, relates to, or is in response to the party's exercise of . . . the right of free speech." TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b)(1); *see also Hersh*, 2017 WL 2839873, at *3. "The basis of a legal action is not determined by the defendant's admissions or denials but by the plaintiff's allegations."

Hersh, 2017 WL 2839873, at *4 “When it is clear from the plaintiff’s pleadings that the action is covered by the [TCPA], the defendant need show no more.” *Id.* The defendant is required to establish only that the plaintiff’s claim is “‘based on, relates to, or is in response to the [defendant’s] exercise of . . . the right of free speech’—that is, ‘a communication made in connection with a matter of public concern’— not that the communication actually occurred.” *Id.* (quoting TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001(3). 27.005(b)(1)).

The trial court specifically determined the Estate was not entitled under the TCPA to seek dismissal of appellees’ claims because the Estate denied making the communications that form the bases of those claims. Based on the reasoning of *Hersh*, the trial court erred by doing so. Accordingly, we resolve in the Estate’s favor that portion of its first issue in which it complains the trial court erred by determining the Estate was not entitled under the TCPA to seek dismissal of appellees’ claims.

In the remainder of its first issue and in its second through fifth issues, the Estate argues it was entitled to prevail on its motion to dismiss and requests that we render judgment dismissing appellees’ claims and remand the case to the trial court for the award of attorney’s fees and sanctions. However, by determining the Estate was not entitled under the TCPA to seek dismissal of appellees’ claims because the Estate denied making the communications that form the bases of those claims, the trial court did not reach the substantive merits of the Estate’s motion. We conclude the trial court should have the initial opportunity to do so. *See e.g., Rigsby v. EECU*, No. 02-14-00074-CV, 2015 WL 1543913, at *3 (Tex. App.—Fort Worth Apr. 2, 2015, no pet.) (mem. op.) (concluding trial court erred by dismissing certain of plaintiff’s claims as time-barred, a basis not asserted in defendant’s motion to dismiss under the TCPA, but declining to consider substantive grounds for dismissal asserted in motion prior to trial court having opportunity to do so).

We reverse the trial court's order denying the Estate's motion to dismiss under the TCPA and remand this case to the trial court to allow it to address the merits of the Estate's motion.

/Robert M. Fillmore/
ROBERT M. FILLMORE
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

THE SAMUEL Y. DORFMAN, JR.
ESTATE, THROUGH ITS INDEPENDENT
EXECUTOR, Appellant

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Trial Court Cause No. DC-16-05821.
Opinion delivered by Justice Fillmore,
Justices Whitehill and Boatright
participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and this cause is **REMANDED** to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that appellant The Samuel Y. Dorfman, Jr. Estate, through its Independent Executor recover its costs of this appeal from appellees Proactive Inventory, Inc., Alison Wood Solomon, and Marion Hagggar Bryan.

Judgment entered this 11th day of July, 2017.