Reversed, Rendered, and Opinion Filed March 24, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-18-00920-CV

BUSPATROL AMERICA, LLC, Appellant
V.
AMERICAN TRAFFIC SOLUTIONS, INC., Appellee

On Appeal from the 14th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-18-06457

MEMORANDUM OPINION

Before Justices Bridges, Partida-Kipness, and Carlyle
Opinion by Justice Partida-Kipness

This is an interlocutory appeal from the trial court's order granting appellee American Traffic Solutions, Inc.'s (ATS) motion to dismiss appellant BusPatrol America, LLC's claims under the Texas Citizen's Participation Act (TCPA)[1] and awarding ATS attorney's fees of $420,950.70 and costs and expenses of $9,959.09.

[1] The Texas Legislature amended the TCPA effective September 1, 2019. Those amendments apply to "an action filed on or after" that date. Act of May 17, 2019, 86th Leg., R.S., ch. 378, § 11, 2019 Tex. Sess. Law Serv. 684, 687. Because this lawsuit was filed before September 1, 2019, the law in effect before September 1 applies. See Act of May 21, 2011, 82d Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws 961–64, amended by Act of May 24, 2013, 83d Leg., R.S., ch. 1042, 2013 Tex. Gen. Laws 2499–2500. All citations to the TCPA are to the version before the 2019 amendments took effect.

BusPatrol brings five issues contending the trial court committed reversible error by (1) applying the TCPA because the commercial speech exemption applies to BusPatrol's claims, (2) dismissing BusPatrol's claims in their entirety when the conduct alleged against ATS was not based on, related to, or in response to ATS's exercise of the right of free speech as defined by the TCPA, (3) dismissing BusPatrol's claims when BusPatrol offered clear and specific evidence of the prima facie elements of its claims and ATS did not establish its affirmative defenses, (4) awarding ATS attorney's fees of $201,885.75 incurred by ATS defending against a previously-filed case that ATS removed to federal court and BusPatrol voluntarily dismissed, and (5) awarding ATS attorney's fees incurred defending claims that are not subject to the TCPA. ATS brings a cross-appeal seeking a sanctions award in addition to the fees and costs awarded by the trial court. Because we conclude BusPatrol's claims are not subject to the TCPA, we reverse the trial court's judgment and render judgment (1) dismissing BusPatrol's claims without prejudice pursuant to BusPatrol's June 20, 2018 nonsuit and (2) denying ATS's TCPA motion to dismiss and request for attorney's fees, costs, expenses, and sanctions.

BACKGROUND

This lawsuit arises from a commercial dispute between two companies — BusPatrol and ATS — that are direct competitors in what BusPatrol describes as "the highly-competitive smart bus technology market." The technology at issue in the underlying lawsuit was BusPatrol's "BusStop Technology," which consists

primarily of camera systems installed on the inside and outside of school buses and proprietary firmware and onboard computers used to gather and transmit the video collected from the cameras to school districts and law enforcement. The inside bus cameras record actions by the bus driver and student passengers, while the outside bus cameras monitor the "stop arms" of school buses, and record "stop arm" violators who pass buses when the stop arm is extended and the red stop lights are flashing. Through the "BusPatrol Safety Program," BusPatrol works with cities, school districts, and other governmental entities to deploy the BusStop Technology on school buses at no cost to the school district. BusPatrol and the relevant governmental entity then share in the revenue collected from processing stop arm violations caught on the BusPatrol cameras.

The BusStop Technology was originally developed and owned by Force Multiplier Solutions, Inc. (FMS). BusPatrol purchased the technology from FMS in September 2017. Before selling the technology to BusPatrol, FMS contracted with various school districts nationwide for installation of the technology on the districts' school buses. Prior to 2014, FMS provided the BusStop Technology, safety program, and services to Dallas County Schools (DCS) for use on school buses in school districts in Dallas County. According to BusPatrol's pleadings below, DCS is a now-dissolved county school district and former political subdivision of the State of Texas. In November 2017, the voters of Dallas County voted not to retain DCS and, in accordance with Senate Bill Nos. 1566 and 2065, the Dissolution Committee for

the Former Board of Dallas County Schools Trustees (the Dissolution Committee) was appointed to dissolve DCS and wind down its affairs.

On February 28, 2014, three years before BusPatrol acquired the BusStop Technology, FMS and a related entity, ONGO Live, Inc. (ONGO), entered into an Asset Purchase Agreement (APA), a Technology License Agreement (TLA), and a Services Agreement with DCS. Pursuant to those agreements, DCS was given, among other benefits, the exclusive right to license the BusStop Technology to school districts in Texas. FMS agreed to continue to service the BusStop Technology to the Texas users in return for a percentage of revenues collected from prosecuting stop arm violations.

From late 2016 through July 2017, DCS began looking for a buyer for its Licensed Products, which included the BusStop Technology, and for a sublicensee of that technology. DCS claimed below that it sought a buyer and sublicensee because FMS was not fulfilling its obligations under the agreements. DCS reached out to ATS as a potential buyer. BusPatrol maintained that DCS sought to sell the technology to ATS because DCS anticipated being dissolved following the 2017 election and hoped to obtain jobs for its employees at ATS following that dissolution. Regardless of the reasons, DCS and ATS began discussions during the spring and summer of 2017, and DCS provided ATS access to the BusStop Technology during those discussions. BusPatrol contends that DCS shipped two, fully-functioning BusGuard kits to ATS's research lab to allow ATS to reverse

engineer the kits and showed ATS representatives a fully-rigged school bus equipped with the full BusPatrol camera system during a meeting in Dallas County. BusPatrol also alleged that DCS employee Scott Peters and other employees answered multiple emails from ATS regarding BusPatrol's proprietary and confidential BusStop Technology and provided confidential information about the technology, including installation instructions, technical specifications of proprietary software, and FMS' back-end solution for processing and reviewing video evidence and interfacing with law enforcement. ATS denies being provided access to FMS' or BusPatrol's source code or back-end systems, other than publicly-accessible, Internet-based landing webpages. The negotiations between ATS and DCS in the summer of 2017 did not result in an agreement for ATS to take over the servicing of the stop arm program from FMS.

BusPatrol acquired the BusStop Technology from FMS in September 2017. During the fall of 2017, DCS allowed BusPatrol to service the stop arm program within Dallas County and other Texas counties while BusPatrol and DCS negotiated a deal. During that time, BusPatrol discovered ATS had obtained access to the BusStop Technology as described above. BusPatrol also contends that ATS contacted BusPatrol's sole source manufacturer and attempted to convince it to violate its confidentiality obligations to BusPatrol and duplicate BusPatrol's proprietary BusGuard kits for ATS on April 9, 2018 after BusPatrol filed this lawsuit.

In February 2018, the Dissolution Committee sought proposals for the purchase of all assets and any contractual interests that DCS has/had a right to transfer in the Stop Arm Camera Program located outside of Dallas County in Texas. The bid request stated that the assets and interests include "camera kits; inter-local agreements between DCS and a school district and/or municipality; and the exclusive license to use and market, including the right to sublicense, the BusGuard System in Texas." ATS responded to the bid request and submitted a proposal to purchase those assets.

PROCEDURAL HISTORY

BusPatrol claims ATS misappropriated BusPatrol's trade secrets when it tried to take over servicing the Bus Stop Arm Program from DCS. BusPatrol originally filed suit in the 14th Judicial District Court of Dallas County, ATS removed that action to federal court, and BusPatrol dismissed the federal court action. BusPatrol then filed the underlying proceeding. In its lawsuit, BusPatrol generally alleged its trade secrets and proprietary information were improperly solicited by, disclosed to, and used by its competitor, ATS. BusPatrol alleged that (1) ATS, DCS, the Dissolution Committee, and Peters violated the Texas Uniform Trade Secrets Act (TUTSA), (2) ATS and DCS engaged in conspiracy to violate TUTSA, (3) ATS engaged in conspiracy to violate the Texas Open Meetings Act (TOMA), and (4) ATS engaged in collusion and conspiracy in restraint of trade. BusPatrol also sought declaratory, injunctive, and monetary relief. BusPatrol sought declarations that

Peters acted outside of his official duties in his actions responding to ATS, and that BusPatrol owns the trade secrets in question. BusPatrol further sought a temporary restraining order and injunction to (1) enjoin ATS, DCS, and the Dissolution Committee from obtaining, using, disclosing, possessing, or requesting accessing to the trade secrets, (2) order return of BusPatrol's confidential information and equipment, and (3) enjoin DCS and the Dissolution Committee from selling or offering to sell any products containing the trade secrets.

ATS filed a motion to dismiss under the TCPA. In the TCPA motion, ATS argued its bid to buy assets and contracts from DCS and the Dissolution Committee was a written communication on a matter of public concern covered by the TCPA. BusPatrol non-suited its claims against ATS without prejudice on June 20, 2018. The trial court granted the motion to dismiss on June 29, 2018 and, on July 23, 2018, signed a final judgment dismissing BusPatrol's claims with prejudice and awarding ATS $420,950.70 in fees and $9,959.09 in costs. The trial court made the following findings in the June 29, 2018 order granting ATS's motion to dismiss:

- BusPatrol's legal action is based on, relates to, or is in response to ATS's exercise of the right of free speech.
- BusPatrol cannot establish by clear and specific evidence a prima facie case for each essential element of its claims against ATS.
- ATS has established by a preponderance of the evidence each essential element of valid defenses to Plaintiff's claims.

BusPatrol appealed and ATS filed a notice of interlocutory cross-appeal.

TEXAS CITIZENS PARTICIPATION ACT

The TCPA permits a defendant to move for dismissal of a legal action that is "based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association." TEX. CIV. PRAC. & REM. CODE § 27.003(a). The statute's purpose "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.

Determination of a motion to dismiss under the TCPA is a "three-step decisional process." *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 132 (Tex. 2019); *Youngkin v. Hines*, 546 S.W.3d 675, 679 (Tex. 2018). In step one, the movant for dismissal has the burden of showing by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the movant's exercise of one of those rights. TEX. CIV. PRAC. & REM. CODE § 27.005(b). If the movant does so, then the procedure moves to step two, and the burden of proof shifts to the nonmovant bringing the legal action to "establish[ ] by clear and specific evidence a prima facie case for each essential element of the claim in question." *Id.* § 27.005(c). If the nonmovant meets this burden, then the procedure moves to step three, and the burden of proof shifts back to the movant to "establish[ ] by a

preponderance of the evidence each essential element of a valid defense to the nonmovant's claim." *Id.* § 27.005(d).

The evidence considered by the trial court in determining a motion to dismiss includes "the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based." TEX. CIV. PRAC. & REM. CODE § 27.006(a). However, the plaintiff's pleadings are usually "the best and all-sufficient evidence of the nature of the action." *Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017) (quoting *Stockyards Nat'l Bank v. Maples*, 127 Tex. 633, 95 S.W.2d 1300, 1302 (1936)); *Goldberg v. EMR (USA Holdings) Inc.*, No. 05-18-00261-CV, 2020 WL 400171, at *2–3 (Tex. App.—Dallas Jan. 23, 2020, no pet. h.).

STANDARD OF REVIEW

We review de novo a trial court's ruling on a TCPA motion to dismiss. *Dyer v. Medoc Health Servs., LLC*, 573 S.W.3d 418, 424 (Tex. App.—Dallas 2019, pet. denied). In doing so, we consider the pleadings and supporting and opposing affidavits in the light most favorable to the non-movant. *Fishman v. C.O.D. Capital Corp.*, No. 05-16-00581-CV, 2017 WL 3033314, at *5 (Tex. App.—Dallas July 18, 2017, no pet.) (mem. op.).

Whether the TCPA applies to a non-movant's claims is an issue of statutory interpretation that we also review de novo. *Youngkin*, 546 S.W.3d at 680. In conducting our analysis, "we ascertain and give effect to the Legislature's intent as expressed in the language of the statute." *State ex rel. Best v. Harper*, 562 S.W.3d 1,

11 (Tex. 2018) (quoting *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008)); *see also Travis Cent. Appraisal Dist. v. Norman*, 342 S.W.3d 54, 58 (Tex. 2011) ("Legislative intent ... remains the polestar of statutory construction.") (internal citations omitted)). We construe the statute's words according to their plain and common meaning, "unless a contrary intention is apparent from the context, or unless such a construction leads to absurd results." *Youngkin*, 546 S.W.3d at 680; *see also Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011) ("The plain meaning of the text is the best expression of legislative intent unless a different meaning is apparent from the context or the plain meaning leads to absurd or nonsensical results.").

We consider both the specific statutory language at issue and the statute as a whole. *In re Office of Attorney Gen.*, 422 S.W.3d 623, 629 (Tex. 2013) (orig. proceeding); *see also Youngkin*, 546 S.W.3d at 680 ("[L]egislative intent derives from an act as a whole rather than from isolated portions of it."). We endeavor to read the statute contextually, giving effect to every word, clause, and sentence. *In re Office of Att'y Gen.*, 422 S.W.3d at 629. We adhere to the definitions supplied by the legislature in the TCPA. *Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 894 (Tex. 2018); *Youngkin*, 546 S.W.3d at 680. In applying those definitions, we must construe those individual words and provisions in the context of the statute as a whole. *Youngkin*, 546 S.W.3d at 680–81.

ANALYSIS

BusPatrol asserts five issues on appeal and seeks reversal of the trial court's judgment. BusPatrol maintains its claims are not subject to the TCPA and, as such, the trial court erroneously dismissed BusPatrol's claims with prejudice and improperly awarded fees and costs to ATS. Because it is dispositive of this appeal, we begin with BusPatrol's second issue in which BusPatrol contends the conduct alleged against ATS is not protected by the TCPA and, as such, the trial court committed reversible error by dismissing BusPatrol's claims with prejudice.

A. Are BusPatrol's claims based on, related to, or in response to ATS's exercise of protected rights?

For ATS to be entitled to dismissal under the TCPA, it has to prove by a preponderance of the evidence that BusPatrol's claims are based on, related to, or in response to ATS's exercise of the right of free speech, right of association, or right to petition. TEX. CIV. PRAC. & REM. CODE § 27.005(b). Central to the definitions of both the right of free speech and right of association is "a communication," which "includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic." TEX. CIV. PRAC. & REM. CODE § 27.001(1).

Here, ATS alleges that BusPatrol's claims are based on, related to, or in response to ATS's exercise of all three protected rights. The trial court, however, found only that BusPatrol's legal action was based on, related to, or in response to

ATS's exercise of the right of free speech. BusPatrol maintains its claims against ATS do not involve speech and are, therefore, not subject to dismissal under the TCPA. We agree and begin our discussion there.

1) Right to Free Speech

"'Exercise of the right of free speech' means a communication made in connection with a matter of public concern." TEX. CIV. PRAC. & REM. CODE § 27.001(3). "'Matter of public concern' includes an issue related to: (A) health or safety; (B) environmental, economic, or community well-being; (C) the government; ... or (E) a good, product, or service in the marketplace." *Id.* § 27.001(7). "The phrase 'matter of public concern' commonly refers to matters 'of political, social, or other concern to the community,' as opposed to purely private matters." *Creative Oil & Gas*, 591 S.W.3d at 135 (quoting *Brady v. Klentzman*, 515 S.W.3d 878, 884 (Tex. 2017)); *see also Lei v. Nat. Polymer Int'l Corp*., 578 S.W.3d 706, 715 (Tex. App.—Dallas 2019, no pet.) (private communications in connection with a business dispute do not involve matters of public concern when the communications address only private economic interests and make no mention of health or safety).

Here, ATS contends that its submission of a bid to purchase assets and contracts from the Dissolution Committee was an exercise of ATS's right to free speech. Specifically, ATS argues the bid was a communication about a matter of public concern because the communication related to "the school bus stop-arm technology market," the subject of the communication constitutes "a good, product,

or service in the marketplace," and the product or service to be bought is intended to provide "student safety." ATS also asserts that its meetings with DCS and exchanges of information with DCS in July 2017, including DCS providing ATS with information about its systems and sending ATS two "kits" (the school bus stop arm camera kits) for analysis, were all precursors to ATS's 2018 bid. As such, ATS says these communications were all in connection with matters of public concern under the TCPA and bear at least "a tangential relationship to ATS's speech on matters of public concern." As for BusPatrol's allegation that ATS was "buying alleged trade secrets" in 2018, ATS argues "this alleged activity is the very speech that forms the basis for BusPatrol's legal action" and is simply another way of referencing ATS's bid to buy assets and contracts.

We disagree with ATS's characterization of its bid and other interactions and communications with DCS and the Dissolution Committee. Not all communications made in connection with a matter related to health or safety, environmental, economic, or community well-being, or a good, product, or service in the marketplace will constitute the exercise of the right of free speech under the TCPA. *See Pearl Energy Inv. Mgmt., LLC v. Gravitas Res. Corp.*, No. 05-18-01012-CV, 2019 WL 3729501, at *6 (Tex. App.—Dallas Aug. 7, 2019, no pet.) (mem. op.); *see also Dyer*, 573 S.W.3d at 428 (citing *In re IntelliCentrics, Inc.*, No. 02-18-00280-CV, 2018 WL 5289379, at *4 (Tex. App.—Fort Worth Oct. 25, 2018, orig. proceeding)). The communications themselves must relate to a matter of public

concern. *See Creative Oil & Gas*, 591 S.W.3d at 135–36. A communication related to a good, product, or service in the marketplace must have some relevance to a public audience of potential buyers or sellers and not be simply a communication between private parties of matters of purely private concern. *Id.* at 136.

For example, in *Dyer*, this Court considered whether appellants Dyer and Basiti were exercising their right of free speech in text messages discussing misappropriating, selling, and using proprietary software and other confidential information of the appellee healthcare management services company. 573 S.W.3d at 428. The text messages did not discuss issues related to health or economic well-being other than the appellants' own financial interests. *Id.* Further, the appellee had taken specific steps to protect the proprietary software and other confidential information and keep it private. *Id*. Under the circumstances, this Court determined it could not conclude the communications were tangentially related to a matter of public concern simply because the information belonged to a company in the healthcare industry or the appellants hoped to profit from their tortious conduct. *Id.* at 428-29.

In *Lei*, an employer manufacturer and distributor of natural pet treats brought an action against former employees for breach, misappropriation of trade secrets, unfair competition by misappropriation, and conversion because the former employees disclosed proprietary and trade secret information to a direct competitor. 578 S.W.3d at 710. The former employees filed a TCPA motion alleging the

communications "were made 'in connection with no fewer than three matters of public concern': (1) 'natural' pet treats that 'promote ... health'; (2) 'economic well-being of [the employer] relative to [the competitor]'; and (3) a good or product in the marketplace." *Id.* at 715. As in *Dyer*, the employer "had taken specific steps to protect and keep private" the proprietary and trade secret information. *Id.* And, as in *Dyer*, this Court was unable to conclude "the alleged 'communications' [were] tangentially related to a matter of public concern simply because the proprietary and confidential information at issue belonged to a company in the business of selling pet treats that promote health 'or because the alleged tortfeasors hoped to profit from their conduct.'" *Id.* Accordingly, this Court held the former employees failed to establish by a preponderance of the evidence that the employer's claims were based on, related to, or in response to the former employees' exercise of the right of free speech as defined by the TCPA. *Id.*

Our Court has applied this same reasoning more recently in *Pearl Energy Investment Management, LLC v. Gravitas Resources Corp.*, No. 05-18-01012-CV, 2019 WL 3729501, at *6 (Tex. App.—Dallas Aug. 7, 2019, no pet.) and *Goldberg v. EMR (USA Holdings) Inc.*, No. 05-18-00261-CV, – S.W.3d –, 2020 WL 400171, at *2–3 (Tex. App.—Dallas Jan. 23, 2020, no pet. h.). In *Pearl Energy*, we held that communications of confidential information to a third party for use in that party's efforts to purchase certain oil and natural gas assets did not relate to a matter of public concern. 2019 WL 3729501, at *6. Those communications related to private

business transactions. *Id.* And, although the information belonged to a company in the business of oil and gas production and appellants hoped to profit from their conduct, those facts did not cause the communication to become tangentially related to a matter of public concern. *Id.*

Similarly, in *Goldberg*, we held that communications with purchasers and suppliers regarding a private, commercial transaction to buy and sell scrap metal was not a communication made in connection with a matter of public concern. Although the emails were by definition communications, they were "private communications between private parties about purely private economic matters." 2020 WL 400171, at *7. Further, the fact that recycling the commodity being sold, i.e., scrap metal, is good for the environment did not transform the communications into communications related to health or safety, or environmental, economic, or community well-being. *Id.* at *7–8. The communications addressed only the financial transaction, not the beneficial effects of recycling scrap metal. *Id.* at *8. As such, the claims concerning those communications were not based on, related to, or in response to the defendants' right of free speech. *Id.*

This Court's reasoning in *Dyer*, *Lei*, *Pearl Energy*, and *Goldberg* mandates the same result here. Although the BusStop Technology provides safety measures for children who ride school buses, the benefits of the technology were not the basis of the communications. ATS's communications with DCS and the Dissolution Committee, including requesting and receiving information about the technology,

obtaining prototypes of the technology, and ATS's actual bid, were private communications about a private, commercial transaction. Similarly, although DCS and the Dissolution Committee are governmental entities, the transactions and associated communications were private financial transactions that did not impact the public; the transactions did not require public approval, and ATS did not argue that the governmental status of DCS and the Dissolution Committee brought the communications into the realm of public concern. Under this record, we conclude that the communications alleged are not even tangentially related to a matter of public concern and, as such, ATS failed to establish by a preponderance of the evidence that BusPatrol's claims are based on, related to, or are in response to ATS's exercise of its right of free speech as defined by the TCPA. Accordingly, the judgment should be reversed and the case remanded to the trial court for further proceedings.

2) Right of Association and Right to Petition

ATS argues that this Court should affirm the judgment because BusPatrol's claims "are implicated by ATS's exercise of its right to petition and its right of association." The trial court, however, expressly rejected ATS's contention that BusPatrol's legal action is based on, relates to, or is in response to those protected rights. ATS's argument for affirmance is, therefore, more properly characterized as an argument that the trial court reversibly erred and is an issue to be raised in a cross-appeal, not as an additional basis to uphold the judgment. *See, e.g., Salinas v.*

Kristensen, No. 13-08-00110-CV, 2009 WL 4263107, at *5 (Tex. App.—Corpus Christi Nov. 25, 2009, pet. denied) (mem. op.) (noting that issue raised by appellee that would result in reversal of trial court's order was an issue to be raised in a cross-appeal, not as an additional basis to uphold the judgment); *see also Pilgrim's Pride Corp. v. Burnett*, No. 12-10-00037-CV, 2012 WL 381714, at *20 (Tex. App.—Tyler Feb. 3, 2012, no pet.) (mem. op.) (same). Although ATS filed a notice of accelerated cross-appeal, ATS has not affirmatively requested that this Court reverse the trial court's determination that BusPatrol's legal action was not based on, related to, or in response to ATS's exercise of the right of association or the right to petition. Instead, ATS's cross-appeal focuses solely on ATS's request for sanctions against BusPatrol pursuant to section 27.009(a)(2). By failing to pursue a cross-appeal of the trial court's adverse findings concerning the right of association and right to petition, we conclude ATS has waived those issues on appeal and this Court need not address the propriety of those findings here. *See Lubbock Cty. v. Trammel's Lubbock Bail Bonds*, 80 S.W.3d 580, 584 (Tex. 2002) (an appellee seeking to change the trial court's judgment or to obtain more favorable relief than that granted by the trial court must file its own notice of appeal); *Wallace Roofing, Inc. v. Benson*, No. 03-11-00055-CV, 2013 WL 6459757, at *15 (Tex. App.—Austin Nov. 27, 2013, pet. denied) (mem. op.); TEX. R. APP. P. 25.1(c), 26.1(d). Moreover, we conclude the trial court properly determined that BusPatrol's legal action did not implicate the right of association or right to petition.

"'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). ATS asserts the TCPA applies here because BusPatrol alleged that ATS and DCS acted in concert to achieve their shared objectives of ATS buying the assets and services. This Court, however, consistently holds that the exercise of the right of association requires that the "nature of the communication between individuals who join together must involve public or citizen's participation." *Dyer*, 573 S.W.3d at 426 (concluding TCPA's protection of the right of association did not apply to claims for misappropriation of trade secrets, conversion, and tortious interference based on communications between alleged tortfeasors with a common interest in a competing business enterprise) (internal quotation marks omitted); *Pearl Energy Inv. Mgmt., LLC*, 2019 WL 3729501, at *4–5 (same).

Here, ATS has not shown its communications with DCS and the Dissolution Committee involved any public or citizen participation. Construing the TCPA to find a right of association simply because there are communications between parties with a shared interest in a private business transaction does not further the TCPA's purpose to curb strategic lawsuits against public participation. *See Dyer*, 573 S.W.3d at 426–27; *ExxonMobil Pipeline Co. v. Coleman*, 464 S.W.3d 841, 847, rev'd on other grounds, 512 S.W.3d 895 (in light of TCPA's purpose, "it would be illogical for the [TCPA] to apply to situations in which there is no element of public

participation"). We conclude ATS failed to establish by a preponderance of the evidence that BusPatrol's claims are based on, relate to, or are in response to ATS's exercise of a right of association as defined by the TCPA.

We reach the same conclusion as to the right to petition. Section 27.001(4) provides various means to exercise the right to petition. Here, ATS relied on subsection (C), which provides that the exercise of the right to petition means . . .

> a communication that is reasonably likely to encourage consideration or review of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding; . . . .

TEX. CIV. PRAC. & REM. CODE § 27.001(4)(C).

The Petition Clause of the Texas Constitution reserves the right to petition the government for a redress of grievances as follows:

> RIGHT OF ASSEMBLY; PETITION FOR REDRESS OF GRIEVANCES.
>
> The citizens shall have the right, in a peaceable manner, to assemble together for their common good; and apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address or remonstrance.

TEXAS CONST. art. 1, § 27. "The 'exercise of the right to petition' requires a communication that pertains to governmental or at a minimum, public, proceedings." *Gaskamp v. WSP USA, Inc.*, No. 01-18-00079-CV, – S.W.3d –, 2020 WL 826729, at *11 (Tex. App.—Houston [1st Dist.] Feb. 20, 2020, no pet. h.).

Here, the communications involve no governmental or public proceedings as contemplated by the Texas Constitution. ATS did not petition the government for

redress or assemble publicly to address a grievance. Rather, ATS sought to buy valuable assets and contractual interests in a commercial transaction for its own financial benefit. We conclude ATS failed to establish by a preponderance of the evidence that BusPatrol's claims are based on, relate to, or are in response to ATS's exercise of a right to petition as defined by the TCPA.

B. Remaining Issues

Because BusPatrol's lawsuit did not implicate ATS's "constitutional rights ... to petition, speak freely, associate freely, and otherwise participate in government," *see* TEX. CIV. PRAC. & REM. CODE § 27.002, we sustain BusPatrol's second issue. Accordingly, we need not address the following matters raised in BusPatrol's appeal and in ATS's cross-appeal: whether the TCPA's commercial speech exemption applies; whether BusPatrol established by clear and specific evidence a prima facie case for each essential element of its claims against ATS; whether ATS proved its affirmative defenses by a preponderance of the evidence; or whether ATS was entitled to an award of attorney's fees, costs, and an award of sanctions. *See Tervita, LLC v. Sutterfield*, 482 S.W.3d 280, 287 (Tex. App.—Dallas 2015, pet. denied) (because appellant failed to meet its burden of showing TCPA applied to appellees' claim, appellate court need not address other prongs of TCPA analysis).

CONCLUSION

For the foregoing reasons, we conclude the trial court erred by granting the motion to dismiss and dismissing BusPatrol's claims with prejudice. Having

resolved BusPatrol's second issue in its favor, it is unnecessary for us to address BusPatrol's remaining issues and ATS's cross-issue. Accordingly, we reverse the trial court's July 23, 2018 final judgment and render judgment (1) dismissing BusPatrol's claims without prejudice pursuant to BusPatrol's June 20, 2018 nonsuit and (2) denying ATS's TCPA motion to dismiss and request for attorney's fees, costs, expenses, and sanctions. *See* TEX. R. APP. P. 43.2(c), 43.3.

/Robbie Partida-Kipness/
ROBBIE PARTIDA-KIPNESS
JUSTICE

180920F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

BUSPATROL AMERICA, LLC, Appellant

No. 05-18-00920-CV V.

AMERICAN TRAFFIC SOLUTIONS, INC., Appellee

On Appeal from the 14th Judicial District Court, Dallas County, Texas Trial Court Cause No. DC-18-06457. Opinion delivered by Justice Partida-Kipness. Justices Bridges and Carlyle participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and judgment is **RENDERED** dismissing BusPatrol America LLC's claims without prejudice pursuant to BusPatrol America LLC's June 20, 2018 nonsuit and denying ATS's TCPA motion to dismiss and request for attorney's fees, costs, expenses, and sanctions.

It is **ORDERED** that appellant BUSPATROL AMERICA, LLC recover its costs of this appeal from appellee AMERICAN TRAFFIC SOLUTIONS, INC.

The clerk of the district court is directed to release the balance of the cash deposit filed on August 13, 2018 to BusPatrol America LLC upon issuance of this Court's mandate.

Judgment entered this 24th day of March, 2020.