REVERSE and REMAND; and Opinion Filed August 2, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00973-CV

STATE FAIR OF TEXAS, Appellant
V.
RIGGS & RAY, P.C., Appellee

On Appeal from the 101st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-15-04484

MEMORANDUM OPINION

Before Justices Lang-Miers, Brown, and Schenck
Opinion by Justice Brown

Appellant the State Fair of Texas ("SFT") appeals an order granting appellee Riggs & Ray's ("R & R's") plea to the jurisdiction and motion to dismiss under the Texas Citizen's Participation Act ("TCPA"). In two issues, SFT asserts the trial court erred in granting R & R's plea to the jurisdiction and its motion to dismiss under the TCPA. For the following reasons, we reverse the trial court's judgment and remand for further proceedings consistent with this opinion.

SFT is a private non-profit corporation that operates the annual State Fair of Texas at Fair Park in Dallas. R & R is an Austin law firm. In 2015, R & R sent a letter to SFT requesting public information under the Texas Public Information Act ("TPIA") on behalf of an unnamed client. By doing so, R & R sought to invoke the duties owed by governmental bodies to disclose public information to the public. In that regard, R & R requested SFT to either request an

opinion from the Texas Attorney General ("AG") as to whether it is a government body subject to the TPIA or to provide the requested information to R & R. Its request included sixty-one items, encompassing a period of ten years, and included broad requests for communications about all litigation SFT has been involved in, communications about SFT's employees and employment decisions, information about its assets, investments, and vendors, and information and communications about virtually all aspects of SFT's operations.

SFT responded to R & R's request. It first stated that SFT did not concede it was subject to the TPIA. With that proviso, SFT asked R & R if it would agree to narrow its requests and to withdraw its request for any attorney-client privileged information. R & R refused and requested SFT to meet the deadlines required by the TPIA. R & R further instructed SFT that it was required to submit its attorney-client privileged information to the AG, allow the AG to review that information, and obtain an opinion from the AG as to whether that information was, in fact, privileged.

SFT then filed this action seeking a declaratory judgment that it is not a governmental body subject to the TPIA and, therefore, that it was not required to comply with or otherwise respond to R & R's request. R & R filed an original answer, motion to transfer venue, plea to the jurisdiction, and motion to dismiss under the TCPA. The trial court subsequently dismissed SFT's suit, simultaneously for want of jurisdiction and also under the provisions of the TCPA. The trial court also awarded R & R attorney's fees under the TCPA. SFT appeals.

Plea to the Jurisdiction

In its first issue, SFT asserts the trial court erred in granting R & R's plea to the jurisdiction. In its plea, R & R asserted SFT's petition failed to invoke the trial court's jurisdiction because (1) no justiciable controversy existed, (2) SFT's suit would not resolve the

dispute between the parties, (3) the TPIA prohibits suits against requestors of public information, (4) R & R was required to first request an AG opinion as to its status, and (5) the AG was a necessary party. The trial court granted its plea. In this issue, SFT asserts the trial court erred in doing so because a genuine dispute existed between it and R & R with respect to SFT's obligations under the TPIA and specifically whether it was required to respond to R & R's request. We agree.

We review the trial court's ruling on a plea to the jurisdiction under a de novo standard of review. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004). The plaintiff has the burden of alleging facts that affirmatively establish the trial court's subject matter jurisdiction. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex.1993). We construe the pleadings liberally in favor of the plaintiff, look to the pleader's intent, and accept the pleadings' factual allegations as true. *Miranda*, 133 S.W.3d at 226.

Here, R & R sent SFT a letter requesting a plethora of information, including undeniably sensitive communications, about all aspects of SFT's operations. It is also apparent R & R did so with the intent to immediately trigger SFT's obligations under the TPIA. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 356 (Tex. 2000) (outlining obligations of governmental body upon receipt of request for public information); *see also* TEX. GOV'T CODE ANN. § 552.302 (West 2012) (if governmental body does not timely request an AG opinion, the information is presumed public). It is also undisputed that the letter could only operate to trigger such obligations if SFT is a governmental body.

As a consequence, SFT filed suit seeking a declaration that it was not a governmental body and therefore that it was not required to comply with or respond to R & R's request. R & R does not deny that it claimed, and continues to claim, its letter placed duties upon STF to

respond. It nevertheless asserts no justiciable controversy exists because SFT was not injured by receiving the letter and R & R did not threaten litigation.[1]

To constitute a justiciable controversy, there must exist a real and substantial controversy involving a genuine conflict of tangible interests and not merely a theoretical dispute. *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995). We conclude the parties' dispute regarding whether SFT was required to respond to R & R's request did constitute such a controversy. Specifically, SFT's obligations, if any, under the TPIA were triggered upon its receipt of the letter and were neither theoretical nor contingent.

R & R further asserted the trial court lacked jurisdiction because SFT did not request an opinion from the AG or join it as a party. We conclude the Texas Supreme Court has resolved this precise issue against R & R. In *City of Garland v. Dallas Morning News*, the Dallas Morning News ("DMN") sent the City of Garland ("the City") a request for documents under the provisions of the TPIA. *City of Garland*, 22 S.W.3d at 354. The City did not request an AG opinion and instead sued DMN seeking a declaration that the documents requested were not public information. *Id*. at 354-55. On appeal, DMN asserted the trial court had no jurisdiction over the City's declaratory judgment action. *Id*. at 357. Specifically, DMN asserted that a governmental body's only avenue of redress when seeking to withhold information from a requestor is to obtain an opinion from the AG and, if it is dissatisfied with the opinion, sue the AG in Travis County. *Id.* Because the City did not do so, DMN asserted the City had no available judicial remedy. *Id*. The Texas Supreme Court disagreed. The Court explained the

[1] According to R & R, SFT had only two options. First, it could do nothing, and ignore SFT's request, leaving R & R's request outstanding and the issue unresolved. Or R & R asserts SFT could request an AG opinion under Subchapter G of the TPIA. *See* TEX. GOV'T CODE ANN. § 552.301 (West 2012). We are not convinced SFT had the latter option. Subchapter G both allows and requires a *government body* to request an opinion from the AG when the government body wishes to withhold public information. *See id*. The AG is required to respond to such requests and it must do so within certain deadlines. *See id*. at § 552.306(a). The AG also *may* issue opinions related to the TPIA under section 552.011. *See id*. at § 552.011. The AG has issued numerous opinions under that provision addressing whether private entities are governmental bodies. See *Greater Houston P'ship v. Paxton*, 468 S.W.3d 51, 71 (Tex. 2015). Those opinions, however, are issued under subchapter A, not subchapter G of the TPIA. *See* TEX. GOV'T CODE ANN. § 552.011.

declaratory judgment act gives courts the power to declare rights, status and other legal relations. *Id*. at 357 (*citing* TEX. CIV. PRAC. & REM. CODE § 37.003(a) (West 2015)). Therefore, notwithstanding any other remedies that might have been available to the City under the TPIA, the City was permitted to bring a declaratory judgment to determine its rights and obligations under the TPIA. *City of Garland*, 22 S.W.3d at 357.

According to R & R, *City of Garland* is not controlling because the TPIA now expressly prohibits suits against requestors of public information.[2] Specifically, section 552.325(a) of the TPIA now provides that "[a] governmental body, officer for public information, or other person or entity that files a suit seeking to withhold information from a requestor may not file suit against the person requesting the information." TEX. GOV'T CODE ANN. § 552.325(a) (West 2012). R & R asserts, in essence, that section 552.325(a) effectively operated to divest courts of subject-matter jurisdiction over suits against persons who have requested public information under the TPIA.

However, we do not agree section 552.325(a) applies to SFT's suit. Section 552.325(a) prohibits suits seeking to "withhold information from *a requestor*." *Id*. (emphasis added). The TPIA specifically defines "requestor" as "a person who submits a request *to a governmental body* for inspection or copies of public information." *Id.* In its petition, SFT asserted it is not a governmental body. Taking that allegation as true, as we must, R & R is not a requestor and SFT's suit does not, therefore, seek to withhold information from a "requestor." *Miranda*, 133 S.W.3d at 226 (in determining plea to jurisdiction, court must take factual allegations as true).

[2] *City of Garland* was decided in 2000, well after section 552.325 became effective in 1995. *City of Garland*, 22 S.W.3d at 358. However, the Supreme Court explained that section 552.325 did not apply to that case because DMN had made its request in 1993 before its effective date. *Id*.

In reaching this conclusion, we reject R & R's suggestion that our construction of section 552.325(a) would lead to absurd results. According to R & R, construing the statute to only prohibit suits against persons who made a request on a governmental body is "untenable" because it would require the parties to litigate the merits of the claim, *i.e.*, whether the entity was a governmental body, in order to determine whether the suit was prohibited. It also asserts such a construction renders section 552.325(a) meaningless, at least when applied to suits brought by third parties.

If a statute is worded clearly, we must honor its plain language, unless that interpretation would lead to absurd results. *Combs v. Health Care Services Corp.*, 401 S.W.3d 623, 629 (Tex. 2013). First, we cannot conclude it is absurd, or even uncommon, for a jurisdictional challenge to require a determination that also implicates the merits of a case. *See, e.g.*, *Miranda*, 133 S.W.3d at 226, 234 (trial court lacked subject matter jurisdiction because evidence conclusively established government entity was not grossly negligent). Nor do we agree our construction renders section 552.325(a) meaningless. The result R & R complains of arises only when a person sues to withhold information on the basis that it is not a government entity. However, the evident purpose of section 552.325(a) is to prohibit third parties who wish to prevent a governmental body from disclosing their private or confidential information to a requestor from suing that requestor. *See Boeing Co. v. Paxton*, 466 S.W.3d 831, 839 (Tex. 2015) (construing sections 552.325(a)'s prohibition as permitting third party suit against AG to prevent disclosure of third party's confidential information to a requestor/competitor). In such cases, the governmental body's status is not related to the merits of the dispute. Thus, our construction does not render section 552.325(a) meaningless.

We conclude SFT's petition was sufficient to invoke the trial court's subject matter jurisdiction. Therefore, we sustain the SFT's first issue.

Dismissal Under the Texas Citizens Protection Act

In addition to dismissing SFT's suit for want of jurisdiction, the trial court also dismissed the suit under the provisions of the TCPA and, based on that dismissal, awarded R & R its attorney's fees. In its motion to dismiss under the TCPA, R & R generally asserted that SFT brought its declaratory judgment action in retaliation for R & R's request for public information. In its second issue, SFT asserts the trial court erred in dismissing its suit and awarding attorneys' fees under the TCPA. Again, we agree with SFT.

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 a demonstrable injury. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.002 (West 2015); *ExxonMobil Pipeline Co. v. Coleman*, 464 S.W.3d 841, 844 (Tex. App.—Dallas 2015, pet. filed). To promote these purposes, the TCPA provides a means for the expedited dismissal of unmeritorious suits that are based on, related to, or in response to a party's exercise of its right of free speech, right to petition, or right of association. TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(a); *ExxonMobil Pipeline Co*, 464 S.W.3d at 844.

To prevail on a motion to dismiss under the TCPA, the movant bears the initial burden to show, by a preponderance of the evidence, that the action is based on, relates to, or is in response to the party's exercise of the right of free speech, the right to petition, or the right of association. TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b). If the movant satisfies this burden, the trial court must dismiss the lawsuit unless the plaintiff establishes by clear and specific evidence a prima facie case for each essential element of the claim in question. *Id*. § 27.005(c). Even if the plaintiff meets this burden, the movant is still entitled to dismissal if it establishes by a preponderance of the evidence each essential element of a valid defense. *Id*. § 27.005(d). In

determining whether to grant or deny a motion to dismiss, the court must consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based. *Id*. § 27.006(a).

In its motion to dismiss, R & R asserted SFT's suit was brought in retaliation for its request for public information. R & R further asserted dismissal was mandated because its request was a protected communication under the TCPA. SFT filed a response to R & R's motion asserting that R & R failed to show its request was protected by the TCPA, but even if it did, it presented sufficient evidence to support its claim. R & R filed a reply to SFT's response asserting that SFT had not presented clear and specific evidence to support its claim because the trial court lacked jurisdiction over the claim it asserted. R & R further asserted that, even if SFT presented such evidence, it was still entitled to dismissal because (1) suits against requestors are prohibited under section 552.325(a) of the TPIA and (2) its letter was absolutely privileged.

In this issue, SFT asserts the trial court erred in granting R & R's motion to dismiss under the TCPA because (1) R & R's letter was not a protected communication under the TCPA, (2) it came forward with evidence to support each element of its claim, and (3) R & R failed to come forward with evidence of a defense to that claim.

We will assume, for purposes of this opinion only, that R & R met its preliminary burden to show SFT's suit was based on a protected communication as defined by the TCPA. Further R & R does not dispute, and it did not dispute in the trial proceedings, that SFT presented sufficient evidence to support the *merits* of its claim.[3] Instead, it asserted that SFT failed to present clear

[3] The TPIA defines a governmental body to include certain governmental entities and agencies as well as "the part, section, or portion of an organization, corporation, commission, committee, institution, or agency that spends or that is supported in whole or in part by public funds." See TEX. GOV'T CODE ANN. § 552.003(1)(A)(xii) (West 2012). To show it was not a governmental body, SFT relied on the affidavit of its President, Mitchell Glieber. In his affidavit, Glieber stated that SFT is a private non-profit corporation, that it operates the State Fair of Texas pursuant to a contract with the City and that it does not receive any funding or monetary support from the City. Instead, Gliever stated that SFT receives its revenues from its operations and it pays the City for the property it leases.

and specific evidence that the trial court possessed jurisdiction over its claim. Under the plain terms of the TCPA, a trial court is required to determine whether the nonmovant presented clear and convincing evidence of "each essential element of the claim in question." *Id*. at § 27.005(c). This is an inherently different inquiry than whether the movant presented evidence to show the trial court possessed jurisdiction, which is generally, but not always, determined by the face of the petition. *See, e.g., Miranda*, 133 S.W.3d at 226. In any event, we have previously rejected R & R's jurisdictional arguments. We have also rejected R & R's assertion that section 552.325(a) of the TPIA prohibited SFT's suit.

Therefore, the remaining question is whether R & R's request was absolutely privileged. According to R & R, its request was privileged because it sent the request to SFT "in contemplation of the quasi-judicial proceeding of a formal letter ruling by the [AG]."[4] In this issue, SFT asserts the absolute privilege is inapplicable because it applies only to tort claims seeking damages for the content of a communication. We agree.

The general rule is that communications made in the course of judicial or quasi-judicial proceedings are protected by an absolute privilege. *Stephan v. Baylor Med. Ctr. at Garland*, 20 S.W.3d 880, 890 (Tex. App.—Dallas 2000, no pet.); *see also James v. Brown*, 637 S.W.2d 914, 916–17 (Tex.1982). The purpose of the privilege is to encourage free communications in judicial and quasi-judicial proceedings. *See James*, 637 S.W.2d at 917. Therefore, "[a]ny communication, even perjured testimony, made in the course of a judicial proceeding, cannot serve as the basis for a suit in tort." *Tervita, LLC v. Sutterfield*, 482 S.W.3d 280, 285 (Tex. App.—Dallas 2015, pet. denied) (citing *in re Hinterlong*, 109 S.W.3d 611, 635-36 (Tex. App.—Fort Worth 2003, orig. proceeding); *see also Shell Oil Co. v. Writt*, 464 S.W.3d 650, 654–55

[4] We express no opinion as to whether the AG has the authority to "investigate and decide" issues under the TPIA, such that it is exercising a quasi-judicial power when it issues opinions under the TPIA. *See, e.g., Senior Care Res., Inc. v. OAC Senior Living, LLC*, 442 S.W.3d 504, 512 (Tex. App.—Dallas 2014, no pet.).

(Tex. 2015) (quoting Restatement (Second) of Torts §§ 588, 587 (1977)). In other words, tort suits for damages based on the "content" of such communications are prohibited. *See IBP, Inc. v. Klumpe*, 101 S.W.3d 461, 471 (Tex. App.—Amarillo 2001, pet. denied). Here, SFT's suit sought a declaration of its rights and obligations under the TPIA. SFT's suit related to R & R's request only insofar the request operated to trigger SFA's duties under the TPIA. In other words, SFT does not contend the letter contained any tortious communications. Nor does SFT seek to recover any damages based on any communications contained in the request. We conclude the absolute privilege is inapplicable in this case. We therefore conclude the trial court erred in granting R & R's motion to dismiss and we sustain SFT's second issue.

We reverse the trial court's judgment and remand for further proceedings consistent with this opinion.

/Ada Brown/
ADA BROWN
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

STATE FAIR OF TEXAS, Appellant

No. 05-15-00973-CV V.

RIGGS & RAY, P.C., Appellee

On Appeal from the 101st Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-15-04484.
Opinion delivered by Justice Brown. Justices Lang-Miers and Schenck 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.

It is **ORDERED** that appellant STATE FAIR OF TEXAS recover its costs of this appeal from appellee RIGGS & RAY, P.C.

Judgment entered this 2nd day of August, 2016.