NO. 03-12-00576-CV

IN THE TEXAS COURT OF APPEALS FOR THE THIRD DISTRIBUTED AUSTIN, TEXAS

AUSTIN, TEXAS

3rd COURT OF APPEALS AUSTIN, TEXAS

5/16/2014 10:00:56 AM JEFFREY D. KYLE Clerk

DR. ANDREW J. WAKEFIELD, MB, BS,

* * * * *

APPELLANT

V.

THE BRITISH MEDICAL JOURNAL PUBLISHING GROUP, LTD., BRIAN DEER and DR. FIONA GODLEE,

APPELLEES

* * * * *

On Appeal from the 250thJudicial District Court Travis County, Texas Trial Court Cause No.D-1-GN-12-000003 * * * * * *

APPELLANT'S UNOPPOSED MOTION FOR LEAVE TO FILE NOTICE OF SUPPLEMENTAL AUTHORITY

* * * * *
TO THE HONORABLE COURT OF APPEALS:

Appellant, Dr. Andrew J. Wakefield, MB, BS, requests leave to file a Notice of Supplemental Authority addressing a case from the Houston Fourteenth Court of Appeals pertinent to one of the issues raised in this case. The opinion in *Direct Commer. Funding v. Beacon Hill Estates*, 407 S.W.3d 398, 401 (Tex. App. – Houston [14th Dist.] 2013, no pet.), was issued and published approximately two months after this case was submitted on oral arguments. The *Direct Commer. Funding* case is relevant to

the third issue on appeal raised in Dr. Wakefield's brief, regarding whether the

Defendants/Appellees effectively waived their claims under the Texas "Anti-SLAPP" statute, TEX. CIV. PRAC. & REM. CODE §27.001, et. seq., by failing to secure a hearing within thirty (30) days of the date their motion was filed, and by failing to demonstrate they were unable to obtain a timely hearing because of the "docket conditions of the court." TEX. CIV. PRAC. & REM. CODE §27.004. Since the latter is the only permitted exception to the hearing deadline imposed under the statute, the failure to timely obtain a hearing effectively waived the motion.

The Houston court's discussion of the statute supports Dr. Wakefield's argument that the narrowly proscribed deadlines put in the statute by the Texas legislature are mandatory - particularly in light of the legislative purpose behind these deadlines. While the *Direct Commer. Funding* court did not address the failure to meet the 30-day hearing deadline, the court found that the legislature structured the deadlines in the statute specifically for the purpose of expediting the resolution of Anti-SLAPP claims, supporting Dr. Wakefield's argument that these deadlines are mandatory conditions precedent to seeking relief under the statute.

The Houston court explained there are three deadlines in the statute: (1) a deadline to file an Anti-SLAPP motion that can be extended for "good cause," (2) a 30-day deadline after the motion is filed in which to have it heard that can only be extended based on the "docket conditions of the court" (the deadline at issue in *this* appeal) and, (3) a 30-day deadline after the hearing in which to issue a ruling that

cannot be extended for any reason (the deadline at issue in *Direct Commer. Funding*). *Id.* at 401.

The court went on to explain that since the legislature "included several specific deadlines in the Act . . .", and did not provide any discretion for the trial court to extend the third deadline, the legislature intended that deadline to be mandatory. *Id.* However, in so holding, the court explained:

The entire Act is directed toward the expeditious dismissal and appeal of suits that are brought to punish or prevent the exercise of certain constitutional rights. The distinction drawn by the legislature between extendable deadlines and firm deadlines—and more particularly, the mandatory deadline that applies to the trial court's authority to rule on a motion to dismiss—would be meaningless if the trial court, acting *sua sponte*, could reverse the consequences imposed by statute for the failure to timely act.

Id. at 402.

While the court did not address the limited discretion to extend the second of the three deadlines, the court's reasoning and its understanding of the legislature's purpose in structuring these deadlines the way that it did equally supports Dr. Wakefield's argument that the second deadline and its one narrow exception are likewise mandatory, and failure to establish the hearing was untimely because of the "docket conditions of court" effectively waived Defendants' Anti-SLAPP motion.

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¹ Appellees attempted to argue they were unable to get a timely setting for the hearing because of docket conditions, but the record shows otherwise. The affidavit relied on for Appellees' argument does not state that Appellees even attempted to get a hearing set on the Anti-SLAPP motion within the thirty day deadline, let alone that the "docket conditions" of the court prevented it. Rather, they called about *dates for their special appearances to be heard*, and only sought dates for the "week of April 9" or later, which would have already been more than thirty days after they filed their Anti-SLAPP motion on March 10. (CR 2:54-55)

Certificate of Conference: On May 15, 2014, the undersigned conferred with counsel for Appellee, Marc Fuller, regarding the relief requested in this motion. Counsel indicated that the motion could be filed as unopposed.

A copy of Advisory to the Court (Supplemental Authority), which includes a copy of the opinion in *Direct Commer. Funding* is attached for the Court's convenience.

Respectfully submitted,

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COUNSEL FOR APPELLANT, DR. ANDREW J. WAKEFIELD, MB, BS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded on May 16, 2014 to Appellee's appellate counsel of record via electronic service through the Texas.gov electronic filing system and via email.

Brendan K. McBride

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is in compliance with the rules governing the length of briefs and motions prepared by electronic means. The motion was prepared using Microsoft Word 2010. According to the software used to prepare this brief, the total word count, not including those sections excluded by rule, is <u>853</u>.

Brendan K. McBride

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Neutral As of: January 23, 2014 11:31 AM EST

Direct Commer. Funding v. Beacon Hill Estates

Court of Appeals of Texas, Fourteenth District, Houston July 11, 2013, Opinion Filed NO. 14-12-00896-CV

Reporter: 407 S.W.3d 398; 2013 Tex. App. LEXIS 8524; 2013 WL 3477578

DIRECT COMMERCIAL FUNDING, INC., Appellant v. powering the trial court to grant a motion to dismiss af-BEACON HILL ESTATES, LLC AND INTESAR HUter it had been overruled by operation of law. SAIN ZAIDI, Appellees

Prior History: [**1] On Appeal from the 295th District Court, Harris County, Texas. Trial Court Cause No. 2012-01150.

<u>Direct Commer. Funding, Inc. v. Beacon Hill Estates, LLC, 2013 Tex. App. LEXIS 1898 (Tex. App. Houston 14th Dist., Jan. 24, 2013)</u>

Core Terms

trial court, motion, motion to dismiss, overruled, hearing, deadline, operation of law, time, rule, authorize, file, legislature, extend, party, grant a motion, trial, legal action, provision, exercise, person, order, constitutional right, permitted, evidence, response, speech, plain, text, mandatory, appeal

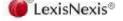
Case Summary

Procedural Posture

Appellant lender challenged a decision from the 295th District Court, Harris County, Texas, which granted a motion to dismiss filed by appellee prospective debtors in a case alleging breach of contract and slander.

Overview

The debtors sought to borrow money from the lender, and an agreement was signed whereby the debtors agreed to not defame or slander the lender or its principal if the loan request was rejected. After the loan was denied, comments were posted on internet websites. The lender then sued for breach of contract and defamation. The debtors filed a pleading seeking to dismiss the action under the Texas Citizen Participation Act. The trial court failed to rule on the motion in 30 days, but the trial court later signed an order granting the motion to dismiss. This appeal followed. In reversing, the appellate court determined that the trial court erred by signing an order granting the motion to dismiss 6 weeks after the motion was overruled by operation of law.



Unlike <u>Tex. r. Civ. P. 165a(3)</u> and <u>Tex. R. Civ. P.</u> 329b(e), the Act contained no analogous provision empowering the trial court to grant a motion to dismiss after it had been overruled by operation of law.

Outcome

The decision was reversed, and the case was remanded for further proceedings.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Interpretation

HNI An appellate court reviews questions of statutory construction de novo. The purpose in construing a statute is to determine and give effect to the legislature's intent. Because the text's plain meaning is the best expression of that intent, courts will construe the text in accordance with its plain meaning unless doing so would lead to absurd or nonsensical results, or the context makes it apparent that the legislature intended some other meaning.

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation Evidence > Burdens of Proof > Preponderance of Evidence

HN2 The Texas Legislature enacted the Texas Citizens Participation Act 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. <u>Tex. Civ. Prac. & Rem.</u> Code Ann. § 27.002 (Supp. 2012). To achieve these ends, the Legislature provided that if a legal action is brought in response to a person's exercise of certain constitutional rights, that person may move to dismiss the action. Tex. Civ. Prac. & Rem. Code Ann. § 27.003(a). 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 certain rights, including the right of free speech. Tex. Civ. *Prac. & Rem. Code Ann. § 27.005(b)*. If the movant satisfies this burden, then the trial court must dismiss the legal action unless the party who brought the action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question. *Tex. Civ. Prac. & Rem. Code Ann. § 27.005(c)*.

Civil Procedure > Dismissal > Involuntary Dismissals > Motions Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN3 The Texas Legislature has included several specific deadlines in the Texas Citizen Participation Act, and although the Legislature authorized the trial court to extend the deadlines for filing and hearing a motion to dismiss, it did not authorize the trial court to extend the time in which the court is permitted to rule on the motion. The first deadline in the Act concerns the time during which a party may move to dismiss the action. A motion to dismiss under the Act "must be filed" within 60 days after service of the legal action, but upon a showing of good cause, the trial court may extend the time to file the motion. Tex. Civ. Prac. & Rem. Code Ann. § <u>27.003(b)</u>. The second deadline concerns the date of the hearing. A hearing on the motion "must be set" within 30 days after the motion was served unless the docket conditions of the court require a later hearing. <u>Tex. Civ.</u> Prac. & Rem. Code Ann. § 27.004.

Civil Procedure > Dismissal > Involuntary Dismissals > Motions Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN4 In contrast to other provisions in the Texas Citizen Participation Act, one deadline is mandatory: a court must rule on a motion to dismiss not later than the 30th day following the date on the hearing on the motion.

Tex. Civ. Prac. & Rem. Code Ann. § 27.005(a). The Legislature gave the trial court no discretion to extend this deadline, but instead provided that if the trial court does not rule on the motion within 30 days after the hearing, then the motion is overruled by operation of law. Tex. Civ. Prac. & Rem. Code Ann. § 27.008(a).

Civil Procedure > Dismissal > Involuntary Dismissals > Motions Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN5 The entire Texas Citizen Participation Act is directed toward the expeditious dismissal and appeal of suits that are brought to punish or prevent the exercise of certain constitutional rights. The distinction drawn by the Texas Legislature between extendable deadlines and firm deadlines—and more particularly, the mandatory deadline that applies to the trial court's authority to rule on a motion to dismiss—would be meaningless if the trial court, acting sua sponte, could reverse the consequences imposed by statute for the failure to timely act.

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to Prosecute

Civil Procedure > Dismissal > Involuntary Dismissals > Motions Civil Procedure > Judgments > Relief From Judgments > New Trials

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN6 Unlike <u>Tex. R. Civ. P. 165a(3)</u> and <u>Tex. R. Civ. P. 329b</u>, the Texas Citizens Participation Act contains no analogous provision empowering a trial court to grant a motion to dismiss after it has been overruled by operation of law.

Civil Procedure > Dismissal > Involuntary Dismissals > Motions Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN7 The plain text of the Texas Citizens Participation Act provides a limited authorization for a party to seek, and a trial court to grant, dismissal of a legal action that was brought in response to the party's exercise of the right of free speech. A trial court is not authorized to grant a motion to dismiss under the Act more than 30 days after the hearing on the motion.

Counsel: For APPELLANT: Matthew Joseph Kita, DALLAS, TX.

For APPELLEE: Scott Rothenberg, Kevin H. George, HOUSTON, TX.

Judges: Panel consists of Justices Brown, Christopher, and McCally.

Opinion by: Tracy Christopher

Opinion

[*399] In the dispositive issue in this interlocutory appeal, the plaintiff in a defamation and breach-of-contract suit contends that the trial court erred in granting the defendants' motion to dismiss under the Citizens Participation Act six weeks after the motion was overruled by operation of law. We agree; thus, we reverse the trial court's order and remand the case to the trial court.

I. FACTUAL AND PROCEDURAL BACKGROUND

According to the pleadings in this case, appellant Direct Commercial Funding, Inc. ("Direct") is a private commercial lender. Appellees Beacon Hill Estates, LLC and Intesar Husain Zaidi (collectively, "Zaidi") contacted Direct about obtaining financing for a construction project. Zaidi signed a hold-harmless agreement in which he agreed not to defame or slander Direct or its principal Calvin Blake "in any cyber, private or public forum" if Zaidi's loan request were rejected. After Direct denied the loan request, Zaidi posted comments about Direct and Blake on the internet websites "Ripoffreport.com" and [**2] "complaintsboard.com."

Direct sued Zaidi for breach of contract and defamation, seeking declaratory and injunctive relief as well as ac-

tual and punitive damages and attorney's fees. Zaidi responded to the suit by filing a pleading that combined his answer with counterclaims, a third-party complaint against Blake, and pursuant to the Citizens Participation Act, a motion to dismiss Direct's claims. The motion to dismiss was heard by submission on June 25, 2012. The [*400] Citizens Participation Act ("the Act") provides that if a trial court does not rule on a motion to dismiss under the Act within 30 days after the hearing, then the motion is overruled by operation of law. It is undisputed that the trial court did not rule on the motion within that time; however, 72 days after the hearing, the trial court signed an order in which it granted Zaidi's motion to dismiss Direct's claims, held Direct liable for Zaidi's costs and attorney's fees incurred in responding to Di- tect the rights of a person to file meritorious lawsuits rect's suit, and directed Zaidi to file an affidavit to sub- for demonstrable injury." Tex. Civ. Prac. & Rem. Code Ann. stantiate these amounts.

overruled Zaidi's motion to dismiss the appeal,² and now address the merits of Direct's appellate complaint.

II. Issues Presented

In its first issue, Direct argues that Zaidi's motion to dismiss was overruled by operation of law 30 days after it was served, and thus, the trial court erred in granting the motion to dismiss 72 days after the motion was served. Direct argues in its second issue that the trial court erred in granting the motion to dismiss because (a) Zaidi did not set the motion for hearing within 30 days after it was filed, (b) Zaidi failed to present the trial court with sufficient evidence to establish that he could prevail on a First -Amendment defense, and (c) Direct provided sufficient evidence to defeat the motion. Direct asserts in its third issue that the Act violates the Texas Constitution's open-courts provision because it [**5] imposes a heightened evidentiary standard on plaintiffs that, as a matter of law, cannot be satisfied.

III. STANDARD OF REVIEW

HN1 We review questions of statutory construction de novo. Molinet v. Kimbrell, 356 S.W.3d 407, 411 (Tex. 2011). Our purpose in construing a statute is to determine and give effect to the legislature's intent. Id. Because the text's plain meaning is the best expression of that intent, we will construe the text in accordance with its plain meaning unless doing so would lead to absurd or nonsensical results, or the context makes it apparent that the legislature intended some other meaning. *Id*.

IV. Analysis

HN2 The Texas legislature enacted the Citizens Participation Act "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, pro-§ 27.002 (West Supp. 2012). To achieve these ends, the legislature provided that if a legal action is brought in Direct timely filed a notice of interlocutory appeal. We response to a person's exercise of certain constitutional rights, [**6] that person may move to dismiss the action. Id. $\sqrt[6]{27.003}$ (a). 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 certain rights, including the right of free speech. *Id.* § 27.005(b). If the movant satisfies this burden, then the trial court must dismiss the legal action unless the party who brought the action "establishes by clear and specific evidence a prima facie case for each essential element [*401] of the claim in question." Id. $\S 27.005(c)$.

> *HN3* The legislature included several specific deadlines in the Act, and although the legislature authorized the trial court to extend the deadlines for filing and hearing a motion to dismiss, it did not authorize the trial court to extend the time in which the court is permitted to rule on the motion. To illustrate, the first deadline in the Act concerns the time during which a party may move to dismiss the action. A motion to dismiss under the Act "must be filed" within 60 days after service of the legal action, but upon a showing of good cause, the trial court may extend the time to file the motion. *Id.* § 27.003(b). The second deadline [**7] concerns the date of the

¹ In the prayer for relief of Zaidi's answer/counterclaims/third-party complaint/motion to dismiss, Zaidi asked "[t]hat the Court set this matter [**3] for a hearing within 30 days, as provided by the Anti-SLAPP statute and that upon hearing, the Court grant this motion and dismiss [Direct's] claims against Zaidi with prejudice in their entirety, [and] award Zaidi . . . reasonable costs and attorney's fees " The statement in Zaidi's prayer did not comply with local rules for setting a motion for hearing by submission or for setting a motion for oral hearing. See Civil Trial Div., Harris Cnty. (Tex.) Dist. Ct. Loc. R. 3.3.3 ("Motions may be heard by written submission. Motions shall state Monday at 8:00 a.m. as the date for written submission. This date shall be at least 10 days from filing, except on leave of court.") (emphasis added); id., Rule 3.3.4 ("Settings for oral hearings should be requested from the court clerk."). Because Direct does not complain on appeal that Zaidi's ineffective "prayer" for a hearing did not comply with the trial court's local rules, we do not address the effect under the Act of a movant's failure to take the steps actually required to set the motion to dismiss for a timely hearing. On June 13, 2012, Zaidi filed a notice of submission setting the motion to be heard without oral argument at 8:00 [**4] a.m. on June 25, 2012. We take judicial notice that June 25, 2012 was a Monday; thus, this subsequent request complied with local rules.

Direct Commercial Funding, Inc. v. Beacon Hill Estates, LLC, No. 14-12-00896-CV, 2013 Tex. App. LEXIS 1898, 2013 WL 407029 (Tex. App.—Houston [14th Dist.] Jan. 24, 2013, order).

hearing. A hearing on the motion "must be set" within 30 days after the motion was served "unless the docket Tex. R. Civ. P. 329b(c)). At the time the trial court made conditions of the court require a later hearing." *Id.* § 27.004. HN4 In contrast to these provisions, the next deadline is mandatory: "The court must rule on a motion [to dismiss] not later than the 30th day following the law. The opposite is true here. Moreover, *Rule 329b* condate on the hearing on the motion." Id. § 27.005(a). The legislature gave the trial court no discretion to extend this deadline, but instead provided that if the trial court does not rule on the motion within 30 days after the all such timely-filed motions are overruled, either by a hearing, then the motion is overruled by operation of law. written and [**10] signed order or by operation of law, Id. § 27.008(a).

Here, the trial court [**8] signed an order granting Zaidi's motion to dismiss six weeks after the motion was tion and the trial court does not rule on a motion to overruled by operation of law. We agree with Direct that reinstate within the prescribed time, then the motion is the trial court erred in granting the motion more than 30 days after it was heard. The Act contains no provision authorizing such an action, nor can the authority to do so be implied.

HN5 The entire Act is directed toward the expeditious dismissal and appeal of suits that are brought to punish or ing the trial court to grant a motion to dismiss after it has prevent the exercise of certain constitutional rights. The distinction drawn by the legislature between extendable deadlines and firm deadlines—and more particularly, the mandatory deadline that applies to the trial court's authority to rule on a motion to dismiss—would be meaningless if the trial court, acting sua sponte, could reverse the consequences imposed by statute for the failure to timely act. See Avila v. Larrea, 394 S.W.3d 646, 656 (Tex. App.—Dallas 2012, pet. filed) (holding that a motion to dismiss under the Act was overruled by operation of law 30 days after the hearing on the motion because no provision in the Act permits the extension of this mandatory deadline).

Zaidi contends that the trial court properly could grant the motion to dismiss even [**9] after it was overruled by operation of law because a trial court that has plenary power over the case can always set aside an interlocutory order. In support of this argument, Zaidi cites Fruehauf Corp. v. Carrillo, 848 S.W.2d 83, 84 (Tex. 1993) (per curiam). The issue presented in *Fruehauf* was whether a trial court that had expressly granted a motion for new trial could set aside the order and overrule the motion on the 75th day after judgment. <u>Id</u> . at 84. The court quoted the subsection of <u>Texas Rule of Civil Pro-</u> cedure 329b in which it is stated that a motion for new trial is overruled [*402] by operation of law on the "expi-

ration" of the 75th day after the judgment. Id. (citing the challenged ruling in <u>Fruehauf</u>, the time in which the trial court was permitted to rule had not yet expired, and the motion had not been overruled by operation of tains an additional provision specifically empowering the trial court "to grant a new trial or to vacate, modify, correct, or reform the judgment until thirty days after whichever occurs first." Tex. R. Civ. P. 329b(e) (emphasis added). See also Tex. R. Civ. P. 165a(3) (similarly providing that if a case is dismissed for want of prosecuoverruled by operation of law, but authorizing the trial court to reinstate the case within 30 days after the motion to reinstate is overruled, regardless of whether the motion was overruled expressly or by operation of law). **HN6** Unlike these procedural rules, the Citizens Participation Act contains no analogous provision empowerbeen overruled by operation of law.

In sum, HN7 the plain text of the Citizens Participation Act provides a limited authorization for a party to seek, and a trial court to grant, dismissal of a legal action that was brought in response to the party's exercise of the right of free speech. Because a trial court is not authorized to grant a motion to dismiss under the Act more than 30 days after the hearing on the motion, the trial court erred in signing such an order here. We therefore sustain Direct's [**11] first issue. In light of our disposition of this issue, Direct's remaining issues are moot.⁴

V. Conclusion

Because Zaidi's motion to dismiss was overruled by operation of law, we reverse the trial court's subsequent order purporting to grant the motion, and we remand the case for further proceedings not inconsistent with this opin-

/s/ Tracy Christopher

Justice

³ For the sake of completeness, we note two additional deadlines. The ruling on the motion, whether expressly made by the trial court or by operation of law, may be challenged by an appeal or other writ filed within 60 days of the ruling. Id. § 27.008(c). Direct's appeal was timely. The Act also contains a deadline that applies if certain statutory findings are requested. See id. § 27.007. Findings were requested, but were not made in this case; however, neither party complains of the trial court's failure to issue findings.

Because Zaidi neither timely filed a cross-appeal nor raised any cross-points to argue that the trial court erred in allowing the motion to dismiss to be overruled by operation of law, that question is not presented for our review.