

AFFIRM; Opinion Filed June 12, 2020



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

No. 05-19-01256-CV

**COLLABORATIVE IMAGING, LLC AND DHRUVA CHOPRA, Appellants
V.
ZOTEC PARTNERS, LLC AND EMPHYSIS MEDICAL MANAGEMENT,
LLC, Appellees**

**On Appeal from the 471st Judicial District Court
Collin County, Texas
Trial Court Cause No. 471-04069-2019**

MEMORANDUM OPINION

Before Justices Schenck, Molberg, and Nowell
Opinion by Justice Schenck

Collaborative Imaging, LLC (“CI”) and Dhruva Chopra appeal the trial court’s denial of their motion to dismiss appellees Zotec Partners, LLC (“Zotec”) and Emphasis Medical Management, LLC (“EmPhysis”)’s claims under the Texas Citizens Participation Act (“TCPA”), an Anti-SLAPP statute. *See* TEX. CIV. PRAC.

& REM. CODE ANN. §§ 27.001–.011.¹ We affirm the trial court’s order. Because all issues are settled in law, we issue this memorandum opinion. TEX. R. APP. P. 47.4.

BACKGROUND

Zotec provides revenue cycle and practice management services to healthcare providers. Beginning in 2007, Chopra worked for Zotec and EmPhysis, Zotec’s wholly owned subsidiary and affiliate, in various capacities, including as a client service manager. While employed at Zotec, according to Chopra, his duties included “overseeing the activity of the team responsible for identifying missing reports and demographics and managing clients of Zotec.” In early 2018, Chopra gave notice to Zotec of his intent to leave Zotec no later than July 4, 2018.

One of Zotec’s clients for which Chopra worked as a client service manager was Texas Radiology Associates, LLP (“TRA”), a partnership of physicians who provide radiology services. In March 2018, TRA signed an extension of a billing services agreement with Zotec. In mid-2018, some of the partners of TRA worked with other investors to create a separate entity, CI, to provide management services to TRA and other radiology groups. Chopra was recruited to serve as an executive officer of CI and began working for CI in June 2018. In late 2018, TRA raised

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.

certain billing issues with Zotec. In December 2018, TRA informed Zotec of its intent to terminate its agreement with Zotec ahead of the agreement's expiration in March 2021.

In May 2019, Zotec and EmPhysis filed this suit for damages and injunctive relief against Chopra and CI, asserting violations of the Texas Uniform Trade Secrets Act ("TUTSA"), tortious interference with contractual relationships, and breach of contract. In their petition, Zotec and EmPhysis allege Chopra is inappropriately and unlawfully using and sharing Zotec and EmPhysis's proprietary business information with CI so that Chopra and CI may gain an unfair advantage in the marketplace, including interfering with Zotec's and EmPhysis's contractual relationships with their clients and former employees. In July 2019, Chopra and CI filed a motion to dismiss Zotec and EmPhysis's claims under the TCPA. Zotec and EmPhysis filed a response, and on September 6, 2019, the trial court conducted a hearing on the motion to dismiss. The trial court denied the motion to dismiss.²

THE TCPA AND STANDARD OF REVIEW

The TCPA, Chapter 27 of the civil practice and remedies code, protects citizens from retaliatory lawsuits that seek to silence or intimidate them for exercising their rights in connection with matters of public concern. *In re Lipsky*,

²The clerk's record does not contain an order denying the motion nor does the reporter's record contain a ruling, but the docket contains an entry that the motion to dismiss was denied on October 4, 2019. Even without this docket entry, the motion would be considered to have been denied by operation of law by October 7, 2019. *See* CIV. PRAC. & REM. § 27.008.

460 S.W.3d 579, 586 (Tex. 2015) (orig. proceeding); *see generally* CIV. PRAC. & REM. §§ 27.001–.011. The TCPA’s purpose is to identify and summarily dispose of lawsuits designed only to chill First Amendment rights, not to dismiss meritorious lawsuits. *In re Lipsky*, 460 S.W.3d at 589; *see also* CIV. PRAC. & REM. § 27.002. To accomplish its purpose, the TCPA endorses a summary process, requiring judicial review of the pleadings and limited evidence. *See In re Lipsky*, 460 S.W.3d at 589.

The defendant-movant has the initial burden to show by a preponderance of the evidence that the case is based on, relates to, or is in response to the party’s exercise of the right of free speech, to petition, or of association. CIV. PRAC. & REM. §§ 27.003, 27.005(b). If the motion satisfies this burden, then the burden shifts to the plaintiff to establish “by clear and specific evidence a prima facie case for each essential element of the claim in question.” *Id.* §§ 27.005(b), (c).

We review de novo the trial court’s determinations that the parties met or failed to meet their respective burdens under section 27.005. *Id.* In conducting this review, we consider, in the light most favorable to the non-movant, the pleadings and any supporting and opposing affidavits and other evidence stating the facts on which the claim or defense is based. *See 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.); *see also* CIV. PRAC. & REM. § 27.006(a). However, the plaintiffs’ pleadings are generally “the best and all-sufficient evidence of the nature of the action.” *Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017).

ANALYSIS

In their first three issues, CI and Chopra contend the trial court erred by denying their motion to dismiss Zotec and EmPhysis's claims because they were based on, related to, or in response to their exercise of their rights to free speech and association. Zotec and EmPhysis's pleadings allege three claims against CI and Chopra: (1) violation of the TUTSA by misappropriating and disclosing Zotec and EmPhysis's trade secrets; (2) tortious interference with the contractual relationships between Zotec and EmPhysis; and (3) Chopra's breach of the contracts he entered into with Zotec and EmPhysis during his employment with them. Accordingly, we will address whether Zotec and EmPhysis's claims are based on, related to, or in response to CI's and Chopra's exercise of their rights to free speech or association.

I. Freedom of Speech

As the movants to dismiss under the TCPA, CI and Chopra were required to show by a preponderance of the evidence that Zotec and EmPhysis's legal action "is based on, relates to, or is in response to" his exercise of the right of free speech, right of association, or his right to petition. *See* CIV. PRAC. & REM. § 27.005(b).³ Each of these protected rights requires a "communication" as defined by the TCPA. *Id.* § 27.001(2)–(4). For purposes of the exercise of free speech, the communication must be made in connection with a "matter of public concern." *Id.* § 27.001(3). A "matter

³ CI and Chopra do not argue their rights to petition were implicated by Zotec and EmPhysis's claims.

of public concern” includes an issue related to health or safety; environmental, economic, or community well-being; the government, a public official or public figure; or a good, product, or service in the marketplace. *Id.* § 27.001(7). However, not every communication bearing some conceptual or tangential relation to one of the broad categories set out in section 27.001(7) necessarily regards a matter of public concern. *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 137 (Tex. 2019). Rather, we ask whether the alleged communication actually relates to the relevant public interest to which it is said to relate. *See id.* at 136–37.

CI and Chopra argue Zotec and EmPhysis’s claims are based upon CI’s and Chopra’s communications concerning inaccurate billing and coding of charges to government medical programs and commercial health insurers for medical procedures. CI and Chopra rely on this Court’s opinion in *Elliott v. S & S Emergency Training Solutions, Inc.*, 559 S.W.3d 568 (Tex. App.—Dallas 2017), *rev’d on other grounds*, 564 S.W.3d 843 (Tex. 2018), to argue that the communications at issue here identify deficiencies and improprieties in the provision of healthcare services such that they are within the purview of the TCPA. In *Elliott*, the plaintiff who provided training for first responders to become certified or licensed paramedics sued defendant for her complaints to a state agency and on social media of alleged deficiencies in the certification process. *See id.* at 573–74. Here, although there is the potential for speech related to government actions or programs, none has to do with the gravamen of the dispute. *See Creative Oil & Gas, LLC*, 591 S.W.3d at 137

(“A private contract dispute affecting only the fortunes of the private parties involved is simply not a “matter of public concern” under any tenable understanding of those words.”).

Review of the petition reveals the following alleged violations of TUTSA and Chopra’s agreements with Zotec and EmPhysis:⁴

- Chopra had specific knowledge concerning Zotec’s and EmPhysis’s trade secrets and proprietary information, including their technology platform and software for their revenue cycle and practice management services business, how the system worked, the algorithms used and how information from a variety of sources and platforms was collected, merged, processed and collated in connection with the billing process.
- Chopra also learned and had specific working knowledge of the functionality, coding and development of proprietary software, including software developed solely on behalf of Zotec and/or EmPhysis.
- Chopra learned about Zotec and/or EmPhysis’s billing rules and related processes and methods and is using that knowledge to gain and expand business for CI, even with current Zotec and/or EmPhysis clients.
- Chopra and CI are using information Chopra learned in confidence while employed with Zotec and/or EmPhysis in sales pitches to Zotec and/or EmPhysis’s current clients representing Chopra’s knowledge of Zotec and/or EmPhysis’s inner-workings and confidential and proprietary processes as a reason to hire CI.

⁴ At oral argument, CI and Chopra wisely conceded that the TCPA does not apply to the claims for tortious interference with Zotec and EmPhysis’s relationships with their clients as those claims would fall within the commercial speech exemption. *See* CIV. PRAC. & REM. § 27.010(b) (exempting legal actions brought against person engaged in selling services, if conduct arises out of commercial transaction in which intended audience is an actual or potential customer).

Zotec and EmPhysis’s remaining claims for tortious interference allege that Chopra and CI tortiously interfered with Zotec and EmPhysis’s relationship with two former employees by soliciting them to work for CI and disclose Zotec and EmPhysis’s proprietary information. However, none of the allegations related to those claims include any alleged communications. As such, the TCPA does not apply to this claim. *See* CIV. PRAC. & REM. § 27.001(2)–(4).

From the foregoing and from review of the pleadings and affidavits, it is clear the dispute is one of commercial competition by which a former employer alleges a former employee disclosed proprietary information to a new employer and used that purloined information to inflict competitive harm on it.

Chopra and CI argue that the alleged communications had to do with billing errors resulting in improper billing to government medical programs and harassment of members of the public by collection agencies. Private communications are indeed sometimes covered by the TCPA. *Creative Oil & Gas, LLC*, 591 S.W.3d at 136. But to be covered by the TCPA, those communications must involve environmental, health, or safety concerns that have public relevance beyond the pecuniary interests of the private parties involved. *See id.* Viewing the pleadings and evidence in the light most favorable to the non-movant, as we must, we cannot conclude the alleged communications here were made in connection with a “matter of public concern.”

Accordingly, we conclude CI and Chopra failed to establish by a preponderance of the evidence that Zotec and EmPhysis’s claims are based on, related to, or in response to CI’s and Chopra’s exercise of a right of free speech as defined by the TCPA.

II. Right of Association

CI and Chopra also contend Zotec and EmPhysis’s lawsuit is based on, related to, or in response to his exercise of their right of association. The TCPA broadly defines the “exercise of the right of association” as “a communication between

individuals who join together to collectively express, promote, pursue, or defend common interests.” See CIV. PRAC. & REM. § 27.001(2). The nature of the communication must involve public or citizen’s participation. *Dyer v. Medoc Health Servs., LLC*, 573 S.W.3d 418, 426 (Tex. App.—Dallas 2019, pet. denied). This Court has previously concluded that applying the right of association to private communications related to an alleged conspiracy to misappropriate confidential business information would be “illogical” and lead to an absurd result that would not further the purpose of the TCPA to curb strategic lawsuits against public participation. *Id.*

CI and Chopra urge the alleged communications here relate to public participation because, according to CI and Chopra, they concern improper billing of government programs and consumers and improper collections attempts on public consumers. They further urge that they had joined together to promote common interests of “ensuring that billing service providers such as Zotec (a) appropriately report data and submit claims to insurance and government medical program payors and (b) maximize the economic well-being of radiology groups by ensuring proper collections of payments on medical procedures performed by such groups.” However, this Court has already held that similar private communications did not involve public or citizen’s participation. See *id.*; see also *Erdner v. Highland Park Emergency Ctr., LLC*, 580 S.W.3d 269, 275 (Tex. App.—Dallas 2019, pet. denied) (private communications about establishing new free-standing emergency room not

exercises of right of association); *ExxonMobil Pipeline Co. v. Coleman*, 464 S.W.3d 841, 847 (Tex. App.—Dallas 2015), *rev'd on other grounds*, 512 S.W.3d 895, 900–01 (Tex. 2017) (communications made between a few Exxon supervisors who joined together in the course and scope of their employment to internally discuss technician's alleged failure to meet the requirements of his job, did not have any element of citizen participation).

Accordingly, we conclude CI and Chopra failed to establish by a preponderance of the evidence that Zotec and EmPhysis's claims are based on, related to, or in response to CI's and Chopra's exercise of a right of association as defined by the TCPA.

CONCLUSION

We affirm the trial court's order denying CI and Chopra's motion to dismiss pursuant to the TCPA.

/David J. Schenck/

DAVID J. SCHENCK
JUSTICE

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

JUDGMENT

COLLABORATIVE IMAGING,
LLC AND DHRUVA CHOPRA,
Appellants

No. 05-19-01256-CV V.

ZOTEC PARTNERS, LLC AND
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2019.

Opinion delivered by Justice
Schenck. Justices Molberg and
Nowell participating.

In accordance with this Court's opinion of this date, the trial court's October 4, 2019 order denying appellants' motion to dismiss pursuant to the Texas Citizen's Participation Act is **AFFIRMED**.

It is **ORDERED** that appellees ZOTEC PARTNERS, LLC AND EMPHYSIS MEDICAL MANAGEMENT, LLC recover their costs of this appeal from appellants COLLABORATIVE IMAGING, LLC AND DHRUVA CHOPRA.

Judgment entered this 12th day of June, 2020.