TEXAS COURT OF APPEALS' DISMISSAL OF A CLAIM UNDER THE TEXAS CITIZENS PARTICIPATION ACT MAKES PROTECTION OF TRADE SECRETS MORE DIFFICULT

ALIX VALENTI*

I. INTRODUCTION

Balancing the rights of employers to protect their trade secrets and proprietary information and the rights of employees to pursue gainful employment is often difficult, producing inconsistent rulings among the courts in Texas. Courts have recognized protection for employers' trade secrets and impose a common law duty on employees not to divulge such information even in the absence of a covenant not to compete. This common law protection was codified in 2013 in the Texas Uniform Trade Secrets Act (TUTSA). However, the application of another statute, the Texas Citizens Participation Act (TCPA), may render the TUTSA ineffective against a state lawsuit for misappropriation of a trade secret. In *Elite Auto Body v. Autocraft Bodywerks, Inc*.,[1] the court of appeals dismissed a trade secret claim on the basis that communications among the appellants were made to promote, pursue, or defend common business interests and therefore could be the basis of a motion to dismiss pursuant to the TCPA.

II. TRADE SECRETS

Texas has long recognized a civil action in tort for the misappropriation of a trade secret.[2] It is not necessary that a non-compete or other agreement exists for a former employer to recover damages or seek an injunction to prevent the unauthorized use of a trade secret.[3] Traditionally, under Texas

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[1] 520 S.W.3d 191 (Tex. App.—Austin 2017, pet. dism'd).

[2] *Hyde Corp. v. Huffines, 158 Tex. 566, 314 S.W.2d 763 (1958);* Lamons Metal Gasket Co. v. Traylor, 361 S.W.2d 211 (Tex. Civ. App.—Houston 1962, writ ref'd n.r.e.). Texas also imposes criminal penalties for misappropriation of a trade secret. It is a third degree felony if a person: "without the owner's effective consent . . . knowingly: (1) steals a trade secret; (2) makes a copy of an article representing a trade secret; or (3) communicates or transmits a trade secret." TEX. PENAL CODE ANN. § 31.05(b) (West 2017).

[3] Gonzales v. Zamora, 791 S.W.2d 258 (Tex. App.—Corpus Christi 1990, no pet.).

law, a trade secret was "any formula, pattern, device or compilation of information which is used in one's business and presents an opportunity to obtain an advantage over competitors who do not know or use it."[4] Customer lists and contacts, pricing and client information, customer preferences, marketing strategies, blueprints, and drawings have been recognized as trade secrets.[5]

Until 2003, the courts in Texas did not provide uniform guidance as to what specifically constituted a trade secret under this definition; therefore, interpretations were made by courts on a case-by-case basis.[6] In 2003, the Texas Supreme Court decided *In re Bass,*[7] in which it applied the Restatement of Torts' six-factor test[8] as follows:

> (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of the measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.[9]

While application of the *Bass* factors made protection of trade secrets more predictable, Texas courts, unlike courts of other states, did not consistently rule that all six factors were necessary for a finding that there existed a trade secret.[10] In 2013, Texas adopted the Texas Uniform Trade Secrets Act ("TUTSA"),[11] which modernized and clarified the common law definitions and brought Texas in line with how the term was defined in 47 other states. The TUTSA was intended to preempt the application of

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[4] Computer Assocs. Int'l., Inc. v. Altai, Inc., 918 S.W.2d 453, 455 (Tex. 1996).
[5] T–N–T Motorsports, Inc. v. Hennessey Motorsports, Inc., 965 S.W.2d 18, 22 (Tex. App.—Houston [1st Dist.] 1998, pet. dism'd) (citations omitted).
[6] Michelle Evans, *Determining What Constitutes a Trade Secret under the New Texas Uniform Trade Secrets Act*, 46 TEX. TECH. L. REV. 469, 471 (2014).
[7] 113 S.W.3d 735 (Tex. 2003).
[8] RESTATEMENT (THIRD) OF TORTS § 757 (2013).
[9] 113 S.W.3d at 739.
[10] Evans, *supra* note 6, at 471.
[11] TEX. CIV. PRAC. & REM. CODE ANN. §§ 134A.001 et seq. (West Supp. 2018). Effective in 2016, a federal right of action for trade secret misappropriation was added to the U.S. Code. The Defend Trade Secrets Act (DTSA), Pub. L. No. 104-294, 18 U.S.C. §§ 1831-36 (2016). At least one author has commented that despite the initial publicity, the practical effect of the law has been to provide an option to file trade secrets lawsuits in federal court rather than state court while not changing the nature of such claims. Zach Wolfe, *One Year Later: A Review of the Defend Trade Secrets Act*, 55 HOUS. LAW. 10, 10 (2017).

"conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret."[12] Specifically, the TUTSA defines a trade secret as follows:

> "Trade secret" means all forms and types of information, including business, scientific, technical, economic, or engineering information, and any formula, design, prototype, pattern, plan, compilation, program device, program, code, device, method, technique, process, procedure, financial data, or list of actual or potential customers or suppliers, whether tangible or intangible and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if:
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> (A) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and
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> (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.[13]

The TUTSA eliminated the "continuous use" requirement of a trade secret and protects plaintiffs who have not yet put their trade secrets to use.[14]

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[12]TEX. CIV. PRAC. & REM. CODE ANN.§ 134A.007(a) (West Supp. 2018). Despite the TUTSA's statement that it replaces the common law analysis of trade secret enforcement, one court has noted that courts continue "to conflate statutory and common law by grafting the common law elements, and interpretations of these elements, onto the statute without an in-depth analysis of the statutory language and structure." HIS Co. v. Stover, 202 F. Supp. 3d 685, 693 (S.D. Tex.), *vacated as moot*, 4:15-CV-00842, 2016 WL 6134939 (S.D. Tex. Sept. 9, 2016). The court then listed the following cases as examples: Miller v. Talley Dunn Gallery, LLC, 05–15–00444–CV, 2016 WL 836775, at *12 (Tex. App.—Dallas Mar. 3, 2016, mand. denied) (citing both the common law elements of trade secret misappropriation and the language of TUTSA defining "misappropriation"); Educ. Mgmt. Servs. v. Tracey, 102 F. Supp. 3d 906, 913-14 (W.D. Tex. 2015) (citing a case applying Texas common law and another case applying TUTSA for the elements of trade secret misappropriation); Emerald City Mgmt., LLC v. Kahn, 4:14–CV–358, 2016 WL 98751, at *18 (E.D. Tex. Jan. 8, 2016) (reciting both the language of TUTSA and the common law elements); Capstone Associated Servs., Ltd. v. Organizational Strategies, Inc., CV H–15–3233, 2015 WL 9319239, at *2 (S.D. Tex. Dec. 23, 2015) (listing common law elements then quoting *Tracey* to interpret TUTSA); 360 Mortg. Grp., LLC v. Homebridge Fin. Servs., Inc., A–14–CA–00847–SS, 2016 WL 900577, at *3 (W.D. Tex. Mar. 2, 2016) (citing the common law elements to define misappropriation under TUTSA).

[13]TEX. CIV. PRAC. & REM. CODE ANN. § 134A.002(6) (West Supp. 2018).

[14] Joseph F. Cleveland, Jr. & J. Heath Coffman, *The Texas Uniform Trade Secrets Act*, 45 TEX. J. BUS. L. 323, 324 (2013).

In addition, as long as the plaintiff makes reasonable efforts to maintain secrecy, the secrecy requirement is met; the common law requirement that a "substantial element of secrecy" must be proved was eliminated. The Act also requires courts to preserve the secrecy of an alleged trade secret by reasonable means. Under the TUTSA the court can limit access to confidential information only to attorneys and their experts. When considering a party's pre-trial request for protection of trade secrets, the court need not determine whether the information is, in fact, a trade secret, but only whether the information is entitled to trade-secret protection until a trial on the merits.[15]

To prevail on a trade secret misappropriation claim under Texas common law, "a plaintiff must show that (1) a trade secret existed, (2) the trade secret was acquired through a breach of a confidential relationship or discovered by improper means, and (3) the defendant used the trade secret without authorization from the plaintiff."[16] The TUTSA modified the definition of misappropriation as follows: 1. The acquisition of a trade secret by a person who knows or has reason to know that the trade secret was acquired by improper means, or 2. The disclosure or use of a trade secret without the express or implied consent of the owner by a person who used improper means to acquire knowledge of the trade secret, or 3. The disclosure or use of a trade secret without the express or implied consent of the owner by a person who at the time of disclosure or use, knew or had reason to know that the person's knowledge of the trade secret was: a. derived from or through a person who had utilized improper means to acquire it; b. acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or c. derived from or through a person who owed a duty to the owner to maintain its secrecy or limit its use, or, 4. The disclosure or use of a trade secret without the express or implied consent of the owner by a person who, before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.[17] A suit under the TUTSA against a former employee who was furnished with a trade secret by his or her employer will be based on 3.b. or 3.c., which does not require that the trade secret be acquired through "improper means."[18]

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[15] *In re M–I L.L.C.,* 505 S.W.3d 569, 575 n.3 (Tex. 2016).

[16] Gaia Techs. Inc. v. Recycled Prods. Corp*.,* 175 F.3d 365, 376 (5th Cir. 1999).

[17] TEX. CIV. PRAC. & REM. CODE ANN. § 134A.002(3) (West Supp. 2018).

[18] HIS Co. v. Stover, 202 F. Supp. 3d 685 (S.D. Tex.), *vacated as moot*, 4:15-CV-00842, 2016 WL 6134939 (S.D. Tex. Sept. 9, 2016). The defendant moved to dismiss, arguing the language in the TUTSA requires that the trade secret be obtained by improper means, and because his prior employer had given him the confidential information, the TUTSA cannot apply. The court denied defendant's motion (1) based on the text of the statute, (2) in light of the TUTSA's legislative history, and (3) for policy reasons. 202 F. Supp. 3d at 695.

The remedies available for misappropriation of a trade secret under the TUTSA include injunctive relief, actual damages, exemplary damages, and attorney's fees. Comments on the Act clarify that "perpetual injunctions" that existed under Texas common law are no longer available; instead, injunctions will last only for as long as they are necessary to prohibit a commercial advantage.[19] In addition, injunctive relief is available for "threatened misappropriation" in those situations when proof of actual use or disclosure by the misappropriation is not available.[20] However, the claimant continues to bear "the burden to plead and adduce proof of probable, imminent, and irreparable injury to obtain a temporary injunction."[21] An unsupported claim that competition by the former employee could harm the employer's reputation without any proof of potential damages will not support injunctive relief.[22]

It is clear that the adoption of the TUTSA was intended to broaden the definition of trade secrets and streamline trade secret litigation.[23] However, many of the common law requirements continue to apply. For example, if the previous employee can show that he was able to create a customer list based on independent research and investigation, the employer's customer list is not a secret warranting injunctive relief.[24]

III. TEXAS CITIZENS PARTICIPATION ACT

Before discussing the *Elite Auto Body v. Autocraft Bodywerks, Inc*.[25] decision, we first consider the Texas Citizens Participation Act (TCPA) upon which the court's holding was based. The law was enacted in 2011 at which time Texas was one of 27 states and the District of Columbia to enact such legislation. These laws are commonly called anti-SLAPP statutes, with SLAPP being an acronym for Strategic Lawsuits Against Public

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[19] Michelle Evans, *The Uniform Trade Secrets Act Makes Its Way to Texas*, 23 TEX. INTELL. PROP. L.J. 25, 35 (2014).
[20] TEX. CIV. PRAC. & REM. CODE ANN. § 134A.003(a) (West Supp. 2018).
[21] DGM Servs., Inc. v. Figueroa, No. 01–16–00186–CV, 2016 WL 7473947 *4 (Tex. App.—Houston [1st Dist.] Dec. 29, 2016, no pet.). The court also declined to apply the inevitable disclosure doctrine which would have effectively relieved the plaintiff of the burden to prove irreparable injury. *Id*. at *5.
[22] Midstate Envtl. Servs., LP v. Atkinson, 13–17–00190–CV, 2017 WL 6379796 *4 (Tex. App.—Corpus Christi Dec. 14, 2017, no pet.).
[23] Greg Porter, *New Statute Modernizes Trade Secret Protection and Litigation in Texas*, 51 HOUS. LAW. 28, 29 (2013).
[24] Baxter & Assocs., L.L.C. v. D & D Elevators, Inc., No. 05–16–00330–CV, 2017 WL 604043 *9 (Tex. App.—Dallas Feb 15, 2017, no pet.) (defendants compiled the list by driving around "high-end" neighborhoods, contacting builders and architects, advertising, and canvassing permits).
[25] 520 S.W.3d 191 (Tex. App.—Austin 2017, pet. dism'd).

Participation. The law is aimed to prevent lawsuits by large, wealthy entities to silence criticism against them by private citizens.[26] States enacting such laws were motivated by research showing that SLAPP filers were not interested in addressing any wrongs, but rather to "bury the other side" with litigation costs such that it would become financially impossible to fight the lawsuit.[27]

Section 27.002 of the TCPA states that the statute is designed to serve the following dual purposes: "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."[28] "[The] TCPA protects citizens from retaliatory lawsuits that seek to intimidate or silence them on matters of public concern."[29] One commentator remarked that the law should operate as a "shield for individuals and consumers that promotes judicial economy, that restricts corporations from using lawsuits as a bullying tactic, and that aims to protect the First Amendment rights of all Texas citizens."[30]

The process under the TCPA in an accelerated motion process whereby a defendant can move to dismiss a complaint before any discovery takes place in "a legal action [which] 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 . . . ."[31] The motion under the TCPA must be filed within 60 days of commencement of the suit,[32] and compliance with the TCPA's time requirements for making the motion is strictly enforced.[33]

Under the statute, a court "shall dismiss a legal action against the moving party if the moving party shows by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of: (1) the right of free speech; (2) the right to petition; or (3) the

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[26] Laura Prather, *The Texas Citizens Participation Act – Five Years after Passage*, HAYNES & BOONE (2016), http://www.haynesboone.com/~/media/files/attorney%20publications/2016/antislapp_5yr.ashx (last visited Oct. 7, 2018).

[27] Landon A. Wade, *The Texas Citizens Participation Act: A Safe Haven for Media Defendants and Big Business, and a Slapp in the Face for Plaintiffs with Legitimate Causes of Action*, 47 TEX. TECH. L. REV. ON-LINE ED. 69, 71 (2014).

[28] TEX. CIV. PRAC. & REM. CODE ANN. § 27.002 (West 2015).

[29] In re Lipsky, 460 S.W.3d 579, 586 (Tex. 2015).

[30] Pete Reid*, A Memorandum on the Texas Citizens Participation Act*, PETE REID LAW (Sept. 7, 2012), http://petereidlaw.com/2012/09/memorandum-on-the-texas-citizens-participation-act-the-texas-anti-slapp-statute/ (last visited Oct. 7, 2018).

[31] TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(a) (West 2015).

[32] *Id*. § 27.003(b).

[33] Grubbs v. ATW Invs. Inc., 544 S.W.3d 421, 425 (Tex. App.—San Antonio 2017, no pet.).

right of association."[34] In order to avoid dismissal, "the party bringing the legal action [must establish] by clear and specific evidence a prima facie case for each essential element of the claim in question."[35] Even if the plaintiff establishes this, the court "shall" dismiss the action if the defendant "establishes by a preponderance of the evidence each essential element of a valid defense" to the plaintiff's claim.[36] If the motion to dismiss is denied, the moving party may immediately file an appeal of the denial.

Scholars note that the strength of the Texas anti-Slapp statute lies in its mandatory provisions.[37] Unless the parties agree or limited discovery is allowed, the court must set a hearing date on the motion within 60 days from the time the motion is filed. Once the hearing has occurred, the court must rule on the motion within 30 days. If the court dismisses the case, the statute requires the court to award court costs, attorney's fees, and other expenses plus sanctions against the plaintiff to deter future suits.[38] Section 27.009(b) provides for dismissal of the motion if the court determines it was frivolously filed or filed to delay the case, in which case attorneys' fees and costs may be awarded to the non-moving party.[39]

There are exceptions to the TCPA; it does not apply to personal injury claims (including wrongful death and survivors claims) or claims under the Insurance Code, claims arising out of an insurance contract, and most personal injury actions.[40] A commercial speech exemption also protects persons selling goods or services if the statement in question was to a potential buyer in the course of a sale.[41]

IV. CASE LAW PRIOR TO *ELITE AUTO BODY*

The first cases to test the limits of the TCPA were, not surprisingly, defamation cases against media defendants. In *Avila v. Larrea*,[42] an attorney sued Univision Television alleging that its reporter made false statements about him. The court of appeals held that an attorney's services were "services in the marketplace," and thus were "matters of public concern," and

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[34] TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b) (West 2015).
[35] *Id*. § 27.005(c).
[36] *Id.* § 27.0§21: 05(d).
[37] Prather, *supra* note 26, at 3.
[38] TEX. CIV. PRAC. & REM. CODE ANN. § 27.009(a) (West 2015).
[39] The dismissal of a TCPA motion and award of attorney's fees against the moving party is rare. Geoff A. Gannaway & Alex B. Roberts, *Anti-Slapp and Rule 91 Motions: Ending the Lawsuit before It Begins*, 79 ADVOC. (TEX.) 326, 337 (2017).
[40] TEX. CIV. PRAC. & REM. CODE ANN. § 27.010(c), (d) (West 2015). Certain claims brought in the name of the state or political subdivision are also exempt. *Id*. § 27.010(a).
[41] *Id*. § 27.010(b).
[42] 394 S.W.3d 646 (Tex. App.—Dallas 2012, pet. denied).

that the broadcasts constituted an "[e]xercise of the right of free speech" [43] as defined in the TCPA. The attorney had argued at trial that the purpose of the TCPA was to protect ordinary citizens against lawsuits by large corporations and that it was ironic that in this case, a large corporation was using the statute to defend itself against him.[44] This argument was not addressed by the court of appeals.[45]

The court of appeals in *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd*.[46] also addressed whether the challenged statements fell within the definition of "[a] matter of public concern." There, the claim involved a newspaper report about regulatory compliance problems and official investigations into an assisted living facility. The court of appeals reversed the lower court's dismissal of the TCPA motion stating that "the articles at issue in this suit involve communications made in connection with a matter of public concern and relate to the exercise of free speech."[47]

In *KTRK Television, Inc. v. Robinson*,[48] the plaintiff had not raised the issue that the TCPA did not apply to her defamation lawsuit. Thus, the court of appeals addressed only the issue whether the plaintiff had demonstrated by clear and specific evidence a prima facie case for each essential element of her claim.[49] The court noted that while the statute does not define "clear and specific" evidence, these terms should be given their ordinary meaning. Quoting from Black's Law Dictionary, the court stated: "'Clear' means 'unambiguous,' 'sure,' or 'free from doubt' [while] 'Specific' means 'explicit' or 'relating to a particular named thing.'"[50] Because the plaintiff

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[43] *Id*. at 655.
[44] *Id*. at 651.
[45] Wade, *supra* note 27, at 84.
[46] 416 S.W.3d 71 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).
[47] *Id*. at 81. The court rejected the plaintiff's argument that the commercial speech exemption should bar the motion. Applying the standard used by the Supreme Court of California in considering a similar exemption under California's anti-Slapp statute, the court looked at four factors to determine if the exemption applied: (1) is the cause of action against a person primarily engaged in the business of selling or leasing goods or services; (2) does the cause of action arises from a statement or conduct by that person consisting of representations of fact about that person's or a business competitor's business operations, goods, or services; (3) was the statement or conduct made either for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services or in the course of delivering the person's goods or services; and (4) was the intended audience for the statement or conduct an actual or potential buyer or customer. *Id*. at 88 (citing S*impson Strong–Tie Co. v. Gore,*49 Cal. 4th 12, 30, 109 Cal. Rptr. 3d 329, 343, 230 P.3d 1117, 1129 (2010)).
[48] 409 S.W.3d 682 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).
[49] *Id*. at 689.
[50] *Id*. (quoting BLACK'S LAW DICTIONARY 268, 1167 (8th ed. 2004)).

failed to meet this burden, the TCPA motion should not have been dismissed.[51]

The Texas Supreme Court further addressed the issue of what a plaintiff must show to defeat a motion under the TCPA. According to the Court, more than merely pleading the elements of a cause of action is required.[52] The "plaintiff must provide enough detail to show the factual basis for its claim. In a defamation case that implicates the TCPA, pleadings and evidence that establish the facts of when, where, and what was said, the defamatory nature of the statements, and how they damaged the plaintiff should be sufficient to resist a TCPA motion to dismiss."[53] However, it is not necessary that direct evidence be presented to prove each element; circumstantial evidence may be used to meet the burden to defeat a TCPA motion.[54]

The breadth of the cases reversing the dismissal of TCPA claims makes it clear that the TCPA can be applied to claims other than defamation actions. *Better Business Bureau of Metropolitan Dallas, Inc. v. BH DFW, Inc*.[55] was a breach of contract action in which a business sued the Better Business Bureau (BBB) for having reduced its rating from "A" to "F." The BBB moved to dismiss under the TCPA and the motion was denied. On appeal, the court of appeals construed the statutory language broadly and concluded that the BBB's business review of the plaintiff's business containing the "F" rating was a communication relating to an issue of public concern and was an exercise of the BBB's right to free speech as defined by the TCPA.[56] In *Serafine v. Blunt*,[57] a property owner sued her neighbors for trespass and nuisance claiming that they had built a fence and a trench on her land. The neighbors counterclaimed for tortious interference of contract and fraudulent lis pendens. The owner sought to dismiss the counterclaims on the basis that they were based on, related to, or was in response to the owner's exercise of her right to petition within the meaning of the TCPA. The lower court denied the motion, but the court of appeals reversed, stating that the counterclaims were in part subject to the Act, and that because the neighbors failed to establish a prima facie case of tortious interference with contract and a prima facie case of fraudulent lien, the trial court erred by denying the owner's motion to dismiss.[58]

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[51] 409 S.W.3d at 692.
[52] In re Lipsky, 460 S.W.3d 579, 590 (Tex. 2015).
[53] *Id*. at 591.
[54] *Id*.
[55] 402 S.W.3d 299 (Tex. App.—Dallas 2013, pet. denied).
[56] *Id*. at 308.
[57] 466 S.W.3d 352 (Tex. App.—Austin 2015, no pet.).
[58] *Id*. at 364. Ultimately, the property owner lost her boundary dispute with her neighbor. Nevertheless, the court of appeals ruled that she was entitled to attorney's fees and sanctions

While the TCPA is to be broadly interpreted, not every motion will be granted. Communications regarding whether a litigant was owed a 6% broker's commission upon a sale of property and whether the co-owner owed 50% of the expenses incurred for repairs to and maintenance of the property did not involve a matter of public concern, and thus the trial court was correct in denying a TCPA motion to dismiss appellees' libel and business disparagement claims.[59] Similarly, statements made by an attorney in connection with a business dispute, which were the subject of a defamation claim, were not a matter of public concern.[60]

Both these cases, however, were decided before the Texas Supreme Court's decision in *ExxonMobil Pipeline Co. v. Coleman*.[61] In *Coleman* a former employee sued ExxonMobil and other employees for defamation, alleging that his former supervisors made false statements about him. The Court ruled that the lower courts incorrectly denied defendants' motion to dismiss under the TCPA, stating that "the statements at issue in this case constitute communications made in connection with environmental, health, safety, and economic concerns under the TCPA."[62] The *Coleman* Court relied heavily on its prior decision in *Lippincott v. Whisenhunt*[63] in which it held that the TCPA imposes no requirement that the communication in question must be made in public and that the law covers both public and private communication.[64] Comments have called the *Coleman* decision as "groundbreaking" and opening the door for TCPA motions in a variety of commercial contexts.[65]

V. THE *ELITE AUTO BODY* CASE

In *Elite Auto Body* an automobile repair shop brought suit against two former employees and the business that they had established seeking both damages and injunctive relief. The former employer alleged trade secrets misappropriation, violation of the TUTSA, unfair competition, breach of

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against the neighbors as required under the TCPA. Serafine v. Blunt, No. 03–16–00131–CV, 2017 WL 2224528 at *7 (Tex. App.—Austin July 21, 2017, pet. denied).

[59] Lahijani v. Melifera Partners, LLC, NO. 01–14–01025–CV, 2015 WL 6692197 at *4 (Tex. App.—Houston [1st Dist.] Nov. 3, 2015, no pet.).

[60] Brugger v. Swinford, No. 14–16–00069–CV, 2016 WL 4444036 at *3 (Tex. App.—Houston [14th Dist.] Aug. 23, 2016, no pet.).

[61] 512 S.W.3d 895 (Tex. 2017) (per curiam).

[62] *Id*. at 902.

[63] 462 S.W.3d 507 (Tex. 2015).

[64] *Id*. at 509.

[65] Nick Brown & Ethan Gibson. *Slapped and Sanctioned: The Heavy Hand of the Texas Citizens Participation Act*, 8 HOUS. L. REV. OFF THE REC. 45, 46 (2017).

fiduciary duty, and civil conspiracy.[66] Defendants filed a motion under the TCPA seeking dismissal of the suit on the grounds that the lawsuit was a "legal action" relating to the defendants' exercise of the right of association and the exercise of free speech in pursuit of their business.[67] The trial court denied the motion and defendants appealed.

The opinion of Justice Pemberton began as follows:

> This case illustrates that the Texas Citizens Participation Act (TCPA), as written—and as the Texas Judiciary, therefore, is bound to apply it—can potentially be invoked successfully to defend against claims seeking to remedy alleged misappropriation or misuse of a business's trade secrets or confidential information.[68]

The appellate court first noted that there was "no question" that the lawsuit was a legal action as defined by the TCPA and that the claim is predicated on communications and association among the defendants.[69] Further, noted the court, there is no requirement in the law that the communication be public.[70] Relying on the Texas Supreme Court's decision in *ExxonMobil Pipeline Co. v. Coleman*,[71] the court rejected the appellee's argument that the TCPA protects only speech or association that would be protected under the First Amendment, stating that "the supreme court never suggested that the *constitutional* concepts of 'freedom of speech' or 'public concern' had any bearing on its 'plain-meaning' construction of the TCPA's definitions of those terms."[72] Further, the claim alleging trade secret misappropriation was related to the appellants' exercise of their right of association protected by the TCPA.[73] Accordingly, since under the expedited dismissal mechanism of the TCPA, the appellees were unable to present a prima facie case for each essential element of their claims as required to avoid dismissal, the court held that the claim should have been dismissed to the extent it was based on conduct by the appellants that constituted communications.[74]

The *Elite Auto Body* case was not the first time a party sought to dismiss a claim for misappropriation of trade secrets based on the TCPA. In both

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[66] 520 S.W.3d at 194.
[67] *Id*.
[68] *Id*. at 193 (footnote omitted).
[69] *Id*. at 197.
[70] *Id*. at 198-99.
[71] 512 S.W.3d 895 (Tex. 2017) (per curiam).
[72] 520 S.W.3d at 204 (italics in original, footnote omitted).
[73] *Id*. at 205.
[74] *Id*. at 204.

Schlumberger Ltd. v. Rutherford[75] and *Fleming & Associates, LLP v. Kirklin*,[76] the trial courts granted the motion on the misappropriation claims although other claims were not dismissed. On appeal, the court of appeals ruled that although the TCPA authorizes an appeal from an interlocutory order that denies a motion to dismiss filed under the TCPA, it does not authorize interlocutory appeal of the portion of order granting the motion.[77] However, in *Miller v. Talley Dunn Gallery, LLC*,[78] the trial court denied the defendant's motion to dismiss a misappropriation claim under the TUTSA. The defendant had filed a motion to dismiss the suit under the TCPA "arguing he was entitled to the dismissal of the lawsuit because appellees were public figures and his communications were related to a good, product, or service in the marketplace, economic or community well-being, or a judicial proceeding." The court that found the motion was frivolous within the meaning of section 27.009(b) of the TCPA,[79] and awarded costs and reasonable attorney's fees incurred by appellees in opposing the motion. Following *ExxonMobil Pipeline Co. v. Coleman,* it is likely that trial courts will be more inclined to grant such a motion.

VI. IMPLICATIONS FOR THE FUTURE

The court in *Elite Auto Body* appears to have extended the Supreme Court's opinions in *Coleman* and *Lipsky* regarding the "public concern" requirement. In *Coleman* the Court reasoned that even though the statements in questions were private and among ExxonMobil employees, they related to a matter of public concern because they were about an employee's failure to perform certain preventative maintenance on storage tanks, a process that at least in part would "reduce the potential environmental, health, safety, and economic risks associated with noxious and flammable chemicals overfilling and spilling onto the ground."[80] The communications in question in *Elite Auto Body* were related to the promotion and pursuit of the defendants'

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[75] 472 S.W.3d 881 (Tex. App.—Houston [1st Dist.] 2015, no pet).
[76] 479 S.W.3d 458 (Tex. App.—Houston [14th Dist.] 2015, pet. denied).
[77] 472 S.W.3d at 887; 479 S.W.3d at 460.
[78] No. 05–15–00444–CV, 2016 WL 836775 at *4 (Tex. App.—Dallas, Mar. 3, 2016, mand. denied). In QTAT BPO Solutions, Inc. v. Lee & Murphy Law Firm, G.P., 524 S.W.3d 770, 779 (Tex. App.—Houston [14th Dist.] 2017, pet. denied), the TCPA motion to dismiss was denied on procedural grounds because the party had not asserted the argument at the trial court level.
[79] CIV. PRAC. & REM. CODE ANN. § 27.009(b) (West 2015). For some reason the moving party in *Miller* did not raise the TCPA motion on appeal. 2016 WL 836775 at *16.
[80] 512 S.W.3d at 901 (citing Lippincott v. Whisenhunt, 462 S.W.3d 507, 509 (Tex. 2015) (e-mails about whether the defendant, as a nurse anesthetist, properly provided medical services to patients were communications regarding a matter of public concern)).

"common interests in developing and maintaining a competitive auto body repair business."[81] Quoting from section 27.001(7)(E) of the statute, because the defendants' communication concerned "a good, product, or service in the marketplace," the court concluded that it can be considered a matter of public concern.[82]

The decision in *Elite Auto Body* and its application of *Exxon Mobil Pipeline Co. v. Coleman*, will have far-reaching implications for commercial litigation. As noted in one article, a careful analysis of the TCPA should be taken by every plaintiff before filing a lawsuit.[83] In addition to defamation and trade secret misappropriation claims, the TCPA motion to dismiss is likely to be filed in the following actions: breach of contract, harassment and negligence, fraud, and abuse of process.[84] The definition of matters of public concern to include "a good, product or service in the marketplace" could cover almost any case involving an allegation that a company has provided poor service or an inferior product to the public. In the employment law arena, it has been suggested that a TCPA motion can be made in virtually every discrimination case based on an argument that the employer's actions involved protected communications about an employee's competence to perform his or her job.[85] For example, a state law age discrimination claim by a doctor against her hospital employer was dismissed because the communications by hospital administrators about the plaintiff's performance related to health and safety which were matters of public concern sufficient to invoke the TCPA.[86]

The question posed by legal scholars is how far will the courts go in their interpretation of the TCPA.[87] As Justice Pemberton noted in his concurring option: "[The] implications of a literal reading of the TCPA's

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[81] 520 S.W.3d at 197.
[82] *Id*.
[83] Brown & Gibson, *supra* note 65, at 50.
[84] *Id.* at 49.
[85] W. Gary Fowler, *A Slap at Employment Law: A Look at the Impact of the Texas Citizens Participation Act in 2017*, TEX. LAW. (Dec. 1, 2017), https://www.jw.com/wp-content/uploads/2017/12/A-Slap-at-Employment-Law-Texas-Lawyer-Gary-Fowler.pdf (last visited Oct. 7, 2018).
[86] Khalil v. Mem'l Hermann Health Sys., No. H-17-1954, 2017 WL 5068157, at *5 (S.D. Tex. Oct. 30, 2017, no pet.). The dismissal did not affect the plaintiff's federal claim under Title VII. *Id*. at *8. Plaintiffs may be wise to consider bringing claims solely under federal law such as the Defend Trade Secrets Act to avoid a TCPA dismissal and its mandatory sanctions and fees. Brown & Gibson, *supra* note 65, at 51.
[87] Geoff Gannaway & Beck Redden*, Does the Texas Anti-SLAPP Statute Apply to Your Lawsuit? You Might Be Surprised*, 74 ADVOC. (TEX.) 98, 111 (2016). The authors commented that we may never know whether the legislature contemplated or intended such far-reaching results or the expansive views of the TCPA taken in recent decisions.

definitions cannot be dismissed as merely speculative or far-fetched . . . ."[88] In a case decided shortly after *Elite Auto Body,* the court of appeals in Austin agreed that the TCPA could apply in a non-commercial case and dismissed a defamation suit arising out of a family dispute.[89] The court ruled: "[T]he subjects of mental illness or domestic abuse plainly fall within the ordinary meaning of 'health' or 'safety,' and it is now clear that such 'health' and 'safety' under the TCPA includes that of private parties embroiled in an otherwise-private dispute far removed from any public participation in government."[90]

VII. CONCLUSION

While the trend in Texas seems to have been moving toward increased protection for employer trade secrets, the decision in *Elite Auto Body* signals a significant shift in how plaintiffs' attorneys need to prepare such cases in anticipation of a TCPA motion. The non-moving party should not rely on the chance that a court will dismiss the motion as not covered by the TCPA, but should be ready to present "clear and specific" evidence of each element of the claim. Although the Court's decision in *Lipsky* provides some guidance as to what must be proven to defeat the motion,[91] the plaintiff is at a disadvantage because the motion is made before most discovery can be obtained. Further, the Court's guidance offered only general advice and did not define what evidence would need to be provided in any specific case.[92]

For defendants in a trade secret case, the TCPA does not automatically guarantee success. However, given the broad definition of "a matter of public interest," it would appear as long as the defendant can show that the allegations in the lawsuit involve communications or associations to further a common business interest, the law is applicable. The only risk defendants face is if the court dismisses the motion as frivolous under the statute. Given the uncertainty surrounding the process, it would not be surprising to see bills introduced in the Texas Legislature to modify the board scope of the TCPA or to clarify its provisions.

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[88] Serafine v. Blunt, 466 S.W.3d 352, 378 (Tex. App.—Austin, 2015, pet. denied) (J. Pemberton, concurring).
[89] Cavin v. Abbott, 545 S.W.3d 47 (Tex. App.—Austin 2017, no pet.).
[90] *Id*. at 64 (footnotes omitted).
[91] *See* notes 52-54 and accompanying text, *supra*.
[92] Jody S. Sanders, *The Texas Citizens Participation Act: How to Avoid (or Give) an Anti-Slapp*, 36 CORP. COUNS. REV. 53, 61 (2017).