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SUPREME COURT OF TEXAS
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NO. 15-0407

In the Supreme Court of Texas

**EXXONMOBIL PIPELINE COMPANY,
ROBERT W. CAUDLE, AND RICKY STOWE,**

***Petitioners*,**

V.

TRAVIS G. COLEMAN,

***Respondent*.**

PETITION FOR REVIEW

**On Petition for Review from the
Court of Appeals, Fifth District of Texas
Dallas, Texas**

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ABBREVIATIONS AND RECORD REFERENCES

PARTIES:

"Caudle" means Petitioner Robert W. Caudle.

"Coleman" means Respondent Travis Coleman.

"EMPCo" means Petitioner ExxonMobil Pipeline Company.

"EMPCo parties" means Petitioners EMPCo, Caudle, and Stowe, collectively.

"Stowe" means Petitioner Ricky Stowe.

STATUTES:

"TCPA" means the Texas Citizens Participation Act, which is codified as Chapter 27 of the Texas Civil Practice and Remedies Code.

RECORD REFERENCES:

Citations to the Court of Appeals' opinion in this case……..."Op. [pg. no.]"[1]

Citations to the Clerk's Record are in the form of……..."CR:[pg. no.]"

Citations to the Reporter's Record are in the form of……"RR:[pg. no.]"

HYPERLINKING:

All references or citations underlined and blue are hyperlinked to documents in the Appendix**.**

[1] Westlaw cite is *ExxonMobil Pipeline Co. v. Coleman*, No. 05-14-00188-CV, --- S.W.3d ---, 2015 WL 2206466 (Tex. App.–Dallas May 12, 2015).

STATEMENT OF THE CASE

Nature of the Case: This is a defamation case based on statements the plaintiff (Respondent Travis Coleman) admitted were true.

Coleman sued his former employer, EMPCo, and his two EMPCo supervisors (Petitioners), claiming defamation on the basis of a statement in an internal safety report—that Coleman admitted was true—and related communications in the internal investigation prompted by the safety report. (CR:7-9, 58-59, 74, 82, 86.)

Trial Court Proceedings: Petitioners moved for early dismissal pursuant to Chapter 27 of the Texas Civil Practice and Remedies Code (the "Texas Citizens Participation Act" or "TCPA"). (CR:26-86.) The trial court (Hon. Emily Tobolowsky, 298th Judicial District Court, Dallas County, Texas) denied Petitioners' motion on the ground that the TCPA did not apply. (CR:156-57.)

Court of Appeals Proceedings: The Fifth Court of Appeals affirmed, in an opinion to be published, authored by Justice Ada Brown and joined by Justices Elizabeth Lang-Miers and David J. Schenck.

Although the court of appeals found that the "communications seem to fall within the plain language of the [TCPA's] definition of the exercise of the right of association," the court (1) declined to enforce the TCPA as written, (2) judicially amended the statute to "read a public-participation requirement into the definition" of the "exercise of the right of association," and (3) held the Act inapplicable on that basis. (Op. 9, 11.)

The court of appeals also held that the communications did not fall under the "free speech" prong of the TCPA because they were not made "in connection with a matter of public concern," notwithstanding the court's finding that the potential consequences of the communications' subject matter "included health, safety, environmental and economic concerns." (Op. 8.)

STATEMENT OF JURISDICTION

The court of appeals' opinion conflicts with prior decisions of this Court and other courts of appeals on questions of law material to the decisions in those cases, giving rise to this Court's jurisdiction under section 22.001(a)(2) of the Texas Government Code.

The ink was barely dry on this Court's decision in *Lippincott v. Whisenhunt*, 462 S.W.3d 507 (Tex. 2015) (per curiam), when the Dallas Court of Appeals declined to follow it. In *Lippincott*, this Court held that the "right of free speech" prong of the Texas Citizens Participation Act could not be judicially amended to limit its scope to public communications. Fewer than three weeks later, the court of appeals, after noting this Court's admonition "against 'judicially amending' the Act by adding words that are not there," did just that by judicially amending the "exercise of the right of association" definition "to read a public-participation requirement into the definition." (Op. 11, 12.) By altering the statutory definition and refusing to adhere to this Court's directives in *Lippincott*, the court of appeals justified its finding that the Act did not apply.

Of course, it goes without saying that the court of appeals' statutory amendment by judicial fiat does not just conflict with *Lippincott*; it conflicts with a long line of cases by this Court. *See, e.g.*, *Iliff v. Iliff*, 339 S.W.3d 74, 80-81 (Tex. 2011) (courts have no right to add conditions or provisions to statutes not included

by the Legislature); *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 443 (Tex. 2009) ("we should always refrain from rewriting text that lawmakers chose…."); *Lee v. City of Houston*, 807 S.W.2d 290, 294-95 (Tex. 1991) ("A court may not judicially amend a statute").

The court of appeals' decision on the scope of the "right of association" prong of the Texas Citizens Participation Act also conflicts with the Third District Court of Appeals' holding applying the statute's "exercise of the right of association" prong to private communications regarding an employment matter. *See Combined Law Enforcement Ass'ns of Texas v. Sheffield*, 2014 WL 411672, at *1, *4-*5 (Tex. App.—Austin Jan. 31, 2014, pet. denied).

Finally, the court of appeals' opinion conflicts with *Lippincott* in yet another important way. In *Lippincott,* communications regarding the plaintiff's failure to perform his job duties as a healthcare provider met the public concern requirement of the "free speech" prong of the TCPA because the plaintiff's work pertained to an issue "related to health" and the communications were thus "made in connection with a matter of public concern." 462 S.W.3d at 509; TEX. CIV. PRAC. & REM CODE ANN. § 27.001(7). This case presents the same scenario, the only difference being that the "safety/environmental" prongs apply instead of the "health" prong. Here, the communications concerned Coleman's failure to perform his job duties as a terminal technician responsible for the monitoring and

handling of highly flammable and noxious petroleum products—"an issue related to . . . safety [or] environmental, economic, or community well-being"—and were thus "made in connection with a matter of public concern." § 27.001(7). For this additional reason, the TCPA applies here and the court of appeals' opinion holding otherwise conflicts with *Lippincott*.

ISSUES PRESENTED

1. Did the court of appeals err when it judicially amended the "right of association" prong of the Texas Citizens Participation Act to "read a public participation requirement into the definition"[2]—notwithstanding the absence of this limiting language in the statutory definition of "right of association"?

2. Did the court of appeals improperly limit the "right of free speech" prong of the Texas Citizens Participation Act by holding that communications that potentially raised "health, safety, environmental, and economic concerns"[3] were not "in connection with" or "related to . . . health or safety . . . environmental, economic, or community well-being" within the meaning of the statute?

[2] Op. 11.

[3] Op. 8.

REASONS TO GRANT REVIEW AND SUMMARY OF ARGUMENT

Review is necessary to clear up the confusion created by the court of appeals' disregard of this Court's recent decision in *Lippincott* and the court's rewriting of the "right of association" definition in the Texas Citizens Participation Act (TCPA) to insert a "public-participation requirement," when the plain language of the statute provides otherwise.

Three weeks before the court of appeals' opinion, this Court decided *Lippincott*, wherein the Court, applying longstanding rules of statutory construction, held that "[a] court may not judicially amend a statute by adding words that are not contained in the language of the statute. Instead, it must apply the statute as written." 462 S.W.3d at 508. Because the TCPA broadly defines "communication," and its definition of "exercise of the right of free speech" does not contain language limiting its application to public communications, the Court held that the TCPA's free speech prong applied to both private and public communications.

After noting that "in *Lippincott*, the supreme court cautioned against 'judicially amending' the Act by adding words that are not there," the court of appeals did just that—and did so expressly, in an opinion to be published. The court initially found that the communications in this case "seem to fall within the plain language of the Act's definition of the exercise of the right of association,"

but the court did not like that outcome. (Op. 9.) So it rewrote the definition: "*we think the better approach is to read a public-participation requirement into the definition*." (Op. 11) (emphasis added). But there is no public-participation requirement in the statute, which 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." § 27.001(2). By judicially amending the TCPA's right of association definition, the court of appeals not only ran afoul of this Court's decision in *Lippincott* and longstanding jurisprudence on statutory construction—it also put TCPA construction into a state of utter confusion.

The court of appeals' refusal to apply the TCPA's "free speech" clause is similarly misguided, creating another basis for review by this Court. Here again the court ran afoul of *Lippincott* and the statutory language. By the court of appeals' own admission, the "potential consequences" of the matters addressed in the communications "included health, safety, environmental and economic concerns." (Op. 8.) Yet, the court held that the communications were not made "*in connection with* a matter of public concern," which is defined to "include[] an issue *related to*: (A) health or safety; [and] (B) environmental, economic, or community well-being." § 27.001(3)(7) (emphasis added). As in *Lippincott*, the communications involve comments about employee misconduct that were *in*

connection with and *related to* issues encompassed by the statutory definition of "matter of public concern"—"health" in *Lippincott* and here, "safety" and the "environment"—yet the court of appeals erroneously held otherwise by requiring a nexus that reads the statutory terms "in connection with" and "related to" out of the definition.

The Texas Legislature unanimously enacted the TCPA to provide an early dismissal mechanism for meritless suits based on communications falling under the statute. The communications in this case concern an employee's admitted safety violations following his mishandling of dangerous petroleum products. Such communications were made in exercise of both the "right of association" and the "right of free speech" as those terms are defined in the statute. When the TCPA is applied as written, the applicability of the Act is clear.

In holding that the TCPA did not apply, the court of appeals disregarded this Court's holdings on statutory construction in general and TCPA construction in particular—creating confusion in the construction and interpretation of a significant statute. The Court should grant review to provide clarity in this important area.

STATEMENT OF FACTS

This is a defamation suit based on communications among EMPCo personnel in an internal safety "near loss report" and the resulting investigation—

all of which were unquestionably true. All arise from Respondent Travis Coleman's admitted failure to carry out his job duties and his cover-up.

1. Coleman admittedly failed to perform his duties.

As an EMPCo terminal technician, Coleman's job responsibilities included gauging and recording the volumes of highly flammable and noxious petroleum-based additives and products stored in tanks. (CR:56-58.) Terminal technicians are required to gauge the tanks each night for three reasons: (i) to assess the fluid levels in the tanks to avoid overfilling; (ii) to determine whether any tanks have leaks; and (iii) to keep an accurate account of the facility's inventory. (CR:57.)

Failure to properly gauge a tank can result in serious safety and environmental risks. (CR:57-58.) Without an accurate log of the amount of fluid in a tank, the tank can be overfilled, causing noxious and flammable fluids to overflow, endangering those in the area and spilling onto the surrounding ground, causing environmental harm. (CR:57.) Additionally, failure to properly gauge a tank can cause leaks to go undetected, causing immediate danger to those in the area and harm to the surrounding environment. (CR:57-58.)

On August 20, 2012, when Coleman was working the night shift, he admittedly failed to gauge a tank. (CR:58-59, 63-68, 71-72, 78, 86.) Rather than gauge the tank and record correct data on the company's records, Coleman fabricated the gauging data. (CR:58-59, 63-68, 71-72, 78, 86.)

On August 22, 2012, Coleman's supervisor, EMPCo employee Robert W. Caudle, became concerned that something was amiss because the tank (#7840) was out of balance and Coleman's August 21 report data was identical to the data reported on August 20. He asked Coleman for an explanation by e-mail. (CR:58-59, 72.) After Coleman failed to respond, Caudle e-mailed another Coleman supervisor, Ricky Stowe, to request his assistance in obtaining an explanation from Coleman. (CR:59, 72.) Stowe followed up by sending Coleman another e-mail, again requesting an explanation. (CR:82.) Stowe noted that Coleman's failure could have resulted in "a loss or an incident" and that it would be treated as a "Near Loss." (CR:82.) EMPCo employees prepare "near loss" reports any time an environmental or safety risk is observed. (CR:58.)

It was only after the follow-up e-mail by Stowe that Coleman finally responded, admitting his failure to gauge tank 7840:

> Sorry for the delay…. I felt so embarrassed about being caught that I forgot to answer Robert's e-mail. * * * *When I started gauging my idle tanks I did not check 7840 because I sure we were pulling from 7850. WRONG…. * * * I still have the opportunity to go back when I notice that the numbers were not looking right at midnight, but I didn't go look.*

(CR:82) (emphasis added).

Consistent with company practice, Caudle prepared a "near loss" report, which stated:

> On 8/20/12 Tech went out to gauge tanks and after gaugeing (sic) tank 7850 he made the assumption that tank 7840 was the same as night before not knowing the tech on the day shift had change the pulling tank back to 7840 and did not gauge the tank.

(CR:58-59, 74.)

EMPCo internally investigated the incident to determine whether Coleman had falsified a company document in violation of the company's ethics policy. (CR:78.) On November 6, 2012, an EMPCo investigator met with Coleman and Stowe to discuss the incident. (CR:78.) Coleman again admitted he had failed to gauge tank 7840 on the date in question. (CR:78.) Coleman then signed a handwritten statement confirming his admission:

> On August 21, 2012 I filled out a gauging report ("Inventory Planning" report) stating that Tank # 7840 had the same reading as what was reported on August 20, 2012. *I did not gauge the tank on August 21 but reported that I did.* I understand that reporting something that I did not actually do constitutes falsification of a company document, which is a violation of EMPCo's Ethics policy.

(CR:86.) At the conclusion of the investigation, as a result of his admitted failure to gauge tank 7840 and falsification of an EMPCo document, Coleman was placed on leave and later discharged. (CR:78, 82, 86.)

2. Coleman brought suit claiming defamation, based on statements he admitted were true.

Coleman thereafter filed this lawsuit against EMPCo, Caudle, and Stowe (the "EMPCo parties"), asserting defamation and related tort claims based on the

following internal statements relating to his admitted failure to gauge tank 7840 and the investigation that followed:

1. Caudle's statement in an August 22, 2012, "near loss" report and "inventory sheet" that Coleman did not gauge tank 7840. (CR:7, 9.)
2. Stowe's November 6, 2012, statements to Van Buren that he "could find no more documents in support of the statement that Coleman could not have gauged tank 7840" and that he had asked Coleman what had happened "multiple times." (CR:8, 9.)

The truth of these statements is well established. (CR:58-59, 63-68, 71-72, 78-79, 86.) Coleman twice admitted in writing that he had failed to gauge tank 7840. (CR:82, 86.) With respect to the statement that Stowe "could find no more documents," Stowe testified that he "found no other instances where gauging data had been falsely reported." (CR:78-79.) And it is clear that Coleman was asked what had happened multiple times through e-mails. (CR:78, 82-83.)

3. The EMPCo parties moved to dismiss under the Texas Citizens Participation Act; the denial of that motion—on the ground that the Act does not apply—led to this appeal.

The EMPCo parties moved to dismiss Coleman's claims under the TCPA on the grounds that: (i) the TCPA applied because the communications were made in (a) "exercise of the right of association" and (b) "exercise of the right of free speech;" (ii) Coleman could not meet his burden to establish a prima facie case;

and (iii) even if Coleman could meet his burden, dismissal was required because the EMPCo parties proved their affirmative defenses by a preponderance of the evidence. (CR:26-86.)

At the hearing on the motion to dismiss, the trial court expressed doubt as to the merits of Coleman's claims, stating "based on some of the arguments I've heard, I think there [are] some problems with this case." (RR:31.) The court nevertheless denied the EMPCo parties' motion to dismiss on the ground that the TCPA "does not apply to the alleged communications that form the basis of [Coleman's] claims." (CR:156.)

As noted in the court of appeals' opinion, the argument advanced by Coleman in the trial court—that the TCPA did not apply because the communications were not public—was rejected by this Court in *Lippincott*. (Op. 7.) The Dallas Court of Appeals nevertheless affirmed the trial court's ruling, finding that the TCPA did not apply for reasons that the EMPCo parties contend are inconsistent with the plain language of the statute.

ARGUMENT

I. The court of appeals' opinion conflicts with this Court's decision in *Lippincott* and creates confusion regarding the construction and scope of the TCPA.

By failing to follow this Court's holdings in *Lippincott* and misconstruing the plain language of the TCPA, the court of appeals has created confusion regarding the construction and scope of the TCPA, requiring review.

A. Based on well-established principles of statutory construction, *Lippincott* holds that the TCPA cannot be re-written by judicial amendment.

This Court held in *Lippincott* that "[a] court may not judicially amend a statute by adding words that are not contained in the language of the statute." 462 S.W.3d at 508. In *Lippincott*, the defendants sought to dismiss the plaintiff's claims under the TCPA on the ground that certain private e-mail communications regarding the plaintiff's performance as a nurse anesthetist were made in "exercise of the right of free speech." The court of appeals in *Lippincott* held that the motion should be denied because the "right of free speech" prong of the TCPA, despite an absence of limiting language, should only apply to communications in a public form. This Court reversed the decision in a per curiam opinion, holding that:

> [t]he plain language of the statute imposes no requirement that the form of the communication be public. Had the legislature intended to limit the Act to publicly communicated speech, it could have easily added language to that effect. In the absence of such limiting language, we must presume that the Legislature broadly included both public and private communication.

Lippincott, 462 S.W.3d at 509 (internal citations omitted).

In interpreting the TCPA, this Court refused to look to extraneous sources or the Act's titles or inapplicable provisions to bolster the notion of a public purpose, but looked to the plain language chosen by the Legislature to define the relevant provisions ("communication" and "exercise of the right of free speech"). The Court found that neither "communication" nor "exercise of the right of free speech" was defined to exclude private speech. *Id.* The Court observed that the TCPA broadly defines "communication" to include "the making or submitting of a statement or document in any form or medium…." with no limitation that communications must be public to be covered by the Act and that nothing in the "free speech" definition provides otherwise. *Id*.; *see also* § 27.001(1).

B. In contravention of this Court's opinion in *Lippincott*, the court of appeals erroneously limited the scope of the TCPA by re-writing it.

1. The court of appeals judicially amended the statutory definition of "right of association" by imposing a limitation not in the statute.

Notwithstanding the clarity of this Court's admonition in *Lippincott* that "[a] court may not judicially amend a statute by adding words that are not contained in the language of the statute," the court of appeals declined to follow it. *Lippincott*, 462 S.W.3d at 508. Rather, after noting this Court's admonishing language in *Lippincott*, the court of appeals disregarded it. (Op. 12-13.) Specifically, regarding

the applicability of the "right of association" prong of the TCPA to the speech at issue, the court of appeals held "[a]lthough these communications seem to fall within the plain language of the Act's definition of exercise of the right of association," "we think the better approach is to ***read a public-participation requirement into the definition***." (Op. 9, 11) (emphasis added). The court of appeals thus modified the definition of "exercise of the right of association" by imposing a limitation that is nowhere to be found in the definition *and* conflicts with the definition (which applies to communications "between individuals").

Even assuming that a judicial amendment were somehow appropriate, the court of appeals did so based on a false premise. The court explained that it could "read a public-participation requirement into the definition" of "exercise of the right of association" because "Chapter 27 is intended to curb strategic lawsuits against public participation." (Op. 10.) But the TCPA makes no reference to "strategic lawsuits against public participation." Thus, instead of citing the TCPA for that proposition, the court cited its own opinion in *American Heritage Capital, L.P. v. Gonzalez*, which merely held that "[s]tatutes ***like*** Chapter 27 are commonly known as 'anti-SLAPP statutes' because ***they*** are intended to curb 'strategic lawsuits against public participation." 436 S.W.3d 865, 868 (Tex. App.—Dallas 2014, no pet.).

Regardless of what the intent of other states' statutes may be, the TCPA nowhere states an intent or purpose to limit its application to "strategic lawsuits against public participation," and this Court did not endorse such a limitation in *Lippincott*. The TCPA only mentions the term "public participation" once in its text, and that is in one of five subparts to the definition of "exercise of the right to petition," which was not invoked in this case. *See* § 27.001(4)(D). While the "right of free speech" prong requires that speech must be connected to a "matter of public concern," even that requirement was left out of the definition of "exercise of the right of association." *Compare* § 27.001(2) *with* § 27.001(3). Thus, the court of appeals' judicial amendment of the "right of association" definition fails for the additional reason that it is based on a claimed purpose that is nowhere to be found in the TCPA.

The court's other excuse for judicial amendment—a claimed need to avoid absurd results—fares no better. (Op. 10-11.) Absurdity is a very narrow exception to plain-text interpretation and one that this Court has declined to expand. "The absurdity safety valve is reserved for truly exceptional cases, and mere oddity does not equal absurdity.'" *Jaster v. Comet II Constr., Inc.*, 438 S.W.3d 556, 569 (Tex. 2014) (quoting *Combs v. Health Care Serv. Corp.*, 401 S.W.3d 623, 630 (Tex. 2013)). "Even if the result seems to be unreasonable, 'reasonableness is not the

standard for eschewing plain statutory language.' *Jaster*, 438 S.W.3d at 570 (citing *In re Blair*, 408 S.W.3d 843, 859 (Tex. 2013) (Boyd, J., concurring)).

There is certainly no reason to apply the absurdity exception here. First, the court of appeals failed to explain ***why*** it would be absurd to have the "right of association" definition apply to communications among supervisors about an employee's failure to perform his job duties. After all, these types of communications have long been subject to the qualified "common interest" privilege, and have therefore received heighted protection in Texas courts for years. *See, e.g.*, *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 646-47 (Tex. 1995). Why, then, would it be absurd for such privileged communications to fall under the TCPA? The court of appeals did not say.

If the court of appeals' concern was that application of the "right of association" here would improperly lead to the dismissal of a broad category of meritorious claims, it need not have worried. The TCPA merely requires a plaintiff to present a prima facie case on each element of his claims with clear and specific evidence, which this court has held is not an elevated evidentiary standard. *In re Lipsky*, 460 S.W.3d 579, 591 (Tex. 2015). Requiring a plaintiff to meet the minimal burden of establishing a prima facie case is hardly absurd and would only weed out claims that have no merit at the forefront, such as this one.

2. The court of appeals judicially amended the statutory definition of "right of free speech" by imposing a limitation not in the statute.

The TCPA defines "exercise of the right of free speech" as "a communication made ***in connection with a matter of public concern***." § 27.001(3) (emphasis added). "Matter of public concern" is defined to "***include an issue related to***: (A) health or safety; [and] (B) environmental, economic, or community well-being…." § 27.001(7) (emphasis added).

The court of appeals acknowledged that "the potential consequences of Coleman's failure to gauge the tank included health, safety, environmental, and economic concerns," but concluded that the communications were not protected under the free speech prong because they did not mention health, safety, the environment, or EMPCo's economic interests and instead related to Coleman's job performance. (Op. 8.)

This holding judicially amends the TCPA by reading "***in connection with***" and "***related to***" out of the statutory definitions. Under Sections 27.001(3) and (7), the communication need only be "*in connection with*" a matter that "*relate[s] to*: (A) health or safety; [and] (B) environmental, economic, or community well-being…." § 27.001(7) (emphasis added). The TCPA does not require that communications ***mention*** health, safety, or the environment to fall within its scope, but only that they be made ***in connection with*** and ***relate*** to one of these matters,

which requires courts to look to the context in which the statements were made. By holding otherwise, the court of appeals once again improperly limited the scope of the statute and disregarded this Court's opinion in *Lippincott*, where the Court held that communications regarding a healthcare professional's job performance related to matters of public concern. *See also Shipp v. Malouf*, 439 S.W.3d 432, 438 (Tex. App.—Dallas 2014, pet. denied) (court "must consider the broader context of the speech to know whether or not it relates to an issue identified as a matter of public concern by the legislature.").

II. The TCPA applies to this case on two, independent bases: "right of association" and "right of free speech."

The TCPA applies to this case for two independent reasons: (i) the challenged communications were made in "exercise of the right of association;" and (ii) the communications were made in "exercise of the right of free speech."

A. The challenged statements were made in the "exercise of the right of association."

The "exercise of the right of association" protects "communication[s] between individuals who join together to collectively express, promote, pursue, or defend common interests." § 27.001(2). The definition of "exercise of the right of association" is analogous to the qualified common-interest privilege applicable to defamation actions at common law, which protects good faith communications made on a subject matter in which the communicator and recipient share a

common interest or duty. *Pioneer Concrete of Texas, Inc. v. Allen*, 858 S.W.2d 47, 49-50 (Tex. App.—Houston [14th Dist.] 1993, writ denied). Courts applying the common-interest privilege have routinely found that employers and employees share a common interest in employment-related matters, including employee performance and internal investigations. *See, e.g.*, *Randall's Food Mkts.*, 891 S.W.2d at 646-47 (employer communications made in course of investigating employee wrongdoing are protected by qualified privilege); *Schauer v. Mem'l Care Sys.*, 856 S.W.2d 437, 449 (Tex. App.—Houston [1st Dist.] 1993, no writ) ("Accusations or comments about an employee by her employer, made to a person having an interest or duty in the matter to which the communication relates, have a qualified privilege.") *disapproved on other grounds by Huckabee v. Time Warner Entm't Co., L.P.*, 19 S.W.3d 413 (Tex. 2000).

Additionally, one court has applied the TCPA's "right of association" protection to communications made by an employer about a former employee. *Combined Law Enforcement Ass'ns of Texas v. Sheffield*, No. 03-13-00105-CV, 2014 WL 411672 at *1, *3, *5 (Tex. App.—Austin Jan. 31, 2014, pet. denied) (communications among members of law enforcement union about former employee were made in "exercise of the right of association"); *see also Neyland v. Thompson*, 2015 WL 1612155, at *1, *4 (Tex. App.—Austin Apr. 7, 2015, no pet.) (communications among HOA members regarding property manager employed by

HOA were made in "exercise of right of association"). The court of appeals tried to distinguish *Sheffield* on the ground that the communications were between union members, not "people who had the police union as their employer." (Op. 13-14.) However, *Sheffield* does not so limit its holding, and, in any event, the distinction does not differentiate *Sheffield* from this case, as both involve communications between "individuals who join together to collectively express, promote, pursue, or defend common interests."[4]

Each of the challenged communications in the "near loss" safety report and subsequent investigation was made in "exercise of the right of association" as defined in the TCPA. Each communication was made among EMPCo personnel, who were joined together to express, promote, and pursue EMPCo's interests in compliance with EMPCo's safety policies, Coleman's job performance, and/or EMPCo's investigation following Coleman's failure to gauge tank 7840. (CR:7-8, 58-59, 74, 78-79.) The communications therefore fall within the plain language of the TCPA's definition of "exercise of the right of association."

[4] The court of appeals also improperly relied on dicta and a concurrence in *Cheniere Energy, Inc. v. Lotfi*, 449 S.W.3d 210 (Tex. App.—Houston 2014, no pet.). (Op. 11-12.) In that case, the TCPA motion to dismiss was denied for lack of evidence that a communication had occurred. The dicta and concurrence that the Dallas Court of Appeals relied on were based on the premise that the TCPA's purpose limits its application to public discourse, a premise that this Court rejected in *Lippincott* and which is also wrong for the reasons stated throughout this petition.

B. The challenged statements were made in the "exercise of the right of free speech."

The TCPA additionally applies to Coleman's claims because the statements were made in exercise of the right of free speech. The statute defines "exercise of the right of free speech" as "a communication made in connection with a matter of public concern." § 27.001(3). "[M]atter of public concern" is defined to include issues related to "health or safety" or "environmental, economic, or community well-being." § 27.001(7)(A), (B). Because the statutory definition of "matter of public concern" is not ambiguous; courts "must enforce it as written." *Better Bus. Bureau of Metropolitan Dallas, Inc. v. BH DFW, Inc.*, 402 S.W.3d 299, 308 (Tex. App.—Dallas 2013, pet. denied).

The challenged communications pertained to Coleman's failure to gauge a tank containing petroleum-based fuel additives and the related investigation. (CR:7-8; 57-59, 78-79.) Coleman was required to gauge tanks on a nightly basis to (i) avoid overfilling, (ii) determine whether tanks were leaking, and (iii) keep an accurate account of the facility's inventory. (CR:57.) Failure to gauge a tank could result in safety and environmental risks because tanks that were not properly gauged could overflow from the top and leaks could go undetected. (CR:57-58.) In either case, noxious fluids could spill from the tanks, endangering EMPCo employees and the surrounding environment. (CR:57-58.)

The communications were thus made "in connection with" and "related to" safety and environmental protection. The fact that the statements regarding Coleman's failure to gauge a tank were made in a "near loss" report makes the point. EMPCo employees only prepare those reports when environmental or safety risks are observed. (CR:7, 58, 74.) Indeed, even the court of appeals acknowledged that "the potential consequences of Coleman's failure to gauge the tank included health, safety, environmental, and economic concerns." (Op. 8.) The court of appeals therefore erred in refusing to apply the TCPA under the free speech prong. § 27.001(3), (7)(A), (B).

III. Review is necessary to clarify the construction and scope of the TCPA.

The TCPA clearly defines the terms "exercise of the right of association" and "exercise of the right of free speech," and, as defined, those sections encompass the communications at issue in this case. § 27.001(2), (3), (7). The court of appeals' contrary holdings rely on judicial amendments that defy the plain text of the TCPA and this Court's decision in *Lippincott*. It is not the job of courts to rewrite statutes, especially where, as here, the language chosen by the Legislature is unambiguous and the applicability of the TCPA is clear.

Petitioners seek review and clarification by this Court (by per curiam opinion or otherwise) that the TCPA applies to the subject communications. The

case can then be remanded to the court of appeals for disposition of the remaining issues under the TCPA.

PRAYER

Petitioners respectfully request that the Court grant their petition for review, reverse the court of appeals' judgment, and remand the case to the court below for consideration of the issues the court did not reach.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 9.4(e), (i)

1. This brief complies with the type-volume limitation of Texas Rule of Appellate Procedure 9.4(i)(2)(D) because, according to the Microsoft Word 2010 word count function, it contains 4,446 words on pages 1-20, excluding the parts of the brief exempted by Texas Rule of Appellate Procedure 9.4(i)(1).

2. This brief complies with the typeface requirements of Texas Rule of Appellate Procedure 9.4(e) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 software in Times New Roman 14 point font in text and Times New Roman 12 point font in footnotes.

/s/ Jason P. Bloom
Jason P. Bloom

CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2015, the foregoing document was filed with the Clerk of the Court using the electronic case filing system of the Court. I also certify that a true and correct copy of the foregoing was served on all counsel of record via e-service, as shown below:

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Index to Petitioners' Appendix

Petitioners' Appendix

Tab 1

AFFIRM; and Opinion Filed May 12, 2015.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-14-00188-CV

EXXONMOBIL PIPELINE COMPANY,
ROBERT W. CAUDLE, AND RICKY STOWE, Appellants
V.
TRAVIS G. COLEMAN, Appellee

On Appeal from the 298th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-13-12563

OPINION

Before Justices Lang-Miers, Brown, and Schenck[1]
Opinion by Justice Brown

At issue in this interlocutory appeal is whether the Texas Citizens Participation Act applies to appellee Travis G. Coleman's lawsuit against appellants — his former employer, ExxonMobil Pipeline Company, and supervisors, Robert W. Caudle and Ricky Stowe — arising out of internal, private communications about his job performance. The trial court concluded it did not and denied appellants' motion to dismiss the lawsuit under the Act. Appellants contend on appeal that the Act applies because the challenged statements were made both in the exercise of the right of free speech and in the exercise of the right of association. For reasons that follow, we conclude the Act does not apply and affirm the trial court's order denying the motion to dismiss.

[1] Justice David J. Schenck succeeded Justice Michael J. O'Neill, a member of the original panel, following Justice O'Neill's retirement. Justice Schenck has reviewed the briefs and the record before the Court.

BACKGROUND

Beginning in August 2010, Exxon employed Coleman as a terminal technician at its facility in Irving, Texas, where petroleum products and additives are stored and mixed before being shipped out to gas stations. Coleman worked the night shift, and one of his duties, referred to as "gauging the tanks," was to record the volume of fluid in various storage tanks each night. Some tanks had a glass gauge on the side for determining volume. But technicians were required to gauge three particular tanks, including additive tank 7840, from the top with a tape and bob measuring device. Coleman was to handwrite the results and later record them in Exxon's computer system so they would appear on an inventory planning report the following day. Exxon fired Coleman in November 2012 following an investigation into his alleged failure to gauge tank 7840 on August 20, 2012.

After he was fired, Coleman sued Exxon and his two former supervisors for defamation. Coleman alleged appellants were liable for defamation because Caudle and Stowe, acting in the course and scope of their employment, made false statements to Exxon about him. Specifically, he alleged that Caudle, on an Exxon Near Loss form and on an Exxon inventory sheet, stated he did not gauge tank 7840. Coleman also asserted that Stowe verbally stated to Rick Van Buren, an Exxon investigator from the Houston office, that Stowe "could find no more documents in support of the statement that Coleman could not have gauged tank 7840" and had asked Coleman what had happened multiple times. Coleman maintained in his pleadings that he did gauge the tank, there were documents available to show he gauged the tank, and Stowe had asked him only one time about the incident. His pleadings alleged three other causes of action also arising out of the defamation, namely civil conspiracy, tortious interference with an existing business relationship, and business disparagement.

Appellants answered with a general denial and various affirmative defenses. Thereafter, they moved to dismiss Coleman's case under the Texas Citizens Participation Act, found in chapter 27 of the civil practice and remedies code. TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001-.011 (West 2015). Appellants contended they were entitled to a dismissal because Coleman's legal action was in response to their exercise of their right to free speech and their right of association. They further asserted the case should be dismissed under chapter 27 because Coleman could not present clear and specific evidence of each element of his claims to establish a prima facie case and also because appellants established by a preponderance of the evidence all the elements of their affirmative defenses. Appellants attached the affidavits of Caudle and Stowe to their motion, as well as documentary evidence, including inventory planning sheets and the Near Loss Form.

Caudle was Coleman's immediate supervisor. In his affidavit, he stated that during the day on August 20, 2012, he asked a technician to take some additive out of tank 7840 to make room for a new shipment. The next day, Caudle noticed the inventory numbers for that tank were the same as they had been the previous day. Caudle emailed Coleman to ask why he had failed to gauge the tank. Several days later, after getting no response, Caudle forwarded his email on to Stowe, the Terminal Superintendent, who was Caudle's supervisor. On August 22, 2012, Caudle prepared a Near Loss Report regarding the incident. In the report, Caudle stated, "On 8/20/12 Tech went out to gauge tanks and after gauging tank 7850 he made the assumption that tank 7840 was the same as night before not knowing the tech on the day shift had change[d] the pulling tank back to 7840 and did not gauge the tank." Caudle's affidavit stated that employees prepare Near Loss Reports any time an incident occurs or an environmental or safety risk is observed. The reports are generally used as learning tools at monthly safety meetings. Caudle disputed also stating in an inventory sheet that Coleman failed to gauge the tank.

According to Caudle, Exxon required nightly assessment of the fluid levels in the tanks for three reasons: 1) to avoid overfilling, 2) to determine if any tanks have leaks, and 3) to keep an accurate inventory. He stated that failure to gauge a tank as required could result in serious safety and environmental risks, specifically overfilling a tank or having an unnoticed leak. These conditions could endanger those working at the terminal and result in potential environmental harm. Also, failure to keep a proper inventory of fluids could impact Exxon's economic interests. Caudle further stated in his affidavit that his communications regarding Coleman's failure to gauge the tank were kept internal to Exxon and were made in furtherance of Exxon's interests.

In his affidavit, Stowe stated that Coleman was investigated for violation of Exxon's ethics policy as a result of his failure to gauge the tank and his report of inaccurate information on the inventory planning sheet. On November 6, 2012, Stowe attended a meeting with Exxon investigator Van Buren and Coleman. According to Stowe, Coleman admitted at the meeting that he did not gauge the tank on August 20, 2012. Coleman also admitted he understood he had falsified company records in violation of the ethics policy and signed a handwritten statement to that effect. Exxon placed Coleman on leave and discharged him effective November 30, 2012. Like Caudle, Stowe stated the communications regarding Coleman's failure to gauge the tank were kept internal to Exxon and were made in furtherance of Exxon's interests.

Coleman filed a response opposing appellants' motion to dismiss. He asserted the Act did not apply because it is limited to matters involving the public at large. In an affidavit attached to the motion, Coleman stated he had gauged tank 7840 on August 20th.[2] Coleman also

[2] Coleman's affidavit seems to indicate he did not gauge tank 7840 on August 21, 2012, but did gauge it during his shift that began on August 21st and ended the morning of August 22nd. Coleman stated that because tank 7850 was reading the same as the previous night, he held off on gauging tank 7840 until the morning so he could talk to the technician who works the day shift.

disputed that there were safety reasons for gauging the tanks. He claimed the only reason Exxon required technicians to gauge the tanks was to keep an accurate inventory.

After a hearing at which the trial court heard the arguments of counsel, the court denied appellants' motion to dismiss. In making its ruling, the court indicated it did not believe chapter 27 applied in this instance. This interlocutory appeal followed. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(12) (West 2015).

On appeal, appellants initially contend the Act applies to the allegedly defamatory statements involved. Appellants next contend that since the Act applies, the trial court was required to dismiss Coleman's lawsuit because 1) Coleman failed to meet his burden of establishing a prima facie case on each element of his claims, and, alternatively, 2) appellants established the elements of one or more of their affirmative defenses. Finally, appellants ask us to remand the case to the trial court for a determination of the fees and costs due to them upon dismissal of Coleman's suit.

TEXAS CITIZENS PARTICIPATION ACT

We begin with an examination of the Act in question. The stated purpose of the Act is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury. *Id.* § 27.002; *see In re Lipsky*, No. 13-0928, 2015 WL 1870073, at *6 (Tex. Apr. 24, 2015) (purpose is to summarily dispose of lawsuits designed only to chill First Amendment rights). To promote these purposes, chapter 27 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); *Pickens v. Cordia*, 433 S.W.3d 179, 183 (Tex. App.—Dallas 2014, no pet.). Statutes

like chapter 27 are commonly referred to using the acronym "anti-SLAPP" because they are intended to curb "strategic lawsuits against public participation." *Am. Heritage Capital, LP v. Gonzalez*, 436 S.W.3d 865, 868–69 (Tex. App.—Dallas 2014, no pet.).

A motion to dismiss under chapter 27 must be filed within sixty days of the date of service. TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(b). To prevail on a motion to dismiss, 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. *Id.* § 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 court must still dismiss the lawsuit if the movant 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 shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based. *Id.* § 27.006(a).

At issue in this appeal is whether appellants met their initial burden to show the Act applies. Appellants contend the Act applies for two reasons: the challenged statements were made in the exercise of the right of free speech and in the exercise of the right of association. This Court has held that we review this issue de novo. *Backes v. Misko*, No. 05-14-00566-CV, 2015 WL 1138258, at *6 (Tex. App.—Dallas Mar. 13, 2015, no pet. h.); *Pickens*, 433 S.W.3d at 183–84; *Better Bus. Bureau of Metro. Dallas, Inc. v. BH DFW, Inc.*, 402 S.W.3d 299, 304 (Tex. App.—Dallas 2013, pet. denied) (noting that we review issues of statutory construction de novo).

I. The Right to Free Speech

We first consider appellants' argument that the Act applies because the allegedly defamatory communications were made in exercise of the right of free speech. The Act defines "Exercise of the right of free speech" as "a communication made in connection with a matter of public concern."[3] TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(3). The Act provides that a "Matter of public concern" includes an issue related to: 1) health or safety; 2) environmental, economic, or community well-being; 3) the government; 4) a public official or public figure; or 5) a good, product, or service in the marketplace. *Id.* § 27.001(7).

In the trial court, Coleman argued the Act does not apply because the communications were not public. The Texas Supreme Court recently rejected this argument, stating the plain language of the statute imposes no requirement that the form of the communication be public. *Lippincott v. Whisenhunt*, No. 13-0926, 2015 WL 1967025, at *2 (Tex. Apr. 24, 2015) (per curiam). Under the definition in the Act, the right of free speech has two components: 1) the exercise must be made in a communication, and 2) the communication must be made in connection with a matter of public concern. *Id.* Had the legislature intended to limit the Act to publicly communicated speech, the supreme court reasoned, it could easily have added language to that effect. *Id.*; *see Bilbrey v. Williams*, No. 02-13-00332-CV, 2015 WL 1120921, at *10 (Tex. App.—Fort Worth Mar. 12, 2015, no pet. h.) (mem. op.). There is no dispute about whether a communication was made in this case. We turn to whether the communication was in connection with a matter of public concern.

Appellants maintain the statements are a matter of public concern because they clearly related to health, safety, environmental well-being, and economic interests. They assert that

[3] "Communication" includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic. TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(1).

failure to gauge a tank could result in health, safety, and environmental risks because it could lead to a tank being overfilled or having an undetected leak, resulting in hazardous fluid spilling onto the ground, endangering employees and causing possible environmental harm. Appellants also assert spills and undetected leaks could impact Exxon's economic interests as Exxon would not have an accurate inventory of products coming and going from its facility.

We do not agree that the communications at issue are a matter of public concern. The communications related to Coleman's job performance, specifically his failure to fulfill a mandatory requirement of his job and his delay in responding to inquiries about the incident. Coleman alleged he was defamed when: 1) Caudle stated Coleman did not gauge tank 7840, both in the Near Loss Form and in an inventory sheet; and 2) Stowe stated to Exxon's investigator that a) he could "find no more documents in support of the statement that Coleman could not have gauged tank 7840," and b) he asked Coleman what had happened multiple times. These statements make no mention of health, safety, the environment, or Exxon's economic interests. They only involve Coleman's failure to gauge a tank and failure to timely respond when asked about it. The communications at issue involve nothing more than an internal, personnel matter at Exxon and were not a matter of public concern. The fact that the potential consequences of Coleman's failure to gauge the tank included health, safety, environmental, and economic concerns is not enough to transform communications about a private employment matter into a public concern. *Cf. In re Lipsky*, 411 S.W.3d 530, 542–43 (Tex. App.—Fort Worth 2013, orig. proceeding), *mand. denied*, No. 13-0928, 2015 WL 1870073 (Tex. Apr. 24, 2015) (communications about alleged contamination of residential water well due to fracking were matter of public concern because they involved environmental effects of fracking and safety of oil and gas company's drilling operations). The communications here had only a tangential relationship to health, safety, environmental, and economic concerns. We conclude appellants

did not establish by a preponderance of the evidence that Coleman's lawsuit was based on appellants' exercise of their right of free speech.

II. The Right of Association

We turn to appellants' alternative argument that the Act applies to Coleman's case because the communications at issue were made in the exercise of the right of association. The Act defines "Exercise of the right of association" as "a communication between individuals who join together to collectively express, promote, pursue, or defend common interests." *Id.* § 27.001(2). Appellants contend the communications meet this statutory definition because they were made between Exxon employees regarding issues in which they shared a common interest, specifically Coleman's job performance, compliance with Exxon safety policies, and Exxon's investigation into Coleman's failure to gauge the tank and falsification of documents. Although these communications seem to fall within the plain language of the Act's definition of the exercise of the right of association, we decline to read the statute this broadly, concluding it would lead to absurd results.[4]

In interpreting a statute, our primary objective is to give effect to the legislature's intent in enacting the statute. *Crawford, Servs., Inc. v. Skillman Int'l Firm, L.L.C.*, 444 S.W.3d 265, 267 (Tex. App.—Dallas 2014, pet. dism'd) (citing *City of Houston v. Bates*, 406 S.W.3d 539, 544 (Tex. 2013)). We start with the text of the statute and presume the legislature intended what it enacted. *Id.* Legislative intent is best expressed by the plain meaning of the text unless the plain meaning leads to absurd results or a different meaning is supplied by legislative definition or is apparent from the context. *Id.; Jardin v. Marklund*, 431 S.W.3d 765, 770 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

[4] We question whether Coleman's lawsuit is truly based on, related to, or in response to appellants' right of association. Coleman's defamation-related claims challenge appellants' communications, not their right to associate freely. However, as defined in the Act, exercise of the right of association is a *communication* between individuals who join together based on a common interest.

Here, if we were to look only to the text of section 27.001(2), defining the right of association as a communication between individuals who join together to collectively express, promote, pursue, or defend common interests, it would result in giving constitutional right of association protection to virtually any private communication between two people about a shared interest. That is an absurd result that does not promote the purpose of the Act. Chapter 27 is intended to curb strategic lawsuits against public participation. *See Am. Heritage Capital*, 436 S.W.3d at 868–69. It would be illogical for the Act to apply to situations in which there is no element of public participation. *See Serafine v. Blunt*, No. 03-12-00726-CV, 2015 WL 2061922, at *18 (Tex. App.—Austin May 1, 2015, no pet. h.) (Pemberton, J., concurring) (noting that communications between husband and wife would seem to fall under Act's definition of exercise of right of association).

The Act itself instructs us to construe it liberally to fully effectuate its purpose and intent. TEX. CIV. PRAC. & REM. CODE ANN. § 27.011(b). Further, our analysis of a statute may be informed by the object sought to be obtained, the consequences of a particular construction, the legislative history, and the title of the provision. TEX. GOV'T CODE ANN. § 311.023 (West 2013). Again, the stated purpose of the Act is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury. TEX. CIV. PRAC. & REM. CODE ANN. § 27.002. Considering the title of the Act (the Citizens Participation Act)[5], the object sought to be obtained, and the consequences of reading the definition of "exercise of the right to association" in

[5] *See* Citizens Participation Act, 82nd Leg., R.S., ch. 341, § 1, 2011 Tex. Gen. Laws 960 ("This Act may be cited as the Citizens Participation Act.").

isolation, we think the better approach is to read a public-participation requirement into the definition.

In a case also involving a private employment dispute, the Houston First Court of Appeals reached a similar conclusion, albeit in dicta. *See Cheniere Energy, Inc. v. Lotfi*, 449 S.W.3d 210, 216–17 (Tex. App.—Houston [1st Dist.] 2014, no pet.). In that case, the plaintiff sued her former employer for wrongful termination and sued two former coworkers for tortious interference. 449 S.W.3d at 211–12. The coworkers moved to dismiss the claim against them under the Act, asserting the plaintiff's lawsuit was brought in response to their exercise of the right of association. *Id.* at 212. The plaintiff filed a response, but neither side filed any affidavit evidence. With only the pleadings to go on, the trial court denied the motion to dismiss. *Id.* The court of appeals upheld the trial court's ruling, concluding the coworkers failed to meet their burden to show they were entitled to dismissal because the limited allegations in the plaintiff's pleadings did not show the coworkers had a communication, acted in furtherance of a common interest, or that the claim against them is related to their exercise of the right of association. *Id.* at 214–15.

Referring to the title of the Act, the court noted that the terms "citizen" and "participation" contemplate a larger public purpose. *Id.* at 216. It further stated the plaintiff's lawsuit did not implicate the legislature's express declaration of the purpose behind the Act, which indicates that a nexus is required between the communication and the generally recognized parameters of First Amendment protection. *Id.* "Otherwise, any communication that is part of the decision-making process in an employment dispute — to name just one example — could be used to draw within the [Act's] summary dismissal procedures private suits implicating only private issues." *Cheniere Energy*, 449 S.W.3d at 216–17.

Two members of the three-judge panel concurred, writing separately to emphasize that the Act did not apply to the plaintiff's tortious interference claim against her coworkers. *Id.* at 217 (Jennings, J., concurring). The concurrence stated that, standing alone, the Act's definition of the "exercise of the right of association" in section 27.001(2) appears to include communications that are not constitutionally protected and do not concern citizen or public participation. *Id.* at 219. The concurrence stated that reading section 27.001(2) in isolation would lead to absurd results and would "actually thwart any meritorious lawsuit for demonstrable injury in which a plaintiff alleges that two or more persons engaged in a civil wrong involving a communication." *Id.* At a minimum, such a reading would add unnecessary delay and expense to a plaintiff's lawsuit. *Id.*

Although we are aware that in *Lippincott*, the supreme court cautioned against "judicially amending" the Act by adding words that are not there, we agree that the legislature could not have intended for section 27.001(2) to be read in isolation. *See Lippincott*, 2015 WL 1967025, at *1 (discussing definition of exercise of right of free speech). We conclude that, to constitute an exercise of the right of association under the Act, the nature of the "communication between individuals who join together" must involve public or citizen's participation.[6] *See, e.g.*, *Neyland v. Thompson*, No. 03-13-00643-CV, 2015 WL 1612155, at *4 (Tex. App.—Austin Apr. 7, 2015, no pet. h.) (mem. op.) (allegedly defamatory statements made between members of homeowners' association about performance of HOA's property manager were communications made in exercise of right of association); *Backes*, 2015 WL 1138258, at *9–10 (right of association was invoked where plaintiff's civil conspiracy lawsuit was based on posts two friends made on public social media forum for horse enthusiasts). The communications in this case, made between a few Exxon higher ups who joined together in the course and scope of their employment to

[6] To be clear, public participation does not equal public speech.

internally discuss Coleman's alleged failure to meet the requirements of his job, do not have any element of citizen participation. We therefore conclude appellants have not shown they were exercising their right of association.

Appellants cite *Combined Law Enforcement Associations of Texas v. Sheffield*, No. 03-13-00105-CV, 2014 WL 411672 (Tex. App.—Austin Jan. 31, 2014, pet. filed) (mem. op.), for the proposition that the Act's right of association protection extends to private communications in an employment context. We note that *Sheffield* does not expressly hold that private communications by an employer about an employee invoke the right of association. And we do not consider it to be analogous to Coleman's case.

In *Sheffield*, the employer was a labor union that represented law enforcement officers. *Id.*, at *1. Sheffield worked for the union, but was fired, and sued the union for defamation. *Id.* The allegedly defamatory statements arose from Sheffield's conduct regarding his union-issued computer after he was terminated. *Id.* Sheffield complained of five communications he alleged were collectively made to more than seventy police officers and former coworkers: 1) an email sent by the union's executive director to the union board and staff; 2) a comment made by the executive director to the president of the Corpus Christi Police Officers Association; 3) statements union officials made to the Laredo Police Association President; 4) statements a union lawyer made to an unspecified recipient; and 5) statements the lawyer made to a local District Attorney. *Id.*, at *3. The court of appeals concluded the first three communications were made between members of the union and thus were between individuals who joined together in the union to collectively express, promote, or defend the common interests of police officers. *Id.*, at *5. There was no evidence the remaining two communications were made to members of the union and therefore the Act did not apply to those communications. *Id.* From our reading of the opinion, it seems the court invoked the right of association not because the

communications were between people who had the police union as their employer, but because they were between people who were *members* of the union, an association organized for the purpose of representing law enforcement officers. We are not persuaded that *Sheffield* suggests we should reach a different outcome in this case.

Appellants also make the argument that the Act applies because the definition of the "exercise of the right of association" is almost identical to the "common-interest privilege." There is a qualified privilege against defamation liability for communications made in good faith between people with an interest sufficiently affected by the communication, and the privilege applies to employers and employees who share a common interest in employment-related matters. *See Burbage v. Burbage*, 447 S.W.3d 249, 254 (Tex. 2014); *Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995). This privilege is an affirmative defense. *See Burbage*, 447 S.W.3d at 254. We fail to see how the fact that the nature of the communications might give appellants an affirmative defense to liability is relevant to our determination of whether the Act applies in the first instance.

In summary, we have concluded appellants did not meet their burden to prove their communications were made in the exercise of the right of free speech because the communications did not involve a matter of public concern. We have further concluded appellants did not meet their burden to show that their private, internal communications about Coleman's job performance were made in exercise of the right of association. We overrule appellants' first issue. Because appellants did not meet their burden to show the Act applies to Coleman's lawsuit, we need not address their remaining issues.

We affirm the trial court's order denying the motion to dismiss.

/Ada Brown/
ADA BROWN
JUSTICE

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Petitioners' Appendix

Tab 2

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

EXXONMOBIL PIPELINE COMPANY, ROBERT W. CAUDLE, AND RICKY STOWE, Appellants

No. 05-14-00188-CV V.

TRAVIS G. COLEMAN, Appellee

On Appeal from the 298th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-13-12563.
Opinion delivered by Justice Brown. Justice Lang-Miers and Schenck participating.

In accordance with this Court's opinion of this date, the trial court's January 29, 2014 order denying the motion to dismiss is **AFFIRMED**.

It is **ORDERED** that appellee TRAVIS G. COLEMAN recover his costs of this appeal from appellants EXXONMOBIL PIPELINE COMPANY, ROBERT W. CAUDLE, AND RICKY STOWE.

Judgment entered this 12th day of May, 2015.

Petitioners' Appendix

Tab 3

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No. DC-13-12563

TRAVIS G. COLEMAN, *Plaintiff*,	§	IN THE DISTRICT COURT
v.	§	298th JUDICIAL DISTRICT COURT
EXXONMOBIL PIPELINE COMPANY, ROBERT W. CAUDLE, and RICKY STOWE, *Defendants*.	§	DALLAS COUNTY, TEXAS

ORDER DENYING
DEFENDANTS' MOTION TO DISMISS PURSUANT TO
CHAPTER 27 OF THE TEXAS CIVIL PRACTICE AND REMEDIES CODE

On January 24, 2014, the court held a hearing on the following matter – *Defendants' Motion to Dismiss Pursuant to Chapter 27 of the Texas Civil Practice and Remedies Code* ("Motion"). After careful consideration, including reviewing the file and hearing the arguments of counsel, the courts finds that Chapter 27 of the Texas Civil Practice and Remedies Code does not apply to the alleged communications that form the basis of Plaintiff's claims, and that Defendants are not, therefore, entitled to the relief requested in the Motion. Accordingly, it is ORDERED that the Motion is DENIED.

SIGNED this 29 day of January, 2014.

Emily G. Tobolowsky, District Judge

APPROVED AS TO FORM:

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Petitioners' Appendix

Tab 4

CIVIL PRACTICE AND REMEDIES CODE

TITLE 2. TRIAL, JUDGMENT, AND APPEAL

SUBTITLE B. TRIAL MATTERS

CHAPTER 27. ACTIONS INVOLVING THE EXERCISE OF CERTAIN CONSTITUTIONAL RIGHTS

Sec. 27.001. DEFINITIONS. In this chapter:

(1) "Communication" includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.

(2) "Exercise of the right of association" means a communication between individuals who join together to collectively express, promote, pursue, or defend common interests.

(3) "Exercise of the right of free speech" means a communication made in connection with a matter of public concern.

(4) "Exercise of the right to petition" means any of the following:

(A) a communication in or pertaining to:

(i) a judicial proceeding;

(ii) an official proceeding, other than a judicial proceeding, to administer the law;

(iii) an executive or other proceeding before a department of the state or federal government or a subdivision of the state or federal government;

(iv) a legislative proceeding, including a proceeding of a legislative committee;

(v) a proceeding before an entity that requires by rule that public notice be given before proceedings of that entity;

(vi) a proceeding in or before a managing board of an educational or eleemosynary institution supported directly or indirectly from public revenue;

(vii) a proceeding of the governing body of any political subdivision of this state;

(viii) a report of or debate and statements made in a proceeding described by Subparagraph (iii), (iv), (v), (vi), or (vii); or

(ix) a public meeting dealing with a public purpose, including statements and discussions at the meeting or other matters of public concern occurring at the meeting;

(B) a communication in connection with an issue under consideration or review by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

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

(D) a communication reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding; and

(E) any other communication that falls within the protection of the right to petition government under the Constitution of the United States or the constitution of this state.

(5) "Governmental proceeding" means a proceeding, other than a judicial proceeding, by an

officer, official, or body of this state or a political subdivision of this state, including a board or commission, or by an officer, official, or body of the federal government.

(6) "Legal action" means a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief.

(7) "Matter of public concern" includes an issue related to:

(A) health or safety;

(B) environmental, economic, or community well-being;

(C) the government;

(D) a public official or public figure; or

(E) a good, product, or service in the marketplace.

(8) "Official proceeding" means any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant.

(9) "Public servant" means a person elected, selected, appointed, employed, or otherwise designated as one of the following, even if the person has not yet qualified for office or assumed the person's duties:

(A) an officer, employee, or agent of government;

(B) a juror;

(C) an arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy;

(D) an attorney or notary public when participating in the performance of a governmental function; or

(E) a person who is performing a governmental function under a claim of right but is not legally qualified to do so.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Sec. 27.002. PURPOSE. The purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Sec. 27.003. MOTION TO DISMISS. (a) If a legal action 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, that party may file a motion to dismiss the legal action.

(b) A motion to dismiss a legal action under this section must be filed not later than the 60th day after the date of service of the legal action. The court may extend the time to file a motion under this section on a showing of good cause.

(c) Except as provided by Section 27.006(b), on the filing of a motion under this section, all discovery in the legal action is suspended until the court has ruled on the motion to dismiss.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Sec. 27.004. HEARING. (a) A hearing on a motion under Section 27.003 must be set not later than the 60th day after the date of service of the motion unless the docket conditions of the court require a later hearing, upon a showing of good cause, or by agreement of the parties, but in no event shall the hearing occur more than 90 days after service of the motion under Section 27.003, except as provided by Subsection (c).

(b) In the event that the court cannot hold a hearing in the time required by Subsection (a), the court may take judicial notice that the court's docket conditions required a hearing at a later date, but in no event shall the hearing occur more than 90 days after service of the motion under Section 27.003, except as provided by Subsection (c).

(c) If the court allows discovery under Section 27.006(b), the court may extend the hearing date to allow discovery under that subsection, but in no event shall the hearing occur more than 120 days after the service of the motion under Section 27.003.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.
Amended by:

Acts 2013, 83rd Leg., R.S., Ch. 1042 (H.B. 2935), Sec. 1, eff. June 14, 2013.

Sec. 27.005. RULING. (a) The court must rule on a motion under Section 27.003 not later than the 30th day following the date of the hearing on the motion.

(b) Except as provided by Subsection (c), on the motion of a party under Section 27.003, 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 right of association.

(c) The court may not dismiss a legal action under this section if the party bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question.

(d) Notwithstanding the provisions of Subsection (c), the court shall dismiss a legal action against the moving party if the moving party establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.
Amended by:

Acts 2013, 83rd Leg., R.S., Ch. 1042 (H.B. 2935), Sec. 2, eff. June 14, 2013.

Sec. 27.006. EVIDENCE. (a) In determining whether a legal action should be dismissed under this chapter, the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based.

(b) On a motion by a party or on the court's own motion and on a showing of good cause, the court may allow specified and limited discovery relevant to the motion.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Sec. 27.007. ADDITIONAL FINDINGS. (a) At the request of a party making a motion under Section 27.003, the court shall issue findings regarding whether the legal action was brought to deter or prevent the moving party from exercising constitutional rights and is brought for an improper purpose, including to harass or to cause unnecessary delay or to increase the cost of litigation.

(b) The court must issue findings under Subsection (a) not later than the 30th day after the date a request under that subsection is made.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Sec. 27.008. APPEAL. (a) If a court does not rule on a motion to dismiss under Section 27.003 in the time prescribed by Section 27.005, the motion is considered to have been denied by operation of law and the moving party may appeal.

(b) An appellate court shall expedite an appeal or other writ, whether interlocutory or not, from a trial court order on a motion to dismiss a legal action under Section 27.003 or from a trial court's failure to rule on that motion in the time prescribed by Section 27.005.

(c) Repealed by Acts 2013, 83rd Leg., R.S., Ch. 1042, Sec. 5, eff. June 14, 2013.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.
Amended by:
Acts 2013, 83rd Leg., R.S., Ch. 1042 (H.B. 2935), Sec. 5, eff. June 14, 2013.

Sec. 27.009. DAMAGES AND COSTS. (a) If the court orders dismissal of a legal action under this chapter, the court shall award to the moving party:

(1) court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require; and

(2) sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.

(b) If the court finds that a motion to dismiss filed under this chapter is frivolous or solely intended to delay, the court may award court costs and reasonable attorney's fees to the responding party.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Sec. 27.010. EXEMPTIONS. (a) This chapter does not apply to an enforcement action that is brought in the name of this state or a political subdivision of this state by the attorney general, a district attorney, a criminal district attorney, or a county attorney.

(b) This chapter does not apply to a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or

lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer.

(c) This chapter does not apply to a legal action seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action.

(d) This chapter does not apply to a legal action brought under the Insurance Code or arising out of an insurance contract.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.
Amended by:

Acts 2013, 83rd Leg., R.S., Ch. 1042 (H.B. 2935), Sec. 3, eff. June 14, 2013.

Sec. 27.011. CONSTRUCTION. (a) This chapter does not abrogate or lessen any other defense, remedy, immunity, or privilege available under other constitutional, statutory, case, or common law or rule provisions.

(b) This chapter shall be construed liberally to effectuate its purpose and intent fully.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Petitioners' Appendix

Tab 5

462 S.W.3d 507
Supreme Court of Texas.

Matthew Lippincott and Creg Parks, Petitioners,
v.
Warren Whisenhunt, Respondent

No. 13–0926 | OPINION DELIVERED: April 24, 2015

Synopsis

Background: Nurse anesthetist brought action against administrators at medical facility for defamation, tortious interference with existing and prospective business relations, and conspiracy to interfere with business relations arising out of allegedly defamatory e-mails about nurse anesthetist. The County Court at Law, Hopkins County, Amy M. Smith, J., granted administrators' motions to dismiss all but the defamation claim under the Texas Citizens Participation Act (TCPA), which was an anti-SLAPP (strategic lawsuits against public participation) statute. Nurse anesthetist appealed, and the Texarkana Court of Appeals, 416 S.W.3d 689, reversed and remanded, finding that the TCPA did not apply. Administrators filed petition for review.

Holdings: The Supreme Court held that:

[1] TCPA was not limited to public communications, and

[2] e-mails were communications made in connection with a matter of public concern.

Reversed and remanded.

West Headnotes (6)

[1] **Constitutional Law** Judicial rewriting or revision

A court may not judicially amend a statute by adding words that are not contained in the language of the statute; instead, it must apply the statute as written.

Cases that cite this headnote

[2] **Appeal and Error** Cases Triable in Appellate Court

Supreme Court reviews issues of statutory construction de novo.

Cases that cite this headnote

[3] **Statutes** Language and intent, will, purpose, or policy

Statutes Plain Language; Plain, Ordinary, or Common Meaning

Statutes Plain language; plain, ordinary, common, or literal meaning

Supreme Court's objective in construing a statute is to give effect to the legislature's intent, which requires Supreme Court to first look to the statute's plain language; if that language is unambiguous, Supreme Court interprets the statute according to its plain meaning.

2 Cases that cite this headnote

[4] **Statutes** Language

Statutes Absent terms; silence; omissions

Supreme Court presumes the legislature included each word in the statute for a purpose and that words not included were purposefully omitted.

Cases that cite this headnote

[5] **Pleading** Frivolous pleading

Texas Citizens Participation Act (TCPA), which was an anti-SLAPP (strategic lawsuits against public participation) statute, applied to all communications made in connection with a matter of public concern, and was not limited to public communications; nothing in Act imposed a requirement that the form of the communication be public. Tex. Civ. Prac. & Rem. Code Ann. § 27.001(1).

2 Cases that cite this headnote

[6] **Pleading** Frivolous pleading

E-mails sent by administrators at medical facility containing disparaging comments about certified registered nurse anesthetist were communications made in connection with a matter of public concern and, thus, were protected by the Texas Citizens Participation Act (TCPA), which was an anti-SLAPP (strategic lawsuits against public participation) statute; e-mails related to whether nurse anesthetist properly provided medical services to patients, and included allegations that nurse anesthetist failed to provide adequate coverage for pediatric cases, administered a different narcotic than was ordered, falsified records, and violated facility's sterile protocol policy. Tex. Civ. Prac. & Rem. Code Ann. § 27.001(7).

1 Cases that cite this headnote

***508** ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE SIXTH DISTRICT OF TEXAS

Attorneys and Law Firms

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Jon Michael Smith, Attorney at Law, Austin, for Petitioners Matthew Lippincott, Creg Parks.

David Wilson Dodge, Glast, Phillips & Murray, P.C., Farbod Farnia, H. Arnold Shokouhi, Stephanie Almeter, Ty Mychael Sheaks, McCathern, PLLC, Dallas, for Respondent Warren Whisenhunt.

Opinion

PER CURIAM

[1] A court may not judicially amend a statute by adding words that are not contained in the language of the statute. Instead, it must apply the statute as written. This appeal involves the Texas Citizens Participation Act, under which a defendant may move to dismiss a claim involving the exercise of the right to free speech upon a showing that the communication was made in connection with a matter of public concern. Here, the court of appeals held that the Act only applies to communications that are public in form. But the plain language of the Act merely limits its scope to communications involving a public subject—not communications in public form. Accordingly, we reverse the court of appeals' judgment and remand to that court for further proceedings consistent with this opinion.

In May 2012, Creg Parks and Matthew Lippincott, administrators at First Surgery Suites, LLC (First Surgery), allegedly made disparaging comments about Warren Whisenhunt, a certified registered nurse anesthetist contracted to provide anesthesiology services for First Surgery's patients. As proof of these disparaging comments, Whisenhunt included copies of several emails sent by Lippincott to four recipients summarizing reports Lippincott claimed to have received and, in some instances, investigated about Whisenhunt. The reports alleged that Whisenhunt represented himself to be a doctor, endangered ***509** patients for his own financial gain, and sexually harassed employees.

Whisenhunt filed suit against Lippincott and Parks for defamation, tortious interference with existing and prospective business relations, and conspiracy to interfere in business relations. Lippincott and Parks moved to dismiss all the claims based on the Texas Citizens Participation Act. The trial court granted Lippincott and Parks's motion to dismiss in part and denied it in part, concluding that Whisenhunt met the minimum threshold to proceed with the defamation claim but failed to provide sufficient evidence to proceed with the other claims. The court of appeals reversed and remanded, concluding that because the Act does not apply to private communications, it was inapplicable to this case. 416 S.W.3d 689, 699–700 (Tex.App.2013).

[2] **[3]** **[4]** This appeal requires us to construe the Act, and we review issues of statutory construction de novo. *Molinet v. Kimbrell,* 356 S.W.3d 407, 411 (Tex.2011). Our objective in construing a statute is to give effect to the Legislature's intent, which requires us to first look to the statute's plain language. *Leland v. Brandal,* 257 S.W.3d 204, 206 (Tex.2008). If that language is unambiguous, we interpret the statute according to its plain meaning. *Id.* We presume the Legislature included each word in the statute for a purpose and that words not included were purposefully omitted. *In re M.N.,* 262 S.W.3d 799, 802 (Tex.2008). We are also mindful that the Legislature has directed us to construe this Act "liberally to effectuate its purpose and intent fully." TEX. CIV. PRAC. & REM. CODEE § 27.011.

To assert a motion to dismiss under the Act, the defendant must show "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 ... the right of free speech." *Id.* § 27.005(b). The statute broadly defines "the exercise of the right of free speech" as "a communication made in connection with a matter of public concern." *Id.* § 27.001(3). Under this definition, the right of free speech has two components: (1) the exercise must be made in a communication and (2) the communication must be made in connection with a matter of public concern. We address each element in turn.

[5] First, the statute defines "communication" as "the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic." *Id.* § 27.001(1). The court of appeals concluded that because the purpose of the Act, as described in section 27.002, includes the phrase "otherwise participate in government," the Act only protects public communication. 416 S.W.3d at 697. We disagree.

This statute defines "communication" to include any form or medium, including oral, visual, written, audiovisual, or electronic media—regardless of whether the communication takes a public or private form. TEX. CIV. PRAC. & REM. CODEE § 27.001(1). The plain language of the statute imposes no requirement that the form of the communication be public. Had the Legislature intended to limit the Act to publicly communicated speech, it could have easily added language to that effect. *See In re M.N.,* 262 S.W.3d at 802. In the absence of such limiting language, we must presume that the Legislature broadly included both public and private communication. TEX. CIV. PRAC. & REM. CODEE § 27.011.

[6] Next, we must determine whether the communications were made in connection with a matter of public concern. Here, the emails related to whether Whisenhunt, as a nurse anesthetist, properly provided medical services to patients. The ***510** allegations include claims that Whisenhunt "failed to provide adequate coverage for pediatric cases," administered a "different narcotic than was ordered prior to pre-op or patient consent being completed," falsified a scrub tech record on multiple occasions, and violated the company's sterile protocol policy. We have previously acknowledged that the provision of medical services by a health care professional constitutes a matter of public concern. *See Neely v. Wilson*, 418 S.W.3d 52, 70 n.12 & 26 (Tex.2013) (determining that the public had a right to know about a doctor's alleged inability to practice medicine due to a mental or physical condition); *see also* TEX. CIV. PRAC. & REM. CODEE § 27.001(7) (defining "matter of public concern" to include issues related to health or safety, community well-being, and the provision of services in the marketplace, among other things). Thus, we conclude these communications were made in connection with a matter of public concern.

Lippincott and Parks successfully demonstrated the applicability of the Act. The court of appeals must now consider, among other matters, whether Whisenhunt met the prima facie burden the Act requires. *See* TEX. CIV. PRAC. & REM. CODEE § 27.005(c). Because *In re Lipsky*, 460 S.W.3d. 579, 587 (Tex.2015), squarely addresses the standard a plaintiff must meet in order to establish a prima facie case, we reverse the court of appeals' judgment without hearing oral argument, *see* TEX. R. APP. P. 59.1, and remand this case to that court for further proceedings consistent with this opinion and in light of our analysis in *Lipsky*.

All Citations

462 S.W.3d 507, 58 Tex. Sup. Ct. J. 705

End of Document

Petitioners' Appendix

Tab 6

NEAR LOSS

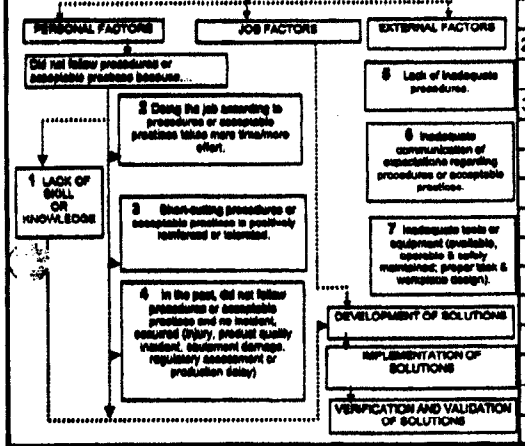
CONTROL NO. 6 30126

	TIME		TERMINAL NAME	INCIDENT LOCATION
8/20/2012	11:30	X AM / PM	Irving	ExxonMobil Additive Tanks

DESCRIPTION OF NEAR MISS: (INCLUDE ALL PERTINENT FACTS ABOUT POTENTIAL INCIDENT)

On 8/20/12 Tech went out to gauge tanks and after gaugeing tank 7850 he made the assumption that tank 7840 was the same as night before not knowing the tech on the day shift had change the pulling tank back to 7840 and did not gauge the tank

ROOT CAUSE ANALYSIS FLOW CHART



ROOT CAUSE NO.	ROOT CAUSE(S) CONTRIBUTING FACTOR: DESCRIBE IN DETAIL WHY POTENTIAL LOSS OCCURRED
1	Not gaugeing all tanks
2	Assumption that are not being used
3	No communication with each tech

SOLUTION(S): HOW TO PREVENT POTENTIAL LOSS FROM OCCURRING

ROOT CAUSE NO.	RCA	SOLUTION(S): HOW TO PREVENT POTENTIAL LOSS FROM OCCURRING	PERSON RESPONSIBLE	AGREED DUE DATE	COMPLETED DATE
1	4	Need to finnish the task at hand	Tech	9/18/2012	9/18/12
2	2	Gauge all tanks daily	Tech	9/18/2012	9/18/12
3	4	Tell someone if something dosenot look wright	Tech	9/18/2012	9/18/12

SYSTEM NO. | FOLLOW-UP ACTION TAKEN / FINAL SOLUTION:

PREPARED BY: (PRINT)	PREPARER'S TITLE	PHONE NO.	DATE PREPARED
Robert Caudle	Foreman	972-579-3820	8/22/2012
REVIEWED/APPROVED BY: DATE	IMMEDIATE SUPERVISOR'S NAME	SUPERVISOR'S TITLE	