Texans for Lawsuit Reform

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September 28, 2015

Hon. Blake Hawthorne, Clerk
Supreme Court of Texas
201 West 14th Street, Room 104
Austin, Texas 78701

RE: Texans for Lawsuit Reform *Amicus curiae* letter brief
No. 15-0407, *ExxonMobil Pipeline Company v. Coleman*

Dear Mr. Hawthorne:

Please accept this *amicus curiae* letter brief submitted by Texans for Lawsuit Reform pursuant to Texas Rule of Appellate Procedure 11 in support of Petitioner ExxonMobil Pipeline Company's (EMPCo) petition for review. Please provide a copy of this brief to the Justices, in accordance with your custom.

Introduction

For more than twenty years, the Texas Legislature has been enacting statutes designed to curb abusive litigation. The Texas Citizens Participation Act (TCPA) is one of those statutes. *See, generally,* TEX. CIV. PRAC. & REM. CODE § 27.001 *et seq*. It was designed and intended to be used to quickly and efficiently resolve lawsuits that attempt to impose liability for constitutionally protected speech. To achieve its goals, the statutory language is broad, reaching all forms of protected speech. The

court of appeals, however, disregarded this Court's recent holding in *Lippincott v. Whisenhunt*, 462 S.W.3d 507 (Tex. 2015) by adding words to part of the statute and ignoring words in other parts of the statute. The court of appeals decision limits the statute's reach by explicitly declining to apply the plain words of the statute. As this Court has repeatedly held, the duty of a court is to apply a statute's plain words, not to judicially amend a statute by adding words to it, or ignoring words in it, to give effect to what that court desires to be the proper outcome in a particular case.

Unless this Court grants ExxonMobil's petition for review and reaffirms its holding in *Lippincott* that the TCPA must be applied as written, there will be confusion among the lower courts regarding the TCPA's reach, which will seriously weaken its effectiveness as a lawsuit-reform measure. The proper application of the TCPA to this case accords with the Legislature's intent of creating an early dismissal procedure for claims arising from constitutionally protected speech and gives force to the plain words of the statute.

Underlying Facts

Travis Coleman, the plaintiff in this case, worked as a terminal technician at an EMPCo facility. One of his duties was to measure the fluid levels in petroleum and additive tanks on a nightly basis, and then record the data he gathered. In pretrial proceedings brought under the TCPA, EMPCo presented evidence to the trial court that the purposes of measuring the liquid levels in the tanks each night was to ensure employee safety and protect the environment by preventing spills and detecting leaks.

EMPCo. alleges that on August 20, 2012, Coleman failed to measure the fluid level in a specific tank, yet he reported that he measured the level and that it was unchanged from the previous night. One of Coleman's supervisors discovered Coleman's failure and

deception the next day. When an investigation was conducted by EMPCo, Coleman admitted that he failed to gauge the tank and falsified a company record, although he has subsequently denied these statements. Ultimately, Coleman was terminated for failing to perform his job and for making a false report.

After being terminated, Coleman sued EMPCo and two supervisors for defamation and other tort claims based on defamation (tortious interference, business disparagement, and civil conspiracy). EMPCo moved to dismiss Coleman's lawsuit under the TCPA, arguing that the TCPA applies to Coleman's claims because the challenged statements were made in (i) "exercise of the right of association" and (ii) "exercise of the right of free speech." The trial court refused to dismiss Coleman's action. EMPCo appealed from that decision, and the court of appeals affirmed the trial court's order.

The Court of Appeals' Decision

In affirming the trial court's order, the court of appeals held that the TCPA did not apply, stating that even though the challenged communications seemed "to fall within the plain language of the Act's definition of the exercise of the right of association," it was necessary for the court to "read a public-participation requirement into the [TCPA's] definition" of "exercise of the right of association." If the legislature intended that a "public participation requirement" was necessary, the legislature would have stated that requirement on the face of the statute. And if public policy demands that the statute be amended to incorporate a "public participation requirement," that is in the province of the legislature, not the judiciary.

The court of appeals also held that the allegedly defamatory statements did not constitute the "exercise of the right of free speech" because the statements did not relate to a "matter of public concern." Here the court concluded that the statements were not protected

because they did not mention health, safety, or the environment—although the court admitted that the consequences of Coleman's failure to gauge the tank (the subject of the statements) included health, safety, and environmental concerns.

Under the TCPA, the "exercise of the right of association" is defined to mean "a communication between individuals who join together to collectively express, promote, pursue, or defend common interests." TEX. CIV. PRAC. & REM. CODE § 27. 001(2). The plain language of this section simply does not include a "public-participation requirement" of any sort. The court of appeal's inclusion of non-statutory words in the right of association definition directly contradicts this Court's conclusion in *Lippencott* that courts cannot judicially amend statutes by fiat, but, instead, must apply them as written.

The statute defines "exercise of the right of free speech" to mean "a communication made in connection with a matter of public concern." *Id*. § 27. 001(3). The statute defines a "matter of public concern" to include "an issue ***related to*** health or safety [and] environmental, economic, or community well-being," among other things. *Id*. § 27. 001(7) (emphasis added). While the court of appeals, in one part of its opinion, added words to the statute to reach its desired outcome, in another part of its opinion, concerning its interpretation of a "matter of public concern," the court ignored specific statutory language.

The statute's definition of a "matter of public concern" is expansive, reaching any "issue" (not "statement") of public concern, including those "related to" health and safety and the environment. The statute does not say that the words giving rise to the defamation action must specifically reference health, safety, or the environment. It says, instead, that the words in question must concern an "an ***issue***" that is "***related to*** health or safety [and] environmental, economic, or community well-being." In this case, the speech in question was related to an issue of public health and safety, environmental protection, and

community well-being: the potential release of hazardous liquids. Merriam-Webster defines "related to" to include the meaning "connected in some way." A job requirement focusing on employee safety and the environment is related to—is "connected in some way"—to a statute focused on public safety and environmental well-being. The court of appeals improperly ignored the words "related to" in order to conclude that the statute did not reach the speech in question.

Review Should be Granted

The TCPA is a lawsuit reform statute that, if properly applied, is a valuable tool for quickly and efficiently dealing with meritless lawsuits that are based on protected speech. It is one of many statutes enacted by the Legislature and signed by the Governor in the past twenty years that are intended to provide greater fairness and efficiency to the civil justice system.

If the Dallas Court of Appeals' decision stands, the TCPA will have been judicially amended to have a far narrower scope than its plain language allows. This Court should grant EMPCo's petition for review and reaffirm its holding in *Lippincott* that the TCPA is to be interpreted literally and broadly to effectuate the Legislature's intent to protect speech and resolve speech-based lawsuits quickly and efficiently.

Statement of Amicus Curiae's Interest

Texans for Lawsuit Reform (TLR) is a volunteer-led organization founded in 1994 to help foster and maintain a system that achieves a fair, merits-based resolution of all civil disputes, in an efficient manner, so as to encourage respect for the law, economic development, and job creation in Texas for the benefit of all Texans. TLR has more than 17,000 individual supporters in 857 towns and cities, representing 1,266 different trades, businesses and professions, who support its mission. TLR has no direct or indirect interest in this matter. TLR's only interest is in avoiding the creation of unnecessary and costly litigation

in the State of Texas. TLR has paid all fees incurred in preparing this brief.

Respectfully submitted,

/s/ E. Lee Parsley

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Certificate of Compliance

Based on a word count run in Microsoft Word, this brief contains 1395 words, excluding the portions of the brief exempt from the word count under Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ E. Lee Parsley
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Certificate of Service

I hereby certify that on September 28, 2015, a true and correct copy of this document was served through the electronic filing service provider on all counsel of record in this case.

/s/ E. Lee Parsley
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