COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00432-CV

REDFLEX TRAFFIC SYSTEMS, INC. — APPELLANT

V.

JAMES H. WATSON — APPELLEE

FROM THE 153RD DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 153-278080-15

MEMORANDUM OPINION[1]

Chapter 707 of the transportation code authorizes local governments to implement photographic traffic signal enforcement systems, commonly referred to as red-light cameras, within their jurisdictions and to assess a civil penalty against the owner of a motor vehicle that runs through a red traffic light in

[1]*See* Tex. R. App. P. 47.4.

violation of the applicable traffic laws. *See* Tex. Transp. Code Ann. § 707.002 (West 2011). Pursuant to chapter 707, the City of Southlake adopted an ordinance implementing a red-light camera program within its city limits, and it contracted with Appellant Redflex Traffic Systems, Inc. to install and administer that system. *See* Southlake, Tex., Code of Ordinances ch. 18, art. VIII, §§ 18-325 to -345 (2016).

On October 31, 2014, a Redflex red-light camera photographed a vehicle registered to Appellee James H. Watson, a Louisiana resident, running a red traffic light in Southlake. He subsequently received a notice of violation in the mail stating he owed a $75.00 penalty. Watson claims he was not in Texas at any time on October 31, 2014. Although the ordinance provided an administrative process whereby Watson could contest the violation, he did not seek to do so, opting instead to simply pay the $75.00 penalty. *See id.* § 18-338. Then he filed a class action lawsuit that seeks more than $130 million in damages, as well as to put an end to red-light camera programs in the entire state.

Redflex is one of the defendants named in that lawsuit. It sought to dismiss Watson's claims against it under the Texas Citizens Participation Act (TCPA)[2], which the trial court denied. Redflex now challenges that ruling by

[2]This statute is commonly referred to as an anti-SLAPP statute. *See Serafine v. Blunt*, 466 S.W.3d 352, 356 (Tex. App.—Austin 2015, no pet.) (noting that "SLAPP" is an acronym for "Strategic Lawsuits Against Public Participation," and that the TCPA is an anti-SLAPP statute); *see also id.* at 365 (Pemberton, J.,

interlocutory appeal. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(12) (West Supp. 2016). For the reasons set forth below, we affirm.

I. BACKGROUND

A. REMOVAL AND REMAND

This case began when Watson filed his class action lawsuit on April 23, 2015, in the 153rd District Court of Tarrant County, Texas, on behalf of himself and a purported class of people who had paid a fine under a red-light camera ordinance. He named as defendants the State of Texas; fifty-three Texas municipalities that allegedly operated red-light camera systems within their jurisdictions; and the companies that administered those systems—American Traffic Solutions, Inc., American Traffic Solutions, LLC, Xerox State & Local Solutions, Inc., and Redflex. He alleged that the municipalities' red-light ordinances impermissibly conflicted with provisions of the transportation code and that chapter 707—the statute authorizing the municipalities to implement red-light camera systems—violated multiple provisions of the Texas constitution. Against the municipalities and the State of Texas Watson asserted a cause of action seeking reimbursement of all fines collected under a red-light camera ordinance, allegedly totaling more than $130 million. Against the companies administering the red-light camera systems, including Redflex, he asserted a civil

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concurring) (noting that SLAPP "refers, generally speaking, to a meritless lawsuit that is aimed at deterring members of the public—through intimidation, expense, distraction, or other collateral impacts of the litigation process in itself—from advocating governmental action on some issue of public concern").

claim under the federal Racketeer Influenced and Corrupt Organizations Act (RICO), a common-law misrepresentation claim, and a claim under the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA). *See* 18 U.S.C.A. §§ 1961–1968 (West 2015); Tex. Bus. & Com. Code Ann. §§ 17.41–.63 (West 2011 & Supp. 2016).

On May 5, 2015, the American Traffic Solutions defendants filed a notice of removal of Watson's suit to the United States District Court for the Northern District of Texas on diversity grounds under the federal Class Action Fairness Act of 2005 (CAFA). *See* 28 U.S.C.A. §§ 1332(d), 1711–1715 (West 2006), §§ 1441, 1446, 1453 (West Supp. 2016). Meanwhile, Redflex was first served with Watson's lawsuit that same day. About a month later, it filed its own notice of removal to supplement the notice filed by the American Traffic Systems defendants by asserting the additional ground of federal question jurisdiction premised upon Watson's federal RICO claims. The parties' briefing suggests that at this point, the procedural maneuvering in the federal proceeding became fairly complex. But our disposition of this appeal does not require us to wade much further into those waters at this point. It is sufficient to say that on May 27, 2016, the federal district court remanded Watson's suit back to the 153rd District Court of Tarrant County, Texas.

B. WATSON'S CLAIMS AGAINST REDFLEX

With the case back in state court, Watson amended his pleadings several times. In this appeal, we need only concern ourselves with Watson's claims against Redflex.

1. Facts Relevant to Watson's Claims Against Redflex

In basic terms, the City of Southlake's red-light camera ordinance imposes a $75.00 civil penalty on the owner of a motor vehicle if the City's red-light camera system captures the owner's vehicle running a red light. *See* Southlake, Tex., Code of Ordinances ch. 18, art. VIII, § 18-333(a). The imposition of that civil penalty is initiated when an authorized entity mails a notice of violation to the vehicle's owner. *Id.* § 18-335(a). If after receiving such a notice the recipient fails to timely pay the $75.00 penalty or contest the violation, the ordinance imposes an additional $25.00 late fee. *Id.* §§ 18-333(b), -335(b)(8), -338. The ordinance also provides an administrative process whereby a person who receives a notice of violation can contest the imposition of the civil penalty. *Id.* § 18-338.

In August 2007, the City entered a contract with Redflex for the latter to implement and administer the City's red-light camera program. The contract called for Redflex to install its red-light camera systems at designated intersections, to maintain those systems, and to process violations of the City's red-light camera ordinance. Under the contract, Redflex's systems would capture images, video, and other data showing potential violations of the City's

ordinance (i.e., vehicles running through a red light), and Redflex would make that information available to an authorized City police officer to determine whether a notice of violation should be issued. If the officer determined a notice of violation should be issued, the contract required Redflex to mail a notice of violation to the vehicle's owner.

A Redflex red-light camera photographed a vehicle registered to Watson running a red light in Southlake. A City police officer reviewed the images and concluded that a violation of the City's red-light camera ordinance had occurred. Redflex then mailed a notice of violation to Watson. The notice stated that a Southlake red-light camera had photographed a vehicle registered to Watson running a red light and that based upon his review of those photographs, a City police officer had concluded that a violation of the City's red-light camera ordinance had occurred. As relevant to Watson's claims against Redflex, the notice further stated that Watson owed a $75.00 penalty; that the failure to pay the penalty could result in the same being reported to a collection agency; and that the allegation and evidence of a culpable mental state were not required for the penalty to be imposed.

2. Watson's Common-Law and DTPA Claims

In his petition, Watson alleges that he was not even in the State of Texas when the violation alleged in the notice occurred and that he did not allow the person operating his vehicle to do so in a manner that violated the law. But he paid the $75.00 penalty nonetheless. And he asserts that by sending the notice

of violation to him, Redflex committed common law misrepresentation[3] and violated the DTPA.

Watson bases his misrepresentation claim on three statements in the notice of violation. First, he alleges that because the City's red-light camera ordinance and the state statute authorizing its enactment are both unconstitutional, they are void, and thus no penalty can be assessed or collected under the ordinance. Consequently, Watson alleges, the notice of violation's statement that he owed $75.00 for violating the ordinance was a false representation upon which he relied, causing him damage.

Second, Watson alleges state law prohibits the administrator of a red-light camera program from reporting to any credit bureau a person's failure to pay a penalty for violating a red-light camera ordinance. He contends the notice of violation's statement that his failure to pay the penalty could be reported to a collection agency was a misrepresentation because it created the false impression that his credit would be ruined if he did not pay. Thus, he alleges, the notice of violation's statement that the failure to pay the penalty could be reported to a collection agency was also a misrepresentation upon which he relied, resulting in damage.

[3]Watson characterizes his common-law cause of action as one for "misrepresentation." In its brief, Redflex states that no such cause of action exists in Texas but that the "two causes of action most closely resembling [Watson's misrepresentation] claim" are negligent misrepresentation and common law fraud. We need not address that matter of pleading here.

Third, Watson alleges that Texas law requires a culpable mental state before a vehicle's owner can be liable for a traffic violation committed by another person who was operating the owner's vehicle. Thus, he contends the notice of violation's statement that a culpable mental state was not required for the imposition of the penalty was a misrepresentation upon which he relied, causing him damage.

As for his DTPA claim, Watson alleges that because Redflex, by its red-light camera systems, engages in the business of collecting evidence for use before a court, board, officer, or investigating committee, it is an "investigations company" within the meaning of the Texas Private Security Act (TPSA). *See* Tex. Occ. Code Ann. §§ 1702.001–.413 (West 2012 & Supp. 2016). Watson contends that state law requires an investigations company to be licensed, and he alleges that at all times relevant to his case, Redflex did not have such a license. Thus, he contends, Redflex violated the TPSA act by collecting evidence concerning a violation of the City's red-light camera ordinance and sending him a notice of violation. And he alleges that such a violation of the TPSA is also a violation of the DTPA, a violation that was a producing cause of damages to him.

C. REDFLEX'S TCPA MOTION TO DISMISS

On July 26, 2016, Redflex filed a motion to dismiss under the TCPA.[4] *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.003 (West 2015). The TCPA protects citizens from retaliatory lawsuits that seek to intimidate or silence them on matters of public concern. *In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015) (orig. proceeding). Its purpose is to identify and summarily dispose of lawsuits designed only to chill First Amendment rights, not to dismiss meritorious lawsuits. *Id.* at 589 (citing Tex. Civ. Prac. & Rem. Code Ann. § 27.002). Thus, the TCPA provides a two-step process whereby a defendant who believes a lawsuit responds to his valid exercise of First Amendment rights may seek dismissal of the suit. *See id.* at 586–87. Under the first step, the movant bears the initial burden to show by a preponderance of the evidence that the plaintiff's claim is based on, relates to, or is in response to a defendant's exercise of the right of free speech, the right to petition, or the right of association. *Id.* at 586–87 (citing Tex. Civ. Prac. & Rem. Code Ann. § 27.005(b)). If the movant meets that burden, then under the second step, the burden shifts to the plaintiff to establish by clear and specific evidence a prima facie case for each essential element of

[4]Redflex filed in the federal district court an essentially identical motion to dismiss under the TCPA before the case was remanded to state court. The federal district court did not, however, hold a hearing on that motion. In this appeal, Watson bases some, but not all, of his arguments on the fate of Redflex's pre-remand TCPA motion to dismiss in the federal proceeding. As we discuss in more detail below, however, our disposition of this appeal does not require us to reach those particular arguments.

the claim in question. *Id.* at 587 (citing Tex. Civ. Prac. & Rem. Code Ann. § 27.005(c)).

In its motion to dismiss, Redflex asserted that Watson's claims against it are based on, related to, and in response to the notice of violation it mailed to him. It contended that the notice of violation was an exercise of both its right to free speech and its right to petition. And it argued Watson could not meet his burden to establish by clear and specific evidence a prima facie case for each essential element of his claims against it. Redflex therefore moved the trial court to dismiss Watson's suit.

In his response to Redflex's motion to dismiss, Watson argued that Redflex's motion was not timely filed; that it was barred under principles of res judicata because the federal court had already addressed it; that Redflex was estopped from raising the motion in state court because, by voluntarily invoking the jurisdiction of the federal courts, it had chosen to litigate the issue in federal court; and that it had waived its right to any relief under the TCPA. Watson further argued that the TCPA does not apply to his claims because the notice of violation was neither an exercise of the right to free speech nor the right to petition. He also argued that the TCPA does not apply to his claims because the notice of violation constituted commercial speech, which is not protected by the TCPA. *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.010(b) (West 2015). Finally, Watson argued that even if Redflex met its burden to show the TCPA applied, he

nevertheless met his burden to establish a prima facie case for each essential element of his claims.

D. Hearing on Redflex's TCPA Motion to Dismiss

On September 23, 2016, the trial court held a hearing on Redflex's motion to dismiss. Following that hearing, the trial court denied Redflex's motion to dismiss. In its order, the trial court expressly found that the motion was timely filed, and it did not otherwise state the reasons for its ruling. In three issues, Redflex has appealed from that order.

II. STANDARD OF REVIEW

We review de novo a trial court's ruling on a motion to dismiss under the TCPA. *United Food & Commercial Workers Int'l Union v. Wal-Mart Stores, Inc.*, 430 S.W.3d 508, 511 (Tex. App.—Fort Worth 2014, no pet.). We consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based. Tex. Civ. Prac. & Rem. Code Ann. § 27.006(a) (West 2015).

III. RES JUDICATA AND ESTOPPEL

Watson contends that because Redflex filed a motion to dismiss under the TCPA in federal district court while this case was pending there, principles of res judicata and estoppel precluded Redflex from prevailing on the nearly-identical motion to dismiss it filed in state district court following remand. We discuss this issue to acknowledge that we did not overlook it.

The record, as well as the briefing and oral argument of both parties, reflect that for much of the duration of this litigation to date, both parties have assumed that the TCPA motion to dismiss Redflex filed in the federal proceeding was overruled by operation of law before this case was remanded to state court. That assumption is grounded on TCPA section 27.008(a), which provides,

> 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.

Id. § 27.008(a) (West 2015). The "time prescribed by Section 27.005" is "not later than the 30th day following the date of the hearing on the motion." *Id.* § 27.005(a) (West 2015). And with respect to the hearing requirement, the TCPA provides,

> 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 . . . .

Id. § 27.004(a) (West 2015).

Redflex filed its TCPA motion to dismiss in the federal district court on July 6, 2015. On September 23, 2015—79 days after it filed that motion to dismiss—Redflex filed a motion in the federal district court requesting the court set a hearing on the motion to dismiss. The court denied that motion and never held a hearing on Redflex's TCPA motion to dismiss. Both parties have thus assumed that under TCPA section 27.008(a), the TCPA motion to dismiss Redflex filed in

the federal district court was overruled by operation of law. And taking that assumption as true, Watson argues that because Redflex's TCPA motion to dismiss was overruled by operation of law in the federal proceeding, principles of res judicata and estoppel precluded Redflex from raising another TCPA motion to dismiss in state court after remand.

We note, however, that the language of TCPA section 27.008(a) provides that a TCPA motion to dismiss is considered overruled by operation of law if the trial court does not rule on the motion "in the time prescribed by Section 27.005." *Id.* § 27.008(a). The time prescribed by section 27.005 is "not later than the 30th day following the date of the hearing on the motion." *Id.* § 27.005(a). But the federal district court never held a hearing on Redflex's TCPA motion to dismiss, which raises the issue of whether Watson and Redflex are correct in their assumption that the motion was overruled by operation of law. Indeed, the Fifth Circuit recently considered this issue and concluded,

> Given that the deadline for ruling on the motion before it is deemed denied [by operation of law] is explicitly pegged to the date of the hearing and that no hearing occurred, a straightforward reading of the statute indicates that the motion was never deemed denied by operation of law.

See Cuba v. Pylant, 814 F.3d 701, 710 (5th Cir. 2016). It does not appear that our court, however, has previously addressed that issue, and to our knowledge, only one of our sister courts has. *See Braun v. Gordon*, No. 05-17-00176-CV, 2017 WL 4250235, at *1–2 (Tex. App.—Dallas Sept. 26, 2017, no pet. h.) (mem. op.) (concluding that TCPA motion to dismiss was not overruled by operation of

law where trial court held no hearing on the motion). In any event, we need not address it in this case because even if we were to conclude that Redflex's TCPA motion to dismiss in the federal proceeding was not overruled by operation of law, Redflex would, nevertheless, not prevail in this appeal because, as we conclude below, the state district court could have properly denied Redflex's post-remand TCPA motion to dismiss on the ground that the TCPA's commercial-speech exemption applies to Watson's claims against Redflex. We therefore decline to decide whether the federal district court's failure to hold a hearing on Redflex's pre-remand TCPA motion to dismiss resulted in that motion being overruled by operation of law under TCPA section 27.008(a). *See* Tex. R. App. P. 47.1; *see also Campbell v. Kosarek*, 44 S.W.3d 647, 650 (Tex. App.—Dallas 2001, pet. denied) (noting that addressing issues unnecessary to disposition of the appeal would be advisory in nature).

IV. THE TCPA'S COMMERCIAL-SPEECH EXEMPTION

In its first issue, Redflex argues the TCPA applies to Watson's claims against it. We conclude, however, that the TCPA's commercial-speech exemption exempts Watson's claims against Redflex from the TCPA's protections.

A. REDFLEX'S AND WATSON'S POSITIONS REGARDING THE APPLICABILITY OF THE TCPA'S COMMERCIAL-SPEECH EXEMPTION

Watson argues that the TCPA does not apply to the notice of violation because it falls within the TCPA's commercial-speech exemption. *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.010(b). That exemption provides,

> [The TCPA] 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.

Id. Redflex argues this exemption does not apply. The primary dispute between Watson and Redflex over the applicability of the exemption boils down to how each reads the phrase "in which the intended audience is an actual or potential buyer or customer," which we refer to as the "intended-audience phrase."[5] *Id.*

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[5]In its opening brief, Redflex stated,

> [E]ven assuming the language in the [notice of violation] occurred in connection with the sale of Redflex's services to the City of Southlake—it did not—the commercial speech exception does not apply to this litigation, because the [notice of violation's] intended audience—Mr. Watson—is not Redflex's actual or potential customer.

Broadly construed, the phrase, "it did not," though vague and conclusory, could be understood as an argument that the commercial-speech exemption does not apply because the notice of violation did not arise out of the sale of Redflex's services. As we discuss in more detail below, however, the pleadings and evidence demonstrate that but for the sale of Redflex's services to the City of Southlake, services that included sending notices of violation to the owners of vehicles Redflex's cameras captured running a red light, Redflex would not have sent the notice of violation to Watson.

As Redflex reads it, the intended-audience phrase applies to the entire series of potential commercial activities listed in the commercial-speech exemption—the sale or lease of goods, services, an insurance product, insurance services, or a commercial transaction—as opposed to applying only to the immediately-preceding term "commercial transaction." This reading, Redflex argues, means the commercial-speech exemption does not apply unless:

> (1) the defendant is a person primarily engaged in the business of selling or leasing goods or services;
>
> (2) the speech at issue arose out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction; and
>
> (3) the intended audience of the speech was an actual or potential buyer or customer.

Watson, by contrast, argues the intended-audience phrase applies only to the immediately-preceding term "commercial transaction." This reading, Watson argues, means the exemption applies if:

> (1) the defendant is a person primarily engaged in the business of selling or leasing goods or services; and
>
> (2) the speech at issue arose out of
>
> > (A) the sale or lease of goods or services;
> >
> > (B) an insurance product;
> >
> > (C) insurance services; or
> >
> > (D) a commercial transaction in which the intended audience of the speech was an actual or potential buyer or customer.

These divergent readings result in equally divergent consequences. Applying its reading, Redflex contends the commercial-speech exemption does not apply unless the intended audience of the speech or conduct at issue was an actual or potential buyer or customer. Because Redflex's customers are municipalities, not individuals, it argues, the commercial-speech exemption is inapplicable because Watson, the intended audience of the speech at issue here, was not an actual or potential buyer or customer of Redflex's goods or services. Applying his reading, however, Watson argues the exemption applies because it does not require the intended audience of the speech or conduct at issue to have been an actual or potential buyer or customer; rather, it is sufficient that Redflex is primarily engaged in the business of selling goods and services and the notice of violation arose out of the sale of its goods and services to the City of Southlake.

B. REDFLEX'S CASELAW ARGUMENT

We turn first to Redflex's contention that several Texas state appellate courts, as well as the Fifth Circuit, have already construed the TCPA's commercial-speech exemption and have done so in the way it advocates. *See NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C.*, 745 F.3d 742, 753–55 (5th Cir. 2014); *Whisenhunt v. Lippincott*, 474 S.W.3d 30, 42–43 (Tex. App.—Texarkana 2015, no pet.); *Schimmel v. McGregor*, 438 S.W.3d 847, 856–58 (Tex. App.—Houston [1st Dist.] 2014, pet. denied); *Pena v. Perel*, 417 S.W.3d 552, 555 (Tex. App.—El Paso 2013, no pet.); *Better Bus. Bureau of Metro. Houston, Inc. v. John Moore*

Srvs., Inc., 441 S.W.3d 345, 354 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); *Better Bus. Bureau of Metro. Dallas, Inc. v. BH DFW, Inc.*, 402 S.W.3d 299, 309 (Tex. App.—Dallas 2013, pet. denied); *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 88–89 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (op. on reh'g). In its briefing, Redflex relies in particular upon *NCDR* and *Crazy Hotel* to support its reading of the commercial-speech exemption. Those cases apply a four-pronged test to determine whether the exemption applies. *See NCDR*, 745 F.3d at 754–55; *Crazy Hotel*, 416 S.W.3d at 88–89. Under that test, the exemption applies if

> (1) the cause of action is against a person primarily engaged in the business of selling or leasing goods or services;
>
> (2) the cause of action arises from a statement or conduct by that person consisting of representations of fact about that person's or a business competitor's business operations, goods, or services;
>
> (3) the statement or conduct was made either for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services or in the course of delivering the person's goods or services; and
>
> (4) the intended audience for the statement or conduct [is an actual or potential buyer or customer].

NCDR, 745 F.3d at 754–55; *Crazy Hotel*, 416 S.W.3d at 88–89 (alteration in original) (citation omitted). The use of the conjunctive "and" between the third and fourth prong means that test requires the intended audience of the speech or conduct at issue to be an actual or potential customer in order for the exemption to apply. That, of course, is the reading of the intended-audience phrase Redflex

urges us to adopt and apply here. For the reasons discussed below, however, we decline to adopt the test set forth in *NCDR* and *Crazy Hotel*.

We begin by considering *NCDR*. That case required the Fifth Circuit to apply the TCPA's commercial-speech exemption, which it was constrained to do in "the way the [Texas] supreme court would, based on prior precedent, legislation, and relevant commentary." *NCDR*, 745 F.3d at 753 (citation omitted). But at the time, the supreme court "ha[d] not yet interpreted the TCPA, much less the 'commercial speech' exemption." *Id.* Thus, the *NCDR* court turned to decisions from the Texas intermediate appellate courts construing and applying the exemption—of which there were few—in an effort to make an *Erie* guess in order to apply it. *Id.* at 753, 754; *see Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). In that context, the *NCDR* court looked to the First Court of Appeals's decision in *Crazy Hotel*, noting it had applied the four-pronged test set forth above in analyzing whether the commercial-speech exemption applied. *NCDR*, 745 F.3d at 753–54. The *NCDR* court further explained *Crazy Hotel* had adopted that four-pronged test from a California supreme court case that had interpreted a commercial-speech exemption in California's anti-SLAPP statute, an exemption that was "similar, but not identical, to Texas's." *Id.* at 754. In making its *Erie* guess, the *NCDR* court adopted and applied *Crazy Hotel*'s four-pronged test. *Id.* at 754–55.

In his brief, Watson, too, highlights the fact that *Crazy Hotel* adopted the four-pronged test from a California supreme court case that had applied

California's anti-SLAPP statute. He points out that the language of the commercial-speech exemption in California's anti-SLAPP statute differs from the language of the TCPA's commercial-speech exemption. And he emphatically insists that because of those differences, reading the intended-audience phrase in accordance with *Crazy Hotel*'s four-pronged test effectively rewrites the TCPA's commercial-speech exemption. Our duty is, of course, to apply the statute our legislature enacted, not the one California's legislature did. *See Liberty Mut. Ins. Co. v. Adcock*, 412 S.W.3d 492, 494 (Tex. 2013) ("[O]ur primary objective in construing a statute is to ascertain and give effect to the Legislature's intent."). So, Watson's argument, along with the *NCDR* court's observation that the four-pronged test in *Crazy Hotel* was adopted from a California supreme court case that applied a commercial-speech exemption to California's anti-SLAPP statute that was similar, but not identical, to the TCPA's, led us to inquire further.

The California supreme court case from which *Crazy Hotel* adopted the four-pronged test in question here was *Simpson Strong-Tie Co., Inc. v. Gore*, 230 P.3d 1117 (Cal. 2010). *See Crazy Hotel*, 416 S.W.3d at 88–89. The statute at issue in *Simpson* was section 425.17(c) of the California Code of Civil Procedure, *see* 230 P.3d at 1126–29, the commercial-speech exemption to California's anti-SLAPP law that the court in *Crazy Hotel* found was similar to the TCPA's, *see* 416 S.W.3d at 88. Under that statue, California's anti-SLAPP law

> does not apply to any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services, including, but not limited to, insurance, securities, or financial instruments, arising from any statement or conduct by that person if both of the following conditions exist:
>
> (1) The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services, or the statement or conduct was made in the course of delivering the person's goods or services.
>
> (2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer, or the statement or conduct arose out of or within the context of a regulatory approval process, proceeding, or investigation, except where the statement or conduct was made by a telephone corporation in the course of a proceeding before the California Public Utilities Commission and is the subject of a lawsuit brought by a competitor, notwithstanding that the conduct or statement concerns an important public issue.

Cal. Civ. Proc. Code § 425.17(c). Interpreting that statute, the California supreme court set forth the four-pronged test *Crazy Hotel* adopted, and that test tracks the language of the California statute. *See Crazy Hotel*, 416 S.W.3d at 88–89.

But is a test that tracks the language of the commercial-speech exemption to California's anti-SLAPP statute helpful in interpreting the TCPA's commercial-speech exemption? Perhaps—if the language of California's exemption happens to also track the language of the TCPA's. But it does not. Again, the TCPA's commercial-speech exemption provides the TCPA

> 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.

Tex. Civ. Prac. & Rem. Code § 27.010(b). We first note that California's exemption is notably longer than, and structured differently from, the TCPA's exemption. We also note that the California exemption contains language the TCPA's exemption does not. For instance, the California exemption contains a clause requiring that the statement or conduct at issue "consists of representations of fact about that person's or a business competitor's business operations, goods, or services." Cal. Civ. Proc. Code § 425.17(c)(1); *see Simpson*, 230 P.3d at 1129. That particular clause forms the second prong of the test adopted in *Crazy Hotel*. *See* 416 S.W.3d at 88–89. But as the *NCDR* court pointed out, the TCPA's exemption lacks such a clause. *See NCDR*, 745 F.3d at 755 (citing Cal. Civ. Proc. Code § 425.17(c)(1)).

Additionally, the California statute contains a clause requiring that the statement or conduct be "**made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services**, *or the statement or conduct was made in the course of delivering the person's goods or services*." Cal. Civ. Proc. Code § 425.17(c)(1) (emphases added); *see Simpson*, 230 P.3d at 1129. That particular clause forms the third prong of the test adopted in *Crazy Hotel*. *See*

416 S.W.3d at 88–89. But as the Seventh Court of Appeals has recently observed, the TCPA's exemption lacks the phrase we have bolded. *See Castleman v. Internet Money Ltd.*, No. 07-16-00320-CV, 2017 WL 1449224, at *3 (Tex. App.—Amarillo Apr. 19, 2017, pet. filed) (mem. op.) (noting that omitted from the verbiage of the TCPA's commercial-speech exemption is any mention of the bolded language). And we further note that the TCPA's exemption also lacks the phrase we have italicized. *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.010(b).

In sum, there are substantial differences in the structure of, and language in, the commercial-speech exemption in California's anti-SLAPP statute and the TCPA's exemption, and thus we do not believe that a test the California supreme court developed to apply the former is particularly helpful to us in carrying out our duty to apply the latter. *See Castleman*, 2017 WL 1449224, at *4 (declining to apply second prong of *Crazy Hotel* test and concluding that because of the differences between California's exemption and the TCPA's, neither California's exemption nor the decisions of those Texas intermediate and federal appellate courts that incorporate aspects of California's exemption when interpreting the TCPA's exemption are controlling); *see also Global Tel*Link Corp. v. Securus Techs. Inc.*, No. 05-16-01224-CV, 2017 WL 3275921, at *3 (Tex. App.—Dallas July 31, 2017, pet. filed) ("We agree with the Amarillo Court of Appeals [that] the California statute does not control or even assist in the interpretation of [the TCPA's exemption]." (footnote omitted)).

C. WATSON'S STATUTORY-CONSTRUCTION ARGUMENT

Having concluded that the cases interpreting the TCPA's commercial-speech exemption that Redflex pointed us to are of no aid to us here, we turn now to consider Watson's statutory-construction argument. We review a question of statutory construction de novo. *Liberty Mut.*, 412 S.W.3d at 494. Our primary objective in construing a statute is to ascertain and give effect to the legislature's intent. *Id.* The truest measure of what the legislature intended is what it enacted. *Melden & Hunt, Inc. v. E. Rio Hondo Water Supply Corp.*, 520 S.W.3d 887, 893 (Tex. 2017). Thus, the plain meaning of the statutory text provides the best expression of legislative intent. *See Liberty Mut.*, 412 S.W.3d at 494. We read the words and phrases of a statute in context and construe them according to the rules of grammar and common usage. *See* Tex. Gov't Code Ann. § 311.011(a) (West 2013); *Crosstex Energy Servs., L.P. v. Pro Plus, Inc.*, 430 S.W.3d 384, 390 (Tex. 2014). We construe statutes so that no part is surplusage, but so that each word has meaning. *Pedernal Energy, LLC v. Bruington Eng'g, Ltd.*, No. 15-0123, 2017 WL 1737920, at *4 (Tex. Apr. 28, 2017) (citing *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 256 (Tex. 2008)). We presume the legislature chooses a statute's language with care, including each word chosen for a purpose, while purposefully omitting words not chosen. *Id.* (quotation and citation omitted). If a statute's plain language is clear and unambiguous, we do not resort to extrinsic aides in interpreting it. *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016).

It is evident from its structure that the exemption's applicability is limited to legal actions that involve two characteristics: the legal action must (1) be brought against a particular kind of person and (2) arise out of a particular kind of statement or conduct. *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.010(b). The statutory-construction question in this case involves the second component—what we will call the "arises-out-of component"—which provides, "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." *Id.*

Watson bases his reading of the commercial-speech exemption on its plain language. He points out that the arises-out-of component is grammatically structured as a series that employs the disjunctive term "or." He further notes the intended-audience phrase appears at the end of the series, and there is no comma before the intended-audience phrase that sets it off from the rest of the series. This grammatical structure and punctuation, Watson argues, means the intended-audience phrase does not modify each item in the series but only the item that immediately precedes it—the term "commercial transaction." Reading the exemption this way would result in the exemption applying if:

> (1) The legal action is brought against a person primarily engaged in the business of selling or leasing goods or services; and
>
> (2) the statement or conduct arises out of
>
> > (A) the sale or lease of goods, services, or an insurance product;

> (B) insurance services; or
>
> (C) a commercial transaction in which the intended audience is an actual or potential buyer or customer.

This reading is both grammatical and reasonable. And we conclude it is correct.

As used in the commercial-speech exemption, the intended-audience phrase functions as a modifier. Because that phrase follows a series of items, the fundamental question here is whether that phrase modifies each item in the series or whether it modifies only the last item. That being the question, Watson's focus on how the exemption is punctuated to determine the answer finds strong support in a recent supreme court decision involving the same question. *See Sullivan*, 488 S.W.3d at 294. *Sullivan* involved the construction of section 27.009(a) of the TCPA. *See id.* at 295, 296. In pertinent part, section 27.009(a) provides,

> (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 . . . .

Tex. Civ. Prac. & Rem. Code Ann. § 27.009(a) (West 2015); *see Sullivan*, 488 S.W.3d at 296. And the issue in that case was whether the modifying phrase "as justice and equity may require" modified all the items in the series preceding it (specifically, the "attorney's fees" item) or whether it modified only the "other expenses" item. *See Sullivan*, 488 S.W.3d at 297.

The supreme court concluded that the statute's punctuation resolved the matter: it held that the statute's punctuation indicated the legislature intended to limit the justice-and-equity modifier to the last item in the series. *Id.* at 298. The court's analysis began with the proposition that "[p]unctuation is a permissible indicator of meaning." *Id.* at 297 (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 161 (2012) (citing *United States Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454 (1993))). The court then stated that properly placed commas could determine whether a modifier that follows a series applies to the entire series or only to the item immediately preceding it. *See id.* Thus, the presence of a comma after the final item in a series and before the modifier indicates an intent that the modifier apply to the entire series. *See id.* at 298. By contrast, the absence of a comma after the final item in a series and before the modifier signals an intent to limit the modifier to the last item in the series. *See id.* Thus, because no comma appeared after the "other expenses" item in TCPA section 27.009(a)(1), the court held the statute's plain language revealed the legislature intended to limit the justice-and-equity modifier to the "other expenses" item. *See id*.

The same punctuation was used here. The lack of a comma after the term "commercial transaction" signals that the legislature intended to limit the intended-audience phrase to the "commercial transaction" item. *See id.* Moreover, we cannot overlook the fact that Redflex's proposed reading of the commercial-speech exemption subtly transforms the term "in which" that the

legislature wrote after the term "commercial transaction" into the term "and." Had the legislature intended "and" instead of "in which," it could have written "and" instead of "in which." It did not do so. It chose to use the term "in which," a decision we presume it made with care. *See Pedernal Energy*, 2017 WL 1737920, at *4. And it declined to use the term "and," a decision we presume it made purposefully. *Id.* Based upon the commercial-speech exemption's language and punctuation, we conclude the intended-audience phrase modifies only the term "commercial transaction." Accordingly, contrary to Redflex's contention, Watson's commercial-speech exemption argument is not upended by the mere fact that the intended audience of the notice of violation at issue here was not an actual or potential buyer or customer of Redflex.

D. THE COMMERCIAL-SPEECH EXEMPTION APPLIES

As we have construed it above, the commercial-speech exemption applies if (1) Redflex is a person primarily engaged in the business of selling or leasing goods or services, and (2) the statement or conduct arises out of the sale or lease of goods, services, or an insurance product.

1. Redflex is a Person Primarily Engaged in the Business of Selling or Leasing Goods or Services

There is no doubt—or dispute—that Redflex meets the first requirement. In its briefing, Redflex concedes it "engage[s] in the business of selling its photo-enforcement services to municipalities like the City of Southlake." And in its motion to dismiss, Redflex likewise conceded that it is in the business of

contracting with municipalities to install and administer their photo-enforcement systems. Additionally, Redflex attached to its motion to dismiss the affidavit of Robert Salcido, Redflex's Director of Operations and Corporate Custodian of Records, who averred that "Redflex is a traffic safety company headquartered in Phoenix, Arizona," which "contracts with . . . local governments to provide traffic safety assessments, counsel, and program development." He further stated that "Redflex partners with more than 220 communities and operates more than 2,000 traffic safety systems in the United States and Canada." Thus, there is no question Redflex is a person primarily engaged in the business of selling or leasing goods or services

2. The Notice of Violation Arose Out of the Sale of Redflex's Services

It is further undisputed that Redflex's relationship with the City of Southlake is a contractual one that, broadly speaking, involved Redflex's provision of services related to the administration and enforcement of the City of Southlake's red-light camera program. Under that contract, if an authorized City police officer reviewed the data Redflex gathered in performing its services and instructed Redflex to send a notice of violation to someone, Redflex was contractually obligated to send the notice to that person. Further, under the contract, Redflex had no discretion or authority to send a notice of violation absent an authorized City police officer directing it to do so. In discussing Redflex's contract with the City, Salcido noted the contract's provision that only an authorized City police officer could decide whether to issue a notice of violation. He further stated that

Redflex sent the notice of violation to Watson "[o]n behalf of and at the direction of the Southlake Police Department," confirming that in sending that notice to Watson, Redflex was simply performing a service under its contract with the City. And, of course, in exchange for the services it provided to the City, Redflex was entitled to receive compensation, namely, a percentage of the fines people paid after receiving a notice of violation from Redflex. Thus, the notice of violation arose out of the services Redflex was contractually obligated to perform for the City, services it performed in exchange for compensation. Accordingly, the pleadings and affidavits demonstrate the notice of violation arose out of the sale of Redflex's services.

In sum, because the pleadings and affidavits demonstrate that (1) Watson's claims against Redflex are brought against a person primarily engaged in the business of selling services and (2) the statements or conduct in question here arose out of Redflex's sale of services to the City of Southlake, we conclude the TCPA's commercial-speech exemption applies. *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.010(b). And by the terms of that exemption, the TCPA does not apply to Watson's claims against Redflex. *Id.*

Of course, we express no opinion on the underlying merits of Watson's claims against Redflex. We decide only that under the plain language of the TCPA's commercial-speech exemption, those claims are exempted from application of the TCPA. Therefore, the trial court did not err by denying Redflex's motion to dismiss. We overrule Redflex's first issue. And because our

resolution of Redflex's first issue is dispositive of this appeal, we do not address Redflex's second or third issues. *See* Tex. R. App. P. 47.1.

V. WATSON'S RULE 45 MOTION FOR SANCTIONS

Watson filed a "Motion for Sanctions Under TRAP 45," requesting sanctions against Redflex for filing a frivolous appeal. We have considered the motion, and it is denied.

VI. CONCLUSION

Having overruled Redflex's first issue, which is dispositive of this appeal, we affirm the trial court's order without addressing Redflex's second or third issues. Tex. R. App. P. 43.2(a), 47.1.

/s/ Lee Gabriel

LEE GABRIEL
JUSTICE

PANEL: WALKER, GABRIEL, and PITTMAN, JJ.

DELIVERED: October 5, 2017