REVERSE and REMAND and Opinion Filed November 5, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-01229-CV

KALEI MERRILL, Appellant
V.
MITCHELL CURRY, MELINDA DEFELICE AND TAMIRA GRIFFIN, EACH INDIVIDUALLY AS DEFENDANTS, Appellees

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On Appeal from the 380th Judicial District Court
Collin County, Texas
Trial Court Cause No. 380-01827-2019

MEMORANDUM OPINION

Before Justices Whitehill, Pedersen, III, and Reichek
Opinion by Justice Reichek

Kalei Merrill sued McKinney Independent School District administrators Mitchell Curry, Melinda DeFelice, and Tamara Griffin, all individually, alleging they improperly used unauthorized nude photographs of her that were posted and sent to them by her ex-fiancé to force her to resign her position as teacher.

Appellees moved to dismiss all claims under chapter 27 of the Texas Civil Practice and Remedies Code (Texas Citizens Participation Act) and to dismiss some claims under Texas Rule of Civil Procedure 91a. The trial court denied the rule 91a motion, granted the TCPA motion, and dismissed Merrill's lawsuit. In four issues

on appeal, Merrill generally argues the trial court erred by (1) granting the TCPA motion and (2) failing to award her attorney's fees for surviving the rule 91a motion. In a cross-appeal, appellees challenge the trial court's ruling on their rule 91a motion.

For reasons set out below, we conclude the trial court erred in granting appellees' TCPA motion because Merrill's claims do not implicate free speech or association concerns as defined in the statute. Because the rule 91a motion addressed only some of the claims and would not resolve the case, we do not address issues related to it. We reverse the trial court's judgment dismissing the lawsuit under the TCPA and remand for further proceedings consistent with this opinion.

FACTUAL BACKGROUND[1]

Mitchell Curry is the principal at Scott Johnson Middle School in McKinney. At 10:53 p.m. on October 15, 2017, an anonymous email was sent to him and two of his assistant principals, Grace Harris and David Warren. The email stated:

> I am an anonymous MISD parent and I recently came across some text messages on my son's phone. The text messages were from other kids [sic] were talking about a teacher at Scott Johnson Middle School, who had posted some nude pictures of herself. I found out the name of the teacher and went online to FLICKR and checked it out for myself to see if this was true and much to my surprise it is.
>
> I can't believe it! All I can say is WOW! I thought maybe you should tell her that she needs to take those pictures off the internet. I am not sure how many of the kids have already seen these pics. I do not want to get involved in this, because it is such an awkward situation. Please

[1] Our facts are taken from the pleadings and evidence filed in support of and in opposition to the motion to dismiss.

> tell this teacher to get those pictures off the internet. The teacher's name is Kalei Merrill.

The email provided a link to the website where the photos were posted and could be viewed. Although the email showed it was sent by "Anonymous Mom," it is undisputed the email was sent by Merrill's ex-fiancé.

Because Curry's email address contained a typographical error, he did not see the email until the following morning when Warren forwarded it to him. Curry accessed the website and saw "nude (and some pornographic) photos" of Merrill. He believed the postings and sharing of the photographs violated MISD policy, the Educators Code of Ethics, and the MISD Student Code of Conduct, requiring investigation. Because of the content of the email, Curry forwarded the email to his direct supervisor, Dr. Melinda DeFelice, assistant superintendent of secondary student support, who then contacted Tamira Griffin, assistant superintendent of human resources. Curry said they were concerned the email and website link implicated "potential adverse effects on the mental, safety, and well-being of MISD students" at his school and that Merrill had "likely lost the ability to be an effective teacher in the MISD." DeFelice and Griffin instructed Curry to bring Merrill to his office with her pictures on the screen "for a 'shock factor.'" DeFelice advised him to have a female administrator at the meeting.

The very same morning that he received the email, Curry pulled Merrill from her classroom. As the two walked back to his office, Merrill, who had worked in the McKinney school district for several years with only positive performance

reviews, asked the reason for the meeting. Curry would not say. When they arrived at Curry's office, Harris was already there. Curry displayed the nude images from the website on an oversized computer monitor and asked if the pictures were of her. Merrill confirmed that they were but said she had not created the website, posted the photographs, or authorized or consented to the publishing of such photographs. Rather, she explained that she had previously taken the pictures and sent them to a former fiancé with whom she had been in a long-distance relationship.

Curry proceeded to scroll through the photographs[2] and told Merrill she had "two options: resign or go on administrative leave and incur an investigation that would involve the human resources department and school board to see the pictures." Merrill was in a "shocked state" and "under duress." According to her petition, Merrill repeatedly stated that she did not know what to do and asked for time to call her parents and her lawyer, but Curry refused.[3] Merrill alleged that Curry repeatedly demanded and emphasized that it was "urgent" that she make a decision. She asked for twenty-four hours to consider the events and the options available to her, but Curry refused and demanded a decision "now." Merrill alleged that Curry told her that the photos "were being viewed by school parents already, and that they were being circulated thru [sic] student devices at school too." He told Merrill that

[2] According to Harris, there were nine to eleven photographs on the website. Harris also said there was no counter on the website to indicate how many people viewed the images.

[3] The record contains other evidence indicating that Curry told her she could make the call, "but we need to go out (of the building) and turn it over to HR. Either way, we have to leave today."

if she proceeded with an investigation, "everyone" would know and they "would 'all' see the website." Merrill ultimately decided to resign, but told Curry and Harris that she did not want to and did not understand why she had to lose her job; both Curry and Harris told her she had "no other choice." Curry gave her a pad of paper and told her what to write. He then escorted her from the building. Merrill alleged that a subsequent investigation by MISD proved that the information used by Curry to pressure and intimidate her, including that the photographs had been viewed by parents and students, was false.

During the meeting, which lasted about thirty minutes, Curry left the images displayed on his monitor rather than closing out the website. When he left the office to walk Merrill to her car, the images remained on his monitor, which faced the open, unlocked door "so that any one passing by" could view them. And, Merrill alleged, the images were viewed by other parties.

For example, while Curry was out of his office, Sacnite Gonzalez, the school office manager, walked past his open office door and saw the images on his computer screen. Gonzalez, who suspected Curry was looking at inappropriate pictures, reported it to the school resource officer, Chris Golden. Golden and Gonzalez went back to Curry's office, closed the door, and the photographs were still displayed on the screen. As Golden started to minimize the screen, the screen went "to sleep" and went black. Merrill alleged that Curry exposed the images to other MISD employees as well.

Two days later, Curry sent an email to faculty and staff at the school informing them that Merrill was no longer employed with MISD but that he "was not at liberty to discuss it." Merrill subsequently appealed to rescind her resignation, which she said she was forced to tender by appellees who placed her in a "hostile and humiliating environment" to discuss the pictures. Merrill said she was "ill-prepared," "under pressure," and in "emotional distress" at the meeting. She also informed MISD that since the meeting which resulted in her resignation, she had obtained a protective order against her former fiancé. (The evidence also showed that he was subsequently prosecuted for illegally posting the pictures without her permission.)

Chad Teague, MISD human resources director, conducted an investigation and issued a report in November 2017. In the report, Teague sustained allegations that (1) Curry created a hostile and humiliating environment when meeting with Merrill, (2) Curry's email to faculty and staff implied Merrill left the school for negative reasons, and (3) Curry left the pictures of Merrill on his computer screen with his office door open "for anybody passing by to see." Teague also concluded that Curry, at the direction of DeFelice and Griffin, brought Merrill into his office with the pictures on the screen "for a 'shock factor.'" Teague also determined that while Curry did not prohibit Merrill from contacting her parents or lawyer, she was led to believe that if she did, she would be escorted from the building, her pictures would be sent to human resources for an investigation, and countless people would

see them. Teague determined that these factors contributed to Merrill's "state of duress" and rendered her "unable to make a clear decision regarding her employment."

Finally, Teague stated that had Merrill opted for the investigation, he could not say "that she would have been terminated for taking the pictures." Teague believed the email was sent by Merrill's former fiancé, not an anonymous parent. Although the email suggested students had seen the pictures, Curry never received a complaint pertaining to the pictures. Teague concluded: "The premise to a teacher to not post inappropriate pictures, other than the moral issues, is his/her effectiveness to teach their students, and we cannot say definitively that her ability as a teacher was compromised."

In February 2018, as a result of Teague's findings and other evidence, the school district rescinded Merrill's resignation, reinstated her as a teacher, paid a lump sum for salary and benefits lost during the period of time prior to her reinstatement, and, at her request, moved her to a different campus, among other things.

On April 3, 2019, Merrill sued appellees, individually, alleging she was forced to resign her teaching position under duress and false pretenses. She alleged appellees "planned the intentional display" of the photos on Curry's oversized computer monitor, knowing it would "negatively impact her mental and emotional state" and intending to "apply pressure," "manipulate," "intimidate," and

"humiliate" her into resigning. She alleged appellees took no action to verify the accuracy of the information posted or that the person in the profile was real, provided no "privacy policy," and used the "display" of the photographs as "a tool to provide shock factor" to intimidate and threaten her. She further alleged Curry negligently or purposely exposed the staff, students, and parents to the images left on his monitor, in plain view, in his unattended office. Merrill alleged causes of action for (1) violation of section 98B.002 of the Texas Civil Practice and Remedies Code (Unlawful Disclosure or Promotion of Intimate Visual Material), (2) negligence per se alleging violation of section 21.16 of the Texas Penal Code, "Unlawful Disclosure or Promotion of Intimate Visual Material," (3) intentional infliction of emotional distress, (4) intrusion upon seclusion, (5) defamation, and (6) public disclosure of private facts. She alleged she was harmed as a result of appellees' conduct, including the suffering of anxiety, PTSD, paranoia, loss of relationships, emotional distress and mental anguish, loss of wages and healthcare benefits, and diminished earning capacity.

Appellees filed an answer asserting a general denial and numerous affirmative defenses. They also filed a motion to dismiss pursuant to the TCPA and a motion for partial dismissal under rule 91a of the rules of civil procedure. In their TCPA motion, appellees sought dismissal of Merrill's lawsuit, asserting her claims were based on, related to, or in response to their exercise of the right to free speech and/or association as defined in the TCPA. Appellees' rule 91a motion sought to dismiss

only Merrill's claims for defamation, intentional infliction of emotional distress, negligence per se, and intrusion upon seclusion.

The trial court heard the rule 91a motion first and denied it on August 21, 2019. In its order, the court awarded Merrill her costs and attorney's fees and ordered counsel to submit by affidavit costs and reasonable and necessary attorney's fees related to the motion. The order did not provide a deadline for the affidavit.

Less than three weeks later, on September 9, the trial court heard the TCPA motion by submission and granted it by written order on the same day. In this order, the trial court awarded appellees their costs and attorney's fees and gave defense counsel fourteen days to submit an affidavit. Appellees' counsel filed his affidavit on September 17 and, at the same time as that filing, the trial court signed a Final Judgment in the case awarding appellees $49,000 in attorney's fees pursuant to the TCPA and $142,000 in contingent appellate fees. Merrill's counsel had not yet filed his affidavit on attorney's fees for successfully defending the 91a motion, and none were awarded. The order stated the judgment disposed of all claims and all parties and was appealable.

On October 10, Merrill's counsel filed his unsworn declaration of attorney's fees related to the denial of the rule 91a motion. The next day, which was less than thirty days after the final judgment was rendered, the trial court signed an order awarding $24,878.39 in costs and attorney's fees as well as an additional $105,000 in contingent appellate fees to Merrill from appellees.

On November 4, Merrill's counsel filed a motion to modify the judgment to incorporate the October 11 order into its final judgment. Appellees argued the motion was filed outside the trial court's plenary power, rendering the court without jurisdiction. The trial court agreed with appellees and denied the motion "[b]ecause the Motion to Modify was filed more than 30 days after the Final Judgment was signed[.]" This appeal followed.

DISMISSAL UNDER TCPA

In three of her four issues, Merrill challenges the trial court's decision to dismiss her lawsuit under the TCPA, arguing that (1) appellees failed to establish that her claims against them were based on, related to, or in response to appellees' exercise of their rights of free speech and association, (2), even if the claims fell within the TCPA, she presented sufficient evidence of each claim and appellees' affirmative defenses do not apply, and (3) applying the TCPA to the "victim of nonconsensual pornography conflicts with the intent of the TCPA, Texas Penal Code, or Texas public policy." Because it is dispositive, we begin with Merrill's first issue in which she challenges whether the TCPA applies to her claims.

The TCPA protects citizens from retaliatory lawsuits that seek to silence or intimidate them from exercising their rights in connection with matters of public concern. *In re Lipsky*, 460 S.W.3d 579, 584 (Tex. 2015) (orig. proceeding); *see*

generally TEX. CIV. PRAC. & REM. CODE ANN. § 27.001–.011.[4] Its stated purpose 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. It accomplishes this purpose by establishing a burden-shifting scheme that, if satisfied, results in a relatively expedited dismissal of claims brought to intimidate or silence a defendant's exercise of a protected right. *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 898 (Tex. 2017) (per curiam).

Under this scheme, the movant has the threshold burden of showing by a preponderance of the evidence that the legal action is based on or in response to the movant's exercise of the right to free speech, the right of association, or the right to petition, as defined in the statute. TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b). If the movant meets this burden, the nonmoving party must establish by clear and specific evidence a prima facie case for each essential element of its claim. *Id.* § 27.005(c). If the nonmoving party satisfies this requirement, the burden shifts back

[4] The Texas Legislature amended the TCPA effective September 1, 2019. Those amendments apply to "an action filed on or after" that date. Act of May 17, 2019, 86th Leg., R.S., ch. 378, § 11, 2019 Tex. Sess. Law. Serv. 684, 687. This lawsuit was filed on April 3, 2019; thus, the law in effect before September 1 applies. *See* Act of May 21, 2011, 82d Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws 961–64, amended by Act of May 24, 2013, 83d Leg., R.S., ch. 1042, 2013 Tex. Gen. Laws 2499–2500. All citations to the TCPA are to the version before the 2019 amendments took effect.

to the movant to prove each essential element of any valid defense by a preponderance of the evidence. *Id*. § 27.005(d).

We review de novo the trial court's determination that the parties met or failed to meet their burdens of proof under section 27.005. *Dallas Morning News, Inc. v. Hall*, 579 S.W.3d 370, 377 (Tex. 2019). In conducting this review, we consider, in the light most favorable to the nonmovant, the pleadings and any supporting and opposing affidavits stating the facts on which the claim or defense is based. *Dyer v. Medoc Health Servs., LLC*, 573 S.W.3d 418, 424 (Tex. App.—Dallas 2019, pet. denied). In other words, we read both the petition and the affidavits in the manner most sympathetic to the TCPA's non-applicability. *United Dev. Funding, L.P. v. Megatel Homes III, LLC*, No. 05-19-00647-CV, 2020 WL 2781801, at *3 (Tex. App.—Dallas May 29, 2020, pet. denied).

A. Right of Free Speech

For purposes of the TCPA, the "exercise of free speech" means a communication made in connection with a matter of public concern. TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(3). As relevant here, the TCPA defines a "matter of public concern" to include issues related to "health or safety" and "community well-being." *Id*. at § 27.001(7)(A), B). But not every communication related to one of the broad categories set out in section 27.001(7) always regards a matter of public concern. *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 137 (Tex. 2019). When considering whether a communication is made in connection

with a "matter of public concern" within the meaning of the TCPA, we should not ignore the common meaning of the words being defined and, as the supreme court explained, the phrase "commonly refers to matters 'of political, social, or other concern to the community,' as opposed to purely private matters." *Id*. at 135.

Appellees claim that the internet posting of nude/pornographic photos by an MISD teacher and the subsequent sharing of those photos would violate both teacher and student policies, including the Texas Educators' Code of Ethics and the MISD Student Code of Conduct, and also would likely affect her ability to be an effective teacher. They contend the email/FLICKR.com link implicated "potential adverse [e]ffects" on the mental health, safety, and well-being of MISD students, all matters of "public concern," and it was their responsibility to investigate and take any appropriate remedial actions, including disciplinary action. They argue that Merrill's claims are related to this communication "made 'in connection with' one or more 'matter[s] of public concern,' specifically the health, safety, welfare, and education of minor public school students as well as the well-being of the community."

Initially, we note that private communications made in connection with a matter of public concern fall within the TCPA's definition of the exercise of the right of free speech. *Lippincott*, 462 S.W.3d at 509. The TCPA does not require that the communication specifically "mention" a matter of public concern or have more than a "tangential relationship" to such a matter. *ExxonMobil Pipeline Co.,* 512 S.W.3d

at 900. Rather, the TCPA applies so long as the movant's statements are "in connection with" "issue[s] related to" any of the matters of public concern listed in the statute. *Id*. Even so, courts have acknowledged that the TCPA "has its limits" and not every communication falls under the statute. *U.S. Anesthesia Partners of Tex., P.A. v. Mahana*, 585 S.W.3d 625, 629 (Tex. App.—Dallas 2019, pet. denied).

For example, in *Mahana*, this Court concluded that text messages, allegedly sent by a nurse anesthetist's employer to her co-workers stating that she was being terminated after testing positive for opiates and other controlled substances, were not a matter of public concern. *Id*. at 629–30. There, plaintiff Whitney Kelley Mahana arrived at work one morning and was told by the nursing director she had to take a drug test because of a "wastage of drugs" on the pharmacy logs. The director told Mahana if she refused to take a test, she would be denied privileges at the hospital. *Id*. at 627. Mahana submitted to the test, which later turned out to be negative for any controlled substances other than those prescribed by her treating physician. *Id*. In her petition, Mahana alleged that her supervisor, in violation of Mahana's privacy, sent text messages and spread rumors that she was a drug addict, had tested positive for opiates and other controlled substances, was being terminated, and had been escorted from the building. Mahana subsequently sued her employer, USAP, for breach of contract and intentional infliction of emotional distress. As to the latter, she alleged that the text messages accusing her of taking illegal drugs,

among other circumstances, constituted extreme and outrageous conduct that caused her damages. *Id*.

USAP moved to dismiss the intentional infliction claim under the TCPA, arguing the text messages were communications made in connection with matters of public concern, i.e., health and safety and community well-being. *Id*. at 629. This Court rejected the argument. First, as to health and safety, we concluded the text messages did not relate to the provision of medical services by a health care professional because they did not address Mahana's job performance or relate to whether she properly provided medical services to patients. *Id*. at 629. Similarly, we concluded the messages did not relate to community well-being as opposed to Mahana's well-being because they did not relate to drug use in the community at large or even within a community of nurses; they simply alleged that a specific nurse tested positive for illegal drugs and was fired. *Id*. at 630.

This case is indistinguishable from *Mahana*. Just as in *Mahana*, where the text messages did not address Mahana's job performance or relate to whether she provided medical services to patients, the email at issue here does not address the health, safety, or well-being of any MISD student nor does it address Merrill's job performance or effectiveness as a teacher. Rather, it informs school administrators about purported discussions among middle school students of nude photographs of a teacher, provides a link to the images, and suggests the teacher remove the images. To the extent appellees claim the email asserted that students had actually *seen* the

images, a fact finder might be entitled to make such an inference; however, the email itself asserted only that "kids were talking about a teacher . . . who had posted some nude pictures of herself." Moreover, in analyzing whether the TCPA applies to a suit, we begin by determining the basis of the legal action as reflected in the plaintiff's petition, which is the "best and all-sufficient evidence of the nature of the action." *RigUp, Inc. v. Sierra Hamilton, LLC*, No. 03-19-00399-CV, 2020 WL 4188028, at *3 (Tex. App.—Austin July 16, 2020, no pet.) (citing *Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017)). In her petition, Merrill alleged that appellees "planned the intentional display of the intimate and private photos" contained in the email in a way that they knew would humiliate and intimidate her into resigning by, for example, displaying the private images on an oversized computer monitor for "shock factor," refusing to allow her to seek out a third party for advice, and then leaving the images on the monitor for others to see. In other words, the gravamen of Merrill's lawsuit involves *how* appellees used the email to create a hostile and humiliating environment in the context of a private employment matter. The manner in which appellees conducted a private employment matter, even if the target is a public schoolteacher, is not a matter of public concern under the circumstances here. In so concluding, we acknowledge school districts have a legitimate interest in investigating information such as that contained in the email. But the actions that Merrill has alleged form the basis of her claims in this case concern how the email was used in a manner that does not implicate that legitimate interest.

Having considered the pleadings and evidence in the light most favorable to Merrill, we conclude appellees failed to establish by a preponderance of the evidence that Merrill's claims were based on, related to, or filed in response to appellees' exercise of the right of free speech. We turn now to the right of association.

B. Right to Association

Appellees assert that Merrill's claims are related to their exercise of the right to association because they are related to appellees' communication between "public school officials who 'join[ed] together to collectively express, promote, pursue, or defend common interests,' specifically the common interest of protecting the education, health, safety and welfare of MISD students.'"

"Exercise of the right of association' means a communication between individuals who join together to collectively express, promote, pursue, or defend common interests." TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(2). This Court has concluded that to constitute an exercise of the right of association under the TCPA, the nature of the communication between individuals who join together must involve public or citizen's participation. *Erdner v. Highland Park Emergency Ctr.*, 580 S.W.3d 269, 275 (Tex. App.—Dallas 2019, pet. denied) (citing *Dyer,* 573 S.W.3d at 426).

Here, appellees have not shown the communication involved any public or citizen participation. Rather, the communication was revealed in a private meeting regarding a private employment matter, and the gravamen of Merrill's lawsuit, as

explained above, is the manner in which the communication was handled to achieve a certain result, i.e, Merrill's resignation. Construing the TCPA to find a right of association under these circumstances, where the communication is between parties in a private employment dispute, does not further the TCPA's purpose to curb strategic lawsuits against public participation any more than communications between parties with a shared interest in a business transaction. *See BusPatrol Am., LLC v. Am. Traffic Sols., Inc.,* No. 05-18-00920-CV, 2020 WL 1430357, at *8 (Tex. App.—Dallas Mar. 24, 2020, pet. filed) (mem. op.) (concluding movant failed to establish communications related to exercise of right of association when they were between parties with a shared interest in private business transaction, i.e, dispute over school bus safety technology). We therefore conclude appellees failed to meet their burden to establish by a preponderance of the evidence that Merrill's claims are based on, related to, or in response to appellees' exercise of the right of association as defined by the TCPA. Accordingly, the trial court erred by granting appellees' motion to dismiss under the TCPA. We sustain Merrill's first issue. Our disposition of this issue makes it unnecessary to address issues two and four.

DENIAL OF RULE 91A MOTION

Merrill's third issue and appellees' cross-appeal both address issues related to appellees' partial motion to dismiss under rule 91a.

Rule 91a provides that a party "may move to dismiss a cause of action on the grounds that it has no basis in law or fact." TEX. R. CIV. P. 91a. "A cause of action

has no basis in law if the allegations, taken as true, together with reasonable inferences drawn from them, do not entitle the claimant to the relief sought." *Id*. "A cause of action has no basis in fact if no reasonable person could believe the facts pleaded." *Id*. Except as required by 91a.7 (award of costs and attorney fees), the court "may not consider evidence in ruling on the motion and must decide the motion based solely on the pleading of the cause of action. . . ." TEX. R. CIV. P. 91a.6.

Appellees' rule 91a motion sought dismissal of only some of Merrill's claims: defamation, intentional infliction of emotional distress, negligence per se, and intrusion upon seclusion. The trial court denied the motion and indicated its intent to award attorney's fees to Merrill. At the time the trial court signed its final judgment, Merrill's counsel had not provided an affidavit on attorney's fees and the final judgment did not include any such fees for Merrill. Within the time frame for modifying the judgment, however, Merrill's counsel filed an unsworn declaration on attorney's fees. *See* TEX. R. CIV. P. 329b(d). The next day, the trial court signed an order awarding Merrill her fees before appellees had an opportunity to challenge the supporting evidence. Merrill subsequently filed a motion to modify the final judgment to incorporate the order, and appellees argued the trial court's plenary power over the judgment had expired. The trial court denied the motion to modify on that basis.

On appeal, Merrill complains the trial court erred by failing to incorporate, into the final judgment, the order awarding her "mandatory" attorney's fees[5] for surviving the rule 91 motion to dismiss. In response and by cross-appeal, appellees argue (1) the trial court should have granted their motion, instead of denying it; thus, they were entitled to attorney's fees, not Merrill, and (2) even if Merrill is entitled to some amount of attorney's fees, her counsel's unsworn declaration does not support the fees requested.

Before addressing the merits of these issues, we first consider the propriety and efficiency of addressing interlocutory issues after we have reversed the judgment dismissing the case. *See* TEX. R. APP. P. 47.1 ("The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal."). We have not located a case in which a party pursued, and a court addressed, the denial of a partial 91a motion under these circumstances. But this situation is analogous to the analysis employed when a party seeks review of a cross motion for partial summary judgment. As courts have explained, the denial of a motion for summary judgment is generally not appealable, except when both parties move for summary judgment and the trial court grants one and denies the other. In such a case, an appellate court

[5] Rule 91a.7, which governs the award of costs and attorney fees, has been amended since this action was commenced to state that a trial court "may," rather than "must," award costs and attorney fees to the prevailing party. Because the amendment applies only to civil actions filed on or after September 1, 2019, it does not apply here.

reviews both motions and renders the judgment the trial court should have rendered. *Mid-Continent Cas. Co. v. Global Enercom Mgmt.*, 323 S.W.3d 151, 153–54 (Tex. 2010) (per curiam). But, when a party moves for only partial summary judgment, the exception does not apply. *See e.g., Aflalo v. Harris*, 583 S.W.3d 236, 241 (Tex. App.—Dallas 2018, pet. denied) (en banc) ("But where a cross-motion for summary judgment is only a motion for partial summary judgment and does not seek final disposition of the claims in the trial court, the issue is not properly before us."); *Bryceland v. AT&T Corp.*, 114 S.W.3d 552, 555 (Tex. App.—Dallas 2002, pet. granted, judgm't set aside pursuant to settlement) (declining to review partial cross-motion for summary judgment that did not seek final disposition of all claims, after reversing trial court's grant of defendant's motion for summary judgment); *Jensen Const. Co. v. Dallas Cty.*, 920 S.W.2d 761, 768 (Tex. App.—Dallas 1996, writ denied) (declining to review cross-motion for partial summary judgment because resolution of issue would not allow Court to resolve entire case or to render judgment), *disapproved on other grounds*, *Travis Cty. v. Pelzel Assocs., Inc.*, 77 S.W.3d 246, 251 (Tex. 2002); *Faulkner v. Bost*, 137 S.W.3d 254, 261 (Tex. App.—Tyler 2004, no pet.) ("Before a court of appeals may review an order denying a cross motion for summary judgment not covered by an interlocutory appeal statute, both parties must have sought final judgment in their motions for summary judgment.").

Here, appellees' motion admittedly did not seek relief on the entire case but sought only an interlocutory order; thus, any review by this Court would involve an

order that is generally not appealable,[6] does not involve the issues raised in the TCPA motion, and would not resolve all issues in the case or lead to a final judgment. Moreover, to the extent the parties raise jurisdictional issues related to the timing of the award of attorney's fees to Merrill, such an issue is mooted by this Court's decision to reverse the final judgment and remand the case.[7]

We reverse the trial court's judgment and remand the cause for further proceedings consistent with this opinion.

/Amanda L. Reichek/
AMANDA L. REICHEK
JUSTICE

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[6] *See In re Farmers Tex. Cty. Mut. Ins. Co.*, 604 S.W.3d 421, 429 (Tex. App.—San Antonio June 26, 2019, orig. proceeding) ("An order denying a Rule 91a motion to dismiss is an interlocutory order, for which there is no specific statute providing appellate jurisdiction for an interlocutory appeal.").

[7] Nothing in this opinion should be interpreted to preclude the trial court from considering or reconsidering any interlocutory ruling, including those related to the rule 91a motion.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

KALEI MERRILL, Appellant	On Appeal from the 380th Judicial District Court, Collin County, Texas
No. 05-19-01229-CV V.	Trial Court Cause No. 380-01827-2019.
MITCHELL CURRY, MELINDA DEFELICE, AND TAMIRA GRIFFIN, EACH INDIVIDUALLY AS DEFENDANTS, Appellees	Opinion delivered by Justice Reichek; Justices Whitehill and Pedersen, III participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and this cause is **REMANDED** to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that appellant KALEI MERRILL recover her costs of this appeal from appellees MITCHELL CURRY, MELINDA DEFELICE AND TAMIRA GRIFFIN, EACH INDIVIDUALLY AS DEFENDANTS.

Judgment entered November 5, 2020.