Affirmed and Opinion Filed August 27, 2019.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-18-01414-CV

U.S. ANESTHESIA PARTNERS OF TEXAS, P.A., Appellant
V.
WHITNEY KELLEY MAHANA, Appellee

On Appeal from the 193rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-18-08272

OPINION

Before Justices Bridges, Brown, and Nowell
Opinion by Justice Nowell

This is an interlocutory appeal from an order denying a motion to dismiss under the Texas Citizens Participation Act (TCPA). Whitney Kelley Mahana sued U.S. Anesthesia Partners of Texas, P.A. (USAP) for damages after she was fired from her job as a nurse anesthetist. She alleged claims for breach of contract and intentional infliction of emotional distress (IIED) based in part on text messages she claims were sent by her supervisors to her co-workers stating she tested positive for illegal drugs and was being fired. USAP filed a motion to dismiss and argued that the IIED claim was filed in response to the alleged text messages and those messages were communications in connection with a matter of public concern within the definitions in the TCPA. The trial court denied the motion. We affirm.

BACKGROUND

We take these facts from Mahana's first amended original petition. Mahana is a nurse anesthetist who went to work for USAP's predecessor company in 2013. In 2015, Mahana signed a written employment contract with USAP. The contract was for a one-year term and automatically renewed for one-year periods unless one of the parties gave timely notice of its intent not to renew. The contract contains several provisions for termination of employment, including termination for cause, immediate termination, and termination without cause, all subject to specific conditions set forth in the contract.

Mahana alleged USAP breached the contract in several ways, specifically by requiring her to work excessive hours, at times up to thirty-six hours when she worked on-call shifts. She alleged USAP breached a promise to hire additional personnel to alleviate the excessive hours. The excessive hours and lack of breaks produced inordinate stress and extreme fatigue "which often could be considered as dangerous to both the employee and patients." The stress and fatigue from her working conditions affected Mahana's quality of life to the point where she sought professional assistance and counseling.

On December 21, 2016, Mahana was assigned to work at Heritage Surgical Hospital. Shortly after she arrived that morning, the director of nursing for Heritage demanded she take a drug test due to "wastage of drugs" shown on pharmacy logs. The director told Mahana she would be denied privileges at the hospital if she refused to take the test. Mahana asked if USAP was aware of the demand for a drug test and the threatened loss of privileges if Mahana refused the test. The director stated USAP was aware. Mahana then submitted to the drug test. The test later turned out to be negative for any controlled substances.

Mahana alleged:

> At this time, the supervisor of the Plaintiff in violation of the privacy of the Plaintiff began to text to other employees that the Plaintiff was being removed from her

> duties because she had tested positive for opiates and other controlled substances. The Plaintiff at the same time begin [sic] to receive texts and telephone calls from fellow employees and Associates that rumor [sic] of alleged drug abuse and addiction were being spread by her supervisor and other employees of the Defendant and that she was being terminated and had been escorted from the building. As was later shown by the drug test conducted by the Defendant, the Plaintiff did not have any controlled substances in her body other than those prescribed by her treating physician and she had voluntarily left the hospital facility to proceed with another employee of the Defendant to take the voluntary drug test, not being escorted from the building as if she had been abruptly terminated from her employment.

Mahana further alleged that she performed her duties in an "excellent and competent manner." No disciplinary proceedings were filed against her. She also alleged she "was never physically or mentally impaired while performing clinical duties, and never had a complaint filed against [her] for inadequate performance."

After "the accusations of drug use and continued overwork," Mahana took a leave of absence to seek in-patient counseling. She was released to return to work on July 1, 2017. She was terminated in September 2017. She alleged USAP breached the contract by terminating her employment without following the procedures and conditions for termination set out in the contract.

Mahana also alleged a cause of action for IIED. She claimed she "suffered loss of morale, confidence, humiliation, nervousness, and loss of reputation among her friends and fellow workers" and sought damages for those injuries. She alleged the demand for excessive and grueling hours, breach of the promise to hire additional personnel, the circumstances surrounding the demand for a drug test, and the text messages accusing her of taking illegal drugs constituted extreme and outrageous conduct by USAP that caused her damages. Specifically, she alleged:

> Within a short time after the Plaintiff submitted to the drug testing by the Defendant, supervisors and other persons known and unknown to the Plaintiff at this time intentionally and with malicious intent began texting that the Plaintiff had tested positive for several illegal drugs and controlled substances and was being fired. The Plaintiff was later shown texts from agents and supervisors of the Defendant alleging she had tested positive for numerous illegal or controlled

> substances when in fact the Plaintiff had tested negative. The said text also stated or implied that the Plaintiff was a "drug addict" and was being terminated for illegal activity.

Referencing the allegations in the text messages, Mahana alleged that USAP's conduct was extreme and outrageous because the results of the tests were unknown at the time and later turned out to be negative. Further, she alleged the conduct was extreme and outrageous

> in light of the fact that the Plaintiff was employed in the medical field of licensure and practice where allegations of illegal or illicit drug use could be particularly damaging to the present and future ability of the Plaintiff to seek, maintain or enhance and promote her career in the [field] of medicine.

USAP moved to dismiss the IIED claim under the TCPA based on these allegations. It argued the IIED claim was based on, related to, or filed in response to USAP's alleged exercise of the right of free speech defined by the TCPA. USAP attached Mahana's first amended petition in support of the motion. In her response to the motion, Mahana argued her claim did not fall within the scope of the TCPA and that her affidavit provided prima facie evidence of her claim. The trial court denied the motion to dismiss without specifying a particular ground.

In a single issue on appeal, USAP asserts Mahana's petition establishes by a preponderance of the evidence that her claim for IIED is based on, relates to, or is in response to USAP's exercise of its right of free speech and Mahana failed to establish a prima facie claim for IIED by clear and specific evidence.

STANDARD OF REVIEW

The TCPA "protects citizens who petition or speak on matters of public concern from retaliatory lawsuits that seek to intimidate or silence them." *In re Lipsky*, 460 S.W.3d 579, 584 (Tex. 2015) (orig. proceeding). That protection comes in the form of a motion to dismiss for "any suit that appears to stifle the defendant's" exercise of those rights. *Id.* Reviewing a TCPA motion to dismiss requires a three-step analysis. *Youngkin v. Hines*, 546 S.W.3d 675, 679–80 (Tex. 2018). Initially the moving party must show by a preponderance of the evidence that the legal action

against it is based on the movant's exercise of the rights as defined in the TCPA. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b). If the movant meets its 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 that requirement, the burden shifts back to the movant to prove each essential element of any valid defenses by a preponderance of the evidence. *Id.* § 27.005(d).

We review de novo the trial court's determinations that the parties met or failed to meet their burdens of proof under section 27.005. *Dallas Morning News, Inc. v. Hall*, No. 17-0637, 2019 WL 2063576, at *5 (Tex. May 10, 2019); *Campbell v. Clark*, 471 S.W.3d 615, 623 (Tex. App.—Dallas 2015, no pet.). We also review de novo questions of statutory construction. *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015) (per curiam).

DISCUSSION

USAP argues it met its burden of establishing the TCPA applies to Mahana's IIED claim because the text messages she claims were sent by USAP employees are communications made in connection with health and safety and community well-being.

As defined by the TCPA, the "exercise of the right of free speech" is a communication made in connection with a matter of public concern. TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(3). A "matter of public concern" includes an issue related to health or safety; environmental, economic, or community well-being; the government; a public official or public figure; or a good, product, or service in the marketplace. *Id.* § 27.001(7).

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. Further, the TCPA does not require that communications specifically "mention" a matter of public concern or have more than a "tangential relationship" to such a matter. *ExxonMobil Pipeline Co.*

v. Coleman, 512 S.W.3d 895, 900 (Tex. 2017). 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.*

The TCPA, however, "has its limits" and not every communication falls under the statute. *In re IntelliCentrics, Inc.*, No. 02-18-00280-CV, 2018 WL 5289379, at *4 (Tex. App.—Fort Worth Oct. 25, 2018, orig. proceeding) (mem. op.); *see also Erdner v. Highland Park Emergency Ctr., LLC*, No. 05-18-00654-CV, 2019 WL 2211091, at *4 (Tex. App.—Dallas May 22, 2019, no pet. h.); *Dyer v. Medoc Health Servs., LLC*, 573 S.W.3d 418, 428 (Tex. App.—Dallas 2019, pet. denied).

USAP relies on *Lippincott* to support its argument that communications claiming a nurse anesthetist tested positive for illegal drugs and is a drug addict were made in connection with an issue related to health and safety. In *Lippincott*, the communications related to whether the nurse "properly provided medical service to patients." *Lippincott*, 462 S.W.3d at 509. The communications included claims that the nurse "failed to provide adequate coverage for pediatric cases," administered a "different narcotic than was ordered prior to pre-op or patient consent being completed," falsified a scrub tech record on multiple occasions, and violated the company's sterile protocol policy. *Id*. at 510. After noting its previous acknowledgment that the provision of medical services by a health care professional constitutes a matter of public concern, the court concluded the communications in *Lippincott* were made in connection with a matter of public concern. *Id*.

Unlike the e-mails in *Lippincott*, the text messages alleged in this case do not address Mahana's job performance or relate to whether she properly provided medical services to patients. The text messages do not state that she used illegal drugs on the job or that her alleged use impacted her job performance. Indeed, she alleged she was never physically or mentally impaired while

performing her clinical duties and that no complaints were filed against her for inadequate performance. The text messages, as alleged in her petition, stated: Mahana was "being removed from her duties because she had tested positive for opiates and other controlled substances"; her supervisor was spreading a rumor of alleged drug abuse and addiction; and she was terminated and escorted from the building. As such, they are not communications related to the provision of medical services by a health care professional.[1]

Further, the alleged messages do not relate to community well-being as opposed to Mahana's well-being. USAP argues that communications about criminal activity are related to community well-being. *See Deaver v. Desai*, 483 S.W.3d 668, 673 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (communications calling for criminal charges against person for committing identity theft related to both economic and community well-being); *Watson v. Hardman*, 497 S.W.3d 601, 607 (Tex. App.—Dallas 2016, no pet.) (communications accusing party of stealing charitable funds related to community well-being, specifically members of the public who donated the money and the intended recipients of the funds). However, USAP cites no authority stating that testing positive for drugs is in itself a crime. The status of being a drug addict is not an offense. *See Robinson v. California*, 370 U.S. 660, 666–67 (1962) (holding statute unconstitutional for making addiction to narcotics a crime); *Casias v. State*, 452 S.W.2d 483, 487 (Tex. Crim. App. 1970) (status of being a narcotic addict is not considered a crime); *Martinez v. State*, 373 S.W.2d 246, 247 (Tex. Crim. App. 1963). Considering the pleadings in the light most favorable to Mahana,

[1] The dissent argues that any communication about someone in the healthcare industry is a matter of public concern. We cannot agree. In *Lippincott*, after concluding the private communications fell within the TCPA, the supreme court analyzed whether the communications were made in connection with a matter of public concern. *Lippincott*, 462 S.W.3d at 509. It specifically noted that "the emails related to whether Whisenhunt, as a nurse anesthetist, *properly provided medical services to patients*." *Id.* (emphasis added). Acknowledging the court's previous determination that "the provision of medical services by a health care professional constitutes a matter of public concern," the court concluded the communications were made in connection with a matter of public concern. *Id.* at 510 (citing *Neely v. Wilson*, 418 S.W.3d 52, 70 n.12 & 26 (Tex. 2013)). It would have been unnecessary to engage in this analysis if all that was required is for the communication to relate to a healthcare professional.

we cannot conclude the text messages, as alleged, are related to criminal conduct as opposed to the alleged status of drug addiction. *See Dyer*, 573 S.W.3d at 424 (reviewing pleadings and affidavits in light most favorable to non-movant on TCPA motion).

Furthermore, the TCPA does not define community well-being, but the plain meaning of the phrase refers to a group's or society's state of being healthy or happy.[2] Here, the communications did not relate to drug use in the community at large or even within a community of nurses. The communications alleged a specific nurse tested positive for illegal drugs and was fired. Without more, we cannot conclude the communication was made in connection with an issue related to community well-being.

As we explained in *Erdner*, "Construing the statute to denote that all private business discussions are a 'matter of public concern' if the business offers a good, service, or product in the marketplace or is related to health or safety is a potentially absurd result that was not contemplated by the Legislature." *Erdner*, 2019 WL 2211091, at *5 (holding TCPA did not apply to private communications about business dispute over possible formation of emergency health clinics). Similarly, construing private communications about an employee's alleged positive drug test or addiction as a matter of public concern merely because the employee happens to be a nurse is a potentially absurd result that was not contemplated by the Legislature. *See id*. On this record we cannot say that private text messages allegedly asserting Mahana tested positive for illegal drugs, was a drug addict, and was being fired are communications made in connection with an issue related to health or safety or community well-being.

We conclude USAP failed to establish by a preponderance of the evidence that Mahana's

[2] *See Community*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("1. A neighborhood, vicinity, or locality. 2. A society or group of people with similar rights or interests."); *Well-being*, DICTIONARY.COM, https://www.dictionary.com/browse/well-being (last visited Aug. 7, 2019) ("a good or satisfactory condition of existence; a state characterized by health, happiness, and prosperity; welfare"); *Well-being*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1981) (the state of being happy, healthy, or prosperous).

IIED claim was based on, related to, or filed in response to USAP's exercise of the right of free speech. We overrule USAP's issue.

CONCLUSION

Because USAP failed to meet its initial burden under the TCPA, the trial court did not err by denying the motion to dismiss. We affirm the trial court's order.

/Erin A. Nowell/
ERIN A. NOWELL
JUSTICE

Bridges, J., dissenting.

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DISSENTING OPINION

Opinion by Justice Bridges

"A court may not judicially amend a statute by adding words that are not contained in the language of the statute." *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 508 (Tex. 2015) (per curiam). Because the majority impermissibly narrows the definition of "matter of public concern" related to "health or safety," I respectfully dissent. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(7)(A).

The majority thoroughly explains the underlying facts of this appeal; therefore, I include only those facts necessary for my analysis.

Appellee Whitney Kelley Mahana is a nurse anesthetist. In 2015, she signed a written employment contract with appellant U.S. Anesthesia Partners of Texas, P.A. (USAP). She provided general anesthetic services for all surgical and obstetric medical procedures requested by the medical facility, which included administering anesthesia as directed by a licensed physician

in all surgical and emergency conditions at the medical facility in both operative and post-operative situations.

On December 21, 2016, the director of nursing for Heritage Surgical Hospital demanded Mahana take a drug test because of "wastage of drugs" shown on pharmacy logs. Mahana submitted to the drug test. According to Mahana's amended petition, a supervisor "began to text [] other employees that Plaintiff was being removed from her duties because she had tested positive for opiates and other controlled substances." Mahana also began receiving text messages and telephone calls "that rumor of alleged drug abuse and addiction were being spread by her supervisor . . . and that she was being terminated and had been escorted from the building." Some texts stated or implied she was a "drug addict" and was being terminated for illegal activity.[1]

Mahana contends USAP's communications do not fall under the TCPA's definition of "matter of public concern" relating to "health or safety" because "there were no complaints of incidents of negligence, abuse, endangering patients, violation[s] of administrative employee performance standard[s] or violations of rules and regulations." Thus, any question of public health and safety is "theoretical only and not based in fact."

Mahana's argument centers on what the communications do not say rather than focusing on the content of the communications. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(1) (defining "communication" to include "the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic"). The majority reaches its conclusion by expanding *Lippincott*.

In *Lippincott*, the Texas Supreme Court considered whether emails alleging that a nurse anesthetist represented himself as a doctor, endangered patients for his own financial gain, and sexually harassed employees were communications made in connection with a matter of public

[1] I recognize there is no evidence of drug use by Mahana in this record.

concern. *Lippincott*, 462 S.W.3d at 509. The court concluded the emails related to whether the nurse anesthetist "properly provided medical services to patients," and "the provision of medical services by a health care professional constitutes a matter of public concern." *Id*. at 509–10.

The majority distinguishes the text message communications in this case from the email communications in *Lippincott* because the text messages about Mahana's alleged drug use "do not address Mahana's job performance or relate to whether she properly provided medical services to patients" and "do not state that she used illegal drugs on the job or that her alleged use impacted her job performance." Without any further statutory analysis, the majority concludes the communications are not "related to the provision of medical services by a health care professional" and therefore were not a "matter of public concern."

I agree the communications here and in *Lippincott* are distinguishable; however, the distinction does not remove the communications from the statutory definition of "matter of public concern." According to the majority's analysis, communications about someone in the healthcare industry fall under the definition of "matter of public concern" only if the communications relate to the provision of medical services. The majority concludes communications about Mahana's alleged drug addiction would be a health or safety concern only if the text messages stated she used drugs while working or her drug use impacted her ability to perform her duties. This requires too much.

Although *Lippincott* held "the provision of medical services by a healthcare professional constitutes a matter of public concern," nothing within the opinion limits the statutory definition of "matter of public concern" to only those acts. 462 S.W.3d at 509. More importantly, the TCPA has prescribed a specific definition to "matter of public concern" requiring only that "an issue relate to health or safety" without any further elaboration or qualification. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(7). The majority ignores the plain-meaning approach dictated by the

supreme court and improperly narrows the scope of the TCPA by inserting the requirement that communications involve more than a "tangential relationship to matters of public concern." *Id*. Mahana was a healthcare professional admittedly in charge of providing general anesthetic services and administering anesthesia. Any use of drugs that could impair her ability to perform her duties at the very least involves a "tangential relationship" to matters of public concern.

Any notion that courts should read implicit limitations into the TCPA definitions has been put to rest by the Texas Supreme Court. *See Lippincott*, 462 S.W.3d at 509 (plain language of statute imposes no limiting language that communication must be public, therefore we presume legislature intended communications to include both private and public communications); *see also ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 900 (Tex. 2017) (applying plain-meaning construction of TCPA definitions' literal language even when this results in vastly expansive application of "exercise of the right of free speech"). "We do not substitute the words of a statute in order to give effect to what we believe a statute should say." *Coleman*, 512 S.W.3d at 901. All the legislature has required is that USAP's communications be "made in connection with a matter of public concern," and a "matter of public concern" includes "an issue related to health or safety." TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(3), (7). Text messages between coworkers indicating a nurse anesthetist tested positive for opiates and other controlled substances concern an "issue related to health or safety." *See, e.g., Coleman*, 512 S.W.3d at 901 (statements, although private and among employees, related to "matter of public concern").[2] Accordingly, USAP's "communications" qualify as an "exercise of the right of free speech" under the TCPA.[3] Having

[2] The record indicates Mahana's drug test came back negative; however, this is irrelevant to the analysis. Whether a statement is true or false, defamatory or not, has no bearing on whether the statement constitutes an exercise of the right of free speech. *Cruz v. Van Sickle*, 452 S.W.3d 503, 515 (Tex. App.—Dallas 2014, pet. denied); *see also In re Lipsky*, 411 S.W.3d 530, 543 (Tex. App.—Fort Worth 2013, orig. proceeding).

[3] In recent opinions, this Court has determined the TCPA "has its limits," and not every communication falls under the statute. *See, e.g., Erdner v. Highland Park Emergency Ctr., LLC*, No. 05-18-00654-CR, 2019 WL 2211091, at *5 (Tex. App.—Dallas May 22, 2019, no pet.); *Dyer v. Medoc Health Servs., LLC*, 573 S.W.3d 418, 428 (Tex. App.—Dallas 2019, pet. denied); *Staff Care, Inc. v. Eskridge Enterps, LLC*, No. 05-18-00732-CV, 2019 WL 2121116, at *5 (Tex. App.—Dallas May 15, 2019, no pet.) (mem.op.). However, the alleged communications in these cases involved business disputes. In *Staff Care* and *Erdner*, even though the parties were in the healthcare industry, we concluded this alone was not

reached this conclusion, I do not address whether the communications relate to community well-being.

The second step in the TCPA analysis required Mahana to establish by clear and specific evidence a prima facie case for each essential element of her intentional infliction of emotional distress claim. TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c). But because the majority does not reach step two, neither do I. *See Erdner*, 2019 WL 2211091, at *8 (Whitehill, J., dissenting) (not reaching second step of TCPA analysis when not considered by the majority).

/David L. Bridges/
DAVID L. BRIDGES
JUSTICE

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enough to turn a private communication made in connection with a business dispute into a matter of public concern. *Erdner*, 2019 WL 2211091, at *5; *Staff Care, Inc*., 2019 WL 212116, at *6. Here, the alleged communications directly involve a matter of public concern regarding health or safety. Therefore, my application of the statute neither tests the limits of the TCPA nor results in a "potentially absurd result that was not contemplated by the Legislature." *Erdner*, 2019 WL 2211091, at *5.

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OPINION DISSENTING FROM DENIAL OF EN BANC CONSIDERATION

Before the Court En Banc
Opinion by Justice Whitehill

Imagine that you show up for surgery requiring general anesthesia and as they are wheeling you into the operating room they tell you that the person responsible for administering the drugs that put you to sleep—a person in whose hands your life rests—is a drug addict who that day failed a test for illegal drugs.[1] Would any ordinary person in that situation have some potential concern for his or her own health and safety? Would communications among that hospital's personnel discussing that anesthetist's (alleged) drug habits and failed drug test be communications at least tangentially related to public health and safety or community well-being?

[1] This hypothetical is based on allegations in the plaintiff's petition about alleged communications. This opinion does not suggest that these facts are true of plaintiff, but it must accept the petition's allegations at face value for purposes of the TCPA step one analysis.

The panel majority suggests that ordinary people would not have some concern for health and safety or community well-being simply because a person who puts people to sleep for a living is a drug addict who recently failed a drug test.

I requested en banc consideration of this case because the majority opinion conflicts with our prior cases, and a majority of the Court voted to deny en banc consideration. I respectfully dissent from that decision for the following reasons.

I. ISSUE PRESENTED

The issue is straightforward. Nurse anesthetist Mahana sued her former employer for intentional infliction of emotional distress. She alleged that (i) her supervisor sent text messages to her co-workers stating that she was being removed from her duties because she had tested positive for opiates and other controlled substances and (ii) her supervisor and other employees were spreading rumors that she was a drug abuser and addict. The question presented under the TCPA's first step is whether these statements relate, even tangentially, to a matter of public concern such as public health and safety or community well-being.[2] *See ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 900 (Tex. 2017) (per curiam) (TCPA does not require more than a "tangential relationship" to a "matter of public concern").

The panel opinion holds that the subject matter of those statements doesn't at least tangentially relate to health, safety, or community well-being, that is, a matter of public concern, and therefore the TCPA does not apply in this case. Because the majority opinion is incorrect and conflicts with our controlling precedent, I dissent from the Court's denial of en banc consideration.

[2] Step one does not require that the legal action be based on the truth of the communication's content as long as the action relates to or is in response to the communication. *See Damonte v. Hallmark Fin. Servs., Inc.*, No. 05-18-00874-CV, 2019 WL 3059884, at *5 (Tex. App.—Dallas July 12, 2019, no pet. h.) (mem. op.) (Whitehill, J., concurring). It is the fact that the communication was made and that it implicates one of the three TCPA statutorily defined protected rights that counts for the TCPA's first step analysis. *Id*.

II. CONTRARY TO THE PANEL OPINION, THE SPEECH AT ISSUE SUFFICIENTLY IMPLICATES (I) HEALTH AND SAFETY AND (II) COMMUNITY WELL-BEING.

Mahana is a nurse anesthetist. As this passage from her live pleading shows, the communications at issue are that she is a drug addict who tested positive for illegal drugs one day when she arrived for work:

> Within a short time after the Plaintiff [reported for work and] submitted to the drug testing by the Defendant, supervisors and other persons known and unknown to the Plaintiff at this time intentionally and with malicious intent *began texting that the Plaintiff had tested positive for several illegal drugs and controlled substances* and was being fired. The Plaintiff was later shown texts from agents and supervisors of the Defendant alleging she had tested positive for numerous illegal or controlled substances when in fact the Plaintiff had tested negative. *The said text also stated or implied that the Plaintiff was a "drug addict"* and was *being terminated for illegal activity*.

(Emphasis added.) Yet the panel professes that they would not be concerned for their (or the public's) health or safety if they (or the public) appeared for surgery that day and were given that information about the person who would be putting them to sleep in a few minutes.

Under *Lippincott v. Whisenhunt*, 462 S.W.3d 507 (Tex. 2015) (per curiam), and *Coleman*, 512 S.W.3d at 900, Mahana's claim triggers the TCPA with respect to the communications stating that (i) she was being removed from her duties because she tested positive for illegal drugs and controlled substances and (ii) she was a drug addict.

Under the TCPA, the step one question is whether the communication relates at least tangentially to a matter of public concern, such as health, safety, or community well-being. Statements that a nurse anesthetist—a medical professional in whose hands peoples' lives rest—is a drug addict who shows up for work testing positive for illegal drugs and other controlled substances unquestionably and directly relate to public and patient health and safety, let alone tangentially so. Patients could die or suffer life altering injuries if a nurse anesthetist makes a mistake because of drug impairment. This is an obvious health and safety risk. According to

Mahana's petition, the hospital thought so; that is a reason why it fired her. At this stage, we accept the truth of Mahana's petition alleging that fact. *See Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017).

Many employers consider drug use a health and safety risk, which is why many fire employees for positive tests for illegal drugs. Indeed, Mahana's employment agreement provides that she may be terminated immediately if "a determination is made by the Board that there is an immediate and significant threat to the health or safety of any Patient as a result of the services provided by Provider under this Agreement." Further, Mahana's employment agreement provides that it violates her employer's standards of conduct if there is "[p]hysical or mental impairment while performing clinical duties, including but not limited to, substance abuse."

The majority opinion concludes that there would be a health and safety concern only if someone had said that Mahana used illegal drugs on the job or that her alleged use affected her job performance. That requires too much. It is enough that the public would be concerned about health and safety risks because a drug addicted nurse anesthetist might show up for surgery high on drugs. (None of this is to say that this actually happened in this case, but we must deal with the import of the communications described in Mahana's first amended petition.)

As we have held, whether a statement is true or false has no bearing on whether it implicates a matter of public concern and thus constitutes an exercise of the right of free speech. *AOL, Inc. v. Malouf*, No. 05-13-01637-CV, 2015 WL 1535669, at *3 (Tex. App.—Dallas Apr. 2, 2015, no pet.) (mem. op.); *Cruz v. Van Sickle*, 452 S.W.3d 503, 515 (Tex. App.—Dallas 2014, pet. denied).

The panel opinion's holding that the statements about Mahana do not implicate health and safety conflicts with our holding in *AOL, Inc*. In that case, we held that statements that a dentist had been charged with Medicaid fraud implicated health and safety, among other matters of public concern. 2015 WL 1535669, at *2. The statements about Mahana bear a much more direct

relationship to health and safety than the statements in *AOL, Inc.*, so the panel opinion conflicts with that precedent.

The alleged speech also relates to community well-being. The panel opinion's holding that it doesn't conflicts with both *AOL, Inc.* and *Watson v. Hardman*, 497 S.W.3d 601 (Tex. App.—Dallas 2016, no pet.). In both of those cases, we held that statements accusing someone of criminal activity implicated community well-being. *Watson*, 497 S.W.3d at 607 (accusation of stealing charitable funds); *AOL, Inc.*, 2015 WL 1535669, at *2 (accusation of Medicaid fraud). The panel opinion attempts to avoid the conflict by construing the statements about Mahana to be limited to the state of drug addiction, which is not itself a crime. But the statements about Mahana also accuse her of testing positive for illegal drugs and controlled substances on a day she showed up for work putting people to sleep. Testing positive for illegal drugs necessarily entails illegal use of those substances. Thus, the panel opinion conflicts with both *AOL, Inc.* and *Watson* on this basis. Furthermore, given the allegation of *illegal* drug use, the panel decision's rationale that the TCPA does not apply because the petition did not allege illegal activity is puzzling.

Finally, we should remember that ruling in appellant's favor concerning TCPA step one is not the be-all, end-all here. The real question arises at step two, when we would consider whether Mahana's allegations, if true, add up to a viable intentional infliction of emotional distress claim. This is the sort of thing we routinely address and decide on this Court. There is no reason for not doing so in this case.

III. CONCLUSION

If a statement that a nurse anesthetist, who routinely puts people to sleep for medical procedures, abuses and is addicted to illegal drugs doesn't at least tangentially relate to health, safety, or community well-being, what statement does?

Because the panel opinion misapplies the TCPA and conflicts with binding precedents from this Court, I respectfully dissent from the Court's refusal to consider this case en banc.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

Schenck, J., joins this dissenting opinion

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