



**ORIGINAL**

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

**FILED**  
**COURT OF CIVIL APPEALS**  
**STATE OF OKLAHOMA**

DIVISION II

SEP 28 2022

THURMAN BUCK, )  
 )  
 Plaintiff/Appellee, )  
 )  
 vs. )  
 )  
 RUSSELL GOODWIN, JEREMY )  
 THOMAS and OKLAHOMA PREDATOR )  
 PREVENTION, )  
 )  
 Defendants/Appellants. )

**JOHN D. HADDEN**  
**CLERK**

Case No. 119,166

Rec'd (date)	9-28-22
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APPEAL FROM THE DISTRICT COURT OF  
CANADIAN COUNTY, OKLAHOMA

HONORABLE JACK D. MCCURDY II, TRIAL JUDGE

**REVERSED AND REMANDED**

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Edmond, Oklahoma

For Plaintiff/Appellee

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For Defendants/Appellants

OPINION BY GREGORY C. BLACKWELL, JUDGE:

The defendants appeal the district court's denial of their motion to dismiss the plaintiff's petition pursuant to the Oklahoma Citizens Participation Act

(OCPA). On review,<sup>1</sup> we find that the defendants met their first-stage OCPA burden to show that the OCPA applied. This shifted the burden to the plaintiff to show a *prima facie* case for at least one of his claims, which were defamation *per se*, libel, slander, and intentional infliction of emotional distress.<sup>2</sup> We find the plaintiff failed to meet this burden. Accordingly, the trial court erred in denying the defendants' motion to dismiss. We reverse and remand with instructions to enter dismissal in favor of all defendants.

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<sup>1</sup> We are duty-bound to note a lingering question regarding our jurisdiction to hear this appeal. Section 1437(A) of the OCPA grants jurisdiction to hear an interlocutory appeal of a motion to dismiss that is deemed denied by operation of law due to the trial court's failure to timely rule on the motion. 12 O.S. § 1437(A) ("If a court does not rule on a motion to dismiss filed pursuant to Section 3 of the Oklahoma Citizens Participation Act in the time prescribed by Section 5 of the act, the motion shall be considered denied by operation of law *and the moving party may appeal.*" (emphasis added)). In this case, however, the trial court *expressly* denied the motion to dismiss and subsection (A) does not apply. Subsection (B), which governs such express denials, is somewhat less direct than subsection (A). It does not contain an express grant of jurisdiction to hear an otherwise interlocutory appeal, but rather, it commands us to "*expedite* an appeal or other writ, whether interlocutory or not, from a trial court order on a motion to dismiss." 12 O.S. § 1437(B) (emphasis added). Although we are not alone in our concern as to whether § 1437(B) is sufficient to grant jurisdiction to hear the appeal of an otherwise interlocutory order, *see e.g., Jennings v. WallBuilder Presentations, Inc.*, 378 S.W.3d 519 (Tex. App. 2012) (superseded by statute) (holding that the Texas version of the same statute, with language was identical to the OCPA in all relevant respects, does *not* grant such jurisdiction), at least two unpublished orders of the Oklahoma Supreme Court have found that § 1437(B) *does* confer such jurisdiction. *See Francis M. Oliver, M.D., et al. v., MHM Support Services, et al.* (No. 118,862) (order filed September 21, 2020) and *Boevers Homes, LLC, et al. v. Kyle and Natalie Wagner, et al.* (No. 119,408) (order filed April 26, 2021). Additionally, at least four published opinions of this Court have presumed jurisdiction over such orders. *See Steidley v. Cmty. Newspaper Holdings, Inc.*, 2016 OK CIV APP 63, 383 P.3d 780; *Krimbill v. Talarico*, 2018 OK CIV APP 37, 417 P.3d 1240; *Sw. Orthopaedic Specialists, P.L.L.C. v. Allison*, 2018 OK CIV APP 69, 439 P.3d 430; and *Lewis v. Corrente*, 2020 OK CIV APP 45, 473 P.3d 531. By the weight of this authority, we find that § 1437(B) grants us jurisdiction to hear this otherwise interlocutory appeal. We note, however, that the question remains ripe for continued litigation until the Oklahoma Supreme Court issues a published order or opinion definitively deciding the question.

<sup>2</sup> The plaintiff labeled his fourth count simply "Emotional Distress," but pleads the elements of intentional infliction of emotional distress. *See Durham v. McDonald's Restaurants of Oklahoma, Inc.*, 2011 OK 45, ¶ 4, 256 P.3d 64, 66.

## **BACKGROUND**

The defendants operate an unincorporated entity they refer to as “Oklahoma Predator Prevention.” One activity the group undertakes is posing—*Catch-a-Predator* style—in online forums as minor females in an attempt to attract and eventually expose adults who make sexual advances towards these fictional girls. In this case, the defendants posted a message on a social media platform posing as a fourteen-year-old girl who was stranded in Oklahoma City and needed a ride. According to the defendants, the plaintiff responded and exchanged numerous explicit and sexually suggestive messages with the defendants. The defendants arranged a meeting between the plaintiff and the fictional “girl.” When the plaintiff arrived at the meeting point, the defendants recorded the incident, including the plaintiff’s license plate number, with which the defendants later discovered the plaintiff’s identity.

Armed with this information, the defendants apparently posted details about their encounter with the plaintiff on the organization’s Facebook page. According to the petition, those details included plaintiff’s name, age, and “residential information.” Though it is not clear from the record exactly what the defendants posted, their posts appear to have included a selection of the messages shared between the parties and portions of the video of the parties’ meeting.

The plaintiff filed a petition seeking damages for defamation *per se*, libel, slander, and intentional infliction of emotional distress. The defendants filed a motion to dismiss pursuant to the OCPA. The plaintiff responded with an

argument that the defendants' speech was not protected by the OCPA because it constituted criminal "cyberstalking." The court denied the OCPA motion stating that plaintiff's petition "does meet the minimum requirements of the Pleading Code." The defendants filed a motion to reconsider which was also denied. The defendants appeal.

### **STANDARD OF REVIEW**

Based on the reasoning provided in *Southwest Orthopaedic Specialists, P.L.L.C. v. Allison*, 2018 OK CIV APP 69, ¶5, 439 P.3d at 433, an OCPA proceeding is a form of pre-answer summary judgment and involves only issues of law. "Issues of law are reviewable by a *de novo* standard. An appellate court claims for itself plenary, independent and non-deferential authority to re-examine a trial court's legal rulings." *Neil Acquisition, L.L.C. v. Wingrod Inv. Corp.*, 1996 OK 125, n.1, 932 P.2d 1100.

Additionally, our assessment of the trial court's exercise of discretion in denying the motion to reconsider<sup>3</sup> depends on the propriety of the underlying order. Here, this question is settled by our *de novo* review of the underlying order. *See Reeds v. Walker*, 2006 OK 43, ¶ 9, 157 P.3d 100.

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<sup>3</sup> The motion was filed thirteen days after the order but was filed within ten days if the day of filing and the intervening weekend days are excluded, per 12 O.S. § 2006(A). As such, it tolled the time to appeal the underlying decision.

## ANALYSIS

### THE OPERATION OF THE OCPA<sup>4</sup>

The defendants filed a motion pursuant to the OCPA seeking dismissal of the plaintiff's petition. The dismissal inquiry under the OCPA has three stages. The first requires the movant to show that the speech or expressive conduct that is the subject of the suit falls under the protection of the act. The defendants here were initially required to show that the plaintiff's suit related to activity protected by the OCPA, *e.g.*, "speech on a matter of public concern." 12 O.S.Supp.2014, § 1434(B). If this threshold requirement is met, the plaintiff has the burden in the second stage of demonstrating a *prima facie* case establishing a viable basis for the suit. 12 O.S.Supp.2014, § 1434(C). If the plaintiff does so, the defendant may then attempt to show a summary defense to this *prima facie* case as a matter of law. 12 O.S.Supp.2014, § 1434(D). In a defamation case, this third stage would typically involve showing an entitlement to summary judgment on the grounds that the challenged statements were true, privileged, or undisputedly "opinion" rather than representations of fact.<sup>5</sup>

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<sup>4</sup> It is clear from trial court's comments at the hearing that the OCPA was not considered separate and apart from the traditional dismissal inquiry of whether the petition was legally sufficient to state a claim for relief. This was error. Although the caselaw is not voluminous, it has been clear for some time that the OCPA provides a different test of a plaintiff's case than the traditional § 2012(b)(6) motion. *See, e.g., Sw. Orthopaedic Specialists*, 2018 OK CIV APP 69, ¶ 7. Nevertheless, we need not remand for consideration under the applicable law where the record on appeal reveals that, had the correct law been applied, the case would have been dismissed. *Hall v. GEO Grp., Inc.*, 2014 OK 22, ¶ 17, 324 P.3d 399, 406 ("When possible, an appellate court must hand down that judgment, which in its opinion, the trial court should have rendered.").

<sup>5</sup> *See, e.g., Oklahoma Publ'g Co. v. Kendall*, 1923 OK 999, ¶ 35, 221 P. 762 (the general rule is that the "truth of the communication is a complete defense to a civil action for libel");

### *The First Stage Inquiry*

The plaintiff opposed the OCPA motion here on the grounds that the defendants' speech was not protected by the act at all. The burden in the first stage of an OCPA proceeding requires the defendant to show that the challenged speech or expressive conduct was related to "free speech" that was "made in connection with a matter of public concern." 12 O.S.Supp.2014, § 1431(C). The act states that "[t]he purpose of the Oklahoma Citizens Participation Act is to encourage and safeguard the constitutional rights of persons to ... speak freely ...." 12 O.S.Supp.2014, § 1430. We agree that the protections of the OCPA are broadly linked to constitutionally protected speech and activities.<sup>6</sup>

The plaintiff argues that the defendants' statements here constituted "doxing" or "cyberstalking" or some similar form of harassment as a matter of criminal and civil law.<sup>7</sup> The plaintiff argues that because such activities are not protected by the First Amendment, the OCPA cannot apply, and the trial court was therefore correct to dismiss defendants' motion. If the question of whether

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12 O.S. § 1443.1 (privileged publication is not punishable as libel); *Bird Constr. Co., Inc. v. Oklahoma City Housing Auth.*, 2005 OK CIV APP 12, ¶10, 110 P.3d 560 ("As a general rule, statements which are opinionative and not factual in nature, which cannot be verified as true or false, are not actionable as slander or libel under Oklahoma law.") (quoting *Metcalf v. KFOR-TV, Inc.*, 828 F. Supp. 1515, 1529 (W.D. Okla. 1992)).

<sup>6</sup> We need not, and do not, decide here if the speech protected by the OCPA is entirely identical to that protected by the First Amendment of our Federal Constitution. The Texas courts, interpreting identical language, have expressed some doubts on the question. See *Jackson v. Kell Auto Sales, Inc.*, 02-21-00106-CV, 2021 WL 5367846, at \*3 (Tex. App. Nov. 18, 2021) (noting that the exercising of rights listed in the TCPA may not be completely coextensive with First Amendment constitutional rights because speech must also involve matters of "public interest" to be protected). This implies that the First Amendment also covers speech that is "uninteresting" to the public, a proposition with which we do not quarrel.

<sup>7</sup> "Cyberstalking" is a criminal offense under 18 U.S.C. § 2261A and 21 O.S. § 1172.

the relevant speech is protected by the First Amendment must be fully resolved *before the Act applies*, however, the procedure established by the OCPA will become useless in defamation cases, which are frequently the subject of OCPA litigation.

In the Texas case of *Tu Nguyen v. Duy Tu Hoang*, 318 F. Supp. 3d 983 (S.D. Tex. 2018), a similar argument was raised, and the court held that the threshold test for application of the Texas version of the act is simply whether the “alleged defamatory speech related to a matter of public concern” and the question of whether the language is *ultimately* protected by the First Amendment “is not the question addressed at the first stage of the inquiry.” *Id.* at 1002. This interpretation is well-established in Texas,<sup>8</sup> and we are persuaded it is correct. The purpose of the OCPA is to provide an accelerated summary adjudication procedure to a defendant as soon as practicable after a suit is filed in order to forestall prolonged but unviable litigation aimed at suppressing speech. See *Krimbill*, ¶ 7. If the underlying question of whether the speech is defamatory must be tried *before* a preliminary determination under the act can be made, the

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<sup>8</sup> See *Amini v. Spicewood Springs Animal Hosp., LLC*, 03-18-00272-CV, 2019 WL 5793115, at \*6 (Tex. App. Nov. 7, 2019) (collecting cases). Oklahoma’s act, which became effective in 2014, largely copied the Texas Citizens’ Participation Act enacted in 2011. The Texas act has been the subject of numerous decisions by the Texas courts, which we may look to as authority in resolving this matter. See *In re Fletcher’s Estate*, 1957 OK 7, ¶ 25, 308 P.2d 304 (stating a general rule that that a statute adopted by Oklahoma from another state which at the time of adoption has been construed by the highest court of the first state, is presumed adopted as so construed and decisions by the highest court of the other state after adoption of the statute in Oklahoma are considered persuasive).

procedure is upended, and the act is entirely undermined. We will not interpret the act this way.<sup>9</sup>

Consistent with these principles, Texas's treatment of its parallel act, and the text of the statute, we hold that the test of stage one simply asks whether the "alleged defamatory speech related to a matter of public concern," and the question of whether the language is ultimately protected by the First Amendment is not a question addressed at the first stage of the inquiry.

Having rejected the plaintiff's theory that the relevant speech did not trigger the OCPA because it was in and of itself criminal, we find the defendants easily met the first stage inquiry to show that the alleged speech was "speech on a matter of public concern." 12 O.S.Supp.2014, § 1434(B). The act defines "matter of public concern" broadly, as including speech "related to" such broad topics as "health or safety" or "community well-being." *Id.* § 1431. The harmful speech alleged here was the defendants' Facebook posts concerning the plaintiff's alleged attempts to meet and have sex with a person the plaintiff is alleged to have believed was fourteen years old. We hold this was speech on "a matter of public concern" and that the OCPA applied as a threshold matter.

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<sup>9</sup> Further, in *Tu Nguyen*, the question of defamation *was before the court*. Here, the plaintiff argues that the involved speech is exempt from First Amendment protection on "cyberstalking" grounds outside the scope of either this case or any other case that is currently *sub judice*. What the plaintiff essentially proposes is that the court here was required, pre-answer, to conduct little less than a full trial on the question of whether defendant's activities constituted unprotected criminal cyberstalking, *even though no criminal or even civil claims alleging cyberstalking have been filed*. Such a proceeding would be the epitome of an advisory opinion and would raise troubling questions as to whether a civil court has jurisdiction to determine if a criminal offence has occurred based only on the limited record contemplated in an OCPA proceeding.



### *The Second Stage Inquiry*

With the threshold inquiry satisfied, the burden is shifted to the plaintiff. The plaintiff must demonstrate—via “clear and specific evidence”—“a *prima facie* case for each essential element of the claim in question.” *Id.* § 1434(C). If he cannot do so, the offending claim “shall [be] dismiss[ed].” *Id.* § 1434(B). *See also Orthopaedic Specialists*, 2018 OK CIV APP 69, ¶ 14.

In this case, however, the plaintiff relied entirely on his argument as to the first stage inquiry, that is, that the OCPA did not apply because the speech at issue was not protected by the First Amendment. At no time did plaintiff’s opposition in the trial court attempt to address the *second stage* burden of showing the elements of a *prima facie* case. Indeed, the opposition does not so much as include the speech at issue, or any evidence of what the defendants posted that the plaintiff alleged is defamatory or that constitutes intentional infliction of emotional distress. The plaintiff made no reference to or quoted any specific statement he considered defamatory, nor does he cite any evidence detailing the specific statements he alleged to be defamatory or to constitute the tort of intentional infliction of emotional distress. The words “slander” or “libel” appear only once in plaintiff’s objection to the OCPA motion, and this is as part of a vaguely couched argument that the defendants cannot show a defense in the third stage of the inquiry.

Exactly what is meant by “clear and specific evidence” and “a *prima facie* case” in the context of § 1434(C) need not be fully resolved here. However, we hold that, *at a minimum*, a party responding to an OCPA motion to dismiss that

survives the first stage inquiry must set forth those statements which he is alleging caused his harm. To meet this requirement here, for example, the plaintiff could have simply provided the trial court with screenshots of the offending Facebook posts and a copy of the allegedly defamatory video. Armed with this evidence, the trial court could have then made a decision as to whether the second stage inquiry was satisfied, and if so, could have used that same evidence as part of the third-stage inquiry. In this case, however, neither the trial court nor this Court has a record of the actual statements—the Facebook posts and video—that the plaintiff claims caused his injury. This is entirely the fault of the plaintiff and inadequate under the procedures of the OCPA, which mandates dismissal when a *prima facie* case is not established. Because the plaintiff made no such effort in this case, the matter should have been dismissed.<sup>10</sup>

### CONCLUSION

We find that the defendants met the requirements of the first-stage inquiry and the procedures of the OCPA applied here. The burden then shifted to the

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<sup>10</sup> As this Court noted in the second *Krimbill v. Talarico* opinion, 2018 OK CIV APP 73, ¶ 16, 439 P.3d 447, 451 (*Krimbill II*), “[o]ne aim of the OCPA is clearly to provide a quick and simple process” for weeding out unviable suits “in the early stages of litigation.” As *Krimbill II* notes, the OCPA procedure is essentially a “single shot.” *Both parties must marshal all the evidence and arguments available into a single proceeding.* The act does not contemplate more than one OCPA proceeding in a case. Because the plaintiff failed to meet the required second-stage burden here, we find it incompatible with the act to remand to allow plaintiff a second opportunity to provide argument that he failed to bring in the original proceeding. In *Krimbill II*, the defendants, who had previously been unsuccessful in their quest for an OCPA dismissal, attempted to start a second OCPA proceeding under the guise of seeking a new trial six months after the district court denied the original motion. As noted in that case, allowing multiple OCPA procedures could mean two or more trips to the appellate courts before the merits of the underlying suit are even considered in the district court. Such an interpretation is incompatible with the aims of the act. *Id.* ¶ 16.

plaintiff to show a *prima facie* case for defamation or intentional infliction of emotional distress. The plaintiff made no effort to do so, and instead rested on the argument that the OCPA did not apply. As such we reverse the decision of the trial court and remand with instructions to enter a complete dismissal in favor of the defendants.<sup>11</sup>

**REVERSED AND REMANDED.**

WISEMAN, P.J., and HIXON, J. (sitting by designation), concur.

September 28, 2022

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<sup>11</sup> On page fifteen of their brief, the defendants request an award of costs and attorney's fees. Such a request is not in compliance with statutory law or Supreme Court Rule. Such an award must be sought "by a separately filed and labeled motion in the appellate court prior to issuance of mandate." Okla. Sup. Ct. R. 1.14 (citing 12 O.S. § 696.4(C)). The request is therefore denied without prejudice to refile consistent with Rule 1.14.