

AFFIRMED and Opinion Filed November 12, 2019



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-19-00091-CV

**BYRON CURTIS COOK, Appellant
V.
RONALD SIMMONS, Appellee**

**On Appeal from the 417th Judicial District Court
Collin County, Texas
Trial Court Cause No. 417-02850-2018**

MEMORANDUM OPINION

Before Justices Myers, Osborne, and Nowell
Opinion by Justice Osborne

Appellee Ronald Simmons sued appellant Byron Curtis Cook alleging securities fraud. The trial court denied Cook’s motion to dismiss under the Texas Citizens Participation Act. TEX. CIV. PRAC. & REM. CODE §§ 27.001–27.011 (“TCPA”).¹ Because Simmons’s legal action is not factually predicated on Cook’s protected activity, we affirm the trial court’s order.

BACKGROUND

In 2013, Simmons invested \$74,000 in Cypress Income Fund, L.L.C. (“CIF”). In 2018, he brought suit against Cook, CIF, and Legacy Income Properties, L.L.C. (“Legacy”), alleging claims for fraud, breach of fiduciary duty, and violations of the Texas Securities Act in connection with

¹ The TCPA was recently amended, effective September 1, 2019. Act of May 17, 2019, 86th Leg., R.S., ch. 378, §§ 1–9, § 12, sec. 27.001, 27.003, 27.005–007, 27.0075, 27.009–010 (to be codified at TEX. CIV. PRAC. & REM. CODE § 27.001, 27.003, 27.005–007, 27.0075, 27.009–010). The foregoing amendments do not apply to this case, which was filed before the amendments’ effective date. *Id.* § 11.

his investment. He alleged that Cook was jointly and severally liable with Legacy and CIF “because of his direct control of Legacy or CIF as the issuer or offeror or because of his material aid to Defendants Legacy or CIF with intent to deceive or defraud or with reckless disregard for the truth or the law.” Simmons’s operative petition added allegations that Cook was the alter ego of Legacy and CIF.

Cook filed a TCPA motion to dismiss Simmons’s claims. He argued that Simmons filed suit “in bad faith at the behest of his friend Ken Paxton as part of an intimidation and disparagement campaign” against Cook, in “retaliation for Cook’s cooperation and participation in the criminal investigation and prosecution of Paxton for securities fraud.” Texas Attorney General Paxton had solicited Cook’s investment in Servergy, Inc. (an entity that is not a party to this case), and the Texas Rangers interviewed Cook in connection with an investigation of Paxton and Servergy. Paxton was subsequently indicted on charges including securities fraud in connection with the solicitation, and the Securities and Exchange Commission filed a civil action against him. Cook argued that in cooperating with law enforcement’s investigation, he was exercising protected speech rights, so that Simmons’s suit “relates to or is in response to” Cook’s exercise of the right of free speech. He also contended that his statements to law enforcement “regarding possible criminal activity” were an exercise of his right to petition. Cook also argued that Simmons could not show clear and specific evidence to support his prima facie case, and that in any event Simmons’s claims were barred by limitations.

The trial court permitted limited discovery at the parties’ request. After a hearing, the trial court denied Cook’s motion to dismiss. This appeal followed. In three issues, Cook argues that the TCPA applies, Simmons failed to establish a prima facie case on each element of his claims by clear and specific evidence, and Simmons’s claim for securities fraud was barred by limitations.

STANDARDS OF REVIEW

We review de novo the trial court's ruling on a motion to dismiss under the TCPA. *Dyer v. Medoc Health Servs.*, 573 S.W.3d 418, 424 (Tex. App.—Dallas 2019, pet. denied). “In conducting this review, we consider, in the light most favorable to the non-movant, the pleadings and any supporting and opposing affidavits stating the facts on which the claim or defense is based.” *Fishman v. C.O.D. Capital Corp.*, No. 05-16-00581-CV, 2017 WL 3033314, at *5 (Tex. App.—Dallas July 18, 2017, no pet.) (mem. op.); *see also* TCPA § 27.006(a). Whether the TCPA applies to Simmons's claims is an issue of statutory interpretation that we also review de novo. *Dyer*, 573 S.W.3d at 424.

DISCUSSION

In *Riggs & Ray, P.C. v. State Fair of Texas*, this Court explained:

In order to trigger the TCPA's protection, the legal action must be factually predicated on the alleged conduct that falls within the scope of the TCPA's definition of the right of free speech, petition, or association. If this nexus is missing, then the statute does not apply.

No. 05-17-00973-CV, 2019 WL 4200009, at *4 (Tex. App.—Dallas Sept. 5, 2019, no pet. h.) (mem. op.) (internal quotations and emphasis omitted). In his first issue (“Does the [TCPA] apply to bar a meritless lawsuit brought in retaliation for a defendant's cooperation in a criminal investigation and prosecution, even when the plaintiff's pleadings do not specifically reference the defendant's participation in the criminal proceedings?”), Cook acknowledges that Simmons's petition says nothing about the criminal investigation. But Cook explained in his motion to dismiss that “this suit seeks to gin up securities fraud claims so that Paxton can accuse Cook of the same kind of misconduct for which Paxton is being prosecuted.”

Cook argues that he and Paxton were both managers of a limited liability company called Unity Resources, L.L.C. which, through several related LLCs, arranged private offerings in CIF and other oil and gas investment funds. He contends that Paxton would have responsibility equal

to his for any liability to Simmons in this suit. He concludes that Simmons's failure to join Paxton in this suit is evidence of (1) Simmons's retaliatory motive, (2) the groundlessness of Simmons's claims, and (3) the effort to discredit Cook in the Paxton investigation. Cook also argues that Simmons is represented in this suit by Paxton's defense counsel in the SEC suit, and the same counsel also represent other Paxton allies who have been recruited to bring identical suits against Cook. Cook also quotes from an article by "Paxton spin doctor Jon Cassidy" that Simmons read before filing suit. Cassidy opined that the suits by Paxton's allies alleging that Cook engaged securities fraud—the same conduct alleged against Paxton in the SEC's suit—weakens Cook's credibility in the proceedings against Paxton and put Cook "in a bind."

In sum, Cook contends Simmons's claims "were part of a retaliatory scheme against Cook as a key witness against Paxton." He contends that Simmons brought this suit "in response to" his protected speech and his right to petition. *See* TCPA § 27.003 (party may file motion to dismiss action that is based on, relates to, or is in response to party's exercise of right of free speech, right to petition, or right of association). "'Exercise of the right of free speech' means a communication made in connection with a matter of public concern." TCPA § 27.001(3). Cook argues that his statements to the Texas Rangers related to Paxton's criminal conduct, a matter of public concern relating to economic or community well-being under TCPA section 27.001(7)(B), and to a "good, product, or service in the marketplace" under TCPA section 27.001(7)(E). He also argues that he exercised his right to petition because his communications with the Texas Rangers were "in or pertaining to" a judicial proceeding or official proceeding as defined in TCPA sections 27.001(4)(A)(i), 27.001(4)(A)(ii), 27.001(4)(B), and 27.001(4)(C).

We first note that Cook did not plead or show the content of any particular "communication" he alleges he made to the Texas Rangers, nor did Simmons's petition make any

such reference.² The TCPA’s definitions of the right of free speech and the right to petition both require a “communication.” *See* TCPA § 27.001(3), (4). As defined in the TCPA, a “communication” “includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.” TCPA § 27.001(1). Without pleading or evidence of the alleged communication’s content, it is difficult to review Cook’s contention that Simmons’s suit is “in response to” the communication, even under the supreme court’s directive that a communication’s “tangential relationship” to a matter of public concern is sufficient to establish exercise of the right of free speech. *See ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 900 (Tex. 2017) (per curiam). This is especially true because neither Paxton nor Servery, the alleged subjects of the communication, is a party to this lawsuit. This difficulty is compounded in reviewing Cook’s allegation that the communication was “reasonably likely to encourage consideration or review of any issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding” under TCPA section 27.001(4)(C), because Cook does not identify the “issue” that might prompt review.

Although Cook relies on several cases for the proposition that filing a police report constitutes the exercise of the right to petition for purposes of the TCPA, in each case, the substance of the report was included in the record. *See Robert B. James, DDS, Inc. v. Elkins*, 553 S.W.3d 596, 602 (Tex. App.—San Antonio 2018, pet. denied) (defendants made statements to police department that plaintiff stole money from a dental practice); *Ford v. Bland*, No. 14-15-00828-CV, 2016 WL 7323309, at *1 (Tex. App.—Houston [14th Dist.] Dec. 15, 2016, no pet.) (mem. op.) (plaintiff filed complaint with police alleging that defendant switched stone in his

² In an affidavit submitted to the trial court, Cook stated: “During the Spring of 2015, I met with the Texas Rangers at their request to answer questions about Paxton’s solicitation of my investment in a company called Servery Inc. I understood that I was cooperating and participating in an investigation into potential criminal conduct on Paxton’s part.” He continued, “Subsequently, in July 2015, a Collin County grand jury indicted Paxton on criminal securities fraud charges related in part to Paxton’s solicitation of investments in Servery.” As Simmons pointed out in his response to Cook’s TCPA motion, “Simmons’ pleadings in no way reference the communications made by Cook to Texas Rangers.” He also argued, “it is impossible to say whether Cook’s alleged communications to Texas Rangers involved a ‘matter of public concern’ such that he can base his Motion on the exercise of his right to free speech.”

wife’s wedding ring during refurbishment); *Murphy USA, Inc. v. Rose*, No. 12-15-00197-CV, 2016 WL 5800263, at *3 (Tex. App.—Tyler Oct. 5, 2016, no pet.) (mem. op.) (gas station manager reported to police that plaintiff attempted to steal gas). And in each case, in contrast to Cook’s Texas Rangers interview, the report to law enforcement was about a party to the lawsuit. For the reasons we discuss below, however, even if we were to conclude that Cook has shown a “communication” by a preponderance of the evidence, he has not met his burden to show that Simmons’s legal action is “in response to” that communication. *See* TCPA § 27.005(b).

Cook argues that as long as he shows that Simmons’s suit is “in response to” Cook’s exercise of protected rights, he need not show that it is “based on” or “relates to” that exercise. *See* TCPA § 27.005(b) (court may dismiss legal action if moving party shows the action “is based on, relates to, or is in response to the party’s exercise of” protected right). In *Riggs & Ray*, however, we explained that “[a]ny activities by the movant that are not a factual predicate for the non-movant’s claims are not pertinent to our inquiry regarding whether the TCPA applies.” *Riggs & Ray*, 2019 WL 4200009, at *4; *see also Stroud v. Clearview Energy*, No. 05-18-00729-CV, 2019 WL 1930176, at *6–8 (Tex. App.—Dallas May 1, 2019, no pet.) (mem. op.) (where plaintiff’s claims were not in response to matters expressed in defendant’s email, TCPA did not apply).

“We cannot ‘blindly accept’ attempts by the movant to characterize the claims as implicating protected expression.” *Damonte v. Hallmark Fin. Servs., Inc.*, No. 05-18-00874-CV, 2019 WL 3059884, at *5 (Tex. App.—Dallas July 12, 2019, no pet.) (mem. op.) (quoting *Sloat v. Rathbun*, 513 S.W.3d 500, 504 (Tex. App.—Austin 2015, pet. dism’d)). “To the contrary, we view the pleadings in the light most favorable to the non-movant, favoring the conclusion that its claims are not predicated on the protected expression.” *Id.* at *5. Cook relies on the *Damonte* concurring opinion for the proposition that “there is no statutory requirement that the communication’s content be the subject of the provoked legal action.” *Id.* (Whitehill, J., concurring). But as that opinion

recognizes, the movant bears the burden of “[p]roving that the subject communication prompted the challenged legal action” by a preponderance of the evidence, which “may be difficult when the subject pleading does not assert a claim based on the communication’s content.” *Id.* We conclude that Cook did not meet that burden. Cook does not dispute that Simmons’s pleadings do not mention Cook’s interview with the Texas Rangers or make any reference to Paxton or Servery. Nor is there any evidence that Simmons was involved in any way with the Texas Rangers’s investigation. According to Cook, his interview was about Paxton, not Simmons. Simmons’s allegations are that Cook made misrepresentations in the sale of securities. “Any activities [by Cook] that are not a factual predicate for [Simmons’s] claims are not pertinent to our inquiry regarding whether the TCPA applies.” *Damonte*, 2019 WL 3059884, at *5.

We conclude Cook did not meet his burden to establish by a preponderance of the evidence that Simmons’s legal action is based on, relates to, or is in response to Cook’s exercise of the right of free speech or the right of association. *See* TCPA § 27.005(b). Consequently, the TCPA does not apply. *See Riggs & Ray*, 2019 WL 4200009, at *6. We decide Cook’s first issue against him.

Cook’s second and third issues are dependent on the TCPA’s application to Simmons’s claims and Cook’s limitations defense. *See* TCPA § 27.005(c), (d) (burden-shifting to establish prima facie case and essential elements of defense); *In re Lipsky*, 460 S.W.3d 579, 586–87 (Tex. 2015) (orig. proceeding) (discussing burden-shifting under TCPA). For that reason, we need not consider them. *Riggs & Ray*, 2019 WL 4200009, at *6 (pretermitted remaining issues and cross-appeal after concluding TCPA did not apply); *Sullivan v. Tex. Ethics Comm’n*, 551 S.W.3d 848, 856 n.6 (Tex. App.—Austin 2018, pet. denied) (“Because we hold that the TCPA does not apply, we do not reach the second step in the TCPA analysis of whether [the non-movant] met its burden to prove a prima facie case.”).

CONCLUSION

We affirm the trial court's order denying Cook's motion to dismiss.

/Leslie Osborne/
LESLIE OSBORNE
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

BYRON CURTIS COOK, Appellant

No. 05-19-00091-CV V.

RONALD SIMMONS, Appellee

On Appeal from the 417th Judicial District
Court, Collin County, Texas

Trial Court Cause No. 417-02850-2018.

Opinion delivered by Justice Osborne.

Justices Myers and Nowell participating.

In accordance with this Court's opinion of this date, the trial court's order denying the motion of appellant Byron Curtis Cook to dismiss is **AFFIRMED**.

It is **ORDERED** that appellee Ronald Simmons recover his costs of this appeal from appellant Byron Curtis Cook.

Judgment entered November 12, 2019