NUMBER 13-20-00557-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

DENNIS LOTHAR DAENEKAS, Appellant,

v.

MELONY THORPE, Appellee.

On appeal from the 152nd District Court of Harris County, Texas.

MEMORANDUM OPINION

Before Chief Justice Contreras and Justices Benavides and Silva
Memorandum Opinion by Justice Silva

Appellant Dennis Lothar Daenekas was acquitted of indecency with a child, a second-degree felony, *see* TEX. PENAL CODE ANN. § 21.11(a)(1), involving his minor daughter, E.D.[1] Daenekas thereafter sued E.D.'s mother, appellee Melony Thorpe, for

[1] To protect the identity of the minor child, we refer to the child by her initials. *See* TEX. R. APP. P. 9.8(a) cmt.

malicious prosecution and a violation of Texas Family Code § 261.107.[2] *See* TEX. FAM. CODE ANN. § 261.107 (False Report; Criminal Penalty; Civil Penalty). Daenekas claimed Thorpe made a false report of child abuse and manipulated E.D. into fabricating the sexual assault claims. Thorpe filed a motion to dismiss under Chapter 27 of the Texas Civil Practices and Remedies Code (TCPA), which the trial court granted. *See* TEX. CIV. PRAC. & REM Code ANN. § 27.005(c). By a single issue, Daenekas appeals a trial court order dismissing his suit. We affirm.

I. BACKGROUND

A. The Parties' History

Daenekas and Thorpe began dating in 2007 or 2008 when Daenekas was seventeen years old and Thorpe was twenty-three. They separated at some unspecified point shortly after E.D. was born in early 2009. On September 23, 2009, when E.D. was eight months old, the trial court executed an agreed child support order, wherein Daenekas and Thorpe were appointed joint managing conservators of E.D., and Thorpe was granted the right to "determine the child's primary residence without regard to geographic location." Over the next five years, E.D. resided with Thorpe and visited Daenekas periodically as specified by the agreed order.

Both parties agree things remained amicable until 2014, when Thorpe married and informed Daenekas that she would be moving to Washington State following her husband's military deployment. It is unclear from the record when Daenekas filed his

[2] This case is before this Court on transfer from the First Court of Appeals in Houston pursuant to a docket equalization order issued by the Supreme Court of Texas. *See* TEX. GOV'T CODE ANN. § 73.001.

petition to modify an order in a suit affecting the parent-child relationship (SAPCR). Daenekas requested that the trial court give him the exclusive right to determine E.D.'s residency.[3] Daenekas further alleged that he had concerns "about [E.D.'s] emotional and physical safety and well-being while living primarily with [Thorpe]," claiming that E.D. had been "often left with strangers" and "has had a literal parade of men in and out of her life" due to Thorpe's romantic relationship history.

The parties entered into mediation in August 2014. At the first mediation meeting, Thorpe proposed the implementation of a geographic restriction and that Daenekas have the right to designate E.D.'s primary residence in Houston, where Daenekas lived with his parents. Daenekas agreed, and the agreed order containing the geographical restriction and primary residence designation was signed by the trial court on November 7, 2014.

Thorpe moved to Washington in September 2014 before the order was issued, and E.D. resided with Daenekas in Houston until June 2015. Thorpe maintained she flew from Washington to Houston for one week each month, except for "one or two months that [she] wasn't able to come down," and everything was "fine" apart for some "disagreements" regarding phone call communications between Thorpe and E.D. Daenekas asserted that Thorpe only visited E.D. one or two times during the nine months E.D. resided with him in Houston.

[3] An exhibit attached to Daenekas's response to Thorpe's motion to dismiss his civil suit, titled "Petitioner's Supporting Affidavit," appears to concern the SAPCR and contains a clerk's record file stamp of June 4, 2014.

On June 21, 2015, Thorpe returned to Houston to bring E.D. to Washington for summer visitation. On June 25, 2015, Thorpe contacted local law enforcement. According to Thorpe, earlier that day, she was in the restroom when E.D. asked her to explain the "right name" for male and female "private parts." E.D. then disclosed that Daenekas had showed her his penis. Thorpe stated she immediately contacted her mother-in-law, who advised Thorpe to file a report with the military criminal investigations department since Thorpe was living on a military base at the time. Thorpe stated that later that same day, E.D. told her that Daenekas had also masturbated in front of her "until white stuff came out." E.D. underwent a forensic interview and medical examination on July 7, 2015. Thorpe sought a temporary restraining order against Daenekas on July 8, 2015. On or about July 10, 2015, the Houston Police Department (HPD) received an out-of-state criminal investigation referral from a military base in Washington.

Daenekas was arrested on September 22, 2015, and he posted bail the next day. Daenekas was ultimately indicted on the offense of indecency with a child by contact alleged to have occurred on or about March 21, 2015.[4]

B. Criminal Trial

Daenekas was tried before a jury on March 10, 2020. E.D., eleven years old at trial, testified that Daenekas exposed himself when she was living with him and her paternal grandparents, Rudolph and Marita Daenekas, in Houston. E.D. testified that she

[4] Daenekas argues that there were two criminal causes he was subjected to: cause no. 1482343 for indecency with a child and cause no. 1507173 for indecency with a child. The record reflects that Daenekas was tried and found not guilty in cause no. 1507173. In his pleadings, Daenekas states cause no. 1482343 was dismissed; however, the record contains no evidence of an indictment or dismissal for cause no. 1482343. The only mention of cause no. 1482343, apart from Daenekas's pleadings, is in a police report where the cause is listed as a "related case[.]"

recalled one incident when she was watching Daenekas play video games, and he "pulled his pants down and he forced [her] hand" to touch him "[u]nder his private parts." E.D. testified another incident occurred near bedtime when he touched her "private parts" "under" her clothes. "I just remember that he said not to tell anyone or he would get in big trouble and go to jail," testified E.D. When asked why she waited until the summer to tell her mother, E.D. testified that she felt safer once she "was in a different state."

The State also elicited testimony from a physician who oversees the clinical operations and training of forensic nurses in the Houston area to explain the forensic examination process, and a staff psychologist who testified to her observations of behaviors and characteristics of children who have been abused.

As part of Daenekas's case-in-chief, Rudolph and Marita testified. Neither recalled Thorpe visiting more than "once or twice" while E.D. was living with them in Houston. Marita testified she believed Thorpe was "manipulative" and stated that there was never a time while E.D. lived with them that E.D. was ever alone with Daenekas. Daenekas maintained his innocence at trial and agreed he had "never, ever, never, ever, ever spent any time alone with" his daughter while they lived together in Houston.

The jury returned a not guilty verdict on March 12, 2020.

C. Daenekas's Malicious Prosecution Suit

On July 29, 2020, Daenekas filed his original petition against Thorpe, claiming malicious prosecution and a violation of Texas Family Code § 261.107. Daenekas argued, in part:

> The charges against Plaintiff were without probable cause, in that Defendant initiated or procured a criminal complaint against Plaintiff,

> knowing it was specious, in an attempt to obtain primary conservatorship and to, later, terminate Plaintiff[']s parental rights.
>
> The charges against Plaintiff were malicious in that Defendant reported false outcries of abuse from the Plaintiff[']s own daughter. The Defendant also manipulated the child to report false allegations of child abuse against the Plaintiff. The false complaints made by Defendant resulted in the charges being filed against Plaintiff.

Thorpe filed a timely answer denying Daenekas's claims, and on October 13, 2020, Thorpe filed a motion to dismiss under the TCPA. Thorpe asserted Daenekas's suit was based on, related to, or in response to her exercise of her right of free speech and to petition. Thorpe further challenged Daenekas's ability to provide evidence of his claims. In support of her motion to dismiss, Thorpe attached a signed affidavit, wherein she stated, in part:

> Near the end of June of 2015, my daughter told me that her father had exposed himself to her. Based off of this statement, I did not know how to react, I was scared, angry, sad, and hurt, and fearful of what all my child had been exposed to while in the presence of her father, the Plaintiff in this case. I learned that in the instance of a child making these types of statements, that I had to report it to a law enforcement agency or risk being in trouble myself for failing to report this information.
>
> I was unsure of who to contact, so I reached out to the Department of the Army at the recommendation of the military police, who are in charge of reporting and policing on the base where we lived. After making the initial report with the Army, I then was told even more unsettling and disturbing things from my daughter. She told me that not only did her father expose himself, but that he also made her watch him masturbate.
>
> Her words at the time were that "daddy was rubbing his private parts until white stuff came out." This was even more shocking than finding out he was exposing himself to our daughter. I immediately followed back up with the Army's CID (criminal investigation division), whom I had earlier spoke with when making the initial report, where I went on to tell him exactly what my daughter had told me about her father and what he had exposed her to.
>
> . . . .

> At no time did I initiate the Department of Army with any malicious intent to go after the father of my child. I initiated the Department of the Army, because I knew I had to report what my child told me to law enforcement . . . . My daughter has made these same reports and statements to numerous other counselors over the years, and it breaks my heart that she has been exposed to this situation.

Thorpe also attached a partially redacted investigation report issued by the military and business record affidavits with accompanying counseling notes from E.D.'s counseling sessions spanning five years. E.D.'s most recent therapist, whom she saw from 2018 to 2020, also submitted an affidavit, stating in part: "Since [the] first meeting, [Thorpe] has appeared to have the best interests of [E.D.] in mind"; Thorpe accompanies E.D. to every session, waiting in the lobby or her vehicle; E.D. has "only spoken positively about [Thorpe] and has shared no concerns of being pressured or manipulated"; and E.D. has never made any statements which would lead the therapist to "believe that [Thorpe] has 'coached [E.D.]' in any way."

On November 23, 2020, Daenekas filed a response. While Daenekas did not dispute that Thorpe's "right to petition has been implicated under the TCPA," Daenekas asserted that he has provided "prima facie evidence of each element of his cause[s] of action." In support, Daenekas attached a signed affidavit; offense report and related file from HPD[5]; the trial transcript from cause no. 1507173; the 2014 SAPCR order; and Thorpe's affidavit in support of a temporary restraining order filed July 8, 2015.

[5] The related file included information concerning E.D.'s child advocacy center (CAC) statements and medical examination interview—neither of which were admitted at trial. The reports indicated that E.D. told the CAC interviewer that Daenekas showed her his private parts on more than one occasion, starting on or around her birthday in January 2015. E.D. stated that these incidents occurred when no one else was home; Daenekas made her touch his genitals until the "white stuff" came out; and he declined to tell her what the "white stuff" was called. E.D. also claimed Daenekas "messed with her private part" in the "front" with his hand, and she stated that it "hurt to pee" afterwards. E.D. said her mom told her to "tell the truth

On November 30, 2020, the trial court signed an order granting Thorpe's motion to dismiss. The order did not award attorney's fees. This appeal followed.

II. JURISDICTION

As a preliminary matter, we address whether this Court has jurisdiction to entertain this appeal. *See M.O. Dental Lab v. Rape*, 139 S.W.3d 671, 673 (Tex. 2004) (per curiam) ("[W]e are obligated to review *sua sponte* issues affecting jurisdiction."). Generally, an appeal may only be taken from a final judgment unless an interlocutory appeal is authorized by statute. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001). "[W]hen there has not been a conventional trial on the merits, an order or judgment is not final for purposes of appeal unless it actually disposes of every pending claim and party or unless it clearly and unequivocally states that it finally disposes of all claims and all parties." *Id.* at 205.

Daenekas filed his notice of appeal on December 9, 2020, within two weeks of the trial court's November 30, 2020 order granting Thorpe's motion to dismiss. However, the November 30, 2020 order was not a final judgment because it did not contain the statutorily-required award of attorney's fees. *See* TEX. CIV. PRAC. & REM. CODE ANN § 27.009(a) (requiring that a trial court award "the moving party court costs and reasonable attorney's fees incurred in defending against the legal action" if it orders a dismissal under this chapter); *Trane US, Inc. v. Sublett*, 501 S.W.3d 783, 787 (Tex. App.—Amarillo 2016, no pet.) (concluding an order granting a TCPA dismissal was not a

and be honest," and she was going to get donuts for telling the truth. Similarly, E.D. reportedly told the nurse conducting the medical examination: "One time he showed me his and asked me to touch it and I said no. . . . He grabbed my hand and made me touch it." E.D. said it happened "lots of times," and described Daenekas's penis like "a milk u[dd]er—like a cow."

final judgment because the order "expressly leaves for future disposition the statutorily-required award of attorney's fees and sanctions"); *see also Nguyen v. Pham*, No. 14-19-00540-CV, 2019 WL 3788656, at *1 (Tex. App.—Houston [14th Dist.] Aug. 13, 2019, no pet.) (mem. op.) (dismissing the appeal because the trial court's order granting appellee's TCPA motion to dismiss "did not address appellees' claim for attorney's fees, nor did it dispose of the claims against the other named defendants in the underlying case"). While Texas Civil Practice and Remedies Code § 51.014(a) allows a party to appeal from an interlocutory order denying a motion to dismiss under the TCPA, it does not allow an appeal from an interlocutory order granting the motion to dismiss, which this case is. *See* TEX. CIV. PRAC. & REM. CODE ANN. 51.014(a)(12); *Fleming & Assoc., L.L.P. v. Kirklin*, 479 S.W.3d 458, 460 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (per curiam) ("[T]he courts of appeals do not have jurisdiction over an interlocutory appeal from an order granting a motion to dismiss under chapter 27 of the Texas Civil Practice and Remedies Code."); *see also Verde Energy Sols. LLC v. SGET Duval Oil I LLC*, No. 13-19-00163-CV, 2020 WL 6601611, at *3 (Tex. App.—Corpus Christi–Edinburg Nov. 12, 2020, no pet.) (mem. op.) ("Here, the trial court *granted* appellees' motion to dismiss Verde's lawsuit under the TCPA. Because this order does not arise from a *denial* of a motion to dismiss under section 27.003, when we strictly construe the statute as we must, we agree with the appellees that we have no jurisdiction over the appeal of this order.").

On August 13, 2021, this Court requested that Daenekas file a letter brief addressing the Court's jurisdiction. In response, Daenekas filed an amended notice of appeal on August 27, 2021. Daenekas additionally requested "leave to include a

subsequent final judgment" issued by the trial court on December 26, 2020, awarding Thorpe attorney's fees, expenses, and sanctions. Thorpe, in a letter response brief, argued that the November 30, 2020 order "is not a final judgment"; Daenekas "cannot go back and claim that [he] somehow intended for the notice of appeal for a subsequent order which [the trial court] had not yet issued"; and "[t]o date, the [t]rial [c]ourt has not subsequently issued an order that expressly disposes of all parties and claims."

"[A] final judgment may consist of several orders that cumulatively dispose of all the parties and issues." *Tex. Sting, Ltd. v. R.B. Foods, Inc.*, 82 S.W.3d 644, 647–48 (Tex. App.—San Antonio 2002, pet. denied); *Columbia Rio Grande Reg'l Hosp. v. Stover*, 17 S.W.3d 387, 391 (Tex. App.—Corpus Christi–Edinburg 2000, no pet.) ("Where an interlocutory order is entered disposing of the interests of less than all parties and claims, that order does not become final until a subsequent order is entered disposing of the remaining parties and claims."); *see also Mayfield v. N. Vill. Green I Homeowner's Ass'n, Inc.*, No. 01-12-00748-CV, 2014 WL 2538554, at *8 (Tex. App.—Houston [1st Dist.] June 5, 2014, pet. denied) (mem. op.) (concluding that three orders "[t]aken together . . . disposed of all issues and all parties and thus constitute a final and appealable judgment."). While we agree that the November 30, 2020 order was not a final judgment as it did not award statutorily mandated attorney's fees, *see* TEX. CIV. PRAC. & REM. CODE ANN § 27.009(a), the trial court's December 26, 2020 order actually disposed of all remaining matters. *See Lehmann*, 39 S.W.3d at 195; *Tex. Sting*, 82 S.W.3d at 647–48; *Stover*, 17 S.W.3d at 391. Thus, Daenekas's notice of appeal filed on December 9, 2020, constitutes a premature notice of appeal which may be given effect under Texas

Rule of Appellate Procedure 27.1(a) following the trial court's issuance of the December 26, 2020 order. *See* TEX. R. APP. P. 27.1(a) (providing that "a prematurely filed notice of appeal is effective and deemed filed on the day of, but after, the event that begins the period for perfecting the appeal"); *see also In re A.W.*, No. 14-20-00492-CV, 2020 WL 7068131, at *1 n.4 (Tex. App.—Houston [14th Dist.] Dec. 3, 2020, pet. denied) (mem. op.) (concluding the appellant's notice of appeal was prematurely filed but "deemed filed on the day of, but after, the event that begins the period for perfecting the appeal"); *Toth v. Martinez*, No. 13-19-00202-CV, 2019 WL 4866044, at *2 n.1 (Tex. App.—Corpus Christi–Edinburg Oct. 3, 2019, pet. denied) (mem. op.) (same). Accordingly, Daenekas properly invoked our jurisdiction.

III. TCPA

A. Standard of Review and Applicable Law

We review de novo a trial court's ruling on a TCPA motion to dismiss. *Dall. Morning News, Inc. v. Hall*, 579 S.W.3d 370, 377 (Tex. 2019). "The TCPA's purpose is to safeguard 'the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law' without impairing a person's right 'to file meritorious lawsuits for demonstrable injury.'" *Kinder Morgan SACROC, LP v. Scurry County*, 622 S.W.3d 835, 847 (Tex. 2021) (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 27.002); *In re Lipsky*, 460 S.W.3d 579, 589 (Tex. 2015) (orig. proceeding). Under the TCPA, a defendant may move to dismiss a suit if it "is based on or is in response to a party's exercise of the right of free speech, right to petition, or

right of association . . . .” TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(a); *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 131 (Tex. 2019).

The defendant must show by a preponderance of the evidence that the conduct that forms the basis of the claim against it is protected by the TCPA—that is to say, that the suit is based on, relates to, or is in response to the defendant exercising her right to free speech, petition, or association. TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b); *S & S Emergency Training Sols., Inc. v. Elliott*, 564 S.W.3d 843, 847 (Tex. 2018). Whether a legal action is based on, related to, or in response to the exercise of a protected right is determined based on the claims made in the nonmovant’s petition, pleadings, and affidavits. TEX. CIV. PRAC. & REM. CODE ANN. § 27.006; *Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017).

If the defendant meets this burden, then the burden shifts to the plaintiff to establish “by clear and specific evidence a prima facie case for each essential element of the claim in question.” TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c); *Montelongo v. Abrea*, 622 S.W.3d 290, 301 (Tex. 2021). “Clear” means “unambiguous, sure, or free from doubt,” and “specific” means “explicit or relating to a particular named thing.” *In re Lipsky*, 460 S.W.3d at 590 (quoting *KTRK Television, Inc. v. Robinson*, 409 S.W.3d 682, 689 (Tex. App.—Houston [1st Dist.] 2013, pet. denied)) (cleaned up). A “prima facie case” is “the minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true.” *Id.* (quoting *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 223 (Tex. 2004) (per curiam)). The “clear and specific evidence” requirement requires more than mere notice pleading. *Id.* at 590–91. It refers to evidence sufficient as

a matter of law to establish a given fact if it is not rebutted or contradicted. *Id.* We consider evidence favorable to Daenekas in determining whether he met his burden of establishing a prima facie case under the TCPA. *See D Magazine Partners, L.P. v. Rosenthal*, 529 S.W.3d 429, 440 n.9 (Tex. 2017) (refusing to consider TCPA movant's rebuttal evidence in determining whether nonmovant established prima facie case, stating that although movant "disputes [nonmovant's factual assertion] . . . at this stage of the proceedings we assume its truth"). Dismissal of the case is required if the plaintiff fails to meet its burden or, alternately, if the defendant "establishes by a preponderance of the evidence each essential element of a valid defense to the [plaintiff's] claim." TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(d); *Lona Hills Ranch*, 591 S.W.3d at 127.

B. TCPA Applicability

In her TCPA motion, Thorpe argued Daenekas's suit is based on, related to, or in response to her right to free speech and right to petition. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(a). Daenekas does not dispute that Thorpe satisfied her initial burden to show that Daenekas's legal action is subject to the TCPA. *See Buckingham Senior Living Cmty., Inc. v. Washington*, 605 S.W.3d 800, 807 (Tex. App.—Houston [1st Dist.] 2020, no pet.) ("When a person interacts with the police to report perceived wrongdoing, that person is exercising their right to petition, as that right is defined in the TCPA."); *see also 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.) ("Filing a police report, whether true or false, implicates a person's right to petition the government."). Therefore, under the decisional framework set out above, the burden shifted to Daenekas to present clear and specific

evidence establishing a prima facie case for each essential element of his claims for malicious prosecution and § 261.107 of the Texas Family Code. *See Creative Oil & Gas, LLC*, 591 S.W.3d at 132.

On appeal, Daenekas asserts that he met his burden with respect to his malicious prosecution claim, but his brief makes no mention of his claim under the Texas Family Code. *See* TEX. FAM. CODE ANN. § 261.107 (stating that it is an offense to knowingly make a false report of child abuse or neglect and that a person who does so "is liable to the state for a civil penalty of $1,000"); *see also de la Torre v. de la Torre*, 613 S.W.3d 307, 312–13 (Tex. App.—Austin 2020, no pet.) (concluding dismissal under TCPA was appropriate where the plaintiff brought forth a claim under family code § 261.107 because "[§§] 261.101 and 261.107 of the Texas Family Code . . . do not create private causes of action; rather, their enforcement is the responsibility of the 'appropriate county prosecuting attorney'" and thus, the appellant lacked standing). Accordingly, we only address whether Daenekas met his burden to establish by clear and specific evidence each essential element of his malicious prosecution claim. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c).

C. Clear and Specific Evidence

"Clear and specific evidence" must be more than "general allegations that merely recite the elements of a cause of action"; instead, "a plaintiff must provide enough detail to show the factual basis for its claim." *In re Lipsky*, 460 S.W.3d at 590–91. Specifically, to prevail on a suit alleging malicious criminal prosecution, Daenekas must have shown that: "(1) a criminal prosecution was commenced against [him]; (2) [Thorpe] initiated or

procured that prosecution; (3) the prosecution terminated in [his] favor; (4) [Daenekas] was innocent of the charges; (5) [Thorpe] lacked probable cause to initiate the prosecution; (6) [Thorpe] acted with malice; and (7) [Daenekas] suffered damages." *Kroger Tex. Ltd. P'ship v. Suberu*, 216 S.W.3d 788, 793 n.3 (Tex. 2006); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c).

"Actions for malicious prosecution are not favored." *Forbes v. Lanzl*, 9 S.W.3d 895, 898 (Tex. App.—Austin 2000, pet. denied). "Courts must be especially careful in malicious prosecution cases to ensure that sufficient evidence supports each element of liability." *Suberu*, 216 S.W.3d at 795. "Otherwise, the fourth element (innocence) automatically swallows the fifth (lack of probable cause) and sixth (malice) elements of this claim." *Id.* The elements necessary to prevail on a malicious criminal prosecution claim reflect a balance between "society's greater interest in encouraging citizens to report crimes, real or perceived" and providing a recourse for those who've been "subjected unjustifiably to criminal proceedings." *Suberu*, 216 S.W.3d at 792; *see Richey v. Brookshire Grocery Co.*, 952 S.W.2d 515, 519–20 (Tex. 1997).

Because the fifth element (lack of probable cause) is dispositive, we address it first. "The probable cause element 'asks whether a reasonable person would believe that a crime had been committed given the facts as the complainant honestly and reasonably believed them to be before the criminal proceedings were instituted.'" *Suberu*, 216 S.W.3d at 792–93 (quoting *Richey*, 952 S.W.2d at 517). Unless rebutted—whereby the plaintiff produces "evidence that the motives, grounds, beliefs, or other information upon which the defendant acted did not constitute probable cause"—courts must presume that the

defendant acted reasonably and had probable cause to initiate criminal proceedings. *Id.* Further, the existence of probable cause cannot be negated by evidence that the defendant failed to fully disclose all relevant facts or that the criminal charges were subsequently resolved by dismissal. *See First Valley Bank of Los Fresnos v. Martin*, 144 S.W.3d 466, 470 (Tex. 2004); *Pettit v. Maxwell*, 509 S.W.3d 542, 547 (Tex. App.—El Paso 2016, no pet.) ("[P]robable cause is measured as of the time the case is reported to the authorities by the defendant, and not sometime later as when the case has been investigated, tried, or as in this case, dismissed.").

Put simply, Daenekas was required to produce evidence that Thorpe "initiated [his] prosecution on the basis of information or motives that do not support a reasonable belief that [he] was guilty" of sexually assaulting their daughter. *See Suberu*, 216 S.W.3d at 794–95. Without such evidence, Thorpe is entitled to judgment as a matter of law. *See id.* Daenekas claims he has done just that, arguing:

> [T]here was no probable cause because the prosecutor lacked the facts necessary for a reasonable mind to believe Daenekas was guilty of indecency with a child. The prosecutor only had the statements of Thorpe alleging what the child told her, that could not be collaborated [sic] because she was the only person present when the child supposedly made them; and the forensic interview of the child in which the child stated she was bribed with donuts and going "somewhere special" for speaking with the interviewer and admitting Thorpe told her not to talk about Thorpe. This information was offset by the sworn affidavit of Daenekas stating he did not commit any sexual misconduct with his child, along with the fact that there were no signs of physical injuries to the child. Finally, even though the child was going to school and living with other adults at Daenekas' home, no one else ever stated they had reason to believe the child was abused, observed abuse, or received an outcry from the child. No reasonable person could have determined there was probable cause that Daenekas was guilty of the crime charged with the conflicting evidence presented in this case.

(Internal citations omitted). This argument, however, ignores that the law presumes that Thorpe acted honestly and reasonably in contacting law enforcement regarding her daughter's allegations—irrespective of whether other corroborating evidence existed or Daenekas would later deny the allegations. *See Suberu*, 216 S.W.3d at 794–95; *Forbes*, 9 S.W.3d at 902 ("Whether [the plaintiff] could later show he did not inflict this particular injury is relevant to establishing his innocence of the charges but is not relevant to rebutting the presumption of [the defendant's] probable cause to reasonably believe she was the victim of an assault."); *see also Guzman v. State*, 955 S.W.2d 85, 87 (Tex. Crim. App. 1997) ("Probable cause deals with probabilities; it requires more than mere suspicion but far less evidence than that needed to support a conviction or even that needed to support a finding by a preponderance of the evidence."). That presumption was not rebutted with "evidence that the motives, grounds, beliefs, or other information upon which [Thorpe] acted did not constitute probable cause." *Suberu*, 216 S.W.3d at 792–93.

Elsewhere in his brief, Daenekas argued Thorpe acted with malice. *See Luce v. Interstate Adjusters, Inc.*, 26 S.W.3d 561, 566 (Tex. App.—Dallas 2000, no pet.); *see also Columbia Valley Healthcare Sys., L.P. v. Pisharodi*, No. 13-18-00660-CV, 2020 WL 486491, at *7 (Tex. App.—Corpus Christi–Edinburg Jan. 30, 2020, no pet.) (mem. op.) ("Malice may be inferred from a lack of probable cause, but a lack of probable cause may not be inferred from malice."). As evidence of malice, Daenekas referenced his 2014 affidavit in support of his SAPCR petition, wherein he alleged Thorpe had neglected and endangered E.D. by exposing her to "a literal parade of men," and his mother's testimony at trial, "affirm[ing] that Thorpe was manipulative." Even construing this as evidence in

support of Daenekas's allegations that Thorpe had an improper motive—i.e., a probable cause challenge—it falls short of the clear and specific evidentiary standard. Both parties testified that their relationship had been amicable until 2014, when Thorpe married and notified Daenekas she planned to move to Washington—a move which would have been consistent with the existing trial court's order. Daenekas thereafter filed his petition seeking to impose a geographic restriction on Thorpe's right to designate E.D.'s primary residence. In response to Daenekas's petition and allegations, Thorpe proposed an order granting Daenekas the right to designate E.D.'s primary residence with a geographical restriction. Although Daenekas asserts that Thorpe's "actions were designed to reverse a custody agreement that did not benefit her," Daenekas has not presented evidence of a single instance of animus on Thorpe's part occurring before her initiation of criminal proceedings against Daenekas. Daenekas's own commencement of SAPCR proceedings one year prior cannot, alone, establish that Thorpe had an improper motive. *See Washington*, 605 S.W.3d at 812 ("[C]onclusory allegations are not evidence that will meet the prima facie standard."); *Lesher v. Coyel*, 435 S.W.3d 423, 429 (Tex. App.—Dallas 2014, pet. denied) (concluding the plaintiff's evidence of custody proceedings which predated the criminal case against the plaintiff created "no more than a surmise or suspicion that [the defendant] had a motive to retaliate against them" and was insufficient to rebut the probable cause presumption); *cf. Smith v. Hammonds*, No. 01-19-00866-CV, 2021 WL 2690867, at *7 (Tex. App.—Houston [1st Dist.] July 1, 2021, no pet. h.) (mem. op.) (concluding that the plaintiff had rebutted the probable cause presumption where the plaintiff presented evidence of the parties' "prior bad relations" and the defendants'

"private motivation to harm her" by providing "several examples of conflicts she alleges were initiated by [the defendant]").

E.D. outcried to Thorpe that Daenekas exposed himself to her, made her touch his genitals, and he touched her genitals. A reasonable parent in Thorpe's position would have believed their child's accusations and contacted law enforcement. *See Suberu*, 216 S.W.3d at 792–93; *Coyel*, 435 S.W.3d at 428. Daenekas did not provide clear and specific evidence showing that Thorpe lacked probable cause to make the report. Because Daenekas failed to meet his burden to establish a prima facie case for each element of his cause of action, the trial court properly granted Thorpe's TCPA motion to dismiss. *See Washington*, 605 S.W.3d at 812. We overrule Daenekas's sole issue.

IV. CONCLUSION

We affirm the trial court's judgment.

CLARISSA SILVA
Justice

Delivered and filed on the
4th day of November, 2021.