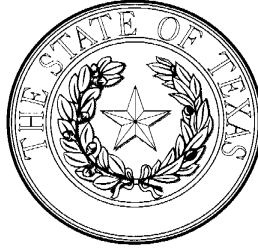


Opinion issued August 2, 2022



In The
Court of Appeals
For The
First District of Texas

NO. 01-20-00418-CV

ALBERT G. HILL, III, Appellant

V.

**LISA BLUE, STEPHEN MALOUF, CHARLA ALDOUS, MICHAEL LYNN,
JEFF TILLOTSON, Appellees**

**On Appeal from the 127th District Court
Harris County, Texas
Trial Court Case No. 2019-38870**

MEMORANDUM OPINION

Albert G. Hill, III (“Hill III”) sued the appellees for malicious prosecution, conspiracy, and aiding and abetting. The appellees filed motions to dismiss under the Texas Citizens Participation Act. The trial court granted the motions and dismissed Hill III’s claims. Hill III raises five issues on appeal. The first four

issues challenge the trial court’s ruling on the TCPA motions, and the fifth issue challenges the trial court’s ruling sustaining all objections to his evidence.

We affirm.

Procedural History

This appeal is related to *Hill v. Keliher*, No. 01-20-00419-CV, slip op. (Tex. App.—Houston [1st Dist.] Aug. 2, 2022, no pet. h) (mem. op.). Beginning in 2007, Hill III was engaged in extensive, protracted, and acrimonious litigation with his father and other relatives and associates regarding family trusts and assets, which included multiple different cases in multiple venues and jurisdictions,¹ including a lawsuit in the federal district court for the Northern District of Texas, Civil Action No. 3:07-cv-02020 (the “trust litigation”), which resulted in a global settlement agreement. Hill III’s father, Albert G. Hill, Jr. (“Hill Jr.”),² was represented in the trust litigation by Michael Lynn, whose law partner is Jeff Tillotson. From November 2009 until November 2010, Hill III was represented by Lisa Blue, Charla Aldous, and Stephen Malouf.

Discovery in the trust litigation revealed that, in 2009, Hill III applied for a home equity loan on the house he shared with his wife, which was owned jointly by Hill III and a family trust. On the loan application Hill III represented that he

¹ See *Hill v. Keliher*, No. 01-20-00419-CV, slip op. (Tex. App.—Houston [1st Dist.] Aug. 2, 2022, no pet. h) (mem. op.).

² Hill Jr. is now deceased.

owned 100% interest in the house and that he had an annual salary of \$55,000. Hill Jr. suspected that his son had made false representations and failed to disclose relevant facts on the loan application.

In February 2010, the federal district judge presiding over the trust litigation found Hill Jr. had committed perjury with help from attorney Mike Lynn. Hill III contended that his father publicly blamed him for the ruling. Several days later, Lynn submitted a criminal complaint regarding Hill III's potentially criminal activities related to the 2004 home equity loan. In mid-May 2010, Hill III entered into a global settlement agreement regarding the trust litigation in exchange for a nine-figure payment.

In July 2010, a dispute arose between Hill III and his attorneys—Blue, Aldous, and Malouf—regarding attorney's fees. The federal court entered final judgment based on the settlement agreement in November 2010, and the court allowed Blue, Aldous, and Malouf to withdraw from representation of Hill III. In December 2010, Blue, Aldous, and Malouf sued Hill III for approximately \$50 million in attorney's fees.

In late March 2011, a grand jury returned four indictments against Hill III. Three indictments charged him with making false statements to obtain property or credit, *see* TEX. PENAL CODE § 32.32, and the fourth indictment charged him with securing execution of a document by deception. *See id.* § 32.46. In November

2012, Hill III moved to quash the indictments, and in March 2013, after an evidentiary hearing, the trial court dismissed all charges against Hill III with prejudice. The judgment became final in 2018, after final disposition of all appeals.³

Background

I. The malicious prosecution lawsuit

In June 2019, Hill III filed suit for malicious prosecution. As relevant to this appeal, Hill III alleged that that Lynn and Tillotson had sought his prosecution in retaliation after the federal court found that Lynn had helped Hill Jr. commit perjury. Hill alleged that in February 2010, Lynn submitted to the district attorney a written report alleging that Hill III had engaged in potentially criminal activity regarding the 2004 home loan. Hill III further alleged that in March 2010, Lynn met with an assistant district attorney to discuss his report. Hill III also alleged that Jeff Tillotson, Lynn’s law partner, donated \$48,500 to Watkins’s political campaign between June 2010 and March 2011.⁴ Hill III asserted that Tillotson’s campaign contributions “crossed the line and constituted improper influence.”

Hill III also alleged that Blue pressured Watkins to prosecute him in order to gain an advantage in the attorney’s fee litigation. Hill III alleged that Blue made

³ See *State v. Hill*, 558 S.W.3d 280, 286–87 (Tex. App.—Dallas 2018, no pet.).

⁴ Watkins was reelected to a second term as district attorney on November 2, 2010.

political and charitable donations and frequently communicated with Watkins during times that were significant either to Hill's prosecution or to the attorney's fee litigation. Hill III alleged that Blue held political fundraisers at her home to benefit Watkins in November 2009 and March 2011, and that she donated nearly \$20,000 to Watkins's political campaign between November 2009 and March 2011. Blue also donated \$100,000 to Southern Methodist University's Dedman School of Law in honor of Craig Watkins in 2010.

Hill III alleged that Blue frequently communicated with Watkins between May 2010 and April 2011.⁵ Hill III alleged that his malicious prosecution and conspiracy claims against Blue were based "largely on the evidence that was

⁵ The communications that Hill III relies on include:

1. Meeting, May 14, 2010, the day after the trust litigation settled;
2. Phone calls, July 13, 2010 to July 21, 2010, when Blue, Aldous, and Malouf exchanged emails about attorney's fees;
3. Phone calls, November 8, 2010 to November 16, 2010, when Blue, Aldous, and Malouf withdrew from representation in the trust litigation;
4. Phone call, December 6, 2010, the day before the attorney's fee suit was filed;
5. Phone calls, texts and in person meeting, January 7–21, 2011, days before and after the district attorney's office met to consider charging Hill III;
6. Phone call, January 21, 2011, when Watkins asked Blue if she was "still interested in the indictments";
7. Attending charity events, March 3–4, 2011;
8. Political fundraiser hosted by Blue for Watkins, March 9, 2011;
9. Phone calls to Watkins or his assistant, March 22–25, 2011, when depositions were taken in the attorney's fee dispute case, and about a week before Hill III was indicted;
10. Phone calls, March 30–April 4, 2011, days before and after Hill III was indicted;
11. Phone call, April 27, 2011, after Blue testified in the attorney's fee trial.

introduced at the hearing on the Motion to Quash” and findings and conclusions made by the trial court that reviewed the evidence.⁶ Hill III alleged that his malicious prosecution and conspiracy claims against Aldous and Malouf were based on their association with Blue when they jointly represented Hill III in the trust litigation and later sued him for attorney’s fees. Hill III referenced communications among Blue, Aldous, and Malouf, and he alleged that Malouf was present during one phone call between Blue and Watkins in which the indictments against him were discussed. Hill also alleged that Malouf had an independent relationship with Watkins, as demonstrated by Watkins selecting Malouf to represent Dallas County in a civil matter in September 2011.⁷

⁶ The Dallas Court of Appeals, however, concluded that the trial court’s findings of fact were void:

The trial court signed the order dismissing the indictments on March 7, 2013, and the State filed its notice of appeal on March 27, 2013. The trial court made written findings of fact and conclusions of law on August 2, 2013, after both the clerk’s record and the reporter’s record were filed. Once the record is filed in the court of appeals, the trial court loses jurisdiction until it receives a mandate from the appellate court. *Berry v. State*, 995 S.W.2d 699, 700 (Tex. Crim. App. 1999); see TEX. R. APP. P. 25.2(e). The trial court was therefore without jurisdiction to make findings of fact and conclusions of law in August 2013. The court’s findings and conclusions are null and void, and we may not consider them. See *Berry*, 995 S.W.2d at 701.

Hill, 558 S.W.3d at 283 n.1.

⁷ Hill III alleges that this contingent fee litigation was potentially lucrative and that Malouf brought in Blue and Terri Moore, who by then had left the district attorney’s office, to join the representation.

II. The TCPA motions

Each appellee filed a motion to dismiss under the Texas Citizens Participation Act.⁸

A. Lynn

Lynn argued that Hill III's claims arose from his rights to petition and to free speech. Lynn asserted that Hill III could not make a prima facie case for malicious prosecution because he lacked clear and specific evidence to establish: (1) procurement, (2) Hill III's innocence, (3) lack of probable cause, and (4) malice. Moreover, Lynn argued that even if Hill III could make a prima facie case, it was barred by the defenses of (a) attorney immunity and (b) release, based on the global settlement agreement in the trust litigation. Lynn maintains that all of Hill III's claims arise out of Lynn's representation of Hill Jr. in litigation or Lynn's actions in representing Hill Jr. in researching, drafting, and presenting a complaint to law enforcement. Lynn asserted that he submitted the report to the district attorney in February 2010 as part of his representation of Hill Jr., and then he withdrew from representation in April 2010. Lynn had no further communication

⁸ See TEX. CIV. PRAC. & REM. CODE §§ 27.001–.011 (Texas Citizens Participation Act). The Legislature enacted the TCPA in 2011 and amended it in 2013 and again in 2019 to narrow its application. See Act of May 21, 2011, 82nd Leg., ch. 341 (HB 2973), §2; amended by Act of May 24, 2013, 83rd Leg., ch. 1042 (H.B. 2935), §1; amended by Act of May 17, 2019, 86th Leg., R.S., ch. 378, (H.B. 2730), §2. The 2019 amendments were effective on September 1, 2019. This lawsuit was filed in June 2019, and, to the extent that a provision was amended in 2019, we rely on the prior version of the statute, which we indicate with a parenthetical citation to the year of enactment.

with the district attorney's office after April 2010. The release in the global settlement agreement pertained to claims against all present and former attorneys for Hill Jr. Lynn never donated to Watkins's campaign, and he denied knowledge of Tillotson's contributions.

B. Tillotson

Tillotson argued that the TCPA applied to Hill III's claims because his involvement was limited to making lawful campaign contributions, which constitutes the exercise of his rights to free speech and association. Tillotson argued that Hill III could not make a prima facie case for the first element of malicious prosecution—procurement of the prosecution—because Hill III did not allege that he would not have been indicted but for the campaign contributions. Tillotson also argues that derivative claims cannot survive without proof of an underlying tort, and Texas does not recognize a cause of action for “aiding and abetting” malicious prosecution.

C. Blue

Blue argued that Hill III's claims arose from her exercise of the rights to free speech and of association. She maintained that Hill III's claims are based on her lawful campaign contributions to Watkins and her communications with Watkins and others in his office. She argued that Hill III cannot make a prima facie case for malicious prosecution because there is no clear and specific evidence that she

procured his prosecution by providing false information that caused Hill III to be indicted. Like the other appellees, she also argued that derivative claims cannot survive without proof of an underlying tort, and Texas does not recognize a cause of action for “aiding and abetting” malicious prosecution. Blue further argued that, even if Hill III could make a prima facie case, it was barred by collateral estoppel based on the findings of the magistrate judge and federal district court in the attorney’s fee suit.

D. Aldous

Aldous argued that Hill III’s allegations arose from her exercise of the rights to free speech, to petition, and of association, and therefore the TCPA applies.⁹ She maintained that Hill III could not prove with clear and specific evidence any of the elements of malicious prosecution. Finally, she argued that even if Hill III could make a prima facie case, his claims were barred by res judicata and collateral estoppel based on the findings of the magistrate judge and federal district court in the attorney’s fee suit.

E. Malouf

Malouf argued that the TCPA applied because Hill III’s allegations arose from the exercise of his rights to petition, to free speech, and to association.

⁹ On the day the case against Hill III was presented to the grand jury, Blue had dinner with Watkins. Later, Blue called Aldous. Aldous argued that the only allegation directly about her was that she received that call from Blue.

Malouf argued that Hill III could not make a prima facie case for malicious prosecution against him because there was no allegation or evidence that Malouf initiated or procured Hill III's prosecution. Malouf also argued that Hill III's claims were barred by res judicata and collateral estoppel based on the findings of the magistrate judge and federal district court in the attorney's fee suit.

III. Hill III's response and objections to his evidence

Hill III filed an "omnibus" opposition to the appellees' TCPA motions to dismiss. He argued that the TCPA did not apply, that he could make a prima facie case for every element of malicious prosecution with clear and specific evidence, and that none of the appellees had proven a defense. And he argued that the trial court judgment and appellate opinions cited in his motion to quash litigation indicated that the facts relevant to the TCPA motions to dismiss had already been found in his favor. In support of his response, he submitted nearly 5,000 pages of documents. These documents included:

- Watkins's campaign finance reports;
- Pleadings, briefs, motions, transcripts, orders, judgments, and opinions from prior litigations involving the parties to this appeal, including Hill III's fee agreement with Blue, Aldous, and Malouf and records pertaining to trust accounts at issue in the trust litigation;
- Documents pertaining to Hill III's home equity loan;
- Emails and texts: (i) among Blue, Aldous, and Malouf regarding the attorney's fee dispute; (ii) regarding political fundraisers, and

(iii) between Blue and Watkins or his staff regarding political, charitable, professional, and social matters;

- Indictments and written submissions to the district attorney from Hill III's counsel and from Mike Lynn; and
- Phone records.

Malouf, Blue, and Tillotson replied and objected to nearly all of the evidence on a variety of grounds, including:

- Statements in Hill III's declaration are conclusory, hearsay, irrelevant, not based on personal knowledge, and speculative;
- Hearsay;
- Lack of authentication; and
- Relevance.

The trial court sustained the appellees' objections to Hill III's evidence, granted the appellees' TCPA motions to dismiss, and, after determining costs and attorney's fees, rendered judgment for each of the appellees. Hill III appealed.

Analysis

On appeal, Hill III presents five issues. The first four issues challenge the trial court's dismissal of his claims against each appellee. He asserts that the trial court erred at each stage of the TCPA burden-shifting analysis. In his fifth issue, Hill III argues that the trial court erred by summarily sustaining the appellees' objections to his evidence.

I. TCPA

A. Standards of review

We review a trial court’s ruling on a TCPA motion to dismiss de novo. *Kassab v. Pohl*, 612 S.W.3d 571, 577 (Tex. App.—Houston [1st Dist.] 2020, pet. denied). We consider the pleadings and evidence in the light most favorable to the nonmovant. *Id.*; *Schimmel v. McGregor*, 438 S.W.3d 847, 855–56 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). Whether the TCPA applies is an issue of statutory interpretation that we also review de novo. *Youngkin v. Hines*, 546 S.W.3d 675, 680 (Tex. 2018).

B. Purpose

The TCPA “is a bulwark against retaliatory lawsuits meant to intimidate or silence citizens on matters of public concern.” *Dall. Morning News, Inc. v. Hall*, 579 S.W.3d 370, 376 (Tex. 2019); *see In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015). It is intended “to identify and summarily dispose of lawsuits designed only to chill First Amendment rights, not to dismiss meritorious lawsuits.” *Lipsky*, 460 S.W.3d at 589; *see also* TEX. CIV. PRAC. & REM. CODE § 27.002 (“The purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.”).

C. Applicability—rights of free speech, to petition, and of association

The TCPA applies to a legal action that “is based on, relates to, 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 § 27.003(a) (2011). A lawsuit is a legal action. *Id.* § 27.001(6). The “exercise of the right of free speech” means “a communication made in connection with a matter of public concern.” *Id.* § 27.001(3). “‘Communication’ includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.” *Id.* § 27.001(1). A “matter of public concern includes an issue related to: (A) health or safety; (B) environmental, economic, or community well-being; (C) the government; (D) a public official or public figure; or (E) a good, product, or service in the marketplace.” *Id.* § 27.001(7). Under the First Amendment to the United States Constitution, the freedom of speech includes contributing to political campaigns. *See* U.S. CONST. amend. I; *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185, 191 (2014); *King St. Patriots v. Tex. Democratic Party*, 521 S.W.3d 729, 745 (Tex. 2017).

Under the 2011 TCPA, “exercise of the right to petition” includes “a communication in or pertaining to: (i) a judicial proceeding; (ii) an official proceeding, other than a judicial proceeding, to administer the law; [and] (iii) an executive or other proceeding before a department of the state . . . government or a

subdivision of the state . . . government” *Id.* § 27.001(4)(A). Exercise of the right to petition also includes “a communication in connection with an issue under consideration or review by a legislative, executive, judicial, or other governmental body in another governmental or official proceeding,” or “a communication that is reasonably likely to encourage consideration or review of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding.” *Id.* § 27.001(4)(B), (C) (2011).

Reporting wrongdoing to governmental officials is an exercise of the right to petition, regardless of whether the report is true or false. *See Bibby v. Bibby*, 634 S.W.3d 401, 408–09 (Tex. App.—Houston [1st Dist.] 2021, no pet.); *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 Vu v. Tran*, No. 02-21-00059-CV, 2021 WL 3679245, at *4 (Tex. App.—Fort Worth Aug. 19, 2021, no pet.) (mem. op.) (malicious prosecution claim implicated defendants’ right to petition when it alleged that they made reports that led to charges that were later dropped); *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.) (“Statements to police regarding incidences of perceived wrongdoing are protected by the TCPA.”); *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 . . .”).

Under the 2011 TCPA, “‘exercise of the right of association’ means a communication between individuals who join together to collectively express, promote, pursue, or defend common interests.” TEX. CIV. PRAC. & REM. CODE § 27.001(2) (2011).

D. Motions to dismiss and the burden-shifting test

A party may file a motion to dismiss a legal action that “is based on, relates to, or is in response to [that] party’s exercise of the right of free speech, right to petition, or right of association.” *Id.* § 27.003(a) (2011). The TCPA movant has the initial burden to demonstrate by a preponderance of the evidence that the TCPA applies to the challenged legal action. *Id.* § 27.005(b) (2013). “In determining whether a legal action should be dismissed under [the TCPA], the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based.” *Id.* § 27.006(a) (2011). Once the movant shows that the TCPA applies to the challenged legal action, the burden shifts to the nonmovant to establish “by clear and specific evidence a prima facie case for each essential element of the claim in question.” *Id.* § 27.005(c) (2013). If the nonmovant makes this showing, the burden again shifts to the movant to establish

“by a preponderance of the evidence each essential element of a valid defense to the nonmovant’s claims.” *Id.* § 27.005(d) (2013).

“The phrase ‘prima facie case’ traditionally ‘refers to evidence sufficient as a matter of law to establish a given fact if it is not rebutted or contradicted.’” *Lang v. Knowles*, No. 01-18-00268-CV, 2019 WL 4065015, at *5 (Tex. App.—Houston [1st Dist.] Aug. 29, 2019, pet. denied) (mem. op.) (quoting *Lipsky*, 460 S.W.3d at 590). The “prima facie standard requires only the minimum of evidence necessary to support a rational inference that the allegation of fact is true.” *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 223 (Tex. 2004) (internal quotations omitted). Evidence is clear and specific when the plaintiff provides “enough detail to show the factual basis” for his claim. *Lipsky*, 460 S.W.3d at 591.

II. Hill III’s evidentiary issue is not meritorious.

We begin with Hill III’s fifth and final issue regarding the trial court’s ruling on objections to his evidence because it is necessary to the analysis of his other four issues. In his fifth issue, Hill III asserts that the court erred by sustaining all objections to his evidence. Hill III argues that it was improper for the trial court to sustain the “en masse generic objections,” and he contends that “any of the district court’s evidentiary rulings based on objections other than being conclusory or lacking personal knowledge were improper and prejudicial and should be

reversed.” Hill III’s evidence exceeds 5,000 pages, and on appeal he failed to identify which documents or parts of documents were improperly excluded.

Hill III challenges the exclusion of his evidence generally with the exception of objections that his evidence is conclusory or not based on personal knowledge. He does not make any arguments on a granulated basis that correspond to the specific objections made by the appellees in the trial court. He failed to make any argument explaining how the alleged error probably caused the rendition of an improper judgment or prevented him from properly presenting his case on appeal. *See* TEX. R. APP. P. 44.1(a) (reversible error in civil cases).

“When an appellee objects to evidence on several independent grounds and, on appeal, the appellant complains of the exclusion of the evidence on only one of those grounds, the appellant waives any error by failing to challenge all possible grounds for the trial court’s ruling that sustained the objection.” *Gulley v. Davis*, 321 S.W.3d 213, 218 (Tex. App.—Houston [1st Dist.] 2010, pet. denied). Hill III failed to challenge all possible grounds for the trial court’s evidentiary ruling, and we therefore conclude that he waived his challenge to the exclusion of his evidence. *See id.*

Moreover, an appellant’s brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record. TEX. R. APP. P. 38.1(i); *see Reyna v. Acad. Ltd.*, No. 01-15-00988-CV, 2017 WL

3483217, at *9 (Tex. App.—Houston [1st Dist.] Aug. 15, 2017, no pet.) (mem. op.). “A failure to provide substantive analysis of an issue or cite appropriate authority [and to the record] waives the complaint.” *Reyna*, 2017 WL 3483217, at *9; see TEX. R. APP. P. 38.1(i); *Tesoro Petroleum Corp. v. Nabors Drilling USA, Inc.*, 106 S.W.3d 118, 128 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) (“Rule 38 requires [an appellant] to provide us with such discussion of the facts and the authorities relied upon . . . to maintain the point at issue.”). Hill III’s fifth issue is also inadequately briefed. See TEX. R. APP. P. 38.1(i); *Reyna*, 2017 WL 3483217, at *9. Cf. *Cavin v. Abbott*, 545 S.W.3d 47, 71–72 (Tex. App.—Austin 2017, no pet.) (explaining inadequacy, in a TCPA case, of referring to a voluminous record without argument, analysis, or explanation of which record reference supports which elements of the cause of action).

We overrule the fifth issue.

III. The TCPA applies to claims against all of the appellees.

The threshold inquiry on a TCPA motion to dismiss is whether the TCPA applies to the alleged claims. TEX. CIV. PRAC. & REM. CODE § 27.005(b) (2013).

Hill III’s claims against Lynn were based on his reporting of potentially criminal activity to the district attorney’s office. This claim is subject to the TCPA because Lynn’s action was an exercise of the right to petition. See *id.*

§ 27.001(4)(A); *Buckingham Senior Living Cmty.*, 605 S.W.3d at 807 (reporting perceived wrongdoing is an exercise of the right to petition under the TCPA).

Hill III's claims against Tillotson were based on his contributions to Watkins's political campaign. The TCPA's broad definition of communication includes "the making . . . of a statement . . . in any form or medium" TEX. CIV. PRAC. & REM. CODE § 27.001(1) (2011). Tillotson's donations to Watkins's political campaign were an exercise of his right to free speech. *See* U.S. CONST. amend. I; *McCutcheon*, 572 U.S. at 191; *King St. Patriots*, 521 S.W.3d at 745.

Hill III's claims against Blue, as alleged, were based on her communication with Watkins and contributions to his political campaign. Although Hill III does not clearly identify the substance of her communications with Watkins, by alleging malicious prosecution, he alleges that she communicated with him and his staff regarding his potential criminal liability. A matter of public concern includes issues related to "community well-being" and "the government." TEX. CIV. PRAC. & REM. CODE § 27.001(7) (2011). We conclude that Hill III's suit alleges that Blue communicated with Watkins and his staff about a matter of public concern and was therefore an exercise of free speech. In addition, Blue's donations to Watkins's political campaign were also an exercise of free speech. *See* U.S. CONST. amend. I; *McCutcheon*, 572 U.S. at 191; *King St. Patriots*, 521 S.W.3d at 745.

Hill III's claims against Aldous allege that she communicated with Blue regarding his potential criminal liability and indictment in furtherance of the alleged scheme to have him charged. Because this claim alleges communication about a matter of public concern, we conclude that Hill III's claims against Aldous are subject to the TCPA. *See* TEX. CIV. PRAC. & REM. CODE § 27.001(7) (2011).

Hill III's claims against Malouf allege, among other things, that he communicated with Blue and Aldous to further Hill III's prosecution in order to advance their common interest in the attorney's fee litigation. This allegation fits within the statutory definition of the exercise of the right of association, and we conclude that the TCPA applies to Hill III's claims against Malouf. *See id.* § 27.001(2) (2011).

Because we conclude that all of the appellees carried their burden to demonstrate that the TCPA applies, we overrule Hill III's second issue.

VII. Hill III failed to make a prima facie case for his claims.

Because the trial court excluded nearly all of Hill III's evidence, we rely primarily on the factual allegations in his live pleading to determine whether he has established by clear and specific evidence a prima facie case for his claims. *See* TEX. CIV. PRAC. & REM. CODE § 27.005(c).

A. Malicious prosecution

A plaintiff alleging malicious prosecution must establish:

- (1) the commencement of a criminal prosecution against the plaintiff;
- (2) causation (initiation or procurement) of the action by the defendant;
- (3) termination of the prosecution in the plaintiff's favor;
- (4) the plaintiff's innocence;
- (5) the absence of probable cause for the proceedings;
- (6) malice in filing the charge; and
- (7) damage to the plaintiff.

Richey v. Brookshire Grocery Co., 952 S.W.2d 515, 517 (Tex. 1997).

The Supreme Court of Texas has explained the judicial philosophy behind malicious prosecution claims:

This Court has long recognized a cause of action for those subjected unjustifiably to criminal proceedings, but has also made clear that the cause of action must sometimes yield to society's greater interest in encouraging citizens to report crimes, real or perceived. The elements necessary to prevail on a malicious prosecution claim reflect this balance. Thus, the plaintiff must prove not only that the defendant commenced criminal proceedings against her and she is innocent of the crime charged, but also that the defendant lacked probable cause and harbored malice toward her. These latter elements guard against a jury's natural inclination to punish those who, through error but not malevolence, commence criminal proceedings against a person who is ultimately exonerated. 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." *Richey v. Brookshire Grocery Co.*, 952 S.W.2d 515, 517 (Tex. 1997) (citing *Akin v. Dahl*, 661 S.W.2d 917, 920 (Tex. 1983), *cert. denied*, 466 U.S. 938, (1984)). Courts must presume that the defendant acted reasonably and had probable cause to initiate criminal proceedings. *Id.* To rebut this presumption, the plaintiff must produce evidence that the motives, grounds, beliefs, or other information upon which the defendant acted did not constitute probable cause. *Id.* at 518.

Kroger Tex. Ltd. P'ship v. Suberu, 216 S.W.3d 788, 792–93 (Tex. 2006). The dichotomy between the criminal law's presumption of innocence and requirement of proof beyond a reasonable doubt and the civil law's presumption that one who reports a crime does so in good faith is justified by societal interests that “it is more important that the guilty occasionally go free than for the innocent to be jailed,” and that “it is more important that a private citizen report an apparent subversion of our laws than for the wrongly accused to attain monetary redress from the accuser.” *Id.* at 794.

In light of these competing interests, an acquittal or dismissal of charges does not prove lack of probable cause, nor does an arrest prove that the malicious prosecution plaintiff is not innocent. *Id.* Because probable cause is presumed, to make a prima facie case on malicious prosecution, the plaintiff must show that the defendants harbored animus or relied on information that does not support a reasonable belief that the plaintiff was guilty of the crimes for which he was charged. *See id.* at 794–95. In reviewing the record to determine whether a plaintiff has made a prima facie case, we remain cognizant that “a private citizen has no duty to investigate a suspect's . . . explanation before reporting a crime.” *Id.* at 794.

Ordinarily a “person cannot be held liable for malicious prosecution if ‘the decision whether to prosecute is left to the discretion of another, including a law enforcement official or the grand jury.’” *King v. Graham*, 126 S.W.3d 75, 76 (Tex.

2003) (quoting *Browning-Ferris Indus., Inc. v. Lieck*, 881 S.W.2d 288, 293 (Tex. 1994)). Two exceptions to this rule have been noted by the Texas Supreme Court. *King*, 126 S.W.3d at 78. The Restatement (Second) of Torts § 653, comment g, which the Texas Supreme Court has cited with approval, states:

In order to charge a private person with responsibility for the initiation of proceedings by a public official, it must therefore appear that his desire to have the proceedings initiated, expressed by direction, request or pressure of any kind, was the determining factor in the official's decision to commence the prosecution, or that the information furnished by him *upon which the official acted* was known to be false.

Id. at 78 (quoting Restatement (Second) of Torts § 653 cmt. g (emphasis added)).

Thus, the two exceptions to the general rule of nonliability for malicious prosecution when the decision to prosecute is left to another are (1) the person expressed a desire to have the proceedings initiated by direction, request or pressure and this direction, request, or pressure was the determining factor in the commencement of the prosecution and (2) the person knowingly provides material and false information that is acted upon in the commencement of the prosecution.

Id.

1. Tillotson, Aldous, and Malouf

Hill III failed to make a prima facie case for malicious prosecution as to Tillotson, Aldous, and Malouf because there is not clear and specific evidence that they commenced or caused the prosecution. The decision to prosecute was

ultimately within the discretion of Watkins and his staff to present the charges to the grand jury and within the discretion of the grand jury to indict. Hill III did not allege that Tillotson, Aldous, or Malouf provided any information to the district attorney's office or that they knowingly furnished false information.

2. Lynn

On appeal, Hill III argues that he demonstrated by clear and specific evidence that Lynn initiated or procured his prosecution by supplying false or misleading evidence. Hill III also argues that he demonstrated by clear and specific evidence that Lynn lacked probable cause to submit a report to the district attorney's office.¹⁰

Citing the Clerk's Record, Hill III relies on paragraph 88 of his declaration to demonstrate that Lynn's report was false or misleading. Clerk's R. 3304. Page

¹⁰ "Probable cause is the 'existence of such facts and circumstances as would excite belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor [complainant], that the person charged was guilty of the crime for which he was prosecuted.'" *Buckingham Senior Living Cmty.*, 605 S.W.3d at 811 (quoting *Richey*, 952 S.W.2d at 517). The probable-cause element inquires "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." *Richey*, 952 S.W.2d at 517. "There is an initial presumption in malicious prosecution actions that the defendant acted reasonably and in good faith and had probable cause to initiate the proceedings." *Richey*, 952 S.W.2d at 517. The presumption disappears if a plaintiff produces evidence that the motives, grounds, beliefs, and other evidence upon which the defendant acted did not constitute probable cause. *Id.* "Courts must be especially careful in malicious prosecution cases to ensure that sufficient evidence supports each element of liability. Otherwise, the fourth element (innocence) automatically swallows the fifth (lack of probable cause) and sixth (malice) elements of this claim." *Kroger Tex. Ltd. P'ship*, 216 S.W.3d at 795.

3304 of the record does not include a paragraph 88. It does, however, include a paragraph 8, which states:

8. The law firms of Campbell Harrison & Dagley and Calloway, Norris, Burdette & Weber represented me in the 02020 Action (and various other suits for approximately one year from October 2008 until November 2009. I will collectively refer to those firms (and the individual lawyers at those firms who represented me) as “CHD.”

In the trial court, Hill III relied on his second amended petition, paragraphs 24, 33, and 42–52 and paragraphs 87–89 and 105 of his declaration to demonstrate that Lynn provided false and misleading information to the district attorney’s office, which relied on his submission.

Hill III’s response to the TCPA motions was filed in late September 2019, and on October 1, 2019, before the trial court ruled on the motions, Hill III amended his petition again. Thus, his third amended petition was his live pleading and the second amended petition became a nullity. Nevertheless, the referenced paragraphs of the second amended petition contain either conclusory statements that Lynn provided false information to the district attorney’s office or do not mention Lynn at all.

Paragraph 41 of the second amended petition provides the basis from which Hill III concludes that Lynn’s report to the district attorney’s office was false. This paragraph alleges that the statements on Hill III’s loan application regarding ownership of his house were accurate because the 2004 transaction was allegedly

“illegal and void under Texas law.” It also alleges that Hill III did not misrepresent his income, he merely stated that he had an income of \$55,000 at the bank’s direction. Hill III made the same allegations in the live pleading in the companion case. *See Keliher*, slip op. at 11–13, 40–42. In the companion case, we explained that Hill III’s argument was based on a flawed and erroneous understanding of Texas law and how it applies to the 2004 transaction by which a family trust acquired an 80% interest in Hill III’s house. *See id.* at 11–13, 40–42. For the same reasons, we conclude that Hill III has not demonstrated that Lynn lacked probable cause or submitted false information to the district attorney to procure Hill III’s prosecution.

We conclude that Hill III did not meet his burden to demonstrate a prima facie case against Lynn in the trial court or on appeal because he failed to provide clear and specific evidence of procurement or lack of probable cause.

3. Blue

On appeal, Hill III argues that Blue procured his prosecution by exerting undue influence over Watkins, and that influence was the determinative factor in the issuance of the indictments against him. Hill III relies on statements from the Dallas Court of Appeals, on remand from the Texas Court of Criminal Appeals, on his motion to quash the indictments in his criminal case. There are three problems with his approach.

First, the TCPA requires that he come forward with evidence or factual assertions in his pleadings. Hill III has not identified clear and specific evidence that Blue in fact exerted undue influence over Watkins. The facts are undisputed that she made donations to his political campaign, met with him, exchanged emails and texts, and had conversations with him. To the extent that emails and text messages are included in the record, they do not demonstrate that Blue was pressuring Watkins to prosecute Hill III. Most of them have nothing to do with Hill III.

Second, Hill III cites to the court of appeals opinions misleadingly. For example, in his brief, Hill III writes:

As to Blue, the evidence shows a complete “about face” from her initial communication with the DA in support of Al III, to becoming in the words of the Dallas Court of Appeals “egregious and amount to the kind of extraordinary circumstances that warrant the drastic measure of dismissal with prejudice.”

Appellant’s Br. 24. The problem with this statement is that it imputes egregious conduct to Blue, when the court of appeals was actually referring to prosecutorial misconduct that extended beyond Watkins and included a career assistant district attorney falsifying her own records. *See State v. Hill*, 558 S.W.3d 280, 287 (Tex. App.—Dallas 2018, no pet.). Even the concurring justice, who opined about the corrupting influence of private money in campaigns, noted: “While political contributions within statutory limits are both lawful and regular, the concern here

is not with Hill's father's counsel and Blue's decisions to support Watkins's campaign or promote his career, which they had every right to do." *Id.* at 289 (Schenck, J., concurring). Instead, Justice Schenck opined that "the concern is with the prosecutor himself and his apparent eagerness to curry Blue's favor" *Id.*

Third, the Dallas Court of Appeals applied an abuse of discretion standard while reviewing the trial court's dismissal of the indictments against Hill III with prejudice. These parties have argued for years about the proper inference that comes from the facts of Blue's contacts with Watkins. Under the deferential abuse of discretion standard, the court of appeals' assessment of the facts was not a fact finding. In the context of an abuse of discretion review, the court of appeals's assessment of the facts is analysis of what the trial court could have believed.¹¹ In this case, however, surmise or supposition is not enough to meet Hill III's burden to make a prima facie case by clear and specific evidence.

Based on the record in this case, we cannot conclude the Hill III met his burden to make a prima facie case by clear and specific evidence of procurement of prosecution, which is a necessary element of malicious prosecution.

B. Conspiracy and "aiding and abetting"

Hill III also alleged that the appellees were part of a conspiracy to procure criminal charges against him and that they aided and abetted the primary actors in

¹¹ And the federal courts reached contrary inferences from the very same evidence.

doing so. Civil conspiracy is not an independent tort. *Agar Corp., Inc. v. Electro Circuits Int'l, LLC*, 580 S.W.3d 136, 142 (Tex. 2019). Rather it is “a theory of vicarious liability,” and “part of the factual situation that permits a remedy against co-conspirators . . . who did not commit the underlying unlawful act.” *Id.* at 141. “Civil conspiracy is ‘derivative’ such that it is ‘connected to the underlying tort and survives or fails alongside it.’” *Cunningham v. Waymire*, 612 S.W.3d 47, 68 (Tex. App.—Houston [14th Dist.] 2019, no pet.) (quoting *Agar Corp.*, 580 S.W.3d at 140–41). “Aiding and abetting, like civil conspiracy, is also a derivative tort—to the extent it is an actionable tort in Texas” and dismissal or a grant of summary judgment as to the underlying tort also determines the disposition of the aiding and abetting claim. *Brumfield v. Williamson*, 634 S.W.3d 170, 208 (Tex. App.—Houston [1st Dist.] May 27, 2021, pet. denied).

Having concluded that Hill III failed to make a prima facie case of malicious prosecution by clear and specific evidence as to each of the appellees, we further conclude that his conspiracy and aiding and abetting claims lack such support. We hold that the trial court did not err by dismissing Hill III’s claims against Lynn, Tillotson, Blue, Aldous, and Malouf. We overrule all of Hill III’s issues.

Conclusion

We affirm the judgment of the trial court. All pending motions are dismissed as moot.

Peter Kelly
Justice

Panel consists of Justices Kelly, Hightower, and Countiss.