Affirmed in Part, Reversed and Remanded in Part, and Majority Opinion and Concurring and Dissenting Opinion filed August 17, 2023.

In The

Fourteenth Court of Appeals

NO. 14-22-00113-CV

WALGREENS, Appellant

V.

PAMELA MCKENZIE, Appellee

On Appeal from the County Civil Court at Law No. 1
Harris County, Texas
Trial Court Cause No. 1173052

C O N C U R R I N G A N D D I S S E N T I N G O P I N I O N

I concur in the judgment to the extent the majority reverses the trial court's order denying Walgreen's motion to dismiss under the Texas Citizen's Participation Act ("TCPA") and remands for further proceedings. I respectfully dissent to the extent the majority affirms the trial court's order.

The majority treats negligent hiring, training, and supervision as independent tort claims that may be viable even if there is no liability for an underlying tort.

That is not the law. Presuming that these theories are recognized under Texas law,[1] negligent hiring, training, and supervision (the "Three Theories") are derivative theories of liability, under which an employer like Walgreens may be held liable for the torts of one of its employees, like the Walgreens employee who allegedly told the police that McKenzie had committed crimes in the store ("Employee"). *See Wansey v. Hole*, 379 S.W.3d 246, 247–48 (Tex. 2012); *Nat'l Union Fire Ins. Co. v. Merchants Fast Motor Lines*, 939 S.W.2d 139, 142 (Tex. 1997); *Blaine v. National-Oilwell, L.P.*, No. 14-09-00711-CV, 2010 WL 4951779, at *8–9 (Tex. App.—Houston [14th Dist.] Oct. 30, 2018, no pet.); *Verinakis v. Medical Profiles, Inc.*, 987 S.W.2d 90, 97–98 (Tex. App.—Houston [14th Dist.] 1998, pet. denied). Under vicarious theories of liability, like respondeat superior, and also under derivative theories of liability, like the Three Theories, a plaintiff may hold an employer liable for the tortious conduct of its employee, but only if the employee's tortious conduct proximately caused damage to the plaintiff.[2] *See Wansey*, 379 S.W.3d at 247–48 (holding that negligent hiring and negligent supervision theories are based on the underlying tort allegedly committed by the employee in question and that these theories fail as a matter of law if the claim against the employee fails); *Nat'l Union Fire Ins. Co.*, 939 S.W.2d at 142 (concluding that negligent-hiring and negligent-supervision theories were derivative theories that survive or fail along with the underlying negligence claim); *Blaine*, 2010 WL 4951779, at

[1] Although intermediate courts of appeals have recognized these liability theories, the Supreme Court of Texas has not yet ruled definitively on the existence, elements, and scope of any of negligent hiring, negligent training, or negligent supervision. *See JBS Carriers, Inc. v. Washington*, 564 S.W.3d 830, 842 (Tex. 2018); *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 804 n.27 (Tex. 2010).

[2] But derivative theories are different because they involve the additional requirement that the plaintiff prove some type of negligence by the employer separate from the employee's tortious conduct, which is not required with vicarious theories like respondeat superior. *See Blaine*, 2010 WL 4951779, at *8–9.

*8–9 (holding that the Three Theories are based on the tortious conduct of the employee in question and fail as a matter of law absent tortious conduct by the employee); *Verinakis*, 987 S.W.2d at 97–98 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) (same as *Wansey*). Therefore, the Three Theories are dependent on the Employee being liable for intentional infliction of emotion distress or negligence, and the Three Theories are not independent claims under which liability is based solely on Walgreens's alleged negligent hiring, training, or supervision.[3] *See Wansey*, 379 S.W.3d at 247–48; *Alford v. Singleton*, No. 14-17-00504-CV, 2018 WL 5621472, at *4–5 (Tex. App.—Houston [14th Dist.] Oct. 30, 2018, no pet.) (mem. op.); *Blaine*, 2010 WL 4951779, at *8–9; *Verinakis*, 987 S.W.2d at 97–98.

McKenzie's claims for intentional infliction of emotional distress and negligence are based on and in response to the Employee's reporting to the police of an alleged crime, which is a communication made in connection with a matter of public concern. *See Brady v. Klentzman*, 515 S.W.3d 878, 884 (Tex. 2017). Therefore, the majority correctly concludes that these two claims are based on or in response to a party's exercise of the right of free speech. *See ante* at 4–6. The majority correctly concludes that the respondeat superior theory also falls within the TCPA, because under this theory McKenzie's seeks to hold Walgreens liable for the Employee reporting an alleged crime to the police. *See id*. The majority should treat the Three Theories in the same way because under these theories McKenzie also seeks to hold Walgreens liable for the Employee's reporting to the police of an alleged crime, which is a communication made in connection with a matter of public concern. *See Wansey*, 379 S.W.3d at 247–48; *Alford*, 2018 WL

[3] Notwithstanding the majority's statement to the contrary, McKenzie did not plead the Three Theories as claims; instead, she pleaded them as theories for holding Walgreens liable for the Employee's tortious conduct.

5621472, at *4–5; *Blaine*, 2010 WL 4951779, at *8–9; *Verinakis*, 987 S.W.2d at 97–98. Instead, the majority treats the Three Theories as if they were independent claims that are not based on the Employee's reporting to the police of an alleged crime. *See ante* at 6–7. The majority concludes that the Three Theories are independent claims for "direct negligence in hiring, training, and supervising." *Ante* at 6. The majority then concludes that the Three Theories are not based on and in response to the Employee's reporting to the police of an alleged crime because these theories are based on "the hiring, training, and supervision of the Walgreens employee [that] occurred before this incident" and that "are conduct, not communications." *Ante* at 6. The majority ignores the reality that under the Three Theories, the only damages that McKenzie may recover against Walgreens are damages proximately caused by the Employee's allegedly tortious conduct in reporting an alleged crime to the police. *See Wansey*, 379 S.W.3d at 247–48; *Alford*, 2018 WL 5621472, at *4–5; *Blaine*, 2010 WL 4951779, at *8–9; *Verinakis*, 987 S.W.2d at 97–98. No matter how negligent Walgreens may have been in hiring, training, and supervising the Employee, Walgreens has no liability to McKenzie under the Three Theories unless the Employee's communication with the police was tortious conduct that proximately cause damage to McKenzie.[4] *See Wansey*, 379 S.W.3d at 247–48; *Alford*, 2018 WL 5621472, at *4–5; *Blaine*, 2010 WL 4951779, at *8–9; *Verinakis*, 987 S.W.2d at 97–98. Thus, in the first prong of its analysis, the majority errs in concluding that the Three Theories do not fall within the scope of the TCPA.

As to the second prong of the analysis, the majority correctly notes that McKenzie's respondeat superior theory is not an independent claim and that it is

[4] Though the Three Theories are also based on Walgreens's allegedly negligent conduct, this does not change the fact that the Three Theories are based on the Employee's communication with the police in the alleged underlying torts and thus fall within the scope the TCPA.

"connected to the underlying tort and survives or fails alongside it." *Ante* at 13–14. The same rationale applies equally to the Three Theories, which are not independent claims. *See Wansey*, 379 S.W.3d at 247–48; *Alford*, 2018 WL 5621472, at *4–5; *Blaine*, 2010 WL 4951779, at *8–9; *Verinakis*, 987 S.W.2d at 97–98. If McKenzie's claims for intentional infliction of emotional distress and negligence fail, as the majority holds, then even if Walgreens negligently hired, trained and supervised its employees, McKenzie may not recover against Walgreens under any of the Three Theories, so the Three Theories fail along with the underlying torts. *See Wansey*, 379 S.W.3d at 247–48; *Alford*, 2018 WL 5621472, at *4–5; *Blaine*, 2010 WL 4951779, at *8–9; *Verinakis*, 987 S.W.2d at 97–98. Therefore, the majority errs in failing to conclude that McKenzie did not carry her burden to establish by clear and specific evidence a prima facie case as to Walgreens's alleged liability under the Three Theories.

The majority's failure to reverse the trial court's order as to the Three Theories is inconsistent with prior opinions from this Court and our sister Court. *See Comcast Corp. v. Houston Baseball Partners, LLC*, 627 S.W.3d 398, 422 n.15 (Tex. App.—Houston [14th Dist.] 2021), *aff'd sub nom. McLane Champions LLC v. Houston Baseball Partners, LLC*, —S.W.3d—,—, 2023 WL 4306378, at *1 (Tex. Jun. 30, 2023); *Cunningham v. Waymire*, 612 S.W.3d 47, 68 (Tex. App.—Houston [14th Dist.] 2019, no pet.); *Hill v. Keliher*, No. 01-20-00419-CV, 2022 WL 3031620, at *13–14 (Tex. App.—Houston [1st Dist.] 2022, no pet.). In *Cunningham* this court concluded that the plaintiffs' conspiracy theory was a derivative liability theory based on the alleged underlying tort of libel. *See Cunningham*, 612 S.W.3d at 68. The *Cunningham* court held that the conspiracy theory fell within the TCPA under the first prong, without conducting a separate analysis for the conspiracy theory and that under the second prong, the derivative

theory would survive or fail along with the underlying tort of libel (in this case it survived the TCPA motion). *See id*. at 58–59, 68. Similarly, in *Comcast Corporation v. Houston Baseball Partners*, this court cited with approval the conclusion of the Third Court of Appeals that a trial court does not err by refusing to analyze derivative theories like conspiracy separately from the underlying tort on which the theories are based in determining whether to grant a TCPA motion to dismiss. *See Comcast Corp.*, 627 S.W.3d 398 at n.15; *Warner Bros. Entm't, Inc. v. Jones*, 538 S.W.3d 781, 813–14 (Tex. App.—Austin 2017), *aff'd*, 611 S.W.3d 1 (Tex. 2020). Our sister court came to the same conclusion in *Hill v. Keliher*, No. 01-20-00419-CV, 2022 WL 3031620, at *13–14 (Tex. App.—Houston [1st Dist.] 2022, no pet.). The *Hill* court concluded that derivative theories like aiding and abetting and conspiracy were based on the underlying tort of malicious prosecution and because the TCPA applied to the malicious prosecution claims, the TCPA necessarily applied to these derivative theories. Nevertheless, the majority concludes that the TCPA applies to the underlying torts and yet holds that the TCPA does not apply to the Three Theories, thus conflicting with *Cunningham*, *Comcast*, and *Hill*. *See Comcast Corp.*, 627 S.W.3d at 422 n.15; *Cunningham*, 612 S.W.3d at 68; *Hill*, 2022 WL 3031620, at *13–14.

The majority also states that even if negligent hiring, training, and supervision are not independent tort claims, this court may not reverse as to the Three Theories because McKenzie pleaded claims for defamation and false imprisonment based on the Employee's conduct. *See ante* at 7, n.2. The majority asserts that Walgreens did not identify false imprisonment, defamation, or negligent hiring, training and supervision as claims as to which Walgreens sought dismissal under the TCPA. *See id*. This analysis lacks merit for several reasons: (1) McKenzie did not plead claims for defamation or false imprisonment and conceded

in the trial court that she only asserted claims for "Intentional Infliction of Emotional Distress, Vicarious Liability/Respondeat Superior, and Negligence"; (2) if a party moves to dismiss all of the plaintiff's independent claims, the party necessarily has challenged the plaintiff's vicarious and derivative liability theories; *Comcast Corp.*, 627 S.W.3d at 422 n.15 and (3) even if McKenzie had pleaded defamation or false imprisonment and even if the Three Theories were considered independent claims, Walgreens challenged all claims asserted by McKenzie, arguing that they are all based on the Employee's alleged false report of a crime to the police, a matter of public concern, and therefore her claims are covered by the TCPA and must be dismissed.

Courts review TCPA motions to dismiss in a multi-step analysis. *See McLane Champions, LLC v. Houston Baseball Partners, LLC*, No. 21-0641, 2023 WL 4306378, at *4 (Tex. Jun. 30, 2023). First, the moving party must show by a preponderance of the evidence that the TCPA applies to the "legal action" against it. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 27.003, .005 (West, Westlaw through 2023 R.S.); *McLane Champions, LLC*, 2023 WL 4306378, at *4. The TCPA definition of "legal action" includes "a lawsuit . . . petition . . . or any other judicial pleading or filing that requests legal, declaratory, or equitable relief." Tex. Civ. Prac. & Rem. Code Ann. § 27.001(6) (West, Westlaw through 2023 R.S.). If the moving party shows that the TCPA applies to the "legal action" against it, the burden shifts to the nonmoving party to establish by clear and specific evidence a prima facie case for each essential element of its claims. *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.005(c); *McLane Champions, LLC*, 2023 WL 4306378, at *4; *Youngkin v. Hines*, 546 S.W.3d 675, 681 (Tex. 2018). If the nonmoving party cannot satisfy that burden, the trial court must dismiss the suit. *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.005(c); *McLane Champions, LLC*, 2023 WL 4306378, at

*4. If all the plaintiff's claims are based on the same conduct, a court may determine whether the movant showed that the TCPA applies to the legal action or lawsuit in a single analysis rather than a claim-by-claim analysis. *See McLane Champions, LLC*, 2023 WL 4306378, at *4–9 (determining whether the movant proved that the TCPA applied to plaintiff's "suit" involving claims for breach of contract, fraud, and negligent misrepresentation in a single analysis).

In her petition McKenzie asserted only two claims against Walgreens: intentional infliction of emotional distress and negligence. In its motion to dismiss under the TCPA, Walgreens asserts that (1) its motion to dismiss should be granted because all of McKenzie's allegations are subject to the TCPA; (2) the TCPA applies to claims based on a defendant's reporting of a crime to the police; (3) all of McKenzie's claims are based on the alleged false report of a crime to the police; (4) in her petition McKenzie asserts two claims: intentional infliction of emotional distress and negligence; and (5) these claims arise from Walgreens's alleged actions in calling the police and therefore McKenzie's claims are covered by the TCPA and must be dismissed. Walgreens challenged all claims asserted by McKenzie, arguing that they are all based on the Employee's alleged false report of a crime to the police, a matter of public concern, and therefore her claims are covered by the TCPA.

In her response to Walgreens's motion to dismiss, McKenzie stated that Walgreens "asserts in its Motion to Dismiss Plaintiffs' claims for Intentional Infliction of Emotional Distress, Vicarious Liability/Respondeat Superior, and Negligence that Plaintiff's allegations fall within the parameters of the TCPA . . . and should be dismissed." McKenzie contended that she was asserting "causes of action for Intentional Infliction of Emotional Distress, Vicarious Liability/Respondeat Superior, and Negligence." McKenzie argued that she could

establish clear and specific evidence of a prima facie case for each cause of action, and then attempted to do so for "Intentional Infliction of Emotional Distress" and for "Negligence and Respondeat Superior Claim." McKenzie did not attempt to establish by clear and specific evidence a prima facie case for each essential element of (1) any defamation claim, (2) any false imprisonment claim, or (3) any alleged negligent hiring, training or supervision claim.

McKenzie did not plead any claim for defamation or false imprisonment, and the Three Theories are not independent claims. *See Wansey*, 379 S.W.3d at 247–48; *Alford*, 2018 WL 5621472, at *4–5; *Blaine*, 2010 WL 4951779, at *8–9. But, even if the Three Theories were independent claims and even if McKenzie pleaded claims for defamation and false imprisonment, Walgreens challenged all claims asserted by McKenzie, arguing that they are all based on the Employee's alleged false report of a crime to the police, a matter of public concern, and therefore her claims are covered by the TCPA. Thus, Walgreens showed that the TCPA applies to all of McKenzie's claims, and the burden shifted to McKenzie to establish by clear and specific evidence a prima facie case for each essential element of her claims. *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.005(c); *McLane Champions, LLC*, 2023 WL 4306378, at *4; *Youngkin*, 546 S.W.3d at 681. Because McKenzie did not satisfy that burden, the trial court should have dismissed all of her claims. *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.005(c); *McLane Champions, LLC*, 2023 WL 4306378, at *4.

But that's not all. Even if the majority were correct that the Three Theories are independent torts not tied to the underlying torts of intentional infliction of emotional distress and negligence, the majority's analysis is still flawed. In footnote 3, the majority responds to an argument appellant made in the trial court that appellee cannot bring a claim for negligent hiring, training, etc. when there has

been no allegation that a Walgreens employee was acting outside the course and scope of employment. *See ante* at 7 n.3. That footnote is incorrect for at least three reasons. First, though Walgreens made that argument in the trial court, even construing Walgreens's brief liberally, Walgreens has made no such argument on appeal. By addressing an argument not raised by appellant, the judges in the majority err and abandon their station as neutral judges by constructing a merits argument that Walgreens has chosen not to make. *See Hudgens v. Univ. of Texas MD Anderson Cancer Ctr.*, 615 S.W.3d 634, 648 (Tex. App.—Houston [14th Dist.] 2020, no pet.). Second, even if it were permissible for this court to consider this argument, the majority's statement that there's no stipulation to vicarious liability in this record is incorrect. In the trial court, appellant asserted that "the employer . . . does not contest liability under the theory of respondeat superior if it should be determined that the employee was, indeed, negligent and the negligence caused the Plaintiff's alleged injuries." Finally, footnote 3 is incorrect for the reasons stated in my en banc dissenting opinion in *Werner Enterprises v. Blake*, —S.W.3d—,—, 2023 WL 3513843, *47 (Tex. App.—Houston [14th] May 18, 2023, pet. filed) (Wilson, J., en banc dissenting opinion).

I respectfully dissent from the majority's conclusions that (1) the trial court did not err in declining to dismiss McKenzie's claims based on the Three Theories and (2) McKenzie pleaded claims for defamation and false imprisonment that the trial court did not err in declining to dismiss. This court should reverse the trial court's order in its entirety and remand this case with instructions for the trial court (a) to determine the amount of reasonable attorney's fees Walgreens incurred in defending against this action; (b) to determine whether to award to Walgreens and against McKenzie sanctions sufficient to deter McKenzie from bringing similar actions described in Chapter 27 of the Civil Practice and Remedies Code, and if so,

the amount of sanctions to be awarded; and (c) to render a judgment awarding Walgreens court costs, reasonable attorney's fees incurred in defending against the legal action, and any sanctions awarded, and dismissing all of McKenzie's claims with prejudice. *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.009 (West, Westlaw through 2023 R.S.); Tex. R. App. P. 43.3(a); *United Locating Services v. Fobbs*, 619 S.W.3d 863, 875–76 (Tex. App.—Houston [14th Dist.] 2021, no pet.).

/s/ Randy Wilson
Justice

Panel consists of Justices Spain, Poissant, and Wilson (Poissant, J., majority).