COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-15-00326-CV

BRAD SCHOFIELD AND ALMA MARIE HOWARD — APPELLANTS

V.

DAVID DOUGLAS GERDA — APPELLEE

FROM COUNTY COURT AT LAW NO. 1 OF TARRANT COUNTY
TRIAL COURT NO. 2015-002533-1

MEMORANDUM OPINION[1]

I. Introduction

"The Texas Citizens Participation Act (TCPA) protects citizens who petition or speak on matters of public concern from retaliatory lawsuits that seek to intimidate or silence them." *In re Lipsky*, 460 S.W.3d 579, 584 (Tex. 2015) (orig.

[1]*See* Tex. R. App. P. 47.4.

proceeding) (citing Tex. Civ. Prac. & Rem. Code Ann. §§ 27.001–.011 (West 2015)) (footnote omitted). The statute's purpose is to identify and summarily dispose of lawsuits designed to chill First Amendment rights but not to dismiss meritorious lawsuits. *Id.* at 589 (citing Tex. Civ. Prac. & Rem. Code Ann. § 27.002). In three issues, Appellants Brad Schofield and Alma Marie Howard bring this interlocutory appeal from the trial court's denial of their motion under the TCPA to dismiss Appellee David Douglas Gerda's defamation suit. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 27.001–.011, 51.014(a)(12) (West 2015 & Supp. 2016). We reverse and remand to the trial court for further proceedings.

II. Factual and Procedural Background

The following facts are derived from Gerda's verified original petition, Schofield and Howard's motion to dismiss and the affidavits and other evidence attached to their motion, and Gerda's response to the motion and the affidavits and other evidence attached to his response. *See id.* § 27.006(a) (providing that the trial court "shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based" in considering chapter 27 motions to dismiss); *Lipsky*, 460 S.W.3d at 587.

A. The Contested School Board Race

On January 31, 2015, Gerda appointed Matthew Mucker as his campaign treasurer for his bid for election to Place 6 on the Keller Independent School District (KISD) Board of Trustees, the seat held by Schofield at the time. From that date until election day—May 9, 2015—Gerda and Schofield were opponents

in a contested and spirited political race for public office. All statements Gerda complains of in his defamation lawsuit against Schofield and Howard, a political activist, occurred after Gerda officially declared his candidacy for public office.

In February 2015, after learning that Gerda was running for his KISD seat, Schofield began to research both Gerda and Mucker. In his investigation, Schofield uncovered various activities that he described as "strange," "odd," and potentially unethical involving Gerda, Mucker, Vote Yes for Keller Schools PAC (VYKS PAC), a political action committee formed to advocate voter support for a $169.5 million bond proposal to benefit KISD, and VKS Architects, a firm selected by KISD to perform construction work on recently-approved bond projects. Voters had approved the bond package in the November 2014 election.

B. Gerda's Connection with VYKS PAC

At the beginning of the race, and in response to an offer to local candidates to submit information about their campaigns, Gerda submitted the following to the *Texas Blaze News*:

> [W]e've just passed a bond to build new schools, renovate others and to create a game changing Career Technology Education Center.
>
> . . . .
>
> I believed we could pass this bond while my opponent did not, so spending the hundreds of hours this last election cycle was a labor of love for me to help benefit our KISD kids. We also had 8-9 moms and dads giving that same type effort, and yet I didn't see my opponent advocating the elements of the bond to our citizens. What I did see was someone wanting to delay the bond, which would have

> cost our district tens of millions of dollars more and delay much needed help and space for our kids. . . .
>
> I also believe that by putting my name behind the bond meant having a responsibility to make sure our administrators are true to their word regarding the bond. They've earned much trust from us but we still have to verify. Equally important is one's energy level and belief system toward our upcoming projects. I was honored to serve as Co-Chair of the Get the Yes Vote Out last fall and currently serve on Oversight Committees that oversee interviewing of [c]onstruction firms for the renovations of Keller High and BCI and general Bond Oversight Committee to make sure the bond is utilized in the fashion promoted last fall. These next few years will change our kid's [sic] lives for the good and my opponent has decided that it is not important enough to put the time and effort in as several other board members have.

Texas Blaze News published this information in March 2015.

C. VYKS PAC's Connection with VLK Architects

When Schofield investigated Gerda's role as self-proclaimed "Co-Chair"[2] of VYKS PAC in advocating for voter approval for the bond package in the November election, he discovered the following:

- At the conclusion of the November 4, 2014 election, VYKS PAC was in debt in the amount of $3,311.
- On November 17, 2014, Mucker, who also served as campaign treasurer for VYKS PAC, personally loaned the PAC $1,673.79.
- On December 11, 2014, the Citizens Bond Oversight Committee (CBOC) met and discussed that VLK Architects had been selected "in a no-bid process," for recommendation as the provider of architectural services for

[2]While Gerda used the term "Co-Chair" in his campaign literature to describe his role in the Get the Yes Vote Out movement, at the hearing on the motion to dismiss, he down-played the significance of that title. In his affidavit, Gerda characterized his "co-chair" title with regard to the VYKS PAC as "nothing more than a volunteer label [he] shared with another volunteer" and stated that he was not "otherwise affiliated [with VYKS PAC] beyond being a volunteer."

the 2014 bond program. Gerda was present at that meeting, serving as a member of the CBOC, the committee he referenced in the *Texas Blaze News* article.[3]

- On December 16, 2014, KISD approved VLK Architects' no-bid contract.
- On December 22, 2014, six days after being awarded the architectural contract and 46 days after the November election, VLK Architects contributed $1,600 to VYKS PAC.
- On February 15, 2015, VYKS PAC, acting through Mucker as treasurer, repaid Mucker $1,311.42 of the $1,673.79 he had loaned VYKS PAC three months earlier.
- Without VLK Architects' contribution, VYKS PAC would have had insufficient funds to repay Mucker's loan to the PAC.

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[3]Schofield attached a copy of the December 11, 2014 CBOC meeting minutes to his affidavit. The minutes reflect that "[a]pproximately twelve" members were in attendance, but their names are not listed. Gerda confirmed in his affidavit that he was present at that meeting and that Schofield was also present at that meeting. Gerda and others were introduced to their "1st Bond Oversight Committee meeting" that day.

The minutes reflect that at a meeting two days earlier, on December 9, the three architectural firms that were selected by the administration for interviews (out of a total eighteen applicants) made presentations that were reviewed by the Keller High School principal, the Keller High School Chief Technology Officer, a CBOC representative, a KISD Board representative, a representative from the "Leadership function," and individuals from both the Purchasing and Facility Services departments. The CBOC representative who attended the December 9 meeting was not listed by name but, as Gerda points out, the December 9 meeting occurred "[two] days before [Gerda] joined as a volunteer on the [CBOC]."

The minutes also recite that "[t]he Administration explained that after this process was completed that VLK Architects was the architectural firm that was recommended and that decision would be submitted for Board approval at the December 16th Board meeting."

The December 16, 2014 KISD Board meeting minutes reflect that Schofield was in attendance and that, while the motion to approve VLK Architects carried 5–2, Schofield opposed it.

Based upon this chain of events, Schofield suspected that "VLK's contribution to VYKS PAC was a quid pro quo for being selected to receive a no-bid contract."

D. Other Issues Related to Gerda's Campaign Materials

Schofield also noticed other anomalies.

On VYKS PAC's January 16, 2015 Campaign Finance Report, the PAC revealed an expenditure made to Gerda on November 3, 2014, in the amount of $600.40. That entry, however, was manually crossed out with a large "x" over the entry, but no corresponding in-kind contribution was reported to indicate whether Gerda had contributed any materials or services to the PAC.[4]

In February 2015, Schofield also noticed that the templates for Gerda's campaign website and for VYKS PAC were "nearly identical." Both shared the same color schemes, layouts, navigation menu styles, and fonts. In his affidavit, Schofield stated, "It appeared as though the website files were transferred from

[4]In his affidavit, Gerda admits that he did purchase campaign materials for VYKS PAC and that he did receive reimbursement for that purchase. He denies that he profited from VYKS PAC, however, stating,

> I did purchase some sign materials for VYKS PAC from my personal funds. . . . I received nothing more than a dollar for dollar reimbursement for that expense. . . . I received no profit from VYKS PAC and no record out there indicates that I did. It is clear in the public records that I received nothing but a dollar for dollar reimbursement from VYKS PAC.

Gerda also pointed out that he had "no control and never ha[d], regarding how VYKS PAC reports its financing." The financial disclosures also show that Gerda donated $450 to VYKS PAC in January 2015, which Gerda stated was to help pay off some of VYKS PAC's debts.

VYKS PAC['s] website to Mr. Gerda's campaign website. To me, this looked to be a campaign contribution from VYKS PAC to the Gerda campaign, which I believe violates Texas election laws." *See generally* Tex. Elec. Code Ann. § 254.031(1) (West Supp. 2016) (requiring candidates to report contributions received).

Schofield also noticed that Gerda's campaign website contained a disclosure at the bottom that stated, "Political ad paid for by the Gerda for KISD PAC." Yet, according to Schofield, no such PAC existed in the public filings. Schofield concluded, "This appeared to be in violation of Texas election laws requiring all political committees to appoint a treasurer and report such appointment with the TEC." *See generally id.* §§ 252.001–.003, 255.001 (West 2010).

When Schofield revisited Gerda's campaign website in March, the disclaimer had been changed to read, "Political ad paid for by David Gerda." But the website also included a new feature, a link to "Donate" for accepting campaign donations. When Schofield clicked on that link, he was directed to a PayPal page listing "furniture experts llc dba aamco" as the owner of the account. This appeared to Schofield "as though Mr. Gerda was using his business's bank accounts to receive donations to his political campaign, which also appeared violate [sic] Texas election laws." *See id.* § 253.040 (West Supp. 2016) (requiring candidates to keep campaign contributions in accounts "separate from any other account maintained by the person").

E. Howard Becomes Involved

Schofield took his suspicions to Howard, president of The Boiling Point TEA Party,[5] whom he had met in 2012 when he was running for election to the KISD Board.[6] Schofield showed to Howard VYKS PAC's financial disclosure listing the November 17, 2014 $1,673.79 loan that Mucker made to the PAC, the disclosure reflecting the $1,600 donation made by VLK Architects to VYKS PAC on December 22, 2014—seven weeks after the bond election and six days after the KISD Board approved a no-bid contract to VLK Architects to work on the Keller High School renovations—as well as the disclosure showing that on February 15, 2015, VYKS PAC, through Mucker as treasurer, repaid Mucker $1,311.42 of his outstanding loan.

According to Howard, after reviewing these documents, she believed that the issues were "important to the community" and "needed to be addressed."

1. Howard Suggests Schofield Speak with the District Attorney

Howard suggested that Schofield take up the matter with Sharen Wilson, the Tarrant County Criminal District Attorney and, according to Schofield, since Howard knew Wilson personally, she agreed to introduce them. Since Wilson

[5]The Boiling Point TEA Party is a PAC formed "to advocate for conservative issues, such as smaller government and lower taxes." At all times relevant to this lawsuit, Howard served as President of the Boiling Point TEA Party. In her capacity as President, Howard "manage[s] its social media sites" and "send[s] out a regular e-mail newsletter" on behalf of the PAC.

[6]The Boiling Point TEA Party endorsed Schofield in 2012 and again when he ran for reelection in 2015.

was already scheduled to speak at the Boiling Point's March 24, 2015 meeting, Schofield attended. At some point during the meeting, he and Wilson discussed the matter, and Schofield presented Wilson with a "Criminal Offense Investigation Referral form that [he] had obtained from the Tarrant County District Attorney's office and filled out" that outlined his concerns. According to Schofield, Wilson directed him to bring the matter back to her attention after the KISD school board election had concluded.[7]

2. Howard's Statement at the March 26 KISD Board Meeting

During their conversations, Schofield also asked Howard to bring these issues to the attention of the KISD Board at its March 26 meeting. Howard agreed to do so.

According to Schofield, he "prepared some remarks that summarized [his] findings" for her and emailed that summary to Howard with a message that she should "feel free to edit [his] remarks in whatever way she deemed necessary." Howard took Schofield up on his suggestion and edited the prepared remarks by "cut[ting] down the length of the remarks and remov[ing] some of the conclusory language."

At the March 26 meeting, Howard addressed the KISD Board and said:

> This statement concerns the questionable actions of two members on the KISD Citizens Bond Oversight Committee, who are also members of the interview committee for bond construction contractors. *These two individuals have the capacity and ability to*

[7]The record in this case indicates that Schofield did not follow through on Wilson's invitation to revisit his concerns after the election.

nudge a particular bond construction contract from one contractor to another. With this power to influence the bidding and review process[8] an individual should be upright, unbiased, objective in carrying out their bond oversight duties and should be free of conflicts of interest. In my opinion, that was not the case concerning the VLK Architect[s] contract approved by the Board in December.

Taking you back to November fourth, the KISD bond was passed by the voters. The following day the Vote Yes for Keller Schools PAC (which is Political Action Committee) found itself over thirty-three hundred dollars in debt. With the bond already passed by the voters, options were limited by the PAC to pay its outstanding debts. In early December, the PAC started getting inquiries from vendors and others wanting payment for their overdue bills. Up until December twenty-second the PAC only received seventy-five dollars in new donations since the bond election. The PAC still owed over thirty-two hundred dollars nearly seven weeks after the November bond election.

PAC campaign treasurer, Matthew Mucker, loaned the PAC approximately sixteen hundred dollars on November sixteenth, in efforts to keep it afloat.

On December the eleventh, the KISD Citizens Bond Oversight Committee met with PAC co-chair, David Gerda, with PAC campaign treasurer, Matthew Mucker in attendance. The VLK Architect[s] no-bid contract was on the agenda. Mr. Gerda and Mr. Mucker strongly supported granting VLK Architects a no-bid contract for work to be done on Keller High and Bear Creek Intermediate schools.

On December sixteenth, at the recommendation of the KISD Citizens Bond Oversight Committee, the KISD bond [sic] approved the VLK Architect[s] no-bid contract.

On December twenty-second, just four business days after the Board approved the contract, VLK Architect[s] provided Mr. Gerda and Mr. Mucker with a sixteen-hundred dollar contribution to the Vote Yes PAC. This contribution was made seven weeks after the

[8]Gerda identifies this portion of Howard's statement as at issue. He also complains about an equivalent portion in a Boiling Point newsletter that was published later.

election and just four days after VLK obtained their no-bid contract. The VLK check was equal to the amount of money Mr. Mucker loaned the PAC on November sixteenth.

For the record, no KISD employee is involved in any actions described within this commentary.

KISD prides itself on financial integrity and transparency but the VLK contract damages what the district has worked so hard to achieve. In order to rebuild the district's reputation of excellence in financial stewardship, I request that David Gerda and Matthew Mucker resign their positions on the KISD Citizens Bond Oversight Committee and also resign their positions on the Committee to interview construction firms and any other membership involving dispersing bond proceeds from the November fourth bond election.

I ask the Board to take up this matter as an action item in a future Board meeting. [Emphasis added.]

3. The Boiling Point Newsletter

On April 20, Howard published a Boiling Point newsletter that included a political endorsement of Schofield and other candidates. It also included a segment expressing concern about Gerda, his campaign treasurer, the VYKS PAC contributions and expenditures, and the VLK Architects no-bid contract with KISD. Included in the three-paragraph article was the statement, "VLK Architect[s] provided Mr. Gerda and Mr. Mucker with a $1,600 dollar contribution to the ***Vote Yes PAC***. This contribution was made *seven weeks after the election* and just *FOUR days after VLK obtained their no-bid contract*."

F. Schofield's Comments at the March 26 KISD Board Meeting

At the same meeting where Howard had made her statement, Schofield expressed his own concerns about the KISD Board awarding no-bid contracts to

vendors. Schofield's comments were made in conjunction with his request that an agenda item—unrelated to VLK Architects—be "pulled" from the consent agenda for discussion. During that discussion, Schofield said,

> I guess my main concern is the no-bid contract. My concern is that VLK was a no-bid contract. And two gentlemen on the CBOC committee got reimbursed about sixteen hundred bucks. And they got to have personally benefited by that money. And that money went right back into—about thirteen—a little over thirteen hundred went back into their checking accounts.
>
> My concern is—this here, what are their involvements in—Mr. Gerda and Mr. Mucker's involvement in these two no-bid contracts? And are they going to get payments from these also? That is my main concern. I don't know what their involvement is in the process of this.

Schofield then directly addressed the individual who was at the podium presenting the agenda item, "I don't know if you know that question, can answer that question or not."

Further discussion ensued between the two regarding the VLK Architects selection process, specifically regarding which individuals were involved in the vendor selection process. As Schofield received answers, he posed clarifying questions, such as "No volunteers were involved in that decision?" After he was assured that none of the volunteers who served on the CBOC participated in the selection process, he reiterated, "Okay, they weren't involved in any of the process of selection?" At that point, Schofield was assured by the presenter—and by another unidentified woman who voluntarily joined the discussion—that Gerda and Mucker were not involved in the VLK Architects selection process.

The woman, who said that she had participated in the selection process, offered further details, affirming to Schofield that neither of the "two gentlemen" Schofield had referenced were actually a part of the committee that made the selection. She explained that while they were "on the CBOC," and while they were present "when the selection was taken to CBOC," the two men "weren't even in the room" at the time the selection was actually made. By her account, Gerda and Mucker were at the meeting when the decision was announced to the CBOC, but they did not participate in choosing VLK Architects.

At that point, Schofield said, "Doesn't matter. They still got thirteen hundred in their checking account – I have evidence of it. So they did personally benefit, and unethically." Immediately after that comment, a third person pointed out that because the VLK Architects issue was not on the agenda for the meeting, any discussion related to VLK Architects needed to cease, and it did.

G. Schofield Files a Complaint with the Texas Ethics Commission

In late April, Schofield filed a complaint against Gerda with the Texas Ethics Commission (TEC). In it, he raised three additional complaints about irregularities that he had uncovered related to Gerda and Gerda's political campaign.

Schofield complained that one of Gerda's campaign finance reports did not purport to cover the entire reporting period, as required by law. Because on its face the report did not purport to cover the period between January 29, 2015, and February 27, 2015, Schofield concluded that Gerda had not reported his

campaign finances for that gap in time, which "also appeared to violate Texas election laws." *See* Tex. Elec. Code Ann. § 254.041 (West Supp. 2016) (providing penalties for an incomplete campaign finance report). He also complained that Gerda released campaign e-mails that did not contain the required disclosure stating the name of the person who paid for creating or distributing the e-mail. *See id.* § 255.001 (West 2010) (requiring certain disclosures on political advertising). And, finally, he complained that Gerda's campaign signs that read, "Gerda for School Board Place 6," were deceptive because the word "for" was "less than half the size of the other words," creating the false impression that Gerda was the incumbent in that position. *See id.* § 255.006 (West 2010) (requiring political advertising by a nonincumbent to include "the word 'for' in a type size that is at least one-half the type size used for the name of the office to clarify that the candidate does not hold that office"). In his affidavit Schofield stated that he believed that these three additional complaints also violated Texas election laws.

Two days prior to the election, the TEC sent Schofield a notice of noncompliance, informing him that his complaint did not comply with the "legal and technical form requirements" for a complaint filed with the agency. The notice provided Schofield with an item-by-item description of the deficiencies it found with each allegation. The record indicates that Schofield did not amend his complaint after receiving the notice and that on May 29, 2015, the TEC dismissed Schofield's complaint for noncompliance with "form requirements."

H. Schofield's Political Ads in the *Keller Citizen*

Also in late April, Schofield purchased a political advertisement in the *Keller Citizen* newspaper that was published on two dates—April 29 and May 6. Those advertisements included the following statement: "Brad's opponent and his campaign treasurer have been reported to state and county officials for contribution transfers from the [V]ote Yes [B]ond PAC to his personal campaign, incomplete campaign finance reporting, and running campaign credit card donations through a furniture company LLC."

I. The Schofield-Gerda Race Gets Media Attention

On the eve of the election, the *Fort Worth Star-Telegram* ran an article entitled, "Ethics replaces education as campaign topic." The subheading stated, "KISD Incumbent Brad Schofield and challenger David Gerda are accusing each other of unethical behavior." The article stated that the conflict started in late March when Schofield "wrote a speech for a resident to give during the public comment portion of a school board meeting, accusing challenger David Gerda of using his influence as a member of the KISD Citizens Bond Oversight Committee to help an architecture firm win a contract." The article went on to say that Schofield contended that it was unethical for the leaders of VYKS PAC to sit on the CBOC because of the contributions the PAC received from VLK Architects and other firms bidding on bond projects.

The article also included Gerda's response that Schofield violated campaign ethics by using his position as a board member to circulate false

allegations against him. The article mentioned that Howard's speech had been drafted by Schofield and had accused Gerda and Mucker—"both members of the bond oversight committee—of using their influence to get VLK the contract."

The newspaper article alleged that VLK had contributed to VYKS PAC not once, but twice—a $5,000 contribution on September 24 and a $1,600 contribution on December 22. It also reported that VLK was awarded the contract by the school board on December 16 by a 5–2 vote.

With regard to the VLK Architects selection process, the newspaper reported that school district officials stated that neither Gerda nor Mucker was on the subcommittee that recommended the company. The article repeated Gerda's claim that his first meeting with the CBOC was on December 11, two days after the subcommittee had already made its recommendation on VLK Architects. And the article quoted Gerda, "The accusation that I could influence a meeting that I didn't know existed for a company I didn't know was up for the work is impossible."

J. Gerda Sues Schofield and Howard

On May 1, 2015, Gerda sued Schofield and Howard for defamation—libel per se and slander—and civil conspiracy. He also sought attorney's fees, as well as a temporary injunction and a temporary restraining order prohibiting Schofield and Howard "from making any statements concerning or regarding Gerda and from publishing any statements or advertisements concerning or regarding Gerda" until an injunction hearing "may be had."

Gerda waited until election day—May 9, 2015—to have Schofield and Howard served with the lawsuit.[9] Howard was served while acting in her capacity as election judge at the Shady Grove Elementary School polling site. Schofield was served while he was campaigning near the Bear Creek Intermediate School polling site.

In his Original Petition and Application for Temporary Restraining Order, Gerda identifies four allegedly defamatory publications: (1) Howard's statements at the March 26 KISD meeting, (2) Schofield's remarks at the March 26 KISD meeting, (3) the statements contained in the April 20 Boiling Point newsletter, which Gerda attributed to both Howard and Schofield, and (4) the paid political advertisements[10] that appeared in the *Keller Citizen* newspaper, which he attributed not just to Schofield, but also to Howard.

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[9]In his affidavit Gerda explained the timing of service as follows:

> [M]ultiple emails were sent to both Defendants regarding the suit and need for service, efforts were made to serve them in private at a location of their choosing to avoid any perception of this being a "campaign stunt" by the process server. Both Defendants ignored those efforts and chose not to do this in private and it appeared actively avoided service, so they were served at the only place I was confident they could be located.

[10]In his petition, Gerda complains of "an advertisement" that was published "[o]n or about April 30, 2015," but Schofield admits he ran the advertisement twice—on April 29 and May 6, 2015. Although he did not plead it as such, we will construe Gerda's pleading to complain of both publications.

1. Gerda's Defamation Allegations Against Howard

In the lawsuit, Gerda specifically complained that Howard:

- Made "false statements of fact concerning [Gerda]."
- [F]alsely stated that "Gerda accepted money in his personal capacity from VLK Architects in exchange for helping get VLK the contract."
- Made false statements "indicating that Gerda accepted a bribe."
- "Falsely stated that Gerda influenced the selection of VLK by strongly supported [sic] granting VLK Architects a no-bid contract."
- Stated that "Gerda had the ability to influence, control, or impact the Board's decision."
- Stated that "Gerda attended the meeting to select VLK Architect[s]."
- Published a flier on behalf of Boiling Point "falsely stating that 'VLK Architect[s] provided Mr. Gerda and Mr. Mucker with a $1,600 dollar [sic] contribution to the Vote Yes PAC.'"
- Published "an advertisement in the newspaper falsely stating 'Brad's opponent [Gerda] and his campaign treasurer have been reported to state and county officials for contribution transfers from the [V]ote Yes [B]ond PAC to his personal campaign, incomplete campaign finance reporting, and running campaign credit card donations through a furniture company LLC.'"

2. Gerda's Defamation Allegations Against Schofield

With regard to Schofield, Gerda complained that he:

- Made "false statements that Schofield had evidence that Gerda accepted money from VLK Architects."
- Made a false statement that "VLK Architects directed funds through a PAC and that the funds from VLK were deposited into Gerda's personal checking account."
- Stated that "[Schofield] provided evidence supporting his statements to the District Attorney."
- "Incorrectly replied"—to other speakers who took issue with certain facts that Schofield had alleged—that "he had evidence that Gerda and another individual received $1,300.00 into a personal checking account."

- Stated that "Gerda had the ability to influence, control, or impact the Board's decision."
- Stated that "Gerda attended the meeting to select VLK Architect[s]."
- Published "an advertisement in the newspaper falsely stating 'Brad's opponent [Gerda] and his campaign treasurer have been reported to state and county officials for contribution transfers from the [V]ote Yes [B]ond PAC to his personal campaign, incomplete campaign finance reporting, and running campaign credit card donations through a furniture company LLC.'"

Gerda's petition reflects, and he has further clarified on appeal, that he did not sue Schofield and Howard for the allegations of campaign violations that Schofield communicated to Wilson and the TEC. Instead, according to Gerda, those reports constitute evidence of Schofield's malice and the political motivation for his accusations that Gerda "accepted a bribe."

3. Gerda's Conspiracy Allegation Against Schofield and Howard

In his civil conspiracy cause of action, Gerda alleged that Schofield and Howard were "working together to publish and make these false representations," that they "exchanged one or more emails detailing their agenda to work together to defame Gerda," and that all of the allegedly defamatory statements and publications by Howard and Schofield occurred as a result of "a meeting of the minds regarding their plan to defame Gerda."

4. Schofield and Howard's Joint Motion to Dismiss

After filing their answer, which included a general denial and a variety of affirmative defenses, Schofield and Howard filed a joint motion to dismiss under chapter 27 of the civil practice and remedies code. In this motion, Schofield and

Howard argued that Gerda's lawsuit was frivolous and brought solely to stifle their constitutional rights. And, in their affidavits supporting the motion, Schofield and Howard asserted their beliefs that their statements were true and based on true facts. Both denied intending to defame Gerda. They also argued that Gerda was a public figure in his role as co-chair of a PAC and a public official in his roles as a CBOC member and KISD Board candidate and that their statements related to a matter of public concern.

After a hearing on the matter, the trial court[11] denied the motion to dismiss in its entirety. Thereafter, Schofield and Howard filed their notice of appeal of the trial court's order, which operated to stay the trial court proceedings pending resolution of this appeal. Tex. Civ. Prac. & Rem. Code Ann. § 27.003, § 51.014(b).

III. Discussion

In three issues, Howard and Schofield argue that (1) they met their initial burden under the TCPA to prove by a preponderance of the evidence that their speech was protected; (2) Gerda did not meet his burden to establish by clear and specific evidence a prima facie case for each element of his claims for defamation and defamation per se; and (3) Gerda's remaining claims have been abandoned and should be dismissed under the TCPA. Gerda responds that their statements, both individually and when viewed together, accuse him of taking a

[11]A visiting judge, not the presiding judge of the court, heard the motion and signed the order denying it.

bribe and that in light of the true facts, it is "inherently improbable that [Schofield] thought Gerda could influence VLK's selection in any way or that he did so in exchange for $1,600.00."

A. Applicable Law and Standard of Review

The TCPA protects citizens from retaliatory lawsuits that seek to intimidate or silence them on matters of public concern, i.e., "Strategic Lawsuit[s] Against Public Participation," commonly known as SLAPP suits, by providing a mechanism for summary disposition of such suits. *Bedford v. Spassoff*, 485 S.W.3d 641, 645–46 (Tex. App.—Fort Worth 2016, pet. filed) (citing *Lipsky*, 460 S.W.3d at 586); *see also* Tex. Civ. Prac. & Rem. Code Ann. § 27.002; *Hand v. Hughey*, No. 02-15-00239-CV, 2016 WL 1470188, at *1 n.3 (Tex. App.—Fort Worth Apr. 14, 2016, no pet.) (mem. op.).

Summary disposition is achieved through the TCPA's provision for expedited dismissal of lawsuits. The statute permits a defendant, within 60 days of service of the lawsuit, to seek dismissal of the lawsuit by challenging the plaintiff to show prima facie evidence to support the plaintiff's claim. Tex. Civ. Prac. & Rem. Code Ann. §§ 27.003, .005. The movant is entitled to an expedited hearing and, if ultimately successful on the motion, an award of court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action. *Id.* §§ 27.004, .009; *Sullivan v. Abraham*, 488 S.W.3d 294, 295 (Tex. 2016).

The TCPA's dismissal process involves two steps. The initial burden belongs to the defendant-movant to show by a preponderance of the evidence that the plaintiff's claim "is based on, relates to, or is in response to," among other things, "the [movant's] exercise of the right of free speech." Tex. Civ. Prac. & Rem. Code Ann. § 27.005(b); *Bedford*, 485 S.W.3d at 646. If the movant satisfies this burden, the second step shifts the burden to the plaintiff-respondent 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).

As we have previously explained in *Hand v. Hughey*, to satisfy this burden, a respondent must present evidence—whether direct or circumstantial—to explain the factual basis for the claim of liability:

> The legislature enacted the TCPA "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 [persons] to file meritorious lawsuits for demonstrable injury." When a plaintiff's claim implicates a defendant's exercise of First Amendment rights, chapter 27 allows the defendant to move for dismissal. But even if a claim implicates the exercise of First Amendment rights, a trial court must deny a motion to dismiss filed under chapter 27 when the plaintiff "establishes by clear and specific evidence a prima facie case for each essential element of the claim in question."
>
> The clear and specific standard "neither imposes a heightened evidentiary burden nor categorically rejects the use of circumstantial evidence when determining the plaintiff's prima-facie-case burden under the Act." In determining whether the clear and specific standard has been met, a trial court must consider the pleadings and evidence that explain "the facts on which the liability . . . is based."

2016 WL 1470188, at *3–4 (citations omitted). And the supreme court has directed us that such evidence must be provided with some degree of detail. *Bedford*, 485 S.W.3d at 647 ("'[C]lear and specific evidence,'" as used in the TCPA, requires a plaintiff to "'provide enough detail to show the factual basis for its claim.'" (quoting *Lipsky,* 460 S.W.3d at 590–91)). "In a defamation case that implicates the TCPA, pleadings and evidence that establishes the facts of *when, where, and what was said,* the defamatory nature of the statements, and how they damaged the plaintiff should be sufficient to resist a TCPA motion to dismiss." *Id.* (quoting *Lipsky*, 460 S.W.3d at 591) (emphasis added).

But we are also directed to construe the statute "liberally to effectuate its purpose and intent fully," *see Hotchkin v. Bucy*, No. 02-13-00173-CV, 2014 WL 7204496, at *1 (Tex. App.—Fort Worth Dec. 18, 2014, no pet.) (mem. op.) (citing Tex. Civ. Prac. & Rem. Code Ann. § 27.011(b)), and we review de novo a trial court's denial of a motion to dismiss under the TCPA. *Hand*, 2016 WL 1470188, at *3 (citing *United Food & Commercial Workers Int'l Union v. Wal-Mart Stores, Inc.*, 430 S.W.3d 508, 511 (Tex. App.—Fort Worth 2014, no pet.)). In our de novo review, we consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based. Tex. Civ. Prac. & Rem. Code Ann. § 27.006(a).

B. Speech, Petition, and Association

Schofield and Howard claim that they met their initial burden of establishing entitlement to file a motion to dismiss by showing that each of their

communications about Gerda fell under one or more statutorily defined rights—speech, petition, and association—and that Gerda's lawsuit was related to the exercise of those rights. They further argue that as a public figure or public official, in order to prevail under either defamation or conspiracy to defame, Gerda must prove that the statements he complains of were false and that they were made with actual malice. Schofield and Howard argue that in his response to their motion to dismiss, Gerda failed to establish, by clear and specific evidence, a prima facie case for each essential element of his claims against them.

While Gerda argues that the communications did not fall within Schofield's and Howard's rights of petition and association, his primary argument centers upon their right of free speech. The "exercise of the right of free speech" means a communication made in connection with a "matter of public concern," which, by definition, includes an issue related to a public official or public figure. *Id.* § 27.001(3), (7)(B)–(D). Gerda contends that he was not a public figure at all relevant times and that, therefore, Schofield's and Howard's statements were not made in the exercise of the right to free speech.[12] *See id.* § 27.001(3) (defining "exercise of the right of free speech" as "a communication made in connection with a matter of public concern"), § 27.001(7)(D) (defining a "matter of public

[12]And, as will be discussed later, Gerda also contends that because Schofield and Howard failed to prove that he was a public official or limited purpose public figure at all relevant times, he need not prove actual malice, but need only show that they were negligent in making defamatory statements.

concern" as "an issue related to a public official or public figure"). Except for his contention that he was not a public official or public figure, Gerda offers little argument to support his contention that his lawsuit does not relate to Schofield's and Howard's exercise of the right of free speech, petition, or association.[13]

1. Gerda Was a Public Official

Gerda's status is a question of law for the court. *Neely v. Wilson*, 418 S.W.3d 52, 70 (Tex. 2013). In this determination, federal, not state, standards apply. *Rosenblatt v. Baer*, 383 U.S. 75, 84, 86 S. Ct. 669, 675 (1966). Schofield and Howard contend that they met their burden to show that their statements related to Gerda in his capacity as a public official or at least a limited purpose public figure.

A public official is, generally, what the name implies—a person who occupies a public office. A limited purpose public figure is someone who thrusts himself to the forefront of a particular public controversy in order to influence the resolution of the issues involved, inviting attention and comment; who voluntarily injects himself or is drawn into a particular public controversy, assuming special prominence in the resolution of public questions; and who thrusts himself into the

[13]Because the statute is cast in the disjunctive, if Gerda is a public official or a limited purpose public figure, their statements would involve the exercise of free speech. In that event, we would need not decide whether Gerda's lawsuit related to Schofield's and Howard's exercise of the right to petition or the right of association. *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.003(a) (stating that the TCPA applies to a legal action relating to "a party's exercise of the right of free speech, right to petition, or right of association").

vortex of a public issue or engages the public's attention in an attempt to influence its outcome. *Rauhauser v. McGibney*, 508 S.W.3d 377, 386 (Tex. App.—Fort Worth 2014, no pet.) (citations omitted). A limited purpose public figure is only a public figure for a limited range of issues surrounding a particular public controversy. *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998), *cert. denied*, 526 U.S. 1051 (1999).

Gerda replies that he was not a public official or a limited purpose public figure at the times relevant to the VLK Architects selection process, which formed the basis of Schofield's and Howard's statements to the KISD Board, the comments contained in the Boiling Point newsletter, and the advertisements in the *Keller Citizen*. He also argues that the statements made by Schofield and Howard did not relate to any public controversy that actually existed.

Gerda contends that the fact that he joined CBOC later does not alter the fact that at the time when Schofield and Howard alleged that the misconduct occurred, he was a private citizen, that he had no role in VLK Architects' selection, and that he was not part of the CBOC on December 9, 2014, when VLK Architects was selected. Thus, according to Gerda, he was not a "public official."

Gerda further argues that even if the matter constituted a public controversy, the reports that Schofield made to the district attorney and the TEC only would have related to Gerda's role as a candidate for public office if Schofield had ever officially filed them. Because Schofield did not file them, and

without any factual basis to implicate Gerda in a matter of public concern, even these statements were not protected as speech concerning a candidate for public office.

Gerda misses the point.

The Supreme Court instructs us that a person receives the label of "public official," when they are "among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt*, 383 U.S. at 85, 86 S. Ct. at 676. While it does not include all government employees, under this standard, a "public official" includes anyone who holds, by election or appointment, a public office. *See id*. at 77, 86–88, 88 S. Ct. at 671, 676–77 (stating that "public official" may include a county ski recreation area supervisor); *see also Time, Inc. v. Pape*, 401 U.S. 279, 280–81, 284, 91 S. Ct. 633, 635–36 (1971) (stating that the lower and intermediate federal courts agreed that the plaintiff deputy chief of police was a "public official"); *St. Amant v. Thompson*, 390 U.S. 727, 730 & n.2, 88 S. Ct. 1323, 1325 & n.2 (1968) (stating that for purposes of the case, the Court accepted the state courts' determinations that deputy sheriff was a public official); *Henry v. Collins*, 380 U.S. 356, 356–58, 85 S. Ct. 992, 993–94 (1965) (stating that "public official" includes county attorney and chief of police); *Garrison v. Louisiana*, 379 U.S. 64, 76–77, 85 S. Ct. 209, 217 (1964) (stating that "public official" includes elected criminal district court judges).

But its reach does not end there—the status of "public official" applies even to those who do not hold, but merely seek, public office. Because candidates for elected public office voluntarily place information about their public and private lives into the public domain to garner support from the electorate, the Supreme Court has extended the concept of "public official" to candidates for elective office as well:

> The principal activity of a candidate in our political system, his "office," so to speak, consists in putting before the voters every conceivable aspect of his public and private life that he thinks may lead the electorate to gain a good impression of him. A candidate who, for example, seeks to further his cause through the prominent display of his wife and children can hardly argue that his qualities as a husband or father remain of "purely private" concern. And the candidate who vaunts his spotless record and sterling integrity cannot convincingly cry "Foul!" when an opponent or an industrious reporter attempts to demonstrate the contrary.[] Any test adequate to safeguard First Amendment guarantees in this area must go far beyond the customary meaning of the phrase "official conduct."
>
> Given the realities of our political life, it is by no means easy to see what statements about a candidate might be altogether without relevance to his fitness for the office he seeks.

Monitor Patriot Co. v. Roy, 401 U.S. 265, 274–75, 91 S. Ct. 621, 626–27 (1971) (footnote omitted). A candidate for public office, therefore, "must accept certain necessary consequences of that involvement in public affairs," including exposure to close, public scrutiny that private individuals should not expect to withstand. *Neely*, 418 S.W.3d at 71 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342, 344–45, 94 S. Ct. 2997, 3009 (1974)).

Public scrutiny does have its limits, however. While a candidate for public office is a public person during the campaign, the allegedly defamatory statements must clearly relate to official conduct, which includes both performance of official duties and fitness for office. *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809, 814–15 (Tex. 1976), *cert*. *denied*, 429 U.S. 1123 (1977).

But fitness for office has broad application. When it comes to the public's interest in matters touching upon fitness for public office, the Supreme Court has observed that few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation. *Gertz*, 418 U.S. at 345, 94 S. Ct. at 3009. Thus, the *New York Times* standard prevents a candidate for public office from recovering damages for a defamatory falsehood relating to honesty, malfeasance, or improper motivations unless he proves that the statement was made with actual malice. *Id.* at 344–45, 94 S. Ct. at 3009 (referencing test set out in *New York Times v. Sullivan*, 376 U.S. 254, 279–80, 84 S. Ct. 710, 726 (1964)).

Applying First Amendment principles to the facts here, we may look no further than Gerda's decision to seek public office and his own characterization of his role in matters related KISD bond projects to determine that, at all relevant times, he was a "public official." We cannot ignore that early in his campaign for a seat on the KISD Board of Trustees, Gerda made his participation in the "Get the Yes Vote Out" effort—including his motivation for doing so—a campaign

issue, when he submitted the following statement for publication in the *Texas Blaze News*,

> I believed we could pass this bond while my opponent did not, so spending the hundreds of hours this last election cycle was a labor of love for me to help benefit our KISD kids. We also had 8-9 moms and dads giving that same type effort, and yet I didn't see my opponent advocating the elements of the bond to our citizens. What I did see was someone wanting to delay the bond, which would have cost our district tens of millions of dollars more and delay much needed help and space for our kids. I believed we needed to do this now while conditions were right for the best financial and educational results we could give our kids in years.
>
> I also believe that by putting my name behind the bond meant having a responsibility to make sure our administrators are true to their word regarding the bond. They've earned much trust from us but we still have to verify. Equally important is one's energy level and belief system toward our upcoming projects. I was honored to serve as Co-Chair of the Get the Yes Vote Out last fall and currently serve on Oversight Committees that oversee interviewing of Construction firms for the renovations of Keller High and BCI and general Bond Oversight Committee to make sure the bond is utilized in the fashion promoted last fall.

Having publicly cast himself as a volunteer who spent "hundreds of hours" in the bond endeavor for the good of the "kids" and the community, Gerda cannot now argue that his activities relating to the bond project—whether current or past—were a private concern. *See Monitor Patriot*, 401 U.S. at 274–75, 91 S. Ct. at 626–27. Nor could he "cry foul" and claim private citizen status when his political opponent questioned his activities or his motivations related to the bond projects. *See id*., 91 S. Ct. at 626–27.

Because the allegedly defamatory statements were made at a time when Gerda was a candidate for public office, all matters related to his honesty,

malfeasance, or improper motivation became matters of public interest. And because from the outset of Gerda's campaign he placed the bond election—including his efforts to support the bond election and his role in overseeing the implementation of the bond projects once the bond passed—squarely at issue for public consideration in the campaign, the public's interest extended to his honesty, malfeasance, or motivation involving these matters as well.

2. Gerda's Lawsuit Relates to Exercise of Free Speech

Having met their burden of proving that Gerda was a public official, Schofield and Howard have *ipso facto* demonstrated that their allegedly defamatory statements related to their "exercise of the right of free speech," as defined by chapter 27. Tex. Civ. Prac. & Rem. Code Ann. § 27.001(3), (7)(D). Thus, they were entitled to bring their motion to dismiss. *Id.* § 27.003(a) (providing that "[i]f a legal action 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, that party may file a motion to dismiss the legal action").

C. Gerda's Burden of Proof for Defamation Action – Actual Malice

Because Schofield and Howard demonstrated that Gerda's lawsuit implicated their exercise of the right of free speech, to prevent dismissal of the action, the burden shifted to Gerda to prove, by clear and specific evidence, a prima facie case for each essential element of the claims in question. *Id.* § 27.005(b) (providing that the court "shall" dismiss the action if the movant shows that the action relates to the exercise of the right of free speech), (c)

(providing that the court may not dismiss the action if the opponent "establishes by clear and specific evidence a prima facie case for each essential element of the claim in question").

The elements of Gerda's defamation action include (1) the publication of a false statement of fact to a third party, (2) that was defamatory concerning him, (3) with the requisite degree of fault, and (4) damages. *See Lipsky*, 460 S.W.3d at 593. To prove his defamation per se claim, Gerda need not prove the fourth element, as he would be entitled to recover general damages without proof of any specific loss. *See id*. at 596. This is because, as defamation per se, the statements are so obviously harmful that damages, such as mental anguish and loss of reputation, are presumed. *Bedford*, 485 S.W.3d at 648 (citing *Lipsky,* 460 S.W.3d at 596). Accusing someone of a crime, such as bribery, is one example of defamation per se. *Lipsky*, 460 S.W.3d at 596.

Because Gerda was a public official, the third element, requisite degree of fault, requires proof of actual malice. *See id.* at 593. "Actual malice" means that the statement was made with knowledge of its falsity or with reckless disregard for its truth. *Id*. Thus, setting aside the other elements, in order to defeat Schofield's and Howard's motion to dismiss, Gerda, as a public official, was required to prove, by clear and specific evidence, a prima facie case that Schofield and Howard acted with actual malice in making the communications he complains of.

As the supreme court explains, the concept of "actual malice" in the context of a defamation action is significantly different from the meaning commonly attributed to the word "malice":

> Actual malice in a defamation case is a term of art. Unlike common-law malice, it does not include ill-will, spite, or evil motive. *Casso v. Brand*, 776 S.W.2d 551, 558 (Tex. 1989). Rather, to establish actual malice, a plaintiff must prove that the defendant made the statement "with knowledge that it was false or with reckless disregard of whether it was true or not." *New York Times*, 376 U.S. at 279–80, 84 S. Ct. 710. Reckless disregard is also a term of art. To establish reckless disregard, a public official or public figure must prove that the publisher "entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S. Ct. 1323, 20 L.Ed.2d 262 (1968).

Huckabee v. Time Warner Entm't Co., 19 S.W.3d 413, 420 (Tex. 2000). Thus, to defeat Schofield and Howard's joint motion to dismiss, Gerda was required, at a minimum, to prove a prima facie case that each allegedly defamatory statement made by Schofield was made at a time when Schofield entertained serious doubts as to its truth. And Gerda bore the same burden with respect to Howard and her statements. Furthermore, Gerda was required to meet his burden with "clear and specific evidence."[14] Tex. Civ. Prac. & Rem. Code Ann. § 27.005(c).

[14]While the supreme court has not fully articulated a standard for determining "clear and specific evidence," it has provided us with definitions for the two terms. "Clear" means "unambiguous, sure, or free from doubt." "Specific" means "explicit or relating to a particular named thing." *Lipsky*, 460 S.W.3d at 590. We glean from this that Gerda was required to meet his burden, not with general, debatable evidence, but with evidence that provided explicit proof as to the particular fact at issue. *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.005(c). We will apply the definitions the supreme court has provided us for "clear" and "specific" in our review of the quantum of proof Gerda offered to prove actual malice.

1. Gerda's Proof as to Howard

We need not discuss whether Gerda provided sufficient evidence to prove that the statements Howard made were false. Assuming, without holding, that he did, Gerda was also required to show that Howard either knew that the allegedly defamatory communications Gerda attributed to Howard in his lawsuit[15] were false or that she "entertained serious doubts as to the truth of" the statements she made. *See Huckabee*, 19 S.W.3d at 420. In his brief, Gerda points us to no evidence—clear, specific, or otherwise—from the record that would prove either of these propositions. And we can find none.

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[15]Although the evidence attached to Gerda's response to the motion to dismiss arguably contains complaints about other communications—for example, Gerda's affidavit contains a vague reference to "hundreds of emails [Schofield and Howard] sent to residents"—Gerda's petition was limited to these eight allegedly defamatory communications made by Howard: (1) "false statements of fact concerning Gerda" at the March 26 meeting, (2) "falsely stat[ing] that Gerda accepted money in his personal capacity from VLK Architects in exchange for helping get VLK the contract" at the March 26 meeting, (3) false statements "indicating that Gerda accepted a bribe," (4) "falsely stat[ing] that Gerda influenced the selection of VLK by strongly supported [sic] granting VLK Architects a no-bid contract [on December 11]" at the March 26 meeting, (5) stating that "Gerda had the ability to influence, control or impact the Board's decision" on an unspecified date, (6) stating that "Gerda attended the meeting to select VLK Architect[s]," on an unspecified date, (7) "falsely stating that VLK Architect[s] provided Mr. Gerda and Mr. Mucker with a $1,600 dollar [sic] contribution to the Vote Yes PAC," in an April 20 flier, and (8) publishing "an advertisement in the newspaper falsely stating Brad's opponent [Gerda] and his campaign treasurer have been reported to state and county officials for contribution transfers from the [V]ote Yes [B]ond PAC to his personal campaign, incomplete campaign finance reporting, and running campaign credit card donations through a furniture company LLC" on April 29 and May 6. Because in a defamation action, a plaintiff is required to both plead and prove in sufficient detail to show a factual basis for its claim, we address only those claims that appear in Gerda's pleadings. *See Lipsky*, 460 S.W.3d at 590–91.

Not only does the record demonstrate a complete failure of proof on this point, the record actually reveals the contrary. Although she did not have the burden to do so, Howard negated actual malice with her own evidence by averring that she believed her statements were true at the time she made them and by providing a plausible basis for her belief. *See New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 168 (Tex. 2004), *cert. denied*, 545 U.S. 1105 (2005). In her affidavit, Howard stated that she understood that "Mr. Gerda was the co-chair of [VYKS PAC], and its treasurer was Matthew Mucker." She went on to explain that, prior to March 26 she reviewed documents that showed her that on November 17, 2014, Mucker loaned $1,673.79 to VYKS PAC, that on December 22, 2014, VLK Architects donated $1,600 to VYKS PAC, and that on February 15, 2015, VYKS PAC repaid part of Mucker's loan in the amount of $1,311.42. She then identified three "main reasons" why she believed this evidenced a "quid pro quo" arrangement:

> First, the contribution from VLK came seven weeks after the Bond Election. Second, the VLK contribution was made just six days after the KISD Board approved VLK as the architectural firm to work on Keller High School. And finally, Mr. Gerda and Mr. Mucker were members of the Citizens Bond Oversight Committee of the KISD Board, whose responsibility it was (in part) to recommend architectural firms to the KISD Board.

Howard's first premise is an undisputed fact in this record—VLK Architects' $1,600 contribution was made seven weeks after the bond election had ended. Because the bond issue passed, the PAC's mission had been successfully accomplished, and thus, its purported purpose had been fulfilled.

Likewise, her second premise is also undisputed—the contribution was made just six days after VLK Architects was officially awarded the contract.

And while her third premise was possibly flawed—as to when Gerda and Mucker joined the CBOC—the undisputed evidence also shows that Gerda and Mucker did, in fact, begin serving on that committee in very close temporal proximity to the events in question.

Whether it was the CBOC or the "Administration" that actually recommended VLK Architects to the KISD Board on December 16 is not clear in this record.[16] However, Howard's conclusion that the matter went to the KISD Board for approval with CBOC's recommendation is an understandable deduction from the records that she said she reviewed. And, as the supreme court has instructed us, "[a]n understandable misinterpretation of ambiguous facts does not show actual malice." *Bentley v. Bunton*, 94 S.W.3d 561, 596 (Tex. 2002). Thus, Howard negated actual malice as to the first seven of Gerda's allegations against her, which relate to her March 26 statement and the April 20 Boiling Point newsletter related to Gerda's involvement in the bond election and vendor selection process that followed. As to Gerda's eighth and final allegation—that Howard published an advertisement in the newspaper—there is

[16]On this point, the minutes of the December 11, 2014 CBOC meeting state, "The Administration explained that after this process was completed that VLK Architects was the architectural firm that was recommended and that decision would be submitted for Board approval at the December 16 Board meeting."

no evidence in this record that Howard played any role in the two political advertisements that appeared in the *Keller Citizen* on April 29 and May 6.

To the extent that Gerda argues that Howard had a duty to verify her communications prior to publishing them, the "failure to investigate fully," without more, is no evidence of actual malice. *Id.* Failure to investigate will not rise to the level of actual malice without proof that Howard acted with a "purposeful avoidance of the truth." *Id.* There is no evidence in this record of any purposeful avoidance on Howard's part.

Gerda offered no evidence of actual malice on Howard's part for any of the allegedly defamatory statements he complained of in his lawsuit. And Howard negated actual malice with evidence that she believed her statements were true and with an explanation as to the plausible basis for her belief. Therefore, as to Howard, we sustain the second issue and hold that Gerda failed to establish by clear and specific evidence a prima facie case for each element of his claims for defamation and defamation per se against her.

2. Gerda's Proof as to Schofield

In his brief, Gerda argues that he "presented the trial court with clear and specific evidence" that Schofield published his statements with actual malice. Most of his arguments are based on a general reference to the record as a whole;[17] a few pinpoint certain specific items of evidence that Gerda contends

[17]*See* Tex. R. App. P. 38.1(i) (providing that the Argument section of a brief must contain "appropriate citations . . . to the record").

support his argument. Some of Gerda's arguments are not supported by reference to any authority in support of the proposition that Gerda advances.[18]

We have identified individual arguments raised by Gerda in support of his contention that Schofield "published the statements with actual malice," and each is addressed below.[19]

- **Schofield[20] failed to establish that Gerda had "any opportunity to influence, any actual influence or any money or other personal benefit to Gerda from VLK or relating to VLK that [Schofield] could have reasonably relied on as support for [his] public accusations."**

Here, Gerda essentially argues that the statements made by Schofield were not true. That a statement is false is insufficient to show that the statement was made with actual malice. *See Huckabee*, 19 S.W.3d at 420 (requiring that the defendant either have knowledge of the statement's falsity or that the defendant have entertained doubts about its truth or falsity). As explained above, these are separate inquiries. In order to first take up our inquiry regarding actual malice, unless we indicate otherwise, we will assume, without holding, that the statements made by Schofield and of which Gerda complains were false.

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[18]*See* Tex. R. App. P. 38.1(i) (providing that the Argument section of a brief must contain "appropriate citations to authorities").

[19]We have bulleted and arranged Gerda's arguments for ease of reference; they did not appear in Gerda's brief in the order presented here.

[20]Although in his brief Gerda refers to Schofield as "Appellee," in making this argument, we understand his brief to argue that Schofield, not Gerda, failed to establish these matters.

We also note that Gerda's argument here is flawed because it reverses the burden of proof. To decide whether the trial court abused its discretion in denying the motion to dismiss, we must determine whether Gerda, not Schofield, failed to establish by clear and specific evidence a prima facie case for actual malice.

- **As a KISD Board member, Schofield could "readily access" the names of those who did and did not serve on the committee that selected VLK Architects, and he could have verified that Gerda did not serve on that committee.**

- **Schofield "misstate[d] the dates multiple times to support his false narrative."**

Gerda points to no evidence in the record that any of the statements attributable to Schofield and complained of by Gerda ever stated that Gerda served on the "committee that selected VLK Architects" or that Schofield recited any specific dates at all. And, after a thorough examination of the record, we can find no such evidence.

In the statement made by Schofield at the KISD Board meeting on March 26, he did not state that Gerda served on the selection committee; rather, he stated that Gerda served on the CBOC committee. To be precise, Schofield commented about "two gentlemen on the CBOC committee" receiving a reimbursement, and the remainder of his remarks were posed in the nature of questions:

> I guess my main concern is the no-bid contract. My concern is that VLK was a no-bid contract. And two gentlemen on the CBOC committee got reimbursed about sixteen hundred bucks. . . .

> My concern is—this here, what are their involvements in—Mr. Gerda and Mr. Mucker's involvement in these two no-bid contracts? And are they going to get payments from these also? That is my main concern. I don't know what their involvement is in the process of this.

Gerda points to no other statement or publication by Schofield that stated that Gerda served on the committee that selected VLK Architects.

As for the *Keller Citizen* newspaper advertisement, it is silent as to Gerda's participation in a selection committee or the CBOC. Neither his statement on March 26 nor the newspaper advertisements contained a reference to any dates at all.

Thus, this argument fails for lack of support in the record.

- **Schofield's failure to investigate, combined with his motive and desire to avoid the truth, evidences recklessness.**
- **Schofield relied on his own research, rather than that of others.**
- **Schofield published his statement based on "dubious information."**

On this record, it cannot be disputed that Schofield did investigate, at some level, prior to making the statements at issue. Indeed, Gerda concedes as much by also complaining that Schofield relied only on "his own research." Thus, we interpret these three arguments to complain that Schofield failed to conduct a *thorough* investigation and then spoke based upon dubious information that his incomplete investigation revealed.

Although Schofield did not bear the burden to disprove malice, he, like Howard, did negate Gerda's complaint regarding inadequate investigation. In his affidavit, Schofield testified:

> When I first learned that Mr. Gerda was running against me, I immediately recognized his name. In 2014, there was a proposal for a $169.5 million bond to benefit KISD schools (the "Bond Proposal"). If passed by the voters, the bond would fund such projects as renovations, technology upgrades, and construction of new buildings. In the November 4, 2014, election, voters approved the Bond Proposal.
>
> Mr. Gerda was involved in the Bond Proposal in two ways. First, Mr. Gerda was the co-chair of a political action committee called the Vote Yes for Keller Schools PAC ("VYKS PAC"). VYKS PAC was formed prior to the November 2014 election, and its purpose, as its name suggests, was to advocate in support of the Bond Proposal. Second, Mr. Gerda was a member of the Citizens Bond Oversight Committee ("CBOC"). According to the KISD website, the CBOC "is charged with providing input and monitoring KISD's progress on projects that have resulted from bond elections."
>
> Naturally, when I learned that Mr. Gerda was running against me, I began to research both his campaign and his involvement in the Bond Proposal. In conducting this research, I learned that Mr. Gerda's campaign treasurer was Matthew Mucker, whose name I also remembered from the Bond Proposal. As it turned out, Mr. Mucker was also treasurer for VYKS PAC, and he was also a member of the CBOC. I also learned the following information.
>
> On November 17, 2014, Mr. Mucker loaned $1,673.79 to VYKS PAC. Then on December 22, 2014, an architectural firm called VLK Architects ("VLK") donated $1,600 to VYKS PAC. And on February 15, 2015, VYKS PAC repaid part of Mr. Mucker's loan in the amount of $1,311.42.
>
> In reviewing these documents, I remembered that the CBOC had advocated in support of VLK being selected in a no-bid process as the architectural firm to work on Keller High School. So I conducted further research and discovered that VLK was recommended by the CBOC to the KISD Board on December 11,

2014, and the KISD Board approved VLK's no-bid contract on December 16, 2014.

I also reviewed a newspaper article in the Fort Worth Star Telegram dated October 22, 2014, which stated: "According to campaign finance documents covering the period through Sept. 25, [VYKS PAC] had raised $3,350." Taken together with VYKS PAC's fillings regarding campaign expenditures, I calculated that after the election, VYKS PAC was in debt in the amount of $3,311.

. . . .

In reviewing these documents, I came to believe that VLK's contribution to VYKS PAC was a quid pro quo for Mr. Mucker's and Mr. Gerda's advocacy on behalf of VLK being recommended to the KISD Board. I arrived at this conclusion for three reasons. First, it was strange enough that any uninterested party would donate to a PAC *after* the election the PAC was created for. Second, it was even more odd that VLK's contribution was made mere *days* after it was selected by the KISD Board to receive a no-bid contract. And third, VLK's donation was in an amount almost identical to the amount Mr. Mucker had personally loaned to VYKS PAC, and without VLK's donation, Mr. Mucker might not be able to recoup any of his loan.

Next, I discovered a public filing of VYKS PAC which listed a political expenditure to David Gerda for $600.40, but this expenditure was crossed out.[21] This appeared to be a repayment for supplies that Mr. Gerda purchased on behalf of VYKS PAC, but decided not to take reimbursement. As such, the supplies purchased became an in-kind donation from Mr. Gerda to VYKS PAC that went unreported.[22]

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[21]Schofield attached a page, "Schedule F," of a report purportedly filed by VYKS PAC with the TEC to his affidavit in support of this statement.

[22]Gerda admitted in his own affidavit that he did, as Schofield suspected, purchase materials for VYKS PAC. According to Gerda, and contrary to the VYKS PAC report, VYKS PAC reimbursed him for this purchase:

I have no control and never have, regarding how VYKS PAC reports its financing. I did purchase some sign materials for VYKS PAC from my personal funds. Before I made the purchase, I

Based on the above, Schofield not only provided ample testimony of the investigation he conducted, but he also articulated the conclusions he reached based upon that investigation. Although Gerda denied responsibility for the error, by his own admission, there was a discrepancy in what VYKS PAC reported and what actually occurred in relation to Gerda's use of personal funds to purchase materials for VYKS PAC.

From the entire record, it is clear that a relationship existed between Gerda and Mucker, Gerda and VYKS PAC, and Mucker and VYKS PAC. It is also evident that Gerda, Mucker, and VLK Architects contributed funds to VYKS PAC, that Gerda and Mucker received funds from VYKS PAC, and that the funds Mucker received would not have been possible without the contribution of VLK Architects to VYKS PAC. Additionally, Gerda and Mucker served on the CBOC together, and the evidence shows that the CBOC had at least some involvement in the architectural firm selection process. It is also undisputed that VLK Architects was ultimately selected by KISD as an architect for a bond project the voter approval for which VYKS PAC supported financially. Perhaps

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> received approval to make the purchase and confirmation that I would be reimbursed. I received nothing more than a dollar for dollar reimbursement for that expense. I did not receive anything of monetary value from VYKS PAC at any point in time other than direct one for one dollar reimbursements. I did not decline any reimbursement, I did not donate anything but my donated time and some money to the VYKS PAC in helping get the word out regarding the bond issue and how I believed it would benefit all the children in the district, including my own. My donation was properly reported as far as I can tell.

coincidentally, VLK Architects' contribution to VYKS PAC was made six days after it received a no-bid contract. These facts, though susceptible to more than one interpretation, are far from "dubious," as Gerda contends. That Schofield's *conclusion* may have been dubious—that he may have erred in construing the implication of these facts—is no evidence of actual malice. *See Bentley*, 94 S.W.3d at 596 (stating that "[a]n understandable misinterpretation of ambiguous facts does not show actual malice"); *Huckabee*, 19 S.W.3d at 426 (stating that "an error in judgment [] is no evidence of actual malice").

As the supreme court reminds us, the actual malice standard "honors our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks.'" *Forbes v. Granada Bioscis., Inc.*, 124 S.W.3d 167, 171 (Tex. 2003). With such a "demanding" standard comes inevitable error; yet, this speech must be protected. *Id*. (recognizing that "*erroneous statement is inevitable* in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" (citing *New York Times*, 376 U.S. at 271, 84 S. Ct. at 721 (quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 433, 83 S. Ct. 328, 338 (1963)))).

With regard to the thoroughness of Schofield's investigation, the actual malice standard does not require that Schofield conduct a comprehensive investigation into all of the details surrounding the relationship between Gerda,

Mucker, VYKS PAC, and VLK Architects prior to expressing his concerns. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688, 109 S. Ct. 2678, 2696 (1989) (observing that failure to investigate fully is not evidence of actual malice). Even if Gerda could have shown that Schofield conducted no investigation at all, this alone would not be enough to show actual malice. *Id*. at 692, 109 S. Ct. at 2698 (stating that "failure to investigate will not alone support a finding of actual malice" (citing *St. Amant*, 390 U.S. at 731, 88 S. Ct. at 1325, 1326)). Instead, the actual malice standard requires proof that Schofield, subjectively, entertained "significant doubt about the truth of his statements at the time they [were] made." *Bentley*, 94 S.W.3d at 596.

- **Schofield failed to consider and ignored other evidence to the contrary that would have tended to disprove or raise doubts as to his allegations against Gerda.**

- **On March 26, Schofield ignored another speaker's response that "CBOC was not involved with the selection and that the individuals Schofield referenced were not part of the selection committee," and rather than consider this information to the contrary, Schofield "dismissed it, saying 'it doesn't matter' and continued to publish these statements about Gerda being involved in illegal activity."**

- **Schofield "failed to consider information establishing that Gerda did not have the ability to influence the project's outcome."**

- **Schofield failed to "temper his criminal accusation" in the face of another speaker who "clarified that Gerda was not involved in the selection process."**

As discussed above, even assuming that Gerda proved that Schofield "failed to consider and ignored evidence to the contrary" prior to forming the conclusions that he expressed regarding Gerda, to prove actual malice, Gerda

must prove more than this. Gerda must prove that Schofield subjectively entertained "significant doubt about the truth of his statements at the time they [were] made" or that he made the statements with "purposeful avoidance of the truth." *Id.* at 596. Ignoring one piece of evidence that "tended to disprove his allegations," without more, does not rise to the level of purposeful avoidance of the truth itself.

As to Gerda's contention that Schofield "failed to consider information establishing that Gerda did not have the ability to influence the project's outcome," we find no evidence in the record to support this contention. The evidence did show that Gerda did not serve on the selection committee, but this is no evidence that he "did not have the ability to influence the project's outcome." While actual service on a selection committee might be the most direct way by which a person could exercise influence over the process, it is certainly not the exclusive method. Thus, Gerda did not "establish" that he wielded no influence on the process;[23] at most, Gerda proved that he did not influence the selection by virtue of serving on the selection committee itself. And,

[23]Gerda actually provided proof to the contrary, that he did exercise influence over the process. In a statement he admits he released to the *Texas Blaze News*, Gerda stated, "[I] currently serve on Oversight Committees that oversee interviewing of [c]onstruction firms for the renovations of Keller High and BCI and general Bond Oversight Committee to make sure the bond is utilized in the fashion promoted last fall." Implicit in this statement, by use of the verbs "oversee" and "make sure," is a representation by Gerda that his position on the committee gave him substantial control over the implementation of the bond package.

as will be discussed below, that another speaker at the KISD Board of Trustees meeting pointed out that Gerda did not serve on the selection committee does not change this analysis.

The argument that Schofield failed to "temper his criminal accusation" and continued to make allegations "about Gerda being involved in illegal activity" after the woman spoke up at the meeting is likewise not persuasive because it overstates the evidence. After the woman explained that Gerda and Mucker were "not even in the room" at the time VLK Architects was chosen, Schofield made one brief remark reiterating his belief that Gerda had acted improperly, but he made no criminal accusation. Schofield said, "Doesn't matter. They still got thirteen hundred in their checking account – I have evidence of it. So they did personally benefit, and unethically."

While theoretically, Mucker's receipt of the "thirteen hundred" dollars that Schofield referenced could rise to the level of a criminal offense, that is not necessarily so. Indeed, Gerda goes to great lengths in his response and in the evidence to explain that the nature of his own contributions to and reimbursements from VYKS PAC did not expose him to criminal liability. Thus, after receiving assurances from the woman that Gerda did not serve on the selection committee, Schofield's expression of concern that Gerda still acted "unethically" did not, as Gerda contends here, rise to the level of a criminal accusation against Gerda. At best, Schofield's remarks were ambiguous as to

whether he was accusing Gerda of committing a crime or merely engaging in unethical behavior.[24]

With regard to the *Keller Citizen* newspaper advertisement, based on the evidence in this record, there is no indication that the statement of which Gerda complains was even false. The advertisement—published on April 29 and May 6—stated "Brad's opponent and his campaign treasurer have been reported to state and county officials for contribution transfers from the [V]ote Yes [B]ond PAC to his personal campaign, incomplete campaign finance reporting, and

[24]For purposes of determining whether a statement constitutes defamation per se, a statement need not be unambiguous in the imputing of criminal conduct to the plaintiff; all that is necessary is that an ordinary person would draw a reasonable conclusion that the complaining party was charged with a violation of some criminal law. *See*, *e.g.*, *Mitre v. Brooks Fashion Store, Inc*., 840 S.W.2d 612, 619–20 (Tex. App.—Corpus Christi 1992, writ denied) (referring to a party as a "suspect" in connection with a warning about counterfeit $100 bills "reasonably implied that they were charged with the criminal offense of counterfeiting"), *abrogated on other grounds by Cain v. Hearst Corp.*, 878 S.W.2d 577, 578–81 (Tex. 1994); *Ramos v. Henry C. Beck Co.*, 711 S.W.2d 331, 334 (Tex. App.—Dallas 1986, no writ) (stating that both a direct accusation of theft and merely repeating a theft accusation are criminal allegations that may be defamatory per se); *Hornby v. Hunter*, 385 S.W.2d 473, 475 (Tex. Civ. App.—Corpus Christi 1964, no writ) (stating that when newspaper article reported that a warrant for appellee's arrest had been issued in connection with theft of stolen car, an ordinary person would reasonably conclude that appellee was accused of committing a crime); *Elder v. Evatt*, 154 S.W.2d 684, 685 (Tex. Civ. App.—Eastland 1941, no writ) (stating that the words "dry check," "cold check," or "hot check" impliedly assert that a party committed a crime punishable by imprisonment). *But see Easley v. Express Publ'g Co.*, 299 S.W.2d 782, 784 (Tex. Civ. App.—San Antonio 1957, writ ref'd n.r.e) (stating that notwithstanding that allegation that party was a member of a "crime clique" may insinuate that the party was "dishonest, a confederate to the criminal element mentioned, dishonorable, and a corrupt public official," the words were ambiguous and therefore presented a fact issue as to their meaning).

running campaign credit card donations through a furniture company LLC." The evidence here shows that this statement was true.

On March 24, Schofield reported to the Tarrant County Criminal District Attorney in person his concerns about the VYKS PAC contributions and his concern that Gerda had violated various legal and ethical rules. He provided the District Attorney with a partially-completed report that raised, among others, complaints that at least one in-kind contribution by Gerda to VYKS PAC had gone unreported in violation of election code sections 254.041 and 254.001, that VYKS PAC had made an in-kind contribution to Gerda's campaign by virtue of providing website design and content in violation of election code sections 251.001 and 253.003, and that Gerda's campaign was accepting credit card donations through a company called Furniture Experts LLC in violation of election code section 253.040. In addition, on April 28, Schofield filed a complaint against Gerda with the TEC in which he raised these same three concerns.

Essentially, Gerda complains that, through use of the passive voice in the advertisement, Schofield omitted a material fact in the advertisement, i.e., that *Schofield* was the person who "reported to state and county officials." This, according to Gerda, rendered the statement "false or at least misleading" because it created "a false impression that third parties [were] in fact reporting Gerda, not just his political rival." Gerda cites to our decision in *Lipsky* for this proposition. *See In re Lipsky*, 411 S.W.3d 530, 544 (Tex. App.—Fort Worth 2013, orig. proceeding) ("A statement may be defamatory, although literally true,

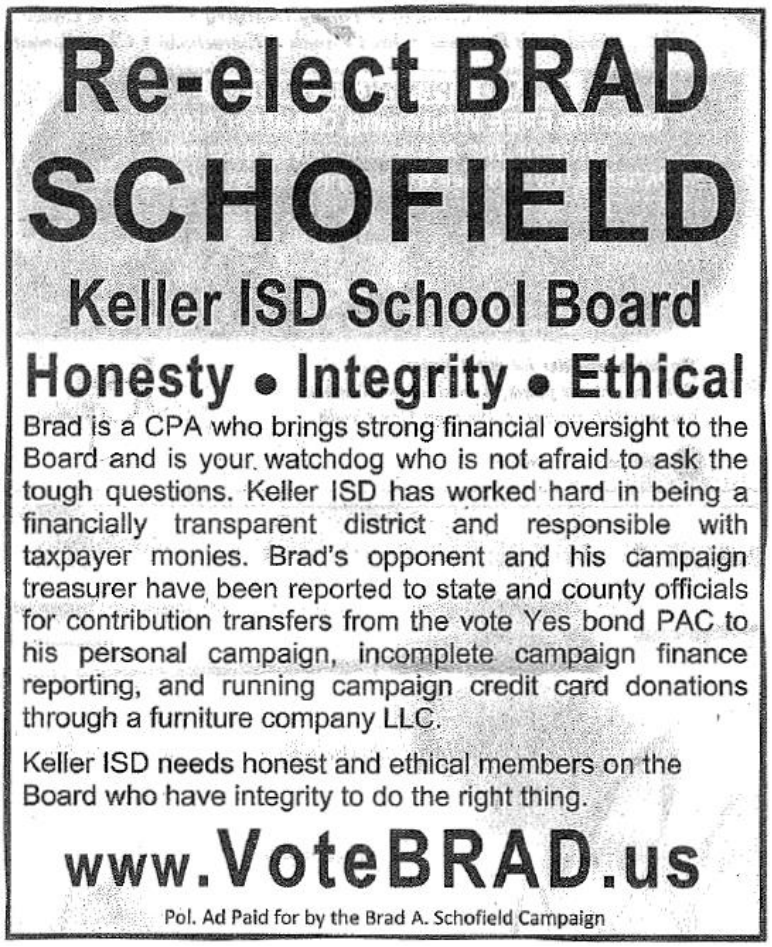
if the omission of material facts allows a reasonable person to perceive a false impression."), *mand. denied*, 460 S.W.3d 579 (Tex. 2015).

But the extreme facts present in *Lipsky* are not present here. In *Lipsky*, to demonstrate that underground fracking had contaminated the drinking water, a video was disseminated showing Lipsky lighting the end of a garden hose on fire. *Id.* at 545–46. In truth, the garden hose was connected to the well's gas vent, not to Lipsky's water supply. *Id.* Certainly a reasonable person would assume that a garden hose was connected to a water supply, not a gas vent. Thus, the omission of a most pertinent fact—that the garden hose was connected to gas, not water—rose to the level of a false statement. *Id*.

Writing in a passive voice, however, at least under the circumstances present here, can hardly be seen as equivalent deception. In fact, it could be as reasonably argued that through precise word-crafting, Schofield took care to ensure that a false impression was not made. The advertisement stated only that Gerda "[had] been reported" and stopped short of alleging that violations had occurred, let alone been proven. *See Bentley*, 94 S.W.3d at 596 (stating that "care and motive are factors to be considered" in determining actual malice).

As to motive, the motivation to cast an opponent in a negative light is inherent during any political campaign. Here, however, the motive was not concealed. Schofield's motive was apparent in the publication itself, from the prominent display of Schofield's name at the top of the ad, the website address

included at the conclusion of the advertisement, and the political disclaimer placed at the bottom:



Re-elect BRAD SCHOFIELD

Keller ISD School Board

Honesty • Integrity • Ethical

Brad is a CPA who brings strong financial oversight to the Board and is your watchdog who is not afraid to ask the tough questions. Keller ISD has worked hard in being a financially transparent district and responsible with taxpayer monies. Brad's opponent and his campaign treasurer have been reported to state and county officials for contribution transfers from the vote Yes bond PAC to his personal campaign, incomplete campaign finance reporting, and running campaign credit card donations through a furniture company LLC.

Keller ISD needs honest and ethical members on the Board who have integrity to do the right thing.

www.VoteBRAD.us

Pol. Ad Paid for by the Brad A. Schofield Campaign

With the purpose of the advertisement and the source of the information contained therein so evident, Schofield's political motive was obvious to any reasonably intelligent person who read it. Thus, it can hardly be said that a reasonable person would be misled to believe anything other than the literal truth of the statement contained in the advertisement, that Gerda had been "reported to state and county officials" for questionable contribution transfers, campaign reporting, and credit card transaction practices.

Gerda's argument that Schofield engaged in purposeful avoidance of the truth, proving actual malice, is likewise untenable. *See id.* While turning a blind eye in the face of the truth is tantamount to actual malice, the purposeful avoidance theory does not apply when no source exists that could easily prove or disprove the criticisms involved. *See Huckabee*, 19 S.W.3d at 428 (stating that the purposeful avoidance theory did not apply because "no source could have easily proved or disproved the documentary's allegation); *see also Hearst v. Skeen*, 159 S.W.3d 633, 638 (Tex. 2005). Here, at its core, Schofield alleged that the interests between Gerda, his campaign treasurer, VYKS PAC, and VLK Architects were unethically intertwined. And allegations of cronyism vis-à-vis bond elections and KISD contract awards pre-dated both KISD's selection of VLK Architects and the KISD Board of Trustee race between Schofield and Gerda.[25]

[25]In a blog entitled, "Bonds for Crony Contractors, Not Kids," posted a month prior to the KISD bond election, author Ross Kecseg—with seeming clairvoyance—actually predicted that VLK Architects would be hired by KISD for work related to the bond package, if it passed:

> [T]he crony contractors [KISD] will hire if the proposition passes are also funding [VYKS PAC] operating the "Vote YES" campaign.
>
> According to campaign finance reports, over 96% of the $25,890 in contributions to [VYKS PAC] came from either employees of contractors who will be hired by KISD, or directly from the companies themselves.
>
> VLK Architects [and others] were the largest contributors, with each contributing $1000 to $5000. The United Education Association, Inc. also gave $500 to the cause.

In investigating his opponent, Schofield uncovered a connection with Gerda and his campaign treasurer related to the ongoing cronyism controversy, and Schofield attempted to connect the dots.[26] But cronyism, as with any other type of behind-the-scenes deal making activity, is not the type of relationship that can easily be proved or disproved. Accusations of this nature are likely to be met

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> We've previously reported on the collusive relationship between Fast Growth School Coalition (FGSC), school board trustees, the "educrat" establishment, and the construction industry who all profit off bonds filled with over-priced projects.
>
> . . . .
>
> It's a vicious cycle . . . but the corruption has much deeper roots.
>
> At this year's Texas Association of School Boards (TASB) Convention, companies like VLK Architects schmoozed school board trustees at Pappas Brothers' Steakhouse with wildly expensive steak dinners . . . and *unlimited* bar tabs.
>
> Even worse, since each district pays for their own officials and bureaucrats to attend the convention, hard-working taxpayers are on the hook for both event admission and a four-night stay at luxurious hotels, which can total over $1400 *per* attendee.
>
> Not only do voters need to see the total cost of bond propositions on the actual ballot (which Keller ISD refused to do), they should understand that ominous [sic] bond projects largely benefit crony contractors, not kids.
>
> Next time you see a "Vote YES" sign, remember, an architectural firm likely paid for it.

[26]As we have explained above, that Schofield may have erred in connecting the dots to Gerda—as to whether Gerda was part of the perceived "crony" conspiracy—is not the test. *See Huckabee*, 19 S.W.3d at 426 (stating that an error in judgment is no evidence of actual malice).

with denials. That Schofield ignored or dismissed a comment made by someone—possibly a fellow "crony," from Schofield's perspective—at a KISD Board of Trustees meeting, who denied that Gerda was involved in the selection of VLK Architects, does not constitute purposeful avoidance on Schofield's part. At most, such comment only clarified that Gerda did not serve on the selection committee itself, but it fell short of disproving Schofield's theory that Gerda's ties with VYKS PAC and VLK Architects were too cozy for ethical comfort.

- **Schofield could not have reasonably believed the allegations he made against Gerda were true.**

- **Schofield's allegations against Gerda were so "inherently improbable" that Schofield's circulation of them "recklessly disregarded their truth."**

- **As a KISD Board member, Schofield created the VLK selection committee, had actual knowledge of who was on the committee and the correct date—December 9, not December 11—when the committee selected VLK, thus making it "even more improbable that Schofield believed what he stated was true."**

- **Given the fact that Gerda "owned and ran a local business and was running for public office," Schofield's belief that Gerda would risk a felony bribery conviction "in exchange for a $1,600.00 payment to [VYKS PAC], which was publicly reported," was "far-fetched."**

- **As "a member of the decision-making body throughout this process," Schofield "would have or should have known how inherently improbable it would be for the actions of which he accused Gerda of taking to actually influence any part of VLK's selection."**

We will take up the argument challenging the reasonableness of Schofield's belief first. As we have stated above, "reasonable belief" is not the proper standard for determining whether actual malice existed:

> [R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant *in fact* entertained serious doubts as to the truth of his publication. Publishing *with such doubts* shows reckless disregard for truth or falsity and demonstrates actual malice.

St. Amant, 390 U.S. at 731, 88 S. Ct. at 1325 (emphasis added). We decline Gerda's invitation to employ a "reasonable belief" standard in analyzing the facts here.

As to Gerda's "inherently improbable" argument, no matter how passionate Gerda's assertion or sincere his belief that he would never engage in the conduct that Schofield accused him of and his insistence that no reasonable person should believe it, Schofield's allegations against him were not "inherently improbable." In *St. Amant*, the Supreme Court used the term "inherently improbable" to clarify that a defamation defendant is not "automatically" protected by the First Amendment just by testifying that he published with a belief that the statements were true. *Id.* at 732, 88 S. Ct. at 1326. In that case, the Court explained:

> Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation.

Id., 88 S. Ct. at 1326.

While Schofield may have misinterpreted the documents that he reviewed prior to making his statements, the record here does not demonstrate that his concern about the relationship between Gerda, VYKS PAC, and VLK Architects was fabricated, a product of his imagination, or "inherently improbable." Unfortunately, incidences of cronyism—even to the level of bribery and kickbacks—are not only possible, plausible, and conceivable, but in some cases, they are also provable beyond a reasonable doubt. *See Lima v. State*, 788 S.W.2d 629, 630 (Tex. App.—Texarkana 1990, pet. ref'd) (stating that conferring a benefit of money and nine yards of concrete on city inspector in violation of inspector's duty imposed by law supported bribery conviction); *Tweedy v. State*, 722 S.W.2d 30, 31 (Tex. App.—Dallas 1986, pet. ref'd) (stating that appellant was convicted of bribery because he offered $200 to city construction inspector to allow him and his work crew to dig trenches, lay pipe, and backfill the trenches without the inspector's examining the work). That one might not risk reputation and livelihood to receive such a small kickback evidences only an unacceptable price-point; it is not evidence of unwillingness to engage in such conduct altogether.

Even if, under certain circumstances, such malfeasance would seem improbable, the improbability would not be an inherent one. In other words, even if Gerda is correct that to engage in such conduct—risking so much for so little—would be improbable, it is not inherently so because the improbability is linked to the specific situation at issue.

Gerda's argument also misapplies the standard. Gerda argues that

> [i]t seems highly improbable that Schofield, looking at all of this, could have reasonably concluded and believed that VLK and Gerda reached a secret agreement where VLK paid Gerda through the VYKS Pac to illegally help it get a multi-million dollar public contract from Keller ISD by sending the VYKS PAC half of its post election debt ($1,600.00), which VYKS [PAC] then publicly reported. Yet, Schofield and Howard did state that Gerda did just that. This claimed belief gets even more farfetched when you consider that Schofield was on the Board when it voted to give VLK the contract and Gerda was not part of any group with the ability to actually award a contract to VLK, *making it inherently improbable that Appellant Schofield thought Gerda could influence VLK's selection in any way or that he did so in exchange for $1,600.00*. [Emphasis added.]

The question is not whether it was "inherently improbable" that Schofield believed what he said was true. The standard is whether the allegations themselves were so inherently improbable that only a reckless man, i.e., a man who entertained serious doubt as to the allegations' truth, would have communicated them. *St. Amant*, 390 U.S. at 731, 88 S. Ct. at 1325. There is no evidence in this record that bribery or kickbacks themselves are inherently improbable, or, as Gerda seems to suggest, that it is inherently improbable that such a small amount of money would entice a person to engage in such conduct. *See Fox Entm't Grp., Inc. v. Abdel-Hafiz*, 240 S.W.3d 524, 560 (Tex. App.—Fort Worth 2007, pet. denied) (op. on reh'g) (finding no genuine issue of material fact as to actual malice when there was no evidence in the record that the defamation defendant believed the assertions were inherently improbable or that he considered the information dubious).

To apply the standard in the way Gerda suggests would allow evidence questioning the probability of Schofield's lack of doubt to substitute for "clear and specific" evidence proving Schofield in fact entertained such doubt. *See Bentley*, 94 S.W.3d at 596 (holding that "the actual malice standard requires that a defendant have, *subjectively*, significant doubt about the truth of his statements at the time they are made" (emphasis added)).

Finally, we can find nothing in the record that indicates that Schofield stated that Gerda served on the selection committee or that Schofield ever stated the dates on which Gerda served on the CBOC committee. And, as discussed above, our analysis is not advanced through a determination of whether or when Gerda served on the selection committee or the CBOC because while service on a committee might be the most effective method of exercising influence, it is not the exclusive means by which to do so.

Schofield alleged improper influence in the selection of construction firms for bond projects. And, through use of the words "oversee" and "make sure," in the March 2015 *Texas Blaze News* article, Gerda admitted that he had at least some influence in that very process, stating, "[I] currently serve on Oversight Committees that *oversee* interviewing of Construction firms for the renovations of Keller High and BCI and general Bond Oversight Committee *to make sure* the bond is utilized in the fashion promoted last fall." [Emphasis added.] Schofield's investigation revealed enough information about the relationship between Gerda, his campaign treasurer, VYKS PAC, and VLK Architects to at least raise a

question as to whether the influence that Gerda himself admitted he wielded in the process—whether limited, as Gerda contends, or more significant, as Schofield suggested—was ethical and proper.

- **Gerda presented sufficient circumstantial evidence that, when combined with evidence of Schofield's motive and degree of care, evidences actual malice.**

Again, Gerda provided no record references or factual support for his assertion that he "presented sufficient circumstantial evidence."[27]

With regard to motive, as stated above, the proof Gerda offered as to Schofield's motive fell short of the "clear and specific" standard.

As stated at the outset of this analysis, the "degree of care" in these circumstances is actual malice. And whether Gerda has provided evidence of actual malice is the precise question before us. It is a circular reasoning, indeed, to propose that evidence of the "degree of care," i.e., actual malice, equals clear and specific evidence of actual malice.

This argument is untenable.

- **The record shows that Schofield "did investigate, saw the truth and altered it for his agenda when he published his statements about Gerda."**

Though Gerda fails to provide a record reference for this statement, we do find some proof in the record that Schofield "saw the truth and altered it for his agenda." Two assertions in Gerda's affidavit support this assertion:

[27]*See* Tex. R. App. P. 38.1(i) (providing that the Argument section of a brief must contain "appropriate citations . . . to the record").

> Mr. Schofield knows he is wrong and that I did not accept a bribe and has laughingly admitted it to me when I confronted him privately about it. He refused to retract the false statement, requiring me to file suit . . . .

and

> Mr. Schofield admitted to me personally that he knew nothing illegal happened and indicated he was using this tac[k] against me because he didn't like people saying he made a motion to delay the School Bond vote in August of 2014.

The question before us is whether these two allegations rise to the level of "clear and specific evidence" sufficient to establish a prima facie case for actual malice. We hold that they do not.

Gerda's statement, "Mr. Schofield knows he is wrong and that I did not accept a bribe," is conclusory. Conclusory statements, by their very nature, fall short of "clear and specific evidence." *See Bates v. Smith*, 289 S.W.2d 215, 216–17 (Tex. 1956) (holding that affiant's statement that she never appeared "as a party to the lawsuit" was conclusory because "what conduct constitutes an 'appearance' is a question of law"; thus, the affidavit "[did] not contain statements of fact putting in issue" whether she appeared in the lawsuit in question); *see also Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 232 (Tex. 2004) (characterizing conclusory testimony as "incompetent evidence," and reiterating that "conclusory testimony cannot support a judgment"); *Anderson v. Snider*, 808 S.W.2d 54, 55–56 (Tex. 1991) (statements such as "I have not violated the [DTPA]," "I did not breach my contract," and "[I] have not been guilty of any negligence or malpractice" were conclusory); *Dolcefino v. Randolph*, 19

S.W.3d 906, 930 & n.21 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (op. on reh'g) (identifying statements such as "this was false and defamatory," "many of the statements made by defendants . . . were untrue and without any factual basis," and "Defendant's allegations were false and defamatory" as conclusory).

Gerda's further statement, "[Schofield] laughingly admitted it to me when I confronted him privately about it," is also conclusory. The meaning of the word "it" is not clear or specific in this context. Whatever Gerda heard Schofield say—the actual words Gerda interpreted to mean that Schofield "admitted" that he was wrong and knew that Gerda did not accept a bribe—do not appear in this record. Without evidence of the actual words Schofield used to convey this information to Gerda, the trial court was left to speculate that, based upon whatever Gerda heard, Gerda's understanding was a reasonable one. It is axiomatic that humans often hear what they want to hear. If, indeed, Schofield revealed inner thoughts of such an inculpatory nature to Gerda, then Schofield's words—not Gerda's—would provide the clear and specific evidence of Schofield's state of mind.

The fact that Schofield reportedly laughed when he said whatever it was that he said dilutes rather than strengthens Gerda's proof, as it calls into question whether Schofield's statements were made in jest. On this record, the word "laughingly" could be interpreted as either a playful or sinister gesture. To meet the "clear and specific" evidentiary hurdle, the trial court should not be left to speculate which type of laughter Gerda observed.

The same is true with regard to Gerda's statement that Schofiled "admitted" to him personally that "[Schofield] knew nothing illegal happened," and Gerda's statement that Schofield "indicated [to him that] he was using this tac[k] against [Gerda]" for political reasons. As to the latter statement, Gerda fails to provide any evidence as to how Schofield "indicated" his motive to Gerda. Without additional facts proving what Schofield actually said that "indicated" what motivated him, this statement falls far short of the "clear and specific" evidence standard that the statute mandates.

As to the former statement, that Schofield, "admitted to [Gerda] personally that he knew nothing illegal happened," this statement is conclusory because what conduct constitutes a crime is a question of law. *See Bates*, 289 S.W.2d at 216–17. Furthermore, the statement is not sufficiently clear or specific. From this bare statement, the trial court could not know whether Schofield said, "I know nothing illegal happened," or if, perhaps, Schofield's recitation of what he believed occurred did not, in Gerda's estimation, rise to the level of an illegal act.

Moreover, Gerda's testimony provided no dates, places, or any other information related to the circumstances in which Schofield's alleged admissions occurred. If "when, where, and what was said" must be included in the pleadings to provide fair notice, certainly this information is required as evidence to meet the "clear and specific" statutory standard and avoid dismissal. *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.005(c); *Lipsky*, 460 S.W.3d at 590–91 (holding that

in a defamation action, the pleadings must provide detail—"where, when, and what was said"—to show the factual basis for the claim).

Without this context, the trial court can judge neither the strength of the evidence nor even its relevance, given that actual malice is determined by the defendant's conduct and state of mind *at the time of publication*, not at some unknown or later date. *Forbes*, 124 S.W.3d at 174. And, on this record, it is entirely possible that whatever statement Gerda attributed to Schofield was made after the publication of the last *Keller Citizen* ad. Indeed, Gerda's assertion that Schofield "refused to *retract* the false statement" implies that whatever admission Schofield made occurred after the defamatory statement had already been made.

The trial court should not be left to speculate or presume that a party's general characterization of his opponent's words was reasonable or accurate. The "clear and specific" standard demands something more. If an opponent's own statement is to be used as "clear and specific" evidence of actual malice, he should be quoted, not paraphrased—at least not to the point of using conclusory statements—and the words should speak for themselves.

As the supreme court has instructed us, motive and care cannot be determined by words alone; the court must apply words to particular circumstances. *Bentley*, 94 S.W.3d at 600. In order to apply that standard, simple logic dictates that we must at least begin with the words that were actually spoken.

Because Schofield and Howard met their initial burden under the TCPA to prove by a preponderance of the evidence that their speech was protected and because Gerda failed to establish by clear and specific evidence a prima facie case for actual malice, we sustain Schofield and Howard's first and second issues.

D. Gerda's Remaining Claims

Schofield and Howard's third issue is framed, "Whether Appellee's remaining claims, which have been abandoned, should be dismissed under the TCPA." Among other arguments, they argue that Gerda "did not attempt to make a prima facie case for his remaining claims."

1. Claim for Civil Conspiracy

Given our disposition as to the defamation and defamation per se actions against Howard and Schofield, we need not address whether Gerda *attempted* to make a prima facie case for civil conspiracy. Because we find no clear and specific evidence that Howard and Schofield committed defamation against Gerda, Gerda's cause of action against Schofield and Howard for conspiracy to commit defamation against him must also fail. *See Bank One, Tex., N.A. v. Stewart*, 967 S.W.2d 419, 446 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) (op. on reh'g) (holding that "if an act by one person cannot give rise to a cause of action, then the same act cannot give rise to a cause of action [for civil conspiracy] if done pursuant to an agreement between several persons"). Thus,

we hold that Gerda did not make a prima facie case for the remaining claim of civil conspiracy and sustain this part of Schofield and Howard's third issue.

2. Claims for Injunctive Relief

In his brief, Gerda concedes that his request for a restraining order and injunctive relief were "abandoned and became moot as of the time of the hearing on the motion to dismiss." We therefore sustain this part of Schofield and Howard's third issue, that Gerda did not make a prima facie case for each element of his claims for injunctive relief.

E. Attorney's Fees and Sanctions

Having sustained all three of Schofield and Howard's issues on appeal, we must reverse the trial court's decision denying the motion to dismiss.

Civil practice and remedies code section 27.009 mandates that if an action is dismissed under the TCPA, the trial court "shall award to the moving party court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require," as well as sanctions "sufficient to deter" future "similar actions." Tex. Civ. Prac. & Rem. Code Ann. § 27.009(a).

Because here the trial court has not had the opportunity to determine the amount of court costs, reasonable attorney's fees, and other expenses that justice and equity require be awarded to Schofield and Howard or the amount of sanctions sufficient to deter Gerda from bringing similar actions in the future, we

must remand the case to the trial court to make these determinations. *See Sullivan*, 488 S.W.3d at 299–300.

IV. Conclusion

Having sustained Schofield and Howard's three issues, we reverse the denial of their joint motion to dismiss under the TCPA and remand this case to the trial court to enter an order of dismissal as to all of Gerda's claims against them and for further proceedings relating to Schofield's and Howard's court costs, attorney's fees, other expenses, and sanctions under section 27.009(a)(1) and (2) of the TCPA.

/s/ Bonnie Sudderth
BONNIE SUDDERTH
JUSTICE

PANEL: LIVINGSTON, C.J.; GABRIEL and SUDDERTH, JJ.

DELIVERED: May 18, 2017