Reversed and Remanded; Opinion Filed July 8, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00805-CV

CALIFORNIA COMMERCIAL INVESTMENT GROUP, INC., Appellant
V.
RICHARD HERRINGTON, Appellee

On Appeal from the 192nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-19-01930

MEMORANDUM OPINION

Before Justices Bridges, Molberg, and Partida-Kipness
Opinion by Justice Partida-Kipness

California Commercial Investment Group, Inc. (CCI) appeals from the trial court's denial of its motion to dismiss appellee Richard Herrington's claims under the Texas Citizens Participation Act (TCPA). Herrington sued CCI for malicious criminal prosecution and defamation arising from a report of criminal activity. In three issues, CCI contends the trial court erred because (1) the criminal activity report is protected speech under the TCPA; (2) the TCPA's commercial speech exemption does not apply; and (3) Herrington did not establish a prima facie case by

clear and convincing evidence. We reverse the trial court's order and remand for an attorney's fees determination.

BACKGROUND

CCI owns Vega Place Senior Apartments (Vega Place) in Fort Worth, Texas. Elizabeth Potter, Vega Place's manager, reported a burglary to the Fort Worth Police Department on January 3, 2018. Herrington worked as a janitor at Vega Place at the time. According to the police reports, responding officers met with Potter, Herrington, and Vega Place resident Scott Wiernik on January 3, 2018. Fort Worth Police Detective Collins later spoke with these individuals and Vega Place porter, David Day, on January 16–18, 2018.

It appeared a burglar had entered the Vega Place laundry room through a "maintenance space between the coin-operated washer and dryer machines" and broke into the Vega Place maintenance shop by making a hole in the wall of the adjoining storage closet located in the laundry room. The responding officers investigated and determined that a person could not enter through the maintenance space, and that the hole in the wall would accommodate only a "smaller framed" person. Herrington had originally suggested that the burglar had entered through the maintenance space, noting damage on the back of a dryer. He offered other possible theories, but the officers found no evidence to support these additional theories.

Wiernik told the responding officers that he saw Herrington's vehicle on the property around 1:00 a.m. on December 31, 2017, and wondered why Herrington

was there so late. Potter said there were no emergency maintenance calls during that time that could have explained Herrington's presence, and she suspected Herrington "had something to do with the burglary."

Collins's report indicates Potter said she "knows very well that [Herrington] staged the burglary so that he could steal the property and sell it," citing six reasons she doubted Herrington's burglary theory. First, the gas lines were still attached to the dryers, and a "normal burglar" would not have been concerned about breaking them. Second, the dust and dirt behind the dryer was undisturbed and the dryer was damaged before the theft, having been dropped during delivery. Third, it was impossible to enter the storage closet without a key because of "a metal plate over the door," and Herrington had the only other key. Fourth, Potter heard "banging" coming from the closet on Friday, December 29, 2017, and believed Herrington staged the hole in the wall. Fifth, a person could not use the hole to access the maintenance shop because of a "plastic shelf on the other side." Sixth, Herrington "suddenly became happier the next week and said that he had 'came into some money.'" Potter believed that he was able to sell some of the stolen property.

Collins reviewed the responding officers' body camera footage and agreed that Herrington's story seemed implausible because there was a lack of evidence the intruder entered the building from behind the dryers, the holes were not large enough to remove the stolen equipment, and there was no sign of forced entry.

Herrington claimed he had the only key to the storage closet, made "plenty of money," and had not sold anything recently. Collins had already discovered, however, that Herrington had sold some "A/C pressure gauges" to a pawnshop on January 15, 2018. Herrington also said he completed an inventory of the maintenance shop's contents and identified the stolen items. However, the inventory sheet incorrectly listed the gauges as present.

Collins's report also reflects that Herrington asked for the location of the appliance dolly on Saturday, December 30, 2017, the dolly was subsequently missing from that location, and Day found it in Herrington's truck two weeks later.

The Tarrant County Assistant Criminal District Attorney issued a criminal complaint against Herrington on February 1, 2018, for unlawfully appropriating fifteen items valued between $2,500 and $30,000 "with intent to deprive the owner, Elizabeth Potter, of the property." CCI put Herrington on unpaid suspension on February 12, 2018, and terminated his employment on February 22, 2018, following his arrest. A grand jury indicted Herrington on March 13, 2018. The district attorney dismissed the charges on August 28, 2018, citing prosecutorial discretion.

Herrington filed suit against CCI for malicious criminal prosecution and defamation. CCI moved to dismiss Herrington's claims under the TCPA. Herrington responded that the rights of free speech and association do not apply, and the commercial speech exemption deprived Potter's statements of TCPA protection. The trial court denied CCI's motion to dismiss, and this appeal followed.

STANDARD OF REVIEW

The TCPA protects citizens from retaliatory lawsuits that seek to silence or intimidate them for exercising their rights in connection with matters of public concern. *In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015) (orig. proceeding); *see generally* TEX. CIV. PRAC. & REM. CODE §§ 27.001–.011.[1] The stated purpose of the statute is to "encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury." TEX. CIV. PRAC. & REM. CODE § 27.002; *see also ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 898 (Tex. 2017) (per curiam).

To accomplish this purpose, the statute provides a procedure to expedite dismissing claims brought to intimidate or to silence a defendant's exercise of a protected right. *Coleman*, 512 S.W.3d at 898; *see also* TEX. CIV. PRAC. & REM. CODE §§ 27.003(a), 27.005(b); *Youngkin v. Hines*, 546 S.W.3d 675, 679 (Tex. 2018). The movant bears the initial burden of showing by a preponderance of the evidence that the legal action is based on or is in response to the movant's exercise of the right

[1] The Texas Legislature amended the TCPA effective September 1, 2019. Those amendments apply to "an action filed on or after" that date. Act of May 17, 2019, 86th Leg., R.S., ch. 378, § 11, 2019 Tex. Sess. Law Serv. 684, 687. Because this lawsuit was filed before September 1, 2019, the law in effect before September 1 applies. *See* Act of May 21, 2011, 82d Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws 961–64, amended by Act of May 24, 2013, 83d Leg., R.S., ch. 1042, 2013 Tex. Gen. Laws 2499–2500. All citations to the TCPA are to the version before the 2019 amendments took effect.

of free speech, the right of association, or the right to petition. TEX. CIV. PRAC. & REM. CODE § 27.005(b); *see also S&S Emergency Training Sols., Inc. v. Elliott*, 564 S.W.3d 843, 847 (Tex. 2018). If the movant makes this showing, the burden shifts to the nonmovant to establish by clear and specific evidence a prima facie case for each essential element of its claims. TEX. CIV. PRAC. & REM. CODE § 27.005(c); *see also Elliott*, 564 S.W.3d at 847.

We review de novo the trial court's ruling on a motion to dismiss under the TCPA. *See Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 894 (Tex. 2018); *Dyer v. Medoc Health Servs., LLC*, 573 S.W.3d 418, 424 (Tex. App.—Dallas 2019, pet. denied). "In conducting this review, we consider, in the light most favorable to the nonmovant, the pleadings and any supporting and opposing affidavits stating the facts on which the claim or defense is based." *Dyer*, 573 S.W.3d at 424; *see also* TEX. CIV. PRAC. & REM. CODE § 27.006(a). However, the plaintiff's petition is generally "the best and all-sufficient evidence of the nature of the action." *Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017).

ANALYSIS

In three issues, CCI contends that the trial court erred in denying its motion to dismiss because (1) Herrington's claims are based on, related to, or in response to Potter's protected report of criminal activity; (2) the commercial speech exemption does not apply to Herrington's claims; and (3) Herrington did not establish a prima facie case by clear and specific evidence. We address each issue in turn.

A. Reporting Criminal Activity

In its first issue, CCI contends Potter's statements to the police implicating Herrington as the theft suspect fall under the TCPA's protection. According to CCI, the statements implicate all three rights protected under the TCPA. *See* TEX. CIV. PRAC. & REM. CODE § 27.005(b)(1).

In its motion to dismiss, CCI argued that Potter's statements to police regarding the theft were an exercise of all three TCPA-protected rights. Specifically, CCI relied on *Ford v. Bland*, No. 14-15-00828-CV, 2016 WL 7323309, at *1 (Tex. App.—Houston [14th Dist.] Dec. 15, 2016, no pet.) (mem. op.), and *Murphy USA, Inc. v. Rose*, No. 12-15-00197-CV, 2016 WL 5800263, at *3 (Tex. App.—Tyler Oct. 5, 2016, no pet.) (mem. op.), to argue that Potter's report of criminal activity was a protected exercise of the right to petition. CCI also argued that Potter's report was an exercise of the rights of free speech and association in that a person reporting a crime has joined with police in a common pursuit of criminal justice and community safety. *See* TEX. CIV. PRAC. & REM. CODE §§ 27.001(2), (3), (7)(A)–(C).

Herrington responded that Potter's statements did not constitute an exercise of the rights of free speech and association. In doing so, however, he merely recited facts related to his employment with CCI and Potter's statements. He offered no legal analysis to explain how these facts relate to the rights at issue. Moreover, Herrington did not address CCI's argument regarding the exercise of the right to

petition. Regardless, it is well established that the reporting of a crime implicates both the right of free speech and the right to petition.

The TCPA defines the exercise of the right of free speech as "a communication made in connection with a matter of public concern." *Id.* § 27.001(3). A matter of public concern includes, among other things, "an issue related to . . . health or safety," or "environmental, economic, or community well-being." *Id.* § 27.001(7). Reporting a crime to law enforcement and related judicial proceedings arising from prosecutions are matters of public concern. *Brady v. Klentzman*, 515 S.W.3d 878, 884 (Tex. 2017); *Fishman v. C.O.D. Capital Corp.*, No. 05-16-00581-CV, 2017 WL 3033314, at *6 (Tex. App.—Dallas July 18, 2017, no pet.) (mem. op.).

The TCPA defines "exercise of the right to petition" to include "a communication in or pertaining to . . . a judicial proceeding [or] an official proceeding, other than a judicial proceeding, to administer the law[.]" TEX. CIV. PRAC. & REM. CODE § 27.001(4)(A)(i), (ii). "Official proceeding" means "any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant." *Id.* § 27.001(8). The "exercise of the right to petition" also includes "any other communication that falls within the protection of the right to petition government under the Constitution of the United States or the constitution of this state." *Id.* § 27.001(4)(E).

Texas has long recognized the need to balance the right to petition with the right to file a police report. *See Wood v. State*, 577 S.W.2d 477, 479 (Tex. Crim. App. 1978) (criminal offense of making false report must be reconciled with right to petition guaranteed by Texas Constitution); *Zahorik v. State*, No. 14-13-00763-CR, 2015 WL 5042105, at *4 (Tex. App.—Houston [14th Dist.] Aug. 25, 2015, no pet.) (holding that additional proof requirements imposed on state when person is reporting police or other official misconduct are necessary to safeguard constitutional right to petition government for redress of grievances). Filing a police report, whether true or false, implicates a person's right to petition the government, and this right must be considered when determining whether a person filed a false report. *See Wood*, 577 S.W.2d at 479; *Murphy USA*, 2016 WL 5800263, at *3; *Zahorik*, 2015 WL 5042105, at *4.

On appeal, Herrington argues the allegedly defective criminal complaint and indictment demonstrate that the TCPA does not protect Potter's criminal activity report. According to Herrington, both the district attorney's criminal complaint and the grand jury's indictment erroneously identify Potter, not CCI, as the owner of the stolen property, thus depriving her "illegal and false" criminal activity report of protection under the TCPA. Drawing on the discussion of *Lefebvre v. Lefebvre*, 131 Cal. Rptr. 3d 171 (Cal. Ct. App. 2011), in *Murphy USA*, Herrington claims that *Murphy USA* and *Bland*, opinions on which CCI relies, support this contention. We disagree.

Lefebvre held that California's anti-SLAPP statute does not protect an uncontested, intentionally submitted, false criminal allegation. *Murphy USA*, 2016 WL 5800263, at *3; *Lefebvre*, 131 Cal. Rptr. 3d at 176. The falsity of the criminal activity report at issue in *Murphy USA* was contested, thus the court found *Lefebvre* inapplicable. *Murphy USA*, 2016 WL 5800263, at *3–4 (holding that the TCPA protected a criminal activity report even though the charges were dropped). *Bland* cited *Murphy USA* only for the proposition that "[s]tatements to police regarding incidences of perceived wrongdoing are protected by the TCPA." *Bland*, 2016 WL 7323309, at *1. Thus, neither *Murphy USA* nor *Bland* support Herrington's argument that the allegedly defective criminal complaint and indictment deprive Potter's criminal activity report of TCPA protection.

Herrington relies solely on the alleged uncontested error in the criminal complaint and indictment to show that Potter made an "illegal and false" criminal activity report. However, the record does not reflect that Potter made any claims of ownership, and Herrington does not explain how such an error in the complaint and indictment would render Potter's statements unprotected by the TCPA. The penal code provision under which Herrington was indicted states that a person commits theft when "he unlawfully appropriates property with intent to deprive the owner of property." TEX. PENAL CODE § 31.03(a). Both the complaint and indictment echoed this language, and Herrington does not contend that the stolen property belonged to him.

The record reflects that other evidence discrediting Herrington's story corroborated Potter's allegations that Herrington staged the burglary. Indeed, the police drew the same conclusion based on an independent investigation. Thus, even though the charges were dropped, Potter's statements made to police are protected as an exercise of the right to petition and of free speech. *See Brady*, 515 S.W.3d at 884; *Wood*, 577 S.W.2d at 479. We need not address CCI's argument that Potter's statements are also protected as an exercise of the right of association. *See* TEX. R. APP. P. 47.1. Accordingly, we sustain CCI's first issue.

B. Commercial Speech Exemption

In its second issue, CCI contends that the commercial speech exemption does not apply to Potter's statements made to police because the statements did not arise out of a commercial sale or lease, and the intended audience was not an actual or potential buyer or customer. Herrington argues that, although the immediate audience was the police, Potter's statements were intended to show Vega Place residents that CCI was taking steps to ensure their security.

To prevail on his commercial speech argument, Herrington must show that (1) CCI was primarily engaged in the business of selling or leasing goods; (2) CCI made the statements on which Herrington's claims are based in its capacity as a seller or lessor; (3) the statements at issue arose out of a commercial transaction involving the kind of goods and services CCI provides; and (4) the intended audience of the statement was actual or potential customers of CCI for the kind of goods or services

CCI provides. *Castleman v. Internet Money Ltd.*, 546 S.W.3d 684, 688 (Tex. 2018) (per curiam). CCI contends that Herrington failed to demonstrate that Potter's statements to police meet the third and fourth criteria. We agree.

According to Herrington, "CCI's concern in this case was only to promote its resident safety services to the limited audience of its paying residents, which was not a matter of public concern." More specifically, Herrington contends as to the third and fourth criteria that Potter's statements to police "arose out of maintaining a safe premises for the elderly residents," who were also the intended audience. As evidence of this claim, Herrington cites Potter's enlisting Wiernik in the investigation.

For the exemption to apply, however, the challenged statement or conduct must be made "for the purpose of securing sales in the goods or services of the person making the statement." *Backes v. Misko*, 486 S.W.3d 7, 21 (Tex. App.—Dallas 2015, pet. denied). There is no evidence in the record that Potter spoke to police for this purpose. Additionally, there is no evidence in the record that the intended audience was anyone other than the police officers investigating the theft of CCI's property. Finally, there is no evidence in the record that Potter made any statements to Wiernik, but that Wiernik made corroborating statements to police. Consequently, the commercial speech exemption does not apply to the statements in question, and we sustain CCI's second issue. *See id.*

Having sustained CCI's first and second issues, we find that CCI has met its burden to establish by a preponderance of the evidence that Potter's report of perceived criminal activity was protected by the TCPA. *See* TEX. CIV. PRAC. & REM. CODE § 27.005(b). We now must determine whether Herrington has established by clear and specific evidence a prima facie case for each essential element of his claims. *See id.* § 27.005(c).

C. Prima Facie Case

In its third issue, CCI contends that Herrington failed to establish a prima facie case for either of his claims. Herrington contends he has met his burden, relying primarily on the allegedly erroneous criminal complaint and indictment and the dismissal of the criminal charges.

To prevail on his malicious criminal prosecution claim, Herrington must prove: (1) a criminal prosecution was commenced against him; (2) CCI initiated or procured that prosecution; (3) the prosecution terminated in his favor; (4) he was innocent of the charges; (5) CCI lacked probable cause to initiate the prosecution; (6) CCI acted with malice; and (7) he suffered damages. *Kroger Tex. Ltd. P'ship v. Suberu*, 216 S.W.3d 788, 792 n.3 (Tex. 2006); *Richey v. Brookshire Grocery Co.*, 952 S.W.2d 515, 517 (Tex. 1997). To prevail on his defamation claim, Herrington must prove: (1) CCI published a false statement of fact to a third party, (2) that was defamatory concerning Herrington, (3) with the requisite degree of fault (negligence or actual malice, depending on the context), and (4) Herrington suffered damages

(unless the defamatory statements are defamatory per se). *In re Lipsky*, 460 S.W.3d at 593; *Watson v. Hardman*, 497 S.W.3d 601, 609 (Tex. App.—Dallas 2016, no pet.).

To defeat the motion to dismiss, Herrington had to establish by clear and specific evidence a prima facie case for each essential element of these claims. TEX. CIV. PRAC. & REM. CODE § 27.005(c). Notice pleading that merely recites the elements of a cause of action will not satisfy section 27.005(c). *Lipsky*, 460 S.W.3d at 590–91. A plaintiff must provide enough detail to show the claim's factual basis. *Id*. at 591. As an example, *Lipsky* holds that "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 defeat a Chapter 27 motion to dismiss. *Id*. We may consider circumstantial evidence as part of a TCPA review. *Id*.

CCI contends that Herrington failed to establish the second, fourth, fifth, and sixth elements of his malicious criminal prosecution claim. Regarding his defamation claim, CCI contends that Herrington failed to establish the first and third elements.

Herrington's first amended petition—his live petition—alleges that Herrington was 54 years' old and worked as a janitor with an exemplary record at Vega Place; that Potter became the "new manager" of Vega Place before the theft; and that Herrington "understands" that Potter's son is a "drug addict" who had not

been seen in several months before the theft. Beyond this, Herrington's petition recites facts recorded in the police reports and reflected in CCI's letters attached as exhibits to the petition. Herrington recites the elements of his malicious criminal prosecution claim, citing only the dismissed criminal charges as evidence that he was innocent of the theft. He offers no additional explanation to show how the other elements relate to the pleaded facts. Herrington recites a hornbook explanation of his defamation claim, implying by incorporating prior allegations that Potter's statements were false because the criminal charges were dropped. However, he fails to explain how the facts pleaded support the remaining elements of his claim. Although Herrington's petition may meet the notice-pleading standard, *see* TEX. R. CIV. P. 45, 47, it does not provide enough detail to show either claim's factual basis. *See Lipsky*, 460 S.W.3d at 590–91.

Herrington's response to CCI's motion to dismiss again merely recites the allegations contained in his petition and the elements of his two claims, and offers no analysis to explain how the facts relate to the elements. As evidence, he offered the police reports, and CCI's letters attached to his petition, and his declaration, which recites the allegations contained in the petition.

His appellate briefing provides no greater detail than his trial court briefing. Here, Herrington cites various facts as support for each element of his claims, but fails to explain how these facts support the respective elements. For example, to show that CCI "initiated or procured the prosecution," Herrington cites Potter's

statement to police that she "knows very well" that Herrington staged the burglary to steal the property. That fact, standing alone, does not establish a prima facie case that CCI "initiated or procured" the prosecution because "a person cannot be liable for malicious prosecution if 'the decision whether to prosecute is left to the discretion of another, including a law enforcement official or the grand jury, *unless* the person provides information which he knows is false.'" *King v. Graham*, 126 S.W.3d 75, 76 (Tex. 2003) (quoting *Browning-Ferris Indus., Inc. v. Lieck*, 881 S.W.2d 288, 293 (Tex. 1994)). "In other words, there must be proof that the prosecutor acted based on the false information and that but for such false information the decision would not have been made." *King*, 126 S.W.3d at 76. Potter's statement implicating Herrington was her opinion and not a statement of fact. Moreover, the record reflects that the police obtained other evidence, including evidence from Herrington himself, to support the charges and grand jury indictment.

Thus, assuming without deciding that Potter provided false information, such was insufficient to demonstrate that CCI initiated or procured the prosecution. *See id*. at 79 ("[The plaintiffs] argue in essence that causation can be inferred from the falsity of [the defendant's] statements. While such an inference might be drawn *in a case in which the only information the official relied on in deciding to prosecute was false*, that is not the situation in this case.") (emphasis added); *see also Weaver v. Bell*, No. 03–04–00169–CV, 2005 WL 1364046, at *6 (Tex. App.—Austin June 10, 2005, no pet.) (mem. op.) (holding that the plaintiff did not procure the defendant's

prosecution because, in part, the evidence showed that police investigated and interviewed other witnesses before deciding to arrest the plaintiff).

Herrington cites the reference to Potter as the owner of the stolen property in the criminal complaint and indictment as supporting the probable cause element of his malicious criminal prosecution claim. The probable cause element asks whether a reasonable person would believe that a crime had been committed given the facts as the complainant honestly and reasonably believed them to be before the criminal proceeding was initiated. *Richey v. Brookshire Grocery Co.*, 952 S.W.2d 515, 517 (Tex. 1997). Probable cause is measured at the time when the defendant reports the case to the authorities and not later when the case is investigated, tried, or dismissed. *Akin v. Dahl*, 661 S.W.2d 917, 920 (Tex. 1983); *Pettit v. Maxwell*, 509 S.W.3d 542, 547 (Tex. App.—El Paso 2016, no pet.). "Courts must presume that the defendant acted reasonably and had probable cause to initiate criminal proceedings." *Kroger Tex.*, 216 S.W.3d at 793. "To rebut this presumption, the plaintiff must produce evidence that the motives, grounds, beliefs, or other information upon which the defendant acted did not constitute probable cause." *Id*. Herrington fails to explain how the reference to Potter as the owner of the stolen property rebuts this presumption. Regardless, the record reflects evidence such that Potter could reasonably believe at the time she reported it to police that the property was stolen from Vega Place, but a burglary had not occurred as Herrington described. *See Richey*, 952 S.W.2d at 517.

Herrington also cites the allegedly erroneous reference to Potter as the owner of the stolen property in support of the malice element of both his malicious criminal prosecution and defamation claims. According to Herrington, CCI told Potter to make the complaint in her name so CCI could "show action to stop criminal activity to its residents without exposing CCI to damages for injuring innocent employees like Herrington." Herrington offered no evidence to support this claim and does not explain how such an action would demonstrate malice. *See Fisher v. Beach*, 671 S.W.2d 63, 67 (Tex. App.—Dallas 1984, no writ) ("Malice, defined as ill will, evil motive, or reckless disregard of the rights of others . . . ."); *Gren Indus., Inc. v. Brown*, No. 05-98-01368-CV, 2001 WL 180263, at *6 (Tex. App.—Dallas Feb. 26, 2001, no pet.) (not designated for publication) (same).

Herrington's appellate brief also refers to the other fault standards under which a defendant may be liable for defamation: negligence and strict liability. He cites two cases but offers no factual or legal analysis of these standards, thereby presenting nothing for our review. TEX. R. APP. P. 38.1(i), 38.2.

To support the falsity element of his defamation claim, Herrington cites the fact that the criminal charges against him were dropped and identifies only Potter's allegation that she "knows very well" that Herrington stole the property as the published statement at issue. By this, we presume that Herrington is arguing that the dismissal of the criminal charge shows that Potter's statement was false. Statements that are not verifiable as false cannot form the basis of a defamation claim. *Scripps*

NP Operating, LLC v. Carter, 573 S.W.3d 781, 794–95 (Tex. 2019). "Therefore, in distinguishing between fact (verifiable as false) and opinion, we focus on a statement's verifiability." *Id.* at 795. "[E]ven if a statement is verifiable as false, we consider the entire context of the statement which may disclose that "it is merely an opinion masquerading as fact." *Id.* "The question of whether a statement is non-actionable opinion is a question of law." *Id.*

On its face, Potter's statement is an opinion. She made the statement in the context of her second interview with police, citing various facts to support her conclusion that Herrington had stolen the property. Collins cited related facts in support of his conclusion that the theft did not occur as Herrington described. Thus, we conclude that Potter's statement was a subjective opinion, and not an actionable statement of fact. *See Carr v. Brasher*, 776 S.W.2d 567, 570 (Tex. 1989) ("All assertions of opinion are protected by the first amendment of the United States Constitution and article I, section 8 of the Texas Constitution. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40, 94 S. Ct. 2997, 3006–07, 41 L.Ed.2d 789 (1974).").

On the record before us, Herrington failed to present clear and specific evidence of the second, fourth, fifth, and sixth elements of his malicious criminal prosecution claim and the first and third elements of his defamation claim. *See* TEX. CIV. PRAC. & REM. CODE § 27.005(c). Accordingly, we sustain CCI's third issue.

CONCLUSION

Having determined that Potter's report of criminal activity was protected under the TCPA and that Herrington failed to establish a prima facie case for his claims against CCI, we reverse the trial court's order denying CCI's motion to dismiss. Section 27.009 of the civil practices and remedies code requires a court to award court costs and reasonable attorney's fees to the moving party if the court dismisses the legal action under Chapter 27. TEX. CIV. PRAC. & REM. CODE § 27.009(a). The statute also mandates sanctions "as the court determines sufficient to deter" the filing of similar actions. *See id*. Accordingly, we remand the case to the trial court to award the amount of reasonable attorney's fees, costs, or expenses that justice and equity may require, impose sanctions, if any, sufficient to deter future similar conduct, and for further proceedings consistent with this opinion. *See Tatum v. Hersh*, 559 S.W.3d 581, 586 (Tex. App.—Dallas 2018, no pet.) ("Appellate courts generally remand the fee issue when a trial court has erroneously denied a Chapter 27 dismissal motion."); *see also Cox Media Grp., LLC v. Joselevitz*, 524 S.W.3d 850, 865 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

/Robbie Partida-Kipness/
ROBBIE PARTIDA-KIPNESS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

CALIFORNIA COMMERCIAL INVESTMENT GROUP, INC., Appellant

No. 05-19-00805-CV V.

RICHARD HERRINGTON, Appellee

On Appeal from the 192nd Judicial District Court, Dallas County, Texas Trial Court Cause No. DC-19-01930. Opinion delivered by Justice Partida-Kipness. Justices Bridges and Molberg participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and this cause is **REMANDED** to the trial court for further proceedings consistent with this opinion.