

IN THE SIXTH CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

JAMES MARCUS POWELL,

Plaintiff,

v.

25c682

SARAH POWELL,

Defendants.

ORDER

This matter came before the Court on the briefs on Defendant Sarah Powell's Tennessee Public Participation Act ("TPPA") Petition to Dismiss, Rule 12.02(6) Motion to Dismiss, and Tenn. Code Ann. § 29-41-103(a)(2) Motion. Upon considerations of the parties' briefs and the record in this action, the Court finds that the Defendant's TPPA Petition is well taken and should be granted dismissing the Plaintiff's claims.

FACTS

On March 13, 2025, the Plaintiff James Marcus Powell filed his Complaint against the Defendant Sarah Powell for malicious prosecution and abuse of process.¹ The parties are currently married, but their divorce proceedings are pending.² Before filing for divorce, the Defendant was granted an ex-parte order of protection against the Plaintiff.³ Since the Defendant was granted that ex-parte order of protection, she reported three alleged violations of the Order of Protection by the Plaintiff.⁴ The Plaintiff has specifically asserted that the Defendant "brought false charges against the Plaintiff for violations of the Order of Protection, to attempt to harass the Plaintiff and deter

¹ See Generally Pl.'s Compl.

² *Id.* at ¶¶ 5, 7-8.

³ *Id.* at ¶ 6.

⁴ *Id.* at ¶¶ 11-35.

him from pursuing his rights in their divorce proceedings.”⁵ These three alleged violations of the Order of Protection against the Plaintiff were consolidated into a single preliminary hearing on October 2, 2024.⁶ The Plaintiff has asserted that the Court “Nolled” the First Order of Protection Violation;⁷ dismissed the second alleged violation upon finding that it “was not a violation of the order of protection;⁸ and bound over to the Grand Jury the Third Order of Protection violation.⁹ Plaintiff asserts a claim of abuse of process as to all reported violations of the Order of Protection¹⁰ and a claim of malicious prosecution as to the Second Order of Protection Violation.¹¹

TPPA LEGAL STANDARD

The TPPA provides that “[i]f a legal action is filed in response to a party’s exercise of the right of free speech, right to petition, or right of association, that party may petition the court to dismiss the legal action.” Tenn. Code Ann. § 20-17-104(a). A TPPA petition is subject to a three-step inquiry. *See Pragnell v. Franklin*, No. E2022-00524-COA-R3-CV, 2023 WL 2985261, at *8-12 (Tenn. Ct. App. Apr. 18, 2023) (addressing the “first step of the TPPA dismissal analysis,” the “second step of the TPPA dismissal procedure[,]” and the “third step of the TPPA’s dismissal procedure”).

First, “[t]he petitioning party has the burden of making a prima facie case that a legal action against the petitioning party is based on, relates to, or is in response to that party’s exercise of the right to free speech, right to petition, or right of association.” Tenn. Code § 20-17-105(a). In turn, “[i]f the petitioning party meets this burden, the court shall dismiss the legal action unless the responding party establishes a prima facie case for each essential element of the claim in the legal action. § 20-17-105(b). However, “the court shall dismiss the legal action if the petitioning party establishes a valid defense to the claims in the legal action.” § 20-17-105(c). “If the court dismisses a legal action pursuant to a petition filed under this chapter, the legal action or the challenged claim is dismissed with prejudice.” § 20-17-105(e).

“To establish a ‘prima facie’ case under the TPPA, a party ***must present enough evidence***

⁵See Pl.’s Compl.

⁶*Id.* at ¶ 32.

⁷*Id.* at ¶ 33.

⁸*Id.* at ¶ 34.

⁹*Id.* at ¶ 35.

¹⁰*Id.* at ¶¶ 49-56.

¹¹*Id.* at ¶¶ 37-48.

to allow the jury to rule in his favor on that issue.” *Charles v. McQueen*, 693 S.W.3d 262, 280 (Tenn. 2024)(emphasis added). “The Court may base its decision on supporting and opposing sworn affidavits stating admissible evidence upon which the liability or defense is based and on other admissible evidence presented by the parties.” Tenn. Code Ann. § 20-17-105(d). “[T]he court should view the evidence in the light most favorable to the party seeking to establish the prima facie case and disregard countervailing evidence.” *Charles*, 693 S.W.3d at 280.

TPPA ADMISSIBLE EVIDENCE

On April 18, 2025, the Defendant filed a TPPA Petition to dismiss the Plaintiff’s Complaint and a Memorandum of Law in Support. In support of her TPPA Petition, the Defendant filed the following evidence:

1. A Declaration of the Defendant Sara Powell attesting to her relationship to the Plaintiff, including his physical abuse that resulted in criminal charges against the Plaintiff, the reasons she why reported the Plaintiff for actions that allegedly violated her Order of Protection against him, her good faith reliance on counsel when reporting these allegations, and the veracity of her reports;¹²
2. An Order entered on October 23, 2023 Dismissing Plaintiff’s Ex-Parte Order of Protection against Defendant “[a]s a result of testimony and/or evidence presented”;¹³
3. An Order, entered on October 4, 2024, extending the Defendant’s Ex-Parte Order of Protection against the Plaintiff;¹⁴
4. A Declaration of Marisa Martin attesting to the Plaintiff’s behavior, signs of domestic abuse, and the Plaintiff having followed her and the Defendant around the Green Hills Mall on or about September 21, 2023, which was reported and became the First Alleged Order of Protection Violation;¹⁵
5. A Declaration of Taylor Loring, counsel for the Defendant in her divorce proceedings, who advised the Defendant to report the alleged violations of the Order of Protection at issue in

¹²Ex. A to Def’s Mot. and TPPA Pet. to Dismiss the Compl.

¹³Ex. A at Ex. 1 to Def.’s Mot. and TPPA Pet. to Dismiss the Compl.

¹⁴Ex. A at Ex. 2 to Def.’s Mot. and TPPA Pet. to Dismiss the Compl.

¹⁵Ex. B to Def.’s Mot. and TPPA Pet. to Dismiss the Compl.

this case;¹⁶

6. An Order of Deferral entered on April 11, 2025 wherein the Plaintiff pled nolo contendere to Domestic Assault, a Class A misdemeanor, against the Defendant; and¹⁷
7. A Judgment entered on April 11, 2025 wherein the Offense of Aggravated Assault – Strangulation – against the Plaintiff was dismissed.¹⁸

Additionally, the Plaintiff has not objected to the admissibility of any of the evidence submitted by the Defendant. Accordingly, the Court finds that all of the evidence submitted by the Defendant to which the Plaintiff has not objected is admissible, and the Court may consider the evidence for its natural probative effects. *See Bannor v. Bannor*, No. E2022-00507-COA-R3-CV, 2023 WL 307 1341, at *9 (Tenn. Ct. App. Apr. 25, 2023) (“We have explained that when a party fails to object to the admissibility of evidence, ‘the evidence becomes admissible notwithstanding any other Rule of Evidence to the contrary, and the [trier of fact] may consider that evidence for its ‘natural probative effects as if it were in law admissible.’” (quoting *Pearson v. Ross*, No. W2011-00321-COA-R3CV, 2011 WL 6916194, at *4 (Tenn. Ct. App. Dec. 28, 2011))).

In response to the Defendant’s TPPA Petition, the Plaintiff has not filed any evidence alongside his response to Defendant’s TPPA Petition. Nor has Plaintiff put forward a declaration of himself or any other individuals with knowledge of this matter. The Plaintiff did not file a motion to lift the TPPA’s discovery stay to take discovery. The only potentially admissible evidence cited to by the Plaintiff in his response is the Order dismissing the Second Alleged Violation of the Order of Protection.¹⁹

I. Step 1 - Applicability of the TPPA to the Plaintiff’s Claims

The TPPA applies “[i]f a legal action is filed in response to a party’s exercise of the right of free speech, right to petition, or right of association, that party may petition the court to dismiss the legal action.” Tenn. Code Ann. § 20-17-104(a). “The petitioning party has the burden of making a prima facie case that a legal action against the petitioning party is based on, relates to, or is in response to that party’s exercise of the right to free speech, right to petition, or right of association.” § 20-17-105(a). Under section 20-17-103(3), “[e]xercise of the right of free speech

¹⁶Ex. C to Def.’s Mot. and TPPA Pet. to Dismiss the Compl.

¹⁷Ex. D to Def.’s Mot and TPPA Pet. to Dismiss the Compl.

¹⁸Ex. E to Def.’s Mot. and TPPA Pet. to Dismiss the Compl.

¹⁹Pl.’s Resp. to Def.’s Mot. and TPPA Pet. to Dismiss the Compl., at p. 5 n. 10.

means a communication made in connection with a matter of public concern or religious expression that falls within the protection of the United States Constitution or the Tennessee Constitution.” Section 20-17-103(6) defines “Matter of public concern” to include the following:

- (A) Health or safety;
- (B) Environmental, economic, or community well-being;
- (C) The government;
- (D) A public official or public figure;
- (E) A good, product, or service in the marketplace;
- (F) A literary, musical, artistic, political, theatrical, or audiovisual work; or
- (G) Any other matter deemed by a court to involve a matter of public concern[.]

Id. Our Court of Appeals has interpreted health to mean “quality, state, or condition of being sound or whole in body, mind, or should; esp. freedom from pain or sickness,” and safety to mean “condition of being safe from undergoing or causing hurt, injury, or loss” and not exposed to danger; not causing danger.” *Doe v. Roe*, 638 S.W.3d 614, 619 (Tenn. Ct. App. 2021).

Under the TPPA:

“Exercise of the right to petition” means a communication that falls within the protection of the United States Constitution or the Tennessee Constitution and:

- (A) Is intended to encourage consideration or review of an issue by a federal, state, or local legislative, executive, judicial, or other governmental body[.]

§ 20-17-103(4)(A). Our Court of Appeals has construed this definition quite broadly. *Doe v. Roe*, 638 S.W.3d 614, 623 (Tenn. Ct. App. 2021) (“[B]ased on our plain reading of the TPPA, the right to petition merely requires there to be a communication that is either intended to elicit consideration or review by a governmental body or intended to ‘enlist public participation’ to effectuate such consideration.”). Under the TPPA, a “communication” is “the making or submitting of a statement or document in any form or medium, including oral, written, audiovisual, or electronic.” § 20-17-103(1).

Here, the Defendant has argued that the TPPA applies because Plaintiff sued Defendant in response to both her exercise of the right of free speech and the right of petition. The Plaintiff has only argued that the exercise of right of free speech does not apply. No argument in opposition

was made regarding the Defendant's exercise of her right to petition. Our Court of Appeals has found that failing to respond to argument that a petitioner has met their burden of the TPPA's applicability may waive any claim as to whether that burden was met. *See Kedalo Constr., LLC v. Ward*, No. M2024-00224-COA-R3-CV, 2024 WL 4892032, at *2 (Tenn. Ct. App. Nov. 26, 2024) ("We find that the plaintiffs waived any claim that the defendants did not meet their burden under Tenn. Code Ann. § 20-17-105(a)."). The Court finds that the Plaintiff has waived argument as to Defendant exercising her right to petition. Thus, the Court finds that the Defendant has met her burden that the TPPA applies based on the Defendant's exercise of her right to petition.

Even without waiver on this issue, the Court finds that Defendant's argument well-taken that the lawsuit is in response to the Defendant's exercise of her right to petition. In her declaration, the Defendant has stated that she reported the alleged violations to the Metro Nashville Police Department ("MNPd") "to document the Plaintiff's arguable violations of the order of protection and to encourage MNPd to investigate and take action if warranted."²⁰ The Defendant has also stated that she "testified before the judicial commissioner to encourage judicial review of my reports and to protect myself from the Plaintiff."²¹

While the TPPA does not define the various governmental categories for a communication for a right to petition, the Court finds that a judicial commissioner and a police department are governmental bodies within the TPPA's meaning of "exercise of the right to petition." Based on Defendant's affidavit, the Court finds that the Defendant meant her communications—reports and testimony—were intended to encourage consideration and review of the alleged violations. As such, the Court finds that the Defendant has made a prima facie case establishing that this legal action relates to her exercise of her right to petition. Thus, the TPPA applies to both claims of malicious prosecution and abuse of process.

As to the Defendant's argument that she was sued in response to exercise of the right to speech, the Court finds this argument well-taken as well. In her declaration, the Defendant has stated that she "made these reports in good faith, on advice of counsel, and in connection with a matter of health or safety and community well-being because women like me deserve to feel safe in our community."²² The Defendant has also declared that she obtained the Order of Protection

²⁰Ex. A to Def's Mot. and TPPA Pet. to Dismiss the Compl., at ¶ 29.

²¹*Id.* at ¶ 30.

²²*Id.* at ¶ 31.

after her husband, the Plaintiff, beat and strangled her when she refused to have sexual relations with him.²³

Clearly, because the Defendant obtained an Order of Protection against the Plaintiff,²⁴ who was criminally charged for strangling and beating her²⁵ and pled nolo contendere for that act,²⁶ the Defendant's reports of alleged violations of that Order of Protection relate to her health and safety. *See* Tenn. Code Ann. § 20-17-103(6)(A). Order of Protections are meant to prevent bodily harm to an Order of Protection's petitioner from their alleged abuser. Furthermore, the Defendant has stated that she "made these reports . . . in connection with a matter of health or safety."²⁷ Thus, the Court finds that the Defendant's reports constitute "communication[s] made in connection with a matter of public concern," specifically health and safety. *Id.*

Additionally, the Court deems the making of reports and testifying as to violations of an Order of Protection to involve a "matter of public concern" under subsection (G). *See* § 20-17-103(6)(G). As such, the Court finds that the TPPA applies because the Defendant has established the prima facie case that this legal action relates to the Defendant's exercise of her right to free speech.

II. Step 2 – Establishment of the Prima Facie Case

The Plaintiff has put forward two claims against the Defendant: Malicious Prosecution and Abuse of Process. Having found that the TPPA applies to the Plaintiff's claims, the Plaintiff, as the responding party, must "establish[] a prima facie case for each essential element of the claim[s] in the legal action" to prevent dismissal of his claims. Tenn. Code Ann. § 20-17-105(b).

a. Malicious Prosecution

To establish the essential elements of malicious prosecution, a plaintiff must "prove that (1) a prior suit or judicial proceeding was instituted without probable cause, (2) defendant brought such prior action with malice, and (3) the prior action was finally terminated in plaintiff's favor." *Roberts v. Fed. Exp. Corp.*, 842 S.W.2d 246, 247–48 (Tenn. 1992).

In the single paragraph discussion of the establishment of the prima facie case, Plaintiff

²³*Id.* at ¶¶ 7-8.

²⁴Ex. A at Ex. 1 to Def.'s Mot. and TPPA Pet. to Dismiss the Compl.

²⁵Ex. A at ¶¶ 7-8.

²⁶Ex. D to Def.'s Mot and TPPA Pet. to Dismiss the Compl.

²⁷Ex. A at ¶ 31.

refers back to the discussion section of his Response to the Rule 12.02(6) Motion to Dismiss for failure to state a claim to assert that he has established the prima facie case. These sections exclusively rely upon averments in the Complaint, but for the Plaintiff to establish the prima facie case under the TPPA, the Plaintiff “**must present enough evidence** to allow the jury to rule in his favor on that issue.” *Charles*, 693 S.W.3d at 280 (emphasis added).

However, the averments in the Plaintiff’s Complaint are not evidence. *See In re Mya H.*, No. W2016-01285-COA-R3-PT, 2017 WL 3176108, at *5 (Tenn. Ct. App. July 26, 2017) (citing *Washington v. Tenn. Dep’t of Corr.*, No. 01A-01-9603-CH-00131, 1996 WL 334359, at *1 (Tenn. Ct. App. June 19, 1996) (“Unsworn allegations of fact in pleading or brief do not create an issue as to facts shown by sworn evidence.”)); *see also Price v. Mercury Supply Co.*, 682 S.W.2d 924, 929 n.5 (Tenn. Ct. App. 1984) (“Allegations in pleadings are not, by themselves, evidence of facts. . . . Likewise, arguments of counsel in briefs and otherwise are not evidence.”).

Thus, the Court finds that there is no evidence for the second element of malicious prosecution that the “defendant brought such prior action with malice.” *See Roberts*, 842 S.W.3d at 247-8. The only evidence before the Court regarding the Defendant’s motivation for reports of the Plaintiff’s alleged Order of Protection violations come from affidavits from Defendant and her attorney. Neither affidavit indicates the Defendant having malicious intent for instituting the action against the Plaintiff.

The Court finds that the Plaintiff has failed to establish the prima facie for the second element of malicious prosecution. As such, the Court dismisses this claim, pursuant to the TPPA, with prejudice.

b. Abuse of Process

For a claim of abuse of process, a plaintiff must prove: “(1) the existence of an ulterior motive; and (2) an act in the use of process other than such as would be proper in the regular prosecution of the charge.” *Cordova v. Martin*, 677 S.W.3d 654, 659 (Tenn. Ct. App. 2023).

Just as with his claim of malicious prosecution, Plaintiff has failed to put forward evidence needed to establish prima facie case for the essential elements of an abuse of process claim. As stated previously, Plaintiff’s averments are not evidence. *See in re Mya H.*, 2017 WL 3176108, at *5. The Court finds that Plaintiff has not put forward any evidence of “the existence of an ulterior motive.” Thus, the Court finds the evidence submitted by Plaintiff does not show an ulterior motive

when she reported the alleged violations of the Order of Protection.

As such, the Court finds that Plaintiff has failed to establish the prima facie case as to the essential element of the existence of an ulterior motive and dismisses the Plaintiff's claim for abuse of process, pursuant to the TPPA, with prejudice.

CONCLUSION

For the foregoing reasons, the Court finds that the Plaintiff's Complaint must be dismissed under Tenn. Code Ann. § 20-17-105(b) because the Plaintiff has failed to establish a prima facie case for malicious prosecution and abuse of process. As a result, the Plaintiff's Complaint and both causes of action asserted within it shall be dismissed with prejudice. *See* Tenn. Code Ann. § 20-17-105(e). Having found that Defendant's TPPA Petition to Dismiss is well-taken and should be granted, the Court finds that Defendant's Rule 12.02(6) Motion to Dismiss and Tenn. Code Ann. § 29-41-103(a)(2) Motion are pretermitted.

Because the Court has dismissed the Plaintiff's legal action "pursuant to a petition filed under" the TPPA, the Defendant must be awarded her "[c]ourt costs, reasonable attorney's fees, discretionary costs, and other expenses incurred in filing and prevailing upon the petition." Tenn. Code Ann. § 20-17-107(a)(1). The Defendant shall file a motion seeking such an award alongside supporting affidavits, to which the Plaintiff may respond in opposition.

The Defendant has also sought sanctions under Tenn. Code Ann. § 20-17-107(a)(2) and has requested supplemental briefing on appropriate sanctions. The Court finds that the Parties may submit supplemental briefing as to the propriety of an award of sanctions, if any. Defense counsel must submit such briefing by Friday, May 30, 2025. Any response to Defense counsel's brief must be filed by Friday, June 13, 2025. Unless either party specifically requests oral argument, the Court will decide the matter on the briefs.

Accordingly, it is **ORDERED, ADJUDGED and DECREED** that the Defendant's TPPA Petition to Dismiss is **GRANTED** as to the Plaintiff's claims and the Defendant's request for supplemental briefing on the issue of sanctions is also **GRANTED**.

IT IS SO ORDERED.



THOMAS W. BROTHERS, JUDGE

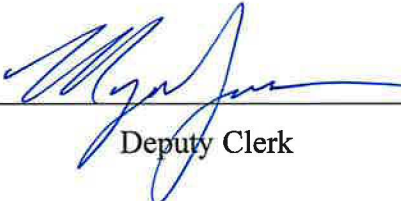
CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing by postage prepaid, U.S. Mail upon the following:

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This, the 15 day of May, 2025.



Deputy Clerk