

NO. 02-19-00394-CV

In the Court of Appeals
Second Judicial District
Fort Worth, Texas

VICTOR MIGNOGNA, Appellant,
v.
FUNIMATION PRODUCTIONS, LLC, JAMIE MARCHI, MONICA RIAL and
RONALD TOYE, Appellees

**APPELLANT'S SUR-REPLY BRIEF TO APPELLEE MARCHI'S
BRIEF**

Oral Argument Requested

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TABLE OF CONTENTS

| | |
|---|-----|
| <u>INDEX OF AUTHORITIES</u> | ii |
| <u>ISSUES PRESENTED</u> | iii |
| <u>REPLY TO MARCHI'S STATEMENT OF FACTS</u> | 1 |
| <u>SUMMARY OF</u> <u>ARGUMENT</u> | 1 |
| <u>ARGUMENT</u> | 7 |

A. The evidence before the trial court did not support its determination that Vic was a public figure7

B. Vic established, by clear and specific evidence, a prima facie case for each of his claims against Marchi, as well as the genuine issues of material fact therein

1. Vic met his burden of raising the existence of fact issue(s)
.....
2. Vic established, by clear and specific evidence, a prima facie case for his defamation claims against Marchi

- a. The record establishes when, where, and what, the defamatory statement said
- b. The record establishes the defamatory nature of the statements
.....
- c. The record establishes that the defamatory statements damaged Vic

3. Vic established, by clear and specific evidence, a prima facie case for his tortious interference with existing contract claims against Marchi
.....

| | | |
|----|--|----|
| a. | Marchi admits there could be rational inferences drawn by the trial court | |
| 4. | <u>Vic established, by clear and specific evidence, a prima facie case for his tortious interference with prospective business relations claims against Marchi</u> | |
| a. | Marchi admits there could be rational inferences drawn by the trial court | |
| 5. | <u>Vic established, by clear and specific evidence, a prima facie case for his civil conspiracy claims against Marchi</u> | |
| a. | There were communications between Marchi and Defendant Rial, about Vic, which establish a civil conspiracy | |
| 6. | <u>Vic sufficiently preserved objections to Marchi's evidence</u> | |
| a. | Paragraph 2 of Marchi's TCPA Motion to Dismiss includes a chart of, "competent evidence," upon which she relies, "in support of [the] Motion." | |
| b. | There is a clear and unambiguous record of Vic's objection to all evidence Marchi included in support of her TCPA Motion to Dismiss | |
| C. | The evidence admitted at trial was insufficient to establish Marchi's affirmative defenses. | 13 |
| 1. | <u>Marchi failed to establish evidence supporting the affirmative defense of qualified privilege</u> | 13 |
| 2. | <u>Marchi failed to establish evidence supporting the affirmative defense that her defamatory statements were true or substantially true</u> | 13 |

| | |
|--|----|
| D. The trial court’s award of attorney’s fees and sanctions against Appellant constitutes reversible error | 15 |
| <u>CONCLUSION & PRAYER</u> | 21 |
| <u>CERTIFICATE OF COMPLIANCE</u> | 22 |

INDEX OF AUTHORITIES

Cases

| | |
|---|--|
| <u>Ctr. Of Lewisville v. Slayton</u> , 335 S.W. 3d 382 (Tex.App.—Ft. Worth 2011, no pet.). | |
| <u>Dallas Morning News, Inc. v. Hall</u> , 17-0637, 2019 WL 2063576 (Tex. May 10, 2019) | |
| <u>Diamond Consortium, Inc. v. Hammervold</u> , 733 Fed. Appx. 151, 155 (5 th Cir. 2018), reh’g denied (June 4, 2018)..... | |
| <u>D Magazine Partners, L.P. v. Rosenthal</u> , 529 S.W. 3d 429, 440 fn. 9 (Tex. 2017), reh’g denied (Sept. 29, 2017). | |
| <u>In re Lipsky</u> , 460 S.W.3d 579, 587 (Tex. 2015) | |
| <u>Lindsey v. Adler</u> , 2013 WL 1456633 at *3 (Tex. App.—Dallas April 9, 2013, no pet.). | |
| <u>McIntyre v. Ramirez</u> , 109 S.W. 3d 741(Tex. 2003)..... | |
| <u>Miranda v. Byles</u> , 390 S.W. 3d 543, 555 (Tex.App.-Houston [1 st Dist.] 2012, pet. denied)..... | |
| <u>Van Der Linden v. Khan</u> , 535 S.W.3d 179, 193 and 198 (Tex. App.—Fort Worth 2017, pet. denied) | |

WFAA-TV, Inc. v. McLemore, 978 S.W.2d 568 (Tex. 1998)

Statutes

TEXAS CIVIL PRACTICE & REMEDIES CODE §27.002.....

TEXAS CIVIL PRACTICE & REMEDIES CODE §27.006(a)

TEXAS CIVIL PRACTICE & REMEDIES CODE §27.009.....

TEXAS CONSTITUTION, ARTICLE 1, SECTION 8.....

TEXAS PENAL CODE §22.01.....

Rules

TEXAS RULES OF CIVIL PROCEDURE 63

TEXAS RULES OF CIVIL PROCEDURE 70.....

TEXAS RULES OF CIVIL PROCEDURE 166A (c).....

Treatises

Laura Lee Prather & Robert Sherwin, *The Changing Landscape of the Texas Citizens Participation Act*, Tex. Tech Law Rev. 1, 188fn. 152-53.....

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ISSUES PRESENTED

1. The evidence before the trial court did not support its determination that Vic was a public figure,
2. Vic sufficiently established, by clear and specific evidence, a prima facie case for the essential elements of his claims against Marchi.
3. The evidence admitted at trial was insufficient to establish Marchi's affirmative defenses.
4. The trial court's award of attorney's fees and sanctions against Vic constitutes reversible error.

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REPLY TO STATEMENT OF FACTS

Victor Mignogna (“Vic”) maintains and refers this Court to his *Statement of Facts* in *Appellant’s Brief*, Vic provides this reply to bring this Court’s attention to two specific instances Appellee Jamie Marchi’s (“Marchi”) unsupported or unfairly distorted factual allegations, and to highlight the importance of certain critical facts.

First, Marchi grossly mischaracterizes Vic’s prominence. She represents to this Court that Vic testified “that he can hardly walk into a convention without being recognized.”¹ The testimony cited by Marchi reveals that Vic’s actual testimony was exactly the opposite.² He testified that people *don’t* recognize him.³ Further, he stated that people attend conventions to celebrate anime (not Vic).⁴

Second, Marchi claims that Vic admitted under oath to assaulting Marchi.⁵ Nothing could be further from the truth. The testimony quoted directly in Marchi’s brief, that Vic ran touched her hair with his hand, does not support any assault.⁶ For one, it fails to show that the contact was in any way harmful or offensive.⁷ The testimony proves that Vic had no reason to believe it was offensive in any way at the time.⁸

¹ Marchi Brief, p. 2.

² CR Vol. 2, p.1014.

³ CR Vol. 2, p.1014.

⁴ CR Vol 2, p. 1014.

⁵ Marchi Brief, p. 6.

⁶ Marchi Brief, p. 6.

⁷ CR Vol. 2, p.1005.

⁸ CR Vol. 2, p. 1005.

SUMMARY OF ARGUMENT

The trial court committed reversible error by failing to resolve all fact issues in favor of Appellant Victor Mignogna (“Vic”), as required by The Texas Citizens Participation Act (“TCPA”). Ironically Appellee Marchi (“Marchi”)’s Response Brief (“Response Brief”) proves this.

Vic established his claims against Marchi for defamation, tortious interference with existing contracts, tortious interference with prospective business relations, and civil conspiracy by clear and specific evidence. He also preserved any objections to Marchi’s evidence.

The trial court improperly excluded Vic’s Second Amended Petition and improperly awarded attorney’s fees and sanctions.

This court must reverse and vacate the trial court’s October 4, 2019 order and its *Final Judgment*, and remand this case for final trial.

ARGUMENT

A. The evidence before the trial court did not support its determination that Vic was a public figure.

The trial court's order includes a finding that Vic is a public figure⁹ and therefore the trial court erroneously required him to prove actual malice.¹⁰

In a defamation claim, a claimant is either a private figure, general purpose public figure, or limited purpose public figure.¹¹ General purpose public figures are individuals who “achieve such pervasive fame or notoriety that [they] become[] ... public figure[s] for *all* purposes and in *all* contexts.”¹² Limited purpose public figures are persons who, “thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved...invit[ing] attention and comment,” who “inject[] [themselves] or [are] drawn into a particular public controversy ... assum[ing] special prominence in the resolution of public questions,” or who “thrust [themselves] into the vortex of [a] public issue ... [or] engage the public's attention in an attempt to influence its outcome.”¹³

Marchi's evidence fails to establish that Vic is either a general purpose or limited purpose public figure. To support her contention, Marchi directs this Court

⁹ CR Vol. 6 p. 3227

¹⁰ *In re Lipsky*, 460 S.W.3d 579, 592 (Tex. 2015); See also *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989)(citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

¹¹ *Klentzman v. Brady*, 312 S.W.3d 886, 904 (Tex. App.—Houston [1st Dist.] 2009, no pet.)

¹² *Id.* (emphasis added)

¹³ *Id.*

to the following: (1) that Vic is a voice actor in the genre of anime¹⁴; (2) that Vic is credited with over 356 productions on the website IMDb¹⁵; and (3) that Vic voiced the title character in “Dragon Ball Super: Broly.”¹⁶

However, on page 2 of Marchi’s Brief, when alleging these facts, she grossly mischaracterizes and blatantly falsifies the record.¹⁷

First, Marchi states that Vic is “*one of the most ubiquitous voice actors in the anime genre,*” and in support of that contention, cites to “CR Vol. 2, p.1013 (242:14-17),”.¹⁸ Specifically, Marchi cites the following:

Q. Okay. Yeah, your IMDb page says that you’ve been in over 356 productions. Does that sound - -

A. See, I - - I don’t even know. I - - I mean, I said over 300, and I didn’t even know.¹⁹

Marchi’s cite is an outright falsehood and fails to support her assertion that Vic is “one of the most ubiquitous voice actors in the anime genre.”

At bottom, Vic’s job in the entertainment industry does not make him a general purpose public figure or a limited purpose public figure.²⁰

¹⁴ Appellant Marchi’s Response Brief, 2.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Supra*

¹⁸ *Id.*, 2 n.2.

¹⁹ CR Vol. 2, p.1013 (242:14-17)

²⁰ See *WFAA-TV v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998), cert. denied, 526 U.S. 1051, 119 S.Ct. 1358, 143 L.Ed.2d 519 (1999)

Second, Marchi states that Vic “*can hardly walk in to an anime convention without immediately being recognized,*”²¹ and in support of that contention, cites to “CR Vol. 2, p.1014 (243:3-7),”²² Specifically, Marchi cites the following:

Q. Uh-huh.

A. You know, you just - - you’re not recognized.

Q. How about when you’re at the conventions?

A. Well, I mean, there, yes, because people come there specifically to celebrate anime.²³

Q. Okay.

This evidence does *not* establish that Vic, “can hardly walk into an anime convention without being immediately recognized.” Again, Marchi grossly mischaracterizes the evidence.

Considering the evidence before the trial court, the trial court should not have required Vic to establish actual malice or gross negligence.²⁴

Marchi claims that Vic failed to allege error about the trial court’s determination that Vic is a public figure, thereby requiring actual malice on the

²¹ Appellant Marchi’s Response Brief, 2.

²² *Id.*

²³ *Id.*

²⁴ *See In re Lipsky*, 460 S.W.3d at 592.

part of Marchi.²⁵ As a threshold matter, Vic cannot waive error as to his status as a public figure.²⁶

Marchi's claim that Vic has waived his objection to the trial court's finding that he is a public figure contradicts this Court's recent opinion in *Hoskins v. Fuchs*.²⁷ In *Hoskins*, a University of Texas, Arlington professor (Fuchs) sued an individual (Hoskins) for defamation based on an accusation that Fuchs was having a sexual relationship with one of his students.²⁸ Hoskins sought dismissal under TCPA. Fuchs conceded at trial and maintained on appeal that he was a public figure.²⁹ This Court found that Fuchs was not a public figure anyway, noting that the issue was a question of law that could not be conceded or judicially admitted.³⁰ Thus, Vic's statement in his pleadings does not concede the issue that he is a public figure, nor could he have waived any objection thereto.

Further, Marchi's evidence does not show that Vic was a limited purpose public figure. Marchi provides no evidence that people other than the immediate participants in this controversy are likely to feel the impact of its resolution.³¹ Moreover, the evidence clearly shows that Vic did not seek out this controversy.³²

²⁵ Marchi Brief, pp. 12 and 21.

²⁶ *Hoskins v. Fuchs*, 517 S.W.3d 834, 841 (Tex. App.—Fort Worth 2016, pet. denied).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ See *WFAA-TV v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998), cert. denied, 526 U.S. 1051, 119 S.Ct. 1358, 143 L.Ed.2d 519 (1999)(

³² CR Vol. 2, p. 1005 (217: 3-5).

Marchi's argument fails to acknowledge the irrefutable fact that this controversy was forced upon Vic, and not sought out by him.³³

Marchi's statements on Twitter accusing Vic of sexual assault and misconduct cannot make Vic a public figure. In *Wolston v. Reader's Digest Ass'n*, the United States Supreme Court stated, "a private individual is not automatically transformed into a public figure by becoming involved in or associated with a matter that attracts public attention...[they] have likely been drawn into a public forum against their will in order to attempt to obtain the only redress available to them or defend themselves against actions by others. There is little reason why individuals should substantially forfeit the degree of protection the law of defamation would afford them by virtue of being drawn in."³⁴ Vic testified, "I did not ask for any of this."³⁵ "I was living my life and suddenly out of nowhere this stuff starts. I merely responded to it."³⁶ There is no evidence suggesting that Vic in any way injected himself into this controversy.

B. Vic established, by clear and specific evidence, a prima facie case for the essential elements of his claims against Marchi, as well as the genuine issues of material fact therein.

1. Vic met his burden of raising the existence of fact issue(s).

³³ *Id.*

³⁴ *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 166 and 169 (1979).

³⁵ CR Vol. 4, p. 1416 (53: 15).

³⁶ CR Vol. 2, p. 1005 (217: 3-5).

In 2015, the Texas Supreme Court established that in order to succeed on an appeal seeking to reverse a trial court's dismissal of claims on a TCPA motion to dismiss, the appellant must meet its initial burden of raising the existence of a fact issue by competent evidence.³⁷ In this regard, courts must accept as true all evidence favorable to the non-movant, and must resolve all doubts and indulge every reasonable inference regarding the existence of a genuine issue of fact in favor of the non-movant.³⁸

Even if the trial court properly refused to consider Vic's Second Amended Petition and its attachments, the trial court took all evidence offered into evidence by Appellees into consideration. This Court must determine if Vic raised the existence of a fact issue within the evidence that the trial court *did consider*. Many genuine issues of fact exist within the evidence before the trial court, as shown by the conflicting arguments, assertions, and contentions made between Vic's Brief,³⁹ and Marchi's Brief,⁴⁰ and their respective usages of the record in support thereof. A cursory reading of each brief's table of contents⁴¹ creates a reasonable inference that genuine issues of material fact exist, and, pursuant to the above referenced rule from

³⁷ See, *In re Lipsky*, 460 S.W.3d 579, 588 (Tex. 2015)

³⁸ *D Magazine Partners, L.P. v. Rosenthal*, 529 S.W. 3d 429, 440 fn. 9 (Tex. 2017), reh's denied (Sept. 29, 2017).

³⁹ See generally *Appellant Brief*

⁴⁰ See generally *Appellee Marchi's Reply Brief*.

⁴¹ See generally *Vic's Brief and Appellee Marchi's Reply Brief*.

the *D. Magazine Partners* case, this Court must indulge this reasonable inference that genuine issues of material fact exist in favor of Vic.⁴²

2. Vic established, by clear and specific evidence, a prima facie case for his defamation claims against Marchi.

The Texas Supreme Court in *Lipsky* establishes that in a case of defamation implicating the TCPA, when the pleadings and evidence establish the facts of (1) when, where, and what was said; (2) the defamatory nature of the statements; and (3) how the statements damaged the plaintiff; this sufficiently establishes a prima facie case for defamation by the clear and specific standard of evidence necessary to reverse a TCPA motion to dismiss.⁴³

a. The record sufficiently establishes when, where, and what, the defamatory statement said.

Vic's defamation claim, must include evidence that Marchi published a false statement of fact, to a third party.⁴⁴ All of the Appellees offered sufficient evidence with their TCPA motions to meet this standard. Marchi offered her published defamatory tweets.⁴⁵ Marchi did not deny in her TCPA Motion to

⁴² *D Magazine Partners, L.P.*, 529 S.W. 3d 440.

⁴³ *See, In re Lipsky*, 460 S.W.3d 579, 590-591 (Tex. 2015).

⁴⁴ *In re Lipsky*, 460 S.W.3d 579 (Tex. 2015).

⁴⁵ CR Vol. 2, P. 964-971.

Dismiss,⁴⁶ during the TCPA hearing,⁴⁷ nor in her Response,⁴⁸ that she published a statement on February 8, 2019 on Twitter (hereinafter, “February 8 tweet”). She has not denied other statements she made about Vic on Twitter⁴⁹ for other people to read. Marchi admitted her publication, content, and the surrounding circumstances of her defamatory statements.⁵⁰

Marchi is again untruthful to this Court when she states that the “February 8 Tweet...does not reference Vic or what he did to Marchi.”⁵¹ Marchi published Vic’s name and accused him of assault in her statement attached to her TCPA Motion to Dismiss, but conveniently does not include her entire statement in her Brief.⁵² Marchi admits the February 8 Tweet is a statement of fact.⁵³

Marchi claims that Vic’s defamation claim fails because it purportedly fails to provide the full context of the statements made in the Undated Tweet,⁵⁴ and because it is not a statement of fact.⁵⁵ In that tweet, Marchi stated, “Vic is a bad person.”⁵⁶ Marchi admits she published this statement about Vic.⁵⁷ Marchi’s statement within this tweet was published on Twitter on February 7, 2019, to be

⁴⁶ CR Vol. 2, pp. 930, 950-954.

⁴⁷ RR Vol. 3, p. 27, Lines 6-8.

⁴⁸ *Supra* at footnote 9.

⁴⁹ RR Vol. 3, pp. 32-33, Lines 21-22 and Lines 2-23.

⁵⁰ Appellee Marchi Brief, p. 2-4.

⁵¹ *Id.* at 13.

⁵² CR Vol. 2, p. 952-953.

⁵³ Appellee Marchi Brief, p. 22.

⁵⁴ CR Vol. 2, p. 960.

⁵⁵ *Id.*

⁵⁶ Appellee Marchi Brief, p. 13; CR Vol. 2, p. 665.

⁵⁷ Appellee Marchi Brief, p. 13.

read by the public, to infer that Vic is a bad person, thus making this a fact statement.⁵⁸ As noted, Vic merely must show the existence of a fact issue *within the evidence that was before the court for its consideration*.⁵⁹ Marchi's assertion that Vic's defamation claim fails because it purportedly fails to provide the full context of the statements made in the Undated Tweet, is incorrect, because as previously mentioned, the evidence taken into consideration by the court included the entire record, save and except Vic's Second Amended Petition and attachments thereto.

Marchi's assertion that Vic's claim should fail because he did not provide the full context of the Undated Tweet is not only nonsensical, but is dishonest, considering the evidence in her TCPA motion to dismiss.⁶⁰ Marchi cannot claim that Vic's defamation claim in regard to the Undated Tweet should fail due to the court not having the full context of the statement made therein, when Marchi herself presented the full context of the Undated Tweet in an attachment to "Defendant Jamie Marchi's Motion to Dismiss Pursuant to the Texas Citizens Participation Act," filed with the trial court on July 19, 2019.⁶¹

Furthermore, any "statement is construed as a whole in light of the surrounding circumstances based upon how a person of ordinary intelligence would

⁵⁸ *Supra*.

⁵⁹ Tex. Civ. Prac. & Rem. Code. Ch. 27 § 27.003-27.006.

⁶⁰ Appellee Marchi Brief, p. 16.

⁶¹ CR Vol. 2, p. 971

perceive it,”⁶² therefore Marchi’s statements about Vic must be viewed through the prism of how a person of ordinary intelligence would perceive each individual statement.⁶³

Vic’s defamation claim evidence must establish that Marchi published a defamatory statement that referred to Vic.⁶⁴ That Vic is, directly or indirectly, identified in Marchi’s defamatory statement.⁶⁵ Vic can show he was indirectly identified by the defamatory statement if those who know him and are acquainted with him understand that the statement refers to him.⁶⁶ Additionally, it is not necessary that every listener understand the reference, as long as there are some who reasonably do.⁶⁷

Marchi’s defamatory statements in her Feb. 7 tweet also refer to Vic.⁶⁸ A statement can still defame Vic,⁶⁹ even if it makes no reference to him, as long as he is known and identifiable within his own community. He does not need to be known and identifiable within the entire forum through which the statement was

⁶² *Hoskins v. Fuchs*, 517 S.W. 3d at 840.

⁶³ *Id.*

⁶⁴ *Huckabee v. Time Warner Entm’g Co.*, 19 S.W.3d 413, 429 (Tex. 2000).

⁶⁵ *Cox. Tex. Newspapers, L.P. v. Penick*, 219 S.W.3d 425, 433 (Tex. App.—Austin 2007, pet. denied.)

⁶⁶ *Id.*

⁶⁷ *Davis v. Davis*, 734 S.W.2d 707, 711 (Tex. App.—Houston [1st Dist.] 1987, writ ref’d n.r.e.).

⁶⁸ CR Vol. 2, pg. 964.

⁶⁹ *Davis*, 734 S.W.2d at 711.

published.⁷⁰ Although Marchi’s Feb. 7 tweet does not refer to Vic by name (as her other two defamatory tweets did), the Feb. 7 tweet still defames Vic, as evidenced by the replies to said tweet, which illustrate that the responders were aware that the tweet referred to Vic.⁷¹

Marchi continues to intentionally mislead this Honorable Court in her Response Brief by stating that “[Vic] expressly admits that the February 7 Tweet,” “doesn’t reference [him].” To support this falsehood, she cites to the record at CR Vol. 2, pp. 1017-19 (249:23-251:2).⁷² Only the last five lines of the cited text are relevant

Q. And my questions might sound familiar to you. The first one is, is your name stated in this tweet?

A. No, sir.

Q. Is there any direct reference to you, that you can see?

A. No, sir.⁷³

Nowhere in this text does Vic agree the tweet is not in reference to him.

In order to maintain his defamation claim Vic must show evidence that the defamatory statement is false.⁷⁴ Vic was not required at the TCPA hearing to “prove”

⁷⁰ *Greer v. Abraham*, 489 S.W.3d 440, 446 (Tex. 2016).

⁷¹ CR Vol. 2, P. 950-954.

⁷² Appellee Marchi Response, p. 15.

⁷³ *Id.*

⁷⁴ *Neely v. Wilson*, 418 S.W.3d 52, 62 (Tex. 2013).

Marchi's statements were false.⁷⁵ That said, if the trial court incorrectly determined he was a limited purpose public figure, Vic had to show that Marchi's statements were false. He did so through his denial, which the trial court erroneously failed to accept as true.⁷⁶

- b. The record sufficiently establishes the defamatory nature of the statements, as well as the genuine issues of material facts therein.

The evidence establishing the defamatory nature of the statement goes toward Vic's defamation claim, which is that in order for a statement to be defamatory, it must have been defamatory concerning the plaintiff.⁷⁷

Marchi's defamatory tweets constitute libel per se, as they contain either references to false allegations and/or direct accusations of sexual assault and sexual misconduct by Vic. These statements are libelous per se under both the statutory definition⁷⁸, and also under the common law categories of defamatory speech which imputes crime and imputes sexual misconduct.

The evidence establishing the defamatory nature of the statement goes toward Vic's defamation claim, which is that with regard to the truth of the defamatory statement, Marchi acted negligently.⁷⁹

⁷⁵ Tex. Civ. Prac. & Rem. Code Ch. 27, § 27.006.

⁷⁶ *CR Vol. 2*, p 626.

⁷⁷ *In re Lipsky*, 460 S.W.3d 579 (Tex. 2015).

⁷⁸ *Gartman v. Hedgpeth*, 157 S.W.2d 139, 140-41 (Tex. 1941)(Statutory libel); *Leyendecker & Accocs. V. Wechter*, 683 S.W.2d 369, 374 (Tex. 1984).

⁷⁹ *Gartman v. Hedgpeth*, 157 S.W.2d 139, 140-41 (Tex. 1941)(Statutory libel); *Leyendecker & Accocs. V. Wechter*, 683 S.W.2d 369, 374 (Tex. 1984).

Texas law dictates that negligence is the requisite degree of fault regarding the truth of the statement when plaintiff is a private individual.⁸⁰

The defamatory statements made by Marchi were in reference to a conversation that only Marchi and Vic were privy to. As such, any evidence contrary to her statements, logically and necessarily prove she knew of the falsity, and thus is sufficient clear and specific evidence that she made the defamatory statements negligently.⁸¹

Furthermore, in regard to the defamatory nature of Marchi's statements about Vic, Marchi repeatedly refused to acknowledge evidence presented by Vic which is to the contrary of the blatant falsifications of the record she represents to this Court, but she also flagrantly ignores the evidence she herself presented to this Court that directly contradicts the assertions in her Response Brief.⁸²

Marchi admitted that she made the accusations against Vic on Twitter to address him and the circumstances surrounding his alleged assault on her and his alleged history of sexual misconduct.⁸³ Claims that her statements were made to

⁸⁰ *Bedford v. Spassoff*, 520 S.W.3d 901, 904 (Tex. 2017).

⁸² Marchi Brief, p. 15.

⁸³ Marchi Brief. P. 15.

protect herself and the public at large⁸⁴ do not render her statements non-defamatory.⁸⁵

Marchi's statements alleged that Vic sexually assaulted her.⁸⁶ Marchi admits she called Vic a "predator" in the same statement.⁸⁷ The rational inference is that Marchi expected people to accept her statement about Vic as fact. Marchi tries to argue that Vic "misstate(d) the nature of [her] use of the word 'predator',⁸⁸" by a dubious and convoluted claim that because the tweet in question "ends with a message to anyone who 'ever goes through a similar experience' it is purportedly a cautionary tale to anyone who "had to experience what happened when they were unable to get out of Vic's grasp," her use of the word predator therein was somehow not in reference to Vic.⁸⁹ Except that it *was* in reference to Vic.

Marchi cannot specifically tweet about Vic's purported assault on her and purported sexual misconduct, then shirk responsibility for calling him a sexual predator by ending with a self-serving reference to others who have had similar experiences with Vic or others. "Sexual predator" and "sexual assault" are clear,

⁸⁴ Marchi Brief, p. 23; Marchi claims (after she was sued) there were other victims of Plaintiff, many of whom were coming out on Twitter that she was supporting with her defamatory tweet from February 8, 2019 (RR Vol. 3, p. 27, Lines 11-14 and p. 30, Lines 17-21) However, there is no evidence in the record to support this assertion. The only other person claiming Appellant sexually assaulted them and was a predator was Appellee Rial (none of the other people any of the Appellees' claim to be "victims" of Appellant have published any public statements claiming Appellant assaulted them, harassed them or claimed Appellant was a predator.)

⁸⁵ CITE

⁸⁶ *Supra* at footnote 9.

⁸⁷ Marchi Brief, p. 15.

⁸⁸ *Id.*

⁸⁹ *Id.*

unequivocal terms that Marchi meant to be derogatory and to damage Vic's reputation, which is how a person of ordinary intelligence would likely perceive them.⁹⁰ In addition, Texas law provides that accusations of sexual misconduct are defamation *per se*⁹¹.

- c. The record sufficiently establishes that the defamatory statements damaged Vic, as well as the genuine issues of material facts therein.

Vic's defamation claim also establishes that Vic suffered pecuniary injury as a result of Marchi's false statement, unless injury can be presumed.⁹² As discussed at length previously, if a defamatory statement constitutes libel *per se*, injury therefrom is presumed under the law.⁹³

In addition to injury being presumed, Vic has put forth a multitude of evidence from the record that sufficiently clearly and specifically establishes the damages to Vic that resulted from Marchi's publicizing defamatory statements about him.

Marchi's Brief contains a section titled "The Truth About Vic," which contains gross distortions of the truth, and allegations substantiated by nothing more than highly-contested, self-serving statements made by Marchi herself.⁹⁴

Marchi alleges that,

⁹⁰ CR Vol. 2, p. 950.

⁹¹ *Leyendecker & Assocs. V. Wechter*, 683 S.W.2d 369, 374 (Tex. 1984).

⁹² *Gertz* at 559

⁹³ *Bentley v. Bunton*, 94 S.W.3d 561, 604 (Tex. 2002)

⁹⁴ Appellee Marchi Brief. P. 4.

“Rumors about Appellant had swirled in anime circles for years before Appellee Marchi’s 2011 encounter with him, so much so that Appellant held a ‘rumor panel’ at an anime convention years ago to address the various ‘rumors’ plaguing him for much of his career.”

In support of this claim (hereinafter, “first allegation in ‘Truth About Appellant’ section), Marchi cites to “CR Vol. 2, pp. 1000-01 (199:11-200:15),” an excerpt from the Vic’s deposition. In reality, that excerpt reads as follows:

Q. In the context of panel discussions at the cons that are, I guess, called rumor panels?

A. No, sir. I did a panel many, many years ago at a convention about rumors about me, because I wanted to dispel them. They were baseless and without substance, and I - - and I knew that people had questions and I wanted to address them.

Q. Is that the only rumor panel that you’ve ever done?

A. Yes, sir.

Q. Do you know what con that was at?

A. No, not offhand. It was a long time ago.

Q. And - - and what was the purpose of the - - the rumor panel?

A. As I said, I - - I knew that there were rumors and gossip online, and I knew that fans had questions about it, and I wanted to dispel the rumors.

Q. All right. I'll show you what we're going to mark as Exhibit 21.

(Exhibit 21 marked.)

Q. (BY MR. LEMOINE) I'll represent to you Exhibit 21 is a post on the internet that I pulled off, or somebody pulled off, with a date of 4/20/2010, references a Tekkoshoccon rumor panel.

A. Which is in Pittsburgh. Tekkoshoccon is in Pittsburgh.

Q. All right. Does that one refresh your recollection, that that's what the rumor panel that you did was at Tekkoshoccon in Pittsburgh?

A. Yes, sir. I suppose, yes. I only did one, and I didn't remember the panel - - the convention, and this says Tekkoshoccon, in which I know is a Pittsburgh convention, so I can - - I'm going to assume that's - - that's the one.

Despite Marchi's claim that the citation supports prior allegations of sexual assault, the information contained in Exhibit 21 fails to raise any allegations of sexual misconduct or sexual assault against Vic.⁹⁵ She also cites to "CR Vol. 2, p. 947 ¶ 5," the "Declaration of Jamie Marchi."⁹⁶ Paragraph 5 mentions nothing about "rumor panel(s)," "rumors swirling," things "plaguing him for much of his career." Paragraph 5 only deals with the February 8, 2019 tweet, which calls Vic a "predator" and accuses him of sexually assaulting her.⁹⁷

⁹⁵ CR Vol 2, p. 947.

⁹⁶ CR Vol 2, p. 947.

⁹⁷ CR Vol 2, p. 947.

Marchi dishonestly tried to link a completely unrelated and irrelevant “rumor panel,” to her own allegations of sexual misconduct, by citing these two excerpts of the record in an attempt to fabricate a pattern of evidentiary support for her allegation that “the various rumors” “about Appellant,” that “had swirled in anime circles for years before [her] 2011 encounter with him,” had “plagu[ed] him for much of his career.”⁹⁸ This misrepresentation of the facts and the record incontrovertibly show Marchi’s calculated mendaciousness towards this Honorable Court. Marchi’s first allegation in “The Truth About Appellant” section of her brief was undeniably deliberately drafted to deceive.

Marchi offers her own highly-contested, self-serving statements to support her second allegation in “The Truth About Appellant” section of her brief which states:

*At the beginning of 2019, Appellant’s victims started speaking out about the pain Appellant had wrought upon them. Seeing the hatred and shame Appellant’s followers attempted to hurl at Appellant’s victims online, Appellee Marchi could no longer stay silent.*⁹⁹

Marchi’s testimony is contradicted by Vic’s evidence that, until the defamatory and false accusations made by her, Rial, Toye, and Funimation, he had

⁹⁸ Appellee Marchi Brief. P. 4.

⁹⁹ Appellee Marchi Brief, p. 4.

been employed as a voice actor at Funimation for many years¹⁰⁰, attended numerous conventions,¹⁰¹ and lived his life without controversy.¹⁰² Marchi's testimony is further plagued by her own evidentiary inaccuracies and circumstances tending to cast suspicion on the testimony, particularly her constant deceitful misrepresentation of the record.

Accordingly, because Marchi's evidence is disputed by Vic, the court must take Vic's dispute as true and thus, deny Marchi's TCPA motion.¹⁰³

Importantly, even if the trial court could not consider Vic's affidavit and the other attachments to his Second Amended Petition the record still sufficiently establishes the required elements of Vic's claim and thus provides sufficient clear and specific evidence to the trial court as to each element of Vic's defamation claim.

1. Clear and specific evidence was before the court to support Vic's claim of tortious interference with existing contracts against Marchi.
 - a. Marchi admits that the trial court could draw rational inferences from Vic's evidence.¹⁰⁴

¹⁰⁰ CR Vol 2, p 946.

¹⁰¹ CR Vol. 2, p. 1012-14

¹⁰²

¹⁰³ *Ragsdale*, 801 S.W.2d at 882. .

¹⁰⁴ Marchi Brief, p. 27.

Vic requested the Court draw rational inferences from the evidence in the record.¹⁰⁵ The trial court refused to consider the rational inference standard indicating Vic was being held to a preponderance of the evidence standard, which violates the TCPA.¹⁰⁶ Vic showed: (1) that he had valid contracts with various conventions;¹⁰⁷ (2) that said contracts were breached in association with Marchi's defamatory statements; (3) that she willfully and intentionally interfered with those contracts; and (4) that Marchi's interference caused him injury and actual loss of revenue. Marchi's knowledge and experience in attending the conventions gave her direct contact with convention organizers and provided her the appearance of credibility to allow interference with Vic's current convention contracts. Contrary to Marchi's misrepresentations, Vic testified that conventions do not bring back the same guests each year and Vic had not been banned from any conventions prior to Marchi's defamatory statements.¹⁰⁸

2. Clear and specific evidence was before the court to support Vic's claim of tortious interference with prospective business relations against Marchi.
 - a. Marchi admits that the trial court could draw rational inferences from Vic's evidence.

¹⁰⁵ RR Vol. 3, pp. 45, 53, 55-56, 65-66, 93, 96, 100, 104, 109, 113, 118-119, 133, 141-142, 145, 147-148, 152, 154-155.

¹⁰⁶ RR Vol. 3, p. 113, Lines 10-13.

¹⁰⁷ CR Vol. 2, p. 998, Lines 1-16.

¹⁰⁸ CR Vol. 2, p. 995 (101: 7-19); CR Vol. 5, pp. 2568-2569.

Vic requested the Court draw rational inferences from the evidence in the record.¹⁰⁹ The trial court refused to consider the rational inference standard indicating Vic was being held to a preponderance of the evidence standard, which violates the TCPA.¹¹⁰ Vic showed: (1) that he lost seven to eight roles as a voice actor¹¹¹ in association with Marchi's defamatory statements; (2) in which she willfully and intentionally interfered with those prospective roles; and (3) that Marchi's interference caused him injury and actual loss of revenue.¹¹²

b.

3. Clear and specific evidence was before the court to support Vic's claim of Civil Conspiracy against Marchi.

a. There were communications between Marchi and Defendant Rial, about Vic, which establish a civil conspiracy.

Vic has shown that Marchi was a member of a group of two or more persons (with Rial), and the object of their defamatory statements was to destroy Vic's career as a voice actor. He demonstrated that they had a meeting of the minds on their course of action, as both have admitted.¹¹³ Despite their contentions that they were allegedly speaking on behalf of Vic's alleged victims, no such other alleged

¹⁰⁹ RR Vol. 3, pp. 45, 53, 55-56, 65-66, 93, 96, 100, 104, 109, 113, 118-119, 133, 141-142, 145, 147-148, 152, 154-155.

¹¹⁰ RR Vol. 3, p. 113, Lines 10-13.

¹¹¹ CR Vol. 2, p. 999, Lines 6-16.

¹¹² RR Vol. 3,

¹¹³ Marchi Brief, p. 23; Rial Brief, pp. 25 and 27.

victims have spoken publicly accusing Vic of assault and of being a predator. Both allege Vic committed an assault against them, and because these statements are defamatory per se, damages are presumed.¹¹⁴

Because Marchi's statements are defamation per se, and Vic has demonstrated a conspiracy between Defendants Marchi and Rial, his civil conspiracy claim against Marchi must be remanded.

4. Vic sufficiently preserved objections to Marchi's Evidence.

Under the rules of evidence, a party may not challenge the admission of an exhibit on appeal unless he made a timely objection or motion to strike the evidence, stating the specific ground of objection, if the specific ground is not apparent from the context.¹¹⁵

- a. In paragraph 2 of Marchi's Motion to Dismiss Pursuant to the Texas Citizens Participation Act¹¹⁶ (hereinafter, "Marchi's MTD"), Marchi includes a chart of "competent evidence," upon which she relies, "in support of [the] Motion."¹¹⁷

This chart includes (1) "Declaration of Jamie Marchi," dated 07/05/19; (2) "Marchi Statement via Twitter," dated 02/08/19; (3) "Demand for Preservation of

¹¹⁴ *Van der Linden v. Khan* at 198.

¹¹⁵ *Smith Motor Sales, Inc. v. Texas Motor Vehicle Comm'n*, 809 S.W.2d 268, 272 (Tex.App. – Austin 1991, writ denied) citing *Tex.R.Civ.Evid. Ann.* 103(a) (Pamph.1990).

¹¹⁶ CR Vol. 2, p. 928.

¹¹⁷ CR Vol. 2, p. 928.

ESI,” dated 03/08/19; (4) “Cease & Desist; Retraction Letter,” dated 04/12/19; and (5) “Deposition of Victor Mignogna,” dated 06/26/19.¹¹⁸

Additionally, paragraph 2 states that, “Jamie incorporates and adopts by reference the evidence attached to Defendant Funimation Productions, LLC’s Motion to Dismiss Under the TCPA and to Defendants Monica Rial and Ronald Toye’s Motion to Dismiss Pursuant to the Texas Citizens Participation Act.”¹¹⁹

- b. There is a clear and unambiguous record of Vic’s objection to all evidence Marchi included in support of her TCPA Motion to Dismiss.

Vic clearly and unambiguously objected to the respective exhibits attached to Marchi’s MTD upon filing Vic’s objections and motions to strike with regard to:

- Funimation’s Supplemental Brief – attached Exhibit D – Declaration of Jamie Marchi;
- Rial and Toye’s TCPA MTD –attached Deposition of Victor Mignogna and additional exhibits attached thereto, including: Marchi Statement via Twitter, Demand for Preservation of ESI, and Cease & Desist; Retraction Letter;
- Funimation’s TCPA MTD – all evidence attached thereto;

¹¹⁸ CR Vol. 2, p. 928.

¹¹⁹ CR Vol. 2, p. 928.

- Rial and Toye's MTD Pursuant to the TCPA – all evidence attached thereto;

C. The evidence admitted at trial was insufficient to establish Appellee Marchi's affirmative defenses.

1. Marchi failed to establish evidence supporting the affirmative defense of qualified privilege.

The assertion that a defamatory statement was protected by a qualified privilege can only be properly asserted by meeting the requirements of such under either the common law standard, or statutorily by meeting requirements of one of the specifically enumerated statutes that can potentially impart this privilege.

To establish that Marchi is entitled to a common law qualified privilege, she must establish that each of her defamatory statements about Vic were: (1) made without actual malice (i.e., in good faith), (2) concern a subject matter that is of sufficient interest to Marchi or be in reference to a duty she owes, AND (3) were communicated to another party having a corresponding interest or duty in relation to the specific assertions and allegations made therein.¹²⁰

Alternatively, Marchi would have to establish that she meets the requirements of one of the specified statutes that potentially may impart a qualified immunity. The statutory qualified privileges that can potentially be asserted as a defense to

¹²⁰ Butler v. Cent. Bank & Tr. Co., 458 S.W.2d 510, 515 (Tex. Civ. App.—Dallas 1970, writ dismissed)

defamation include certain privileges for: Print Media Defendants,¹²¹ Broadcast Media Defendants,¹²² Defendants on a Medical Peer-Review Committee,¹²³ Expert-Physician Panels & Consultants,¹²⁴ and Employers (insofar as the statements relate to a former or current employee's job performance to a prospective employer requesting such information).¹²⁵

Despite attempting to assert this affirmative defense in her Original Answer,¹²⁶ Marchi wholly fails to properly establish that she is properly entitled to a common law qualified privilege.¹²⁷ In lieu of citing evidence in the record, in order to support her alleged privilege, Marchi merely makes conclusory assertions that “any matters allegedly addressed were of public and/or private concern,” and “were made on a subject in which [Marchi] and recipients had an interest or duty.” None of which establishes any requisite element of common law qualified privilege nor falls under any enumerated statutory privilege. Marchi published her defamatory statement on Twitter, a public, world-wide, social media site. She did not send said statement as a personal message to any Twitter user, nor did she tag any one as being the intended recipient. Further, as mentioned above, the other person that the

¹²¹ Tex. Civ. Prac. & Rem. Code § 73.002(b)(1); See *Neely v. Wilson*, 418 S.W.3d 52, 68 (Tex. 2013).

¹²² Tex. Civ. Prac. & Rem. Code § 74.004(a); *Avila v. Larrea*, 394 S.W.3d 646, 657 (Tex. App.—Dallas 2012, pet. denied).

¹²³ Tex. Occ. Code § 160.010(b); *Kinnard v. United Reg'l Health Care System*, 194 S.W.3d 54, 57 (Tex. App.—Fort Worth 2006, pet. denied).

¹²⁴ Tex. Occ. Code. § 160.101(e).

¹²⁵ Tex. Labor Code §§ 103.003(a); 103.004

¹²⁶ CR Vol. 1, p. 18.

¹²⁷ Appellee Marchi Brief, p. 29

statement must have been communicated to must have had a *corresponding interest or duty in relation to the specific assertions and allegations made therein*. Nowhere else in the record or her pleadings, is there any scintilla of evidence to support the idea that any other person had a corresponding interest or duty in relation to her defamatory statements relating to a conversation that occurred between no one other than herself, and the Vic. To claim otherwise is not only disingenuous, but is also a complete fabrication.

2. Marchi failed to establish evidence supporting the affirmative defense that her defamatory statements were true or substantially true.

Marchi's Original Answer makes no reference to any evidence in support of her claim of this affirmative defense. In fact, this section is literally only one sentence.¹²⁸ Furthermore, the record and Marchi's pleadings, specifically her Response Brief, contain numerous blatant fabrications, falsehoods, gross mischaracterizations, and intentional deceptions, that establish a pattern of Marchi's continual mendacity and complete absence of candor to this Honorable Court. In addition to the all the instances mentioned thus far, it is important to note the utterly egregious subterfuge Marchi attempts in the section of her Response Brief entitled, "Appellant Admits Under Oath to Assaulting Marchi." This is unequivocally and categorically an outright lie. Marchi cites "generally" to portions of the record

¹²⁸ CR Vol. 1, p. 18.

containing her own declaration and Vic's deposition. In reality, Vic specifically took issue with Marchi's claim that he assaulted her, by way of pulling her hair, and emphatically states that such was not what occurred, nor did he have any intent to commit such an act.

CONCLUSION AND PRAYER

For the reasons stated herein, Vic respectfully requests this Court reverse the ruling of the trial court and remand this matter for trial on the merits.

Respectfully submitted,
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Certificate of Compliance

This document complies with the form requirements of Texas Rule of Appellate Procedure 9.4 and contains _____ words (except for those items excluded by Rule 9.4(h)(1)).

Dated: June 19, 2020

/s/ Ty Beard
Attorney Certifying

Certificate of Service

The undersigned certifies that, on this day, a copy of the foregoing and the Appendix attached hereto was served in accordance with Texas Rules of Appellate Procedure 6.3 and 9.5, electronically via efile.txcourts.gov to:

(a) Appellee Funimation Productions, LLC, by and through counsel of record, John Volney and Christian Orozco of LYNN PINKER COX & HURST, LLP;

(b) Appellee Jamie Marchi, by and through counsel of record Samuel Johnson of JOHNSON & SPARKS, PLLC; and

(c) Appellees Monica Rial and Ronald Toye, by and through counsel of record Sean Lemoine of WICK PHILLIPS GOULD & MARTIN, LLP, Casey Erick of

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Dated: June 19, 2020

/s/ Ty Beard
Attorney Certifying