

020NO. 02-19-00394-CV

IN THE COURT OF APPEALS
SECOND JUDICIAL DISTRICT
FORT WORTH, TEXAS

VICTOR MIGNOGNA, *Appellant*

v.

FUNIMATIONS PRODUCTIONS LLC, JAMIE MARCHI, MONICA RIAL and
RONALD TOYE, *Appellees*

Appeal from the 141st District Court of Tarrant County
Honorable John P. Chupp, Judge Presiding

VICTOR MIGNOGNA'S SUR-REPLY TO APPELLEE FUNIMATIONS, LLC'S
RESPONSE BRIEF

BEARD AND HARRIS
Ty Beard
Carey-Elisa Christie
100 Independence Place, Suite 300
Tyler, Texas 75703
T: (903) 509-4900
F: (903) 509-4908
ty@beardandharris.com
carey@beardandharris.com

MARTINEZ HSU, P.C.
Michael Martinez
An Lee Hsu
Ryan Sellers
4001 Airport Freeway, Suite 150
Bedford, Texas 76021
T: (682) 224-7810
F: (682) 730-8998
msmartinez@mhlegalgroup.com
ahsu@mhlegalgroup.com
rsellers@mhlegalgroup.com

Attorneys for Appellant

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ISSUES PRESENTED

The trial court's finding that Vic is a public figure led the trial court to commit reversible error in dismissing Vic's defamation claim against Funimation.

Funimation LLC's published tweets are reasonably construed as an accusation of sexual misconduct against Vic.

Sufficient evidence was properly before the trial court to support each of Vic's claims.

The trial court committed reversible error in awarding Funimation, LLC's attorney's fees and expenses.

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 Appellee Funimation LLC’s (“Funimation”) unsupported or unfairly distorted factual allegations, and to highlight the importance of certain critical facts.

While Vic is a career voice actor, Funimation’s statement about Vic’s prominence is exaggerated.¹ Vic provides voice acting for English dubs of Japanese animated cartoons, or anime. Fans of the genre, the anime community, often attend conventions.² The members of the anime community post news and information they find relevant on internet websites.³ But nothing in the record establishes that Vic has any prominence whatsoever in the general public that would justify treating him as a “public figure.” Put another way, there is no evidence in the record that establishes Vic’s prominence outside of the anime community. More importantly, nothing in the record shows that the resolution of the parties’ dispute would have any significant impact on any members of the anime community or the general public.⁴

Despite Funimation’s characterization to the contrary⁵, Vic’s January 20, 2019

¹ Funimation Brief, pp.3-4.

² 3rd Supp. CR 33-34.

³ CR Vol. 1, p. 55; 3rd Supp. CR p 34.

⁴ Hoskins v. Fuchs, 517 S.W.3d 834, 842 (Tex. App.—Fort Worth 2016, pet. denied)

⁵ Funimation Brief, pp. 4-5.

tweet is not properly considered an “apology”, or any kind of admission of any sexual assault, harassment, or misconduct.⁶ In the January 20, 2019, tweet, Vic specifically denies several specific allegations against him⁷ – “[A]ny allegations of sexual harassment, sexual assault, or most disturbingly, pedophilia are COMPLETELY AND UTTERLY FALSE. My heart weeps for anyone who endures a violation of this kind, so to be accused of harming others in this way...I have no words.”⁸ The only apology was for an unrelated comment made years ago.⁹

Funimation’s tweets specifically reference the “Mignogna situation” on Twitter¹⁰, where the only fair reading and understanding of the “Mignogna situation” is the sexual assault allegations against Vic. Funimation’s assertion that the tweets were “truthful” puts the cart before the horse.¹¹ Vic vehemently denied the allegations on twitter, which is all that is necessary to defeat a TCPA motion.¹² Funimation claimed that it conducted an investigation into the allegations of sexual assault by Vic.¹³ The only fair reading and understanding of Funimation’s tweets is that Funimation concluded that the allegations that he committed sexual harassment and

⁶ CR Vol. 1, pp. 68-69.

⁷ CR Vol. 1, pp. 68-69.

⁸ CR Vol. 1, pp. 68-69.

⁹ CR Vol. 1, pp. 68-69.

¹⁰ CR Vol. 1, pp. 117-18.

¹¹ Funimation Brief, p. 22.

¹² CR Vol 1, pp. 68-69.

¹³ Funimation Brief, p. 9.

sexual assault were credible and were the basis for terminating his employment and excluding him from future productions. The record is clear as to Funimation's meaning by "investigation."¹⁴

Vic's February 13, 2019, tweet is not an admission as to the accusations against him or of any other wrongdoing.¹⁵ The tweet is a simple statement about Vic's appreciation for the anime community and that he had never believed he had harmed or hurt anyone (stating "Until these last few weeks, I had no idea that any animosity ever existed").¹⁶

¹⁴ 3rd Supp. CR, pp. 34-35; CR Vol. 1, 60.

¹⁵ CR Vol. 1, pp. 130-131

¹⁶ CR Vol. 1, pp. 130-131.

SUMMARY OF ARGUMENT

Funimation assumes without evidence that Vic is a public figure. The only evidence offered to the trial court in support of Funimation's argument that Vic is a public figure is (1) that Vic provided voice acting work on the production of *Dragon Ball Super: Broly*, (2) that Vic has an imdb page detailing his career from 1972 to present, (3) the number of Vic's Twitter followers, (4) website articles regarding the tweets from Appellees Monica Rial ("Rial"), Ron Toye ("Toye"), Jamie Marchi ("Marchi"), and Funimation, and (5) an affidavit from Funimation's Director of Public Relations claiming the existence of certain hashtags on Twitter. This evidence does rise to the level necessary to establish Vic as a general purpose public figure. The existence of discussion of a particular topic on the internet cannot, by itself, make someone a public figure. Funimation failed to provide the trial court with any evidence that the resolution of this dispute would impact any particular person's decision to attend a convention or view a particular production.

This Court should reverse the trial court's dismissal of Vic's claims against Funimation because the trial court was presented clear and specific evidence supporting each element of each claim as required by the Texas Citizen's Participation Act ("TCPA"). Specifically, Funimation's own Motion to Dismiss offered testimony and evidence by and from Vic denying Funimation's allegations.

Funimation offered Vic's tweet claiming that any allegations of sexual harassment, sexual assault, or, most disturbingly, pedophilia are completely and utterly false. Funimation attempts to argue that because its tweets are "truthful" it should succeed on its TCPA motion when in fact the proper analysis is not whether the tweets are truthful, which is a question of fact that must be decided at trial, but whether Vic provided sufficient rebuttal evidence, namely his denial of the truthfulness of Funimation's tweets to defeat the TCPA motion. The short answer to that question is yes, Vic provided sufficient evidence to dispute the truth defense and thus, defeat the TCPA motion.

Funimation argues that its tweets cannot reasonably be construed as allegations of sexual assault. Again, Funimation's own TCPA evidence is fatal to its argument. Specifically, Funimation Vice President of Operations Karen Mika states in her affidavit that Vic was terminated based on the results of an investigation prompted by social media posts on Twitter. The tweets prompting Funimation's investigation were an accusation made by hanleia against Ilich Guardiola and accusations of sexual harassment leveled against Vic by Appellees' Rial, Toye, and Marchi. Funimation's tweets can only be read as responses to the various tweets accusing Vic of sexual misconduct and demanding action by Funimation. Indeed, as noted above, Funimation's Vice President of Operations Karen Mika confirms that "investigation"

was prompted by social media posts on Twitter. Funimation's not only terminated Vic but also tweeted to its thousands of followers an "update on the Vic Mignogna situation." Funimation's tweet stated Funimation would not be engaging Vic in any future productions. This tweet alone can be rationally inferred by a member of the general public as an accusation against Vic of sexual misconduct which is defamation per se. Funimation, however, confirms the reference to sexual misconduct allegedly committed by Vic with a second tweet stating that it does not condone "harassment or threatening behavior being directed at anyone."

Funimation's tweets were entirely gratuitous and unnecessary.

As to Vic's causes of action for tortious interference with existing and prospective business contracts with anime conventions, vicarious liability as to the tweets by Rial and Marchi, and conspiracy, the trial court was presented with sufficient evidence of each, as was argued in Vic's *Appellant's Brief* filed in this Court.

ARGUMENT

A. The trial court’s finding that Vic is a public figure led the trial court to commit reversible error in dismissing Vic’s defamation claim against Funimation.

The trial court found, improperly, that Vic is a public figure.¹⁷ The trial court’s error in finding Vic was a public figure led it to erroneously require Vic to prove actual malice in connection with his defamation claim against Funimation.¹⁸ If a plaintiff in a defamation action is a public figure, the plaintiff must show the defendant acted with actual malice regarding the truth of the statement.¹⁹ *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, 279–80, 84 S. Ct. 710, 11 L.Ed.2d 686 (1964)). If the plaintiff is a private figure, he need only show that the defendant was negligent. *In re Lipsky*, 460 S.W.3d at 592. For purposes of defamation liability, there are two classes of public figures: (1) general-purpose public figures, who are individuals who “achieve such pervasive fame or notoriety that [they] become[] ... public figure[s] for all purposes and in all contexts”; and (2) limited-purpose public figures, who are persons who “thrust themselves to the

¹⁷ 6 CR, p. 3227.

¹⁸ 1st Supp. CR, pp. 4-9.

¹⁹ *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, 279–80 (1964))

forefront of particular public controversies in order to influence the resolution of the issues involved ... invit[ing] attention and comment”; who voluntarily “inject[] [themselves] or [are] drawn into a particular public controversy ... assum[ing] special prominence in the resolution of public questions”; and who “thrust [themselves] into the vortex of [a] public issue ... [or] engage the public's attention in an attempt to influence its outcome.”²⁰

Funimation supports its claims that Vic is a public figure by asserting (1) that Vic provided voice acting work on the product *Dragon Ball Super: Broly*, (2) that Vic has an imdb.com page detailing his career from 1972 to present, (3) that he has a number of Vic Twitter followers, (4) website articles regarding the tweets from Rial, Toye, Jamie Marchi, and Funimation (5) an affidavit from Funimation’s Director of Public Relations; and (6) Vic had a “fan club” called Risembool Rangers.²¹

Funimation’s evidence is insufficient to support the trial court’s finding that Vic is a general purpose public figure.²² General purpose public figures have assumed so prominent a role in the affairs of society that they have become celebrities.²³ Absent clear evidence of general fame or notoriety and pervasive

²⁰ *Klantzman v. Brady*, 312 S.W.3d 886, 904 (Tex. App.—Houston [1st Dist.] 2009, no pet.)

²¹ Funimation Brief, pp. 50-51.

²² See *Hoskins*, 517 S.W.3d. at 841-43.

²³ 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)

involvement in the affairs of society, one should not be characterized as a general purpose public figure.²⁴ Funimation presented no evidence that Vic possesses “general fame” or “pervasive involvement in the affairs of society.” Instead Funimation points to website articles that include conversation threads between Rial and her fans on Twitter.²⁵ Funimation’s articles show that Rial was using her false accusations against Vic in an effort to gain attention on social media. The same is true of Marchi.²⁶ Statements by other Defendants/Appellees do not establish that Vic is a public figure.²⁷

Furthermore, Funimation provides no explanation as to how Vic’s voice acting work on the program *Dragon Ball Super: Broly* holds such significance among the movie’s fans that the resolution of the accusations against Vic would have any impact on the general public. While *Dragon Ball Super: Broly* was successful for an anime movie in America, the trial court incorrectly concluded that Vic was elevated to the status of public figure from his participation.²⁸ While Vic provided voice acting for *Dragon Ball Super: Broly*,²⁹ the film is an animated action movie with a limited audience. It does not follow that, Vic’s voice work on a successful anime movie

²⁴ *McLemore*, 978 S.W.2d at 571.

²⁵ CR Vol. 1, p. 94.

²⁶ CR Vol. 1, p. 113.

²⁷ See *Hoskins v. Fuchs*

²⁸ 1st Supp CR., pp. 4-9.

²⁹ CR Vol. 1, p. 55.

establishes Vic as a general purpose public figure.

There is no evidence that the group of individuals who participate in internet discussions about an accusation against an anime voice actor is so large that it constitutes the general public, thus, Vic is not a public figure “for all purposes” or “for all contexts.”³⁰

There is insufficient evidence to support a finding that Vic is a limited purpose public figure. To determine whether a person is a limited-purpose public figure, Texas courts apply a three-part test: (1) the controversy at issue must be public both in the sense that people are discussing it and in the sense that people other than the immediate participants in the controversy are likely to feel the impact of its resolution; (2) the plaintiff must have more than a trivial or tangential role in the controversy; and (3) the alleged defamation must be germane to the plaintiff's participation in the controversy.³¹ To determine if Vic's role in the controversy was more than tangential, a court examines whether the plaintiff (1) actually sought controversy, (2) had access to the media, and (3) voluntarily engaged in activities that necessarily involved the risk of increased exposure and injury to reputation.³²

There is no evidence Vic established himself as a limited purpose public figure

³⁰ Klentzman, 312 S.W.3d at 904.

³¹ WFAA-TV, Inc., 978 S.W.2d at 570.

³² Klentzman, 312 S.W.3d at 905 (citing McLemore, 978 S.W.2d at 572–73).

by thrusting or injecting himself into this controversy. In fact, Vic testified that he did not seek out this controversy, which must be assumed to be truthful under the TCPA.³³ Before Vic ever published a tweet responding to the accusations against him, he was the victim of numerous false claims of sexual assault and sexual harassment by Rial, Toye, Marchi, and Funimation.³⁴ The controversy's genesis started with a tweet by @hanleia on January 16, 2019.³⁵ It was (mis)interpreted as an accusation of sexual assault, harassment and misconduct against Vic by Funimation.³⁶ Accusations on Twitter against Vic followed.³⁷ Vic categorically denied the accusations via a Tweet on January 19, 2019.³⁸

Vic's imdb.com page does not make him a public figure.³⁹ Funimation fails to explain how the existence of an imdb.com page establishes that the resolution of the parties' dispute involves a person, namely Vic, whose prominence is so high that the resolution of this dispute will have an impact on the general public.⁴⁰ Funimation fails to establish that any particular degree of recognition or fame is required to have an imdb page. Nor is such recognition demonstrated by the contents of Vic's imdb page.

³³ RR Vol. 4, pp. 104-109; CR Vol. 1, 55; 3rd Supp. CR p. 34.

³⁴ CR. Vol. 1, p. 55; 3rd Supp. CR, p. 34.

³⁵ CR Vol. 1, p. 55.

³⁶ CR Vol. 1, pp. 68-69.

³⁷ 1 CR 55 (¶ 5); 3rd Supp. CR 34 (¶¶ 15-16).

³⁸ 1 CR 68-69.

³⁹ CR Vol. 2, p. 402.

⁴⁰ CR Vol 1, 43-45.

Funimation’s evidence of website blogs is not sufficient to establish Vic as a public figure. Many of the blogs were published after Funimation published tweets accusing Vic of sexual harassment and sexual assault.⁴¹ Funimation would have the Court believe these blogs are evidence of Vic’s status in the public. However, the existence of website blogs, which were published after Funimation tweeted about Vic, is just as easily attributed to Funimation’s status as an expansive media company and subsidiary of Sony as it is to any alleged fame held by Vic.⁴²

While Vic did testify that he has a fan club called the Risembool Rangers,⁴³ there was no showing that the fan club was of any significant prominence.⁴⁴ To the contrary, Vic testified that it started as just two women who liked a show in which Vic Mignogna provided voice acting.⁴⁵ There was no evidence before the trial court to suggest that this small group of individuals was significant in terms of scale of individuals, activity, or public participation, such that it would have any tendency to establish Vic as a public figure.⁴⁶

The trial court’s order dismissing Vic’s claims stated that this case was “factually similar” to the facts in this Court’s recent opinion in *Lane v. Phares*, 544

⁴¹ CR. Vol. 1, p. 80; CR Vol. 1, p. 82; CR Vol. 1, p. 92.

⁴² See *Hancock v. Variyam*, 400 S.W.3d 59, 70 (Tex. 2013)

⁴³ CR Vol. 4, p. 1606:17-23

⁴⁴ CR Vol. 4, p 1606.

⁴⁵ CR Vol. 4, p. 1606:17-23

⁴⁶ *Hoskins*, 517 S.W.3d at 841-43.

S.W.3d 881, 894 (Tex. App.—Fort Worth 2018, no pet.).⁴⁷ The facts in *Lane v. Phares* do not support and are not similar to the evidence Funimation’s submitted in its attempt to establish Vic as a public figure. In *Lane*, the appellant, a UNT opera/voice professor, sued a student for defamation based on the students’ disparaging social media posts. In her motion seeking dismissal under the TCPA, the student, appellee, offered (1) appellant’s professional website, (2) appellant’s faculty page on UNT’s website, (3) appellee’s affidavit, and (4) statements from Appellee’s deposition.⁴⁸ Additionally, the trial court in *Lane* considered appellant’s affidavit.⁴⁹ The appellant’s professional website and faculty page contained appellant’s own statements reporting her acclaim, renown among the public, and recognitions.⁵⁰

There are two important differences between *Lane v. Phares* and this case. First, in *Lane*, the appellee presented evidence showing how the resolution of the dispute would impact other people while Funimation did not. Second, there was no evidence showing Vic’s occupation as a voice actor earned him the level of fame as was shown (and critically, agreed to by the appellee) in *Lane*.

In *Lane*, the substance of appellee’s statements about appellant went to

⁴⁷ CR Vol. 6, p. 3227.

⁴⁸ *Lane v. Phares*, 544 S.W.3d 881, 887-90 (Tex. App.—Fort Worth 2018, no pet.).

⁴⁹ *Id.*

⁵⁰ *Id.*

appellant's fitness for and performance as an opera instructor/professor.⁵¹ Appellant in *Lane* was famous in the world of opera performance and instruction, and her fame was such that the resolution of the accusations against her would impact student's' decisions on whether to seek her out as an instructor.⁵² Appellee offered evidence showing that other students not only discussed the accusations against appellant amongst one another, but also that their decision to attend UNT, as opposed to another university, would be impacted by the resolution of appellee's accusations.⁵³ Additionally, the appellant's own statements established her level of fame, to the extent that she had earned awards, was well-known and was recognized even outside of the opera community.⁵⁴ For example, this Court noted in *Lane* the awards appellant had been awarded, which included an Oscar, contributed to establishing appellant as a public figure. In *Lane*, the trial court properly considered appellant to be a limited-purpose public figure.⁵⁵

Although Vic lost work as a voice actor and convention invitee as a result of Funimation's tweets, there is no evidence that Vic's status in the general public is such that Funimation's tweets about him would actually impact the general public's

⁵¹ Id.

⁵² Id.

⁵³ Id.

⁵⁴ Id.

⁵⁵ Id.

decision of whether to attend an anime convention, watch a film, or buy an item of merchandise. While Vic maintains that Funimation’s tweets caused him to lose existing and future employment opportunities,⁵⁶ that is an impact on Vic, not the general public. Because the evidence is lacking, unlike the appellant in *Lane*, Vic is not public figure or limited purpose public figure. The trial court therefore erred in requiring Vic to establish actual malice in support his defamation claim.

B. Funimation’s published tweets are reasonably construed as an accusation of sexual misconduct against Vic.

Funimation argues, incorrectly, that it did not state or imply in any of its tweets that Vic had engaged in any harassment or intimidation, sexual or otherwise.⁵⁷ Considering the substance of tweets leading up to those published by Funimation, Funimation’s statements can only be rationally inferred by members of the general public that Vic committed sexual assault and sexual harassment.⁵⁸

Funimation’s tweet states that it is an update on the “Vic Mignogna situation.”⁵⁹ Funimation’s own evidence shows that the “Vic Mignogna situation” refers to the accusations of sexual assault and sexual harassment against Vic⁶⁰, and

⁵⁶ RR Vol. 4, p. 81, 103

⁵⁷ Funimation Productions, LLC’s Appellee’s Brief, p. 26

⁵⁸ CR Vol. 1, pp. 117-18.

⁵⁹ CR Vol. 1, pp. 79-98.

⁶⁰ CR Vol. 1, pp. 117-18.

also encompasses Funimation’s “investigation” into those accusation.⁶¹ Funimation’s tweet states that its decision to exclude Vic from future productions was “following an investigation.”⁶² The only rational inference from Funimation’s statement is that Funimation investigated the sexual assault allegations against Vic and determined them to be credible. The fact is, Funimation conceded that its exclusion of Vic from future Funimation productions resulted from its investigation into tweets accusing Vic of sexual misconduct.⁶³

Funimation’s first tweet could reasonably be read as a confirmation of sexual misconduct accusations against Vic.⁶⁴ Funimation’s second tweet confirms this interpretation via its language regarding harassment and threatening behavior.⁶⁵ Funimation concedes this interpretation of the first tweet by saying that the second tweet was “in response to the continued heated back-and-forth between anime fans about Vic [Mignogna].”⁶⁶ However, even if this claim were true, Funimation failed to make it clear that the second tweet was not a reference to Vic. A reader could easily infer that “harassment and threatening behavior” referred to Vic’s behavior uncovered in the Funimation investigation.

⁶¹ CR Vol. 1, pp. 117-18.

⁶² CR Vol. 1, pp. 117-18.

⁶³ CR Vol. 1, pp. 63-66.

⁶⁴ CR Vol. 1, pp. 117-18.

⁶⁵ CR Vol. 1, pp. 117-18.

⁶⁶ Funimation Production LLC’s Appellee’s Brief, Page 9.

In short, Funimation's second tweet both confirms the meaning of the first tweet and accuses Vic of sexual misconduct a second time. The rational inference from Funimation's tweets is that both are statements accusing Vic of sexual assault and sexual harassment.

C. Even if the trial court did not err by refusing to consider Vic's Second Amended Petition and its attachments, sufficient evidence was properly before the trial court to support each of Vic's claims.

Vic reinforces his position that the trial court erred in refusing to consider his *Second Amended Petition* and the exhibits.⁶⁷ However, sufficient evidence was presented to the trial court to support each of Vic's claims because Funimation's *Motion to Dismiss under TCPA* included attached exhibits that established the elements for each of Vic's causes of action. Funimation misstates the scope of evidence before the trial court in its *Motion to Dismiss under TCPA* by failing to acknowledge that the trial court considered the exhibits attached to the motion itself.⁶⁸ The trial court also considered evidence offered by Rial, Toye, and Marchi, in connection with their TCPA motions. Such evidence also clearly and specifically established each of the elements for each of Vic's causes of action. The trial court

⁶⁷ Vic Mignogna's Appellant's Brief, pp. 35-47.

⁶⁸ See *Louck v. Olshan Found. Repair Co.*, 14-99-00076-CV, 2000 Tex. App. LEXIS 5337 (Tex. App.—Houston [14th Dist.] August 10, 2000, pet. denied) (not desig. for pub.); *Saenz v. Southern Union Gas. Co.*, 999 S.W.2d 490 (Tex. App.—El Paso 1999, pet. denied); *Jackson v. Fiesta Mart, Inc.*, 979 S.W.2d 68, 70 (Tex. App.—Austin 1998, no pet.)

held a single hearing for all of Appellees' TCPA motions to be heard together.⁶⁹ The trial court granted each of the motions in a single order.⁷⁰ The record does not reflect that any evidence admitted was limited to any particular purpose or party.

1. Sufficient evidence was before the trial court to support Vic Mignogna's claim for defamation.

Due to Funimation's failure to prove that he is a public figure or limited purpose public figure, Vic is a private figure.⁷¹ Therefore, to defeat Funimation's TCPA motion, Vic was only required to show clear and specific evidence that Funimation acted with negligence in publishing its tweets.⁷² Texas courts have defined negligence in the defamation context as the 'failure to investigate the truth or falsity of a statement before publication, and [the] failure to act as a reasonably prudent [person].'⁷³ Sufficient evidence was admitted by the trial court to make that showing. Considering only the evidence offered in Funimation's Motion to Dismiss, the trial court had Vic's tweet in which he specifically denies the allegations of sexual harassment and sexual assault that were the basis for Funimation's tweet.⁷⁴ The affidavit of Tammy Denbow details the scope of Funimation's investigation into the

⁶⁹ 1st Supp. CR., pp. 4-9.

⁷⁰ 1st Supp. CR., pp. 4-9.

⁷¹ *Hoskins*, 517 S.W.3d at 843.

⁷² *In re Lipsky*, 460 S.W.3d at 592.

⁷³ *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 82, 85 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).

⁷⁴ CR Vol. 1, pp. 68-69.

accusations against Vic.⁷⁵ Funimation’s investigation merely included a review of unsupported internet posts, many of which were made anonymously and often just repeating the allegations made by parties in this case, discussions with Rial who injected herself into the investigation, discussions with two anonymous “fans,” and a single phone call with Vic.⁷⁶ Funimation does not include the content of the conversations, but concludes that the allegations against Vic are “credible.”⁷⁷ Since Funimation reviewed tweets accusing Vic of sexual assault and sexual harassment, and permitted Rial to inject herself into the investigation, Funimation knew that Rial claimed that there were “hundreds” of victims of Vic’s alleged abuse and that Vic would be facing criminal charges. Funimation’s silence on the absence of these witnesses and criminal charges is deafening.⁷⁸ More importantly, such failure to explain the glaring lack of evidence, the lack of criminal charges, demonstrates a fact issue that Funimation did not act as a reasonably prudent person would in conducting its investigation and that its publishing of two tweets accusing Vic of sexual misconduct are defamation per se.

Even if Vic is properly considered a public figure, sufficient evidence was

⁷⁵ 3rd Supp. CR, pp. 34-35.

⁷⁶ 3rd Supp. CR, pp. 34-35.

⁷⁷ CR Vol. 1, pp. 59-61.

⁷⁸ 3rd Supp. CR., pp. 34-35.

before the trial court to support a finding that Funimation published its tweets with actual malice. Actual malice is shown where there is a reckless disregard to the truth.⁷⁹ Funimation provided no evidence that explains how it decided that the accusations against Vic were more credible than Vic's denials of said accusations.

And even in *Turner v. KTRK Television, Inc.*, where the appellee was mistaken in its belief that court records supported its contention that appellant was involved in an insurance scam, the appellee provided sufficient evidence that the appellee could argue supported a good faith basis for appellee's assertion.⁸⁰ Tammy Denbow's affidavit, coupled with the tweets introduced into evidence, show that Funimation made no effort to determine whether it had any basis for the truthfulness of the accusations against Vic. And Funimation is certainly not entitled to a presumption that it had any basis for the truthfulness of the accusations against Vic.

The evidence does show that Funimation had some motivation to respond to Rial, Toye, and Marchi's tweets which repeatedly and vocally attacked Vic and called on Funimation to investigate.⁸¹ By publishing its false tweets, Funimation published its tweets without any regard for truthfulness of the content. Worse, Funimation amplified Rial, Toye, and Marchi's false accusations to a much broader audience due

⁷⁹ *WFAA-TV, Inc.*, 978 S.W.2d at 571.

⁸⁰ *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 137 (Tex. 2000).

⁸¹ CR Vol. 1, p. 55; 3rd Supp. Vol., p. 34.

to Funimation's status in the industry and also claimed to have investigated and found evidence to support the false accusations.⁸² Funimation gave baseless accusations from Rial, Toye, and Marchi the appearance of credibility.

Funimation's evidence in its Motion to Dismiss shows that Vic was damaged by Funimation's tweets. Funimation argues that Vic failed to provide evidence of actual damages.⁸³ Although Vic maintains he was not required to show actual damages because Funimation's tweets constitute defamation per se, the trial court was presented with evidence of actual damages. Specifically, Funimation offered evidence that all of Vic's convention appearances for 2019 were cancelled⁸⁴ and that the reason for those cancellations was Funimation's tweets.⁸⁵ Again, Funimation fails to acknowledge to this Court that Funimation presented evidence supporting Vic's claims in support of its Motion to Dismiss. And accusations of sexual misconduct are defamation per se, in which damages are presumed.⁸⁶

2. Sufficient evidence was before the trial court to support Vic's claim for tortious interference with existing and prospective business relations.

⁸² CR Vol. 1, pp. 117-18.

⁸³ Funimation Brief, p. 27.

⁸⁴ CR Vol. 1, pp. 92-96.

⁸⁵ CR Vol. 1, pp. 92-96.

⁸⁶ *In re Lipsky*, 460 S.W.3d at 596.

Funimation again fails to acknowledge its own evidence in arguing that Vic failed to show evidence of tortious interference with existing and prospective business relations. Funimation's own exhibits show that Vic lost contracts with perspective businesses due to Funimation's false tweets.⁸⁷ Specifically, Funimation introduced evidence that all of Vic's 2019 convention appearances were cancelled and that the reason for those cancellations was Funimation's tweet.⁸⁸

3. Sufficient evidence was before the trial court to support Vic Mignogna's claim theory (claim or theory-need to pick one) of vicarious liability.

Vic Mignogna's claim for vicarious liability in connection with tweets by Rial and Marchi is supported by evidence of control exercised by Funimation as to Rial and Marchi's decision to publish certain tweets and the statements contained therein. Funimation's argument against vicarious liability is based on a denial of its control over Rial's tweets.⁸⁹ Funimation's analysis fails to give proper consideration to the specific facts and inferences supported by evidence of communications between Rial and Funimation regarding Rial's tweet accusing Vic of sexual misconduct. Funimation generalizes Rial's email to Lisa Gibson as "asking for advice."⁹⁰ In fact,

⁸⁷ CR Vol. 1, pp. 92-96.

⁸⁸ CR Vol. 1, pp. 92-96.

⁸⁹ Funimation Brief, pp. 33-41.

⁹⁰ Funimation Brief. P. 37.

the specific statements made by Rial in her email are sufficient to support a finding that Funimation exercised control over Rial's tweet such that Funimation can be vicariously liable for Rial's tweets.⁹¹

Rial's email to Lisa Gibson not only states that Rial "doesn't know what to say when people ask about [Funimation's investigation into accusations against Vic]," she specifically adds "I don't know what I can say," which implies that Funimation has some authority over her statements.⁹² Rial continues "[Funimation] may be waiting to make a statement until [Dragon Ball Super: Broly] has finished its run" or may "not want to make a statement at all."⁹³ This supports a rational inference that Funimation controlled whether Rial published tweets on the topic, the content of the tweet, and the timing of the tweet. The overriding determination of "if, what, and when" Rial tweeted about Vic was Funimation's desire not to impair *Dragon Ball Super: Broly's* performance or profitability.⁹⁴ Accordingly, the trial court erred by dismissing Vic's claim against Funimation based on vicarious liability.

4. Sufficient evidence was before the trial court to support Vic's claim for civil conspiracy.

⁹¹ CR Vol. 4, pp. 1263, 1353; Vol. 5, p. 2480

⁹² CR Vol. 5, p. 2501.

⁹³ CR Vol. 5, p. 2501

⁹⁴ CR Vol. 5, p. 2501

Funimation's argument that the trial court properly dismissed Vic's claim for civil conspiracy is predicated on the assumption that Vic's underlying claims were properly dismissed.⁹⁵ As detailed above, the trial court was presented with sufficient evidence to allow Vic to defeat Funimation's TCPA motion as to each of Vic's underlying claims. Vic's claims were improperly dismissed by the trial court, which was presented with sufficient evidence of both the underlying torts and a meeting of the minds between Funimation and Rial.⁹⁶ As shown above, Rial's email to Lisa Gibson asks for instructions from Funimation as to whether Rial could publish a tweet, what the tweet could say, and when it could be published.⁹⁷ Additionally, the trial court was presented with evidence supporting a rational inference that Rial's tweet was actually published following receipt of instructions from Funimation.⁹⁸ The concert of effort between Rial and Funimation is enough to support a rational inference that Rial and Funimation had a common goal and meeting of the minds on the object and course of action.

⁹⁵ Funimation Brief, p. 41.

⁹⁶ CR Vol. 5, p. 2501.

⁹⁷ CR Vol. 5, p. 2501.

⁹⁸ CR Vol. 1, pp. 39, 117-18; Vol. 2, p. 597; Vol. 4, pp. 1266, 1827-28; Vol. 5, pp. 2474, 2520, 2904; 3rd SUPP., pp. 39.

D. The trial court committed reversible error in awarding Funimation its attorney's fees and expenses.

Funimation's argument supporting its award of attorney's fees is predicated on a conclusion that the trial court properly dismissed each of Vic's underlying claims.⁹⁹ Because the trial court's dismissal of each of Vic's underlying claims was in error, the trial court's attorney's fee award must be vacated. Further, even if the trial court's dismissal was proper as to some causes of action against Funimation but not others, the trial court's award of attorney's fees must be vacated because Funimation's fees were not segregated and Funimation cannot recover attorney's fees for a cause of action that was improperly dismissed.

Vic respectfully re-urges its appellate points and urges this Honorable Court to award the relief sought in Appellant's Brief.

Respectfully submitted,
BEARD & HARRIS, P.C. AND
MARTINEZ HSU, P.C.

By: /s/ Ty Beard

BEARD & HARRIS, P.C.
Ty Beard
SBOT 00796181
Carey-Elisa Christie
SBOT 24103218
100 Independence Place, Suite 300

⁹⁹ Funimation Brief, pp. 60-61.

Tyler, Texas 75703
T: (903) 509-4900
F: (903) 509-4908
Ty@beardandharris.com
Carey@beardandharris.com

and

MARTINEZ HSU, P.C.
Michael Martinez
SBOT 24078933
An Lee Hsu
SBOT 24078699
Ryan Sellers
SBOT 24096803
4001 Airport Freeway, Ste. 150
Bedford, TX 76021
T: (682) 224-7810
F: (682)730-8998
msmartinez@mhlegalgroup.com
ahsu@mhlegalgroup.com
rsellers@mhlegalgroup.com

Attorneys for Appellant

Certificate of Compliance

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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 COWLES & THOMPSON, P.C., and Andrea Perez of CARRINGTON, COLEMAN, SLOMAN & BLUMENTHAL, LLP.

Dated: June 19, 2020

/s/ Ty Beard

Attorney Certifying