

NO. 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 RIAL AND TOYE'S BRIEF

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ISSUES PRESENTED

The evidence before the trial court did not support its finding that Vic is a public figure.

Even without considering Vic's Second Amended Petition and its attachments, sufficient evidence was properly before the court to support each of Vic's claims.

- a. Sufficient evidence was before the trial court to support Vic's claim for defamation.
- b. Sufficient evidence was before the trial court to support Vic's claim for tortious interference with existing and prospective business opportunities.
- c. Sufficient evidence was before the trial court to support Vic's claim for conspiracy.

Rial and Toye did not establish their affirmative defenses by any quantum of evidence.

- a. Rial and Toye did not establish a defense under the Communications Decency Act.
- b. Rial and Toye did not establish a qualified privilege.
- c. Rial and Toye did not establish a previously diminished reputation.

REPLY TO RIAL AND TOYE’S STATEMENT OF FACTS

Appellant Victor Mignogna (“Vic”) refers this Court to his *Statement of Facts* in *Appellant’s Brief*.¹ Vic provides this reply to bring this Court’s attention to Monica Rial (“Rial”) and Ron Toye’s (“Toye”) misrepresentation of facts in their Brief.² Rial and Toye publicly accused Vic of sexual assault and sexual harassment.³ Vic filed this suit to prove his innocence.

While Vic is a career voice actor, Rial and Toye’s statement about Vic’s prominence is exaggerated.⁴ Vic provides voice acting for English dubs of Japanese animated cartoons, or anime.⁵ Fans of the genre, the anime community, often attend conventions. The members of the anime community post news and information they find relevant on internet websites. 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.⁶ 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.⁷

¹ Appellant’s Brief, pp. 1-8.

² Rial and Toye Brief, p. 1.

³ CR Vol. 2, pp. 794-797 and 810-812; CR Vol. 4, pp. 1831-1834 and 2105-2446.

⁴ Rial and Toye Brief, pp. 1-5, 21-23 and 35-36.

⁵ Appellant’s Brief, p.1; CR Vol. 5, p. 2469, 3rd SUPP., pp. 5 and 33.

⁶ CR Vol. 1-6 and 1st Supp-3rd Supp.; RR Vol. 1-5.

⁷ *Hoskins v. Fuchs*, 517 S.W.3d 834, 842 (Tex. App.—Fort Worth 2016, pet. denied); CR Vol. 1-6 and 1st Supp.-3rd Supp.; RR Vol. 1-5.

Rial and Toye mischaracterize Vic's tweet published on January 20, 2019.⁸ Vic's January 20, 2019, tweet is not an "apology" for, or an admission of, any sexual assault, harassment, or misconduct. In the January 20, 2019, tweet, Vic specifically denies several specific allegations against him⁹ – "[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."¹⁰ The only apology was for an unrelated comment made years ago.¹¹ Rather, the tweet specifically states Vic's purpose – "[o]ver the last few days, a number of comments and allegations have been voiced on social media. I'd like to share my thoughts."¹² So Rial and Toye inaccurately state that the tweet was "to address *years* of rumors about his sexual harassment"¹³ (*emphasis added*).

⁸ Rial and Toye Brief, pp. 4 and 22-23.

⁹ CR Vol. 2, p. 626.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Rial and Toye Brief, p.4.

While Vic does apologize “to anyone who ever felt my interaction with them was crossing a line,”¹⁴ Vic does not apologize for or admit to sexual assault, sexual harassment, or any other misconduct.

Additionally, the January 20, 2019, tweet shows that Vic did not, as claimed by Rial and Toye, insert himself into the controversy.¹⁵ Rather, the controversy was brought upon Vic without invitation.¹⁶ Vic’s denial of Rial and Toye’s accusations against him cannot fairly be interpreted as Vic “injecting himself into a controversy,”¹⁷ and therefore cannot be considered a limited purpose public figure.

Rial and Toye allege without evidence that Vic “had his fans attack Appellees online.”¹⁸ Rial and Toye invite this Court to arrive at this conclusion, by citing to an email sent by Chuck Huber, which does not state that he acted on Vic’s behalf.¹⁹ It is interesting that Rial and Toye fail to acknowledge Vic’s direct statement to his fans via a published tweet wherein Vic tells his fans that he does not condone such behavior and calls upon anyone doing it to stop.²⁰

Despite Rial and Toye’s repeated attempts to draw Nick Rekieta (“Rekieta”) into this suit, he has no relevance to any issues in this suit.²¹ Rial and Toye offered

¹⁴ CR Vol. 2, p. 626.

¹⁵ Rial and Toye Brief, pp. 22-23.

¹⁶ *Id.*

¹⁷ CR Vol. 2, p. 626.

¹⁸ Rial and Toye Brief, p. 4

¹⁹ Rial and Toye Brief, pp. 8-9; CR Vol. 2, p. 622.

²⁰ CR Vol. 1, pp. 103-104.

²¹ Rial and Toye Brief, pp. 7-8.

no evidence that Rekieta acted or spoke on Vic's behalf, and there is no evidence that Vic asked Rekieta to start or maintain a GoFundMe. Although Rekieta may have a degree of prominence, the fact that he vocally criticizes Rial and Toye speaks to the incredulous nature of Rial and Toye's accusations and not to "Vic's status as a public figure."²²

Rial and Toye make much of the affidavits Vic submitted to the trial court that were improperly notarized.²³ Rial and Toye refer to the documents as "sham affidavits [...] which were not executed in the physical presence of the notary."²⁴ Rial and Toye would have this Court believe that Mignogna withdrew the affidavits "to avoid the significant consequences involved with three fraudulent notarizations."²⁵ There is nothing to support that Vic or his counsel could face "significant consequences" for filing evidence not signed in the presence of a notary. The documents were sworn under oath and stated facts known within the declarants' personal knowledge.²⁶ The declarant's statements were true and not only does nothing in the record reflect otherwise, none of the parties challenged the veracity of the facts included in the affidavits.

²² Rial and Toye Brief, p. 7; CR Vol. 1-6 and 1st-3rd Supp. and RR Vol. 1-5.

²³ Rial and Toye Brief, p. 7.

²⁴ Rial and Toye Brief, pp. 11 and 30-31.

²⁵ Rial and Toye Brief, p. 30.

²⁶ CR Vol. 5, pp. 2540-2542, 2556-2564 and 2566-2571.

Importantly, even if the trial court did not consider Vic's affidavits and attachments to his Second Amended Petition, the trial court was still presented with the attachments included in each Appellees' Texas Citizen's Participation Act ("TCPA") motions.²⁷ Rial and Toye's own TCPA evidence includes their published statements accusing Vic of sexual assault.²⁸ Rial and Toye also included Vic's statement specifically denying those allegations in his tweet of January 20, 2019.²⁹ In their enthusiasm to disparage Vic, Rial and Toye offered statements and documents showing that Vic was excluded from anime conventions following the accusations against him.³⁰

Rial and Toye's suggestion that Vic had a poor reputation are based on two affidavits containing baseless and false allegations from John Prager and Faisal Ahmed.³¹ The affidavits fail to establish that Vic had a poor reputation in the general public, or even in the anime community.³² The baseless and false accusations do not, in and of themselves, support the assertion that Vic had a poor reputation in the general public. If anything, the affidavits show that Vic was routinely invited to conventions, which strongly implies that he had a good reputation.³³

²⁷ CR Vol. 1, pp. 34-201; CR Vol. 2, pp. 398-1032.

²⁸ CR Vol. 2, pp. 398-926.

²⁹ CR Vol. 2, p. 626.

³⁰ CR Vol. 2, pp. 400, 411, 575, 601, 613 and 914-915.

³¹ CR Vol. 2, pp. 715-716 and 768-770.

³² *Id.*

³³ *Id.*

It bears repeating that Vic denies the accusations.³⁴ Rial and Toye ask this Court to simply accept their accusations as true and completely disregard Vic's statement denying the accusations.³⁵

³⁴ CR Vol. 1, pp. 130-131; Vol. 2, pp. 411, 627-628; Vol. 4, pp. 1351-52, 1498-99, 1503, 1618, 1624; Vol. 5, pp. 2566-2567.

³⁵ CR Vol. 2, pp. 6, 24-25, 38-42 and 52-54; *City of Keller v. Wilson*, 168 S.W.3d 802, 820-21 (Tex. 2005) ("It is the province of the jury to resolve conflicts in the evidence.").

SUMMARY OF THE ARGUMENT

Vic maintains and urges that his Appellant's Brief sufficiently demonstrates harmful error in the trial court's grant of Appellees' motions.³⁶ Despite Rial and Toye's assertions, Vic does not request "this Court to do his job for him."³⁷ Regardless, Rial and Toye did Vic's job for him in the trial court by introducing evidence that constitutes clear and specific evidence establishing a prima facie case for each of Vic's causes of action.³⁸ It is no exaggeration to state that a prima facie case for each cause of action can be made *solely* with the evidence filed by Rial and Toye in this case..

Vic brought this lawsuit to show that the accusations of sexual and criminal misconduct – which constitute defamation *per se*³⁹ – made publicly against him were false.⁴⁰ Rial and Toye's arguments have repeated *ad nauseum* that Vic brought this suit to silence Rial and Toye.⁴¹ Yet they produce no evidence for this proposition. Vic never sought an injunction to prevent Rial and Toye from continuing to publish their false and defamatory statements though he would have been entitled to such relief. Indeed, *the defamatory statements Vic complained of were made and published weeks or even months before Vic filed suit.* Also, Rial

³⁶ Appellant's Brief, pp. 1-48.

³⁷ Rial and Toye Brief, p. 15.

³⁸ CR Vol. 2, pp. 398-926; Vol. 3, pp. 1124-1151.

³⁹ Allegations of sexual misconduct and criminal behavior are defamation *per se*. *In re Lipsky*, 460 S.W.3d 579, 592 (Tex. 2015).

⁴⁰ CR Vol. 4, p. 1539: 9-18.

⁴¹ Rial and Toye Brief, pp. xiii, 9 and 15.

and Toye's lies have been debunked. Rial and Toye tried to convince the world that hundreds of victims would come forward and that Vic would be charged with and convicted of crimes.⁴² Not surprisingly, the hundreds of victims never emerged and Vic has not faced any criminal charges. Whether Rial and Toye continue to repeat their baseless lies is of little consequence to Vic at this point. Rial and Toye are, however, liable to Vic for the damage that their statements have caused Vic.

ARGUMENT & AUTHORITIES

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

The trial court's order includes a specific finding that Vic is a public figure.⁴³ Based on its finding that Vic was a public figure, it erroneously required Vic to prove actual malice.⁴⁴ Considering all the evidence before the trial court, Vic should have been required to show only negligence.⁴⁵ For purposes of a defamation claim, claimants are either a private figure, general purpose public figure, or limited purpose public figure.⁴⁶ 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 (*emphasis added*)"⁴⁷ Limited purpose public figures are

⁴² CR Vol. 4, pp. 1333-1346, 2109, 2131, 2138-2139, 2176, 2183 and 2214

⁴³ CR Vol. 6 p. 3227.

⁴⁴ *In re Lipsky*, 460 S.W.3d at 592; 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)).

⁴⁵ *In re Lipsky*, 460 S.W.3d at 592.

⁴⁶ *Klantzman v. Brady*, 312 S.W.3d 886, 904 (Tex. App.—Houston [1st Dist.] 2009, no pet.)

⁴⁷ *Id.*

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”, and who “thrust [themselves] into the vortex of [a] public issue ... [or] engage the public's attention in an attempt to influence its outcome.”⁴⁸

Rial and Toye’s evidence fails to establish that Vic is either a general purpose or limited purpose public figure. To support their contention, Rial and Toye direct this Court to the following: (1) Vic’s statement in his pleadings; (2) Vic’s number of Twitter followers; (3) the existence a “fan club”; and (4) the fact that an individual, Nick Rekieta, started a GoFundMe without Vic’s knowledge.⁴⁹ Additionally, Rial and Toye erroneously claim that Vic has waived any objection to the trial court’s finding that Vic is a public figure.⁵⁰

This Court’s recent opinion in *Hoskins v. Fuchs* resolves two of Rial and Toye’s arguments.⁵¹ 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.⁵² Hoskins sought dismissal

⁴⁸ *Id.*

⁴⁹ Rial and Toye Brief, pp. 21-23; contradicting the earlier claim that Vic asked Rekieta to start the GoFundMe.

⁵⁰ Rial and Toye Brief, pp. 21-23.

⁵¹ *Hoskins v. Fuchs*, 517 S.W.3d 834, 841 (Tex. App.—Fort Worth 2016, pet. denied).

⁵² *Id.*

under the TCPA. Fuchs conceded at trial and maintained on appeal that she was a public figure.⁵³ Despite Fuchs' concession at trial, this Court found that Fuchs was not a public figure, noting that the issue was a question of law that could not be conceded or judicially admitted.⁵⁴ Thus, Vic's statement in his pleadings does not concede that he is a public figure, nor could he have waived any objection.

The fact that Vic uses a Twitter account does not make him a public figure. Finding as such would make every user of social media, virtually everyone, a public figure. Rial and Toye offer no explanation of how 113,000 Twitter followers equates to "pervasive fame for all purposes and in all contexts."⁵⁵ Even if having a great number of Twitter followers could, in itself, make someone a public figure, Rial and Toye have offered no explanation as to how or why 113,000 would meet that threshold.

The Risembool Rangers, referred to by Rial and Toye as Vic's "fan club," do not make Vic a public figure. Rial and Toye's characterization of this group is misleading and unsupported by evidence. The only evidence in the record is the group was formed by two individuals ten years ago.⁵⁶ Nothing suggests that this

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *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).

⁵⁶ CR. Vol. 4, p. 1607:17-23.

group has attained such significant prominence in the public as to confer public figure status on Vic.

Despite Rial and Toye's obsession with the GoFundMe, it does not have any bearing on the issues before this Court (nor was it relevant to the trial court).⁵⁷ Vic testified that he had nothing to do with the creation of the GoFundMe and did not receive funds from it.⁵⁸ Because Vic didn't create the GoFundMe, its existence cannot support a conclusion that he has taken some action to assume special prominence in the resolution of a public question.⁵⁹

The evidence did not show that Vic was even a limited purpose public figure. Rial and Toye do not provide any evidence that people other than the immediate participants in this controversy are likely to feel the impact of its resolution.⁶⁰ Further, the evidence clearly shows that Vic did not seek out this controversy.⁶¹ Rial and Toye's argument fails to acknowledge the irrefutable fact that this controversy was thrust upon Vic, and not sought by him.⁶²

Vic did have conversations with individuals over the internet.⁶³ However, nothing shows a great number of people were involved in this matter. Rial and

⁵⁷ Rial and Toye Brief, p. 27.

⁵⁸ CR Vol. 2, p. 629.

⁵⁹ *Id.*

⁶⁰ *WFAA-TV v. McLemore*, 978 S.W.2d at 571.

⁶¹ CR Vol. 1-5 and 1st-3rd Supp.; RR Vol. 1-5.

⁶² CR Vol. 2, p. 1005:3-5.

⁶³ CR Vol. 2, pp. 463-464 and 687.

Toye falsely claim these conversations were intended “to stir [Vic’s fans] up to defend him,”⁶⁴ However, the record shows that Vic asked convention participants to share their positive experiences and “counter the lies and negativity.”⁶⁵ Aside from the fact that Vic’s private online conversations occurred *after* and *in response to* Vic being brought into this controversy involuntarily, merely asking people to share their positive experiences does not rise to the level of involvement in a public issue necessary to determine Vic is a limited purpose public figure.⁶⁶

Additionally, Vic’s January 20, 2019 and February 13, 2019 tweets do not reflect any attempt by Vic to insert himself into any controversy, nor are they admissions as to any accusations against him.⁶⁷ As noted above, the January 20, 2019 tweet states “Any allegations of sexual harassment, sexual assault, or, most disturbingly, pedophilia are COMPLETELY AND UTTERLY FALSE.”⁶⁸ The February 13, 2019 tweet expresses Vic’s love for his work and his appreciation for his colleagues.⁶⁹ These statements were to Vic’s followers on social media, and not to the press.⁷⁰ The proper inquiry regarding whether Vic is a limited purpose public figure must center around whether he inserted himself into the public discussion

⁶⁴ Rial and Toye Brief, p. 22.

⁶⁵ CR Vol. 2, p. 687.

⁶⁶ *Id.*

⁶⁷ CR Vol. 2, pp. 626 and 628.

⁶⁸ CR Vol. 1, pp. 68-69 and Vol. 2, p. 626.

⁶⁹ CR Vol. 1, p. 130 and Vol. 2, p. 628.

⁷⁰ *Id.*

and he did not.⁷¹ Rial and Toye ask that this Court to hold that the mere act of publicly denying a public accusation makes Vic a limited purpose public figure.

Similarly, Vic's statements in the io9 article cannot be construed as Vic inserting himself into any controversy.⁷² Vic only states that he used to hug people he met at conventions, but will no longer do so.⁷³ The article was not published in any magazine, as represented by Rial and Toye, but is an internet blog.⁷⁴ Vic's statements to io9 do not make him a limited purpose public figure because Vic's statements in no way support the contention that Vic invited press and public attention.⁷⁵

Rial and Toye's statements on Twitter accusing Vic of sexual assault and misconduct cannot make Vic a public figure. In *Wolston*, 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

⁷¹ *Hoskins v. Fuchs*, 517 S.W.3d at 841.

⁷² CR Vol. 2, p. 613.

⁷³ CR Vol. 2, p. 613.

⁷⁴ CR Vol. 2, p. 613.

⁷⁵ Cf. *Mohamed v. Ctr. for Sec. Policy*, 554 S.W.3d 767, 775 (Tex. App.—Dallas 2018, pet. denied) (Inviting press and public attention on several occasions and in several different ways during the course of public debate made the father of an arrested child a limited purpose public figure).

them by virtue of being drawn in.”⁷⁶ Vic testified, “I did not ask for any of this.”⁷⁷

“I was living my life and suddenly out of nowhere this stuff starts. I merely responded to it.”⁷⁸ There is no evidence suggesting that Vic in any way injected himself into this controversy.

B. Even without considering Vic’s Second Amended Petition and its attachments, sufficient evidence was properly before the court to support each of Vic’s claims.

Even if the trial court properly refused to consider Vic’s Second Amended Petition and its attachments, the trial court did consider all the evidence offered into evidence by Appellees. This Court must determine if the evidence the trial court *did consider* constituted clear and specific evidence of each of Vic’s causes of action.⁷⁹ Rial and Toye along with Jamie Marchi (“Marchi”) and Funimation, LLC (“Funimation”) offered abundant evidence with their TCPA motions.⁸⁰ Rial and Toye offered Vic’s January 20, 2019, tweet specifically denying the accusations of sexual assault and sexual harassment.⁸¹ Vic’s statement on Twitter—that any accusations of sexual assault and sexual harassment are false—is *prima facie* evidence of exactly that.

⁷⁶ *Wolston v. Reader’s Digest Ass’n*, 443 U.S. 157, 166 and 169 (1979).

⁷⁷ CR Vol. 4, p. 1416:15.

⁷⁸ CR Vol. 2, p. 1005:3-5.

⁷⁹ *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.).

⁸⁰ CR Vol. 1, pp. 34-201 and Vol. 2 pp. 398-1032.

⁸¹ CR Vol. 1, pp. 68-69 and Vol. 2, p. 626.

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

Rial and Toye accused Vic of sexual assault.⁸² Rial claims to have been personally assaulted and harassed by Vic, and Toye repeats her accusations and adds others.⁸³ Because of these accusations, Vic lost existing and future business as a voice actor.⁸⁴

Vic's defamation claim does not fail because it purportedly fails to provide the full context of the statements.⁸⁵ Any "statement is construed as a whole in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive it."⁸⁶ As such, Rial's and Toye's (as well as Marchi's and Funimation's) statements about Vic must be viewed through the prism of how a person of ordinary intelligence would perceive each individual statement.⁸⁷

Rial admits her publication, content, and surrounding circumstances of her defamatory statements. Rial admitted that she made the accusations against Vic on Twitter to address Vic and the circumstances surrounding his loss of employment with Funimation and Roosterteeth, and Funimation's private investigation.⁸⁸ Rial claims her statement (where Funimation announced termination of Vic's

⁸² CR Vol. 2, pp. 794-797 and 810-812; CR Vol. 4, pp. 1831-1834 and 2105-2446.

⁸³ *Id.*

⁸⁴ CR Vol. 2, p. 198:1-5 and 6-20.

⁸⁵ Rial and Toye Brief, p. 34.

⁸⁶ *Hoskins v. Fuchs*, 517 S.W. 3d at 840.

⁸⁷ *Id.*

⁸⁸ Rial and Toye Brief, p. 25.

employment and she states, “he is the legal definition of harassment”) on February 11, 2019 is out of context.⁸⁹ What Rial fails to address is how the person of ordinary intelligence would perceive her statement.⁹⁰ She then tries to argue that calling Vic a sexual predator and accusing him of sexual assault is metaphor or hyperbole.⁹¹ The terms sexual predator and sexual assault are clear, unequivocal terms that Rial meant to be derogatory and to damage Vic’s reputation, which is how a person of ordinary intelligence would likely perceive such statements. In addition, Texas law provides that accusations of sexual misconduct are defamation *per se*, which defeats the claim that these statements are hyperbole or opinion.⁹²

Toye admitted his publication, the content and surrounding circumstances of his tweets.⁹³ The trial court was presented with evidence Toye made numerous statements about Vic, on various dates on Twitter accusing Vic of sexually assaulting hundreds of people and being a sexual predator.⁹⁴ Toye also tries to argue that his defamatory *per se* statements about Vic do not show the full context and thus cannot be considered by this Court. Like Rial’s statements, Toye’s statements go well beyond hyperbole or metaphor because they clearly allege

⁸⁹ Rial and Toye Brief, p. 35.

⁹⁰ Rial and Toye Brief, pp. 1-56.

⁹¹ Rial and Toye Brief, p. 37.

⁹² *In re Lipsky*, 460 S.W. 3d at 587.

⁹³ CR Vol. 2, pp. 810:5-20, 811 and 812:2-10.

⁹⁴ CR Vol. 4, pp. 1791: 19-23 and 25, 1792:1, 2109, 2124, 2127, 2131-2132, 2138-2139, 2176, 2183, 2214, 2216-2218, 2292, 2316.

specific acts of sexual assault and sexual harassment and because they constitute defamation *per se*.

Vic's reputation was not impugned until the defamatory tweets made by Rial and Toye. Rial and Toye claim that Vic had a bad reputation prior to their statements and that hundreds of other sources published his purported history of misconduct.⁹⁵ But the evidence establishes that, until Rial and Toye's defamatory and false accusations and those of Marchi and Funimation, Vic had been employed as a voice actor at Funimation for many years⁹⁶, attended numerous conventions⁹⁷ and lived his life without controversy.⁹⁸ Further, Rial and Toye produced no news article printed about any alleged misconduct by Appellant (unlike the ten years of negative press in *Swate*) prior to January 25, 2019, two days after Toye published statements accusing Appellant of sexual assault.⁹⁹

Vic's repeated statements claiming his innocence in face of the accusations against him is clear and specific evidence that he did not commit the acts alleged by Rial and Toye.¹⁰⁰ Taken as true, Vic's statements are also clear and specific evidence that Rial and Toye published their statements with malice. Vic's denials create a fact question that was required to be resolved in his favor for purposes of

⁹⁵ Rial and Toye Brief, pp. 5 and 38-39, CR Vol. 2, pp. 525, 599.

⁹⁶ CR Vol. 4, p. 1827.

⁹⁷ 3rd Supp. CR, p. 33.

⁹⁸ CR Vol. 2, p. 1005:3-5.

⁹⁹ *Swate v. Schiffers*, 975 S.W.2d 70 (Tex. App.—San Antonio 1998, pet. denied).

¹⁰⁰ CR Vol. 1, pp. 68-69 and 130 and Vol. 2, pp. 626 and 628.

the TCPA motion.¹⁰¹ Further, Toye testified he would believe anything on the internet whether true or not about Vic¹⁰² so his statements about Vic committing hundreds of accounts of sexual assault based on unverified and unauthenticated internet sources were made with *admitted* disregard for the truth.

Accordingly, clear, and specific evidence was before the trial court as to each element of Vic's defamation claim.

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

Rial and Toye again fail to acknowledge that their own evidence supports Vic's causes of action. The trial court received evidence Rial and Toye participated in the Funimation investigation and defamatory online posts and articles that led to lost business for Vic. Rial and Toye claim Vic never showed that Funimation terminated him because of what Rial communicated.¹⁰³ However, Tammy Denbow's affidavit contradicts this false assertion.¹⁰⁴ Funimation employed Vic until Rial and Toye participated in the Funimation investigation¹⁰⁵ which interfered with his employment contract with Funimation and destroyed any prospect of future employment with Funimation. Rial and Toye also participated in the

¹⁰¹D Magazine Partners, L.P. v. Rosenthal, 529 S.W.3d 429, 440 fn.9 (Tex. 2017).

¹⁰²CR Vol. 4, pp. 190:8-25 and 191:1.

¹⁰³ Rial and Toye Brief, p. 45.

¹⁰⁴ CR Vol. 1, p. 60.

¹⁰⁵ Rial and Toye Brief, pp. 25 and 27.

creation of at least one defamatory online article¹⁰⁶ contrary to their blatant untruthful assertion to this Court.¹⁰⁷ Toye called for conventions to cancel Vic's appearances¹⁰⁸ and Vic showed conventions were cancelled after these statements.¹⁰⁹ As noted below, Rial and Toye also contacted the convention owner Chris Slatosch and encouraged him to terminate Vic.¹¹⁰

Accordingly, clear, and specific evidence was before the trial court as to each element of Vic's tortious interference claims.

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

Rial and Toye incorrectly assert Vic failed to establish by clear and specific evidence a prima facie case for civil conspiracy. Vic showed that Rial and Toye called convention owner Chris Slatosch and discussed Vic's alleged sexual misconduct, claiming he was about to be charged with a crime, threatening to withdraw sponsorship for the convention, threatening to get other voice actors to breach their contracts and threatening that Rial would breach her contract with Slatosch's company unless Slatosch breached the contract with Vic.¹¹¹ Civil

¹⁰⁶CR Vol. 4, pp. 1790:7-16, 1791:19-23 and 1792:1.

¹⁰⁷ Rial and Toye Brief, p.46.

¹⁰⁸ CR Vol. 4, p. 1798:3-5.

¹⁰⁹ RR Vol. 4, p. 104:3-7.

¹¹⁰ CR Vol. 4, pp. 1333-1346 and 1798:3-5.

¹¹¹ CR Vol. 4, pp. 1333-1346 and 1798:3-5.

conspiracy evidence cannot be any clearer or specific than the situation shown by Vic.

C. Rial and Teye did not establish their affirmative defenses by any quantum of evidence.

1. Rial and Teye did not establish a defense under the Communications Decency Act

Regarding the Communications Decency Act (“CDA”), an affirmative defense added by Rial and Teye after the deadline to file their Motion to Dismiss,¹¹² Rial and Teye repeat their previous argument regarding defamation to attempt to convince this Court that the Communications Decency Act (CDA) protects all the tweets made by Rial and Teye.¹¹³ However, in citing to tweets made by other parties, Rial and Teye ignore their multiple defamatory per se statements which are not protected by the CDA and which provide the basis for the lawsuit. Essentially, Rial and Teye do not establish how the CDA applies to their own personal defamatory per se arguments. The trial court did not seem convinced this was a valid affirmative defense.¹¹⁴

2. Rial and Teye did not establish qualified privilege.

¹¹² CR Vol. 3, pp. 1056-1057.

¹¹³ Rial and Teye Brief, pp. 50-54.

¹¹⁴ RR Vol. 3, pp. 74-77.

Rial and Toye argue they are entitled to dismissal of the claims based on the affirmative defense of qualified privilege.¹¹⁵ However, Monica published information from the confidential Funimation investigation on Twitter¹¹⁶ defeating her claim of qualified privilege.

3. Rial and Toye did not establish a previously diminished reputation.

Ironically, for the affirmative defense of diminished reputation, Rial and Toye point to one of the affidavits they claim are fraudulent to support their defense.¹¹⁷ Therefore the affidavits should be considered for all purposes. They also falsely assert that Vic admits there had been persistent rumors of pedophilia and sexual assault about him for years¹¹⁸. Vic admitted no such thing. Admitting “social media attacks have happened in the past” is not the same as admitting to Vic being the subject of rumors of pedophilia or sexual assault. The clear undeniable evidence before the trial court demonstrated that Vic had a long term career with multiple studios, multiple voice acting roles and regularly attended conventions until Rial and Toye began their campaign to impugn his reputation and bring shame and contempt upon him.

¹¹⁵ Rial and Toye Brief, p.54.

¹¹⁶ CR Vol. 2, pp. 794-797.

¹¹⁷ CR Vol. 4, pp. 1307-1315.

¹¹⁸ Rial and Toye Brief, p. 55.

Conclusion & Prayer

Appellant has shown in his reply that Rial and Toye misrepresented numerous key facts to this Court, raised several fact issues not resolved in favor of Vic as required by the TCPA, showed clear and specific evidence of their own defamation and defamation *per se*, tortious interference with existing contracts, tortious interference with prospective business relations and civil conspiracy.

Therefore, Appellant prays this Court will reverse and vacate the trial court's October 4, 2019 order and its *Final Judgment*, remand this matter back to the trial court for trial, and grant him such other and further relief this Court deems equitable or just.

Respectfully submitted,
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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

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