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

BRIEF OF REKIETA MEDIA, LLC AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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Identity of Parties, Amicus, and Counsel

The Parties and their counsel are correctly identified in the parties' briefs.

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Statement of Interest of Amicus Curiae

Amicus Curiae is Rekieta Media, LLC, a Texas small business developing multimedia content for internet distribution. As a business with its primary product delivered online, Amicus has both personal and professional interests in the application of the Texas Citizen's Participation Act (TCPA). Amicus frequently publishes statements concerning the State of Texas, its citizens, and its businesses; Amicus is also concerned about how online statements might impact its own reputation and business operations within the state.

Stated bluntly, if the TCPA precludes litigation as an avenue of recovery for a plaintiff when, as they have here, the pleadings and evidence clearly establish "the facts of when, where, and what was said, the defamatory nature of the statements, and how they damaged the plaintiff[,]" then defamation and related torts may be effectively nullified in the state of Texas.[1] Further, the District Court did not consider, but did not strike, the Second Amended Petition.[2] This failure raises serious questions about procedural defects which prejudicially impact Appellant as well as future litigants who may be subject to the TCPA. Amicus holds the position that the District Court's errors, stated in Appellant's brief as well as below, led to an improper application of the TCPA which chills potential litigant's "rights [] to file meritorious

[1] In re Lipsky, 460 S.W.3d 579, 591 (Tex. 2015).
[2] 6 CR 3225

lawsuits for demonstrable injury."[3]

Amicus was paid no fee and has no direct financial interest in the outcome.

[3] Tex. Civ. Prac. & Rem. Code § 27.002 (2018)

Introduction

The Texas Citizen's Participation Act popularly and commonly serves as a bulwark against malicious and frivolous litigation designed to stifle free speech and public participation. However, nestled in the same purpose statement of Texas Civil Practice and Remedies Code Section 27.002 is an important and oft overlooked command to protect the rights of a person to file meritorious lawsuits for demonstrable injury.

This case is meritorious. The Appellant has demonstrable injury. In fact, the pleadings, motions, and submitted affidavits of all parties are replete with examples of injury and what caused it. The Appellant established "the facts of when, where, and what was said, the defamatory nature of the statements, and how they damaged the plaintiff[.]"[4] The District Court's decision should be overturned and the case remanded for further proceedings.

Importantly, there is a legal question surrounding the live pleading and accompanying evidence that must be resolved. According to the Rules of Civil Procedure and the relevant case law, Appellant's Second Amended Petition, which was not struck, should be the live and operative pleading but, the trial court chose to not consider it. This is prejudicial to not only this Appellant, but also any future plaintiffs subject to a TCPA motion to dismiss.

[4] In re Lipsky, 460 S.W.3d 579, 591 (Tex. 2015).

Complicating the issue with the Second Amended Petition is the improper construing of the parties' Rule 11 Agreement. The trial court extended the scope of the Rule 11 Agreement beyond the direct meaning of the language. Future litigants must have faith in the court's ability to properly read and enforce Rule 11 Agreements.

Record References

In this brief, "CR" Refers to the clerk's record, and "RR" refers to the reporter's record.

Issues Presented

The Parties have filed substantial briefs covering multiple issues. This Amicus Brief will cover one main issue:

1. Did the lower Court err in excluding the Second Amended Petition and other evidence for the purpose of the TCPA?

Statement of Facts

Appellant Victor Mignogna, as well as Appellees Jamie Marchi and Monica Rial, are voice actors who give English dubs to Japanese cartoons. Appellee Funimation Productions, LLC is an American distributor of Japanese Cartoons and other merchandise who employed Vic, Jamie, and Monica. Appellee Ron Toye is allegedly engaged to Monica Rial but otherwise not apparently relevant to the English-dubbing industry.[5]

Starting in January of 2019, Appellees Rial, Toye, and Marchi began a smear campaign accusing appellant of various criminal acts (such as assault, harassment, and sexual assault) as well as other sexual and professional misconduct.[6] In February, Appellee Funimation made a series of three tweets about their termination of Vic Mignogna following an investigation. The gist of these tweets was understood by readers of ordinary intelligence, and Appellee Rial, as proof that Appellant was terminated due to sexual misconduct and harassment.[7]

Appellant Toye leveraged his alleged relationship with Rial to claim inside knowledge of the allegations and the investigation, and tweeted hundreds of accusations of sexual misconduct and sexual crimes about Appellant.[8]

On January 20th, Appellant unequivocally stated "any allegations of sexual

[5] 5 CR 2467-2469
[6] 5 CR 2469-2476
[7] 5 CR 2474
[8] 5 CR 2722-2807

harassment, sexual assault, or most disturbingly, pedophilia are COMPLETELY AND UTTERLY FALSE."[9]

Appellees Rial and Toye would proceed to contact a convention (Kamehacon) and repeat the accusations to the convention owner, Chris Slatosch. Toye and Rial threatened that if Slatosch did not cancel Appellant's appearance at the convention, that they would withhold a sponsorship and that Rial would breach her appearance contract and convince others to breach their contracts as well.[10] Slatosch did cancel Appellant's appearance due to the actions of Appellees.[11] Slatosch would eventually reinvite Appellant after considerable expense and under new contract terms that were unfavorable to Appellant.[12] Appellee Rial would go on to cancel her appearance, as promised, and induce other attendees to do the same.[13]

Throughout the course of the smear campaign by the Appellees, Appellant would have twelve convention appearance contracts cancelled.[14] The existing record clearly establishes what was said, by whom, where, and when they said it as well as the resulting damage.

Procedural History

The procedural history in this case is voluminous, and this brief will focus

[9] 5 CR 2478
[10] 5 CR 2479
[11] *Id.*
[12] 5 CR 2480
[13] *Id.*
[14] 5 CR 2469-2472; 5 CR 2568

only on the relevant aspects leading up to the TCPA hearing and through the Final Judgment.

On July 1, 2019, Appellee Funimation would file its motion to dismiss under the TCPA; Appellees Marchi, Rial, and Toye would similarly file motions to dismiss on July 19, 2019. Appellant and Appellees would file competing motions to strike, none of which would be ultimately granted by the court. Importantly, parties would enter into a Rule 11 agreement on August 6, 2019 regarding a continuance of the TCPA hearing and a timetable for motions and objections to the TCPA for all parties involved prior to the hearing.[15]

Appellant agreed as follows, "Plaintiff will file his RESPONSES TO THE TCPA MOTIONS and any objections/motions to strike on or before August 30, 2019."[16] (emphasis added)

Appellees agreed that their replies and any evidentiary objections would be filed on or before September 3, 2019 and the hearing was moved to September 6, 2019.[17]

Appellant encountered technical difficulties and filed their response to the TCPA motions just after midnight on August 31, 2019; they would request leave of the court for the late filing and the court determined the response was timely filed.[18]

[15] 3 CR 1188-1189
[16] 3 CR 1188
[17] *Id.*
[18] 6 CR 3224-3225

Appellant filed a Second Amended Petition on September 3, 2019.[19] The court heard arguments over the Second Amended Petition at the September 6, 2019 hearing as Appellees moved to strike.[20] The court did not rule on the motion to strike at the hearing stating instead, "I'll deal with that later."[21]

The hearing proceeded on the First Amended Petition with the court stating, "They're not using that one, they're using the old one for this hearing."[22] In the October 4, 2019 Order Granting [Appellees'] TCPA motions, the court stated that it "did not consider evidence submitted after the agreed upon deadline in the Rule 11 agreement…"[23] The court had still not ruled on the motion to strike the Second Amended Petition.

Appellant filed his notice of appeal on October 24, 2019.

Finally, on November 25, 2019, the court issued its Final Judgment, closing with the statement, "All other relief requested and not expressly granted herein is hereby denied. This judgment finally disposes of all parties and all claims and is appealable."[24] Despite multiple motions to strike and objections to evidence before the court, the court never ruled to strike or sustained any objection to any evidence submitted by any party.

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[19] 5 CR 2467
[20] 3 RR 7-25
[21] 3 RR 25
[22] 3 RR 12
[23] 6 CR 3225
[24] 2 Supp. CR 551; 1 Supp. CR 7

Summary of the Argument

The court's failure to consider the Second Amended Petition without striking is a reversible error. The court's improper application of the Rule 11 agreement precluded evidence without striking said evidence and is reversible error. The court's refusal to consider clear and specific evidence and resolve factual matters in favor of the Appellant is a reversible error.

The Second Amended Petition is the legally operative petition in this case. The court correctly states "if I don't strike [the Second Amended Petition] then we're going forward on the second amended petition, so don't we need to deal with that first?"[25] The court failed to strike the Second Amended Petition but proceeded with the TCPA hearing on the First Amended Petition in violation of Tex. R. Civ. P. 65. In fact, the court expressly denied the relief sought by Appellees' motion to strike the Second Amended Petition in its November 25, 2019 Final Judgment.[26]

The court improperly applied the August 6, 2019 Rule 11 agreement to preclude evidence and the Second Amended Petition despite the plain language of the Rule 11 Agreement. The Rule 11 Agreement concerns specific legal documents: "[Appellant's] responses to TCPA motions," "[Appelant's and Appellees'] objections/motions to strike," "[Appellees'] replies," and

[25] 3 RR 9
[26] 2 Supp. CR 551; 1 Supp. CR 7

"evidentiary objections in support of [Appellees'] TCPA motions." The Rule 11 agreement does not contemplate amended pleadings or supplemental evidence, and the court is obligated to take definite legal meanings within Rule 11 agreements and construe them as a matter of law.[27]

Finally, the court refused to consider, without striking, voluminous evidence presented by both Appellant and Appellees establishing a prima facie case for each element of Appellant's claim.

Argument & Authorities

Appellant's Second Amended Petition is the legally operative document, and failure to consider the Second Amended Petition is reversible error by the lower court. Tex. R. Civ. P. 63 provides that:

> Parties may amend their pleadings, respond to pleadings on file of other parties, file suggestions of death and make representative parties, and file such other pleas as they may desire by filing such pleas with the clerk at such time as not to operate as a surprise to the opposite party; provided, that any pleadings, responses or pleas offered for filing within seven days of the date of trial or thereafter, or after such time as may be ordered by the judge under Rule 166, shall be filed only after leave of the judge is obtained, which leave shall be granted by the judge unless there is a showing that such filing will operate as a surprise to the opposite party.[28]

[27] Shamrock Psychiatric Clinic, P.A. v. Texas Department of Health and Human Services, 540 S.W.3d 553, 560-561 (Texas 2018)
[28] Tex. R. Civ. P. 63

Tex. R. Civ. P. 65 states:

> Unless the substituted instrument shall be set aside on exceptions, the instrument for which it is substituted shall no longer be regarded as a part of the pleading in the record of the cause, unless some error of the court in deciding upon the necessity of the amendment, or otherwise in superseding it, be complained of, and exception be taken to the action of the court, or unless it be necessary to look to the superseded pleading upon a question of limitation.[29]

Appellant filed his Second Amended Petition on September 3, 2019.[30] Appellees filed, among other things, a motion to strike Appellant's Second Amended Petition on September 3, 2019.[31] Quite simply, the trial court refused to strike the Second Amended Petition[32] and further expressly denied the relief requested in the motion under effect of its Final Judgment issued on November 25, 2019.[33]

It is clear from the plain language of Rule 65 and well established in case law that in absence of being stricken, a timely filed Amended Pleading is the operative instrument and the prior pleadings are not before the court.[34] Appellees may argue, and indeed did at the trial court, that the petition was

[29] Tex. R. Civ. P. 65
[30] 5 CR 2467
[31] 6 CR 3010
[32] 3 RR 25
[33] 2 Supp. CR 551; 1 Supp. CR 7
[34] Denton County Elec. Co-op., Inc. v. Hackett, 368 S.W.3d 765, 773 (Tex. App.—Fort Worth 2012, pet. denied); Elliott v. Methodist Hosp., 54 S.W.3d 789, 793 (Tex. App.—Houston [1st Dist.] 2001, pet. denied); United Oil & Minerals, Inc. v. Costilla Energy, Inc., 1 S.W.3d 840, 843 (Tex. App.—Corpus Christi 1999, pet. dism'd)

untimely filed under Rule 63.[35] The validity of that argument will be addressed below, but it is critical to restate that despite the argument being made in both motion and in open court, the trial court refused to rule on the motion or otherwise strike the Second Amended Petition at the hearing[36] or in the dismissal order[37] and ultimately denied striking the Second Amended Petition, or any other evidence objected to by any party in the Final Judgment by stating "[a]ll other relief requested and not expressly granted herein is hereby denied."[38]

Briefly addressing the argument that the Second Amended Petition was not timely filed under Rule 63: Rule 63 allows amendment without leave at any time so long as it is not within seven days of the date of trial or thereafter. Rule 63 allows amendment by leave and directs further that leave should be granted unless there is a showing that such filing will operate as a surprise to the opposite party.[39] "[Rule 63] applies when there is a trial on the merits of the case."[40] "[A] TCPA motion to dismiss is not a trial on the merits and is not intended to replace either a trial or the summary judgment proceeding[.]"[41] This

[35] 6 CR 3010; 3 RR 9-25
[36] 3 RR 25 "I'll deal with that later"
[37] 6 CR 3224-3225 [The court stating it did not "consider evidence" submitted after the Rule 11 deadline, but refusing to strike said evidence or rule on the motion]
[38] 2 Supp. CR 551; 1 Supp. CR 7
[39] Tex. R. Civ. P. 63
[40] Grand Prairie Hosp. Auth. v. Tarrant Appraisal Dist., 707 S.W.2d 281, 283 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.), overruled [on other grounds] by Tarrant Appraisal Dist. v. Tarrant Reg'l Water Dist., 547 S.W.3d 917 (Tex. App.—Fort Worth 2018, no pet.)
[41] Stallion Oilfield Services Ltd. v. Gravity Oilfield Services, LLC, 592 S.W.3d 205, 215 (Tex. App.—Eastland 2019, pet. denied); Krasnicki v. Tactical Entm't, LLC, 583 S.W.3d 279, 284 (Tex. App.—Dallas 2019, pet. denied); Davis v. Gulf Coast Auth., 11-19-00309-CV, 2020 WL 5491201, at *10 (Tex. App.—Eastland Sept. 11, 2020, no pet. h.)

court held in Grand Prairie that "[Rule 63]…does not apply…[to a matter] preliminary to a trial on the merits."[42] It should hold similarly here, where a TCPA motion to dismiss cannot, by nature of its function, be a trial on the merits.

It should similarly be emphasized that although Appellees raised the issue of surprise in their motion to strike[43] and in open court[44], the trial court did not strike the Second Amended Petition at all, nor did it mention rule 63 or surprise anywhere in its decision to "not consider" the live pleading.[45] Rather, the trial court cited the Rule 11 agreement as the impetus to ignore the live pleading and submitted evidence.[46] Surprise, in this case, would similarly not be applicable. The Second amended petition offered no new causes of action, nor did it introduce new parties. The district court mentions new evidence attached to the Second Amended Petition, but those were unsworn declarations replacing withdrawn, defective affidavits. In fact, the record shows that Appellees had already contemplated the original affidavits, which were substantially identical to the unsworn declarations meant to replace them.[47] Surprise simply is not possible if the Appellees were already aware of the evidence.

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[42] 707 S.W.2d 281, 283
[43] 6 CR 3010-3011
[44] 3 RR 7-25
[45] 6 CR 3224-3225
[46] 6 CR 3225
[47] 6 CR 3086-311; 6 CR 3178-3193

Both Appellees and the trial court misconstrued the Rule 11 agreement; relying on it to ignore the live pleading as well as submitted evidence was prejudicial to the Appellant and is reversible error. The trial court's adherence (or failure to adhere) to Rule 11 is reviewed under an abuse of discretion standard.[48] "[Abuse of discretion] is a question of whether the court acted without reference to any guiding rules or principles."[49] In the instant case, the district court went against the plain and definite language of the Rule 11 agreement, and attempted to give the agreement a greater effect than the parties intended.

It can certainly be argued that the district court attempted to follow a guiding rule or principle in its citation to a Texas Tech Law Review article.[50] This is, however, a faulty argument. The article does not cite to any existing authority regarding amended pleadings following the filing of a TCPA motion. Rather, the article cites to a case concerning the Texas Medical Liability Act, a completely different statute, and a California anti-SLAPP decision. There is no existing case law or statute precluding the amendment of a pleading subsequent to the filing of a TCPA motion to dismiss. There are existing rules surrounding Amended Pleadings, such as rule 63, which is discussed more thoroughly above.

[48] Breckenridge v. Nationsbank of Tex., N.A., 79 S.W.3d 151, 157 (Tex. App.—Texarkana 2002, pet. denied)
[49] *Id.*
[50] 6 CR 3225 (footnote 2)

"Rule 11 agreements are contracts relating to litigation and [the court] construe[s] them under the same rules as by contract."[51] The instant Rule 11 agreement contains specific statements of agreement reproduced in their entirety here:

> Under Rule 11 of the Texas Rules of Civil Procedure, this will confirm our agreement regarding scheduling matters related to Defendants' motions to dismiss under the Texas Citizens Participation Act. The parties agree to the following:
>
> 1. Plaintiff will file his responses to the TCPA Motions and any objections/motions to strike on or before August 30, 2019.
> 2. Defendants will file their replies and any evidentiary objections in support of their TCPA Motions and any objections/motions to strike on or before September 3, 2019.
> 3. Hearings for Defendants' motions to dismiss and any party's objections/motions to strike (to the extent the court determines that it needs to hear arguments on any party's objections/motions to strike) are set for September 6, 2019 at 10 am.
> 4. Plaintiff and Funimation agree that the sixty-day TCPA hearing deadline for Funimation is extended to September 6, 2019. Plaintiff agrees that the hearing on Plaintiff's motion to strike that is currently set for August 8, 2019, has been moved to September 6, 2019 as stated above.[52]

The language of the Rule 11 agreement is clear and unambiguous. The Rule 11 agreement pertains to specific legal filings, with the "responses to the

[51] Shamrock Psychiatric Clinic, P.A. v. Tex. Dep't of Health & Human Services, 540 S.W.3d 553, 560 (Tex. 2018)
[52] 3 CR 1188

TCPA Motions" being pertinent to this analysis. Responses to TCPA motions to dismiss are specific documents under the TCPA.[53] In fact, a response to a TCPA is set aside from an amended pleading in their differing treatment under the rules. "The TCPA…does not contain a deadline for filing a response to a motion to dismiss. In the absence of a rule, a trial court has discretion to determine the timeliness of a response."[54] Contrast this with Rule 63 governing amended pleadings, and we have different treatment for clearly different legal documents.

"[The court] do[es] not give a Rule 11 agreement greater effect than the parties intended."[55] All parties to this agreement are licensed, veteran attorneys in the state of Texas; there is no reason to doubt the specific and precise meaning of the words used. In fact, the nature of this agreement was specifically negotiated by the parties via email, and eventually a phone conference with the trial court on August 1, 2019.[56] "If a contract can be given a certain or definite legal meaning or interpretation, it is not ambiguous and we construe it as a matter of law."[57] The district court cannot ignore the definite legal meaning of "responses to TCPA motions to dismiss;" these responses are mentioned by

[53] Tex. Civ. Prac. & Rem. Code § 27.003 (e).
[54] Brown Sims, P.C. v. L.W. Matteson, Inc., 594 S.W.3d 573, 588 (Tex. App.—San Antonio 2019, no pet.)
[55] Shamrock Psychiatric Clinic, P.A. v. Tex. Dep't of Health & Human Services, 540 S.W.3d 553, 560-561 (Tex. 2018)
[56] 3 CR 1182-1184
[57] Shamrock Psychiatric Clinic, P.A. v. Tex. Dep't of Health & Human Services, 540 S.W.3d 553, 561 (Tex. 2018) citing Coker v. Coker, 650 S.W.2d 391, 393 (Tex. 1983).

statute and have specific rules regarding their implementation that differ from amended pleadings.

The trial court's decision to expand the terms of the Rule 11 agreement gave it a greater effect than the parties intended, and the definite legal meanings were not construed as a matter of law; this is an abuse of discretion by the trial court.

For the reasons stated above, the Second Amended Petition is the live pleading for the purposes of the TCPA and the trial court erred in failing to consider it.

The refusal to consider the Second Amended Petition is prejudicial to Appellant and thwarts the court's ability to faithfully and dutifully execute the TCPA's purpose to "protect the rights of a person to file meritorious lawsuits for demonstrable injury."[58] It bears repeating that Appellant submitted hundreds of defamatory statements made by Appellees on Twitter and other electronic media with timestamps, many of them defamatory per se (unsubstantiated allegations of sexual assault and misconduct, as well as criminal acts);[59] Appellant submitted the nature of the damage done in his petitions[60] and in his deposition.[61] Appellant has been defamed by Appellees with specific allegations

[58] Tex. Civ. Prac. & Rem. Code § 27.002
[59] 4 CR 2096-2446; 5 CR 2467-2495; 3 Supp CR 31-43
[60] 5 CR 2467-2495; 3 Supp CR 31-43
[61] 4 CR 1535-1648

of sexual assault and other criminal acts, all of which Appellant has denied.[62]

Appellant establishes the Lipsky facts against each Appellee in each of his petitions. Appellant calls attention to the statement from Funimation in his Original Petition,[63] First Amended Petition,[64] and Second Amended Petition.[65] These paragraphs from each petition are functionally identical.

Appellant calls attention to the allegations of Jamie Marchi in his Original Petition,[66] First Amended Petition,[67] and Second Amended Petition.[68] Again, these paragraphs from each petition are functionally identical.

Appellant calls attention to the allegations of Monica Rial in his Original Petition,[69] his First Amended Petition,[70] and in his Second Amended Petition.[71] Again, these paragraphs from each petition are functionally identical.

Appellant calls attention to the allegations of Ronald Toye in his Original Petition,[72] his First Amended Petition,[73] and in his Second Amended Petition.[74] And again, these paragraphs from each petition are functionally identical.

The notion that Appellees were in any way "surprised" by the Second

[62] 5 CR 2478; 2 CR 603
[63] 3 Supp. CR 10-12
[64] 3 Supp. CR 38
[65] 5 CR 2474; 5 CR 2483-2484
[66] 3 Supp. CR 10
[67] 3 Supp. CR 37
[68] 5 CR 2473
[69] 3 Supp. CR 12
[70] 3 Supp. CR 39
[71] 5 CR 2475
[72] 3 Supp. CR 8-9, 12-13
[73] 3 Supp. CR 35-37, 39-40
[74] 5 CR 2471-2473, 2475-2476

Amended Petition is absurd on its face, as each petition uses functionally identical language to describe the underlying allegations, all of the factors are similarly discussed in the depositions of Appellant and Appellees, all of which are attached to the response to the TCPA motion to dismiss;[75] the attached exhibits including the statements of Appellee Funimation,[76] Monica Rial,[77] and Ron Toye.[78] While the statements of Jamie Marchi are not attached as exhibits, they were discussed explicitly in the Deposition of Victor Mignogna.[79]

In fact, the Deposition of Victor Mignogna establishes the Lipsky facts for Appellant Marchi alone. In the deposition, Appellant not only identifies the statement, he denies the truthfulness of said statement and mentions the loss of convention appearances, citing several specific conventions, as damages.[80]

Appellant also describes the damage he suffered at the hands of all defendants in his deposition.[81] He describes the defamatory story of Appellee Rial,[82] and denies several facts in the story,[83] and the defamatory statement of Funimation.[84] The record is replete with evidence of the defamatory statements, who said them, when and where they were posted, and the damage that has

[75] 4 CR 1364-2094
[76] 4 CR 2096
[77] 4 CR 1827-1835
[78] 4 CR 2015-2446
[79] 4 CR 1580-1582
[80] 4 CR 1580-1584
[81] 4 CR 1454-1456, 1460, 1560
[82] 4 CR 1499-1500
[83] 4 CR 1573-1575
[84] 4 CR 1545

resulted from the statements.

"In the context of a defamation case, pleadings and evidence that establish the facts of 'when, where, and what was said, the defamatory nature of the statement, and how they damaged the plaintiff' should suffice to overcome a challenge under the TCPA."[85] Appellant has clearly done so in this case.

Conclusion & Prayer

Appellant's Second Amended Petition and attached evidence was disregarded in error at the trial court level. The trial court also failed to properly construe the Rule 11 Agreement in a manner that was prejudicial to the Appellant and is cited as the sole reason the court chose to disregard, but not strike, the Second Amended Petition and the unsworn declarations. Disregarding the evidence of the Appellant, evidence which is admitted in the record; is known by the Appellees; and which shows a meritorious case for the Appellant, is an abuse of discretion by the trial court.

Dismissing frivolous lawsuits while preserving meritorious lawsuits is the purpose of the TCPA. To uphold one end but not the other defeats its purpose. To ignore admitted evidence which shows a meritorious case similarly defeats its purpose. For all reasons stated above, this Court should reverse the trial court

[85] Van Der Linden v. Khan, 535 S.W.3d 179, 189 (Tex. App.—Fort Worth 2017, pet. denied) *citing* In re Lipsky, 460 S.W.3d 579, 591 (Tex. 2015).

on all dismissals and allow the case to proceed. In the alternative, this Court should reverse and remand to the trial court with instructions to consider the Second Amended Petition and included evidence.

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Certificate of Compliance

This document complies with the form requirements of Texas Rule of Appellate Procedure 9.4 and contains 4,559 words (except for those items excluded by rule 9.4(h)(1)).

Dated: 9/28/2020

/s/ Nicholas Rekieta
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.

(d) Appellant Victor Mignogna, by and through counsel of record Ty Beard, Carey-Elizsa Christie, and Jim E. Bullock of BEARD HARRIS BULLOCK CHRISTIE, and An Lee Hsu, Michael S. Martinez, and Ryan Sellers of MARTINEZ HSU, PC.

Dated: 9/28/2020 /s/ Nicholas Rekieta