UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

DONALD L. HILTON JR	§	
VS.	§	NO: SA: 19-CV-00755-OLG
NICOLE PRAUSE and LIBEROS LLC	§	

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS DEFAMATION PER SE PURSUANT TO THE TEXAS ANTI-SLAPP LAW

I. Introduction

This is a defamation case brought by Plaintiff Dr. Donald Hilton (Dr. Hilton), a local neurosurgeon, against Defendant Dr. Nicole Prause (Defendant Prause), a sex researcher living in Los Angeles.[1] Dr. Hilton filed suit in state court alleging that Defendant Prause contacted administrators at the University of Texas Health Science Center at San Antonio ("UT Health") and falsely accused Dr. Hilton of sexually harassing her. After Dr. Hilton filed suit, he learned that Defendant Prause had also made similar false accusations to the Texas Medical Board (TMB). Shortly thereafter, Dr. Hilton learned that Defendant Prause had also contacted two prominent academic journals (the *Proceedings of the National Academy of Sciences* (PNAS), and *Surgical Neurology International*) wherein Defendant Prause claimed that Dr. Hilton falsified/exaggerated his credentials. Specifically, she accused Dr. Hilton of claiming to be on the faculty of UT Health when he allegedly was not. All of these accusations were false.

Defendant Prause answered the state court lawsuit and then removed the case to federal court. Plaintiff then filed a Motion for Leave to File an Amended Complaint so the newly discovered allegations regarding the false statements to the TMB and to the academic journals could be formally alleged. After the Motion for Leave to File the Amended Complaint was filed, Defendant Prause filed this Motion to Dismiss based on the Texas Anti-SLAPP statute (TCPA).

[1] Dr. Hilton has also sued Defendant Prause's company, Liberos, under a vicarious liability theory.

The Court granted Plaintiff's Motion for Leave to Amend, so Plaintiff's First Amended Complaint is the live pleading in this case.

Defendant Prause's Motion is replete with false and disparaging remarks about Dr. Hilton, but it never claims that Dr. Hilton sexually harassed Defendant Prause or did anything of a sexual nature towards her. It also contains nothing suggesting that Dr. Hilton ever stalked, cyberstalked, or harassed Defendant Prause as she alleged to the TMB. It also does not deny her allegation to the academic journals that Dr. Hilton falsified his credentials. In other words, Defendant Prause's 20-page Motion with 10 exhibits contains absolutely nothing substantiating any of the accusations she made to UT Health, the TMB or the journals. Indeed, she doesn't even claim that her defamatory statements against Dr. Hilton regarding sexual harassment, stalking, cyberstalking or falsifying credentials were true. Rather, she attempts to paint Dr. Hilton in a negative light in her papers in a strained effort to justify the false and defamatory statements made against him. For the reasons explained below, Defendant Prause's Motion to Dismiss should be denied.

II. Summary of the Argument

1. The TCPA does not apply in Federal Court because it is procedural in nature. It does not change Texas substantive law, but merely provides an expedited way of dismissing meritless lawsuits. Even if parts of the TCPA are substantive, they directly conflict with Federal procedure, including Rule 12 and Rule 56. Since the Motion to Dismiss is based solely on the TCPA, the Motion should be denied.

2. Assuming *arguendo*, that the TCPA does apply in federal court, Plaintiff has provided sufficient evidence in his pleadings and in his Opposition Papers, which evidence establishes his *prima facie* case in compliance with all the elements required by the TCPA. For example, Dr. Hilton has provided sworn and documentary evidence establishing that Defendant Prause made defamatory statements that she knew were false, including the false accusation that Dr. Hilton openly sexually harassed her and that he falsified his credentials to several academic journals. Although he does not need to prove malice or damages, he has proven both. Dr. Hilton has provided evidence that Defendant Prause wanted to hurt him and that she has a pattern of falsely accusing academicians who disagree with her. Indeed Dr. Hilton is the 10th person (6 males and 4 females) she has falsely accused, and he is the third male scientist who Defendant Prause has falsely accused of sexual

harassment. Additionally, Dr. Hilton testified about the damages he has sustained because of these defamatory statements.

3. Defendant Prause has not challenged Dr. Hilton's claim that she maliciously accused him of falsifying his credentials to the academic journals. Defendant Prause was served a copy of Dr. Hilton's Amended Complaint containing these allegations before she filed her Motion to Dismiss, but she ignored these allegations in her moving papers. Defendant Prause's false accusations to the journals constitute an independent reason to deny her Motion to Dismiss.

4. Defendant Prause argues that Dr. Hilton said ugly and false things about her, which, in her mind, apparently justified the false things she said about him. This way of thinking is flawed for a number of reasons. First, Defendant Prause's claims about what Dr. Hilton supposedly said about her are mostly false. For example, Dr. Hilton never said that Defendant Prause was a child molester and never said that she performed in adult films. More fundamentally, what Dr. Hilton said or didn't say about Defendant Prause is not before the Court. Even if Dr. Hilton did call Defendant Prause a child molester 10 years ago, which he did not, such would not excuse Defendant Prause's decision to falsely accuse Dr. Hilton of sexually harassing her, stalking her, threatening her and falsifying his credentials to the academic journals that publish his papers.

5. Because the Motion to Dismiss should be denied, Defendant Prause's request for attorney's fees should be denied. In any event, the provision in the TCPA about mandatory attorney's fees to a prevailing plaintiff is procedural, and does not apply in Federal Court regardless of how the Court rules on the other issues.

III. The TCPA statute does not apply to this case.

The TCPA does not apply in Federal Court because it is procedural. Even if it were substantive, it directly conflicts with Federal Procedural Law.

> "Under the Erie doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law." *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996). *Sommers Drug Stores Co. Empl. Profit Sharing Tr. v. Corrigan*, 883 F.2d 345, 353 (5th Cir. 1989). Even if an *Erie* analysis determines a state rule of law to be substantive, "if there is a direct collision between a state substantive law and a federal procedural rule that is within Congress's rulemaking authority, federal courts apply the federal rule and do not apply the substantive state law."

Block v. Tanenhaus, 867 F.3d 585, 589 (5th Cir. 2017).

In this case, Defendants move for dismissal of all Plaintiff's claims under the TCPA. The TCPA provides that "[i]f a legal action is based on, relates to, or is in response to a party's exercise

of the right of free speech, right to petition, or right of association, that party may file a motion to dismiss the legal action." Tex. Civ. Prac. & Rem. Code § 27.003(a). The TCPA contains a number of deadlines for the Court and other procedural mechanisms for the early dismissal of meritless lawsuits. (*See generally*, Judge Graves' dissent in *Cuba v. Pylant*, 814 F.3d 701, 718–21 (5th Cir. 2016)). Thus, as a threshold question, the Court must decide whether the TCPA is procedural or substantive. If the TCPA is procedural, then Defendant's Motion should be denied because the TCPA does not apply. Even if the TCPA does have some substantive provisions, then the Court must decide whether such provisions directly conflict with Federal procedural law, including Rule 12 and Rule 56. If so, then the court should apply Federal procedural law over the TCPA, which means that Defendants' motion should be denied.

The Fifth Circuit has not decided whether the TCPA applies in federal court. *See, Block v. Tanenhaus*, 867 F.3d 585, 589 (5th Cir. 2017) ("The applicability of state anti-SLAPP statutes in federal court is an important and unresolved issue in this circuit.").[2] Accordingly, there is a split among district courts concerning whether to apply the TCPA. *See, Southwest Airlines Co. v. Roundpipe, LLC*, 375 F.Supp.3d 687, 699-700 (N.D. Tex. 2019) (concluding "that the TCPA is procedural and thus join[ing] those courts that do not apply the TCPA in federal court"). *Thoroughbred Ventures, LLC v. Disman*, No. 4:18-CV-00318, 2018 WL 3472717, at *2–3 (E.D. Tex. July 19, 2018) (concluding that the TCPA is procedural and that it conflicts with Federal Rules of Civil Procedure 12 and 56); *Mathiew v. Subsea*, 7 (US) LLC, No. 4:17-CV-3140, 2018 WL 1515264, at *5–7 (S.D. Tex. Mar. 9, 2018), report and recommendation adopted, No. 4:17-

[2] In *Henry v. Lake Charles American Press, L.L.C.*, 566 F.3d 164, 168–69 (5th Cir. 2009), the Fifth Circuit stated without explanation: "Louisiana law, including the nominally-procedural Article 971 [the Louisiana anti-SLAPP statute], governs this diversity case." However, the issue of whether the anti-SLAPP statute was procedural or substantive was not briefed by the parties or addressed by the Court in the *Henry* case. Thus, Fifth Circuit cases following *Henry* have acknowledged that "[t]he applicability of state anti-SLAPP statutes in federal court is an important and unresolved issue in this circuit." *Block*, 867 F.3d at 589 (citing 5th Circuit cases specifically noting the open question).

CV-3140, 2018 WL 1513673 (S.D. Tex. Mar. 26, 2018) (same). There are a few cases holding that the TCPA does apply in federal court, but they represent the minority view, predate all of the authorities cited by the Plaintiff and are all outside the Western District of Texas[3]. Moreover, they are wrongly decided. As United States Circuit Judge James E. Graves explained, the TCPA "creates no substantive rule of Texas law" and is instead "a procedural mechanism for speedy dismissal of a meritless lawsuit that infringes on certain constitutional protections." *Cuba*, 814 F.3d at 719. Judge Graves further explained that that even if the TCPA were substantive, "it still must yield to federal law because it directly conflicts with the Federal Rules of Civil Procedure." *Id*.

Two recent cases in the Western District of Texas make the point. In *N.P.U., Inc. v. Wilson Audio Specialties, Inc.*, 343 F.Supp.3d 661 (S.D. Tex. Oct. 29, 2018), Judge Pitman analyzed the question under the "outcome determination" test and the "twin aims" of Erie test, which are used in the 5th Circuit to determine whether a state rule of law is procedural or substantive. Judge Pitman concluded that under these tests, the TCPA is procedural – especially when the Plaintiff did not choose to be in federal court in an effort to take advantage of the supposedly more lenient pretrial dismissal rules *Id*. at 666.[4] Likewise, in *Rudkin v. Roger Beasley Imports, Inc*., No. A-17-CV-849-LY, 2018 WL 2122896 (W.D. Tex. Jan. 31, 2018), Judge Yeakel adopted a well-reasoned opinion authored by the magistrate judge Andrew W. Austin. *Rudkin v. Roger Beasley Imports, Inc*., No. A-17-CV-849-LY, 2017 WL 6622561, at *3 (W.D. Tex. Dec. 28, 2017). After reviewing the relevant authorities, both in and outside the 5th Circuit, Judge Austin concluded:

[3] For example, cases that have held the TCPA to be substantive include *Allen v. Heath*, No. 6:16-CV-51 MHS-JDL, 2016 WL 7971294, at *3 (E.D. Tex. May 6, 2016), report and recommendation adopted, No. 6:16-CV-51, 2016 WL 3033561 (E.D. Tex. May 27, 2016) and *Williams v. Cordillera Commc'ns, Inc*., No. 2:13-CV-124, 2014 WL 2611746, at *1 (S.D. Tex. June 11, 2014).

[4] The same analysis applies in this case. Plaintiff initially filed in Bexar County state court, and Defendants removed to Federal Court on diversity grounds. Thus, there can be no argument that Plaintiff forum-shopped in federal court to avoid the TCPA.

> In brief, the TCPA contains procedural provisions setting forth deadlines to seek dismissal, deadlines to respond, and even deadlines for the court to rule, as well as appellate rights, and the recovery of attorney's fees. It is a procedural statute and thus not applicable in federal court. Even if the statute is viewed to be somehow substantive, it still cannot be applied in federal court, as its provisions conflict with Rules 12 and 56, rules well within Congress's rulemaking authority. Accordingly, the motion to dismiss under the TCPA should be denied.

Id. at *3[5]

IV. Assuming *arguendo*, that the TCPA does apply to this case, which it does not, Defendants' Motion to dismiss should be denied because Dr. Hilton has provided clear and specific evidence establishing a *prima facie* case for all the elements of his defamation cause of action.

A. TCPA's Burden Shifting Framework.

Reviewing a motion to dismiss under the TCPA requires a two-step process. First the defendant must show by a preponderance of the evidence that the plaintiff's cause of action is based on, relates to, or is in response to a party's exercise of the rights enumerated in § 27.003. *In re Lipsky*, 460 S.W.3d 579, 586–87 (Tex. 2015). Second, if that finding is made, the burden shifts to the plaintiff to show by clear and specific evidence a prima facie case for each element of their claim. *Id.* The TCPA further provides that, in deciding a motion to dismiss under the act, "the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based." Id. at § 27.006.

In this case, Defendant Prause's reliance on the free speech right is not well founded because such speech does relate to a matter of "public concern" as required by § 27.001(3). However, Dr. Hilton's amended Complaint also alleges that Defendant Prause made false statements to the TMB, and that action does involve the right to petition. Thus, Dr. Hilton agrees that if the TCPA does apply in federal court, Defendant Prause has triggered its provisions. Therefore, we now turn to the evidence establishing Plaintiff's *prima facie* case.

[5] See also, *Southwest Airlines Co. v. Roundpipe, LLCE*, 375 F.Supp.3d 687 (N.D. Texas (2019).

B. The Legal Framework and Essential Elements of Plaintiff's Defamation Case.

"Defamation may occur through slander or through libel. Slander is a defamatory statement expressed orally. *See, Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995). By contrast, libel is a defamatory statement expressed in written or other graphic form. See TEX. CIV. PRAC. & REM. CODE § 73.001." *Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d 614 (Tex.2018). The elements of a defamation claim "include (1) the publication of a false statement of fact to a third party, (2) that was defamatory concerning the plaintiff, (3) with the requisite degree of fault, and (4) damages, in some cases." *In re Lipsky*, 460 S.W.3d 579, 593 (Tex. 2015) (citing *WFAA–TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998));" *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 579 (Tex. 2017). "Texas recognizes the common-law rule that defamation is either *per se* or *per quod*. See *Lipsky*, 460 S.W.3d at 596. Defamation *per se* occurs when a statement is so obviously detrimental to one's good name that a jury may presume general damages, such as for loss of reputation or for mental anguish. *Hancock v. Variyam*, 400 S.W.3d 59, 63–64 (Tex. 2013). Statements that injure a person in her office, profession, or occupation are typically classified as defamatory *per se. Id*. at 64." *Tatum*, 554 S.W.3d at 623. With these principles in mind, we now turn to the essential elements of Dr. Hilton's claim and see that he easily meets his burden.

C. Dr. Hilton's evidence establishing his *prima facie* case.

Dr. Hilton has provided three sources of evidence establishing his *prima facie* case.

1. First, Dr. Hilton verified his Original Complaint, so it constitutes competent evidence opposing Defendant Prause's Motion.
2. Dr. Hilton's sworn declaration attached and incorporated herein as Exhibit "A", (with numerous "sub-exhibits" attached to his declaration) lays out the case.
3. Dr. Hilton has attached the affidavits of ***nine*** other professionals across the country who have also been victims of Defendant Prause's false accusations. These affidavits help establish that Defendant Prause acted with the requisite intent.

D. Dr. Hilton has established a *prima facie* case that Defendant Prause defamed him.

1. Defendant Prause published several false statements of fact to third parties.

The evidence establishes that Defendant Prause went after Dr. Hilton's livelihood and career when, in April 2019, she authored a series of written communications to UT Health making serious and false accusation of sexual harassment against Dr. Hilton. Specifically, on April 16, 2019, Defendant Prause sent an email to UT Health, which included the following statements:

- "I am a neuroscientist with two university appointments being openly sexually harassed by your faculty member Dr. Donald Dr. Hilton."

- "I have filed a complaint against Dr. Hilton's medical license for sexual harassment. However, he clearly uses his UT affiliation to promote his sexual harassment. As a female scientist, he is uniquely attacking my gender with these false claims about my sexuality."

- "Please direct my sexual harassment complaint against Dr. Donald Hilton to the appropriate officer for investigation."

Defendant Prause authored and sent other emails to UT Health including the following:

- "Would you please confirm that this sexual harassment complaint is being directed to the appropriate office for investigation?" (April 17, 2019).

- "Would you confirm that this sexual harassment will be or is being investigated? I will need to start escalating to others if these inquiries are unresponsive." (April 19, 2019).

- "Dr. Hilton has been defaming and libeling me using misogyny for years, while claiming to be representing the views of UTSA. I want the sexual harassment and the libel to stop, and the false information (that I molest children in my lab and perform in pornography) publicly corrected." (April 29, 2019).

- "If you are giving these titles to people, and they use them to defame and sexually harass scientists, it seems their title should be rescinded. Here are a few of the many places he has claimed to be an 'adjunct' at your institution. If these are incorrect, please let me know and I will address his false credentials with his licensing board." (April 30, 2019).

Complete copies of these emails are attached to Dr. Hilton's Affidavit as Exhibit "7".

Additionally, on May 20, 2019, Dr. Hilton received notice that the TMB had received a complaint filed by Defendant Prause, which states:

> It has been alleged that you are stalking, cyberstalking, harassing, threatening, and issuing libelous and/or false statements regarding Nicole Prause, Ph.D. Please furnish a narrative to include whether or not you face any civil and/or criminal charges concerning these matters, and provide the cause numbers, case status, and contact information.

A copy of the notice letter is attached to Dr. Hilton's declaration as Exhibit "8".

Finally, in May 2019, Dr. Hilton received notification of two additional complaints – this time from two journals who had published articles that he authored/co-authored. One journal was the prestigious *Proceedings of the National Academy of Sciences* (PNAS), and the other was the peer-reviewed journal, *Surgical Neurology International*. When communicating to the journals, Defendant Prause falsely claimed that Dr. Hilton falsified/exaggerated his credentials – specifically, that he had claimed to be on the faculty of UT Health when he allegedly was not. A copy of the notice letter from PNAS is attached to Dr. Hilton's declaration as Exhibit "9".

The statements in Defendant Prause's emails to UT Health, the complaint to TMB and the complaints to the journals allege facts – things that are objectively verifiable. Dr. Hilton's supposed sexual harassment of Defendant Prause either happened or it did not. Dr. Hilton's supposed stalking, cyberstalking, and threatening Defendant Prause either happened or they did not. Either Dr. Hilton falsified his credentials to the journals or he did not. None of Defendant Prause's statements express her opinions; they state facts that Dr. Hilton can objectively demonstrate to be false.

Moreover, Defendant Prause's statements that Dr. Hilton "openly sexually harassed" her, that he "stalked" her, that he "cyberstalked" her, that he "threatened" her, and that he falsified his academic credentials are all categorically false.[6] Dr. Hilton's declaration establishes:

[6] Because this suit involves a private plaintiff against a non-media defendant for speech involving a private concern, Plaintiff enjoys a presumption that the statements were false. Thus, Defendant Prause has the burden of proving that her statements were substantially true. See *D Mag. Partners v. Rosenthal*, 529 S.W.3d 429,441 (Tex 2017). However, out of an abundance of caution, Plaintiff has supplied ample evidence that the statements were false.

- Dr. Hilton has never sexually harassed Defendant Prause. In fact, he has only had one personal encounter with Defendant Prause. With his wife standing next to him, Dr. Hilton met Defendant Prause briefly in a crowded meeting room on November 14, 2009 (almost 10 years ago) after a professional presentation he had given. Nothing of a sexual nature was said or done during that brief encounter. (Exhibit "A" at P. 4).

- Dr. Hilton and Defendant Prause have not had any personal communications or interactions since 2009 – not face to face, not by phone, not by email or social media – nothing. (Exhibit "A" at P. 6).

- Dr. Hilton has never flirted with Defendant Prause, made any sexual advancements towards her, or committed any other type of sexual misconduct towards her. (Exhibit "A" at P. 6).

- Dr. Hilton has never "stalked" Defendant Prause. He has never been to Defendant Prause's house, does not know where she works, and has never followed her movements or kept track of where she is. (Exhibit "A" at P. 12).

- Dr. Hilton has never "cyberstalked" Defendant Prause. Indeed, he has never had any online communications with her of any kind – not through email, Facebook, or any other kind of social medial. Moreover, Dr. Hilton doesn't follow Defendant Prause on her social media.[7] (Exhibit "A" at P. 6 and 12).

- Dr. Hilton never "threatened" Defendant Prause. For example, he never said "I am going to do 'X' to you." In fact, he has never said anything to Defendant Prause except for that encounter in 2009, which is explained in detail below. (Exhibit "A" at P. 12).

- Dr. Hilton never gave false credentials to any academic journal. He told the journals that he was on the faculty at UT Health, which was true and still is true. (Exhibit "A" at P. 14).

Defendant Prause's accusations that Dr. Hilton lied about her are also false, as addressed more fully below. But even if Dr. Hilton did say false and disparaging things about Defendant Prause over the years, that does not mean he sexually harassed, stalked, cyberstalked, or threatened her. Nor does it mean that Dr. Hilton falsified his credentials to the academic journals. Indeed,

[7] Some of Defendant Prause's other victims do follow her on social media, and they occasionally send Dr. Hilton screen shots of things Defendant Prause says on social media – like the time Defendant Prause used Twitter to explain the "amazing" story she heard at the Adult Video Network awards ceremony. Dr. Hilton has not asked these people to follow Defendant Prause, and he does not follow her himself.

Defendant Prause's moving papers do not even attempt to establish that her sexual harassment, stalking, cyberstalking, threatening or false credentials allegations are true.[8] Rather, her papers merely attempt to establish that Dr. Hilton told lies about her, which supposedly justifies Defendant Prause's attacks on him.

In an effort to assert her "truth defense," Defendant Prause selectively quotes her emails to UT Health to make it appear that she ***only*** accused Dr. Hilton of saying false things about her. (Moving Papers at Page 16). This is a gross distortion of what the emails actually say. Defendant Prause's complaint to UT Health primarily alleged sexual harassment, which is separate and apart from her claim that Dr. Hilton told lies about her (which is also false). Defendant Prause said Dr. Hilton "openly sexually harassed" her. Defendant Prause repeatedly asked UT Health what was happening to her "sexual harassment complaint." (She referred to her "sexual harassment complaint" in three different emails to UT Health.) Defendant Prause's emails tell UT Health that she wanted "the sexual harassment ***and*** the libel to stop." She also wrote that Dr. Hilton was using his title at UTSA to "defame ***and*** sexually harass scientists." Sexual harassment and defamation are not even close to being the same thing, and Defendant Prause accused Dr. Hilton of both – with the primary emphasis on "sexual harassment." Since all the false allegations (sexual harassment, stalking, cyberstalking, threatening, false credentials) are defamatory, any one of them would independently provide clear and specific evidence establishing a *prima facie* case as to this element.

Finally, the first element of Dr. Hilton's defamation cause of action requires that the statements be published to a third party. This is easily satisfied because Defendant Prause sent

[8] Paragraph 9(f) of Defendant Prause's declaration affirms that she and Dr. Hilton have never had any kind of sexual relationship "whatsoever" and that Dr. Hilton has no personal knowledge of her sex life. Dr. Hilton agrees with that statement and wishes that Defendant Prause had been so forthright with UT Health and with the medical board.

emails and other written complaints to UT Health, to TMB and to the journals, which are all third parties.

2. *Defendant Prause's statements were defamatory concerning Dr. Hilton.*

The second essential element of Dr. Hilton's cause of action is that Defendant Prause's statements were defamatory. The evidence presented by Dr. Hilton easily satisfies his burden as to this element. A statement is defamatory if it:

> "tends to injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation or to publish the natural defects of anyone and thereby expose the person to public hatred, ridicule, or financial injury."

Tex. Civ. Prac. & Rem. Code §73.00; *Houseman v. Publicaciones Paso Del Norte, S.A. de C. V., 242 S.W.3d 518, 524 (Tex.App.-EI Paso 2007, no pet.);* see also *Tatum*, 554 S.W.3d at 623-24.

In the *Tatum*, opinion, the Texas Supreme Court presented a new, comprehensive framework for courts to follow when evaluating defamation claims, including establishing new terms to use when discussing a statement's defamatory nature. In the present case, Defendant Prause's statements are reasonably capable of defamatory meaning because they constitute "textual defamation" – meaning that the defamatory meaning arises from the statement's words without reference to any extrinsic evidence. *See Tatum*, 554 S.W.3d at 626. Additionally, the statements constitute "explicit defamation," meaning that the plaintiff does not need to rely on implications to determine the defamatory meaning. *Tatum*, 554 S.W.3d at 626-27; In a textual-explicit defamation claim such as this case, courts are required to presume that the defendant intended the statement's defamatory meaning. *Tatum*, 554 S.W.3d at 636.

In this case there is no question that the statements are defamatory. Accusing a local physician of sexual harassment is clearly defamatory by any standard — especially when the physician teaches about the dangers of pornography. Moreover, looking at all of Dr. Prause's

accusations cumulatively (sexual harassment, stalking, cyberstalking, and threatening), it is clear that she painted Dr. Hilton as a creepy, sexual predator. Defendant Prause suggested to UT Health that the accusations were serious enough that he should lose his faculty position with the institution. She also suggested that Dr. Hilton's alleged behavior warranted disciplinary action by the TMB. This corroborates the notion that Defendant Prause believes the statements to be defamatory. Finally, telling the professional journals that Dr. Hilton was not on the faculty of UT Health when Dr. Hilton represented otherwise is extremely serious - serious enough for PNAS to open its own investigation. The PNAS is one of the most prestigious journals in the world, and its editors do not tolerate publishing an article under false pretenses. Thus, Defendant Prause's complaint to the journals was a particularly egregious false accusation and is independently actionable as defamation.

Dr. Hilton submits that the statements made by Defendant Prause are unambiguously defamatory. However, even if the Court were to find some ambiguity in their defamatory nature, Dr. Hilton still has made his *prima facie* case, and the ambiguity must be resolved by the jury. *Tatum*, 554 S.W.3d at 632.

Significantly, Defendant Prause does not claim that the statements she made against Dr. Hilton were not defamatory in nature. Rather, she ignores most of what she said about Dr. Hilton and argues that Dr. Hilton said false things about *her*. Again, even if Dr. Hilton did falsely disparage Defendant Prause (which he did not), such would not explain or excuse the serious and defamatory statements discussed above.

3. Defendant Prause made the defamatory statements with the requisite degree of fault.

Because this suit involves a private plaintiff suing a non-media defendant for speech involving private concerns, the level of fault required is either negligence or no fault at all.[9] However, Dr. Hilton's evidence established that Defendant Prause knew perfectly well that her accusations against Dr. Hilton were false. After all, since the sexual harassment, stalking, cyberstalking and threatening conduct were supposedly committed against her personally, she obviously knew that none of it ever occurred. Additionally, as a former member of the UCLA faculty and a person in academia all of her professional life, Defendant Prause clearly knows that an adjunct professor is part of the faculty even if he/she is not employed by the institution. Nevertheless, she accused Dr. Hilton of falsifying his credentials simply because UT Health said he was not a paid employee. Significantly, Defendant Prause was trying to get Dr. Hilton removed from the faculty of UT Health, was trying to have him disciplined by the TMB and was trying to have the journals remove his publications – all of which clearly establish negligence and/or malice.

Finally, Defendant Prause has an extensive history of making false accusations against people who, like Dr. Hilton, believe that the science supports the notion that pornography is addicting. Indeed, Dr. Hilton is Defendant Prause's tenth victim, and he is the third male professional Defendant Prause has falsely accused of stalking and sexual harassment. Each of the other nine victims have sent affidavits explaining Defendant Prause's false accusations against them, which affidavits are attached and incorporated herein as Exhibits "B-J"). Defendant Prause's pervasive pattern of false accusations against similarly-minded scientists and activists provides strong evidence of Defendant Prause's intentional, malicious intent.

[9] There is currently a lively debate amongst courts and commentators about whether, in cases involving private, non-media defendants regarding a matter of private concern, the plaintiff enjoys a strict liability standard or a negligence standard when it comes to the defendant's fault. *Compare*, *Hancock v. Variyam*, 345 S.W.3d 157, 163-64 (Tex.App.-Amarillo 2011) (applying strict liability), rev'd on other grounds, 400 S.W.3d 59 (Tex.2013) with *Fawcett v. Grosu*, 498 S.W.3d 650, 660-61 (Tex.App.-Houston [14th Dist. 2016, pet. denied) (Plaintiff required to prove negligence as the degree of fault). In this case, Dr. Hilton has made a *prima facie* case regardless of whether the applicable standard is strict liability, negligence or actual malice.

4. Dr. Hilton suffered both presumed and actual damages.

Because this case involves defamation *per se*, actual injury to Dr. Hilton is presumed. *Anderson v. Durant*, 550 S.W.3d 605, 618 (Tex.2018). Tex. Civ. Prac. & Rem. Code §73.001 states that a statement is defamation *per se* if it impeaches "a person's honesty, integrity, virtue or reputation." Defendant Prause's false accusations impeached Dr. Hilton's honesty, his integrity, his virtue and his reputation. Additionally, Texas common law provides that a statement is considered defamatory *per se* if it injures a person in his office, profession, or occupation. *Bedford v. Spassoff*, 520 S.W.3d 901, 905 Tex.2017. Defamation *per se* also exists if the statement imputes either a crime or sexual misconduct. *Miranda v. Byles*, 390 S.W.3d 543, 552 (Tex.App.-Houston [1st Dist] 2012, pet. denied) (A statement that a person had sexually molested his granddaughter was defamatory *per se* because it imputed both a crime and sexual misconduct.) On all counts, Defendant Prause's statements qualify as defamation *per se*. Thus, there need be no proof of actual damages for Dr. Hilton to meet his burden under the TCPA.

However, out of an abundance of caution, Dr. Hilton's declaration has provided evidence of injury. For example, his declaration states that the false statements cost him worry, stress, and loss of sleep. (Exhibit "A" at P. 12). He also had to hire separate counsel (in addition to the undersigned) to defend him against the false accusations made to the TMB and to the journals. (Exhibit "A" at P. 12). Thus, he has suffered both economic damages and general damages because of Defendant Prause's defamation.

Dr. Hilton notes that in the Amended Complaint, injunctive relief is only sought with respect to past statements that the jury finds to be defamatory. Thus, the injunctive relief rises or falls on the success of the defamation case. Because Dr. Hilton has produced clear and specific

evidence that supports all of the essential elements of his defamation claim, Defendant Prause's Motion to Dismiss should be denied.

E. Dr. Hilton did not tell lies about Defendant Prause.

Defendant Prause spends the bulk of her papers attempting to prove that Dr. Hilton said insulting things about her like being a child molester or a pornography performer. But these issues are not before the court; Dr. Hilton has not been sued for defamation. More to the point, whether Dr. Hilton said mean and false things about Defendant Prause has nothing to do with whether he sexually harassed, stalked, cyberstalked or threatened her or whether he falsified his credentials to the academic journals. However, because Defendant Prause has built her defense around her "He had it coming" defense, Dr. Hilton will briefly respond.

1. Dr. Hilton Never Called Defendant Prause a Child Molester.

Defendant Prause's declaration claims that ten years ago, Dr. Hilton asked her "why we like molesting children." (Prause declaration at P. 9(a)). That never occurred. Dr. Hilton categorically denies that he ever accused Dr. Prause of sexually molesting children – in her lab or anywhere else. (Exhibit "A" at P. 5).

Dr. Hilton explains what actually happened in paragraph 4 of his declaration. After the 2009 presentation, Dr. Prause approached Dr. Hilton to discuss his presentation. When she said that she studied at the Kinsey Institute, Dr. Hilton made reference to the fact that, back in the 1940s, Alfred Kinsey had actually collaborated with pedophiles in his research and publications. Dr. Prause's Declaration makes it clear that she understood that Dr. Hilton's question stemmed from Table 34 in Dr. Kinsey's book, Sexual Behavior in the Human Male (1948) (Prause

Declaration at Paragraph 9(a))[10]. A true and accurate copy of Dr. Kinsey's Table 34 is attached as Exhibit "3" to Dr. Hilton's Declaration. This table reflects grotesque data regarding how many orgasms children can have and how long it takes for this to occur. For example, the second entry on the Table 34 states than an 11-month old had 10 orgasms in one hour. The oldest victim in Table 34 is only 14 years old. Of course, the only way Dr. Kinsey could have obtained this information was to collaborate with individuals who were abusing children and who were keeping track of their data. Since Dr. Prause studied at the Kinsey's Institute, Dr. Hilton wanted to know if she agreed with Dr. Kinsey's research practices. Dr. Hilton believes that it was important to ask her if she disavows this practice. He is still waiting for his answer.

Of course, asking Dr. Prause whether she agrees with Dr. Kinsey's willingness to collaborate with pedophiles more than 70 years ago is not the same thing as accusing her of personally molesting children. Dr. Hilton never thought that, he never asked about it, and he certainly never made such an accusation. (Exhibit "A" P. 5) Dr. Hilton believes that the people associated with the Kinsey Institute should disavow such abusive research. Indeed, Dr. Hilton believes that all concerned citizens – regardless of how they feel about whether pornography is addictive – should be repulsed by Table 34 and the abuse that led to its creation.

2. Dr. Hilton never claimed that Defendant Prause performed in adult films.

While Defendant Prause does advocate for the benefits of pornography, she does not perform in pornography films. Dr. Hilton has never claimed otherwise. (Exhibit A at Page. 6). It is true that Dr. Hilton said that Defendant Prause went to the Adult Video Awards ceremony (AVN) but he did so because that is what Defendant Prause claimed on her public Twitter

[10] In paragraph 9(a) of Defendant Prause's declaration, she states: "I recognize this as a long-debunked conspiracy theory about the Kinsey Institute." Well, the "theory" has not been debunked, but Defendant Prause admits that she knew Dr. Hilton was not talking about her when he had the conversation about children.

account. For example, on June 1, 2015, Defendant Prause wrote on Twitter to an apparent friend in the pornography industry: "I think Jeanne's story ***I heard at AVN was amazing***. I'll refrain from getting myself into more trouble!" (emphasis added). Defendant Prause also posted a photo of herself posing on the red carpet with some pornography industry individuals. Finally, Defendant Prause posted the following exchange between herself and a pornography performer from Australia on her public Twitter account:

> **Prause**: "Oh nuts. Well if you're not coming in for AVN or something, then I'll send third shirt for next RT!
>
> **Avalon**: No AVN for me but I hope you have an amazing time there, & get lots of attention for these important tshirts."

Screen shots of these posts/photos are attached to Dr. Hilton's Declaration (See Exhibit 6 to Dr. Hilton's Declaration). Given Defendant Prause's public comments about her attendance at the AVN specifically, and the nature of her research generally, it is difficult to understand why Defendant Prause would be offended if someone thought she attended the AVN. After all, she said it was "amazing."[11]

3. <u>Dr. Hilton did say that Defendant Prause is "pro-porn" because it is true.</u>

Defendant Prause's body of academic work speaks for itself, and she takes the position of the pornography industry on virtually every point. For example, in one of her published works, she and her co-author write:

> "While much has been written about the potential negative effects of VSS,[12], a number of positive effects also have been suggested. *Most people who view VSS believe that it*

[11] Dr. Hilton discussed Defendant Prause's cozy relationship with the pornography industry because she brought his religion into the debate – accusing him of being biased in his research because he is a devout member of the Church of Jesus Christ of Latter-day Saints (LDS). She actually made the argument in one of her published works – mentioning Dr. Hilton and his particular religious faith by name. From Dr. Hilton's perspective, bias is always relevant in academic research, and it was necessary for him to raise the issue of whether Dr. Prause's ideological and cultural ties to the pornography industry created a bias in favor of pornography. (See Hilton's Declaration at P. 8)

[12] When referring to viewing pornography, Defendant Prause prefers to use the term "VSS", which stands for visual sexual stimulation. VSS is used in an effort to avoid the stigmatizing term, pornography.

> *improves their attitudes towards sexuality, and improves their quality of life…VSS can also promote pleasant feelings in the moment, such as happiness and joy*…While much has been written about negative aspects of VSS for the general population, the many possible benefits suggest that VSS use is not problematic de facto." (emphasis added).[13]

In the same paper, Defendant Prause also describes the benefits of younger people viewing pornography as follows: "One possibility is that those with higher sexual sensation seeking *use VSS at younger ages and broaden the content of their VSS* when sexual partners are not available to them to engage in actual sexual risk behaviors." (emphasis added). The article is part of Dr. Hilton's Declaration at Exhibit 5.

V. Defendants' request for attorneys' fees should be denied.

Since the Court should deny Defendants' Motion to Dismiss, the request for attorneys' fees should likewise be denied. However, in the unlikely event that the Court were to grant Defendant Prause's Motion, the court should deny the request for attorneys' fees because the fee provisions is procedural. See discussion and citations, supra. Thus, in no event should attorney's fees be awarded to Defendants.

VI. Conclusion

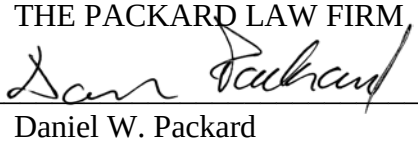
Defendant Prause knew that if she had falsely complained that Dr. Hilton lied about her in his public speeches, her efforts to silence him would have fallen on deaf ears. But Defendant Prause knows that accusing a successful physician of being a sexual harasser and a stalker is incredibly powerful. It is the kind of thing that can destroy a person's career and reputation. Indeed, she has repeatedly made these kinds of false accusations in order to silence her critics, with nine additional victims providing sworn testimony about how Defendant Prause falsely accused them. Dr. Hilton had a stellar reputation before Defendant Prause attacked him.

[13] *The Emperor Has No Clothes: A Review of the 'Pornography Addiction' Model*. The entire article is attached to Dr. Hilton's Declaration as Exhibit 5 .

Regardless of how one feels about the public health consequences of pornography, everyone should agree that what Defendant Prause did was ruthless and wrong. The First Amendment was never intended to open the door to this kind of false and defamatory speech. Moreover, Defendant Prause's actions, if left unchecked, hurt women who have legitimately been harassed, stalked and threatened because they leave people wondering if the victims have ulterior motives. It is time to hold Defendant Prause accountable. Because the TCPA does not apply to this Court and because Dr. Hilton has more than met his evidentiary burden, Defendants' Motion to Dismiss should be denied.

Respectfully submitted,

THE PACKARD LAW FIRM

By: 

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[CERTIFICATE OF SERVICE ON NEXT PAGE]

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this instrument has been forwarded, in accordance with the Federal Rules of Civil Procedure on the 9th day of August, 2019 to:

Claire W. Parsons — Via CM/ECF
Wilson Elser Moskowitz Edelman & Dicker LLP
909 Fannin Street, Suite 3300
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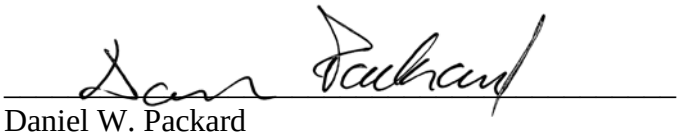

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