COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00374-CV

KATHRYN VAN DER LINDEN — APPELLANT

V.

DR. NADEEM KHAN — APPELLEE

FROM THE 415TH DISTRICT COURT OF PARKER COUNTY
TRIAL COURT NO. CV16-0633

CONCURRING AND DISSENTING OPINION

I agree with the majority that based on a de novo review, the trial court erred by denying appellant Kathryn Van Der Linden's motion to dismiss appellee Dr. Nadeem Khan's claims for tortious interference with a contract and tortious interference with prospective business relations under the Texas Citizens Participation Act (the TCPA). But I respectfully disagree with the majority's

holding that the trial court did not err by denying the motion as to Khan's claims for defamation and defamation per se.[1] While I disagree with portions of the majority's opinion, I certainly understand its thorough reasoning. In law, as in life, these disagreements happen. It is the blessing and the curse of many legal disputes: reasonable minds can differ.

I. SHIFTING BURDENS UNDER THE TCPA

A. APPLICATION OF THE TCPA BY A PREPONDERANCE OF THE EVIDENCE

As the majority recognizes, Van Der Linden satisfied her initial burden under the TCPA to show by a preponderance of the evidence that Khan's claim for defamation per se was based on, related to, or was in response to Van Der Linden's exercise of the right to free speech on a matter of public concern—community well-being. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 27.001(3), (7),

[1]The majority expressly affirms "the portion of the trial court's order denying Van Der Linden's motion to dismiss as to Khan's defamation/defamation per se claim." But to avoid dismissal of his defamation claim, Khan was required to provide clear and specific evidence of his damages, an essential element of his defamation claim. *See Brady v. Klentzman*, 515 S.W.3d 878, 886 (Tex. 2017) ("[I]f the statement is not defamatory *per se*, . . . the plaintiff must prove actual damages to prevail. . . . Absent evidence of actual damages in a case of defamation . . . , judgment should be rendered for the defendant."). The majority concludes, and I agree, that Khan failed to do so regarding his claim for tortious interference with prospective business relations, which scuttles his defamation claim as well. *See Bedford v. Spassoff*, 520 S.W.3d 901, 905–06 (Tex. 2017); *In re Lipsky*, 460 S.W.3d 579, 593 (Tex. 2015) (orig. proceeding). In addition, because Van Der Linden's alleged statements are defamatory per se, Khan cannot state a prima facie claim for defamation. *See Levine v. Steve Scharn Custom Homes, Inc.*, 448 S.W.3d 637, 650 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). Accordingly, I dissent from the majority's holding affirming the trial court's ruling regarding Khan's defamation claim.

27.003(a), 27.005(b) (West 2015). After Van Der Linden met her burden to show that it was more likely than not that the TCPA applied to Khan's claim, the burden then shifted to Khan to establish a prima facie case of each essential element of defamation per se through clear and specific evidence. *See id.* § 27.005(c); *Hersh v. Tatum*, 526 S.W.3d 462, 468 (Tex. 2017); *Lipsky*, 460 S.W.3d at 589. Whether Khan did so is the point upon which I and the majority diverge.

B. Clear and Specific Evidence of Prima Facie Case

The TCPA burdens implicating the amount and quality of evidence necessary for Khan to avoid pretrial dismissal of his claim for defamation per se are easy to recite, yet more difficult to apply in practice. But it is necessary to carefully examine what each term means in order to properly determine if the pleadings and evidence, direct and circumstantial, met those respective burdens. A prima facie case of an essential element is more than notice pleading and requires evidence that, if not rebutted or contradicted, would establish the fact as a matter of law. *See Lipsky*, 460 S.W.3d at 590–91, 593. In short, the term refers to the minimum *amount* of evidence required to support a rational inference that the allegation is true. *See Serafine v. Blunt*, 466 S.W.3d 352, 358 (Tex. App.—Austin 2015, no pet.) (op. on reh'g). Clear and specific evidence is the *quality* of the evidence required to establish a prima facie case. *See id.* Although not defined by statute, clear and specific evidence has been defined as evidence that is unambiguous, sure, and explicit, providing enough detail to reveal a factual basis for the claim. *See Bedford*, 520 S.W.3d at 904; *Lipsky*,

460 S.W.3d at 590–91. Such evidence, then, is more than "general, debatable evidence, but" is evidence "that provide[s] explicit proof as to the particular fact at issue." *Schofield v. Gerda*, No. 02-15-00326-CV, 2017 WL 2180708, at *15 n.14 (Tex. App.—Fort Worth May 18, 2017, no pet.) (mem. op.). Therefore, the quality of Khan's evidence must be more than conclusory, bare, or self-serving statements. *See Lipsky*, 460 S.W.3d at 592; *Schofield*, 2017 WL 2180708, at *26; *Fawcett v. Grosu*, 498 S.W.3d 650, 660 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (op. on reh'g).

For his claim for defamation per se, Khan—a private plaintiff suing a non-media defendant—was required to proffer clear and specific evidence, establishing a prima facie case, (1) that Van Der Linden published a statement of fact to a third party, (2) which was defamatory per se regarding Khan, and (3) with the requisite degree of fault. *See Lipsky*, 460 S.W.3d at 593, 596; *Fawcett v. Rogers*, 492 S.W.3d 18, 25 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (op. on reh'g); *see also* Tex. Civ. Prac. & Rem. Code Ann. § 73.001 (West 2017) (defining libel). I agree with the majority that Khan provided clear and specific evidence that Van Der Linden's alleged statements constituted defamation per se—accusing Khan of a crime—thereby establishing a prima facie case of the second element of his claim. *See* 18 U.S.C.A. §§ 2339A–2339C (West 2015 & Supp. 2016) (prohibiting the provision of support to terrorists and terrorist organizations); *Leyendecker & Assocs. v. Wechter*,

683 S.W.2d 369, 374 (Tex. 1984) (recognizing statement imputing a crime is defamatory per se).

But I disagree that Khan met his burden regarding the third element of his claim for defamation per se—the degree of fault by Van Der Linden. Generally, the requisite degree of fault is negligence based on Khan's status as a private individual. *Lipsky*, 460 S.W.3d at 593; *Grosu*, 498 S.W.3d at 662. However, Khan alleged in his petition that Van Der Linden was liable for defamation per se and alleged that she made the challenged statements "maliciously," "with the knowledge of, or reckless disregard for, their falsity," and with "actual malice." He further sought exemplary damages arising from this claim.[2] Khan, therefore, had to provide clear and specific evidence that Van Der Linden acted with reckless disregard as to the truth or falsity of her statements, not mere negligence. *See* 4 J. Hadley Edgar Jr. & James B. Sales, *Texas Torts and Remedies* § 52.02[4] (2015 ed.) ("Knowledge of a statement's falsity or reckless disregard of a statement's falsity also constitutes a showing of malice, which is a necessary *element* of defamation when . . . a plaintiff seeks the recovery of exemplary damages." (emphasis added) (footnotes omitted)).

[2]Khan's own allegations of his claim for defamation per se, not solely his request for exemplary damages, would also seem to dictate the degree of fault that he must establish by clear and specific evidence. *See generally Monsanto Co. v. Milam*, 494 S.W.2d 534, 536 (Tex. 1973) ("The specific allegation controls over the general allegation.").

To show reckless disregard for the truth, Khan must provide clear and specific evidence that Van Der Linden in fact entertained serious doubts as to the truth of her statements or evidence that she actually had a high degree of awareness of the probable falsity of her statements. *Cf. Hearst Corp. v. Skeen*, 159 S.W.3d 633, 637 (Tex. 2005) (discussing evidence of reckless disregard in context of summary-judgment proceeding between public-official plaintiff and media defendant). I would conclude that Khan's affidavit statements that the conversations between him and Van Der Linden never occurred and that he never said what Van Der Linden ascribed to him are not clear and specific evidence that Van Der Linden acted with the requisite degree of fault.[3] *See Guntheroth v. Rodaway*, 727 P.2d 982, 985–86 (Wash. 1986) (holding private plaintiff failed to establish genuine issue of material fact as to fault for defamation claim against non-media defendant under either preponderance or clear-and-convincing standard); *cf. Reyna v. Baldridge*, No. 04-14-00740-CV, 2015 WL 4273265, at *6 (Tex. App.—San Antonio July 15, 2015, no pet.) (mem. op.) (discussing detailed evidence proffered by plaintiff meeting clear-and-specific standard to show prima facie case of reckless disregard for the truth). Indeed, Khan's bare disclaimers, which make insufficient reference to Van Der Linden's degree of fault, are nothing more than a general statement of a claim, which

[3]In several paragraphs of his affidavits and using different language each time, Khan denied that the conversations with Van Der Linden ever took place and stated that he never gave money to a terrorist organization or that he had told anyone that he had.

would meet only a notice-pleading standard and not a clear-and-specific standard.

Even if the standard were mere negligence, Khan failed to establish his prima facie case. *See Lipsky*, 460 S.W.3d at 592–93; *accord Guntheroth*, 727 P.2d at 985–86; *cf. Camp v. Patterson*, No. 03-16-00733-CV, 2017 WL 3378904, at *10 (Tex. App.—Austin Aug. 3, 2017, no pet.) (mem. op.) (holding defamation defendants' affidavit statements, which lacked factual support, did not establish affirmative defense of truth by a preponderance under the TCPA). Under a negligence fault standard, Khan was required to produce clear and specific evidence that Van Der Linden failed to investigate the truth or falsity of her statements before publication and failed to act as a reasonably prudent person. *See Grosu*, 498 S.W.3d at 662. Khan's affidavit statements do not provide clear and specific evidence that Van Der Linden did so. *Cf. Rogers*, 492 S.W.3d at 27 (holding private plaintiff provided sufficient proof that non-media defendants failed to investigate to satisfy burden under TCPA to establish fault element of defamation per se claim).

I also respectfully disagree with the majority's holding that because only two people were involved in one of the two conversations leading to Van Der Linden's statements—Van Der Linden and Khan[4]—Khan's summary denials necessarily constituted clear and specific evidence of both falsity and fault. But

[4]Khan's then-wife was present for one of the conversations.

because falsity is generally presumed in defamation cases involving a private plaintiff and a non-media defendant, this presumed falsity could not also provide clear and specific evidence of fault. *See Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995). Khan's affidavit statements do not provide clear and specific evidence of the required degree of fault by Van Der Linden and, therefore, cannot meet his burden to establish a prima facie case of fault no matter the circumstances of the genesis of Van Der Linden's alleged defamatory statements. To hold otherwise would seem to impose a different evidentiary requirement to defamation cases involving a two-party conversation than that stated in the TCPA.

C. AFFIRMATIVE DEFENSE BY A PREPONDERANCE OF THE EVIDENCE

I further believe that based on the majority's assessment of the amount and quality of Khan's evidence showing a prima facie case of defamation per se, the trial court necessarily erred by denying Van Der Linden's motion to dismiss based on her affirmative defense of truth. Even assuming that Khan met his burden to establish a prima facie case of defamation per se through clear and specific evidence of each necessary element, the burden then shifted back to Van Der Linden to establish only by a preponderance of the evidence each essential element of a valid defense to Khan's claim. *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.005(d); *United Food & Comm'l Workers Int'l Union v. Wal-Mart Stores, Inc.*, 430 S.W.3d 508, 513 (Tex. App.—Fort Worth 2014, no pet.); *see also Randall's Food*, 891 S.W.2d at 646 (holding, for private-individual

plaintiff against non-media defendant, falsity generally presumed and truth of statement is affirmative defense).[5] If Van Der Linden met this burden, the trial court was required to dismiss Khan's claim even if Khan met his burden to establish a prima facie case by clear and specific evidence. *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.005(d); *United Food*, 430 S.W.3d at 511.

In her answer to Khan's petition and in her motion to dismiss, Van Der Linden raised and argued the affirmative defense of truth. *See* Tex. Civ. Prac. & Rem. Code Ann. § 73.005(a) (West 2017); *Randall's Food*, 891 S.W.2d at 646. In her affidavit, she averred that Khan told her in two conversations that he had given monetary support to a terrorist organization and that the actions taken by such organizations did not bother him because he "preferred animals over people." As the majority perceptively points out, Van Der Linden did not state that Khan had, in fact, given support to a terrorist organization but that Khan said

[5]As discussed by the majority, the supreme court recently held in the context of the TCPA that because falsity is an essential element in some defamation claims, truth cannot be an affirmative defense. *D Magazine Partners, L.P. v. Rosenthal*, No. 15-1790, 2017 WL 1041234, at *9 (Tex. Mar. 17, 2017). But that case involved a media defendant, which implicated different defenses and burdens than claims brought against a non-media defendant. *See Neely v. Wilson*, 418 S.W.3d 52, 56, 62 (Tex. 2013). Here, falsity is not an essential element to be proved under the TCPA because it is presumed and because Van Der Linden is not a media defendant; thus, I believe truth remains a viable affirmative defense for Van Der Linden. *See Randall's Food*, 891 S.W.2d at 646; *Dallas Morning News, Inc. v. Hall*, 524 S.W.3d 369, 371, 374 (Tex. App.—Fort Worth 2017, pet. filed); *Vice v. Kasprzak*, 318 S.W.3d 1, 17 n.9 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). This is true even though the subject of the statement involves a matter of public concern. *See Camp*, 2017 WL 3378904, at *7; *Cummins v. Bat World Sanctuary*, No. 02-12-00285-CV, 2015 WL 1641144, at *10 (Tex. App.—Fort Worth Apr. 30, 2015, pet. denied) (mem. op.).

he had done so. Therefore, the affirmative defense is measured against that statement.

Van Der Linden averred that Khan, in fact, made the statements to her that she then published. If Khan's antipodal denials equated to clear and specific evidence of his prima facie case, then Van Der Linden's affidavit contention that Khan did indeed make the statements to her would constitute a preponderance of evidence establishing her affirmative defense. As such, the trial court was required to grant her motion to dismiss directed to Khan's claim for defamation per se under the TCPA.

II. CONCLUSION

The purpose of the TCPA is not only to protect Khan's right to file a meritorious lawsuit but also to protect Van Der Linden's right to "speak freely." Tex. Civ. Prac. & Rem. Code Ann. § 27.002 (West 2015); *see Lipsky*, 460 S.W.3d at 589. These competing goals and the "murky," perhaps overly broad, language of the TCPA make legal analysis difficult, especially in defamation cases involving a basic swearing match, and could result in deterring meritorious defamation claims under the guise of combating abusive litigation. *Serafine*, 466 S.W.3d at 365, 369, 375–76 (Pemberton, J., concurring). But we still are bound by its explicit textual provisions. *See id.* at 367 (Pemberton, J., concurring).

The TCPA mandates that once Van Der Linden met her burden to show the applicability of the TCPA to Khan's claim by a preponderance of the

evidence, Khan then had to produce clear and specific evidence of each essential element of his claim, including the requisite fault. His affidavits, which insufficiently establish Van Der Linden's fault, do not meet this burden whether the degree of that fault be negligence or reckless disregard. But even if he did meet his burden, Van Der Linden's statements in her affidavit established her affirmative defense of truth by a preponderance of the evidence. Either required the trial court to grant Van Der Linden's motion to dismiss under the explicit provisions of the TCPA.

Accordingly, I concur in the judgment (1) reversing the trial court's order denying Van Der Linden's motion to dismiss Khan's claims for tortious interference with a contract and tortious interference with prospective business relations and (2) remanding those claims to the trial court for an award under section 27.009(a) of court costs, reasonable attorney's fees, and other expenses Van Der Linden incurred in defending herself.[6] But because I believe Khan's claims for defamation per se and defamation also are subject to mandatory dismissal under the TCPA, those claims should be dismissed and remanded to the trial court for a similar award. Because the majority does not do so, I

[6]The majority's conclusion states that the remand is for "further proceedings"; however, the substance of the majority's opinion makes it clear that these further proceedings regarding Khan's claims for tortious interference with a contract and tortious interference with prospective business relations would be only for an award of court costs, reasonable attorney's fees, and other expenses.

respectfully dissent from that portion of the judgment affirming the trial court's denial.

/s/ Lee Gabriel

LEE GABRIEL
JUSTICE

DELIVERED: November 9, 2017