

## Hadimani v. Hiremath

Court of Appeals of Texas, Fourteenth District, Houston

May 23, 2023, Memorandum Opinion Filed

NO. 14-22-00002-CV

### Reporter

2023 Tex. App. LEXIS 3461 \*; 2023 WL 3596248

SRISHAIL KUMAR HADIMANI, Appellant v. HARISH  
HIREMATH, Appellee

**Prior History:** [\*1] On Appeal from the 11th District Court, Harris County, Texas. Trial Court Cause No. 2021-49696.

### Core Terms

defamation, trial court, matter of public concern, pleadings, communications, defamatory, membership, email, affirmative defense, motion to dismiss, matter of law, election, investigated, fraudulent, reputation, religious, free speech, clear-and-specific, alleges, votes, exercise of rights, prima facie case, legal action, authorities, declaration, third-party, argues, voter, false statement, lawsuit

### Case Summary

#### Overview

**HOLDINGS:** [1]-In an action arising out of defamation claims, appellee met his burden under the TCPA of demonstrating that appellant's defamation claims were based on or in response to his exercise of the right to free speech under Tex. Civ. Prac. & Rem. Code Ann. § 27.005(b); [2]-Appellant met his prima facie burden for his claims of defamation as to the email appellee sent to another like-minded organization stating that appellee had relinquished his position due to fraudulent conduct because, all of appellants pleadings and evidence were sufficient to show that appellee published false statements to the organization that defamed him pursuant to Tex. Civ. Prac. & Rem. Code Ann § 73.001.

#### Outcome

Reversed and remanded.

### LexisNexis® Headnotes

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Association

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

#### [HN1](#) **Fundamental Freedoms, Freedom of Association**

The purpose of the Texas Citizens Participation Act (TCPA) is to encourage and safeguard the constitutional rights to speech, petition, and association while also protecting the right to file and pursue meritorious lawsuits for demonstrable injury. Tex. Civ. Prac. & Rem. Code Ann. § 27.002. The TCPA contemplates an expedited dismissal procedure when a legal action is based on or is in response to a party's exercise of the right of free speech, right to petition, or right of association. Tex. Civ. Prac. & Rem. Code Ann. § 27.003(a). To accomplish its objectives, the TCPA provides a multi-step process for the dismissal of a legal action to which it applies. In the first step, the party filing a motion to dismiss under the TCPA bears the burden to demonstrate that the legal action is based on or is in response to, as relevant to this appeal, the party's exercise of the right of free speech and right of association. Tex. Civ. Prac. & Rem. Code Ann. §§ 27.003(a), 005(b). But under the second step, the court may not dismiss the action if the non-moving party establishes by clear and specific evidence a prima facie case for each essential element of the claim. § 27.005(c). Under the third step, the movant can still win

dismissal if he establishes an affirmative defense or other grounds on which the moving party is entitled to judgment as a matter of law. § 27.005(d).

Civil Procedure > Appeals > Standards of Review > De Novo Review

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

Governments > Legislation > Interpretation

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

### [HN2](#) Standards of Review, De Novo Review

In construing the Texas Citizens Participation Act (TCPA) and determining its applicability, the appellate court reviews statutory construction issues de novo. Similarly, whether the parties have met their respective burdens is a question of law that the court review de novo. Under the de novo standard, the court makes an independent determination and apply the same standard used by the trial court in the first instance.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

### [HN3](#) Standards of Review, De Novo Review

Appellate courts should take a broad view of error preservation in Texas Citizens Participation Act (TCPA) cases due to the statute's unique language. Specifically, in the TCPA context, rules of error preservation should not be applied so strictly as to unduly restrain appellate courts from reaching the merits of a case. The unique language of the TCPA directs courts to decide its applicability based on a holistic review of the pleadings. Tex. Civ. Prac. & Rem. Code Ann. § 27.006(a) provides that when considering a TCPA motion to dismiss, the court shall consider the pleadings and supporting and opposing affidavits. In TCPA appeals, the appellate court has decided whether communications are matters of public concern under a de novo standard of review,

suggesting that the determination is one of law.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

Evidence > Types of Evidence > Documentary Evidence > Affidavits

Evidence > Burdens of Proof > Preponderance of Evidence

### [HN4](#) Standards of Review, De Novo Review

The Appellate Courts' Texas Citizens Participation Act (TCPA) analysis has been on the pleadings and on whether, as a matter of law, they are based on or relate to a matter of public concern. A trial court considering a TCPA motion shall consider the pleadings and supporting and opposing affidavits, one of the Court of Appeals of Texas, Fourteenth District, Houston's sister courts concluded that this analysis suggests an independent duty on the court to look beyond the parties' arguments to the pleadings and affidavits before it, to determine if the predicates for the TCPA are met. Given this precedent, the Court of Appeals of Texas, Fourteenth District, Houston has concluded it's de novo review of TCPA cases requires that the court must determine whether the movant met his burden to prove by a preponderance of the evidence that the TCPA applies to the claims at issue. Parties may not establish communications to be a matter of public concern by their agreement.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Association

Evidence > Burdens of Proof > Allocation

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

Evidence > Burdens of Proof > Preponderance of Evidence

### [HN5](#) Fundamental Freedoms, Freedom of Association

To obtain dismissal under the Texas Citizens Participation Act (TCPA), an appellee has the initial burden to demonstrate that the TCPA applied to appellant's claims against him. This burden requires appellee to demonstrate by a preponderance of the evidence that (1) appellant's legal action (2) is based on or is in response to (3) an exercise of the right of free speech or the exercise of the right of association. Tex. Civ. Prac. & Rem. Code Ann. § 27.005(b).

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

### [HN6](#) **Freedom of Speech, Strategic Lawsuits Against Public Participation**

Tex. Civ. Prac. & Rem. Code Ann. § 27.001(6) defines legal action as a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal, declaratory, or equitable relief.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

### [HN7](#) **Fundamental Freedoms, Freedom of Speech**

Exercise of the right of free speech means a communication made in connection with a matter of public concern. Tex. Civ. Prac. & Rem. Code Ann. § 27.001(3). Communication includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic. Tex. Civ. Prac. & Rem. Code Ann. § 27.001(1).

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

Governments > Legislation > Interpretation

### [HN8](#) **Freedom of Speech, Strategic Lawsuits**

### **Against Public Participation**

The phrase "matter of public concern" commonly refers to matters of political, social, or other concern to the community, as opposed to purely private matters.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

Governments > Legislation > Interpretation

### [HN9](#) **Freedom of Speech, Strategic Lawsuits Against Public Participation**

The Texas Citizens Participation Act (TCPA) does not define clear and specific, so the appellate court applies the ordinary meaning of those terms: clear means unambiguous, sure, or free from doubt, and specific means explicit or relating to a particular named thing. Words and phrases shall be read in context and construed according to the rules of grammar and common usage. The supreme court has explained the clear-and-specific evidence standard requires a plaintiff to provide enough detail to show the factual basis for its claim. The appellate court only considers the pleadings and evidence in favor of the plaintiff's case when determining whether it established the requisite prima facie proof.

Torts > Intentional Torts > Defamation > Defamation Per Se

Torts > Intentional Torts > Defamation > Libel

Torts > Intentional Torts > Defamation > Slander

### [HN10](#) **Defamation, Defamation Per Se**

Defamation is generally defined as the invasion of a person's interest in her reputation and good name. The tort includes libel and slander. Defamatory statements are those that tend to (1) injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury as well as those statement that (2) impeach any person's honesty, integrity, virtue, or reputation. Tex. Civ. Prac. & Rem. Code Ann. § 73.001. The elements of defamation cause of action are: (1) the defendant published a false statement; (2) that defamed the plaintiff; (3) with the

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requisite degree of fault regarding the truth of the statement, negligence if the plaintiff is a private individual; and (4) damages, unless the statement constitutes defamation per se. Whether a statement is reasonably capable of defamatory meaning is determined by court as matter of law using objective standard. A statement is considered published when it is communicated to a third person who is capable of understanding its defamatory meaning and in such a way that the person did understand its defamatory meaning.

Torts > Intentional Torts > Defamation > Libel

Torts > Intentional Torts > Defamation > Slander

Torts > ... > Defamation > Defenses > Statute of Limitations

Torts > Intentional Torts > Defamation > Procedural Matters

### [HN11](#) [↓] Defamation, Libel

Libel occurs when defamatory statements are in writing. Tex. Civ. Prac. & Rem. Code Ann. § 73.001. Slander is a defamatory statement that is orally communicated or published to a third person without legal excuse.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

### [HN12](#) [↓] Freedom of Speech, Strategic Lawsuits Against Public Participation

In a defamation case that implicates the Texas Citizens Participation Act (TCPA), pleadings and evidence that establishes the facts of when, where, and what was said, the defamatory nature of the statements, and how they damaged the plaintiff should be sufficient to resist a motion to dismiss under the TCPA.

Torts > ... > Defamation > Defenses > Truth

### [HN13](#) [↓] Defenses, Truth

A plaintiff can bring a claim for defamation when discrete facts, literally or substantially true, are

published in such a way that they create a substantially false and defamatory impression by omitting material facts or juxtaposing facts in a misleading way.

Torts > Intentional Torts > Defamation > Procedural Matters

### [HN14](#) [↓] Defamation, Procedural Matters

As to the requisite degree of fault in defamation actions, the standard is negligence if the plaintiff is a private individual.

Civil Procedure > Remedies > Damages > General Damages

Torts > ... > Defamation > Remedies > Damages

Torts > Intentional Torts > Defamation > Defamation Per Se

### [HN15](#) [↓] Damages, General Damages

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. Statements that injure a person in her office, profession, or occupation are typically classified as defamatory per se.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

### [HN16](#) [↓] Freedom of Speech, Strategic Lawsuits Against Public Participation

Appellants burden in the third step of the TCPA's provides multi-step process for the dismissal of a legal action is to establish a defense as a matter of law. Tex. Civ. Prac. & Rem. Code Ann. § 27.005(d). The appellate court considers all the evidence in determining whether appellee's established a defensive ground.

**Counsel:** For Hadimani, Srishail Kumar, Appellant: Thomas Henry Smith III, June Elizabeth Higgins.

For Hiremath, Harish, Appellee: Robert Joseph Kruckemeyer, Michael Kruckemeyer.

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**Judges:** Panel consists of Justices Spain, Poissant, and Wilson.

**Opinion by:** Charles A. Spain

## Opinion

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### MEMORANDUM OPINION

Appellant Srishail Kumar Hadimani sued appellee Harish Hiremath for defamation. After Hiremath filed a motion to dismiss pursuant to the Texas Citizens Participation Act (TCPA),<sup>1</sup> the trial court dismissed Hadimani's defamation claims. Hadimani now appeals arguing that the trial court erred in dismissing his claims because (1) the TCPA does not apply to his defamation claims, (2) he satisfied his burden to provide clear-and-specific evidence of the prima facie case for each essential element of his claims, and (3) Hiremath did not conclusively establish his affirmative defense. We hold that the TCPA applies to Hadimani's claims and that he produced clear-and-specific evidence for the prima facie case of defamation. Because Hiremath raised a fact question on his affirmative defense of substantial truth, rather than conclusively establishing [\*2] the affirmative defense, we reverse the judgment of the trial court and remand the case for further proceedings.

#### I. BACKGROUND

Veerashaiva Samaja of North America ("VSNA") is a religious and cultural organization formed by persons who emigrated from India to the United States seeking to preserve their religious and cultural identity. VSNA is a non-profit, tax-exempt 501(c)(3) organization with 26 chapters around the United States reporting more than 2,000 member families.

Hadimani was the president of VSNA from 2019 through February 2021. Hiremath was Hadimani's successor and is the current VSNA president. Hadimani alleges that he enjoyed a good reputation in the community until Hiremath began a campaign to remove him as president. Hadimani explains that his term as president expired and he turned over the position to his successor. Although he was supposed to maintain a position on the board as immediate past president, he

resigned from this position to pursue other endeavors because of Hiremath's "defamation campaign." Hadimani's petition alleges that this campaign included defamatory statements made to the VSNA membership as well as to members of a like-minded organization.

Hiremath recounts [\*3] a different version of the facts. He was previously involved in a Texas VSNA chapter and was a member of the VSNA board of directors. He alleges that Hadimani, as president, conducted the 2020 national VSNA election and then was involved in manipulating the voting results. When other members challenged the outcome of the election, Hiremath alleges that Hadimani refused to provide documentation or defend himself. Hiremath further alleges that the third-party website on which the election was conducted established voter fraud on the part of Hadimani.

The record contains a single letter from the third-party website sent to VSNA stating: "As directed by you, we reviewed the voter list and observed that nearly 22 voters have casted the votes [sic] using the same email IDs using different User ID and Access Code assigned by the System Administrator." The letter also stated that VSNA had reported complaints from members who tried to vote but received a message that they had already voted. The third-party provider concluded "[t]his could only be done by someone who had access to the voters initial User ID and Access Code. . . [I]t would allow the system administrator to cast a vote under that [\*4] voters record and lock them out from being able to vote." However, the letter does not confirm that the system administrator did cast votes for others. The letter concludes that "we believe that in the election process conducted by your organization on June 19th to July 10th, 2020, voter fraud was conducted." This letter offers no specific information or further analysis.

A VSNA member filed suit against the organization in a Michigan court to declare the 2020 election invalid and set aside the results. The "Consent Declaratory Judgment" signed by the Michigan trial court in March 2021 states "there is evidence of fraud in the voting process by the 'System Administrator,' Srishail K. Hadimani, and improprieties in tabulating the vote." It is undisputed that Hadimani was not a party to the Michigan proceedings.<sup>2</sup> It is also unclear whether the

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<sup>2</sup> Hiremath asserts that Hadimani was president when the lawsuit was first filed. However, that information is not contained in our appellate record. The appellate record contains only the March 2021 consent judgment, which was signed after Hadimani left VSNA.

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<sup>1</sup> [Tex. Civ. Prac. & Rem. Code Ann. §§ 27.001-011.](#)



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Michigan court heard any evidence in the case and whether it was an adversary proceeding.

Also in March 2021, Hiremath sent the head of Basava Samithi, another like-minded organization, an email discussing coordination between the organizations relating to a religious festival. Hiremath explained that VSNA would not collaborate with Basava Samithi [\*5] if a third organization, founded by Hadimani, was involved, and described the allegations against Hadimani in his March 2021 email to the head of that organization.

We would not like to comment about the Global Basava Foundation's structure and organizational strength but would like to bring to your kind notice some facts about the promoter Mr. Srishail Hadimani. As we are all aware, he was our Former President at VSNA, and he had to unceremoniously relinquish his position both as President and the position of Immediate Past President due to some unsavory and fraudulent conduct on his part. VSNA in the USA is following all procedures in the law to report these fraudulent activities to the law enforcement authorities. The authorities are investigating these complaints and many matters are in the Court of Law at present. I must say at this juncture that these developments are NOT something we are proud of and VSNA has taken a major credibility setback due to Sri Srishail Kumar Hadimani's conduct as President during his tenure.

In June 2021, Hiremath, in a letter to the membership, included the text of a resolution passed by VSNA's board of directors relating to Hadimani:

**VSNA Resolution [\*6] # 2021-5: Revocation of Primary Membership of Mr. Srishail Kumar Hadimani.**

1. Mr. Srishail Kumar Hadimani, having been accused of allegedly "Falsifying a document/ Forgery", a crime under US laws, and unwilling to exonerate himself despite many opportunities presented to him. The Board of Directors (BOD) had suspended his VSNA membership on Dec 6th, 2020, until he could clear his name from suspicion of the 'alleged crime'. Even after six months of waiting, Mr. Hadimani has refused, failed and not even attempted to provide the anticipated & needed proof.

(Reference: Special BOD Minutes of Meeting, Sunday, Dec 6th, 2020)

2. The Circuit Court for the County of Oakland, State of Michigan entered the Declaratory

Judgement on March 26th, 2021. Excerpt from the recorded judgment: "IT IS FURTHER ORDERED, ADJUDGED, AND DECLARED, that there is evidence of fraud in the voting process by the "System Administrator", Srishail K. Hadimani, and improprieties in tabulating the vote. (Reference: Declaratory Judgment, March 26th, 2021).

3. Srishail Hadimani was responsible for multiple counts of bylaw violations, overriding several majority BOD resolutions while continuing to mislead and misinform the general [\*7] members. He engaged VSNA in a legal counterchallenge going against explicit BOD mandate, direction & resolutions. (Reference: Special BOD Minutes of Meeting, Sunday, Aug 16th, 2020)

Above are some of the key reasons, by which we concluded that Mr. Srishail Kumar Hadimani has demonstrated "conduct unbecoming, and detrimental to the goals and objectives of the Religious Corporation["]". In an attempt, to safeguard the image, reputation, legal and financial interests of VSNA, we the Board of Directors are forced to do our duty, and invoke Article III sec 3 of the VSNA bylaws, to revoke Mr. Srishail Kumar Hadimani's primary life membership and past president privileges from the Veerashaiva Samaja of North America and its chapters, without any refund of his membership fees.

Hiremath further commented that VSNA could have pursued criminal actions against Hadimani, but chose not to:

Proven fraudulent actions of Mr. Srishail Kumar Hadimani could have been legally dealt and further tried in a court of criminal law, if pursued by VSNA. After consulting with most of the current board members and advisors, the following internal action, only within the VSNA organization has been implemented for now. To ensure that this never [\*8] happens again in our religious organization, the current VSNA BOD & BOR have acted unitedly against the fraudulent actions stated above.

This newsletter was disseminated to membership in a variety of ways, including through social media.

Hadimani, a resident of Georgia, filed suit in August 2021 in Harris County district court against Hiremath, a resident of Harris County. He alleged causes of action for defamation, specifically libel and slander for statements made by Hiremath in emails to the VSNA community via email, social media, the organization's

website and to members generally. Hadimani further complained that Hiremath published these statements "in an attempt to spread [his] defamatory statements and injure [Hadimani's] character and reputation as far as possible."

Hiremath filed a motion to dismiss pursuant to the TCPA, which the trial court granted in December 2021. The trial court dismissed Hadimani's lawsuit and awarded attorney's fees of \$6,250 to Hiremath. See [Tex. Civ. Prac. & Rem. Code Ann. 27.009\(a\)\(1\)](#); see also [Lehmann v. Har-Con Corp.](#), [39 S.W.3d 191, 192-93 \(Tex. 2001\)](#) ("judgment issued without a conventional trial is final for purposes of appeal if . . . it actually disposes of all claims and parties then before the court").

## II. ANALYSIS

In a single issue on appeal, Hadimani [\*9] argues the trial court erred by granting Hiremath's motion to dismiss because (1) the TCPA does not apply as the communications that form the basis of the lawsuit are not matters of public concern, (2) Hadimani established his prima facie case for defamation, and (3) Hiremath did not establish any affirmative defense as a matter of law.<sup>3</sup>

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<sup>3</sup>Hadimani's brief presents the following four issues:

I. Did the trial court commit error by granting Appellee's motion to dismiss under the Texas Citizens Participation Act? This issue is intended to preserve all possible grounds of error. See e.g. [Malooly Bros., Inc. v. Napier](#), [461 S.W.2d 119 \(Tex. 1970\)](#) (authorizing review of all possible grounds of trial court error in granting summary judgment when a broad issue of error in granting summary judgment is presented)

II. In this case, the TCPA would only apply if the defamatory speech was a "matter of public concern." Are allegations of fraud and malfeasance among members of a private voluntary organization "matters of public concern" under the TCPA or common law?

III. Did Appellant demonstrate to the trial court that he had a prima facie case for defamation?

IV. When the evidence was hotly contested on each of Appellee's affirmative defenses, did Appellee establish any affirmative defense to Appellant's defamation cause of action as a matter [\*10] of law?

However, Hadimani's issue I is the only issue that identifies any error on the part of the trial court. Issues II—IV address

### A. TCPA framework

**HN1** [↑] The purpose of the TCPA is to "encourage and safeguard" the constitutional rights to speech, petition, and association while also protecting the right to file and pursue "meritorious lawsuits for demonstrable injury." [Tex. Civ. Prac. & Rem. Code Ann. § 27.002](#). The TCPA contemplates an expedited dismissal procedure when a "legal action" is "based on or is in response to a party's exercise of the right of free speech, right to petition, or right of association." [Tex. Civ. Prac. & Rem. Code Ann. § 27.003\(a\)](#). Here, Hiremath asserted that Hadimani's claims were made in response to his exercise of his right of free speech and right of association.

To accomplish its objectives, the TCPA provides a multi-step process for the dismissal of a "legal action" to which it applies. [Montelongo v. Abrea](#), [622 S.W.3d 290, 295-96 \(Tex. 2021\)](#). In the first step, the party filing a motion to dismiss under the TCPA bears the burden to demonstrate that the "legal action" is "based on or is in response to," as relevant to this appeal, the party's exercise of the right of free speech and right of association. [Tex. Civ. Prac. & Rem. Code Ann. §§ 27.003\(a\), .005\(b\)](#). But under the second step, the court may not dismiss the action if the non-moving party "establishes by clear and specific evidence a prima facie case for each essential element of the claim." [Tex. Civ. Prac. & Rem. Code Ann. § 27.005\(c\)](#). Under the third step, [\*11] the movant can still win dismissal if he establishes "an affirmative defense or other grounds on which the moving party is entitled to judgment as a matter of law." *Id.* [§ 27.005\(d\)](#).

**HN2** [↑] In construing the TCPA and determining its applicability, we review statutory construction issues de novo. See [Lippincott v. Whisenhunt](#), [462 S.W.3d 507, 509 \(Tex. 2015\)](#) (per curiam). Similarly, whether the parties have met their respective burdens is a question of law that we review de novo. See [Dallas Morning News, Inc. v. Hall](#), [579 S.W.3d 370, 377 \(Tex. 2019\)](#). Under the de novo standard, we "make an independent determination and apply the same standard used by the trial court in the first instance." [Fawcett v. Grosu](#), [498 S.W.3d 650, 656 \(Tex. App.—Houston \[14th Dist.\] 2016,](#)

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the various steps in the TCPA analysis. We therefore reformulate Hadimani's issues into a single overarching issue with multiple sub arguments. The court's reformulation of these issues is nonsubstantive, and this opinion addresses the arguments made in issues II to IV to resolve Hadimani's claim of error.

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[pet. denied](#)) (internal quotation marks and citation omitted).

## B. Waiver

Hiremath argues that Hadimani waived any argument regarding the applicability of the TCPA to his claims by conceding in the trial court that Hiremath's communications were matters of public concern.

At the outset of the hearing, the trial court asked Hadimani's counsel whether there was agreement that Hiremath's communications were matters of public concern. Hadimani's counsel stated he believed they were matters of public concern and agreed that argument could focus on whether Hadimani had clear-and-specific evidence supporting the elements of his cause of action. It is also relevant [\*12] that Hadimani did not challenge the application of the TCPA in his response to Hiremath's motion to dismiss.

[HN3](#) [↑] This court has previously discussed the supreme court's instruction that appellate courts should take a broad view of error preservation in TCPA cases due to the statute's "unique language." [Neely v. Allen, No. 14-19-00706-CV, 2021 Tex. App. LEXIS 4189, 2021 WL 2154125, at \\*4-5 \(Tex. App.—Houston \[14th Dist.\] May 27, 2021, no pet.\)](#) (mem. op.) (quoting [Adams v. Starside Custom Builders, LLC, 547 S.W.3d 890, 897 \(Tex. 2018\)](#)). Specifically, in the TCPA context, "[r]ules of error preservation should not be applied so strictly as to unduly restrain appellate courts from reaching the merits of a case." [Adams, 547 S.W.3d at 896](#). The high court explained:

Moreover, the unique language of the TCPA directs courts to decide its applicability based on a holistic review of the pleadings. [Section 27.006\(a\)](#) provides that when considering a TCPA motion to dismiss, the court "shall consider the pleadings and supporting and opposing affidavits." In TCPA appeals, we have decided whether communications are matters of public concern under a de novo standard of review, suggesting that the determination is one of law. We have not previously cabined our TCPA analysis to the precise legal arguments or record references a moving party made to the trial court regarding the TCPA's applicability. [HN4](#) [↑] Our focus instead has been on the pleadings and on whether, [\*13] as a matter of law, they are based on or relate to a matter of public concern.

[Id. at 897](#) (internal citations omitted). Noting that the supreme court has emphasized that a trial court considering a TCPA motion "shall consider the pleadings and supporting and opposing affidavits," one of our sister courts concluded that this analysis "suggests an independent duty on the court to look beyond the parties' arguments to the pleadings and affidavits before it, to determine if the predicates for the TCPA are met." [Pacheco v. Rodriguez, 600 S.W.3d 401, 406-07 \(Tex. App.—El Paso 2020, no pet.\)](#). Given this precedent, our court has concluded our de novo review of TCPA cases requires that we must determine whether the movant met his burden to prove by a preponderance of the evidence that the TCPA applies to the claims at issue. [Neely, 2021 Tex. App. LEXIS 4189, 2021 WL 2154125, at \\*5-6](#). Parties may not establish communications to be a matter of public concern by their agreement. In following this precedent, we consider whether Hiremath met his burden to prove that the TCPA applies to Hadimani's claims.

## C. The TCPA analysis

### 1. First step—applicability of TCPA

[HN5](#) [↑] To obtain dismissal under the TCPA, Hiremath had the initial burden to demonstrate that the TCPA applied to Hadimani's claims against him. This burden required Hiremath to demonstrate by [\*14] a preponderance of the evidence that (1) Hadimani's "legal action" (2) "is based on or is in response to" (3) an exercise of the right of free speech or the exercise of the right of association. [Tex. Civ. Prac. & Rem. Code Ann. § 27.005\(b\)](#).

Hadimani's petition is a "legal action" as defined by the TCPA. See [HN6](#) [↑] [Tex. Civ. Prac. & Rem. Code Ann. § 27.001\(6\)](#) (defining "legal action" as "a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal, declaratory, or equitable relief"). The next question is whether Hiremath demonstrated that Hadimani's petition was based on or in response to Hiremath's exercise of his right to free speech.

"[HN7](#) [↑] Exercise of the right of free speech' means a communication made in connection with a matter of public concern." [Tex. Civ. Prac. & Rem. Code Ann. § 27.001\(3\)](#). "Communication' includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or



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electronic." [Tex. Civ. Prac. & Rem. Code Ann. § 27.001\(1\)](#). "Matter of public concern" means a statement or activity regarding:

- (A) a public official, public figure, or other person who has drawn substantial public attention due to the person's official acts, fame, notoriety, or celebrity;
- (B) a matter of political, social, or other interest to the community; [\*15] or
- (C) a subject of concern to the public.

[Tex. Civ. Prac. & Rem. Code Ann. § 27.001\(7\)](#). [HN8](#) [↑] The Supreme Court of Texas has explained that the phrase "matter of public concern" "commonly refers to matters 'of political, social, or other concern to the community,' as opposed to purely private matters." [Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC](#), 591 S.W.3d 127, 135 (Tex. 2019) (quoting [Brady v. Klentzman](#), 515 S.W.3d 878, 884 (Tex. 2017)).

The parties agree Hiremath made communications regarding Hadimani, but disagree about whether Hiremath's communications were made in connection with a matter of public concern. Hadimani argues that Hiremath's communications were made to members of VSNA and involve only the internal management and workings of a voluntary religious organization. In response, Hiremath asserts that the statements he made were clearly matters of interest to the VSNA community and involved the allegations that Hadimani had committed a crime, which is a matter of public concern.

This case does not involve the pecuniary or business interests of private parties. See, e.g., [Navidea Biopharmaceuticals, Inc. v. Capital Royalty Partners II, L.P.](#), 14-18-00740-CV, 2020 Tex. App. LEXIS 6973, 2020 WL 5087826, at \*5 (Tex. App.—Houston [14th Dist.] Aug. 28, 2020, *pet. denied*) (mem. op.) (publicly-traded company failed to show by preponderance of evidence that amount owed pursuant to judgment was matter of public concern for purposes of TCPA). VSNA is not a privately-held business, but rather a social, cultural, and religious organization for at least [\*16] two thousand families around the country.

Although Hadimani takes the position that the communications at issue concerned only the inner working of a voluntary social and religious organization, the communications were certainly a matter of interest to members of the VSNA community. See [Tex. Civ. Prac. & Rem. Code Ann. § 27.001\(7\)\(B\)](#); see generally [Grosu](#), 498 S.W.3d at 657 (under prior version of statute

this court held that TCPA applies to allegedly defamatory statements made by members of fraternal organization about other members of organization). Further, to the extent that these communications concerned the management of a 501(c)(3) organization as well as alleged criminal activity on the part of Hadimani, they constituted matters of public concern. See [Tex. Civ. Prac. & Rem. Code Ann. § 27.001\(7\)\(C\)](#).

We conclude that Hiremath met his burden of demonstrating Hadimani's defamation claims are based on or in response to his exercise of the right to free speech. Because Hiremath met this initial burden under the TCPA, the burden shifts to Hadimani to provide clear-and-specific evidence of the prima facie case for each essential element of his claims. [Tex. Civ. Prac. & Rem. Code Ann. § 27.005\(c\)](#).

## 2. Second step—prima facie case

[HN9](#) [↑] The TCPA does not define "clear and specific," so we apply the ordinary meaning of those terms: "clear" means "unambiguous," "sure," [\*17] or "free from doubt," and "specific" means "explicit" or "relating to a particular named thing." [O'Hern v. Mughrabi](#), 579 S.W.3d 594, 604 (Tex. App.—Houston [14th Dist.] 2019, *no pet.*); see also [Code Construction Act, Tex. Gov't Code Ann. § 311.011](#) ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage."). The supreme court has explained the clear-and-specific evidence standard requires a plaintiff to "provide enough detail to show the factual basis for its claim." [Bedford v. Spassoff](#), 520 S.W.3d 901, 904 (Tex. 2017) (per curiam) (internal quotation omitted). We only consider the pleadings and evidence in favor of the plaintiff's case when determining whether it established the requisite prima facie proof. See [Gensetix, Inc. v. Baylor Coll. of Med.](#), 616 S.W.3d 630, 644 (Tex. App.—Houston [14th Dist.] 2020, *pet. dismiss'd*) ("We review both the pleadings and evidence attached to Gensetix's motion to dismiss to determine whether Gensetix has provided 'enough detail to show the factual basis for its claim.'").

### a. Elements of defamation

[HN10](#) [↑] "Defamation is generally defined as the invasion of a person's interest in her reputation and good name." [Hancock v. Variyam](#), 400 S.W.3d 59, 63

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[\(Tex. 2013\)](#). The tort includes libel and slander.<sup>4</sup> *Neely v. Wilson*, 418 S.W.3d 52, 60 (Tex. 2013). Defamatory statements are those that tend to (1) "injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury" as well as those statement that (2) "impeach any person's honesty, integrity, virtue, [\*18] or reputation." [Tex. Civ. Prac. & Rem. Code § 73.001](#). The elements of defamation cause of action are: (1) the defendant published a false statement; (2) that defamed the plaintiff; (3) with the requisite degree of fault regarding the truth of the statement (negligence if the plaintiff is a private individual); and (4) damages, unless the statement constitutes defamation per se.<sup>5</sup> [Bedford, 520 S.W.3d at 904](#); see also [Chehab v. Edgewood Dev., Ltd., 619 S.W.3d 828, 835 \(Tex. App.—Houston \[14th Dist.\] 2021, no pet.\)](#) (explaining that whether statement is reasonably capable of defamatory meaning is determined by court as matter of law using objective standard). A statement is considered "published" when it is communicated to a third person who is capable of understanding its defamatory meaning and in such a way that the person did understand its defamatory meaning. [Exxon Mobil Corp. v. Rincones, 520 S.W.3d 572, 579 \(Tex. 2017\)](#); see also [Comm. on Pattern Jury Charges, State Bar of Tex., Texas Pattern Jury Charges: Business, Consumer, Insurance & Employment PJC 110.3](#) (2020).

[HN12](#) [↑] "In a defamation case that implicates the [TCPA], pleadings and evidence that establishes the facts of when, where, and what was said, the defamatory nature of the statements, and how they damaged the plaintiff should be sufficient to resist a motion to dismiss under the [TCPA]." [Bedford, 520 S.W.3d at 904](#) (internal quotation marks omitted).

### b. Email to Basava Samithi

Here, Hadimani's pleadings and evidence allege that

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<sup>4</sup> [HN11](#) [↑] Libel occurs when defamatory statements are in writing. [Tex. Civ. Prac. & Rem. Code Ann. § 73.001](#). "Slander is a defamatory statement that is orally communicated or published to a third person without legal excuse." [Randall's Food Mkts, Inc. v. Johnson, 891 S.W.2d 640, 646 \(Tex. 1995\)](#); see also [Comm. on Pattern Jury Charges, State Bar of Tex., Texas Pattern Jury Charges: Business, Consumer, Insurance & Employment PJC 110.1](#) (2020).

<sup>5</sup> See also [Texas Pattern Jury Charges: Business, Consumer, Insurance & Employment PJC 110.2](#) (elements).

Hiremath knowingly published false statements about him to Basava Samithi. [\*19] Hiremath's email stated that Hadimani had to "unceremoniously relinquish his position both as President and the position of Immediate Past President due to some unsavory and fraudulent conduct on his part." The email further states that VSNA was reporting "these fraudulent activities to the law enforcement authorities" and that "authorities are investigating these complaints and many matters are in the Court of Law at present." In his appellate brief, Hiremath tries to distance himself from these statements claiming there was never an accusation that Hadimani was "accused or investigated for any crime in criminal court." However, Hiremath's email explicitly states that the fraud was reported to law enforcement authorities and that "authorities" were investigating. His email is also misleading because, although Hiremath never states there was a proceeding in criminal court, his statements create the impression in the reader that Hadimani was being criminally investigated and prosecuted. See [Turner v. KTRK Television, Inc., 38 S.W.3d 103, 115 \(Tex. 2000\)](#) (concluding "[HN13](#) [↑] a plaintiff can bring a claim for defamation when discrete facts, literally or substantially true, are published in such a way that they create a substantially false and defamatory [\*20] impression by omitting material facts or juxtaposing facts in a misleading way").

These statements, if false, are defamatory because they impeach Hadimani's honesty, integrity, virtue, or reputation. See [Tex. Civ. Prac. & Rem. Code § 73.001](#). Hadimani's declaration asserts these statements were false because (1) he was not accused or investigated for committing fraud in criminal court and (2) was not a party to the civil action which declared that Hadimani engaged in fraud. Therefore, his affidavit provides prima facie evidence of falsity.

Considering only Hadimani's pleadings and evidence, we conclude his pleadings and evidence are sufficient to show that Hiremath published false statements to Basava Samithi that defamed Hadimani. See [Bedford, 520 S.W.3d at 904](#); [Gensetix, 616 S.W.3d at 644](#). Likewise, the alleged defamatory statements are sufficient (for TCPA purposes) to constitute defamation per se, given that falsely accusing someone of committing a crime constitutes defamation per se, and accordingly Hadimani need not present evidence of damages.<sup>6</sup> See [Dallas Morning News, Inc. v. Tatum,](#)

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<sup>6</sup> [HN15](#) [↑] Defamation per se occurs when a statement is so obviously detrimental to one's good name that a jury may

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[554 S.W.3d 614, 638 \(Tex. 2018\)](#); [Bedford, 520 S.W.3d at 904](#). [HN14](#) [↑] As to the requisite degree of fault, the standard is negligence if the plaintiff is a private individual, and there is no evidence here that Hadimani is a public official or public figure. See [Bedford, 520 S.W.3d at 904](#); [In re Lipsky, 460 S.W.3d 579, 593 \(Tex. 2015\)](#). We conclude the applicable [\*21] fault standard is negligence and that Hadimani met his prima facie burden for his claims of defamation as to the email Hiremath sent to Basava Samithi.

### c. Letter to VSNA membership

Hadimani's pleadings and evidence allege that Hiremath knowingly published false statements about him to the VSNA membership. Specifically, Hiremath's letter included a resolution passed by the VSNA board.

Although Hiremath states that he was simply exercising his duty to report board resolutions to the membership, the context of his letter clearly adopts and agrees with the statements made in the resolution. Immediately following the text of the resolution, Hiremath's letter explains that the resolution describes the "key reasons, by which we concluded that Mr. Srishail Kumar Hadimani has demonstrated 'conduct unbecoming and detrimental to the goals and objectives of" VSNA.<sup>7</sup> (emphasis added). Hiremath then states that "[p]roven fraudulent actions of Mr. Srishail Kumar Hadimani could have been legally dealt and further tried in a court of criminal law, if pursued by VSNA."<sup>8</sup> Hiremath also specifically states that Hadimani was "unwilling to exonerate himself" and that Hadimani has "refused, failed [\*22] and not even attempted to provide the anticipated & needed proof."

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presume general damages, such as for loss of reputation or for mental anguish. See [Hancock, 400 S.W.3d at 63-64](#). Statements that injure a person in her office, profession, or occupation are typically classified as defamatory per se. [Id. at 64](#); see also [Texas Pattern Jury Charges: Business, Consumer, Insurance & Employment PJC 115.33](#).

<sup>7</sup>The parties debate whether VSNA's bylaws required Hiremath to publish the resolution or whether it should have been kept confidential. Because that question is immaterial to the claim before us, we do not consider it.

<sup>8</sup>Though Hiremath publishes an excerpt from the Consent Declaratory Judgment signed by the trial court in Michigan, Hiremath's letter gives the false impression that the suit addressed criminal matters and that Hadimani was involved in the proceeding. See [KTRK Television, Inc., 38 S.W.3d at 115](#).

These statements, as discussed above, if false, are defamatory because they impeach Hadimani's honesty, integrity, virtue, or reputation. See [Tex. Civ. Prac. & Rem. Code § 73.001](#). Hadimani's declaration asserts these statements were false because he (1) was not "unwilling to exonerate" himself for this "alleged crime" of changing votes in the VSNA election,<sup>9</sup> (2) was not accused or investigated for committing fraud in criminal court, and (3) was not a party to the civil action which declared that Hadimani engaged in fraud. Though Hiremath argues that Hadimani did not provide any evidence supporting his claims, Hiremath overlooks Hadimani's declaration which provides clear-and-specific evidence of falsity for TCPA purposes. Again, considering only Hadimani's pleadings and evidence, we conclude his pleadings and evidence are sufficient to show that Hiremath published false statements that defamed Hadimani. See [Bedford, 520 S.W.3d at 904](#); [Gensetix, 616 S.W.3d at 644](#). Because falsely accusing someone of a crime constitutes defamation per se, Hadimani need not present evidence of damages.<sup>10, 11</sup> See [Tatum, 554 S.W.3d at 638](#); [Bedford, 520 S.W.3d at 904](#).

Accordingly, we conclude that Hadimani has established a prima facie case of defamation by clear-and-specific [\*23] evidence with respect to the letter to VSNA's membership. The burden now shifts to Hiremath to establish an affirmative defense or other ground on which he is entitled to judgment as a matter of law. [Tex. Civ. Prac. & Rem. Code Ann. § 27.005\(d\)](#).

### 3. Third step—proof of defense as a matter of law

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<sup>9</sup>Hiremath complains that Hadimani does not "describe any clear and specific extrinsic evidence of actions that he took to exonerate himself." However, Hadimani was not required to produce "extrinsic" evidence in order to meet his burden.

<sup>10</sup>Hadimani's declaration states that he has suffered damages in the form of an injury to his professional and social reputation, "shame, embarrassment, public humiliation, and mental anguish." He further asserts that Hiremath's statements have affected his ability to meet the financial needs of his family and impaired his ability to perform "at my full potential in the professional workplace."

<sup>11</sup>The fault standard is discussed in the previous section as negligence because there is no evidence here that Hadimani is a public official or public figure. See [Bedford, 520 S.W.3d at 904](#); see also [Texas Pattern Jury Charges: Business, Consumer, Insurance & Employment PJC 110.6](#).

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[HN16](#) [↑] Hiremath's burden in the third step is to establish a defense as a matter of law. See [Tex. Civ. Prac. & Rem. Code Ann. § 27.005\(d\)](#). We consider all the evidence in determining whether Hiremath established a defensive ground. See [D Magazine Partners, L.P. v. Rosenthal, 475 S.W.3d 470, 488 \(Tex. App.—Dallas 2015\)](#), *aff'd in part, rev'd in part on other grounds*, [529 S.W.3d 429 \(Tex. 2017\)](#).

/s/ Charles A. Spain

Justice

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Hiremath argues that he is entitled to dismissal of Hadimani's claims because he established his affirmative defense of truth as a matter of law. In support of his affirmative defense, Hiremath argues that the statements at issue were substantially true and that the evidence is overwhelming. [Tatum, 554 S.W.3d at 640](#); see also [Texas Pattern Jury Charges: Business, Consumer, Insurance & Employment PJC 110.8](#).

The only evidence, outside of Hiremath's declaration, offered to prove substantial truth was the letter from the third-party election provider and the Michigan consent judgment. The letter from the third-party election provider does not establish that Hadimani committed a crime or was investigated by law enforcement for committing a crime. Though it raised irregularities related to the election, the letter [\*24] does not conclusively prove that Hadimani engaged in fraudulent behavior. The letter was quite short and offered little but conclusory statements and opinion. The Michigan consent judgment arises from a civil lawsuit and does not establish any crime or investigation of Hadimani by law enforcement. Neither the consent judgment nor the third-party letter proves that Hadimani refused to defend himself. Hiremath's declaration supporting his motion to dismiss, creates a fact issue but does not establish the affirmative defense as a matter of law. Therefore, there is no evidence conclusively establishing his affirmative defense of truth or substantial truth.

Accordingly, we conclude that Hiremath did not meet his burden. [Tex. Civ. Prac. & Rem. Code Ann. § 27.005\(d\)](#). We hold the trial court erred in granting Hiremath's motion and sustain Hadimani's sole issue on appeal.

### III. CONCLUSION

Having concluded the trial court erred in granting Hadimani's motion to dismiss, we reverse the trial court's final judgment dismissing Hadimani's defamation claims and awarding attorney's fees and costs to Hiremath. We remand the case to the trial court for further proceedings.