No. 04-16-00184-CV

IN THE
FOURTH COURT OF APPEALS
AT SAN ANTONIO, TEXAS

RONALD F. AVERY,

Appellant/Cross-Appellee

V.

DYLAN BADDOUR and HEARST COMMUNICATIONS, INC.,

Appellees/Cross-Appellants.

On Appeal from the 2nd 25th Judicial District Court
Guadalupe County, Texas, Honorable W.C. Kirkendall, Presiding
Cause No. 15-2186-CV

COMBINED APPELLEES' AND CROSS-APPELLANTS' BRIEF

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IDENTITY OF PARTIES AND COUNSEL

The following is a list of all parties to this appeal and the names and addresses of those parties' counsel.

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STATEMENT OF THE CASE

Nature of the Case:

Ronald F. Avery instigated this libel case against Hearst Communications, Inc., publisher of the *Houston Chronicle*, and its reporter Dylan Baddour, who reported on a voluntary association known as the "Republic of Texas" or the "Texians." Avery seeks damages from Appellees/Cross-Appellants for alleged injuries caused by statements in two versions of the same article written by Baddour and published in the *Houston Chronicle* and on www.houstonchronicle.com. (1 CR 3-27.)

Trial Court:

The Honorable W.C. Kirkendall, 2nd 25th Judicial District, Guadalupe County, Texas.

Course of the Proceedings:

On December 23, 2015, Appellees/Cross-Appellants moved to dismiss Avery's claim pursuant to the Texas Citizens Participation Act, Tex. Civ. Prac. & Rem. Code § 27.001, *et seq.* (1 CR 38-71.)

During briefing on the motion to dismiss, Avery moved to recuse the Honorable W.C. Kirkendall from hearing that motion. (1 CR 242-245.) Avery's recusal motion was denied on February 17, 2016 by the Honorable Donnie R. Burgess, Senior Judge of the 9th Court of Appeals, following a hearing under Texas Rule of Civil Procedure 18a. (1 CR 375.)

On March 10, 2016, the trial court held a hearing on Appellees/Cross-Appellants' motion to dismiss. (1 RR 1; *see also* 1 CR 376.)

Trial Court Disposition:

By order of March 18, 2016, the trial court dismissed Avery's libel claim pursuant to the Texas Citizens Participation Act, Tex. Civ. Prac. & Rem. Code § 27.001, *et seq.*, but denied Appellees/Cross-Appellants an opportunity to recover their court costs, reasonable attorney's fees, and other expenses under Section 27.009(a) of that Act. (1 CR 427; App. Br. at A-2.)

STATEMENT REGARDING ORAL ARGUMENT

Appellees/Cross-Appellants Dylan Baddour and Hearst Communications, Inc. believe that the issues before this Court are simple enough to be resolved without oral argument and that oral argument will not significantly aid the Court in its decision of this case. However, Appellees/Cross-Appellants respectfully request that the Court grant them equal time if Appellant/Cross-Appellee Ronald F. Avery's request for oral argument is granted.

APPELLEES' ISSUE PRESENTED

Whether the trial court properly dismissed this case asserting a single claim for defamation under the Texas Citizens Participation Act, Tex. Civ. Prac. & Rem. Code § 27.001, *et seq.*, where the challenged publications were not defamatory as to plaintiff, were substantially true, and plaintiff neither specified nor put forth any evidence of special damages.

CROSS-APPELLANTS' ISSUE PRESENTED

Whether the trial court abused its discretion in denying Appellees/Cross-Appellants the opportunity to recover their court costs, reasonable attorney's fees, and other expenses under Section 27.009(a) of the Texas Citizens Participation Act, Tex. Civ. Prac. & Rem. Code § 27.009(a).

TO THE HONORABLE FOURTH COURT OF APPEALS:

Appellees/Cross-Appellants Hearst Communications, Inc., publisher of the Houston Chronicle, and Dylan Baddour, a reporter for the Chronicle (collectively, "the Chronicle") hereby submit their combined Appellees' and Cross-Appellants' brief, and respectfully show the Court as follows:

INTRODUCTION

Appellant/Cross-Appellee Ronald F. Avery's ("Avery") Appellant's Brief ("App. Br.") consists largely of difficult-to-follow repetitions of allegations in his Original Petition, and makes no attempt to help the Court understand the issues on appeal, much less connect any law to the undisputed facts in the record. Nonetheless, this libel case is relatively simple, and the legal principles requiring that dismissal be affirmed are straightforward:

This action concerns two versions of a single Houston Chronicle article (one published in print and the other online) that lie at the core of the First Amendment.[1] In the highest journalistic tradition of reporting on matters of public concern, the Articles fairly detailed the views of a Texas association called the Republic of Texas (or "Texians"), a nonviolent body engaged in political discourse that believes Texas is not legally part of the United States and seeks recognition of

[1] Copies of the articles (together, the "Articles") are located at 1 CR 87-88 and 1 CR 90-96. They are substantially identical, with one published in print (the "Print Article," (1 CR 87-88)) and the other on the newspaper's website (the "Web Article," (1 CR 90-96)).

Texas' independence through "legalistic" means.

Avery was a speaker at one of the Texians' meetings described in the Chronicle's Articles and alleges that those Articles—which mention him only in accompanying photo captions—defamed him by implying that he is a Texian. Avery's claim of libel-by-association is both remarkable and ironic given that he actually hosted the Texians' meeting on his property, and also hosted defendant Baddour, knowing full well that he would write about it for the Houston Chronicle. Avery's claim is even more remarkable for the premise upon which he has rested his allegations of falsity and defamatory meaning, namely, that he is an "observer of dissolution" (believing that the United States and State of Texas have both "dissolved" and no longer exist as a result of various unlawful actions by the federal government tracing back to the 1800s) and not, as he claims the articles imply, a Texian "secessionist." Significantly, Avery now concedes on appeal that his distinction is one without a difference: "***No one cares about any difference between a secessionist and an observer of dissolution***." (App. Br. at 45 (emphasis added).) Avery is correct, and this concession dooms his claim. Both positions amount to a belief that Texas is not part of the United States.

Avery's second, and equally far-fetched, theory is that the Chronicle somehow implied that he is a "terrorist," "violent extremist," "neo-Nazi," and "far-right fascist"—words that appear nowhere in the Articles—because the Web

Article included hyperlinks to third-party reports in other publications discussing different, more extreme groups that also favor secession as a political goal. This claim stretches the Web Article beyond any reasonable interpretation. The linked materials focus on groups other than the Texians and do not make ***any*** statements about Avery, and the way the links are incorporated into the Web Article does not give rise to any violent implication about Avery or the Texians as a group. Moreover, the Web Article ***expressly*** states that the Texians "foreswear violence," negating any claimed implication to the contrary.

Avery's attempt to punish the Chronicle for its fair and accurate reporting was properly dismissed by the trial court under the Texas Citizens Participation Act, Tex. Civ. Prac. & Rem. Code § 27.001, *et seq.* (the "TCPA"). Avery failed to meet his burden to establish a prima facie case of libel because the Articles—which imply at most that Avery is a Texian engaged in constitutionally-protected advocacy of the dissenting view that Texas is not part of the United States—are not defamatory and are substantially true as a matter of law. In addition, Avery failed to provide any evidence of injury resulting from the Articles.

Now on appeal, Avery provides no basis for reversal. His Appellant's Brief cites no relevant law, points to no relevant evidence, misconstrues the legal standards governing substantial truth and defamatory meaning, and fails to address the clear precedent establishing that the Articles are incapable of defaming him and

are substantially true. The trial court's dismissal of his libel claim should accordingly be affirmed.

However, the trial court did err in one respect: having dismissed Avery's claim under the TCPA, it was statutorily required to award the Chronicle its court costs and reasonable attorneys' fees, but failed to do so. This case should thus be remanded for the limited purpose of considering an appropriate award of costs and fees.

STATEMENT OF FACTS

This case arises out of the Chronicle's reporting on the Texians and their April 2015 meeting, which mentioned Avery in a total of three photo captions but not at all in the body of the Articles.

A. The Texians.

According to Avery and the Texians' own website, the Texians are a group that maintains that the national sovereignty of Texas was never signed over to the United States. (*See, e.g.*, App. Br. at 6-7; 1 CR 6, 129, 304.) Their "Proclamation" explains that "[a] fraudulent color-of-law annexation agreement was foisted on elected officials in Texas, but no lawful treaty was ever ratified to allow the United States to take over our nation [of Texas], which had already been established forever by international treaties." (1 CR 129.) The group holds regular meetings of its congress. (*See* 1 CR 72, 154-164.)

Consistent with their understanding that Texas never became part of the United States as a legal matter, the Texians work to have Texas' independence recognized by legal means under international law. (*See* 1 CR 141-143, 156, 163.) For instance, after the government raided one of their meetings on February 14, 2015, the Texians responded by asking the United Nations to recognize that the raid was a violation of international law. (*See* 1 CR 141-143.)

B. Appellant/Cross-Appellee Ronald F. Avery.

Avery is a licensed architect, a "political philosopher," and the operator of multiple websites including www.lawfulgovernment.com, on which he discusses his theories about government. (1 CR 5, 19; *see also* 1 CR 172-201 (registration information for and excerpts from www.lawfulgovernment.com).) He has also litigated prior lawsuits that have served as platforms for his political beliefs, most notably *Avery v. Guadalupe Blanco River Authority*, No. 04-0499-cv (25th Judicial Dist. July 27, 2004), *aff'd*, No. 04-04-00582-CV, 2005 WL 900155 (Tex. App.—San Antonio Apr. 20, 2005, pet. denied), in which he (unsuccessfully) argued that sovereign immunity does not exist. *Id.* at *1.

According to Avery, he is not a member of the Texians. (*See, e.g.*, App. Br. at 1; 1 CR 6.) However, he does maintain that the United States and the State of Texas have been ***dissolved*** through the alteration of the country's constitutional form "without the required amendments." (1 CR 15, 19, 20; *see also, e.g.*, 1 CR

178-180 (claiming that the state of Texas has been dissolved), 304, 314, 316-317, 323, 330.) On www.lawfulgovernment.com, Avery explains that, according to John Locke's *Second Treatise of Government*, "violations that change the constitutional form without permission of the people by amendment dissolve the state or federation or union . . . ." (1 CR 184; *see also* 1 CR 304.) As a result, according to Avery, "no dissolved court has lawful authority to adjudicate anything" and "all those sitting in the seats of a dissolved government have no authority and henceforth everything they do is tyranny." (1 CR 184.) Avery argues that this has happened to the United States as a result of, among other things, the use of paper currency since 1862; the creation of a central bank in 1913; the maintenance of a federal standing army; federal gun regulation; federal regulation of education; and membership in the United Nations. (1 CR 184 (listing alterations that "dissolve[d] the federal union"); *see also* 1 CR 198-201, 331-332.) Thus, Avery admittedly does not recognize the legitimacy of the United States government. (1 CR 20-21.)

Avery has also advocated in favor of an armed and organized militia, bearing military style weapons, to "defend" against the federal government. (*See* 1 CR 182-186, 187-196 (advocating a "need" and a "right" to retain "military style" weapons and organize into militias to "defend" against the federal government "with force if necessary").)

C. The April 2015 Texian Meeting.

On or about April 11, 2015, Houston Chronicle reporter Dylan Baddour attended a meeting of the Texian congress and interviewed several attendees. (1 CR 72.) Among other things, the speakers discussed means for achieving recognition of Texas' independence, including filing a memorial to the International Court at the Hague. (*Id.*)

Avery was also present at the April 2015 meeting and gave a speech, which he alleges concerned the doctrine of dissolution and its "impact . . . on the [Texians] and contemporary society." (1 CR 6; *see also* 1 CR 330-337.) In that speech, he discussed "evidence showing the present dissolution of the United States" (1 CR 19), including the 2008 bailout, the passage of the Patriot Act, and gun control laws (1 CR 322, 330-337). The speech "did not . . . compare the differences between secession and dissolution . . . ." (1 CR 304.)

D. The Articles At Issue.

Baddour attended a second Texian meeting in August of 2015. (1 CR 72.) Following that meeting, the Chronicle published the Web and Print Articles about the Texians on September 13 and 14, respectively. (*Id.*; *see* 1 CR 87-88, 90-96.)

The Articles, which are substantially identical, focus on a Texian official named Joe Fallin and his experience with the group, which he says has given him "hope of a better future for himself and his children." (1 CR 88, 95.) Although the

word "secessionists" appears in the headlines, both Articles explain up front that the Texians "believe Texas never legally became part of the United States and, therefore, remains a sovereign nation" and that they seek "a legalistic escape from Uncle Sam." (1 CR 87, 91.) The Articles also detail the government raid on the Texians' February meeting, the increase in media attention that resulted from the raid, and discussions at the April and August meetings, including the possibility of filing a memorial with the International Court. (1 CR 87-88, 90-96.) They make clear that the group "foreswears violence," is doing "nothing, yet" to actually separate from the United States, and would need to take several time-consuming steps before they could secede, including securing a statewide vote and a constitutional convention. (1 CR 88, 93.)

As originally published, the Print Article mentions Avery exactly once and the Web Article twice, all in captions to photographs accompanying the Articles. (1 CR 73, 87-88, 90-96, 363-364.) The photograph published with the Print Article shows the back of a man's jacket bearing the words "Republic of Texas Texian National." The caption read:

> All Texians have informally renounced their U.S. citizenship, as shown on Ronald Avery's jacket.

(1 CR 87.) The same photograph was included with the Web Article, originally with a longer caption:

> All Texians have informally renounced their U.S.

> citizenship, as evident from Ronald Avery's jacket. Many members have formally renounced citizenship by filing Republic documents to Texas courts, which has no real effect. Most carry official Texian identification. Some have landed briefly in jail for explaining to law enforcement officers that they don't have a Texas drivers' license because they are citizens of the Republic.

(1 CR 73, 363.) The Web Article also includes a photograph of Avery speaking at the April meeting. Its caption originally read:

> In April, the Texian congress assembled beneath the blue-and-yellow flag of the old Republic, on the dance floor of the shuttered Silver Eagle Taphouse near the banks of the Guadalupe River in McQueeny. They follow a speaker list, and members take turns at the microphone. In this photo, Ronald Avery lists grievances with the U.S., including the 2008 bank bailout, NSA surveillance, the "police state" and "immoral wars."

(1 CR 73, 364.)

Shortly after the Articles were published, Avery complained of inaccuracies in the Articles. (*See* 1 CR 351-352.) The Chronicle communicated with Avery about his complaints and promptly ran a correction on September 16, 2015, which stated:

> In a photo caption accompanying a Sept. 14 article about the Republic of Texas, a secessionist organization, the Chronicle incorrectly identified a man wearing a Republic of Texas jacket as Ronald Avery. Avery is not a member of the organization and was not in the photograph.

(1 CR 73.) Avery's name was later removed from the photo captions

accompanying the Web Article. (1 CR 73.)

E. The Proceedings Below.

Unsatisfied with the Chronicle's correction, Avery continued communicating with the Chronicle and ultimately demanded that the paper publish an almost three-page retraction statement. (1 CR 28-31.) The Chronicle declined to do so, and Avery commenced this action in November, 2015. (1 CR 3.)

The Original Petition. Avery's Original Petition alleges a single count of libel based on the Articles. (1 CR 3-27.) He alleges that the Articles on their face include numerous false and defamatory statements and implications about him arising from the initial implication that he is a member of the Texians. (*See* 1 CR 6, 8, 10, 13-14, 18-21.) Avery also alleges that the Web Article's hyperlinks to a *Politico* article entitled "Putin's Plot to Get Texas to Secede," a *New York Times* article entitled "The Growing Right-Wing Terror Threat," and a Department of Homeland Security report, serve to defame him through a chain of implications: Avery claims that the Article implies that he is a Texian, that all Texians are secessionists, and that the links further imply that all secessionists are "right-wing extremist[s]," "working to 'breakup the United States' even with Russia," "part of the growing right wing terror threat," "worse than Muslim terrorists," and "should be dealt with by state and federal authorities." (1 CR 13-19; *see also* 1 CR 106-122 (copies of materials linked in the Web Article).)

The Motion to Dismiss Pursuant to the TCPA. On December 23, 2015, the Chronicle moved to dismiss Avery's libel claim pursuant to the TCPA. (1 CR 38-71.) Avery filed a Response on January 28, 2016, in which he argued that his claim should survive dismissal based on the particular implications (a) that he is a member of the Texians and therefore a secessionist who has renounced his U.S. citizenship; and (b) that, due to the hyperlinks in the Web Article, he and the Texians are terrorists, violent extremists, etc. (1 CR 283-321.)[2]

The trial court held a hearing on the motion to dismiss on March 10, 2016.[3] (1 RR 1; 1 CR 376.) Avery was afforded an opportunity to be heard and presented argument during the hearing. (1 RR 11:18-15:11.) Subsequently, Avery filed an "Outline of Oral Argument" making additional substantive arguments. (1 CR 401-421.) The Chronicle filed a response, noting that Avery's Outline was improper supplementation and that Avery had a full and fair opportunity to present his arguments at the hearing. (1 CR 422-425.)

The Order and this Appeal. By order dated March 18, 2016, the trial court

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[2] Avery also filed an Affidavit in support of his Response, and two supplements to that Affidavit, all of which are referred to collectively herein as the "Affidavit." (1 CR 322-368, 377-378, 395-400.)

[3] The hearing date was delayed as a result of Avery's filing of a motion to recuse the Honorable W.C. Kirkendall from presiding over the case. (1 CR 242-245.) The recusal motion created a docket condition requiring the Court to hold its hearing on the Chronicle's motion to dismiss more than 60 days after service of that motion. *See* Tex. Civ. Prac. & Rem. Code § 27.004(b). (1 CR 376.) Avery's recusal motion was denied by a different judge on February 17, 2016 (1 CR 375), and Avery does not challenge this denial as a point of error on appeal (*See* App. Br. at x, 9-14).

dismissed Avery's libel claim pursuant to the TCPA, but denied the Chronicle an opportunity to recover its court costs, reasonable attorney's fees, and other expenses under Section 27.009(a) of the TCPA. (1 CR 427; App. Br. at A-2.)

Avery filed a Notice of Appeal on March 29, 2016. The Chronicle timely filed a Notice of Cross-Appeal on April 12, 2016, pursuant to Tex. R. App. P. 26.1(d) and Section 27.008(b) of the TCPA, Tex. Civ. Prac. & Rem. Code § 27.008(b).

SUMMARY OF APPELLEES' ARGUMENT

Because Avery presents no properly-preserved or viable objection to the trial court's finding that the TCPA applies to his libel claim, the overarching question before this Court is whether Avery met his burden of presenting a prima facie case of each essential element of that claim. Tex. Civ. Prac. & Rem. Code § 27.003. He was unable to carry this burden with respect to at least three essential elements: that the Articles defamed him, that the Articles were false as to him, and that he was injured as a result of the Articles.

First, Avery cannot meet his burden of showing that the Articles defamed him because they are incapable of defaming him as a matter of law. Capability of defamatory meaning is a threshold question of law for the court based on an objective "hypothetical reasonable reader" standard, and Avery's own

interpretation of the Articles is legally irrelevant, as are the anonymous online comments that he now seems to point to as evidence of defamatory meaning.

Analyzed under this correct, objective standard, the Articles on their face neither imply that Avery is a criminal (as he claims) nor make any other defamatory statements or implications about Avery. The actual language of the Articles, along with the accompanying photos and captions, imply at most that Avery is a nonviolent Texian "secessionist" merely advocating a dissenting political opinion that Texas is not part of the United States. As a matter of law, it is not defamatory for the Chronicle to state or imply, even incorrectly, that Avery is exercising his legal rights. And the Articles' alleged implication that Avery is a Texian "secessionist" does not pertain to just any legal right—it concerns the celebrated right of political dissent on which this country was founded and which is enshrined in the First Amendment as a value above all others.

Nor is the Web Article capable of defaming Avery through its hyperlinks to extrinsic, third-party reports on other websites. Although Avery believes that these links somehow imply that he is an extremist and/or terrorist, no reasonable reader could agree: the Web Article expressly states that the Texians are nonviolent, the linked materials themselves do not make any statements about Avery, and the particular way the links are incorporated into the Web Article does not give rise to any implications about Avery or the Texians as a group.

Second, Avery cannot meet his burden of establishing the essential element of falsity as a matter of law because the Articles are substantially true. Where, as here, the underlying facts are undisputed, substantial truth is a question of law. And based on the undisputed underlying facts, the gist of the Articles as they relate to Avery is true: Avery admittedly associated with the Texians, he hosted them on his property, and he shares their fundamental belief that Texas is not part of the United States. All of Avery's complaints of literal falsity are minor inaccuracies that do not affect the substantial truth of the Articles.

Finally, Avery failed to meet his burden of establishing that he suffered actual reputational injury as a result of the Articles, which is an essential element of his claim because the Articles are not defamatory on their face. Neither his conclusory allegations of mental anguish, the anonymous online comments, nor the possibility that he might recover exemplary damages can satisfy this element.[4]

[4] In his Request for Oral Argument, Avery appears to assert that the trial court's conduct of the hearing and failure to issue findings and conclusions were prejudicial, although he does not present these complaints as appellate points or argue them with citations to relevant authority. (App. Br. at viii-x.) He has waived these complaints as grounds for reversal by failing to properly brief them. *See* Tex. R. App. P. 38.1(f) & (i); *Neira v. Scully*, No. 04-14-00687-CV, 2015 WL 4478009, at *2-3 (Tex. App.—San Antonio, July 22, 2015). In any event, these claims would provide no basis for reversal: Avery was not constrained by the Chronicle's request for fifteen minutes to present ***its*** argument; he had a fair opportunity to, and did, present his own argument during the hearing (1 RR 11:18-15:11); and he did not object when the trial court concluded the hearing (1 RR 15:16-21). Nor is Avery entitled to findings and conclusions. The TCPA authorizes only the movant to request additional findings, Tex. Civ. Prac. & Rem. Code § 27.007, and the Rules of Civil Procedure authorize such requests only for cases that have gone to trial, *see* Tex. R. Civ. P. 296.

APPELLEES' ARGUMENT

I. Legal Standard Under the TCPA.

The TCPA "safeguard[s] the constitutional rights of persons to . . . speak freely," Tex. Civ. Prac. & Rem. Code § 27.002, by protecting them "from retaliatory lawsuits that seek to intimidate or silence them on matters of public concern," *In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015). It provides for expedited dismissal of such suits through a two-step process initiated by the filing of a motion to dismiss. *Id.* Under the first step, the defendant must show that the plaintiff's claim "is based on, relates to, or is in response to" the defendant's exercise of the right of free speech, right to petition, or right of association. Tex. Civ. Prac. & Rem. Code § 27.005(b). If the defendant makes this showing, "the second step shifts the burden to the plaintiff to 'establish [] by clear and specific evidence a prima facie case for each essential element of the claim in question.'" *In re Lipsky*, 460 S.W.3d at 587 (quoting Tex. Civ. Prac. & Rem. Code § 27.005(c)) (alteration in original). Even if the plaintiff can meet this high burden, the court must still dismiss the claim if the defendant establishes by a preponderance of the evidence each essential element of a valid defense. Tex. Civ. Prac. & Rem. Code § 27.005(d). Thus, dismissal under the TCPA cannot be avoided by merely ***pleading*** facts. A plaintiff must instead submit "clear and specific" evidence to support his claims. *See id.* § 27.006(a).

In this appeal, neither the law nor the facts are in dispute. Avery does not dispute that the actual language of the TCPA applies to his libel claim. (*See* App. Br. at 15-17.) Nor could he—his suit is based solely on the Articles about the Texians' political beliefs and plans, which are textbook examples of the "[e]xercise of the right of free speech" under the TCPA. The TCPA defines the exercise of that right as "a communication made in connection with a matter of public concern," including issues relating to "the government," "health or safety," and "economic[] or community well-being." Tex. Civ. Prac. & Rem. Code §§ 27.001(3), 27.001(7)(A)-(C). These terms must be "construed liberally," *id.* § 27.011(b), and the reporting in the Articles self-evidently falls within their breadth. *See supra* at 7-9. Indeed, the Articles' coverage of the Texians' political views lies at the very heart of the First Amendment's protection of free expression about matters of public concern, which "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Lane v. Franks*, 134 S. Ct. 2369, 2377 (2014) (citation omitted).[5]

[5] Avery complains for the first time on appeal that the TCPA is unconstitutional under Article 2, Section 1 of the Texas Constitution because it amounts to the legislature "tell[ing] the Judiciary how to handle causes of action" (App. Br. at 15-16), but he has waived this argument by failing to assert it before the trial court. *See Better Bus. Bureau of Metro. Houston, Inc. v. John Moore Servs., Inc.*, 441 S.W.3d 345, 352 n.1 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (argument that TCPA was unconstitutional was "waived due to failure to present it to the trial court"); Tex. R. App. P. 33.1(a). Regardless, the fact that the TCPA provides procedures for the courts to follow and burdens for litigants to meet does not violate the principle of separation of powers set forth in Article 2, Section 1. "[T]he legislature has the authority to extend or limit the procedure by which the courts may exercise its powers," so long as it does not interfere with the judiciary's exercise of its constitutional powers. *Lacy v. Lacy*, 122 S.W.2d

Accordingly, the questions presented by Avery's appeal to this Court are under the second step of the TCPA analysis: whether he met his burden of establishing a "by clear and specific evidence a prima facie case for each essential element of the claim in question," and if so, whether the Chronicle established a valid defense. Tex. Civ. Prac. & Rem. Code §§ 27.005(c), 27.005(d). This Court reviews *de novo* the trial court's decision on these issues. *Entravision Commc'ns Corp. v. Salinas*, --- S.W.3d ---, 2016 WL 363586, at *4 (Tex. App—Corpus Christi Jan. 22, 2016, pet. filed).

II. Dismissal Was Proper Because Avery Could Not Show That The Articles Defamed Him.

It almost goes without saying that an essential element of Avery's libel claim

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1104, 1105 (Tex. Civ. App.—Dallas 1938, no writ). The TCPA does not interfere with those powers, which are: "(1) [t]he power to hear facts, (2) the power to decide the issues of fact made by the pleadings, (3) the power to decide the questions of law involved, (4) the power to enter a judgment on the facts found in accordance with the law as determined by the court,(5) and the power to execute the judgment or sentence." *Jackson v. State*, 861 S.W.2d 259, 261 (Tex. App.—Dallas 1993, no pet.) (alteration in original) (citation omitted). Any contrary ruling would mean that much of the Texas Civil Practice and Remedies Code is unconstitutional. Avery's alternative argument that the TCPA is "internally flawed" because it provides protection to factual news reporting (App. Br. at 16-17), is also waived by Avery's failure to support this argument with any relevant authority. *See* Tex. R. App. P. 38.1(i); *Neira v. Scully*, 2015 WL 4478009, at *2-3; *Lance v. Robinson*, No. 04-14-00758-CV, 2016 WL 147236, at *12 (Tex. App.—San Antonio Jan. 13, 2016, no pet. h.) ("To comply with Rule 38.1, existing legal authority applicable to the facts and the questions the appellate court is called on to answer must be accurately cited."). In any event, this Court is required to enforce the TCPA as written, *see Better Business Bureau*, 441 S.W. 3d at 352-54, and the TCPA's protections unambiguously extend to ***all*** communications "made in connection with a matter of public concern," including news reporting on factual events. *See, e.g., Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 76-78, 81 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); *AOL, Inc. v. Malouf*, No. 05-13-0167-CV, 2015 WL 1535669, at *1-3 (Tex. App.—Dallas Apr. 2, 2015, no pet.).

is that the Articles defamed him. *See Entravision*, 2016 WL 363586, at *6 (citing *In re Lipsky*, 460 S.W.3d at 593). A written statement is defamatory only if the words used tend to injure the plaintiff's reputation, or if it tends to impeach the plaintiff's honesty, integrity, or virtue. Tex. Civ. Prac. & Rem. Code § 73.001. The statement "should be derogatory, degrading, and somewhat shocking, and contain 'element[s] of personal disgrace.'" *Means v. ABCABCO, Inc.*, 315 S.W.3d 209, 214 (Tex. App.—Austin 2010, no pet.) (alteration in original) (citation omitted). Moreover, a statement can defame a plaintiff only if it concerns him or her, and thus a statement directed to a group that includes a plaintiff is actionable only if it creates "the inference that ***all members*** of the group have participated in the activity that forms the basis of the libel suit." *Harvest House Publishers v. Local Church*, 190 S.W.3d 204, 213-14 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

The trial court properly dismissed Avery's libel claim under the TCPA because the Articles—which merely describe Avery and the Texians engaged in the exercise of their own First Amendment rights—are incapable of defaming Avery as a matter of law. Avery thus could not meet his burden under the TCPA of establishing a prima facie case that the Articles defamed him.[6]

[6] Avery incorrectly characterizes the Chronicle's argument that the Articles are incapable of defamatory meaning as a "defense." (*See* App. Br. at 31.) To the contrary, because defamatory meaning is an essential element of libel that Avery was required to establish as part of his prima facie case, the Chronicle's argument shows that Avery could never meet that burden because the

Nothing in Avery's brief provides a basis for this Court to reach a different conclusion. Avery's own subjective view that the Articles somehow labeled him a criminal (*see* App. Br. at 28-30), a terrorist and a violent extremist (*see* App. Br. at 11-12, 35-36) is not only strained beyond any credible reading, it is irrelevant to the threshold legal question of whether the Articles are reasonably capable of defaming him—as are the anonymous online comments that he now seems to claim support his position. (*See* App. Br. at 10-11, 30, 33-36 43.) Reasonably read, the Articles imply at most that Avery is a Texian engaged in First Amendment-protected advocacy of a dissenting political view, and are incapable of defaming him as a matter of law.[7]

A. The Articles Are Not Reasonably Capable Of Defaming Avery On Their Face.

Whether a statement is reasonably capable of defaming a plaintiff is a "threshold" question of law for the court. *Musser v. Smith Protective Servs., Inc.*, 723 S.W.2d 653, 654-55 (Tex. 1987). In analyzing this question, the court must

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Articles are simply incapable of defaming him. *See Entravision*, 2016 WL 363586, at *8 (concluding that plaintiff could not establish a prima facie case of his defamation claim where statements were incapable of defaming him as a matter of law).

[7] Avery's arguments about a "fair comment" defense are irrelevant to the issues before this Court. The Chronicle did not assert such a defense in its motion below (1 CR 38-69), and contrary to Avery's unsupported contention, whether the Chronicle can assert a "fair comment" defense does not negatively "impact" its ability to argue that the Articles are substantially true (*see* App. Br. at 31). Courts regularly dismiss claims based on the substantial truth of the statements at issue without considering whether a fair comment defense applies. *See, e.g.*, *Newspaper Holdings*, 416 S.W.3d at 85-86; *Avila v. Larrea*, 394 S.W.3d 646, 659-62 (Tex. App.—Dallas 2012, pet. denied).

"construe[] the statement as a whole in light of surrounding circumstances based upon how a person of ordinary intelligence would perceive the entire statement." *Id.* at 655. This inquiry is "objective, not subjective." *Harvest House Publishers*, 190 S.W.3d at 214. Thus, Avery's personal understanding of the Articles is wholly irrelevant to the Court's legal determination. The Court's task "is not to determine what the statement meant to the plaintiff, but whether it would be considered defamatory to the average reader." *San Antonio Express-News v. Dracos*, 922 S.W.2d 242, 248 (Tex. App.—San Antonio 1996, no writ).

Under this standard, the Articles are incapable of defaming Avery on their face. Even assuming that the Articles imply that he is a Texian, and further imply that all Texians are "secessionists," the Articles make clear that the Texians are engaged ***only*** in non-criminal, non-violent, and constitutionally-protected advocacy of the dissenting viewpoint that Texas is not part of the United States. Implying that Avery is a member of this group does not charge him with a crime, as Avery claims (App. Br. at 28-30), nor does it disgrace him in any other way.

1. The Articles Do Not Charge Avery With A Crime.

Avery asserts that the Articles defame him on their face because they imply that he is one of the Texians, who are characterized as "secessionists," and secession is a federal crime. (App. Br. at 28-30.) But contrary to Avery's suggestion, the Articles' use of the word "secessionist" to describe the Texians

does not imply criminal behavior. The definition of "secessionist" includes those who merely "***maintain***[] that secession is a right" and "***think[]*** that a nation, state, etc., should separate from another and become independent." (1 CR 218-219 (emphasis added).) Even if seceding is illegal,[8] ***believing in*** or ***advocating for*** secession most definitely is not. *See Brandenberg v. Ohio*, 395 U.S. 444 (1969).

Read as a whole, the Articles clearly refer to Texian "secessionists" who are engaged ***only*** in belief and advocacy: they describe the Texians as participating in monthly meetings in which they discuss "legalistic" options for securing Texas' independence, and explain that the Texians "foreswear[] violence" as a means. (1 CR 87-88, 91, 93.) And although the Articles note that actual state secession would be illegal, they also report that the Texians would need to complete a complicated process to secure a statewide vote and a constitutional convention ***before*** Texas could secede through nonviolent means—steps which the Articles make clear the Texians have not taken. (1 CR 88, 94.) Indeed, the Articles unambiguously state that the Texians are doing "***nothing***, yet," to secure independence. (1 CR 88, 94 (emphasis added).)

The fact that the Articles used the word "secessionists" once to refer to the

[8] Avery has cited no law, and the Chronicle is aware of none, that makes it a crime for individuals or groups to pursue secession through legalistic means. While it is true, as the Articles reported, that the U.S. Supreme Court ruled in 1869 that a *State* may not unilaterally secede, particularly (as was the case there) where it has failed to satisfy all the necessary political requisites within the State, that case did *not* hold that *individuals* or *groups* were precluded by law from taking steps in furtherance of State secession. *See Texas v. White*, 74 U.S. 700 (1869).

Texians simply cannot be reasonably read as implying that the Texians (and Avery) are engaged in illegal conduct.[9]

2. The Articles Do Not Otherwise Defame Avery On Their Face.

Nor are the Articles' references to Avery otherwise defamatory in the context of the Articles as a whole. Aside from three photo captions, the Articles do not mention or refer to Avery at all. On their face, the photo captions at most imply that Avery is a member of the Texians, who advocate Texas' independence from the federal government by nonviolent means and have informally renounced their citizenship, and that Avery listed "grievances" with the U.S. government during the Texians' April meeting. (1 CR 87-88, 90-96.) In other words, the Articles cannot reasonably be read to accuse Avery of anything beyond exercising his own First Amendment rights to advocate a dissenting political view, and associating with a minority (and perhaps unpopular) group that shares his fundamental belief that Texas is not part of the United States.

Far from disgracing Avery, these implications (which happen to be true, *see* Point III *infra*) charge him with the American ***virtue*** of political dissent and cannot

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[9] Avery also argues that the alleged implication of criminal conduct arising from the word "secessionist" is "bolster[ed]" by interviews with university professors (App. Br. at 30), but the interviews with professors reported in the Articles do not even mention the legality of secession. Rather, the Articles report that one professor stated that the Texians would need to hold a statewide vote before Texas could be recognized at the International Court at the Hague, and a second professor is reported as stating that a statewide vote requires "a state legislator [to] propose a constitutional convention to discuss secession, and a new constitution must be written

be defamatory. This country was founded on dissenters advocating independence from England, and since then, dissenting ideas and actions—including advocacy of illegal and even violent acts—have been used by numerous celebrated leaders throughout our country's history to push the country closer to their ideals. *See generally* Robert Young, *Dissent: The History of an American Idea* (2015). Significantly, expressions of these ideas are fully protected by the First Amendment, which enshrines expression of political dissent, association, and petition for change as core American values. Indeed, as Justice Holmes explained in his own dissent that has since become the backbone of First Amendment jurisprudence,[10] the very "theory of our Constitution" is that "the ultimate good desired is better reached by free trade in ideas" including "opinions that we loathe and believe to be fraught with death . . . ." *Abrams v. United States*, 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting). In other words, dissenting ideas are valuable because they may confirm the truth of our already held beliefs or they may expose flaws in those beliefs—either way, they bring us closer to the truth. *See id.*

Advocacy of secession and even revolution is part of this American tradition

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to appear on the ballot." (1 CR 88, 94.)

[10] *See, e.g.*, *Virginia v. Black*, 538 U.S. 343, 358 (2003) (quoting *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting)); *Texas v. Johnson*, 491 U.S. 397, 418-19 (1989) (paraphrasing *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting)); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988) (quoting *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting)).

of speaking one's mind in an effort to win over a majority, or at least a like-minded minority. Noted secessionists in American history have included elected officials from all over the country, and state secession currently has wide popular support. Indeed, a recent Reuters survey concluded that 1 in 4 Americans and 34% of those in the Southwest (including Texas) are in favor of state secession—a fact that was reported in the Articles (1 CR 88, 94)—and a 2012 whitehouse.gov petition for Texas' peaceful secession garnered 125,746 signatures. (1 CR 221-223, 238, 241.) In light of the popularity of secession and the American tradition of and value in dissent, the Articles would not lead a reasonable reader to regard Avery with hatred and contempt for his political views, even if they disagreed with him. *Cf. Johnson v. Houston Post Co.*, 807 S.W.2d 613 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (description of appellant as a "militant speaker" was not defamatory as a matter of law); *Rawlins v. McKee*, 327 S.W.2d 633, 635 (Tex. Civ. App.—Texarkana 1959, writ ref'd n.r.e.) (description of a candidate as "radical" and "backed and financed by the big shot labor bosses" was not defamatory as a matter of law).

Indeed, even if dissenting advocacy were not so valued in this country, as a matter of law, it cannot be defamatory for the Chronicle to report that Avery was exercising his legal rights. *See, e.g., Associated Press v. Cook*, 17 S.W.3d 447, 456 n.8 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (statement that plaintiff invoked

the Fifth Amendment was not defamatory because "exercising a legal right is not defamatory as a matter of law"); 50 Tex. Jur. 3d Libel & Slander § 2. That is all the Articles do on their face, and to "suggest such 'accusations' are defamatory . . . tortures the ordinary meaning." *Dracos*, 922 S.W.2d at 248. Rather, the Chronicle's account of Avery and the Texians exercising their constitutional rights simply "lacks the element of disgrace or wrongdoing necessary" to sustain Avery's defamation claim on its face. *Means*, 315 S.W.3d at 214-15; *see also Einhorn v. LaChance*, 823 S.W.2d 405, 411 (Tex. App.—Houston [1st Dist.] 1992, writ dism'd w.o.j.) (statement that someone was "attempting to form a union" not defamatory despite perceived prejudice against unions, because it "is a right protected by federal law"); *Dracos*, 922 S.W.2d at 248 (statement that employee "walked off the job . . . without any excuse" is not defamatory because it does not suggest he did anything illegal or unethical); *Hearst Newspapers P'ship, L.P. v. Macias*, 283 S.W.3d 8, 11-12 (Tex. App.—San Antonio 2009, no pet.) (statement that employee "resigned" was not defamatory because, *inter alia*, he had a right to resign).[11]

B. Avery's Citation to Irrelevant Extrinsic Materials Does Nothing to Establish Defamatory Meaning.

[11] Avery nowhere explains why it was defamatory for the Articles to imply that he "informally" renounced his United States citizenship—which at most in the context of the Articles merely implies another form of peaceful, lawful protest. The other statements in the Articles about particular Texians' illegal activities and "some" Texians "formally" renouncing their citizenship (*see* 1 CR 73)—which Avery does not appear to take issue with on appeal—do not make any implication about Avery. *Harvest House Publishers*, 190 S.W.3d at 214.

Realizing that the actual language of the Articles is incapable of defaming him, Avery focuses the bulk of his brief on extrinsic materials in an effort to conjure up some defamatory meaning as to him. Those efforts are unavailing. Avery's citation to third-party publications that were available through hyperlinks in the Web Article, and to unidentified reader comments posted in response to the Web Article, are irrelevant to the question of the Articles' defamatory meaning and provide no foundation for Avery's argument in any event.

1. The Web Article Is Not Reasonably Capable of Defaming Avery Through Its Hyperlinks To Third Party Reports.

Avery claims that the Web Article's hyperlinks to three ***other*** third-party reports somehow imply that he and the Texians are "part of the 'Growing Right-Wing Terror Threat' worse than Muslim terrorists because he is part of a movement of secessionists that went to Russia to associate with 'far right fascists' and 'neo-Nazis' to 'rail against Western decadence.'" (App. Br. at 35-39; *see also id.* at 9.) This theory stretches the Web Article (including its use of hyperlinks) far beyond any reasonable interpretation. Moreover, Avery cites no legal authority for his fanciful theory that linking to completely separate and distinct third-party publications can give rise to defamatory meaning in the Chronicle's Web Article, and we are aware of none.

As an initial matter, the linked articles are not part of the Web Article, and

the Chronicle cannot be held liable for actually publishing the content of those articles. *See, e.g.*, *Life Designs Ranch, Inc. v. Sommer*, No. 32922-4-III, 2015 WL 7015867, at *13-14 (Wash. Ct. App. Nov. 12, 2015) (posting a hyperlink to material is not publication or republication of the hyperlinked material); *In re Phila. Newspapers LLC*, 690 F.3d 161, 173-75 (3d Cir. 2012) (similar). Even assuming *arguendo* that linking to extrinsic materials could somehow give rise to liability, it would require at a minimum that the linked publications imbue statements actually in the Web Article with defamatory meaning as to Avery in the mind of the "average reasonable person." *See Bingham v. Sw. Bell Yellow Pages, Inc.*, No. 2-06-229-CV, 2008 WL 163551, at *4 (Tex. App.—Fort Worth Jan. 17, 2008, no pet.). This would require a finding that the average reasonable reader actually clicks on links in online articles, reads the linked material, and uses it to actually interpret the meaning of the original articles—something that seems generally unlikely given the wealth of links internet users encounter online and the myriad purposes for which they are used.

Even assuming readers do click on and read the hyperlinks in full, neither the linked material nor the surrounding language in the Web Article refers to Avery. Accordingly, liability based on the links would require the average reader to infer not only that Avery is a Texian and therefore a secessionist, but also that, through the links, ***all*** secessionists are terrorists or violent extremists working with

Russia. *See supra* at 18.

No reasonable reader could make these inferences from the way the links are used in the Web Article. Neither the words that form the hyperlinks in the Web Article nor the linked materials themselves say anything defamatory about Texians or secessionists generally, and the language surrounding the links in the Web Article does not give rise to any such defamatory implication.

Specifically, although Avery alleges that a link to a *Politico* article implies that he is "part of a movement of secessionists that went to Russia to associate with 'far right fascists'" (App. Br. at 35; *see also* 1 CR 14, 18), the link is explicitly cited in the Web Article to show that the "Russian media, at Vladamir Putin's behest, have cheered the independence movement and a ***rival*** secessionist group"—***not*** the Texians. (1 CR 92 (emphasis added).) This does not imply anything about all Texians or all secessionists. Moreover, the text of the *Politico* story itself describes just a few specific people as having connections to Russia, and the specific portion of the piece that Plaintiff alleges creates defamatory implications is explicitly about a particular person, Nathan Smith, and a different group, the Texas Nationalist Movement. (1 CR 14, 18 (quoting *Politico*, "Putin's Plot to Get Texas to Secede" as stating that "Nathan Smith, who styles himself the 'foreign minister' for the Texas Nationalist Movement" was quoted in a Russian newspaper); *see also* 1 CR 106-109 (*Politico* article).) No reasonable reader could

understand the Web Article to have the defamatory implication about Avery or all Texians that Avery ascribes to it as a result of the link to the *Politico* piece.

The other two links—to a Department of Homeland Security report about "sovereign citizen extremists" and a *New York Times* article entitled "The Growing Right Wing Terror Threat"—also fail to create any defamatory implications about all secessionists or all Texians. Although Avery asserts that these links draw a "correlation" between the Texians and extremist groups (App. Br. at 35), they do no such thing. The links are used in the Web Article to provide additional information relating to the statement that the government has a general concern with anti-government groups, a concern that the Articles say may have contributed to a recent raid on the Texians ***despite*** the fact that the Texians "foreswear[] violence." (1 CR 93.)[12] The linked materials themselves are clear that their subject is ***violent*** extremists (in direct contrast to the Web Article's description of the Texians as nonviolent), and neither lists the Texians as such a group. (1 CR 111-114, 116-122.) And even assuming the links did draw a "correlation" between Texians and extremists, a mere correlation does not imply that ***all*** Texians are extremists, and therefore makes no implication about Avery. *See supra* at 18.[13]

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[12] Because the Clerk's Record has been reproduced in black and white, it is difficult to see which words in the Web Article actually form the hyperlinks to these two extrinsic reports. The words "tension between law enforcement nationwide and anti-government groups" link to the Times article, while the words "one by the Department of Homeland Security" link to the DHS report. (*See* 1 CR 302 (underlining the linked words in excerpts from the Web Article).)

[13] Avery cites *Turner v. KTRK Television*, 38 S.W.3d 103 (Tex. 2000) (App. Br. at 24-25),

Moreover, the Web Article's description of the Texians as nonviolent activists working towards a "legalistic" exit from the United States places the challenged links in a context that expressly negates any imagined implication that Avery and the Texians are violent extremists. In this context, the Web Article as a whole cannot reasonably be read as implying violence or extremism. *See, e.g.*, *Musser*, 723 S.W.2d at 655 (in the context of a letter that praised a former employee's qualifications and competence, employer's statement that accused former employee of taking accounts with him when he left the business was not reasonably capable of a defamatory meaning).

Ultimately, Avery's argument based on the Web Article's hyperlinks asks this Court to find that merely including links to other unrelated publications about more extreme groups is enough to imply that Avery and the Texians are also violent extremists, ***even though*** the Web Article expressly states that the Texians are nonviolent and Avery is not named in the linked materials. This is an

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but that case has no application here. *Turner* did not deal with links to extrinsic materials, but rather stands for the proposition that a publication can give rise to false and defamatory implications by "omitting key facts and falsely juxtaposing others" within that publication. *Id.* at 118. Moreover, as the Texas Supreme Court repeatedly underscored in that decision, the resulting defamatory implication must be one arising from "a reasonable person's perception of the entirety of a publication . . . ." *Id.* at 115; *see also id.* at 117-18. Here, for the reasons set forth above, the "juxtaposition" of the hyperlinked material with the Web Article does not reasonably create the defamatory implication that Avery engaged in illegal conduct. Finally, *Turner* is distinguishable on its facts: the court ultimately held that the news report at issue was capable of a defamatory implication based on a ***combination*** of several material omissions (which are not alleged in this case) alongside affirmatively false statements and juxtapositions of facts within the same publication (as opposed to references to extrinsic material). *Id.* at 117-19.

extraordinary request. There is no precedent for such a ruling, and with good reason. Not only is this contrary to the way a reasonable reader would interpret links that direct them to different sites addressing tangentially related (but obviously different) targets, but it would also pose a real and significant threat to free online communication by punishing internet publishers for including links no matter the context. In particular, if publishers cannot negate a potential implication arising from a hyperlink through explicit statements in their publications, they are likely to avoid using links entirely. This would effectively put an end to linking—which is a key innovation and mechanism for sharing topical information online—in direct conflict with the United States' express policy of fostering free and open communication on the internet. *See generally Milo v. Martin*, 311 S.W.3d 210, 215 (Tex. App.—Beaumont 2010, no pet.) (noting Congress' "desire to protect online intermediaries from the potential liability that exists for providing users with access to content created by third parties," as evidenced by Section 230 of the Communications Decency Act).

2. *Online Comments Are Legally Irrelevant To The Court's Determination Of Whether The Articles Can Defame Avery.*

Avery is also both legally and factually incorrect in arguing that defamatory meaning must be found because actual readers "expressed . . . hatred" or found the Articles defamatory in online comments about the Web Article. (*See* App. Br. at 30, 33-36, 43.) As a legal matter, actual readers' understandings of the Articles are

as irrelevant as Avery's own interpretation to the Court's threshold determination of whether the Articles are reasonably capable of defaming Avery. *See supra* at 19-20. The Court's inquiry is based on a "hypothetical reasonable reader" who represents "reasonable intelligence and learning" and "exercises care and prudence, but not omniscience, when evaluating allegedly defamatory communications." *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 157 (Tex. 2004). The hypothetical reasonable reader is not just ***any*** reader, and so "the question is not whether some actual readers" understood the challenged statement to have a particular meaning, "but whether the hypothetical reasonable reader could . . . ." *Id.*; *see also Houseman v. Publicaciones Paso del Norte, S.A. DE C.V.*, 242 S.W.3d 518, 526 (Tex. App.—El Paso 2007, no pet.).

Moreover, as a factual matter, there is no evidence in the record that any actual readers understood the Articles to be defamatory of Avery or expressed hatred towards him as a result of the Chronicle's reporting. Notwithstanding Avery's repeated claims that "many of the readers" expressed hatred towards him, (*see* App. Br. at 35), Avery points only to a couple of anonymous online comments following the Web Article (*see* App. Br. at 10-11)—and there is no evidence of who these commenters are, much less that these comments represent the true understandings of multiple real people. For all the record shows, these comments could have been all posted by the same person under different pseudonyms—

indeed, they could have been posted by Avery. And there is no evidence from which the Court can conclude that the comments set forth the commenters' true opinions of the Texians, especially in light of the well-recognized fact that people express different (and angrier) positions in anonymous online comments than they otherwise would. *See generally* Maria Konnikova, *The Psychology of Online Comments*, The New Yorker, Oct. 23, 2013, http://www.newyorker.com/tech/elements/the-psychology-of-online-comments (discussing Arthur D. Santana, *Virtuous or Vitriolic*, 8 Journalism Practice 18-33 (2014), which found that anonymity in online comments encouraged incivility)). Similarly, there is no evidence that any negative opinions expressed in the comments were actually the result of the Articles (much less of isolated statements in the Articles (*see* App. Br. at 30, 43), or any "correlation" between the Web Article and the hyperlinked reports (*id.* at 35)), as opposed to prior beliefs, biases, articles read, misunderstandings, or general anger of the commenters.[14]

For all these reasons, the Court should disregard the anonymous online comments in determining, as a matter of law, whether the Articles are reasonably capable of defaming Avery.

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[14] To the extent Avery is suggesting that he has been defamed by the comments themselves (*see* App. Br. at 35-36), his issue is with the commenters and not the Chronicle. *See generally* 47 U.S.C. § 230.

Despite the contorted reading Avery has given them, the Articles simply do not accuse Avery of anything criminal or unethical or disgraceful or otherwise injure his reputation or impeach his honesty, integrity, or virtue. *See* Tex. Civ. Prac. & Rem. Code § 73.001. What they do arguably imply about Avery—that he is engaged in advocacy of dissent—is legally insufficient to support his claim. Because Avery thus cannot show that the Articles are even reasonably capable of defaming him, the trial court's dismissal under the TCPA should be affirmed. *See, e.g.*, *Newspaper Holdings*, 416 S.W.3d at 86-87 (dismissing defamation claims under the TCPA where complained-of statement was not defamatory as a matter of law); *Entravision*, 2016 WL 363586, at *8 (same).

III. Dismissal Was Proper Because Avery Could Not Show Falsity.

The trial court's dismissal of Avery's libel claim under the TCPA was proper for the additional reason that Avery could not establish a prima facie case of the essential element of falsity because, as a matter of law, the Articles are substantially true as to him.

As Avery has conceded (*see* App. Br. at 19-20 (discussing falsity as an element on which he has the burden of proof); 1 CR 293 (same)), it is his burden to show falsity as a constitutionally-required element of his libel claim against two media defendants. *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986); *McIlvain v. Jacobs*, 794 S.W.2d 14, 15 (Tex. 1990). He cannot meet this burden if

the Articles are ***substantially*** true as they relate to him. *McIlvain*, 794 S.W.2d at 15-16; *KTRK Television v. Felder*, 950 S.W.2d 100, 105-07 (Tex. App.—Houston [14th Dist.] 1997, no writ).[15] A statement is substantially true unless the "alleged defamatory statement was more damaging to [the plaintiff's] reputation, in the mind of the average [reader], than a truthful statement would have been." *McIlvain*, 794 S.W.2d at 16. Courts must look to the "gist" or "sting" of the publication in determining whether this burden has been met, and not to any "[m]inor inaccuracies." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991); *see also New Times*, 146 S.W.3d at 154 (falsity "depends upon the meaning a reasonable person would attribute to a publication, and not to a technical analysis of each statement.").[16]

Here, the gist of the Articles as they relate to Avery is accurate: he

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[15] Although Avery characterizes substantial truth as a defense (*see* App. Br. at 31), the fact that the Articles are substantially true as a matter of law establishes that Avery cannot meet his own burden under the TCPA of establishing a prima facie case of falsity. In any event, substantial truth is also an absolute defense to a libel action, *see Dolcefino v. Randolph*, 19 S.W.3d 906, 921 (Tex. App.—Houston [14th Dist.] 2000, pet. denied), and the Chronicle's arguments herein and below establish the applicability of that defense by a preponderance of the evidence. *Cf. Newspaper Holding*, 416 S.W.3d at 83 (not deciding which party bore the burden of establishing substantial truth on a TCPA motion, where the record showed that the statements at issue were substantially true).

[16] Texas courts have routinely dismissed libel actions even though the complained of statements may not be literally true in every respect, as long as the statements have the same sting or thrust as the literal truth. For example, an article charging that the mayor had wasted $80,000 of taxpayers' money is substantially true, even though only $17,500 had been spent. *Fort Worth Press Co. v. Davis*, 96 S.W.2d 416, 419 (Tex. Civ. App.—Fort Worth 1936, no writ). Likewise, a statement that a plaintiff failed a drug test was substantially true, even though he then passed a second confirming test. *Washington v. Naylor Indus. Servs., Inc.*, 893 S.W.2d 309, 311 (Tex. App.—Houston [1st Dist.] 1995, no writ).

associated with the Texians, and shares their fundamental belief that Texas is not part of the United States.

A. The Substantial Truth of the Articles Can Be Determined As A Matter of Law.

As an initial matter, Avery appears to argue that it is improper for a court to determine substantial truth as a matter of law because ***he*** disputes the nature and truth of the "gist" of the Articles. (*See* App. Br. at 40-42.) This is not the law. Rather, it is well-established that where the "***underlying facts*** as to the gist of the [statements] are undisputed," a court can "determine substantial truth as a matter of law." *McIlvain*, 794 S.W.2d at 16 (emphasis added).

That is unquestionably the case here. The Chronicle, for purposes of this motion, has not disputed ***any*** of the underlying facts alleged in Avery's Original Petition and Affidavit that go to the truth or falsity of the Articles as they relate to Avery.[17] They have taken as true that Avery is not a member of the Texians, that he has not renounced his U.S. citizenship, and that his political beliefs are as alleged—that he "believes the 'United States' and the 'State of Texas' is dissolved making secession an absurdity." (App. Br. at 45.)[18] In addition, the Articles'

[17] If the trial court's dismissal of this case is reversed, the Chronicle expressly reserves the right to dispute the truth of all of Avery's assertions in his Original Petition and Affidavit.

[18] Avery devotes significant portions of his Appellant's Brief to arguing that it was also false for the Articles to refer to the Texians as secessionists, because they believe Texas is currently an independent nation and thus "secession is not needed." (App. Br. at 39-40; *see also, e.g., id.* at 6-7, 41, 42, 44; 1 CR 304, 312.) This issue is irrelevant to the questions before this Court, as Avery claims to be neither a Texian nor a secessionist, and the Texians themselves are not

content and accompanying photographs and captions, as originally published, have been reproduced in the record and are not disputed by either party. (1 CR 73, 76, 78, 87-88, 90-96, 363-364, 379.)[19] Based on these undisputed facts, this Court can properly determine the gist of the Articles, compare that gist to the undisputed underlying facts, and decide whether that gist is substantially true as a matter of law. *See McIlvain*, 794 S.W.2d at 16 (comparing contents of broadcast about an investigation to the contents of the subject investigation report and determining substantial truth as a matter of law).

In arguing to the contrary, Avery misunderstands the difference between a disputed factual issue and a question of law. The only disputes he points to are the parties' disagreements over the ***legal*** questions of what gist the Articles conveyed to the average reader, and whether that gist reflects the undisputed underlying facts. (App. Br. at 40-42 (stating, e.g., that he disputes that the Texians can be called a "secessionist organization" and domestic terrorists).) In other words, the only disputes here are over the meaning of the Articles and their substantial truth.

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plaintiffs here. In any event, it was substantially true for the Articles to refer to the Texians as "secessionists" because the United States currently recognizes Texas as part of the union, and even though the Texians disagree, their goal of internationally-recognized independence depends on steps being taken to sever the current relationship between Texas and the United States.

[19] Avery's claim that the Chronicle considers just two facts to be disputed, *see* App. Br. at 40, is not true and has no basis in the record. (*See* 1 CR 387-388.) His argument that "[t]he doctrine of substantial truth based upon undisputed underlying facts relates to discrepancies in reports of facts that don't change the underling factual nature of the truth" is nonsensical and in any event is waived by his failure to cite relevant authority. (App. Br. at 41.) *See* Tex. R. App. P. 38.1(i); *Neira*, 2015 WL 4478009, at *1 ("The failure to cite applicable authority or provide

These questions are, of course, disputed in ***every*** libel case where defamatory meaning and falsity are at issue, and do not preclude courts from determining substantial truth as a matter of law on TCPA and summary judgment motions. *See, e.g.*, *Newspaper Holdings*, 416 S.W.3d at 85-86; *Avila*, 394 S.W.3d at 659-62; *Williams v. Cordillera Commc'ns*, 26 F. Supp. 3d 624, 630-33 (S.D. Tex. 2014).

B. The Articles Are Substantially True As To Avery.

Based on the undisputed underlying facts, the gist of the Articles' references to Avery—that he is associated with the (nonviolent) Texians and, like them, believes that Texas is not part of the United States—is true. Avery admittedly allowed the Texians to hold their April 2015 meeting on his property and addressed the Texian congress at that meeting. (*E.g.*, 1 CR 322.) He likewise admits that he, as an "observer of dissolution," believes that the United States no longer exists and Texas is not a part of it. (*E.g.*, 1 CR 15, 19, 20, 178-180, 294, 297-298, 304, 314, 316-17, 323, 330-337; App. Br. at 45 (stating that he "believes the 'United States' and the 'State of Texas' is dissolved").) He therefore admittedly does not recognize the legitimacy of the United States government. (1 CR 20-21.) The Articles' gist as to Avery is thus substantially true as a matter of law, and Avery has not and cannot carry his burden of showing falsity.

None of Avery's complaints of literal falsity detract from the Articles'

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substantive analysis waives an issue on appeal . . . .").

substantial truth and can support his defamation claim. His primary complaint of falsity throughout this litigation has been that the Articles inaccurately implied that he is a "secessionist," by implying that he is a Texian and referring to the Texians as "secessionists." (*See, e.g.*, 1 CR 6-7, 12 15, 293.) But the Articles' use of the word "secessionists" is immaterial to their gist because the Texians' undisputed political beliefs were reported in more detail throughout the Articles, including on the first page of each Article. (1 CR 87, 91.)

Even assuming the use of the word "secessionist" is a material part of the gist of the Articles, it does not affect their substantial truth. Avery claims that it is false to refer to him as a "secessionist," because he in fact believes that the United States is ***already dissolved*** as a result of unlawful government actions and thus it would be "an absurdity" for any state to secede—so, in his words, he is actually an "opponent[] of secession." (App. Br. at 45; *see also, e.g.*, 1 CR 6, 15, 19-21, 323, 353-356.)[20] While it may be Avery's view that "[t]he judge cannot find that

[20] Because Avery now understands that the average reader would not find the Articles' alleged implied description of him as a "secessionist" as more defamatory than a description of him as believing the United States has dissolved and denying the legitimacy of the United States government (*see* App. Br. at 45), he obscures this main tenet of his beliefs in his Appellant's Brief and instead emphasizes that he actually "oppose[s] secession." (App. Br. at 39-45.) But the evidence in the record is unambiguous and undisputed: Avery "oppose[s] secession" not because he wishes Texas to remain part of the United States, but because the dissolution of the United States makes secession an unnecessary "absurdity." (App. Br. at 45; *see also e.g.*, 1 CR 317 ("One cannot observe dissolution of the union and then pursue secession from that which has been observed not to exist.").) In other words, his opposition to secession is entirely consistent with his belief that Texas is not and should not be considered part of the United States, a belief that renders the Articles substantially true as to him.

secession is the same thing as dissolution" because there is a technical distinction between the two (App. Br. at 40), it is not the literal truth or falsity based on technical distinctions that is at issue here. What is relevant is the gist of the Articles "in the mind of the average [reader]" that determines substantial truth. *See McIlvian*, 794 S.W.2d at 16. And as Avery now admits, "***[n]o one cares about any difference between a secessionist and an observer of dissolution***." (App. Br. at 45 (emphasis added).) In short, as Avery concedes, the gist is the same.

Indeed, there was historically no distinction between secession and dissolution: as Avery has acknowledged, secessionists during the Civil War justified seceding on the ground that the union had been dissolved as a result of the federal government's tyranny. *See* South Carolina Declaration of Causes of Secession (1860) (arguing that the "constituted compact" between state and federal government had been "deliberately broken and disregarded" and thus ceased to be binding) (reproduced as an exhibit to Avery's Affidavit at 1 CR 365-368); (1 CR 316 (acknowledging that South Carolina declared secession due to "a dissolution of . . . the union between S.C. and the union of other states").) In light of this history, the average reader is not likely to understand any difference between Avery's beliefs and those of a "secessionist."

Even if the average reader comprehended some difference between Avery's beliefs and those of a secessionist, he or she would not understand the description

of Avery as a secessionist as any more damaging than a description of his admitted belief that the United States has been dissolved and no longer exists, as Avery admits. (App. Br. at 45.) *See McIlvain*, 794 S.W.2d at 16. Both positions amount to a belief that the United States flag should not fly over Texas, that the U.S. government has no legitimate authority here, and that Texas should not be considered part of the United States. Like other "[t]echnical errors in . . . nomenclature," the Articles' description of Avery as a "secessionist" rather than an "observer of dissolution" is of secondary importance to the sting and gist of the Articles and does not affect their substantial truth. *Dolcefino v. Turner*, 987 S.W.2d 100, 115 (Tex. App.—Houston [14th Dist.] 1998), *aff'd sub nom. Turner v. KTRK Television, Inc.*, 38 S.W.3d 103 (Tex. 2000); *see also, e.g., Basic Capital Mgmt., Inc. v. Dow Jones & Co.*, 96 S.W.3d 475, 481-82 (Tex. App.—Austin 2002, no pet.) (report that company had been charged with "money laundering" was substantially true even though only two of its employees had been charged individually with fraud and conspiracy, "money laundering" was not among the charges, and the company had not been charged with anything); *Schirle v. Sokudo USA, L.L.C.*, 484 F. App'x 893, 900-01 (5th Cir. 2012) ("small mental disease" carried same sting as "mood disorder").

For similar reasons, Avery's other complaints that the Articles falsely implied that he is a member of the Texians that has "informally renounced his U.S.

citizenship" (*see* App. Br. at 43), are also legally irrelevant to the Articles' substantial truth. There is no support in the record for Avery's assertion that these alleged inaccuracies "alone exposed [him] to public disgrace and ridicule." (App. Br. at 43.) *See supra* at 32-33. To the contrary, the fact that Avery hosted and addressed the Texians and shares their belief that Texas is not part of the union, the average reader would not find it material to the sting of the story whether Avery is technically a member of that group. Similarly, in light of Avery's avowed belief that the United States simply ***does not exist***, it would make no difference to the average reader whether or not Avery has "informally" renounced his citizenship in the country that he claims does not exist.[21] These are precisely the types of minor inaccuracies that have no effect on the gist of the Articles and cannot support a defamation claim under the substantial truth test. *See, e.g.*, *AOL, Inc.*, 2015 WL 1535669, at *5; *Simmons v. Ware*, 920 S.W.2d 438, 449 (Tex. App.—Amarillo 1996, no writ) (statement that plaintiff drank "a toast to the castration [of the district attorney]" was substantially true since the plaintiff attended a party where the toast occurred, although he denied participating in the toast).

Finally, to the extent that Avery claims that the "real gist and sting" of the Articles is that he is a "terrorist," "far-right fascist[]," "neo-Nazi[]," and "part of

[21] There is no support in the Articles or the record for Avery's assertion (App. Br. at 43) that the statement in a photo caption that all Texians have informally renounced their citizenship was used to "justify" a link to the Department of Homeland Security report in an entirely different section of the Web Article.

the growing right-wing terror threat worse than Muslim terrorist [sic]," (App. Br. at 46; *see also, e.g., id.* at 12, 24, 41, 42, 45), that is not a reasonable reading of the Articles. *See supra* Part II.B.1.

At bottom, while Avery (an alleged political theorist) maintains that his belief that "there is no United States" is "a lot different from saying 'Texas should not be part of the United States'" (1 CR 316), he properly acknowledges that the average reader does not "care[] about any difference between a secessionist and an observer of dissolution," (App. Br. at 45)—or about any of the other nits that he takes issue with. This is particularly true where Avery chose to associate himself with the Texians. The undisputed facts render the Articles substantially true as a matter of law and prevent Avery from meeting his burden of showing material falsity. The trial court's dismissal was thus proper. *See, e.g., Newspaper Holdings*, 416 S.W.3d at 85-86 (dismissing defamation claims under the TCPA where plaintiff failed to show that statements were less than substantially true).

IV. Dismissal Is Proper Because Avery Did Not Present Clear And Specific Evidence of Injury or Damages.

The trial court also properly dismissed this case because Avery failed to carry his burden of providing "clear and specific" evidence of injury or damages.

Because the Articles are not defamatory on their face without reference to extrinsic material, *see supra* Part II.A, they are not libelous *per se*. *See Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc.*, 434 S.W.3d 142, 146 n.7

(Tex. 2014) (distinguishing defamation *per se* from a claim that is "dependent on context and interpretation"); *KTRK Television, Inc. v. Robinson*, 409 S.W.3d 682, 691 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (defamation *per se* requires "the defamatory nature of the challenged statement [to be] apparent on its face without reference to extrinsic facts or 'innuendo'"). Neither the hyperlinked materials nor online comments warrant a different conclusion, and Avery's reliance on them to show defamation *per se* (*see* App. Br. at 12-13, 26-27, 47) is "misplaced." (*Id.*)

And because the Articles are not defamatory *per se*, Avery must, at a minimum, prove reputational injury and damages as an essential element of his claim. *See Leyendecker & Assocs., Inc. v. Wechter*, 683 S.W.2d 369, 374 (Tex. 1984) (libel claims based on statements that are not defamatory *per se* "require evidence of injury to the [plaintiffs'] reputation to allow recovery"); *KTRK*, 409 S.W.3d at 691 (if a statement is not defamatory *per se*, "then it is defamation *per quod* and requires proof of injury and damages."). This requires that Avery produce some "competent evidence" as to actual reputational injury. *Hancock v. Variyam*, 400 S.W.3d 59, 70 (Tex. 2013).

Avery has provided no proof of reputational injury. The only "evidence" of injury in the record is a single conclusory sentence in Avery's Affidavit: "The Defendant's [sic] articles have harmed me and caused me mental anguish in

worrying about what law enforcement is thinking about me and my family." (1 CR 328; *see also* App. Br. at 47.) Texas law is clear that evidence of mental anguish does not satisfy a plaintiff's burden to show reputational injury on a defamation claim that is not *per se*. *Leyendecker & Assocs.*, 683 S.W.2d at 374 (where statements were not libelous *per se*, plaintiffs were required to establish injury to their reputation, and testimony of mental distress did not meet this requirement). And even if evidence of mental anguish could satisfy Avery's burden of establishing the injury element of his claim, his conclusory allegation is not "clear and specific" evidence of that injury sufficient to meet his burden under the TCPA. *See, e.g.*, *Hicks v. Grp. & Pension Adm'rs, Inc.*, 473 S.W.3d 518, 534-35 (Tex. App.—Corpus Christi 2015, no pet.) (conclusory affidavit insufficient to meet burden of showing injury under the TCPA).

To the extent Avery is arguing that the anonymous online comments in response to the Web Article are evidence of his injury (*see* App. Br. at 30), that argument is waived by his failure to assert it before the trial court. *See* Tex. R. App. P. 33.1(a); *Jackson v. Carlton*, No. 04-14-00759-CV, 2015 WL 4554251, at *2 (Tex. App.—San Antonio July 29, 2015, no pet.). (*See* 1 CR 291-295 (setting forth Avery's argument that he had evidence of each element of a defamation claim).) Regardless, as discussed above, the comments are unauthenticated hearsay and not competent evidence of anything, *see supra* Part II.B.2, much less

that the Web Article caused Avery reputational harm. They do not show that any real person has a lower opinion of Avery specifically ***as a result*** of reading the Web Article.

Nor does the possibility that Avery may recover exemplary damages satisfy the injury element of his claim, as he has also suggested for the first time in his briefing before this Court. (*See* App. Br. at 47-48.) This argument too is waived by Avery's failure to assert it before the trial court. (*See* 1 CR 291-295.) Even if Avery had properly raised this argument, punitive damages cannot satisfy the damages or injury element of his claim. Texas law is clear that an award of punitive damages requires that Avery ***first*** prevail on his claim ***and*** recover non-nominal damages, which, as discussed above, requires at least a showing of reputational injury. Tex. Civ. Prac. & Rem. Code § 41.004 ("exemplary damages may be awarded only if damages other than nominal damages are awarded"); *Fed. Express Corp. v. Dutschmann*, 846 S.W.2d 282, 284 (Tex. 1993) (per curiam) ("Recovery of punitive damages requires a finding of an independent tort with accompanying actual damages.").[22]

[22] The Chronicle does not concede that Avery could recover punitive damages if he prevailed on his claim. His entitlement to punitive damages is governed by Sections 41.003 and 41.004 of the Civil Practice and Remedies Code, and not the provisions of Chapter 73 cited in Avery's brief, which only set forth circumstances under which exemplary damages may ***not*** be recovered. (*See* App. Br. at 13-14, 47-48 (citing Tex. Civ. Prac. & Rem. Code §§ 73.057 & 73.058(a)).) Nor does the Chronicle concede that Avery's recovery of such damages is not barred by Chapter 73—the Chronicle issued appropriate corrections, including removal of his name from the Web Article's photo captions, and notified Avery of their corrections on multiple occasions, including

SUMMARY OF CROSS-APPELLANTS' ARGUMENT[23]

Although the trial court properly dismissed Avery's libel claim pursuant to the TCPA, it abused its discretion in denying the Chronicle an opportunity to recover its costs and reasonable attorney's fees. Section 27.009(a) of the TCPA provides in relevant part that a court that "orders dismissal of a legal action under this chapter . . . ***shall*** award to the moving party: (1) court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require." Tex. Civ. Prac. & Rem. Code § 27.009(a)(1) (emphasis added). The Supreme Court of Texas recently confirmed that awards of costs and fees are mandatory under this section. *See Sullivan v. Abraham*, No. 14-0987, 2016 WL 1513674, at *4 (Tex. Apr. 15, 2016). Accordingly, the decision of the trial court should be reversed to the extent it denied the Chronicle an opportunity to file an application seeking recovery of its costs, fees, and expenses,

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notifying him of their intent to rely on those corrections in their Answer. (1 CR 34-35.) In any event, for the reasons set forth above, Avery's entitlement to punitive damages is not relevant to the issues before this Court, and the Chronicle will respond fully to his arguments under Chapter 73 before the trial court at the appropriate time should this Court reverse the dismissal of this case. Likewise, because Avery's lawsuit was properly dismissed under the TCPA for his failure to satisfy the defamatory meaning, falsity, and injury/damages elements of his claim, the Chronicle does not respond herein to Avery's arguments concerning other elements and defenses that were not briefed below and are not at issue on this appeal—including his lengthy discussion of fault. The Chronicle does not concede any points by not responding, and expressly reserves its right to dispute Avery's arguments should this case survive dismissal.

[23] In order to avoid duplicity, the Chronicle has not attached the trial court's March 18, 2016 order or the TCPA (on which its Cross-Appellants' argument relies) in an Appendix because Avery attached these same documents to his own Appendix to his Appellant's Brief. (App. Br. at A-2-A-9.) *See* Tex. R. App. P. 38.1(k), 38.2(a)(C).

and remanded for consideration of such an application under Section 27.009(a).

CROSS-APPELLANTS' ARGUMENT

I. The Trial Court Abused Its Discretion In Denying the Chronicle Recovery Of Costs And Fees Under Section 27.009(a).

In its submissions before the trial court, the Chronicle expressly reserved all of its rights to submit information concerning its costs, fees, and expenses under Section 27.009(a)(1) of the TCPA pursuant to the Court's instructions. (*See* 1 CR 68-69, 392.) The trial court never instructed the Chronicle to submit this information, and in its Order of March 18, 2016, the trial court effectively declined to allow the Chronicle an opportunity to recover its court costs and attorneys' fees under Section 27.009(a) of the TCPA. (1 CR 427; App. Br. at A-2.)

This Court reviews the trial court's decision to grant or deny attorney's fees and litigation expenses for an abuse of discretion. *Avila v. Larrea*, No. 05-14-00631-CV, 2015 WL 3866778, at *2 (Tex. App.—Dallas June 23, 2015, pet. denied) (citing, *inter alia*, *Ridge Oil Co. v. Guinn Invs., Inc.*, 148 S.W.3d 143, 163 (Tex. 2004), and *Lancer Corp. v. Murillo*, 909 S.W.2d 122, 125-26 (Tex. App.—San Antonio 1995, no writ)). A trial court abuses its discretion if it rules without reference to guiding rules or principles. *Van Ness v. ETMC First Physicians*, 461 S.W.3d 140, 142 (Tex. 2015) (per curiam). And trial court has ***no*** discretion in determining what the law is or in applying the law to the facts. *Inwood Nat'l Bank v. Wells Fargo Bank, N.A.*, 463 S.W.3d 228, 235 (Tex. App.—Dallas 2015, no

pet.).

The trial court's refusal to allow the Chronicle an opportunity to recover its costs and reasonable attorneys' fees was a clear abuse of discretion. Section 27.009(a) of the TCPA provides in relevant part that a court that "orders dismissal of a legal action under this chapter . . . ***shall*** award to the moving party: (1) court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require." Tex. Civ. Prac. & Rem. Code § 27.009(a)(1) (emphasis added). Just last month, the Supreme Court confirmed the great weight of authority in the Courts of Appeal that an award of costs and fees to the defendant is ***mandatory*** under this Section if a claim is dismissed under the TCPA. *Sullivan*, 2016 WL 1513674, at *4; *see also, e.g.*, *Cruz v. Van Sickle*, 452 S.W.3d 503, 522 (Tex. App.—Dallas 2014, pet. denied) ("[p]ursuant to the plain wording" of the TCPA, successful movants for dismissal "are entitled to an award of attorney's fees"); *Fitzmaurice v. Jones*, 417 S.W.3d 627, 634 (Tex. App.—Houston [14th Dist.] 2013, no pet.), *disapproved of on other grounds by In re Lipsky*, 460 S.W.3d 579 (Tex. 2015) (trial court erred by not awarding appellants reasonable attorney's fees "required by section 27.009(a)"); *Rauhauser v. McGibney*, No. 02-14-00215-CV, 2014 WL 6996819, at *3 (Tex. App.—Fort Worth Dec. 11, 2014, no pet.) (award of court costs, attorney's fees, and expenses mandatory under section 27.009(a) of the TCPA).

The Supreme Court further clarified that the trial court's discretion to limit an award "as justice and equity may require," Tex. Civ. Prac. & Rem. Code § 27.009(a)(1), applies only to an award of "other expenses" under Section 27.009(a), and not to an award of court costs or reasonable attorney's fees. *See Sullivan*, 2016 WL 1513674, at *4. Thus, because "the TCPA ***requires*** an award of 'reasonable attorney's fees' [and court costs] to the successful movant," *id.* (emphasis added), the trial court abused its discretion in denying the Chronicle an opportunity to recover its fees and costs, and this case should be remanded for the limited purpose of determining an appropriate award of such fees and costs.

CONCLUSION AND PRAYER

For all these reasons, the Court should affirm the trial court's dismissal of Avery's libel claim under the TCPA, but reverse to the extent it denied the Chronicle an opportunity to recover its fees and costs under Section 27.009(a)(1) of the TCPA, and remand for the limited purpose of determining an appropriate award of the Chronicle's fees and costs under that Section.

Dated: May 23, 2016

Respectfully submitted,

/s/ Jonathan R. Donnellan

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CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i), if applicable, because it contains 13,866 words.

/s/ Jonathan R. Donnellan
Jonathan R. Donnellan

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the following parties via Federal Express on May 23, 2016:

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VIA FEDERAL EXPRESS

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Re: ***Ronald Avery v. Dylan Baddour & Hearst Communications, Inc.*, Court of Appeals Number 04-16-00184-CV; Guadalupe County Cause No. 15-2186-CV**

Dear Mr. Avery:

Enclosed for service under Texas Rule of Civil Procedure 21a(a) and Texas Rule of Appellate Procedure 9.5(b), please find a copy of the following documents from Defendants Hearst Communications, Inc. and Dylan Baddour in the above-referenced matter, which were filed with the clerk today:

- Combined Appellees' and Cross-Appellants' Brief

Thank you for your attention to this matter. Please call me at (212) 649-2030, if you have any questions regarding the above.

Yours truly,

Jennifer D. Bishop

Enclosure

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