

**TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN**

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**NO. 03-19-00222-CV**

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**Michael Belcher and Vicky Belcher, Appellants**

**v.**

**William “Bill” King and Thomas “Tom” Kirwan, Appellees**

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**FROM THE 146TH DISTRICT COURT OF BELL COUNTY  
NO. 285,950-B, THE HONORABLE JACK WELDON JONES, JUDGE PRESIDING**

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**MEMORANDUM OPINION**

In this appeal, appellants Michael and Vicky Belcher complain of the trial court’s denial of their motion to dismiss pursuant to the Texas Citizen’s Protection Act (TCPA), which sought to dismiss both a counterclaim and a motion for sanctions brought against them by appellees William King and Thomas Kirwan. *See* Tex. Civ. Prac. & Rem. Code §§ 27.001-.011.<sup>1</sup> As explained below, we will affirm the trial court’s denial of the Belchers’ motion to dismiss.

**FACTUAL AND PROCEDURAL BACKGROUND**

In 2013, the Woodlake Property Owners Association, Section One, Inc., and two individual homeowners, the Belchers’ next-door neighbors, sued the Belchers, alleging that they

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<sup>1</sup> The TCPA was amended in 2019, but those amendments do not apply here because the underlying lawsuit was filed before the amendments became effective on September 1, 2019. *See* Act of May 17, 2019, 86th Leg., R.S., ch. 378, §§ 11, 12, 2019 Tex. Gen. Laws 684, 687.

were violating deed restrictions in their neighborhood by keeping chickens on their property. Three years later, the Belchers filed a counterclaim, alleging violations of the Texas Fair Housing Act (TFHA). *See* Tex. Prop. Code §§ 301.001-.171. In mid-2016, the trial court granted a motion for summary judgment filed by the Association and the Belchers' neighbors and severed that portion of the lawsuit from the Belchers' new TFHA claims.<sup>2</sup>

The Belchers' TFHA claims were severed into the underlying trial court cause number and at some point the parties were realigned to reflect the Belchers as plaintiffs and the Association as defendant. In mid-2018, the Belchers added appellees, who were officers of the Association, as defendants. The Belchers challenged the Association's bylaws and fine schedule; challenged the Association's authority to levy fines, annual assessments, or maintenance fees; and argued that the Association had not filed an amended management certificate as required by law. The Belchers also asserted that all of the defendants had violated the TFHA and the federal Fair Housing Act (FFHA), *see* 42 U.S.C. §§ 3601-3631, by not considering the Belchers' request for reasonable accommodations and that the Association had retaliated against the Belchers for seeking such accommodations. Finally, the Belchers leveled claims for breach of fiduciary duty against King and Kirwan.

In October 2018, appellees filed an amended answer. They asserted several affirmative defenses, including limitations, *res judicata*, and charitable immunity under the Charitable Immunity and Liability Act of 1987, *see* Tex. Civ. Prac. & Rem. Code §§ 84.001-.008, and sought a declaration that they had not violated fair housing laws or discriminated or retaliated against the Belchers. Appellees further asserted a counterclaim for slander and

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<sup>2</sup> This Court affirmed the trial court's summary judgment in favor of the Association. *See Belcher v. Geary Family Tr.*, No. 03-16-00502-CV, 2018 WL 828853, at \*1 (Tex. App.—Austin Feb. 7, 2018, no pet.) (mem. op.).

defamation, asserting that the Belchers had made false statements against appellees for the “sole purpose of causing injury to [appellees’] reputation and to expose them to extreme mental anguish, public humiliation, and embarrassment.” Appellees alleged that the Belchers had “falsely charg[ed] [King and Kirwan] with a crime when they in fact were performing their duties” as Association officers, that the Belchers’ statements “amount to libel per se” and had been made with actual malice, and that the Belchers had acted negligently or with a “total disregard for the truth” in making the statements. Appellees also sought sanctions, asserting that the Belchers had acted with malice and that their claims against appellees were “groundless and brought in bad faith and done for the sole purpose of harassment.” *See id.* §§ 10.001-.006 (sanctions for frivolous pleadings and motions); Tex. R. Civ. P. 13 (same).

The Belchers then filed a motion to dismiss under the TCPA. *See* Tex. Civ. Prac. & Rem. Code § 27.003. Appellees responded, attempting to establish a prima facie case for each element of their counterclaim and their motion for sanctions. Following a hearing, the trial court signed an order denying the Belchers’ motion to dismiss, and the Belchers filed this interlocutory appeal.<sup>3</sup> In two issues, they argue (1) that the counterclaim and motion for sanctions brought against them by appellees were subject to the TCPA and (2) that appellees did not establish a prima facie case of each essential element of their claims.

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<sup>3</sup> The trial court also signed a “Memorandum of Ruling” in which it stated that it was granting appellees’ motion for summary judgment in part and that the Belchers’ claims against them were dismissed with prejudice. It denied appellees’ request for sanctions and stated, “It appears that Defendants are reserving their claim for actual and exemplary damages. Therefore, no ruling is made regarding those claims.”

## STANDARD OF REVIEW

The TCPA is intended to “encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.” *Id.* § 27.002; *see ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 898 (Tex. 2017) (per curiam). We liberally construe the TCPA to fully effectuate its intent of safeguarding and encouraging a person’s constitutional rights to free speech, petition, and association while protecting the right to file a meritorious lawsuit. *Coleman*, 512 S.W.3d at 898; *see* Tex. Civ. Prac. & Rem. Code §§ 27.002, .011(b). If a movant shows by a preponderance of the evidence that the nonmovant’s “legal action” is “based on, relating to, or in response to” the movant’s exercise of the right of free speech, right to petition, or right of association, the trial court must dismiss the action unless the nonmovant establishes by clear and specific evidence a prima facie case for each element of its claim. Tex. Civ. Prac. & Rem. Code §§ 27.003, .005(b), (c); *see Coleman*, 512 S.W.3d at 898; *In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015) (orig. proceeding).

“The prima facie standard requires only the minimum quantity of evidence necessary to support a rational inference that the allegation of fact is true.” *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 223 (Tex. 2004) (orig. proceeding) (per curiam) (cleaned up); *Neyland v. Thompson*, No. 03-13-00643-CV, 2015 WL 1612155, at \*3 (Tex. App.—Austin Apr. 7, 2015, no pet.) (mem. op.). In other words, prima facie evidence is evidence sufficient to prove “a fact in issue until its effect is overcome by other evidence.” *Neyland*, 2015 WL 1612155, at \*3. Whether the nonmovant met the prima facie standard is a question of law that we review de novo. *Id.* As for whether evidence is “clear and specific,” “clear” means “free from doubt,”

“sure,” or “unambiguous,” while “specific” means “explicit” or “relating to a particular named thing.” *Id.* Therefore, we ask “whether the record contains the minimum quantum of clear and specific evidence necessary to support a rational inference as to each essential element of the claim in question if no contrary evidence is offered.” *Id.*

### **EVIDENCE PRESENTED BY APPELLEES**

Appellees alleged that the Belchers had mounted a “smear campaign” against appellees “on an individual basis”; were “attempting to humilat[e] and embarrass[]” appellees; were telling neighbors and others in the subdivision that appellees had “committed criminal offenses which will likely put them in jail”; and were telling other property owners that King, Kirwan, and the Association were lying and “taking action which will cause all homeowners in the subdivision to actually each lose their respective house to the Belchers” and to be held liable as individuals “to pay millions in damages.” Appellees asserted that the Belchers’ statements were false and intended solely to injure appellees’ reputations and “expose them to extreme mental anguish, public humiliation, and embarrassment.” They further claimed that the Belchers were “falsely charging [appellees] with a crime” and that such statements were made with actual malice and were libel per se.

In responding to the TCPA motion, appellees quoted the following statements:<sup>4</sup>

- Michael Belcher to Kirwan, “If I can get you to go to jail I’m going to try to do it or get fined, I’m going to keep going all the way because I got nothing better than to do that and put some prep holes in jail. You’re a criminal Tom. That’s what is going to happen, big fines or jail time is what is going to happen. This is going to get elevated to federal court before it is all over with. The feds going to get after you boy.”

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<sup>4</sup> We quote appellees’ factual allegations as set out in their response, removing “plaintiff” and “defendant” designations but otherwise leaving the text unchanged, including appellees’ ellipses and brackets.

- Vicki Belcher to Kirwan while neighbors were out in their yard, “You are lying to the people, you are lying to the people, King is lying to the people. Bill King thinks it’s great to have continuity of care when everybody in this world thinks there should be term limits on everything from the presidency, to Congress to everything else, while lying to the people on your personally owned website.”
- Michael Belcher to Kirwan while over 5 different neighbors were outside, “I hate your fucking ass you’re a fucking traitor.” Kirwan responded, “Well that didn’t keep you from talking to me.” Belcher, “Well I don’t have to talk to you so go on about your business.” Kirwan, “Well I speak to everybody.” Belcher, “That’s bullshit.” Kirwan, “Who do I not speak to?” Belcher, “You’re a fucking . . . freedom, that’s what you are.” Kirwan, “You have to have laws otherwise you have chaos!” Belcher, “fuck you what laws?” Kirwan, “Any laws.” Belcher, “Ordinances in a local community, which is bullshit.” “You’re just like a spy you think you can impose your will on people!” “You just go ahead, yours is coming, yours is coming, you just keep on.” Another neighbor approached as Belcher walked away and asked Kirwan if everything was okay.
- Michael Belcher to Kirwan, “You guys are wrong . . . bottom line . . . [regarding the covenant violation] basically you guys re-wrote the covenant to go after the chickens. I know that’s harassment and that will openly come out in this other case, but the bottom line is you failed to rule on the fair housing act and my daughter had a health problem. You should’ve given conciliation from the beginning but no you decided that no you were going to sue them, period. Wrong lane to go down, and we’re gonna prove that, we’re gonna prove it. We’re going to go until we prove it. I don’t care how many lawyers I have to hire to deal with the fair housing act we’re going to prove that you guys did that, that you guys broke the law and you know what? When it’s proved guess what’s going to happen? Individuals on the board, they can be fined, they can go to jail! Boy I’m looking forward to this, this is awesome.”

As proof of the Belchers’ statements, appellees provided video recordings of several of the specific interactions; their own affidavits, setting out quotes from the interactions; and affidavits by two neighbors, Tara Manly and Bruce Stokes. The video recordings show the interactions between Kirwan and the Belchers, which occurred while Kirwan was walking through the neighborhood, and appellees asserted that the statements were often made while neighbors were nearby.

In King’s affidavit, he recited that he had served as Association board president from March 2012 until the present and that the Association had informed the Belchers in 2012

that keeping chickens was a violation of the subdivision's covenants. In 2013, the Belchers "referred to the chickens as 'emotional support animals,'" asserting that their daughter "suffered from a 'disability' and [that] they were seeking 'reasonable accommodations.'" King averred that the Association had attempted to investigate the Belchers' claim but that the Belchers "refused to produce relevant medical information." King explained that the Belchers filed a complaint with the Texas Workforce Commission, asserting that the Association had violated state and federal fair housing laws, but that the Commission determined that there was no reasonable basis to believe the Association had discriminated against the Belchers. King went on to aver that the Belchers sued him and Kirwan in 2018 and, around the same time, "started a 'smear' campaign," accusing appellees of lying and committing criminal acts and telling others that appellees "are creating millions of dollars in liabilities to the other home owners." King concluded that he had "felt embarrassed" and that his reputation has been damaged and said he believed the Belchers had made false statements to intimidate and harass him and Kirwan. King averred that as president of the Association, "I am supposed to represent the neighbors and when all of the neighbors are being told they are going to lose their houses because of what I have done personally then that makes me responsible for their stress." The Belchers' statements, King said, "have made me afraid to go outside and be social with the Home Owners Association."

In his affidavit, Kirwan averred that he had served on the Association board between November 2012 and July 2016. He said he often walks his dog in the neighborhood and "routinely record[s]" those walks because his dog had been attacked in the past. He explained that he had come into contact with the Belchers during some of his walks and then recited the following statements they had made to him during those interactions:

- “Once the depositions get going it’s going to be a lot of money.”
- “You’re going to be in court for the rest of your life and I got plenty of money to do it because if we fail on this next round we’re going to start it all over again at the lowest level and take it all the way to the Supreme Court and if I ruin you guys, so be it.”
- When asked why the trial court had ruled against the Belchers, “Michael Belcher responded that ‘they paid the judge off.’”
- “We are going to have all you guys up for depositions so go fuck yourself, you piece of shit, I hate your ass.”
- “We’re going to be in court for the rest of our lives until we win. I’m going to come up with as much money as I have to in beating your ass because I hate you, you son of a bitch, I hate you.”
- “Individuals on the board, and those connected with the board can be fined, they can go to jail.”
- “If I can get you to go to jail I’m going to try to do it or get fined, I’m going to keep going all the way because I got nothing better than to do that and put some prep holes in jail. You’re a criminal Tom. That’s what is going to happen, big fines or jail time is what is going to happen. This is going to get elevated to federal court before it is all over with. The feds going to get after you boy.”
- “I’m going to beat the shit out of you right here, you little mother fucker . . . I hate your ass.”

Kirwan concluded:

Because of the Plaintiffs['] statements I now fear of physical attack as I have been threatened by Plaintiff Michael Belcher on multiple occasion. I have experienced worsening insomnia over the time of this lawsuit. I have experienced [atrial] fibrillation (also called AFib or AF) and believe the stem of their lawsuit caused and/or at least contributed to this condition. I have an ongoing daily fear of Plaintiff Michael Belcher. The degrading comments made about me contributed to a deterioration of the relationship with my wife which ultimately resulted in my divorce. I have little social interaction with my neighbors as a direct result of the Plaintiffs['] degrading comments about myself and Defendant King.



Manly averred that in August 2018, she spoke to the Belchers, who told her about their “legal battle with the” Association. Vicki Belcher said that their daughter no longer comes to visit because of the dispute over the chickens, and Manly “apologized and told her I felt like it would have been reasonable that she would have been able to keep one or two chickens.” Vicki Belcher then told Manly that her lawyers were suing the Association “in a multimillion dollar lawsuit and that all of us as homeowners in the [Association] would be responsible for payment of the settlement when she finally won her case. She mentioned how concerned she was that people in the neighborhood did not know this is an ongoing legal battle.” In Stokes’s affidavit, he averred that he had witnessed Michael Belcher say to Kirwan, “I hate your fucking ass. You are a fucking traitor, a fucking enemy of freedom. You’re just a damn spy.” Stokes further averred that Michael Belcher had confronted Stokes “in the same way, wanting to fight in the middle of the road, saying he was going to stick the chicken up my ass. He also said he was going ranger on me.”

To establish damages related to defamation, appellees asserted that the Belchers had made statements to or in front of other individuals and that the statements were defamatory per se because they “were designed to injure King’s and Kirwan’s reputation and to question their honesty, integrity, virtue and reputation.” As proof, appellees pointed to the videos and to affidavits by other homeowners. Alternatively, appellees stated, pointing to their own affidavits, that the Belchers’ statements had caused appellees great embarrassment, great anxiety, and stress and had damaged their reputations. As a result of the Belchers’ statements, they asserted, they “now have little social interaction with their neighbors” and “have a daily fear of Plaintiff Michael Belcher and a fear of a physical attack.”

As for their motion for sanctions, appellees asserted that the Belchers had sued appellees to harass them, asserting that any claims against Kirwan were barred by limitations and that King was protected from liability by the Charitable Immunity Act and the Business Code. Appellees referred to their motion for summary judgment and attached evidence and asked the trial court to refer to the motion and arguments in considering whether the Belchers' suit could have been brought in good faith. Appellees noted that the trial court had previously ruled against the Belchers, that this Court had affirmed the trial court, and that the Texas Workforce Commission had ruled against the Belchers on their TFHA claims. Appellees concluded by asserting that the Belchers' suit against appellees:

was solely designed to harass, increase the costs of defending against Plaintiffs' baseless claims, and harm and scare the other homeowners and the Board Members with the stated goal of bringing the Homeowners Association to their knees.

Rarely, do you have the opportunity to hear Plaintiffs themselves set forth their objectives. In this case, the videotaped statements of Plaintiffs as well as the Affidavits from the other Homeowner Association members demonstrate Plaintiffs' [objectives]. Certainly, Defendants King and Kirwan have met their burden to show this is at least clear and compelling evidence of the true motivation for bringing individual claims against Defendant King and Kirwan from Plaintiffs.

### **DEFAMATION COUNTERCLAIM**

The elements of defamation are: (1) the defendant published a false statement; (2) that defamed the plaintiff; (3) with the requisite degree of fault regarding the statement's truth; and (4) damages, unless the statement constitutes defamation per se. *Bedford v. Spassoff*, 520 S.W.3d 901, 904 (Tex. 2017) (per curiam); *Neyland*, 2015 WL 1612155, at \*5. When faced with a motion to dismiss a defamation claim under the TCPA, the nonmovant can successfully

resist the motion with “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” nonmovant. *Bedford*, 520 S.W.3d at 904 (cleaned up).

A statement is defamatory if when considered in the appropriate context, “a person of ordinary intelligence would interpret it in a way that tends to injure the subject’s reputation and thereby expose the subject to public hatred, contempt, or ridicule, or financial injury, or to impeach the subject’s honesty, integrity, virtue, or reputation.” *Neyland*, 2015 WL 1612155, at \*5. “If the statement is not reasonably capable of a defamatory meaning, the statement is not defamatory as a matter of law and the claim fails.” *Hancock v. Variyam*, 400 S.W.3d 59, 66 (Tex. 2013). Whether a statement is defamatory is a question of law. *Neyland*, 2015 WL 1612155, at \*5.

The Belchers argue that their statements to appellees were “statements of opinion and/or rhetorical hyperbole, not fact,” and cannot be viewed as defamatory. It is true that some of the statements set out by appellees amount to mere name-calling and insults. However, the Belchers also accused appellees of lying in the context of their positions on the Association board, paying off a trial court judge, breaking fair housing laws, and “impos[ing] [their] will on” the people; said that the federal authorities were going to pursue appellees; and called Kirwan a “traitor” and a “spy.” Further, Manly averred that the Belchers had told her that appellees’ actions were going to result in neighbors losing their homes and being personally liable for millions of dollars to the Belchers. At this preliminary stage, we hold that the trial court did not err in determining that there was clear and specific evidence that the Belchers made statements that can be viewed as tending to: injure appellees’ reputations; expose appellees to public hatred, contempt, or ridicule; impugn appellees’ honesty, integrity, virtue, or reputation; injure appellees

in their capacities as Association board members; or accuse appellees of being dishonest or committing a crime. *See id.*

As for the element of publication, the Belchers argue that appellees did no more than make conclusory allegations that the defamatory statements were published. However, King averred that the Belchers had told other property owners that appellees were “lying and committing criminal acts” and that appellees’ actions would result in other neighbors being held personally liable for damages, while Kirwan averred that many of the Belchers’ statements were made in the presence of neighbors. In one case, he stated, “over 5 different neighbors were outside within hearing range,” and at the conclusion of the interaction, one neighbor approached Kirwan to ask if everything was okay. Although neither affidavit names specific witnesses, other people can be seen in the background of some of Kirwan’s videos, and Manly’s and Stokes’s affidavits support a conclusion that the Belchers made statements about appellees to others or in earshot of others. Finally, appellees point to King’s deposition testimony,<sup>5</sup> in which he stated that “[p]eople in our neighborhood have told” King that the Belchers had made defamatory statements about him to them and that “numerous other people in the neighborhood” have said that the Belchers had told them that homeowners “weren’t going to be able to sell their house because of” what King had done. King declined to identify those individuals “at this time” because he did not “feel that it’s helpful to bring all the other neighborhood people into this.” He thought it “will pit neighbor against neighbor. They come to me and they say, ‘Bill, am I really

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<sup>5</sup> As the Belchers note, King’s deposition excerpts were attached to appellees’ motion for summary judgment, which was argued to the trial court in the same hearing as the TCPA motion, not to their response to the Belchers’ TCPA motion. However, in their TCPA response addressing their motion for sanctions, appellees referred to their summary judgment arguments and evidence. We thus believe the trial court could have considered the excerpts in ruling on the Belchers’ TCPA motion.

going to lose my house?’ . . . ‘Are you going to jail?’” At this stage of the proceeding, we hold that the evidence presented by appellees is sufficient to meet the TCPA standard of prima facie evidence of the element of publication.

We next consider whether appellees put on a prima facie case as to the requisite level of fault. The degree of fault that must be shown depends on whether the plaintiff was a public figure, in which case the plaintiff must show the defendant acted with malice, or if the plaintiff was a private individual, in which case the plaintiff must show negligence. *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998); *Neyland*, 2015 WL 1612155, at \*5. Appellees agree with the Belchers that King, as president of the Association board, should be considered a limited-purpose public figure, and we thus will proceed under that understanding.<sup>6</sup> See *McLemore*, 978 S.W.2d at 571. Because, as explained below, we hold that appellees presented a prima facie case of malice, we need not consider whether the same status applies to Kirwan, who resigned from his official position on the board in 2014.

Appellees assert that the Belchers’ statements satisfy the legal definition of malice—“the publication of a statement ‘with knowledge that it was false or with reckless disregard of whether it was false or not.’” *McLemore*, 978 S.W.2d at 573-74 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964)). “Actual malice” and “reckless disregard” are both terms of art: actual malice focuses “on the defamation defendant’s attitude toward the truth of what it reported,” while reckless disregard requires the claimant to prove that the defendant “entertained serious doubts as to the truth of his publication.” *Id.* (quoting *St. Amant*

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<sup>6</sup> An individual is considered a limited-purpose public figure if the controversy is public both in that people are discussing it and in that people other than the immediate participants are likely to feel the impact of its resolution; the individual has more than a trivial or tangential role in the controversy; and the alleged defamation is germane to the individual’s participation in the controversy. *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998).

*v. Thompson*, 390 U.S. 727, 731 (1968)). Reckless disregard is a subjective standard that focuses on the defendant’s conduct and state of mind. *Bentley v. Bunton*, 94 S.W.3d 561, 591 (Tex. 2002); *Campbell v. Clark*, 471 S.W.3d 615, 629 (Tex. App.—Dallas 2015, no pet.). A showing of reckless disregard requires more than mere negligence or failure to use reasonably prudent conduct—there must be evidence that the defendant had “significant doubt about the truth of his statements at the time they are made.” *Bentley*, 94 S.W.3d at 591, 596.

The evidence must be viewed in its entirety. The defendant’s state of mind can—indeed, must usually—be proved by circumstantial evidence. A lack of care or an injurious motive in making a statement is not alone proof of actual malice, but care and motive are factors to be considered. An understandable misinterpretation of ambiguous facts does not show actual malice, but inherently improbable assertions and statements made on information that is obviously dubious may show actual malice. A failure to investigate fully is not evidence of actual malice; a purposeful avoidance of the truth is.

*Id.* at 596; *see Campbell*, 471 S.W.3d at 629. “A lack of care or an injurious motive in making a statement is not alone proof of actual malice, but care and motive are factors to be considered,” and “inherently improbable assertions and statements made on information that is obviously dubious may show actual malice.” *Campbell*, 471 S.W.3d at 629.

Appellees have shown that the Belchers asserted to them and to others in the neighborhood that appellees had committed criminal acts and that their actions would cause other homeowners to lose their property and owe millions of dollars in damages. However, although the fair housing acts allow for criminal penalties, those provisions only apply when someone “by force of threat or force” intentionally intimidates or interferes with another in the housing context because of the victim’s race, color, religion, sex, disability, familial status, or national origin, *see* 42 U.S.C. § 3631; Tex. Prop. Code § 301.171, and this record does not

include any indication that those provisions might be applied to appellees. Outside of a case involving intentional intimidation by force or threat of force, in an action brought by a private party, the FFHA and TFHA provide only for civil penalties in the form of actual and punitive damages, attorney’s fees and costs, and injunctive relief. *See* 42 U.S.C. § 3613(c); Tex. Prop. Code § 301.153. On this record, it does not appear that there would be a possibility that appellees could be subject to criminal penalties or that appellees’ neighbors might somehow lose their homes or owe “millions” in damages.

We further note that appellees’ evidence shows that the Belchers’ accusations were largely made between June 2016 and March 2018—after the Belchers had lost in their deed-restriction battle at the trial court and before the Belchers added appellees as defendants.<sup>7</sup> The fact that the Belchers publicly accused appellees of bribing the trial court judge and of committing misconduct with regard to Association business after the trial court ruled in favor of the Association in its claims that the Belchers had in fact violated the deed restrictions weighs in favor of concluding that the Belchers either knew their allegations of misconduct lacked a factual basis or were reckless with regard to whether the allegations were false. Finally, the Belchers’ statements were made in the context of them calling appellees “spy” or “traitor,” using insulting and vulgar terms, and stating outright that the Belchers were going to draw out the litigation to last as long as possible. The question of malice or reckless disregard is a subjective one, and we hold that the circumstantial evidence, when considered in whole and in the context of the parties’ dispute, suffices to establish a *prima facie* case that the Belchers knew their accusations lacked a

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<sup>7</sup> The Association filed its lawsuit in mid-2013, and the trial court ruled against the Belchers in June 2016, requiring them to remove the chickens and severing the Association’s claims from the Belchers’ TFHA claim, which was filed in March 2016. Appellees were added as defendants in mid-2018, after this Court affirmed the trial court’s summary judgment in the Association’s favor. *See Belcher*, 2018 WL 828853, at \*1.

factual basis or acted with reckless disregard as to the falsity of their accusations. *See Bentley*, 94 S.W.3d at 591, 596; *Campbell*, 471 S.W.3d at 629.

We finally consider the element of damages. “If the statement is defamatory *per se*, then nominal damages may be awarded without proof of actual injury because mental anguish and loss of reputation are presumed.” *Brady v. Klentzman*, 515 S.W.3d 878, 886 (Tex. 2017). To recover actual damages for loss of reputation, mental anguish, or economic loss, a claimant must bring forth evidence of the existence and amount of such damages, “[b]ut this is optional. The plaintiff can vindicate his name and obtain nominal damages without evidence of actual injury.” *Id.* A statement may be defamatory *per se* if it accuses someone of a crime or tends to injure a person in his office, profession, or occupation. *Lipsky*, 460 S.W.3d at 596; *Hancock*, 400 S.W.3d at 62.

The Belchers alleged that appellees had committed criminal acts and would go to jail and had committed misconduct while acting as officers on the Association’s board—statements which can be viewed as defamatory *per se*. *See Lipsky*, 460 S.W.3d at 596; *Hancock*, 400 S.W.3d at 62. Thus, there is *prima facie* evidence to satisfy the damages element. *See Jones v. Pozner*, No. 03-18-00603-CV, 2019 WL 5700903, at \*9 (Tex. App.—Austin Nov. 5, 2019, pet. filed) (mem. op.) (because appellees established *prima facie* case of defamation *per se*, “we may presume nominal damages, which are sufficient to defeat Appellants’ motion to dismiss”). Furthermore, Kirwan averred that as a result of the Belchers’ conduct, he rarely socialized with his neighbors, suffered from insomnia, feared being attacked physically, was experiencing atrial fibrillation, and had gotten divorced, while King averred that he was embarrassed, felt that his reputation had been damaged, and was afraid to go outside and socialize. We hold that appellees



presented prima facie evidence of the element of damages sufficient to defeat the Belchers' TCPA motion to dismiss.

### **MOTION FOR SANCTIONS**

In addition to their counterclaim for defamation, appellees also filed a motion for sanctions, accusing the Belchers of bringing frivolous claims against appellees. In their response to the Belchers' motion to dismiss, appellees argued that appellees' claims against Kirwan were barred by limitations because he had resigned from the board in 2014, and that King was immune under the Charitable Immunity Act. *See* Tex. Civ. Prac. & Rem. Code §§ 84.001-.008.<sup>8</sup> They observed that the trial court had ruled against appellees and in favor of the Association in its claims related to the deed restrictions, that this Court had affirmed the trial court's ruling, and that the Texas Workforce Commission had ruled against the Belchers' claim under the fair housing laws. Appellees also noted the invectives used by the Belchers, their threats of physical violence, their statements that they were going to continue to litigate the issue "for the rest of our lives until we win . . . because I hate you," and their allegations that the Texas Workforce Commission "was all screwed up" and that appellees had "paid the judge off." Appellees argued that all of those facts together amounted to clear and compelling evidence that the Belchers' claims against appellees were baseless and intended solely to harass appellees and cause them to incur legal fees. Assuming that the TCPA applies to the portion of appellees' answer seeking sanctions, when we consider the procedural history of the case and the evidence produced by appellees, we agree that at this preliminary stage, appellees mounted a prima facie case that the

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<sup>8</sup> A volunteer of a charitable organization, which includes a homeowners' association, is immune from civil liability for acts or omissions resulting in death, damage, or injury if he was acting in the course and scope of his duties or functions, including as an officer of the organization. Tex. Civ. Prac. & Rem. Code §§ 84.003, 004(a).

Belchers filed groundless claims against appellees with an intent to harass them. *See* Tex. R. Civ. P. 13 (sanctions may be imposed if trial court finds that instrument was groundless and brought in bad faith or for purpose of harassment; “groundless” means no basis in law or fact and not warranted by good fair argument).

### CONCLUSION

Having held that appellees produced sufficient evidence of their counterclaim for defamation and their motion for sanctions so as to defeat the Belchers’ motion to dismiss under the TPCA, we overrule the Belchers’ second issue. In making that disposition, we have assumed that the TPCA applies, and we thus need not consider the Belchers’ first issue, which makes that very argument. We affirm the trial court’s order denying the Belchers’ motion.

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Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Triana and Smith

Affirmed

Filed: July 30, 2020