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SUPREME COURT OF TEXAS
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No. 21-1039

In the Supreme Court of Texas

MARK LEE DICKSON & RIGHT TO LIFE EAST TEXAS,

Petitioners,

v.

THE AFIYA CENTER AND TEXAS EQUAL ACCESS FUND,

Respondents.

ON PETITION FOR REVIEW FROM THE FIFTH COURT OF APPEALS AT DALLAS, TEXAS CAUSE NO. 05-20-00988-CV

RESPONSE TO PETITION FOR REVIEW

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IDENTITY OF PARTIES AND COUNSEL

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Respondents The Afiya Center and the Texas Equal Access Fund ("**Respondents**") file their Response to Petitioners Mark Lee Dickson's ("**Dickson**") and Right to Life East Texas's ("**RLET**," and, together with Dickson, "**Petitioners**") Petition for Review pursuant to Texas Rule of Appellate Procedure 53.3, and would show the Court as follows:

STATEMENT OF THE CASE

Respondents do not dispute Petitioners' statement of the case with respect to the Trial Court, the Trial Court Disposition, the Parties in the Court of Appeals, the Court of Appeals, or the Court of Appeals Disposition. Respondents offer their own statement regarding the Nature of the Case as follows:

Nature of the Case:	Mark Lee Dickson and Right to Life East Texas, after authoring and then persuading multiple cities to pass an ordinance that falsely called Respondents "criminal organizations," repeatedly and publicly called Respondents criminal organizations and falsely stated they were engaged in criminal acts. Respondents sued Petitioners for defamation *per se*, and the Defendants-Petitioners filed a Motion to Dismiss under the Texas Citizens Participation Act ("TCPA").

ISSUES PRESENTED

Respondents do not raise any additional issues, but for the reasons noted, restate Petitioners' issues 1, 3, 4, and 5 as follows:

1. Did the District Court and the Court of Appeals correctly hold Respondents produced clear and specific evidence that Petitioners' statements that Respondents are "criminal organizations" are false, where the record shows that when the statements were made, abortion was legal (and regulated) throughout Texas, and that Respondents have not committed nor been investigated, prosecuted, or convicted of any crime?

2. **Respondents agree issue 2 is stated correctly by Petitioners:**

   Did the plaintiffs produce "clear and specific evidence" that Defendants Mark Lee Dickson or Right to Life East Texas acted with "actual malice" or "negligence" in publishing the disputed statements?

3. **Petitioners have conflated two separate issues as their third issue. The two separate issues are**:

   a. Did the District Court and the Court of Appeals correctly hold that Defendants had not conclusively demonstrated the application of a defense of truth or substantial truth "as a matter of law" where it is clear that the statements that Respondents are "criminal organizations" that have committed crimes are literally false because The Afiya Center and Texas Equal Access Fund have committed no crimes?

   b. Respondents authored, campaigned for passage, and caused a city to pass an ordinance declaring abortion a crime and declaring Respondents to be "criminal organizations" and then repeatedly claimed, in public and on social media, that Respondents and similar organizations are criminal

organizations engaged in actual violations of the law. Did the District Court and the Court of Appeals correctly hold that these statements were not expressions of opinion or rhetorical hyperbole, but were statements of verifiable fact given that falsely accusing another of criminal conduct is defamation *per se*?

4. **A claim of conspiracy is one of derivative liability that is dependent on the direct liability of Petitioners. Accordingly, Petitioners' issues 4 and 5 should be restated as one issue:**

   Did the District Court and the Court of Appeals correctly refuse to dismiss Respondents' conspiracy claim against Right to Life East Texas where it is uncontested that Respondent Dickson is a director of that entity, and Dickson made multiple of the defamatory statements as posts from Respondent Right to Life East Texas's Facebook page, and the District Court and Court of Appeals had already decided that the underlying defamation cause of action was not to be dismissed?

STATEMENT OF FACTS

Respondents add the following to Petitioners' Statement of Facts:

Beginning in June 2019, Respondents Mark Lee Dickson ("**Dickson**") and Right to Life East Texas ("**RLET**") (collectively "**Respondents**") campaigned in various cities, including Waskom, Texas, for the passage of an ordinance Dickson himself claims to have drafted. CR 1229 ("I drafted the ordinance"). The ordinance declared various reproductive rights organizations, including Respondents, to be "criminal organizations" and said (among other things):

> Organizations that perform abortions and assist others in obtaining abortions are declared to be criminal organizations. These organizations include, but are not limited to…The Afiya Center…[and] Texas Equal Access fund [.]

CR 968, Pet'rs'.APP.68.[1] The ordinance purports to make abortion, and "knowingly aid[ing]" an abortion occurring in the city, illegal. *Id.* But it also provides that it cannot be enforced by any government official unless and until *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern*

[1] Respondents will mark citations to Petitioners' Appendix as "Pet'rs'.APP.[Number], and will mark citations to their own Appendix as "Resps'.APP.[Number] to distinguish between the appendices.

Pa. v. Casey, 505 U.S. 833 (1992) are overturned. CR 969-70, Pet'rs'.APP.69-70.

After the ordinance was passed, Petitioners continued making false statements about Respondents, as set out in Petitioners' Petition, as quoted in the conflicting Seventh Court of Appeals decision,[2] and as referenced in the briefing below. In those statements, Dickson repeatedly stated that Respondents are "criminal organizations" and, in no uncertain terms, he defended the literal truth of those statements.

Specific examples of such statements are:

- Organizations Listed in the Ordinance Are "Criminal Organizations."

> …the listing of abortion providers as examples of ***criminal organizations*** is not unconstitutional. We can legally do that. This is an ordinance that says murdering unborn children is prohibited, so it makes sense to name ***examples of organizations that are involved in murdering unborn children.***

CR 975, Resps'.APP.2 (emphasis added).

- Organizations Listed in the Ordinance Are "Advocates for Murder" and "Criminal Organizations."

[2] The Seventh Court of Appeals Opinion, when referred to herein, is *Dickson v. Lilith Fund for Reprod. Equity*, 07-21-00005-CV, 2021 WL 3930728 (Tex. App.—Amarillo Sept. 2, 2021, pet. filed), *reh'g denied* (Oct. 7, 2021). That decision is the subject of a Petition for Review in Case No 21-0978, *Lilith Fund for Reprod. Equity v. Mark Lee Dickson et al.*

> [The listed organizations] are advocates for abortion, and since abortion is the murder of innocent life, this makes these organizations advocates for the murder of those innocent lives. ***This is why [the organizations] are listed as criminal organizations***….

CR 998, Resps'.APP.4 (emphasis added).

- Afiya Center and Texas Equal Access Fund are "Criminal Organizations."

> All organizations that perform abortions and ***assist others in obtaining abortions (including…The Afiya Center [and] Texas Equal Access Fund…)*** *are now declared to be criminal organizations* in Waskom, Texas.

CR 1028, Resps'.APP.6 (emphasis added).

Petitioners also made clear they intended their statements about Respondents to be understood literally. For instance, Dickson said:

> The idea is this: in a city that has outlawed abortion, in those cities if an abortion happens, then later on when *Roe v. Wade* is overturned, those penalties can come crashing down on their heads.

CR 1066, Resps'.APP.8.

In response to these (and other) false statements, Respondents requested that Petitioners publicly clarify that they had no reason to believe Respondents had committed any criminal acts:

> [w]e … ask you to publicly clarify that, even to the extent you believe abortion should be a crime, or is morally equivalent to murder or some other crime, you have no reason to believe that any of the organizations we represent, or any employee or agent thereof, has (1) committed the crime of murder under federal or state law, (2) abetted the crime of murder under federal or state law, or (3) committed any other crime associated with providing education or assistance to people seeking abortion services.
>
> ***We are not asking you to change your political views or cease to advocate for them. All we ask is that you … retract[] any allegations that these organizations or their agents have broken or are breaking any laws.***

CR 1104, Resps'.APP.14 (emphasis added). Petitioners refused to do so, and Respondents filed suit.

Petitioners continued to make similar false statements and again declared that their statements were to be understood literally, saying "Is abortion literally murder? Yes." CR 1108. Dickson also publicly declared "I have no reason to retract anything that I said." CR 1109. These statements were made months after the City of Waskom had removed Dickson's "criminal organizations" list from its ordinance. CR 867-74, Pet'rs'.APP.73-79 (revised Waskom ordinance, signed on March 10, 2020, removing "criminal organizations" list).

SUMMARY OF THE ARGUMENT

This is a Texas Citizens Participation Act ("**TCPA**") case that impacts the law of defamation in Texas. The Fifth Court of Appeals, in the decision below, followed the authority of this Court and correctly concluded Respondents had satisfied their TCPA burden as to Petitioners' defamatory statements, that the false statements made by Petitioners here were statements of fact, that Respondents' suit against Petitioners could proceed to trial on the merits.

However, the Seventh Court of Appeals, in a case substantially identical to the present case, found the same statements by the same defendants about a similarly situated plaintiff to be protected opinion or hyperbole rather than defamation *per se*. That decision of the Seventh Court is the subject of a Petition for Review in Case No. 21-0978, *Lilith Fund for Reprod. Equity v. Mark Lee Dickson, et al.*

The Seventh Court erred, not the Fifth Court. In deciding whether the statements were opinions or hyperbole rather than fact, the Fifth Court—as required by this Court's precedent—analyzed whether a reasonable person would have believed the statements were intended literally. That is, a verifiable claim is only opinion if "the entire context in which it was made

discloses that ***it was not intended*** to assert a fact." *Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d 614, 638 (Tex. 2018) (emphasis added); Resps'.APP.36-37. The Seventh Court instead held incorrectly that the appropriate question was whether the "reasonable person" would be deceived by the statements (regardless of perceived intention). *Dickson v. Lilith Fund for Reprod. Equity*, 07-21-00005-CV, 2021 WL 3930728, at *6 (Tex. App.—Amarillo Sept. 2, 2021, pet. filed), *reh'g denied* (Oct. 7, 2021), Pet'rs'.APP.183.

Also, unlike the Fifth Court, the Seventh Court fashioned a presumption that is not derived from defamation law. It declared that the "reasonable person" is presumed to know the law, so that such a person would not believe any of the false statements made by Respondents. Then, the Seventh Court injected a further assumption that the reasonable reader—and not the potential defamer who is charged with a duty not to speak negligently—would conduct a "reasonable investigation" of the defamatory statements "to see them as opinion masquerading as fact or rhetorical hyperbole masquerading as fact." *Lilith Fund*, 2021 WL 3930728, at *6, Pet'rs'.APP.182.

None of the Seventh Court's innovations are supported by the law of defamation. Indeed, if they are allowed to stand, the law of defamation in

Texas would be damaged: the standard for "opinion" would be upended, it would be impossible to defame someone by characterizing their legal conduct as criminal (presently this is defamation *per se*), and defamation—normally a cause of action that sounds in negligence—would be impossible to show since the reasonable reader would never be deceived thanks to their "reasonable investigation." The Fifth Court, by contrast, followed this Court's authority to the letter and reached the correct result.

Petitioners' other arguments—that they did not name Respondents in every statement; that there is some fringe theory of judicial review that statutes declared unconstitutional still have some effect, under which their accusations of criminality are true; or that it is Petitioners who are the true victims in these cases—are equally unpersuasive.

Petitioners' conduct exposes a campaign to defame Respondents through a strategy of complete disregard for the concepts of judicial review, due process, the prohibitions against *ex post facto* laws and bills of attainder, and, most importantly, the truth. The Fifth Court did not err; the Seventh Court did. Respondents respectfully request this Petition for Review be denied.

ARGUMENT

A. The conflict between the Fifth and Seventh Courts of Appeals on whether Petitioners' speech constitutes "opinion" or "hyperbole" should be resolved in favor of the Fifth Court.

Petitioners are correct that the Seventh Court of Appeals, in a near-identical case brought by another plaintiff organization similarly situated to Respondents, found the same statements by Petitioners were protected "opinion" or "hyperbole." *Lilith Fund*, 2021 WL 3930728 at *6-7, Pet'rs'.APP.181-83. That result is the subject of a Petition for Review in this Court in Case No. 21-0978. The Seventh Court, and not the Fifth Court, erred.

First, in deciding the statements made by Dickson were merely opinion or hyperbole, the Seventh Court misapplied the "reasonable person" standard of this Court, holding that what mattered is *not* what the reasonable reader would have thought Dickson and RLET intended, but whether they would successfully deceive the reasonable reader, because "the focus is not on what the speaker intended but what a reasonable person believed." *Lilith Fund*, 2021 WL 3930728 at *6, Pet'rs'.APP.183. In the course of announcing that test, the Seventh Court expressly disagreed with the Fifth Court's conclusion that the "reasonable person" standard focuses on the

"reasonable person's" perception of what the speaker intended. That is, a verifiably false statement is opinion only if "the entire context in which it was made discloses that ***it was not intended*** to assert a fact." *Tatum*, 554 S.W.3d at 638 (emphasis added), Resps'.APP.36-37.

Second, the Seventh Court imposed the legal fiction that all "are presumed to know [the law]" upon the equally hypothetical "reasonable reader" in order to conclude that reasonable people would not be deceived by Dickson's and RLET's words. *Lilith Fund*, 2021 WL 3930728, at *5, Pet'rs'.APP.181. This presumption is an unjustified embellishment and is not part of the law of defamation as the Seventh Court's own cited authority shows. *See S. C. v. Tex. Dep't of Family & Protective Services*, 03-19-00965-CV, 2020 WL 6750561, at *3 (Tex. App.—Austin Nov. 18, 2020, no pet.) (presumption applied to party who missed a deadline). It is also inconsistent with the definition of the "reasonable reader" in defamation law; that is, a person of "ordinary intelligence" who exercises some "care and prudence, but not omniscience[.]" *Tatum*, 554 S.W.3d at 630-31, Resps'.APP.31.

To presume the "reasonable person" knows the law is inconsistent with the practical fact that a "reasonable person" likely knows less about the law than the average lawyer. Even the most experienced lawyer does not

know the whole of the law. There is no basis for the Seventh Court of Appeals to conclude that the "reasonable person" reading or hearing Petitioners' words *could not believe*, by dint of some presumed legal omniscience, that Respondents were, in some way, "criminal organizations."

The Seventh Court also imposed on the "reasonable person" a "penchant for reasonable investigation." *Lilith Fund*, 2021 WL 3930728, at *6, Pet'rs'.APP.183. The Seventh Court cited no authority for assuming the "reasonable person" who reads defamatory statements has undertaken a "reasonable investigation." *Id.* And as this Court knows, except in cases where the plaintiff is a public figure, the standard to test the mental state of the defendant in a defamation case is negligence. *D Magazine Partners, L.P. v. Rosenthal*, 529 S.W.3d 429, 440 (Tex. 2017), Resps'.APP.56-57. If anything, a negligence standard imposes a duty to investigate on the author, not on the author's audience. *Id.* (finding evidence of negligence where magazine "failed to take reasonable steps to verify the accuracy of the story's gist…"). Like the Seventh Court's other errors, this holding dramatically recasts the law of defamation.

Third, the Seventh Court, unlike the Fifth Court, found the Waskom ordinance itself to be an exculpatory element of context for the statements at

issue that rendered them more "opinion" than "fact." The Seventh Court explained this was because Dickson was simply saying that Waskom "got it right." *Lilith Fund*, 2021 WL 3930728, at *6, Pet'rs'.APP.181-82.

There are at least two problems with this: (1) Dickson claims *he* wrote the ordinance and campaigned for its passage, so that context was of his own creation; and (2) whether a statement is "opinion" is determined by whether a reasonable reader would believe the statement was intended by the speaker to be taken literally. *Tatum*, 554 S.W.3d at 638, Resps'.APP.36-37. The ordinance serves to make Petitioners' statements *more* likely to be taken literally.

The Seventh Court, and not the Fifth Court, got it wrong. Therefore, the Petition for Review in this case should be denied and the petition in Case No. 21-0978 granted.

B. <u>The Court of Appeals neither materially misstated the law nor misrepresented Petitioners' statements.</u>

Petitioners argue that the Fifth Court of Appeals erred in stating that abortion was categorically excluded from Texas's definition of murder, but Petitioners do not explain how this is relevant to the case before this Court or to Petitioners' TCPA motion. Pet. Rev. at 10-12. It is factually and legally

correct that lawful abortions are exempted from the definition of murder. *See* TEX. PEN. CODE ANN. § 19.06(2). Petitioners' reference to Senate Bill 8 changes nothing since that law was not in effect at any time relevant to these allegations. Pet. Rev. at 11-12. A false claim that a person is a criminal cannot be made true retroactively, as Petitioners' argument implies.

Texas laws are not retroactive, nor are they capable of retroactively declaring the past intentions of previous legislatures. TEX. CONST. ART. I, § 16, *Rowan Oil Co. v. Tex. Employment Comm'n*, 263 S.W.2d 140, 144 (1953), Resps'.APP.68 ("…neither does one session of the Legislature have the power to construe the Acts or declare the intent of a past session.") When Petitioners spoke, abortion was legal throughout Texas. The only evidence in the record is that Respondents scrupulously followed all applicable laws. CR 1085, 1090 (principals of Respondents testifying that Respondents have never committed any crimes).

It is also baffling that Petitioners argue they did not really call Respondents "criminals" or "murderers." *See* Pet. Rev. at 13, ("Mr. Dickson and Right to Life East Texas have never called The Afiya Center or the Texas Equal Access Fund 'murderers,' and they have never accused them of committing murder or aiding or abetting murder."), 16. At oral argument in

the Court of Appeals, Petitioners specifically argued that the statements were literal and defensible because they were true, and because they specifically made clear the precise criminal conduct of which Respondents were accused:

> He's not accusing them of criminal activity because they have been investigated or prosecuted by the authorities in the past. ***He's calling them criminal because they are currently violating Article 4512.2 of the revised civil statutes by furnishing the means for procuring abortion knowing the purpose intended…and Mr. Dickson did conduct a factual investigation to confirm all of this before he published his statements.***

RR 44 (emphasis added).

> But Mr. Dickson's statements had made abundantly clear what the basis for his accusations of criminal activity is. ***He's making clear that he's calling them criminal organizations because of their involvement in furnishing the means for procuring an abortion knowing the purpose intended.***

RR 50 (emphasis added).

Even assuming, without agreeing, that Petitioners have not waived and abandoned their arguments through their statements below, all of Petitioners' statements were made within the context of an ordinance Petitioners themselves wrote that named Respondents as criminal

organizations. The record shows several of Petitioners' statements directly related to, and expressly defended, the inclusion in the ordinance of the very list that identifies Respondents as "criminal organizations." *E.g.*, CR 975, Resps'.APP.2 (Nov. 26, 2019 Facebook post defending the list by saying that since the ordinance prohibits the "murder" of unborn children, it makes sense to list as criminal organizations those that participate in it).

Moreover, a defamatory statement need not expressly name Respondents if their identities are ascertainable from the statement and its context. *Outlet Co. v. Int'l Sec. Group, Inc.*, 693 S.W.2d 621, 625-26 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.), Resps'.APP.77. The context of these statements was an ordinance Petitioners wrote that contained a list of criminal organizations that specifically named Respondents. Finally, it is demonstrably untrue for Petitioners to say that none of the challenged statements identify Respondents by name. *See*, *e.g.*, CR 1028, Resps'.APP.6 ("All organizations that … assist others in obtaining abortions (including…The Afiya Center [and] Texas Equal Access Fund…) are now declared to be criminal organizations in Waskom, Texas.").

The import of Petitioners' statements is that Respondents are law-breakers, but Respondents have broken no laws that Petitioners can identify.

The only laws Petitioners *have* identified, in their petition or in this litigation, either did not exist at the time (*i.e.*, Senate Bill 8) or are not law because they were struck down by the United States Supreme Court in *Roe v. Wade*. *See* Pet. Rev. at viii.[3] The effect of a high court's decision that a penal statute is unconstitutional is that what the statute prohibits is no longer a crime:

> Here, as a matter of historical fact, Lester's conduct was not a crime at the time it was committed because the Court of Criminal Appeals had already declared the online-solicitation statute unconstitutional. Lester is therefore actually innocent in the same way that someone taking a stroll in the park is actually innocent of the crime of walking on a sidewalk. ***No such crime exists.***

In re Lester, 602 S.W.3d 469, 473 (Tex. 2020), *reh'g denied* (June 19, 2020), Resps'.APP.86 (emphasis added). Petitioners' statements that Respondents are "criminal organizations" are false.

C. Petitioners' statements are not entitled to any other defense.

The last section of the Petition addresses Petitioners' truth defense, their opinion defense, and their hyperbole defense. It also attempts to cast

[3] "The state of Texas has never repealed its pre–*Roe v. Wade* statutes that outlaw abortion unless the mother's life is endangered by the pregnancy. These statutes remain codified at articles 4512.1 through 4512.6 of the Revised Civil Statutes, and they impose criminal liability on anyone who "furnishes the means for procuring an abortion knowing the purpose intended." West's Texas Civil Statutes, article 4512.2 (1974) . . . ." Pet. Rev. at viii.

Petitioners as victims. None of these arguments is persuasive.

1. <u>Petitioners misstate why their statements are false.</u>

Petitioners complain that the statements in which they specifically referred to "murder" are *not* "false statements of fact" because they only referred to providing assistance to women seeking abortion, which Respondents did at the time the statements were made. *See* Pet. Rev. at 16-17. However, the falsity does not come from Petitioners' description of Respondents' conduct, but from Petitioners' characterization of that conduct as "criminal." The law of defamation recognizes a clear distinction between accusing someone of conduct some consider immoral and accusing someone of conduct the law prohibits. *Tatum*, 554 S.W.3d at 638 (listing examples of *per se* defamation, including "accusing someone of a crime…"); Resps'.APP.36. Petitioners falsely characterized Respondents as criminals for their non-criminal conduct. The statements are defamatory because (1) they are statements of fact, since conduct is either criminal or it is not, and (2) the statements are false, and accusations of criminality are defamatory *per se*.

2. <u>Petitioners' statements are neither protected opinion nor hyperbole.</u>

For the reasons given in Section A of this Response, the Seventh Court of Appeals was wrong to find Petitioners' statements to be protected opinion or hyperbole. Petitioners' strained, incomplete arguments do not change this result.

For Petitioners to contend that their statements are opinion, they must *first* show that their statements "cannot reasonably be interpreted as stating actual facts." *Id.* at 639, Resps'.APP.37 (quoting *New Times, Inc. v. Isaacks*, 146 S.W.3d at 157 (Tex. 2004)). This they cannot do because the intended effect of their statements *relies* on them being interpreted as stating actual facts. CR 1066, Resps'.APP.8 (Dickson's statement to CNN that the purpose of the ordinance campaign is to threaten people with future punishment for present actions after *Roe* is overturned).

Petitioners also cite *Milkovich* for the proposition that rhetorical hyperbole is protected. Pet. Rev. at 17. However, Petitioners fail to quote the below quoted relevant language explaining *why* the statements in *Milkovich* were *not* hyperbole:

> This is not the sort of ***<u>loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining</u>*** that petitioner

> committed the crime of perjury. Nor does the general tenor of the article negate this impression.

Milkovich v. Lorain Journal Co., 497 U.S. 1, 21 (1990), Resps'.APP.106 (emphasis added). Here, as in *Milkovich*, the accusations of Respondents' criminality are not couched in terms that suggest Petitioners were not "seriously maintaining" the truth of their statements. Petitioners continue to contend that their statements were true *even now*, listing the defense of truth as one of the issues for review and arguing (in their *statement of issues*) that the pre-*Roe* statutes are somehow still effective, and that they make abortion literal, criminal murder. *See* Pet. Rev. at viii. These arguments are "a compelling indication" that the Petitioners' statements were literal. *Bentley v. Bunton*, 94 S.W.3d 561, 584 (Tex. 2002), Resps'.APP.135 ("Bunton's consistent position at trial that his accusations … were true is a compelling indication that he himself regarded his statements as factual and not mere opinion….").

The statements by Dickson are literal and were intended that way. Petitioners cannot fairly characterize them as "loose, figurative, or hyperbolic language which would negate the impression that the writer was

seriously maintaining" Respondents are criminal organizations. *Milkovich*, 497 U.S. at 21, Resps'.APP.106. For instance:

> …the listing of abortion providers as examples of criminal organizations is not unconstitutional. We can legally do that. This is an ordinance that says murdering unborn children is prohibited, so it makes sense to name examples of organizations that are involved in murdering unborn children.

CR 975, Resps.'APP.2.

This is a literal claim that an ordinance Dickson *wrote* is correct to list and describe reproductive rights organizations (including Respondents) as "criminal organizations" in the official ordinances of a city *because* abortion is prohibited and thus is murder. It is a grave accusation of criminality.

3. <u>Petitioners misstate what they were sued for.</u>

Petitioners also disingenuously claim that they were sued for trying to criminalize abortion. *See* Pet. Rev. at 18. Rather, they were sued for falsely stating that Respondents' lawful conduct is *already criminal*. If anything, a campaign to prohibit certain conduct relies on the proposition that the conduct is not already against the law. If it is, there would be no reason to ban it again. The success of Petitioners' ordinances does not create any cover for these statements because, even if the ordinances were constitutional and

effective, the undisputed evidence is that Respondents never violated them. CR 1085, 1090 (affiants testifying Respondents have never funded abortions in any of the cities at issue).

Respondents do not object to Petitioners' efforts to change the law. However, calling innocent people or businesses criminals when they are not is defamatory. There is no constitutional or common law exception for "sabre-rattl[ing]" to induce compliance with ineffective ordinances Respondents have never violated or laws struck down by the Supreme Court in *Roe* five decades ago. *See* CR 1066, Resps'.APP.8; *see also* CR 879-880 (Dickson claiming he read a law review article written by his present counsel which suggested that threatening enforcement of laws previously declared unconstitutional might induce compliance with them; *i.e.*, Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 992 (2018)).

4. <u>Respondents are not victims of unconstitutional persecution, they are purveyors of it.</u>

Finally, Petitioners characterize themselves as the victim of bullying for their constitutional advocacy, a complaint that is deeply hypocritical. Dickson wrote and persuaded several cities to enact an ordinance that identified and designated a list of Petitioners' political enemies as "criminal

organizations" without any judicial process. Petitioners then used that ordinance as cover for their repeated false statements that Respondents are literally "criminal organizations." Those statements were made with the intention of convincing people of Respondents' alleged "criminal conduct" when Petitioners knew both that the Texas statutes regarding abortion had been declared unconstitutional in *Roe v. Wade*, and that Respondents never violated any of their ordinances. *See* CR 1066 (Resps'.APP.8), 1085, 1090.

CONCLUSION & PRAYER

For these reasons, Respondents The Afiya Center and Texas Equal Access Fund request that this Petition be denied or that the decision of the Court of Appeals be affirmed, and that the matter be remanded to the trial court for proceedings on the merits. Respondents request any other relief to which they are entitled.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENTS THE AFIYA CENTER & TEXAS EQUAL ACCESS FUND

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Attorneys for Petitioners

/s/ John P. Atkins
John P. Atkins

Counsel for Respondents

CERTIFICATE OF COMPLIANCE

I hereby certify that this Petition for Review conforms with the requirements of Texas Rule of Appellate Procedure 9.4 and contains 4,174 words, excluding the portions of the brief exempted by Rule 9.4.(i)(1).

/s/ John P. Atkins
John P. Atkins

Counsel for Respondents

No. 21-1039

In the Supreme Court of Texas

MARK LEE DICKSON & RIGHT TO LIFE EAST TEXAS,

Petitioners,

v.

THE AFIYA CENTER AND TEXAS EQUAL ACCESS FUND,

Respondents.

ON PETITION FOR REVIEW FROM THE
FIFTH COURT OF APPEALS AT DALLAS, TEXAS
CAUSE NO. 05-20-00988-CV

APPENDIX TO RESPONSE TO PETITION FOR REVIEW

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ATTORNEYS FOR RESPONDENTS
THE AFIYA CENTER & TEXAS EQUAL ACCESS FUND

TABLE OF CONTENTS

TAB 1

Nov. 26, 2019 Facebook

Statement of Mark Lee Dickson

Title: The ACLU has sent a letter to the Mayor and City... - Mark Lee Dickson
Link:
https://www.facebook.com/markleedickson/posts/101577735...

Mark Lee Dickson is with Chance Nichols at Chili's Grill & Bar (4302 S Clack St, Abilene, TX).

November 26, 2019 · Abilene, TX ·

The ACLU has sent a letter to the Mayor and City Council of Big Spring, Texas. Apparently the ACLU does not like the idea of Big Spring, Texas outlawing abortion and becoming a Sanctuary City for the Unborn.

Friends, always remember to consider your sources. This is the group that has defended Nazis and the Ku Klux Klan - two groups that I would never want to openly associate myself with. I would assume that the ACLU's letter is meant to intimidate the City Council of Big Spring from hating evil, loving what is good, and establishing justice within the city gates.

Who would try to stop a city from preventing organizations from murdering unborn children in their city?

The ACLU, that's who.

For months I have said that the ACLU gave us our greatest "endorsement" for these ordinances. When the city of Waskom passed the ordinance Drucilla Tigner, Reproductive Rights Strategist with the ACLU, said the ordinance, "makes it impossible for an abortion clinic to exist in Waskom, ever." Like Waskom, the City of Big Spring does not want an abortion clinic to exist in Big Spring, ever. No matter how many letters the ACLU and their friends (which I view as part of a modern-day Axis of Evil) send to the Big Spring city council, it does not change the reality that Big Spring and their friends (which I view as part of a modern-day Allied forces) do not want any organization to come into this city and murder innocent unborn children. It seems very clear to me that the ACLU wants this holocaust of abortion to continue, while groups like Right to Life of East Texas, Texas Right to Life, and the majority of Texans want this holocaust of abortion to end once and for all.

So what, besides this letter, is the ACLU doing to try to stop cities from outlawing abortion?

They have released a webinar, made a toolkit, and launched a section of their website to address how to stop local abortion bans. Despite doing all of this, what they have not done is file a lawsuit. It is worthy to mention, and should be recognized by all, that there has not been one lawsuit filed against the seven cities which have passed a Sanctuary Cities for the Unborn ordinance. Seven cities have passed this ordinance, with the first city to pass this ordinance in June - yet not a single lawsuit filed.

That is because these ordinances have been carefully drafted by expert legal counsel to keep cities out of a lawsuit and protect their citizens and their unborn children by prohibiting baby murdering industries from existing within their city limits.

The ACLU is wrong when it says that this ordinance is unconstitutional, just like they are wrong when they say that abortion is a constitutional right. This ordinance does not violate the United States Constitution, the Texas Constitution, or the laws of the State of Texas. Big Spring's ordinance does the most that it can in the areas where the federal and state legislatures have not spoken while still respecting the boundaries that have been given to us under the current Supreme Court precedent. There are currently no federal or state laws on the books that prohibit cities from prohibiting abortion within their jurisdiction. Actually, in the most recent legislative session, Texas passed SB 22 which included an amendment explicitly clarifying that cities and counties are not prohibited from prohibiting abortion within their jurisdiction.

Nothing is unconstitutional about this ordinance. Even the listing of abortion providers as examples of criminal organizations is not unconstitutional. We can legally do that. This is an ordinance that says murdering unborn children is outlawed, so it makes sense to name examples of organizations that are involved in murdering unborn children. That is what we are talking about here: The murder of unborn children.

Also, when you point out how the abortion restrictions in 2013 cost the State of Texas over a million dollars, you should also point out how many baby murdering facilities closed because of those restrictions. We went from over 40 baby murdering facilities in the State of Texas to less than 20 baby murdering facilities in the State of Texas in just a few years. Even with the win for abortion advocates with Whole Woman's Health v. Hellerstedt, how many baby murdering facilities have opened back up? Not very many at all. So thank you for reminding us all that when we stand against the murder of

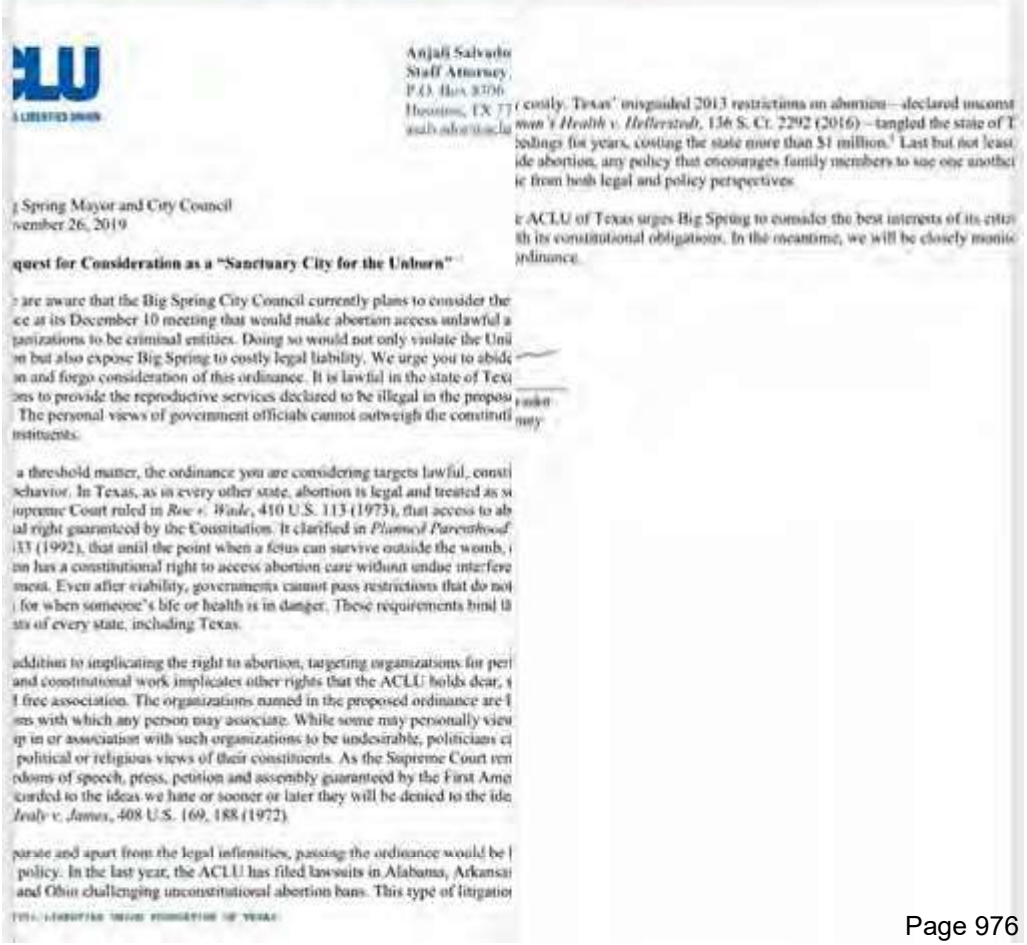
innocent children, we really do save a lot of lives.

Stand strong leaders of Big Spring. You are going to be on the right side of history. You know, that side of history that the Nazis and the Ku Klux Klan were not on.

Big Spring residents, if you are for seeing your city pass an ordinance outlawing abortion within the city limits be sure to sign the online petition here:

https://sanctuarycitiesfortheunborn.com/online-petition

#therighttolife #thefightforlife #fromconceptiontillnaturaldeath #unbornlivesmatter #loveoneanother #BigSpringTexas #PotentialSanctuaryCityForTheUnborn



LU

Anjali Salvado
Staff Attorney

Spring Mayor and City Council
vember 26, 2019

quest for Consideration as a "Sanctuary City for the Unborn"

are aware that the Big Spring City Council currently plans to consider the
ce at its December 10 meeting that would make abortion access unlawful a
anizations to be criminal entities. Doing so would not only violate the Uni
n but also expose Big Spring to costly legal liability. We urge you to abide
n and forgo consideration of this ordinance. It is lawful in the state of Texa
ns to provide the reproductive services declared to be illegal in the propos
The personal views of government officials cannot outweigh the constituti
nstituents.

a threshold matter, the ordinance you are considering targets lawful, consti
ehavior. In Texas, as in every other state, abortion is legal and treated as s
upreme Court ruled in *Roe v. Wade*, 410 U.S. 113 (1973), that access to ab
al right guaranteed by the Constitution. It clarified in *Planned Parenthood*
33 (1992), that until the point when a fetus can survive outside the womb,
on has a constitutional right to access abortion care without undue interfere
mens. Even after viability, governments cannot pass restrictions that do not
for when someone's life or health is in danger. These requirements bind th
tes of every state, including Texas.

addition to implicating the right to abortion, targeting organizations for per
and constitutional work implicates other rights that the ACLU holds dear,
l free association. The organizations named in the proposed ordinance are l
ns with which any person may associate. While some may personally view
p in or association with such organizations to be undesirable, politicians ca
political or religious views of their constituents. As the Supreme Court rec
doms of speech, press, petition and assembly guaranteed by the First Amen
corded to the ideas we hate or sooner or later they will be denied to the ide
Healy v. James, 408 U.S. 169, 188 (1972).

parate and apart from the legal infirmities, passing the ordinance would be
policy. In the last year, the ACLU has filed lawsuits in Alabama, Arkansa
and Ohio challenging unconstitutional abortion bans. This type of litigatio

costly. Texas' misguided 2013 restrictions on abortion—declared unconst
men's Health v. Hellerstedt, 136 S. Ct. 2292 (2016)—tangled the state of T
oldings for years, costing the state more than $1 million.[1] Last but not least
ide abortion, any policy that encourages family members to see one another
ie from both legal and policy perspectives.

e ACLU of Texas urges Big Spring to consider the best interests of its citiz
th its constitutional obligations. In the meantime, we will be closely monito
ordinance.

TAB 2

July 2, 2019 Facebook

Statement of Mark Lee Dickson

Title: (5) You may hear in the news about "a group named... - Mark Lee Dickson
Link:
https://www.facebook.com/markleedickson/posts/10157385...

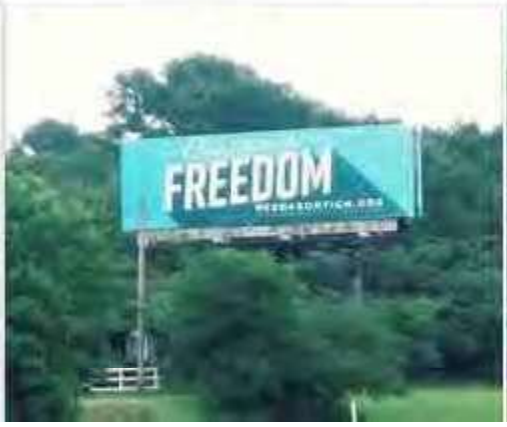
Mark Lee Dickson
July 2, 2019 ·

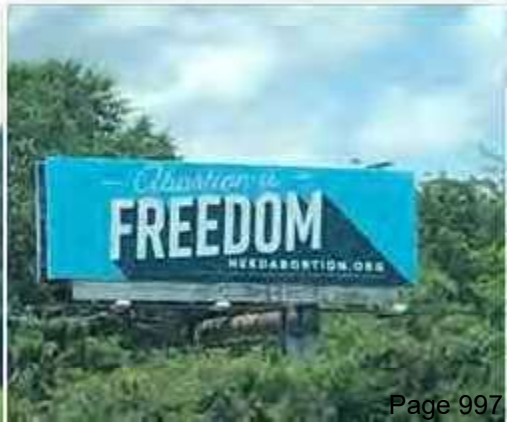
You may hear in the news about "a group named after a child-killing demon" paying for an ad promoting abortion on a billboard in Waskom, Texas. You may be wondering why a group named after "a demonic figure who preys upon women and children with plans to do them harm" would do such a thing. Perhaps they have a desire to live up to their name.

The message on the two new billboards say "Abortion is Freedom" but "Abortion is Freedom" in the same way that a wife killing her husband would be freedom - Abortion is Murder.

The Lilith Fund and NARAL Pro-Choice Texas are advocates for abortion, and since abortion is the murder of innocent life, this makes these organizations advocates for the murder of those innocent lives. This is why the Lilith Fund and NARAL Pro-Choice Texas are listed as criminal organizations in Waskom, Texas. They exist to help pregnant Mothers murder their babies.

#therighttolife #thefightforlife #fromconceptiontillnaturaldeath #unbornlivesmatter #loveoneanother #EndAbortionNow #SanctuaryCityForTheUnborn #WaskomTexas #Istandwithwaskom





TAB 3

June 11, 2019 Facebook

Statement of Mark Lee Dickson

Title: (2) Congratulations Waskom, Texas for becoming the... - Mark Lee Dickson
Link:
https://www.facebook.com/markleedickson/posts/10157334...

Mark Lee Dickson is with Rusty Thomas and 2 others in Waskom, Texas.
June 11, 2019 ·

Congratulations Waskom, Texas for becoming the first city in Texas to become a "Sanctuary City for the Unborn" by resolution and the first city in the Nation to become a "Sanctuary City for the Unborn" by ordinance. Although I did have my disagreements with the final version, the fact remains that abortion is now OUTLAWED in Waskom, Texas!

To quote the ordinance "the Supreme Court erred n Roe v. Wade when it said that pregnant women have a constitutional right to abort their pre-born children."

"constitutional scholars have excoriated Roe v. Wade, 410 U.S. 113 (1973), for its lack of reasoning and its decision to concoct a constitutional right to abortion that has no textual foundation in the Constitution or any source of law, see John Hart Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920, 947 (1973) ("Roe v. Wade . . . is not constitutional law and gives almost no sense of an obligation to try to be."); Richard A. Epstein, Substantive Due Process By Any Other Name: The Abortion Cases, 1973 Sup. Ct. Rev. 159, 182 ("It is simple fiat and power that gives [Roe v. Wade] its legal effect."); Mark Tushnet, Red, White, and Blue: A Critical Analysis of Constitutional Law 54 (1988) ("We might think of Justice Blackmun's opinion in Roe as an innovation akin to Joyce's or Mailer's. It is the totally unreasoned judicial opinion;"

"Roe v. Wade, 410 U.S. 113 (1973), is a lawless and illegitimate act of judicial usurpation, which violates the Tenth Amendment by trampling the reserved powers of the States, and denies the people of each State a Republican Form of Government by imposing abortion policy through judicial decree."

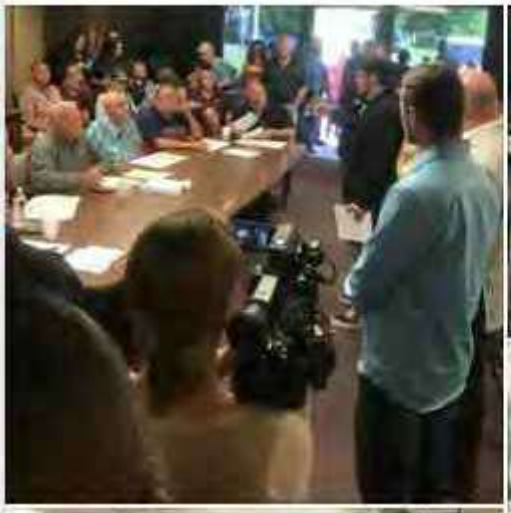
"The Supreme Court's rulings and opinions in Roe v. Wade, 410 U.S. 113 (1973), Planned Parenthood v. Casey, 505 U.S. 833 (1992), Stenberg v. Carhart, 530 U.S. 914 (2000), Whole Woman's Health v. Hellerstedt, 136 S.

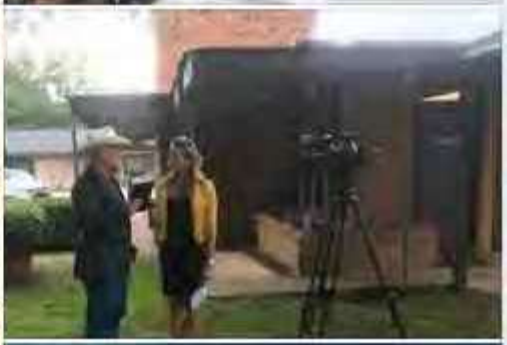
Ct. 2292 (2016), and any other rulings or opinions from the Supreme Court that purport to establish or enforce a "constitutional right" to murder a pre-born child, are declared to be unconstitutional usurpations of judicial power, which violate both the Tenth Amendment the Republican Form of Government Clause, and are null and void in the City of Waskom."

All organizations that perform abortions and assist others in obtaining abortions (including Planned Parenthood and any of its affiliates, Jane's Due Process, The Afiya Center, The Lilith Fund for Reproductive Equality, NARAL Pro-Choice Texas, National Latina Institute for Reproductive Health, Whole Woman's Heath and Woman's Heath Alliance, Texas Equal Access Fund, and others like them) are now declared to be criminal organizations in Waskom, Texas.

This is history in the making and a great victory for life!

#therighttolife #thefightforlife #fromconceptiontillnaturaldeath #unbornlivesmatter #loveoneanother #EndAbortionNow #ResolutionOnTheRightToLife #OrdinanceOnTheRightToLife #SanctuaryCityForTheUnborn #WaskomTexas #GatewayOfTexas





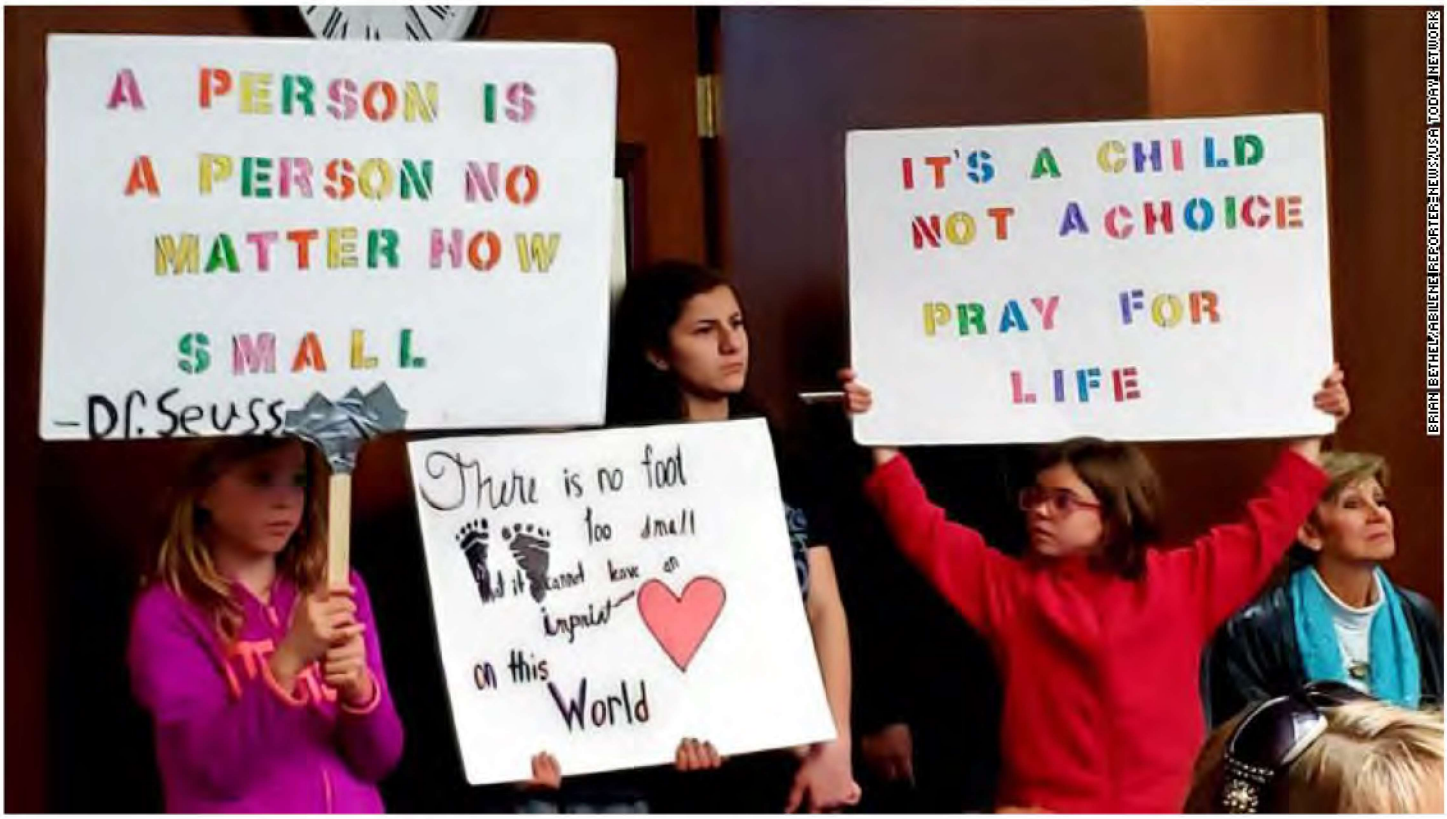

TAB 4

Jan. 25, 2020 CNN Article Quoting Mark Lee Dickson

Small towns in Texas are declaring themselves 'sanctuary cities for the unborn'

By Harmeet Kaur, CNN

Updated 9:53 AM ET, Sat January 25, 2020



Abilene is one of about a dozen towns in Texas that is considering adopting an ordinance to declare itself a "sanctuary city for the unborn."

(CNN) — When most Americans think of sanctuary cities, they think of predominately liberal jurisdictions that have vowed to protect undocumented immigrants from what they view as overzealous federal immigration policies.

But in the last year or so, conservative cities and counties around the nation have co-opted the term, declaring themselves sanctuaries from attempts at gun control -- and now, abortions.

Ten towns in Texas have voted to declare themselves "sanctuary cities for the unborn," with most adopting ordinances that claim to outlaw abortion within city limits. At least 13 cities are considering such ordinances, and three -- Mineral Wells, Omaha and Jacksboro -- have already voted against them.

Most of the towns that have enacted the anti-abortion ordinances have populations of less than 6,000 people. None have abortion clinics.

The town of Waskom, with a population of 1,900, became the first "sanctuary city for the unborn" last June, according to the anti-abortion movement leading the charge across Texas. The town of Gary, with a population of 300, became the latest one last week, joining others like Naples, Joaquin, Gilmer and Rusk.

organizations like Planned Parenthood as criminal and fine medical providers who perform abortions.

Abortion is still legal in Texas

In reality, the ordinances are criminally unenforceable because of the Supreme Court's 1973 ruling in Roe v. Wade, which established the right to abortion nationwide. That means abortion remains legal in Texas.

Mark Lee Dickson, the activist behind the Sanctuaries For the Unborn movement and the director of Right to Life of East Texas, is well aware of these limitations. But in the event that the Supreme Court does reverse its opinion on abortion rights, the ordinances will be in place to penalize those who performed abortions, or otherwise "aided and abetted" in the procedures.

"The idea is this: in a city that has outlawed abortion, in those cities if an abortion happens, then later on when Roe v. Wade is overturned, those penalties can come crashing down on their heads," Dickson told CNN.

Additionally, the ordinances give the family members of someone who has received an abortion the right to sue the abortion provider -- something that Dickson said local courts will be able to enforce.

"For so long, we have put our hope in our state capitols, in our nation's Capitol, when all along we need to be battling these battles on the home front of our cities," Dickson said. "If an abortion clinic moves into our city, it's not Austin's problem, it's not Washington D.C.'s problem, it's our problem. It's going to affect our communities, so that's why we've got to stand up and proactively do something."

Not all anti-abortion activists agree that waging this fight on the local level is the best strategy. Some groups, including the Texas Alliance for Life, have cautioned against approaches that are unlikely to be held up by courts, according to the Texas Tribune.

But Dickson argues that the ordinances are not intended to provoke legal challenges.

"This ordinance specifically was not meant to provoke a lawsuit that would overturn Roe v. Wade," he said. "This ordinance was meant to keep cities out of lawsuits. We wrote it in a way that really protects both the cities and the unborn."

Activists: Sowing 'confusion'?

Advocates for abortion rights argue that while the ordinances cannot actually outlaw abortion, they are spreading misinformation to those seeking the procedure.

"They are a really harmful tactic by the Right to further marginalize low-income people, people of color and young people into thinking they can't access healthcare choices which are well within their rights," Kamyon Conner, executive director of the Texas Equal Access (TEA) Fund, told CNN.

The TEA Fund provides financial assistance to people who need help paying for abortions.

Organizations that advocate for reproductive rights have been receiving calls from individuals asking about whether they are still allowed to get abortions, according to Drucilla Tigner, reproductive rights strategist for the American Civil Liberties Union (ACLU) of Texas.

"Abortion is still legal in every city and county in Texas, as it is everywhere in the United States currently," Tigner told CNN. "But one of the clear purposes of this ordinance is to cause confusion of individuals who live in these towns about whether or not they're able to access rights."

The ACLU of Texas said it is considering mounting legal challenges to the ordinances, although it has not yet announced any plans to do so.

on abortion in Texas, she said.

TAB 5
June 4, 2020 Defamation Mitigation Act Letter

THOMPSON COBURN LLP

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Jennifer R. Ecklund
972 629 7112 direct
jecklund@thompsoncoburn.com

June 4, 2020

U.S. Mail, Overnight Delivery

Mark Lee Dickson
Individually and as Director of Right to Life East Texas
1233 E. George Richey Rd.
Longview, TX 75604-7622

Re: Request that you retract and clarify defamatory statements made against the TEA Fund, The Afiya Center, and the Lilith Fund.

Dear Mr. Dickson:

This letter is directed to you both in your personal capacity, and as Director of Right to Life East Texas. We have been retained to represent the interests of the Texas Equal Access Fund, ("TEA Fund") The Afiya Center, and the Lilith Fund for Reproductive Equity ("Lilith Fund"). This letter is your notification under the Texas Defamation Mitigation Act that you and Right to Life East Texas have made false and/or misleading statements about our clients and is a formal request that you retract and correct such statements in each venue and mode of communication in which they have been made.

Specifically, you and Right to Life East Texas have made numerous statements that label our clients "criminal" or "criminal organizations," or state or imply that these organizations have committed or are presently committing crimes under Texas law. These statements, including but not limited to the examples set out below, are false. Under Texas law, it is *per se* defamation to falsely accuse a person or an organization of criminal activities.

None of our clients has committed any criminal act, and your statements cause damage to their reputations, work, clients, and the services they provide throughout Texas. We request that you immediately retract all statements declaring or implying that the organizations named above are criminal organizations or that they or any of their agents have committed or are committing any criminal acts. We further request that you specifically clarify that neither you, nor to your knowledge anyone else, has any evidence or reason to believe that any of the organizations named above nor any of their agents has committed any acts in violation of the criminal laws of the United States or of any state or local government. Below are some examples of statements we request that you retract and clarify, and we ask the same with respect to any similar statements you or Texas Right to Life have made.

(1) **Your statements contained in city and county resolutions and ordinances which, in the original drafts (and in most cases, the originally adopted versions) declared TEA Fund, The Afiya Center, and Lilith Fund to be criminal organizations, immediately after purporting to declare abortion "murder with malice aforethought," implying**

that TEA Fund, The Afiya Center, and Lilith Fund have abetted or participated in the actual criminal act of murder.

Because these ordinances (an example of which is attached) were drafted at your behest, you are responsible for the text thereof, including both recitals (reciting "facts," such as "a surgical or chemical abortion…is murder 'with malice aforethought'") and declarations (declaring abortion to be murder and declaring our clients to be criminal organizations). Because all of the statements described in this letter, and others you have made, were made in connection with ordinances that several local governments have now passed, it is not merely that you have hyperbolically called our clients "murderers" in some philosophical or moral sense. Instead, it appears your statements are intentionally designed to confuse people about what the law is and smear our clients as literal criminals who have or presently are committing acts that are against the law. Because they are not, such statements are defamatory.

None of the organizations we represent, nor any of their agents, has ever committed the criminal act of murder, or abetted the criminal act of murder. No level of government has ever accused these organizations or any of their agents of murder or any other crime associated with their provision of services to people seeking abortion services, no level of government has ever charged these organizations or any of their agents with same, and neither these organizations nor any of their agents has ever been found civilly or criminally liable for same. To state or imply that these organizations have assisted in committing the literal crime of murder, or any other crime, is defamatory and false. The context of your repeated statements makes it very likely that even reasonable people could be misled about whether our clients have actually committed any criminal acts. This has harmed, and will continue to harm, our clients' reputations as law-abiding organizations.

(2) **Your statements both before and after the passage of such ordinances further equating abortion with the criminal act of murder and declaring our clients "criminal organizations."** For instance:

Your July 2, 2019 Facebook post stating that:

> "Abortion is Freedom" in the same way that a wife killing her husband would be freedom - Abortion is Murder. The Lilith Fund and NARAL Pro-Choice Texas are advocates for abortion, and since abortion is the murder of innocent life, this makes these organizations advocates for the murder of those innocent lives. This is why the Lilith Fund and NARAL Pro-Choice Texas are listed as criminal organizations in Waskom, Texas. They exist to help pregnant Mothers murder their babies.

Your November 26, 2019 Facebook post stating that:

> Even the listing of abortion providers as examples of criminal organizations is not unconstitutional. We can legally do that. This is an ordinance that says murdering unborn children is outlawed, so it makes sense to name examples of organizations that are involved in murdering unborn children.

None of the organizations we represent have ever committed the criminal act of murder or abetted same, nor have they committed any other criminal acts. Moreover, (1) no city, municipality, or state has brought any type of enforcement action against any of our client organizations for conduct related to the education and assistance they provide to people seeking abortion services; (2) no judicial proceeding has found any of the organizations we represent guilty of any crime or crimes related to their provision of education and assistance to people seeking abortion services; (3) abortion, and providing education and assistance in obtaining legal abortion, are not illegal in Texas; and (4) abortion is *excluded* from the murder statute in the State of Texas, and even Texas's prior, unconstitutional anti-abortion law (struck down in *Roe v. Wade*) does not designate abortion or assistance with abortion as murder. Consequently, there is no basis for accusing any of the organizations we represent of criminal activity because of their provision of education and assistance to people seeking abortion services. Your statements explicitly state and give the impression that our clients have broken or are breaking the law when they are not, which is defamatory.

(3) **Your statements, on social media or otherwise, to the effect that it is proper for TEA Fund, The Afiya Center, and/or Lilith Fund to be designated "criminal organizations" by cities because allegedly abortion has been made illegal or outlawed.** For instance:

Your statement on Facebook immediately after Waskom adopted the ordinance you proposed:

> Congratulations Waskom, Texas for becoming the first city in Texas to become a "Sanctuary City for the Unborn" by resolution and the first city in the Nation to become a "Sanctuary City for the Unborn" by ordinance. Although I did have my disagreements with the final version, the fact remains that abortion is now OUTLAWED in Waskom, Texas! … All organizations that perform abortions and assist others in obtaining abortions (including Planned Parenthood and any of its affiliates, Jane's Due Process, The Afiya Center, The Lilith Fund for Reproductive Equality [sic], NARAL Pro-Choice Texas, National Latina Institute for Reproductive Health, Whole Woman's Heath and Woman's Health Alliance, Texas Equal Access Fund, and others like them) are now declared to be criminal organizations in Waskom, Texas. This is history in the making and a great victory for life!

Your statement on the Right to Life East Texas Facebook page on July 2, 2019:

> In closing, despite what these groups may think, what happened in Waskom was not a publicity stunt. The Lilith Fund was in error when they said on a July 2nd Facebook post, "Abortion is still legal in Waskom, every city in Texas, and in all 50 states." We said what we meant and we meant what we said. Abortion is illegal in Waskom, Texas. In the coming weeks more cities in Texas will be taking the same steps that the City of Waskom took to outlaw abortion in their cities and become sanctuary cities for the unborn.

These statements explicitly state that providing abortion services, and providing education or assistance to people seeking abortion services, has been made illegal by the City of Waskom's ordinance (and by implication, the ordinances of other cities you have persuaded to adopt it). You know that this is not true. Abortion is not against the law in Texas, which specifically regulates medical abortion. Educating people about their rights to abortion and assisting them in obtaining legal abortions is also perfectly legal. Consequently, it is defamatory to call Lilith Fund, TEA Fund, and The Afiya Center (as well as other organizations) "criminal organizations" merely because they assist people in these ways.

Nor can you defend these statements by arguing that this is merely the text of the ordinance. You are responsible for the text, having coordinated with others to have it drafted. The cities themselves know that they cannot declare these organizations criminal, and they have amended their statutes to remove that language, but this does not cure your original and ongoing defamation. Moreover, as noted above, (1) no city, municipality, or state has brought any type of enforcement action against any of our clients for conduct related to providing education or assistance to people seeking abortion services and (2) no judicial proceeding has found any of the organizations we represent guilty of any crime or crimes related to providing education or assistance to people seeking abortion services. Consequently, it is defamatory to refer to our clients as "criminal," especially given your repeated statements misrepresenting the state of the law, because it is likely to persuade reasonable people that our clients have actually committed literal criminal acts, when in fact they have committed no crimes.

With respect to all of these statements, and any similar statements, we therefore ask you to publicly clarify that, even to the extent you believe abortion *should* be a crime, or is morally equivalent to murder or some other crime, you have no reason to believe that any of the organizations we represent, or any employee or agent thereof, has (1) committed the crime of murder under federal or state law, (2) abetted the crime of murder under federal or state law, or (3) committed any other crime associated with providing education or assistance to people seeking abortion services.

We are not asking you to change your political views or cease to advocate for them. All we ask is that you immediately make a public statement on your personal and Right to Life East Texas's social media accounts retracting any allegations that these organizations or their agents have broken or are breaking any laws. If you do not do so, we will have no choice but to initiate a defamation suit to set the record straight. We intend to seek injunctive relief requiring you to retract and clarify your past statements to clear this defamation, as well as damages to compensate our clients for the injury to their reputations you have caused, and the expense of litigation you have forced upon them. We may also seek punitive damages given the obviously intentional nature of this defamation.

Feel free to contact me with any questions you may have regarding the foregoing, or to connect me with your own legal counsel. Please forward any retractions or corrections that you make so that our clients can evaluate their legal options and avoid unnecessary litigation.

Very truly yours,

Jennifer R. Ecklund

cc: Elizabeth Myers
John Atkins

TAB 6

Dallas Morning News, Inc. v. Tatum

(Tex. 2018)

554 S.W.3d 614
Supreme Court of Texas.

The DALLAS MORNING NEWS, INC. and Steve Blow, Petitioners
v.
John TATUM and Mary Ann Tatum, Respondents

No. 16–0098
|
Argued January 10, 2018
|
OPINION DELIVERED: May 11, 2018

Synopsis

Background: Parents brought action against newspaper and author for libel in connection with column that, while not mentioning parents and teenager by name, quoted from teenager's obituary and described events surrounding his suicide. The 68th Judicial District Court, Dallas County, entered take-nothing summary judgment in favor of newspaper and author. Parents appealed. The Court of Appeals, 493 S.W.3d 646, affirmed in part, reversed in part, and remanded. Newspaper and author petitioned for review, which was granted.

Holdings: The Supreme Court, Jeffrey V. Brown, J., held that:

[1] libel claim was one for defamation by implication rather than textual defamation;

[2] an objectively reasonable reader would draw implication from column that parents acted deceptively in publishing obituary, which stated that teenager died "as a result of injuries sustained in an automobile accident," as element required for claim;

[3] an objectively reasonable reader would not draw implication from column that teenager had a mental illness that parents ignored, which led to his suicide, and that parents' deception perpetuated and exacerbated the problem of suicide in others, as element required for claim;

[4] implication that parents acted deceptively in publishing obituary was reasonably capable of defaming parents, as element required for claim; but

[5] implied accusation that parents acted deceptively in publishing obituary was an opinion and thus was not actionable defamation.

Reversed; trial court's summary judgment reinstated.

Boyd, J., concurred and filed opinion in which Lehrmann and Blacklock, JJ., joined.

Procedural Posture(s): Petition for Discretionary Review; On Appeal; Motion for Summary Judgment.

West Headnotes (66)

[1] **Libel and Slander** Nature and elements of defamation in general

Defamation is a tort, the threshold requirement for which is the publication of a false statement of fact to a third party; the fact must be defamatory concerning the plaintiff, and the publisher must make the statement with the requisite degree of fault.

14 Cases that cite this headnote

[2] **Libel and Slander** Nature and elements of defamation in general

Defamation may occur through slander or through libel.

6 Cases that cite this headnote

[3] **Libel and Slander** Slander

Libel and Slander Libel

"Slander" is a defamatory statement expressed orally; by contrast, "libel" is a defamatory statement expressed in written or other graphic form. Tex. Civ. Prac. & Rem. Code Ann. § 73.001.

5 Cases that cite this headnote

[4] **Libel and Slander** Actionable Words in General

Defamation is either per se or per quod.

8 Cases that cite this headnote

[5] **Libel and Slander** Presumption as to damage; special damages

"Defamation per se" occurs when a statement is so obviously detrimental to one's good name that a jury may presume general damages, such as for loss of reputation or for mental anguish.

7 Cases that cite this headnote

[6] **Libel and Slander** Actionable Words in General

"Defamation per quod" is defamation that is not actionable per se.

15 Cases that cite this headnote

[7] **Libel and Slander** Actionable Words in General

In a defamation case, the threshold question is whether the words used are reasonably capable of a defamatory meaning.

6 Cases that cite this headnote

[8] **Libel and Slander** Construction of defamatory language in general

In answering the threshold question in a defamation case, whether the words used are reasonably capable of a defamatory meaning, the inquiry is objective, not subjective; but if the court determines the language is ambiguous, the jury should determine the statement's meaning.

1 Cases that cite this headnote

[9] **Libel and Slander** Actionable Words in General

If a statement is not verifiable as false, it is not defamatory.

17 Cases that cite this headnote

[10] **Libel and Slander** Actionable Words in General

Even when a statement is verifiable as false, it does not give rise to liability for defamation if the entire context in which it was made discloses that it is merely an opinion masquerading as a fact.

5 Cases that cite this headnote

[11] **Constitutional Law** Relation between state and federal rights

Both the U.S. Constitution and the State Constitution robustly protect freedom of speech.

U.S. Const. Amend. 1; Tex. Const. art 1, § 10.

1 Cases that cite this headnote

[12] **Constitutional Law** Defamation

To avoid the threat to free speech that unrestrained defamation liability poses, the U.S. Constitution imposes a special responsibility on judges whenever it is claimed that a particular communication is defamatory; for appellate judges, one of these responsibilities is to comply with the requirement of independent appellate review as a matter of federal constitutional law. U.S. Const. Amend. 1.

1 Cases that cite this headnote

[13] **Appeal and Error** De novo review

The Supreme Court reviews a denial of summary judgment de novo.

6 Cases that cite this headnote

[14] **Appeal and Error** Judgment

Appeal and Error Summary judgment

When reviewing a decision on a motion for summary judgment, in the interest of efficiency, the Supreme Court considers all grounds presented to the trial court and preserved on appeal.

[15] **Appeal and Error** Summary Judgment

When reviewing a decision on a motion for summary judgment, the Supreme Court takes as true all evidence favorable to the nonmovant and

indulges every reasonable inference and resolves any doubts in the nonmovant's favor.

13 Cases that cite this headnote

[16] **Judgment** Existence of defense

Judgment Existence or non-existence of fact issue

A trial court properly grants a defendant's traditional motion for summary judgment if the defendant disproves at least one element of each of the plaintiff's claims or establishes all elements of an affirmative defense to each claim.

6 Cases that cite this headnote

[17] **Judgment** Weight and sufficiency

It is proper for the trial court to grant a defendant's no-evidence motion for summary judgment if the plaintiff has produced no more than a scintilla of evidence on an essential element of the cause of action, that is, if the plaintiff's evidence does not rise to a level that would enable reasonable and fair-minded people to differ in their conclusions.

10 Cases that cite this headnote

[18] **Libel and Slander** Actionable Words in General

The first question in a libel action is whether the words used are reasonably capable of a defamatory meaning.

4 Cases that cite this headnote

[19] **Libel and Slander** Construction of defamatory language in general

Whether words used are reasonably capable of a defamatory meaning is a question of law; in answering it, the inquiry is objective, not subjective.

3 Cases that cite this headnote

[20] **Libel and Slander** Construction of language used

The question in a libel action of whether the words used are reasonably capable of a defamatory meaning involves two independent steps: the first is to determine whether the meaning the plaintiff alleges is reasonably capable of arising from the text of which the plaintiff complains, and the second is to answer whether the meaning, if it is reasonably capable of arising from the text, is reasonably capable of defaming the plaintiff.

4 Cases that cite this headnote

[21] **Libel and Slander** Actionable Words in General

Textual defamation refers to the common-law concept of defamation per se, that is, defamation that arises from the statement's text without reference to any extrinsic evidence.

11 Cases that cite this headnote

[22] **Libel and Slander** Actionable Words in General

Extrinsic defamation refers to the common-law concept of defamation per quod, which is defamation that does require reference to extrinsic circumstances.

6 Cases that cite this headnote

[23] **Libel and Slander** Matter imputed

"Extrinsic defamation" occurs when a statement whose textual meaning is innocent becomes defamatory when considered in light of other facts and circumstances sufficiently expressed before or otherwise known to the reader.

3 Cases that cite this headnote

[24] **Libel and Slander** Matter imputed

An extrinsically defamatory statement requires extrinsic evidence to be defamatory at all.

1 Cases that cite this headnote

[25] **Libel and Slander** Necessity and propriety

Plaintiffs relying on extrinsic defamation must assert as much in their petitions to present the theory at trial.

[26] **Libel and Slander** Actionable Words in General

"Textual defamation" occurs when a statement's defamatory meaning arises from the words of the statement itself, without reference to any extrinsic evidence.

3 Cases that cite this headnote

[27] **Libel and Slander** Matter imputed

When a publication's text implicitly communicates a defamatory statement, the plaintiff's theory is "defamation by implication."

6 Cases that cite this headnote

[28] **Libel and Slander** Matter imputed

In a defamation-by-implication case, the defamatory meaning arises from the statement's text, but it does so implicitly.

4 Cases that cite this headnote

[29] **Libel and Slander** Matter imputed

Defamation by implication is not the same thing as textual defamation; rather, it is a subset of textual defamation.

1 Cases that cite this headnote

[30] **Libel and Slander** Actionable Words in General

Libel and Slander Matter imputed

If the defamation is textual, it may be either implicit or explicit.

[31] **Libel and Slander** Construction of language used

Libel and Slander Matter imputed

In a textual defamation case, the precepts that apply to construing explicit meanings do not necessarily apply with the same force or in the same manner when construing implicit meanings.

[32] **Libel and Slander** Certainty

Libel and Slander Matter imputed

In a textual-defamation case, a plaintiff may allege that defamatory meaning arises in one of three ways: (1) explicitly; (2) implicitly as a result of the article's entire gist; or (3) implicitly from a distinct portion of the article rather than from the article's as-a-whole gist.

1 Cases that cite this headnote

[33] **Libel and Slander** Matter imputed

"Gist," for purposes of defamation by implication, refers to a publication or broadcast's main theme, central idea, thesis, or essence.

2 Cases that cite this headnote

[34] **Libel and Slander** Matter imputed

"Implication," for purposes of defamation by implication, refers to the inferential, illative, suggestive, or deductive meanings that may emerge from a publication or broadcast's discrete parts; implication includes necessary logical entailments as well as meanings that are merely suggested.

1 Cases that cite this headnote

[35] **Libel and Slander** Truth of part of defamatory matter; substantial truth

For purposes of a defamation case, a broadcast with specific statements that err in the details but that correctly convey the gist of a story is substantially true.

1 Cases that cite this headnote

[36] **Libel and Slander** Truth of part of defamatory matter; substantial truth

In a defamation case, the substantial-truth doctrine precludes liability for a publication that correctly conveys a story's gist or "sting" although erring in the details.

[37] **Libel and Slander** Actionable Words in General

To determine whether a defamation by implication has occurred, the question is the same as it is for defamatory content generally: whether the publication is reasonably capable of communicating the defamatory statement.

1 Cases that cite this headnote

[38] **Libel and Slander** Matter imputed

When the plaintiff claims defamation by implication, the judicial task is to determine whether the meaning the plaintiff alleges arises from an objectively reasonable reading.

1 Cases that cite this headnote

[39] **Libel and Slander** Matter imputed

In a defamation by implication case, the judicial role is not to map out every single implication that a publication is capable of supporting; rather, the judge's task is to determine whether the implication the plaintiff alleges is among the implications that the objectively reasonable reader would draw.

2 Cases that cite this headnote

[40] **Libel and Slander** Matter imputed

In a defamation by implication case, determining whether the implication the plaintiff alleges is among the implications that the objectively reasonable reader would draw involves a single objective inquiry: whether the publication can be reasonably understood as stating the meaning the plaintiff proposes.

4 Cases that cite this headnote

[41] **Libel and Slander** Construction of defamatory language in general

In a defamation case, only when the court determines the language is ambiguous or of doubtful import should the jury determine the statement's meaning.

[42] **Libel and Slander** Actionable Words in General

In a defamation case, whether language is ambiguous and whether the same language is reasonably capable of defamatory meaning are not the same question.

1 Cases that cite this headnote

[43] **Libel and Slander** Construction of defamatory language in general

If a court determines that a statement is capable of defamatory meaning and only defamatory meaning, i.e., that it is unambiguous, then the jury plays no role in determining the statement's meaning.

2 Cases that cite this headnote

[44] **Libel and Slander** Construction of defamatory language in general

Courts sometimes determine that a statement is capable of at least one defamatory and at least one non-defamatory meaning; when that occurs, it is for the jury to determine whether the defamatory sense was the one conveyed.

[45] **Libel and Slander** Actionable Words in General

In a defamation case, a court may determine that the statement is not capable of any defamatory meanings; 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.

9 Cases that cite this headnote

[46] **Libel and Slander** Construction of defamatory language in general

In a defamation case, when the court determines that a statement is not capable of any defamatory meanings, the plaintiff cannot present the question of meaning to the jury; this remains true even if the statement is otherwise ambiguous.

1 Cases that cite this headnote

[47] **Constitutional Law** Defamation

Libel and Slander Construction of defamatory language in general

In a defamation case, answering whether a statement is reasonably capable of a certain meaning does not end the court's inquiry; instead, upon answering that question in the affirmative, the court must further consider whether its answer will lead publishers to curtail protected speech in an attempt to steer wider of the unlawful zone of unprotected speech, and the court's decision must not exert too great a "chilling effect" on First Amendment activities. U.S. Const. Amend. 1; Tex. Const. art 1, § 10.

1 Cases that cite this headnote

[48] **Constitutional Law** Defamation

The First Amendment imposes a special responsibility on judges whenever it is claimed that a particular communication is defamatory; for appellate judges, one of these responsibilities is to comply with the requirement of independent appellate review reiterated in *New York Times* as a matter of federal constitutional law. U.S. Const. Amend. 1; Tex. Const. art 1, § 10.

[49] **Libel and Slander** Matter imputed

For a court to subject a publisher to liability for defamation by implication, the plaintiff must make an especially rigorous showing of the publication's defamatory meaning.

[50] **Libel and Slander** Matter imputed

A plaintiff who seeks to recover based on a defamatory implication, whether a gist or a discrete implication, must point to additional, affirmative evidence within the publication itself that suggests the defendant intends or endorses the defamatory inference.

4 Cases that cite this headnote

[51] **Libel and Slander** Construction of language used

Libel and Slander Matter imputed

In a defamation by implication case, the evidence of the defendant's intent of the defamatory inference must arise from the publication itself; in considering whether the publication demonstrates such an intent, the court must, as always, evaluate the publication as a whole rather than focus on individual statements.

2 Cases that cite this headnote

[52] **Libel and Slander** Matter imputed

In a defamation by implication case, the court considers the following questions: does the publication clearly disclose the factual bases for the statements it impliedly asserts; does the allegedly defamatory implication align or conflict with the article's explicit statements; does the publication accuse the plaintiff in a defamatory manner as opposed to simply reciting that others have accused the plaintiff of the same conduct; does the publication report separate sets of facts, or does it link the key statements together; and does the publication specifically include facts that negate the implications that the defendant conjures up.

1 Cases that cite this headnote

[53] **Libel and Slander** Matter imputed

In a defamation by implication case, the inquiry whether the defendant intends or endorses the defamatory inference is objective, not subjective.

3 Cases that cite this headnote

[54] **Libel and Slander** Matter imputed

The question in a defamation by implication case is whether the publication indicates by its plain language that the publisher intended to convey the meaning that the plaintiff alleges.

1 Cases that cite this headnote

[55] **Libel and Slander** Matter imputed

In a defamation by implication case alleging a defamatory meaning as a result of an article's entire gist, the court must construe the publication as a whole in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive it.

2 Cases that cite this headnote

[56] **Libel and Slander** Imputation of falsehood, dishonesty, or fraud

Parents' libel claim that newspaper column quoting from teenager's obituary and describing events surrounding his suicide was a claim for "defamation by implication" rather than textual defamation, where parents alleged that column had the defamatory meaning that parents acted deceptively in publishing obituary, which stated that teenager died "as a result of injuries sustained in an automobile accident," that teenager had a mental illness that parents ignored and which led to teenager's suicide, and that parents' deception perpetuated and exacerbated the problem of suicide in others, but none of those meanings appeared in column's text or depended on any extrinsic evidence.

[57] **Libel and Slander** Imputation of falsehood, dishonesty, or fraud

Objectively reasonable reader would draw implication from newspaper column, which quoted from teenager's obituary and described events surrounding his suicide, that parents acted deceptively in publishing obituary, which stated that teenager died "as a result of injuries sustained in an automobile accident," as element required for parents' claim of defamation by implication against newspaper and column author; gist of column was that bereaved families often do society a disservice by failing to explicitly mention when suicide is the cause of death, and author would have had no reason to mention parents' obituary except to support his point that suicide often goes undiscussed.

[58] **Libel and Slander** Imputation of falsehood, dishonesty, or fraud

Objectively reasonable reader would not draw implication from newspaper column, which quoted from teenager's obituary stating that he died "as a result of injuries sustained in an automobile accident" and described events surrounding his suicide, that teenager had a mental illness that parents ignored and which led to his suicide and that parents' deception perpetuated and exacerbated the problem of suicide in others, as element required for parents' claim of defamation by implication against newspaper and column author, even though column stated that mental illness "often" underlies suicide, where column did so immediately after citing statistic that suicide is the third-leading cause of death among young people, gist of column was that bereaved families often do society a disservice by failing to explicitly mention when suicide is the cause of death, there was space between discussion of parents and discussion of mental illness, and column declared that "the last thing I want to do is put guilt on the family of suicide victims."

[59] **Libel and Slander** Imputation of falsehood, dishonesty, or fraud

Implication from newspaper column, which quoted from teenager's obituary and described events surrounding his suicide, that parents acted deceptively in publishing obituary, which stated that teenager died "as a result of injuries sustained in an automobile accident," was reasonably capable of defaming parents, as element required for claim of defamation

by implication against newspaper and column author; column's accusation of parents' deception was capable of impeaching their character for honesty. Tex. Civ. Prac. & Rem. Code Ann. § 73.001.

[60] **Libel and Slander** Presumption as to damage; special damages

A statement is defamatory per se when it is so obviously harmful that general damages, such as mental anguish and loss of reputation, are presumed.

7 Cases that cite this headnote

[61] **Libel and Slander** Words Imputing Crime and Immorality

Libel and Slander Want of chastity or sexual crimes in general

Libel and Slander Words imputing contagious or venereal disease

Accusing someone of a crime, of having a foul or loathsome disease, or of engaging in serious sexual misconduct constitutes defamation per se.

2 Cases that cite this headnote

[62] **Libel and Slander** Words Tending to Injure in Profession or Business

Remarks that adversely reflect on a person's fitness to conduct his or her business or trade are deemed defamatory per se.

1 Cases that cite this headnote

[63] **Libel and Slander** Actionable Words in General

Statements that are not verifiable as false cannot form the basis of a defamation claim.

10 Cases that cite this headnote

[64] **Libel and Slander** Actionable Words in General

For purposes of a defamation claim, statements that cannot be verified, as well as statements that cannot be understood to convey a verifiable fact, are opinions.

8 Cases that cite this headnote

[65] **Libel and Slander** Construction of defamatory language in general

Whether a statement is an opinion in a defamation case is a question of law.

2 Cases that cite this headnote

[66] **Libel and Slander** Imputation of falsehood, dishonesty, or fraud

Implied accusation against parents in newspaper column entitled "Shrouding Suicide Leaves its Danger Unaddressed," which quoted from teenager's obituary stating that teenager died "as a result of injuries sustained in an automobile accident" and described events surrounding his suicide, that parents acted deceptively in publishing obituary, was an opinion, and thus was not actionable defamation by implication; column accused parents of a single, understandable act of deception, undertaken with motives that should not have incited guilt or embarrassment, column compared a quotation from obituary against an account of teenager's suicide and any speculation as to why these two accounts diverged was reasonably based on disclosed facts, and column as whole, though it included facts, argued in support of an opinion that the title conveyed, which was that society should be more frank about suicide.

***620** ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS, William G. Whitehill, J.

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Justice Brown delivered the unanimous opinion of the Court with respect to Parts I, II, III.B, and IV, the opinion of the Court with respect to Part III.A, in which Chief Justice Hecht, Justice Green, Justice Guzman, and Justice Devine joined, and an opinion with respect to Part III.C, in which Chief Justice Hecht and Justice Johnson joined.

Opinion

Jeffrey V. Brown, Justice

> *Words—so innocent and powerless as they are, as standing in a dictionary, how potent for good and evil they become in the hands of one who knows how to combine them.* [1]
>
> —Nathaniel Hawthorne

***621** In this libel-by-implication case, we must determine whether the defamatory meanings the Tatums allege are capable of arising from the words that Steve Blow combined in a column that The Dallas Morning News published. We conclude that the column is reasonably capable of meaning that the Tatums acted deceptively and that the accusation of deception is reasonably capable of defaming the Tatums. However, as we further conclude that the accusation is an opinion, we reverse the court of appeals' judgment and reinstate the trial court's summary judgment for petitioners Steve Blow and The Dallas Morning News.

I

Background

A. Facts

Paul Tatum was the son of John and Mary Ann Tatum. [2] At seventeen years old, Paul was a smart, popular, and athletic high-school student. By every indication, he was a talented young man with a bright future. One mid-May evening, Paul, driving alone, crashed his parents' vehicle on his way home from a fast-food run. The vehicle's airbag deployed, and the crash was so severe that investigators later discovered Paul's eyelashes and facial tissue at the scene. The crash's cause has never been conclusively established and no evidence suggests that Paul was intoxicated or otherwise under the influence of any substance when the crash occurred.

Paul found his way home on foot. He began drinking and he called a friend. The phone call indicated to the friend that Paul was behaving erratically. The friend, concerned, traveled to Paul's house to see him in person. The friend found Paul at the Tatums' house in a confused state and holding one of the Tatum family's firearms. The friend left the room where Paul was to report Paul's irrational behavior to the friend's parent, who was waiting in a car outside the Tatums' house. Soon after, the friend heard a gunshot. Paul had killed himself.

In the wake of Paul's death, the Tatums discovered medical literature positing a link between traumatic brain injury and suicide. The Tatums concluded that the car accident caused irrational and suicidal ideations in Paul, which in turn led to his death (whether through an irrational failure to appreciate the risks that accompany handling a firearm or through suicidal desires that led to an intentional, suicidal ***622** action). Paul's mother, a mental-health professional, had never noticed any suicidal tendencies in Paul. By her account, and by all others, Paul was a normal, healthy, and mentally stable young man. For the Tatums, these observations underscored the plausibility of their theory that Paul's car crash generated a brain injury that led to his suicide.

In addition to establishing a scholarship fund in his name, the Tatums sought to memorialize Paul by writing an obituary, which they published by purchasing space in The Dallas Morning News. The obituary stated that Paul died "as a result of injuries sustained in an automobile accident." The Tatums chose this wording to reflect their conviction that Paul's suicide resulted from suicidal ideation arising from a brain injury rather than from any undiagnosed mental illness.

The Dallas Morning News published the obituary on May 21, 2010. More than 1,000 people attended Paul's funeral.

Steve Blow is a columnist for The Dallas Morning News.[3] On June 20, 2010—Father's Day, and about one month after Paul's suicide—the paper published a column by Blow entitled "Shrouding Suicide Leaves its Danger Unaddressed."[4]

The column characterized suicide as the "one form of death still considered worthy of deception." While it did not refer to the Tatums by name, it quoted from Paul's obituary and referred to it as "a paid obituary in this newspaper." Although those who knew Paul already knew the truth, the column revealed what the obituary left out: Paul's death "turned out to have been a suicide." After providing another example of an undisclosed suicide, the column went on to lament that "we, as a society, allow suicide to remain cloaked in such secrecy, if not outright deception." The reason we should be more open, according to the column, is that "the secrecy surrounding suicide leaves us greatly underestimating the danger there" and that "averting our eyes from the reality of suicide only puts more lives at risk." The reason we are not open about suicide, the column speculated, is that "we don't talk about the illness that often underlies it—mental illness." Despite these perceived risks, the column also suggested that the lack of openness is understandable. Blow wrote that we should not feel embarrassed by suicide and that "the last thing I want to do is put guilt on the family of suicide victims." The column concluded with an exhortation: "Awareness, frank discussion, timely intervention, treatment—those are the things that save lives. Honesty is the first step."

Blow drafted the column without attempting to contact the Tatums and the paper published it without letting the Tatums know that it was going to print. Those who knew the Tatums immediately recognized that the obituary the column referenced was Paul's.

B. Procedural history

The Tatums filed suit. They alleged libel and libel per se against Blow and the paper. In particular, the Tatums alleged the column defamed them by its "gist." They also brought Deceptive Trade Practices Act claims against the paper. The News filed a motion for traditional and no-evidence summary judgment. The News ***623** asserted several traditional grounds. Among them were that the column was not reasonably capable of a defamatory meaning and that the column was an opinion. Without specifying why, the trial court granted the News's motion.[5]

The Tatums appealed. The court of appeals affirmed as to the deceptive-trade practices claims, but it reversed and remanded the Tatums' claims that were based on libel and libel per se. 493 S.W.3d 646, 653 (Tex. App.—Dallas 2015). As is especially relevant here, the court of appeals began by asking whether there was a "genuine fact issue regarding whether the column was capable of defaming" the Tatums. *Id.* at 659. Nowhere in this analysis did the court of appeals discuss the column's gist. Yet the court concluded that "a person of ordinary intelligence could construe the column to suggest that Paul suffered from mental illness and his parents failed to confront it honestly and timely, perhaps missing a chance to save his life." *Id.* at 661. It further concluded that "[t]his meaning is defamatory because it tends to injure the Tatums' reputations and to expose them to public hatred, contempt, or ridicule." *Id.*

In the next section, the court analyzed "the *column's gist regarding* the Tatums." *Id.* at 662–63 (emphasis added). A reasonable reader, the court held, could conclude that "the *column's gist is* that the Tatums, as authors of Paul's obituary, wrote a deceptive obituary to keep Paul's suicide a secret and to protect themselves from being seen as having missed the chance to intervene and prevent the suicide." *Id.* (emphasis added). *But see* *id.* at 672 ("We assume without deciding that the defamatory publication in this case generally involved a matter of public concern (preventing suicides) ....").

The court's conclusion regarding the column's gist drove the rest of its analysis. It held the column was not an opinion because "the column's gist that the Tatums were deceptive when they wrote Paul's obituary is sufficiently verifiable to be actionable in defamation." *Id.* at 668. The News's defenses based on fair comment, official proceedings, truth, substantial truth, actual malice, and negligence fared no better. *See* *id.* at 666–67. Thus, the court of appeals rejected every possible ground on which the trial court might have based its grant of summary judgment.

The News petitioned this Court for review. It argues that the court of appeals was wrong on four fronts: the column is not reasonably capable of defamatory meaning; it is non-

actionable opinion; it is substantially true; and the court of appeals did not properly analyze actual malice.

II

Law

A. Defamation

[1] [2] [3] Defamation is a tort, the threshold requirement for which is the publication of a false statement of fact to a third party. *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 579 (Tex. 2017). The fact must be defamatory concerning the plaintiff, and the publisher must make the statement with the requisite degree of fault. *Id.* And in some cases, the plaintiff must also prove damages. *Id.* (citing *In re Lipsky*, 460 S.W.3d 579, 593 (Tex. 2015)); *see also* *D Magazine Partners, L.P. v. Rosenthal*, 529 S.W.3d 429, 434 (Tex. 2017). Defamation may occur through slander or through libel. Slander is a defamatory statement expressed orally. *See* ***624** *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995). By contrast, libel is a defamatory statement expressed in written or other graphic form. *See* TEX. CIV. PRAC. & REM. CODE § 73.001.

[4] [5] [6] Texas recognizes the common-law rule that defamation is either per se or per quod. *See* *Lipsky*, 460 S.W.3d at 596. Defamation per se occurs when a statement is so obviously detrimental to one's good name that a jury may presume general damages, such as for loss of reputation or for mental anguish. *Hancock v. Variyam*, 400 S.W.3d 59, 63–64 (Tex. 2013). Statements that injure a person in her office, profession, or occupation are typically classified as defamatory per se. *Id.* at 64. Defamation per quod is simply defamation that is not actionable per se. *Lipsky*, 460 S.W.3d at 596.

[7] [8] [9] [10] In a defamation case, the threshold question is whether the words used "are reasonably capable of a defamatory meaning." *Musser v. Smith Protective Servs., Inc.*, 723 S.W.2d 653, 655 (Tex. 1987). In answering this question, the "inquiry is objective, not subjective." *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 157 (Tex. 2004). But if the court determines the language is ambiguous, the jury should determine the statement's meaning. *See Musser*, 723 S.W.2d at 655. If a statement is not verifiable as false, it is not defamatory. *Neely v. Wilson*, 418 S.W.3d 52, 62 (Tex. 2013) (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21–22, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990)). Similarly, even when a statement *is* verifiable as false, it does not give rise to liability if the "entire context in which it was made" discloses that it is merely an opinion masquerading as a fact. *See* *Bentley v. Bunton*, 94 S.W.3d 561, 581 (Tex. 2002); *see also* *Isaacks*, 146 S.W.3d at 156–57.

[11] [12] Both the U.S. Constitution and the Texas Constitution "robustly protect freedom of speech," *Rosenthal*, 529 S.W.3d at 431, and the Texas Constitution expressly acknowledges a cause of action for defamation. *See* Tex. Const. art. I, § 8 ("Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege ...."); *see also* *Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989). These documents also impose substantive limits on defamation law. *See* *Cain v. Hearst Corp.*, 878 S.W.2d 577, 584 (Tex. 1994) ("[T]he Texas Constitution [has] independent vitality from the federal constitution, and [it] impose[s] even higher standards on court orders which restrict the right of free speech."). Among these limits, to avoid the threat to free speech that unrestrained defamation liability poses, the U.S. Constitution "imposes a special responsibility on judges whenever it is claimed that a particular communication is [defamatory]." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 505, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984). For appellate judges, one of these responsibilities is to comply with the "requirement of independent appellate review" as a matter of "federal constitutional law." *Bose*, 466 U.S. at 510, 104 S.Ct. 1949; *see also* *Doubleday & Co., v. Rogers*, 674 S.W.2d 751, 755 (Tex. 1984) ("[T]he first amendment requires the appellate court to independently review the evidence.")

B. Standard of review

[13] [14] [15] [16] [17] We review a denial of summary judgment de novo. *See* *Neely*, 418 S.W.3d at 59. In the interest of efficiency, "we consider all grounds presented to the trial court and preserved on appeal." *Id.* "When

reviewing a summary judgment, we take as true all evidence favorable to the nonmovant and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor." *Rincones*, 520 S.W.3d at 579 (citing ***625** *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005)). A trial court properly grants a defendant's traditional motion for summary judgment "if the defendant disproves at least one element of each of the plaintiff's claims or establishes all elements of an affirmative defense to each claim." *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997) (internal citation omitted). Similarly, it is proper for the trial court to grant a defendant's no-evidence motion for summary judgment if the plaintiff has produced no more than a scintilla of evidence on an essential element of the cause of action, that is, if the plaintiff's evidence does not rise "to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600–01 (Tex. 2004) (quoting *Merrell Dow Pharm. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)).

III

Analysis

A. Is the column reasonably capable of a defamatory meaning?

[18] **[19]** **[20]** "Meaning is the life of language." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991). Thus, the first question in a libel action is whether the words used are "reasonably capable of a defamatory meaning." *Musser*, 723 S.W.2d at 654. Meaning is a question of law. *Id.* at 654. In answering it, the "inquiry is objective, not subjective." *Isaacks*, 146 S.W.3d at 157. We note that the question involves two independent steps. The first is to determine whether the meaning the plaintiff alleges is reasonably capable of arising from the text of which the plaintiff complains. *See, e.g.*, *Rosenthal*, 529 S.W.3d at 437–41 (first analyzing an article's gist, then discussing whether the gist was defamatory). The second step is to answer whether the meaning—if it is reasonably capable of arising from the text—is reasonably capable of defaming the plaintiff. *See id.*

1. What does the column mean?

a) Law

In the typical defamation case, the determination of what a publication means involves little beyond browsing the publication's relevant portions in search of the defamatory content of which the plaintiff complains. That is, defamatory meanings are ordinarily transmitted the same way that other meanings are—explicitly. But this is not the typical defamation case. Rather, the Tatums allege that the column defames them by its "gist." This allegation requires us to consider the history of our cases addressing "gist."

(1) Common law

Texas cases recognize a distinction between a statement that is defamatory by its text alone and a statement that is defamatory only by reason of "extrinsic evidence" and "explanatory circumstances." *Moore v. Waldrop*, 166 S.W.3d 380, 385 (Tex. App.—Waco 2005, no pet.); *see also Gartman v. Hedgpeth*, 138 Tex. 73, 157 S.W.2d 139, 141–43 (1941) (discussing the distinction). The common law employed the term "defamation per se" to refer to the first type of statement —one defamatory by its text alone. *See Defamation Per Se*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining as defamatory "per se" a "statement that is defamatory in and of itself"). Similarly, at common law, "defamation per quod" referred to a statement whose defamatory meaning required reference to extrinsic facts. *See Defamation Per Quod*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining as defamatory "per quod" a statement whose defamatory meaning is "not apparent but [must be] proved by ***626** extrinsic evidence showing its defamatory meaning").

However, this distinction "is not the same as that between defamation which is actionable of itself and that which requires proof of special damage." W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 111, at 782 (5th ed. 1984). Despite the difference, we have also characterized as "defamation per se" statements that are "so obviously hurtful to a plaintiff's reputation that the jury may presume general damages, including for loss of reputation and mental anguish." *Hancock*, 400 S.W.3d at 63–64. In this usage, "[a] statement that injures a person in her office, profession, or occupation is typically classified as defamatory

per se." *Id.* at 64. With regard to special damages, "[d]efamation per quod is defamation that is not actionable per se." *Lipsky*, 460 S.W.3d at 596. Unfortunately, "the terms 'defamation per se' and 'defamation per quod' are used indiscriminately in both senses." KEETON ET AL. *supra*, § 111, at 782 n.41.

[21] **[22]** Thus, for clarity, we introduce the following terms. To begin, "textual defamation" refers to the common-law concept of defamation per se, that is, defamation that arises from the statement's text without reference to any extrinsic evidence. On the other hand, "extrinsic defamation" refers to the common-law concept of defamation per quod, which is to say, defamation that *does* require reference to extrinsic circumstances. Moreover, as we noted in *In re Lipsky*, "Texas has not abandoned t[he] distinction" between defamation so harmful that the jury may presume general damages and defamation that requires the plaintiff to prove special damages. 460 S.W.3d at 596 n.13. Thus, we ratify the continued usage of (and distinction between) "defamation per se" and "defamation per quod" as used in relation to special damages. *See id.*; *Hancock*, 400 S.W.3d at 63–64. This case concerns, in part, the distinction between textual defamation and extrinsic defamation.

[23] **[24]** **[25]** Extrinsic defamation occurs when a statement whose textual meaning is innocent becomes defamatory when considered in light of "other facts and circumstances sufficiently expressed before" or otherwise known to the reader. *See Snider v. Leatherwood*, 49 S.W.2d 1107, 1109 (Tex. Civ. App.—Eastland 1932, writ dism'd w.o.j.). The requirements for proving an extrinsic-defamation case—including the torts professor's perennial favorites of innuendo, inducement, and colloquium—are somewhat technical. Only two are of interest here. First, it must be remembered that an extrinsically defamatory statement *requires* extrinsic evidence to be defamatory at all. *See id.* Second, plaintiffs relying on extrinsic defamation must assert as much in their petitions to present the theory at trial. *See Billington v. Hous. Fire & Cas. Ins.*, 226 S.W.2d 494, 497 (Tex. Civ. App.—Fort Worth 1950, no writ).

[26] **[27]** Textual defamation occurs when a statement's defamatory meaning arises from the words of the statement itself, without reference to any extrinsic evidence. *See Defamation Per Se*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining as defamatory "per se" a "statement that is defamatory in and of itself").[6] The ordinary ***627** textual defamation involves a statement that is explicitly defamatory. Explicit textual-defamation cases share two common attributes. First, none necessarily involve any extrinsic evidence. Thus, none necessarily involve extrinsic defamation. Second, the defamatory statement's literal text and its communicative content align—what the statement *says* and what the statement *communicates* are the same. In other words, the defamation is both *textual* and *explicit*. As discussed below, our cases also recognize that defamation can be *textual* and *implicit*. *See generally* *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103 (Tex. 2000). When a publication's text implicitly communicates a defamatory statement, we refer to the plaintiff's theory as "defamation by implication."

(2) Defamation by implication

[28] **[29]** **[30]** **[31]** In a defamation-by-implication case, the defamatory meaning arises from the statement's text, but it does so implicitly. Defamation by implication is not the same thing as textual defamation. Rather, it is a subset of textual defamation. That is, if the defamation is textual, it may be either implicit or explicit. The difference is important because the precepts that apply to construing explicit meanings do not necessarily apply with the same force or in the same manner when construing implicit meanings. And, importantly, nor is implicit textual defamation the same thing as extrinsic defamation, although parties and courts have often confused the two.[7] Finally, defamation by implication is not the same thing as defamation by innuendo. The dividing line is the same as that between extrinsic defamation and textual defamation generally: the first requires extrinsic evidence, but the second arises solely from a statement's text. The difference is important because plaintiffs relying on extrinsic defamation must say so in their pleadings, whereas plaintiffs relying on textual defamation need not. *See* *Billington*, 226 S.W.2d at 497.

Turner v. KTRK Television, Inc. is our foundational case recognizing defamation by implication *See generally*, 38 S.W.3d at 113. There, we held "that a plaintiff can bring a claim for defamation when discrete facts, literally or substantially true, are published in such a way that they create a substantially false and defamatory impression by omitting

material facts or juxtaposing facts in a misleading way." *Id.* at 115. In particular, *Turner* focused on the "converse of the substantial truth doctrine." *See id.* (citing *McIlvain v. Jacobs*, 794 S.W.2d 14, 16 (Tex.1990)). The converse of that doctrine, we held, is that a defendant may be liable for a "publication that gets the details right but fails to put them in the proper context and thereby gets the story's 'gist' wrong." *See id.* Although *Turner* used the word "gist," commentators were relatively quick to point out that the decision actually addressed libel by implication. [8]

***628** The issue in *Turner* was whether a plaintiff could bring a "gist" claim based on "the entirety of a publication and not merely on individual statements." *Id.* We answered that question in the affirmative, *see id.*, and we have maintained the same approach in subsequent cases. [9] Indeed, just last term we held that "[i]n making the initial determination of whether a publication is capable of a defamatory meaning, we examine its 'gist.' That is, we construe the publication 'as a whole ....' " *Rosenthal*, 529 S.W.3d at 434 (citations omitted). Thus, *Turner* and its progeny recognize that a plaintiff can rely on an entire publication to prove that a defendant has implicitly communicated a defamatory statement.

However, and of special importance in this case, there is no reason that implicit meanings must arise only from an entire publication or not at all. Our decision in *Rosenthal* is illustrative. There, the plaintiff brought a defamation claim based on an article titled "THE PARK CITIES WELFARE QUEEN." *Id.* at 431. The article was

> published under the heading "CRIME" and [was] accompanied by Rosenthal's mug shot from a prior unrelated charge. The article state[d] under the aforementioned "Welfare Queen" title that Rosenthal, described as a "University Park mom," ha[d] "figured out how to get food stamps while living in the lap of luxury." It then invite[d] the reader to see how Rosenthal "pulls it off" despite the assumption that one living in the affluent Park Cities would "never qualify."

Id. at 437. The article's language would not *necessarily* have been any less defamatory if it had been appended to a larger piece discussing, for example, the biographies of various individual Park Cities homeowners. Of course, the larger context would have been relevant for construing what the article meant. But the language would not have ceased being defamatory *solely* by being published within a larger article. In recognizing defamation-by-"gist" in *Turner*, we also recognized the broader category of defamation by implication.

[32] Thus, we acknowledge that in a textual-defamation case, a plaintiff may allege that meaning arises in one of three ways. First, meaning may arise explicitly. *See Bentley*, 94 S.W.3d at 569 ("[Y]'all are corrupt, y'all are the criminals, [and] y'all are the ones that oughta be in jail."). Second, meaning may arise implicitly as a result of the article's entire gist. *See Rosenthal*, 529 S.W.3d at 439 ("[E]valuating the article 'as a whole ...' [t]he article's gist is that ...." (citation omitted)). Third, as in this case, the plaintiff may allege that the defamatory meaning arises implicitly from a distinct portion of the article rather than from the article's as-a-whole gist. As other courts have recognized, the distinction between "as-a-whole" gist and "partial" implication is important. *See, e.g.*, ***629** *Sassone v. Elder*, 626 So.2d 345, 354 (La. 1993) ("[P]laintiffs prove that the alleged implication is the *principal* inference a reasonable reader or viewer will draw ...."); *see also* C. Thomas Dienes & Lee Levine, *Implied Libel, Defamatory Meaning, and State of Mind: The Promise of New York Times Co. v. Sullivan*, 78 IOWA L. REV. 237, 289 (1993) ("The distinction between inferences that may reasonably be drawn from a publication, on the one hand, and the meaning a reasonable reader would ascribe to the publication, on the other, is crucial ....").

[33] Accordingly, we use the following terms. "Gist" refers to a publication or broadcast's main theme, central idea, thesis, or essence. *See* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 745 (4th ed. 2000) (defining "gist" as "[t]he central idea; the essence"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 959 (2002) (defining "gist" as "the main point or material part ... the pith of a matter"); *Gist*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining gist as "[t]he main point"). Thus, we use "gist" in its colloquial sense. In this usage, publications and broadcasts typically have a single gist.

[34] "Implication," on the other hand, refers to the inferential, illative, suggestive, or deductive meanings that may emerge from a publication or broadcast's discrete parts.

Implication includes necessary logical entailments as well as meanings that are merely suggested. Thus, in the sentence "John took some of the candy," implication includes both the *logical entailment* that John took at least one piece of the candy as well as the *suggestion* that John did not take every piece of the candy. "Defamation by implication," as a subtype of textual defamation, covers both "gist" and "implication."

[35] **[36]** The difference between gist and implication is especially important in two contexts. The first relates to the substantial-truth doctrine. "A broadcast with specific statements that err in the details but that correctly convey the gist of a story is substantially true." *Neely*, 418 S.W.3d at 63–64. If the plaintiff demonstrates substantial truth, the doctrine "precludes liability for a publication that correctly conveys a story's 'gist' or 'sting' although erring in the details ...." *Turner*, 38 S.W.3d at 115. We have never held, nor do we today, that a true implication—as opposed to a true gist—can save a defendant from liability for publishing an otherwise factually defamatory statement. Second, the difference between gist and implication matters when considering the requirements that the U.S. Constitution imposes on defamation law.

(3) Construing implications

[37] By nature, defamations by implication require construction. Under *Musser v. Smith Protective Services, Inc*, the standard for construing defamatory meaning generally is whether the publication is "reasonably capable" of defamatory meaning. 723 S.W.2d at 655. Defamation by implication is simply a subtype of textual defamation, which is itself one way that a publisher can communicate a defamatory meaning. Thus, to determine whether a defamation by implication has occurred, the question is the same as it is for defamatory content generally: is the publication "reasonably capable" of communicating the defamatory statement? But to whose "reason" does "reasonably capable" refer?

Sometimes we have said that "reasonably capable" requires us to construe a publication "based upon how a person of ordinary intelligence *would* perceive it." *Rosenthal*, 529 S.W.3d at 434 (emphasis added) (internal quotation omitted); *see also* *Bentley*, 94 S.W.3d at 579; *Turner*, 38 S.W.3d at 114. The "would" standard recognizes ***630** that gist, in particular, is the type of implication that no reasonable reader would fail to notice. But the "would" standard falls short when applied to implications. Not all readers will pick up on all reasonable implications in all publications. In fact, it seems apparent that *no* reader *would* internalize every implication from a single article—or even a single sentence.

For example, what implications would a reasonable reader draw from the following sentence, which opens one of Virginia Woolf's best-known novels: "Mrs. Dalloway said she would buy the flowers herself." VIRGINIA WOOLF, MRS. DALLOWAY 3 (1925). The gist is that Mrs. Dalloway plans to buy flowers. But what are the implications? One implication is that someone else was supposed to do the flower-buying. Another implication, apparent from the fact that Mrs. Dalloway "said" she would buy the flowers, is that she is irritated by this other person's failure to purchase the flowers. Although some of these implications may be reasonable, not all reasonable readers would consciously internalize them. Some reasonable readers would notice one implication, while other reasonable readers would notice another. And some reasonable readers would notice no implications. These observations illustrate that the "would" standard, when applied to implications, is overly subjective. The reason is that when applying the "would" standard to implications, the court necessarily must prefer what one reader would discern over what another reader would discern. Since not all reasonable readers "would" perceive all implications, "would" does not capture the entirety of the "reasonably capable" standard.

In other cases, we have said the meaning the plaintiff proposes fails the "reasonably capable" standard only when no "person of ordinary intelligence *could* conclude" that the publication conveys the meaning alleged. *Neely*, 418 S.W.3d at 76 (emphasis added); *see also* *Toledo*, 492 S.W.3d at 722 (Boyd, J., dissenting) ("[T]he question for us is not whether an ordinary viewer would have understood the broadcasts' gist to be false or defamatory, but whether a 'reasonable jury could have found the broadcast to be false or defamatory.' " (citations omitted)). The "could" standard recognizes that publications of any length will communicate more than one implication and that not all reasonable readers will notice every one. Thus, the "could" standard avoids one of the problems that the "would" standard creates. But "could" also creates its own problems.

To return to the example above, is Mrs. Dalloway speaking to another person? Is it a servant? Was it the servant's job to get the flowers? Has Mrs. Dalloway implied that the servant is doing her job poorly? Does the servant have a cause of action for slander, or even slander per se, against Mrs. Dalloway? From the nine words that comprise the sentence, any lawyer might construct a chain of implications that required answering each question "yes" and demonstrated that some reader "could" construe the sentence as defamatory. And with only "could" at its disposal, no court would have any choice but to pass the question on to the jury.

Neither "would" nor "could"—to the extent that the two words are distinguishable, which is not always the case—captures the full scope of the "reasonably capable" standard that governs defamation by implication. "Would" applies in gist cases, as we have repeatedly emphasized, and thus it accurately states one condition that, if present, is *sufficient* for implicit meaning. But in contrast to a publication's single gist, no reasonable reader "would" absorb all implications that a publication puts forth. "Could," on the other hand, ***631** recognizes that meaning can be transmitted in many ways and that reasonable readers will read some things differently. In this way, "could" states a condition that is *necessary* for the transmission of implicit meaning. But as the sentence from *Mrs. Dalloway* illustrates, a reasonable reader "could," without departing from the constraints that pure logic imposes, follow or construct hyper-attenuated inferential chains that stretch beyond the realm of ordinary semantic meaning. Thus, while these standards capture part of the judicial task, they do not capture all of it.

[38] Instead, when the plaintiff claims defamation by implication, the judicial task is to determine whether the meaning the plaintiff alleges arises from an objectively reasonable reading. *See* *Isaacks*, 146 S.W.3d at 157 (explaining that "*the* hypothetical reasonable reader" is the standard by which to judge a publication's meaning (emphasis added)). "The appropriate inquiry is objective, not subjective." *Id.* The objectively reasonable reader has made little appearance in our cases discussing gist. The reason, as discussed above, is that publications usually have a single gist that no reasonable reader could fail to notice. Thus, in gist cases, the "would" standard renders the objectively reasonable reader redundant.

[39] But when discrete implications are at issue, the objectively reasonable reader reappears to aid the court in determining what meaning has been communicated. The reason for the sudden reappearance is that an objectively reasonable reading encompasses many more implications than any single reasonable reader necessarily "would" understand a publication to convey. Even reasonable readers do not internalize every single implication that a publication conveys. That is, "[i]ntelligent, well-read people act unreasonably from time to time, whereas the hypothetical reasonable reader, for purposes of defamation law, does not." *Id.* at 158. Similarly, the objectively reasonable reader notices some—but not all—of the implications that an ordinary reader could draw from a publication's text. So in an implication case, the judicial role is not to map out every single implication that a publication is capable of supporting. Rather, the judge's task is to determine whether the implication the plaintiff alleges is among the implications that the objectively reasonable reader would draw.

[40] Making this determination is a quintessentially judicial task. It involves "a single objective inquiry: whether the [publication] can be reasonably understood as stating" the meaning the plaintiff proposes. *Id.* The objectively reasonable reader aids in the inquiry, as a "prototype ... who exercises care and prudence, but not omniscience, when evaluating allegedly defamatory communications." *Id.* at 157. He does not place "overwhelming emphasis on a[ny] single term." *See* *Rosenthal*, 529 S.W.3d at 437. Nor does he "focus on individual statements" to the exclusion of the entire publication. *See* *id.* The objectively reasonable reader internalizes all of a publication's reasonable implications. When doing so, he considers inferential meaning carefully, but not exhaustively. He performs analysis, but not exegesis.

(4) Meaning's limits

[41] **[42]** Meanings sometimes terminate in ambiguities. And because defamation involves meaning, ambiguity is often an issue in defamation cases. "Only when the court determines the language is ambiguous or of doubtful import should the jury ... determine the statement's meaning ...." *Musser*, 723 S.W.2d at 655; *see also* *Hancock*, 400 S.W.3d at 66; *Gartman*, 157 S.W.2d at 141. And in the very next sentence *Musser* states that "[t]he threshold ***632** question then, which is a question of law, is whether [the defendant's] statements are reasonably capable of a defamatory meaning."

Musser, 723 S.W.2d at 655. Thus, whether "language is ambiguous" and whether the same language is "reasonably capable of defamatory meaning" are not technically the same question. *See, e.g.*, *Toledo*, 492 S.W.3d at 722 (stating both rules); *accord* *Hancock*, 400 S.W.3d at 66; *Carr v. Brasher*, 776 S.W.2d 567, 570 (Tex. 1989).

[43] **[44]** **[45]** **[46]** Questions of meaning and ambiguity recur in three different types. First, if a court determines that a statement is capable of defamatory meaning and *only* defamatory meaning—that it is unambiguous—then the jury plays no role in determining the statement's meaning. *See* *Hancock*, 400 S.W.3d at 66; *see also* *Brasher*, 776 S.W.2d at 570. Second, courts sometimes determine that a statement is capable of at least one defamatory and at least one non-defamatory meaning. When that occurs, "it is for the jury to determine whether the defamatory sense was the one conveyed." KEETON ET AL., *supra*, § 111, at 781; *see also* *Hancock*, 400 S.W.3d at 66. Third, a court may determine that the statement is not capable of any defamatory meanings. "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*, 400 S.W.3d at 66. Importantly, when the court makes this determination, the plaintiff cannot present the question of meaning to the jury. This remains true even if the statement is otherwise ambiguous.

Our point in reciting these black-letter applications of our defamation law is to emphasize that the analytical framework for considering ambiguities does not evaporate simply because the plaintiff alleges an implicit meaning. Put differently, a plaintiff who alleges defamation by implication has not thereby alleged an ambiguity. At least, not necessarily. Of course, implications can be ambiguous. They can be ambiguous in what they convey, just like explicit denotative meaning. But unlike explicit meaning, it can also be uncertain whether a certain implication arises from a statement at all. Thus, one question is whether a publication implicitly communicates a certain statement—e.g., that "Bob was at the bank." The second question is what the statement means—was Bob at the river bank? Or was he at the First National Bank? Ambiguity sometimes prevents a court from answering either question. But it does not *always* prevent an answer. The same rule that allows courts to determine meaning as a matter of law allows them to determine communicative content as a matter of law.

[47] The U.S. and Texas constitutions also limit defamation law. *See* *Bose*, 466 U.S. at 510, 104 S.Ct. 1949 (requiring "independent appellate review"); *Doubleday*, 674 S.W.2d at 751 (recognizing *Bose* in Texas); *see also* *Rosenthal*, 529 S.W.3d at 431 (discussing the constitutional limits); *accord* *Cain*, 878 S.W.2d at 584; *Brand*, 776 S.W.2d at 556. Accordingly, answering whether a statement is "reasonably capable of" a certain meaning does not end our inquiry. Instead, upon answering that question in the affirmative, we must further consider whether our answer will lead publishers to curtail protected speech in an attempt to "steer wider of the unlawful zone" of unprotected speech. *Time, Inc. v. Hill*, 385 U.S. 374, 389, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967). In other words, our decision must not exert too great a "chilling effect" on First Amendment activities.

[48] The potential chilling effect is especially strong in defamation-by-implication cases. Unlike explicit statements, publishers cannot be expected to foresee every implication that may reasonably arise from ***633** a certain publication. To avoid this chilling effect, the First Amendment "imposes a special responsibility on judges whenever it is claimed that a particular communication is [defamatory]." *Bose*, 466 U.S. at 505, 104 S.Ct. 1949. For appellate judges, one of these responsibilities is to comply with the "requirement of independent appellate review reiterated" in *New York Times v. Sullivan* as a matter of "federal constitutional law." *Id.* at 510, 104 S.Ct. 1949. Although *Sullivan* emphasized the "actual malice" requirement that applies when the plaintiff, defendant, or subject matter are sufficiently "public," *see generally* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), we recognize that its reasoning extends to the First Amendment concerns that defamation by implication raises.

The Constitution requires protection beyond that which the "objectively reasonable reader" standard provides. But what level of protection? And by what means?

One option would be to leave the issue for a jury to decide. However, "[p]roviding triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently

to narrow the category, nor served to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas." *Id.* at 505, 104 S.Ct. 1949; *see also* *Ollman v. Evans*, 750 F.2d 970, 997 (D.C. Cir. 1984) (Bork, J., concurring) ("The only solution to the problem libel actions pose would appear to be close judicial scrutiny to ensure that cases about types of speech and writing essential to a vigorous first amendment do not reach the jury."). Since the determination whether a publication is "reasonably capable" of a given meaning involves a textual analysis rather than a credibility determination, displacing the jury does not present any grave danger to due process. Thus, as the U.S. Supreme Court has acknowledged many times, it is consonant with our nation's heritage to recognize a rule requiring judges to answer some of the factual questions that defamation cases present.

[49] For a court to subject a publisher to liability for defamation by implication, the "plaintiff must make an especially rigorous showing" of the publication's defamatory meaning. *Chapin v. Knight–Ridder, Inc.*, 993 F.2d 1087, 1092–93 (4th Cir. 1993). Under this standard, we must look to the judge rather than the jury to prevent the chilling effect, and the judge's review must be "especially rigorous." *Id.* But what does that standard entail? In this section's remainder we answer the question, first by examining the methods by which other jurisdictions have implemented a heightened standard of review in defamation-by-implication cases. Next, we lay out our reasons for adopting the rule we do today. Finally, we consider how the rule's application varies within the defamation-by-implication contexts of gist and individual implication.

One way of cabining the dangers that defamation by implication poses would be to subsume the constitutional question within the question of meaning. However, we see no reason for thinking that either the U.S. Constitution or the Texas Constitution has anything to do with what a word in its everyday usage *means*. Each, of course, has a great deal to say about a statement's legal effect—does it expose the publisher to liability? is it obscene?—but semantic meaning and legal effect are different inquiries. These considerations persuade us that asking what a statement means is a different question from asking whether the law will punish the speaker for saying it. Of course, in practice the two inquiries may take place concurrently. We see no problem with that, but there remains a discernable difference between ***634** whether a restriction on meaning arises from the particulars of English usage or from the Constitution. We cannot solve the constitutional challenges that the tort of defamation by implication presents simply by heightening our standard of meaning. Doing so would be to swim against the current of our traditional jurisprudence that favors "plain meaning." Consequently, we reject a heightened standard of "meaning" as a workable limit on the chilling effect that defamation by implication poses.

A second category of protection disallows defamation by implication, whether altogether or in certain contexts. Some states have taken this approach. *See* *Sassone*, 626 So.2d at 354; *Diesen v. Hessburg*, 455 N.W.2d 446, 451 (Minn. 1990). Our decision in *Turner* holds that a public figure can "bring a claim for defamation when discrete facts, literally or substantially true, are published in such a way that they create a substantially false and defamatory impression by omitting material facts or juxtaposing facts in a misleading way." *Turner*, 38 S.W.3d at 115. Our cases allow public figures—and by extension, private figures, *see* *Rosenthal*, 529 S.W.3d at 434—to bring cases alleging defamation by implication. These precedents prevent us from relying on wholesale rejection of defamation by implication to protect the freedoms that the First Amendment enshrines.

Still other courts have taken a third path by suggesting that defamatory implications might presumptively constitute opinion in some contexts. *See, e.g.*, *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1303 (8th Cir. 1986). We reject the view that implications are opinions, either necessarily or presumptively. Publishers cannot avoid liability for defamatory statements simply by couching their implications within a subjective opinion. *See* *Milkovich*, 497 U.S. at 19, 110 S.Ct. 2695. Thus, after the U.S. Supreme Court's landmark decision in *Milkovich v. Lorain Journal Co.*, the opinion inquiry seeks to ascertain whether a statement is "verifiable," not whether it manifests a personal view. *See* *Neely*, 418 S.W.3d at 62. But no court can decide whether a statement is verifiable until the court decides what the statement *is*—that is, until it conducts an inquiry into the publication's meaning. Of course, implications may frequently turn out to be non-verifiable opinions, but we disagree that implications are presumptively opinion simply by virtue of being implicit. So we see little hope that asking a court to decide from the outset whether a statement is an

opinion will limit the number of defamation-by-implication claims that reach a jury.

A fourth and final limit is to rely on or adjust the culpability standards that *Sullivan* lays out. *See* 376 U.S. at 280, 84 S.Ct. 710. With regard to public-figure plaintiffs, we note (without adopting) the view in other courts that a defendant cannot act with actual knowledge of or reckless disregard for a statement's falsity if the defendant has *no* knowledge (either actual or constructive) that the publication communicates the statement at issue. *See, e.g.*, *Newton v. Nat'l Broad. Co.*, 930 F.2d 662, 681 (9th Cir. 1990). When the plaintiff is a private figure, the relevant inquiry is whether the defendant acted negligently. *See* *Neely*, 418 S.W.3d at 61. But if a statement is defamatory, then it is "virtually inevitable that a jury will return a verdict that the publisher was negligent in not ascertaining the truth of the defamatory character of the statement." Kelley & Zansberg, *supra*, at 5. We do not think that the defendant's culpability presents the right implement for curtailing the kinds of defamation-by-implication claims that most injure public discourse. A subjective inquiry into whether a defendant ***635** "knew" or "intended" a certain meaning will unquestionably lead to exactly the kind of lengthy litigation and burdensome discovery that *Sullivan* and its progeny indicate ought to be avoided. Thus, we decline to recognize "culpability" as a limit on our meaning inquiry.

[50] In place of these tests, we believe the D.C. Circuit was correct when it stated the following limit on the inquiry into meaning:

> [I]f a communication, viewed in its entire context, merely conveys materially true facts from which a defamatory inference can reasonably be drawn, the libel is not established. But if the communication, by the particular manner or language in which the true facts are conveyed, supplies additional, affirmative evidence suggesting that the defendant *intends* or *endorses* the defamatory inference, the communication will be deemed capable of bearing that meaning.

White v. Fraternal Order of Police, 909 F.2d 512, 520 (D.C. Cir. 1990); *see also* *Dodds v. Am. Broad. Co.*, 145 F.3d 1053, 1063–64 (9th Cir. 1998); *Chapin*, 993 F.2d at 1093; *Vinas v. Chubb Corp.*, 499 F.Supp.2d 427, 437 (S.D.N.Y. 2007). Thus, a plaintiff who seeks to recover based on a defamatory implication—whether a gist or a discrete implication—must point to "additional, affirmative evidence" within the publication itself that suggests the defendant "intends or endorses the defamatory inference." *White*, 909 F.2d at 520 (emphasis omitted). A few of the rule's aspects bear emphasizing.

[51] **[52]** First, the evidence of intent must arise from the publication itself. In considering whether the publication demonstrates such an intent, the court must, as always, "evaluate the publication as a whole rather than focus on individual statements." *Rosenthal*, 529 S.W.3d at 437. Of the myriad considerations that exist beyond this long-standing guidepost, many are only relevant depending on a publication's case-specific context. But among them are at least the following questions. Does the publication "clearly disclose[ ] the factual bases for" the statements it impliedly asserts? *See* *Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180, 185 (4th Cir. 1998). Does the allegedly defamatory implication align or conflict with the article's explicit statements? *See, e.g.*, *Wyo. Corp. Servs. v. CNBC, LLC*, 32 F.Supp.3d 1177, 1189 (D. Wyo. 2014). Does the publication accuse the plaintiff in a defamatory manner as opposed to simply reciting that others have accused the plaintiff of the same conduct? *See, e.g.*, *McIlvain*, 794 S.W.2d at 15. Does the publication report separate "sets of facts," or does it "link[ ] the key statements together"? *See, e.g.*, *Biro v. Conde Nast*, 883 F.Supp.2d 441, 467 (S.D.N.Y. 2012). And does the publication "specifically include[ ] facts that negate the implications that [the defendant] conjures up." *Deripaska v. Associated Press*, 282 F.Supp.3d 133, 148 (D.D.C. 2017), *appeal dismissed per stipulation*, No. 17-7164, 2017 WL 6553388 (D.C. Cir. Dec. 8, 2017).

[53] **[54]** Second, in consonance with our precedent and in accord with the judiciary's traditional role when considering plain meaning, the intent or endorsement inquiry "is objective, not subjective." *See* *Isaacks*, 146 S.W.3d at 157. Objectivity is one feature that distinguishes this limit

from the *Sullivan* tests that address culpability. *See, e.g.*, *Stepanov v. Dow Jones & Co.*, 120 A.D.3d 28, 987 N.Y.S.2d 37, 44 (2014) (noting that actual malice and textually demonstrated intent are "two entirely separate issues"). If the publication itself indicates that the defendant intended to communicate a certain meaning, it is not relevant (at this stage) that the defendant did not *in fact* intend to communicate that ***636** meaning. Similarly, the defendant's subjective views about whether a statement is defamatory have no relevance at this stage. By the same token, a defendant will not be subject to liability for subjectively intending to convey a defamatory meaning that the publication's text does not actually support. In either case, the question is whether the publication indicates by its plain language that the publisher intended to convey the meaning that the plaintiff alleges.

[55] Third, the rule may vary in application depending on the type of defamation that the plaintiff alleges. It does not apply in cases of explicit defamation because when the defendant speaks explicitly, the court indulges the presumption that the defendant intended the communicatory content that he conveyed. In a gist case, the court must "construe the publication 'as a whole in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive it.' " *Rosenthal*, 529 S.W.3d at 434. Under the "would" standard, courts are usually able to determine a publication's gist as a matter of law. A gist case is similar to an explicit-meaning case in that the very fact of the gist's (or meaning's) existence is presumptive evidence that the publisher intended to convey the relevant meaning. Thus, it will usually be the case that if a meaning is reasonably capable of being communicated from the gist as a whole, the fact that the gist arises will be sufficient textual evidence that the publisher meant to communicate it.

Finally, in a discrete-implication case, it becomes especially relevant for the court to apply the requirement that the publication's text demonstrates the publisher's intent to convey the meaning the plaintiff alleges. In applying the requirement, courts must bear its origin in mind. The especially rigorous review that the requirement implements is merely a reflection of the "underlying principle" that obligates "judges to decide when allowing a case to go to a jury would, in the totality of the circumstances, endanger first amendment freedoms." *Ollman*, 750 F.2d at 1006 (Bork, J., concurring).

b) Analysis

[56] At the time of summary judgment, the Tatums' live petition alleged that the column defamed them by implicitly communicating the following "gist":

> [The Tatums] created a red herring in the obituary by discussing a car crash in order to conceal the fact that Paul's untreated mental illness—ignored by Plaintiffs—resulted in a suicide that Plaintiffs cannot come to terms with. Defendants led their readers to believe it is people like Plaintiffs—and their alleged inability to accept that their loved ones suffer from mental illness—who perpetuate and exacerbate the problems of mental illness, depression, and suicide.

From this paragraph we discern that the Tatums construe the column to mean that:

- The Tatums acted deceptively in publishing the obituary;
- Paul had a mental illness, which the Tatums ignored and which led to Paul's suicide; and
- The Tatums' deception perpetuates and exacerbates the problem of suicide in others.

None of these meanings appear in the column's explicit text. Nor do they depend on any extrinsic evidence. Thus, while the Tatums allege a textual defamation, their claim rests on defamation by implication rather than on explicit meaning.

The column's gist has nothing to do with the Tatums. Rather, the column's gist is that our society ought to be more forthcoming ***637** about suicide and that by failing to do so, our society is making the problem of suicide worse, not better. So none of the meanings the Tatums allege arise from the column's gist.

[57] As to the first meaning the Tatums allege, we agree that the column's text supports the discrete implication that the Tatums acted deceptively. The standard is whether an objectively reasonable reader would draw the implication that

the Tatums allege. Here, the gist of Blow's column is that bereaved families often do society a disservice by failing to explicitly mention when suicide is the cause of death. Blow holds up the Tatums as an example of the very phenomenon that his column seeks to discourage. Blow would have no reason to mention the Tatums' obituary except to support his point that suicide often goes undiscussed. The objectively reasonable reader seeks to place every word and paragraph in context and to understand the relation that a publication's subparts bear to its whole. Here, an objectively reasonable reading must end with the conclusion that Blow points to the Tatums as one illustration of his thesis that suicide is often "shrouded in secrecy." Simply put, he had no other reason for including them in the column. For the same reason, we conclude that the publication's text objectively demonstrates an intent to convey that the Tatums were deceptive.

But we do not agree that the second and third meanings the Tatums allege are implications that an objectively reasonable reader would draw.

[58] The second alleged meaning rests on the premise that the column means that Paul had a mental illness. We do not agree that the column conveys that meaning. Though the column does say that "mental illness" "often" underlies suicide, the column does so immediately after citing the statistic that suicide is "the third-leading cause of death among young people." The author's use of the word "often" means the column does not logically entail that all suicides are the result of mental illness. And we think the space between the discussion of the Tatums and the discussion of mental illness negates the inferential construction that the Tatums allege —especially since the reference to mental illness follows a citation to a population-level statistic rather than the example paragraphs. But even if we agreed that the column implies that Paul had a mental illness, we could not agree that the column communicates the further implication that the Tatums ignored it or that their treatment of Paul is what led to his suicide. Thus, we conclude that the second meaning the Tatums allege does not arise from an objectively reasonable reading of the column.

Nor does their third. The column declares that "the last thing I want to do is put guilt on the family of suicide victims." An objectively reasonable reader must conclude that the column is about our society as a whole, not about the Tatums in particular. Blow wrote the column to affect future conduct, not to direct blame at any particular family (including the Tatums) for past conduct.

2. Is the meaning defamatory?

[59] Because the column is "reasonably capable" of communicating the meaning that the Tatums were deceptive, the next question is whether that meaning is "reasonably capable" of defaming the Tatums. *See Musser*, 723 S.W.2d at 655. We conclude that it is.

[60] **[61]** **[62]** In Texas, a statement is defamatory libel by statute if it "tends to injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person's honesty, ***638** integrity, virtue, or reputation." TEX. CIV. PRAC. & REM. CODE § 73.001. In addition, under our state's common law, a statement is defamatory per se when it is "so obviously harmful that general damages, such as mental anguish and loss of reputation, are presumed." *Lipsky*, 460 S.W.3d at 596; *see also Hancock*, 400 S.W.3d at 63. For example, "[a]ccusing someone of a crime, of having a foul or loathsome disease, or of engaging in serious sexual misconduct" constitutes defamation per se. *Lipsky*, 460 S.W.3d at 596; *see also Moore*, 166 S.W.3d at 384. Moreover, "[r]emarks that adversely reflect on a person's fitness to conduct his or her business or trade are also deemed defamatory per se." *Lipsky*, 460 S.W.3d at 596.

We agree with the Tatums and with the court of appeals that the column's accusation of deception is "reasonably capable" of injuring the Tatums' standing in the community. In accusing the Tatums of deception, the column is reasonably capable of impeaching the Tatums' "honesty[ ] [and] integrity[.]" *See* TEX. CIV. PRAC. & REM. CODE § 73.001. Thus, the accusation is reasonably capable of being defamatory. "Deception" and "honesty" are antonyms. Blow's statement accusing the Tatums of the first is capable of impeaching their character for the second.

B. Opinion

We conclude that of the defamatory meanings the Tatums allege, the only one capable of arising from Blow's column is the implicit statement that the Tatums acted deceptively. However, "statements that are not verifiable as false" are not defamatory. *Neely*, 418 S.W.3d at 62 (citing *Milkovich*, 497 U.S. at 21–22, 110 S.Ct. 2695). And even when a

statement is verifiable, it cannot give rise to liability if "the entire context in which it was made" discloses that it was not intended to assert a fact. *See* *Bentley*, 94 S.W.3d at 581. A statement that fails either test—verifiability or context—is called an opinion.

1. Arguments

The News, of course, denies that it has accused the Tatums of deception. But even if the column explicitly levied that accusation, the News argues that the deception in this case is inherently unverifiable. The Tatums' mental states in the hours following Paul's death simply cannot be factually verified. Unlike in *Milkovich*, which involved perjury, no "core of objective evidence" exists from which a jury could draw any conclusions about the Tatums' mental states. *See* 497 U.S. at 21, 110 S.Ct. 2695. The News also argues that the column's context clearly discloses that it contains opinions, and that even if the accusation is capable of verification, it is protected because it is among the opinions that the column contains.

The Tatums contend that the charge of deception is verifiable. The accusation turns on whether the Tatums drafted the obituary with a deceptive mental state. Though the News argues this makes the accusation unverifiable, the law determines mental states all the time. Defamation, the very body of law at issue, has developed a robust process for determining whether a defendant's mental state constitutes actual malice. It cannot be the case, the Tatums argue, that defamation law can ascertain a defendant's mental state but not a plaintiff's. As for context, the Tatums argue that "a reasonable reader ... would conclude that Blow is making objectively verifiable assertions regarding the Tatums and their deliberate misrepresentations of fact in the Obituary." Thus, in the Tatums' view, the statement is both verifiable and contextually stated as a fact.

The court of appeals agreed with the Tatums "that the column's gist that the Tatums were deceptive when they wrote ***639** Paul's obituary is sufficiently verifiable to be actionable in defamation." *See* 493 S.W.3d at 668. The court compared the implicit accusation in this case to "[c]alling someone a liar and accusing someone of perjury." *Id.* The court concluded: "Although the Tatums' mental states when they wrote the obituary may not be susceptible of direct proof, ... they are sufficiently verifiable through circumstantial evidence[ ] ...." *Id.*

2. Law

[63] **[64]** **[65]** "[S]tatements that are not verifiable as false cannot form the basis of a defamation claim." *Neely*, 418 S.W.3d at 62 (citing *Milkovich*, 497 U.S. at 21–22, 110 S.Ct. 2695). However, *Milkovich* requires courts to focus not only "on a statement's verifiability," but also on "the entire context in which it was made." *Bentley*, 94 S.W.3d at 581. And even when a statement *is* verifiable as false, it does not give rise to liability if the "entire context in which it was made" discloses that it is merely an opinion masquerading as fact. *See* *Bentley*, 94 S.W.3d at 581; *see also* *Isaacks*, 146 S.W.3d at 157 ("[*Milkovich* protects] statements that cannot 'reasonably [be] interpreted as stating actual facts' ...." (second alteration in original) (citations omitted)). Thus, statements that cannot be verified, as well as statements that cannot be understood to convey a verifiable fact, are opinions. Whether a statement is an opinion is a question of law. *See* *Bentley*, 94 S.W.3d at 580. Finally, the type of writing at issue, though not dispositive, must never cease to inform the reviewing court's analysis.

3. Analysis

[66] The column's context manifestly discloses that any implied accusation of deception against the Tatums is opinion. Thus, we need not decide whether the accusation is wholly verifiable.

The column does not implicitly accuse the Tatums of being deceptive people in the abstract or by nature. Instead, it accuses them of a single, understandable act of deception, undertaken with motives that should not incite guilt or embarrassment. And it does so using language that conveys a personal viewpoint rather than an objective recitation of fact. The first sentence begins "So I guess," the column uses various versions of "I think" and "I understand," and near the column's close Blow states "the last thing I want to do is put guilt on the family of suicide victims." This first-person, informal style indicates that the format is subjective rather

than objective. Nor does the column imply any undisclosed facts. The Tatums list several "exculpatory" facts that they say Blow should have included in the column. But Blow did not imply that he had personal knowledge that any of the facts the Tatums assert were false. Instead, he compared a quotation from the obituary against an account of Paul's suicide. These two accounts diverged, which Blow noted. Any speculation as to *why* the accounts diverged—if it appears in the column at all—was reasonably based on these disclosed facts. Thus, the column's words indicate that the statement is an opinion. The column's title does the same. The column as a whole, though it includes facts, argues in support of the opinion that the title conveys—society ought to be more frank about suicide. It is an opinion piece through and through.

The court of appeals ignored the column's context, opting instead to focus on de-contextualized words which it—not Blow—emphasized. *See* 493 S.W.3d at 654–55. In doing so, it disregarded *Bentley*'s direction that the "entire context in which [a statement] was made" must be analyzed to determine whether a verifiable statement ***640** of fact is nonetheless an opinion for purposes of defamation. *Bentley*, 94 S.W.3d at 581; *see also* *Isaacks*, 146 S.W.3d at 157. We reject that conclusion, and hold instead that if the column is reasonably capable of casting any moral aspersions on the Tatums, it casts them as opinions. *See* *Musser*, 723 S.W.2d at 654–55. Thus, under our precedent recognizing *Milkovich*'s joint tests, the accusation is not actionable. *See* *Bentley*, 94 S.W.3d at 581.

C. Truth

Blow's column is an opinion because it does not, in context, defame the Tatums by accusing them of perpetrating a morally blameworthy deception. But to the extent that the column states that the Tatums acted deceptively, it is true. Implicit defamatory meanings—like explicit defamatory statements—are not actionable if they are either true or substantially true. *See* *McIlvain*, 794 S.W.2d at 15; *see also* *Neely*, 418 S.W.3d at 66. The court of appeals held that "a genuine fact issue" existed as to whether the column's implicit accusation of deception was true or substantially true. 493 S.W.3d at 666. We disagree.

The statement at issue, which arises implicitly, is that the Tatums acted deceptively when they published the obituary. "The truth of the statement in the publication on which an action for libel is based is a defense to the action." TEX. CIV. PRAC. & REM. CODE § 73.005(a). A statement is true if it is either literally true or substantially true. See *Neely*, 418 S.W.3d at 66. A statement is substantially true if it is "[no] more damaging to the plaintiff's reputation than a truthful [statement] would have been." *Id.* (first citing *Turner*, 38 S.W.3d at 115; and then citing *McIlvain*, 794 S.W.2d at 16). In our view, the statement that the Tatums were deceptive is both literally and substantially true.

The statement is literally true because the Tatums' obituary is deceptive. It leads readers to believe something that is not true. It states that Paul died from injuries arising from a car accident when in fact Paul committed suicide. The Tatums believe that the car accident and the suicide are related, but the obituary does not convey that belief. At oral argument, the Tatums' counsel noted that the public often understands news reporting a death due to mental illness synonymously with death by suicide. The same cannot be said of death due to car accident. The obituary purports to convey that a car accident was both the proximate and immediate cause of Paul's death. The former may be true, but the latter is not. That is enough to render the obituary deceptive, which is enough to render truthful the column's implication that the Tatums acted deceptively in publishing it.

The Tatums respond that they earnestly believed that the obituary was true. But the Tatums' beliefs, however sincere, do not make the obituary's message any less deceptive. Indeed, the Tatums argue that Blow should have included all kinds of background facts about the Tatums' beliefs concerning traumatic brain injuries, cause of death, and other matters. But the Tatums themselves did not include any of this information in Paul's obituary. The Tatums cannot argue both that the obituary was true without this background information and that the column is false for failing to include it.

The Tatums also respond that deception implies intentionality. We agree. But the Tatums plainly and intentionally omitted from the obituary the crucial fact that Paul committed suicide. Their motive with regard to the omission is immaterial to whether the obituary is deceptive. What matters is that they intentionally omitted that Paul committed suicide; in so doing, ***641** they drafted an obituary that conveyed a deceptive message to the substantial majority of the News's readership. At root, the Tatums' argument regarding intentionality muddles the concepts of intentionality and

moral blameworthiness. True, an intentional deception often brings with it the implication of wrongdoing, but that is not always the case. And it is certainly not the case here, where the column's author expressly stated that "the last thing I want to do is put guilt on the family of suicide victims." Accordingly, we conclude that the column is literally true.

And even if the statement is not literally true, it is substantially true because it is no more damaging to the Tatums' reputation than a truthful column would have been. *See* *Neely*, 418 S.W.3d at 63. The column does not damage the Tatums' reputation among the cohort of people who knew, before the obituary, that Paul committed suicide. The reason is that these people, assumedly, read the obituary the way the Tatums claim that they intended it to be read—as a tactful way of acknowledging Paul's death without dishonoring his memory. Nor does the column, by omitting the Tatums' belief as to the reason for Paul's suicide, cause additional damage to the Tatums' reputation among the much larger group of people who first learned that Paul committed suicide upon reading the column. These readers, even if they believed the column's implication that the Tatums intended to be deceptive, would heed the column's exhortation that those who shroud suicide in secrecy do not deserve blame.

The column does not accuse the Tatums of being deceptive people in general, but instead of buckling to the current societal pressure to avoid disclosing suicide when it occurs. And to the extent that readers thought less of the Tatums after reading the column, it would be because they concluded on their own that the Tatums acted deceptively, not because they decided to believe the column's implied assertion to that effect. Put differently, the column revealed something that the obituary did not: Paul committed suicide. If readers formed a negative view of the Tatums as a result of that revelation, it was of their own volition, not because the column urged them to. In fact, the column urged precisely the opposite when it said that our society should not place any guilt on families who conceal suicide.

The Tatums respond that a literally truthful column would have included many caveats beyond the fact that the Tatums did not intend to deceive. These facts all relate to whether the Tatums' view of Paul's death was reasonable or scientifically justified. But, of course, the Tatums do not claim to have been defamed by an allegation that they failed to rely on reason or scientific evidence in coming to their conclusion. Instead, they claim the column defames them by omitting their belief —the same belief that they themselves omitted from the obituary. Thus, even accepting the Tatums' contention that the column was less than literally true, a "hypothetically truthful" account would require nothing more than a recitation that the Tatums did not intend to deceive anyone.

Because we agree with the News that a recitation to that effect would not have mitigated the reputational harm that the accusation of deception caused the Tatums, if any, the statement does not fail our standard for substantial truth. Blow's column was callous, certainly, but it was not false.

IV

Conclusion

The publication of Blow's column may have run afoul of certain journalistic, ethical, ***642** and other standards. But the standards governing the law of defamation are not among them. Accordingly, we reverse the judgment of the court of appeals and reinstate the trial court's summary judgment in favor of petitioners Steve Blow and The Dallas Morning News, Inc.

Justice Boyd filed a concurring opinion, in which Justice Lehrmann and Justice Blacklock joined.

APPENDIX

So I guess we're down to just one form of death still considered worthy of deception.

I'm told there was a time when the word "cancer" was never mentioned. Oddly, it was considered an embarrassing way to die.

It took a while for honesty to come to the AIDS epidemic. Ironically, the first person I knew to die of AIDS was said to have cancer.

We're open these days with just about every form of death except one—suicide.

When art expert Ted Pillsbury died in March, his company said he suffered an apparent heart attack on a country road in Kaufman County.

But what was apparent to every witness on the scene that day was that Pillsbury had walked a few paces from his car and shot himself.

Naturally, with such a well-known figure, the truth quickly came out.

More recently, a paid obituary in this newspaper reported that a popular local high school student died "as a result of injuries sustained in an automobile accident."

When one of my colleagues began to inquire, thinking the death deserved news coverage, it turned out to have been a suicide.

There was a car crash, all right, but death came from a self-inflicted gunshot wound [page break] in a time of remorse afterward.

And for us, there the matter ended. Newspapers don't write about suicides unless they involve a public figure or happen in a very public way.

But is that always best?

I'm troubled that we, as a society, allow suicide to remain cloaked in such secrecy, if not outright deception.

Some obituary readers tell me they feel guilty for having such curiosity about how people died. They're frustrated when obits don't say. "Morbid curiosity," they call it apologetically.

But I don't think we should feel embarrassment at all. I think the need to know is wired deeply in us. I think it's part of our survival mechanism.

Like a cat putting its nose to the wind, that curiosity is part of how we gauge the danger out there for ourselves and our loved ones.

And the secrecy surrounding suicide leaves us greatly underestimating the danger there.

Did you know that almost twice as many people die each year from suicide as from homicide?

Think of how much more attention we pay to the latter. We're nearly obsessed with crime. Yet we're nearly blind to the greater threat of self-inflicted violence.

Suicide is the third-leading cause of death among young people (ages 15 to 24) in this country.

Do you think that might be important for parents to understand?

***643** In part, we don't talk about suicide because we don't talk about the illness that often underlies it—mental illness.

I'm a big admirer of Julie Hersh. The Dallas woman first went public with her story of depression and suicide attempts in my column three years ago.

She has since written a book, Struck by Living. Through honesty, she's trying to erase some of the shame and stigma that compounds and prolongs mental illness.

Julie recently wrote a blog item titled "Don't omit from the obit," urging more openness about suicide as a cause of death.

"I understand why people don't include it," she told me. "But it's such a missed opportunity to educate."

And she's so right.

Listen, the last thing I want to do is put guilt on the family of suicide victims. They already face a grief more intense than most of us will ever know.

But averting our eyes from the reality of suicide only puts more lives at risk.

Awareness, frank discussion, timely intervention, treatment —those are the things that save lives.

Honesty is the first step.

See Steve Blow, *Shrouding suicide in secrecy leaves its danger unaddressed*, THE DALLAS MORNING NEWS (July 12, 1010), https://www.dallasnews.com/news/news/2010/07/12/20100620-Shrouding-suicide-in-secrecy-leaves-its-9618.

Jeffrey S. Boyd Justice, Concurring

I imagine it's no surprise by now that many courts and commentators have complained that defamation law is a "quagmire,"[1] lacks "clarity and certainty,"[2] is "overly

confusing"[3] and "convoluted,"[4] leaves courts "hopelessly and irretrievably confused,"[5] and "has spawned a morass of case law in which consistency and harmony have long ago disappeared."[6] I'm afraid Part III.A. of the Court's opinion in this case—in which the Court addresses whether Steve Blow's column was reasonably capable of a defamatory meaning—tends to prove their point. Of course, the Court is writing on a cluttered slate. But I fear its effort to advance the law by introducing new terminology and addressing concepts unnecessary to this decision only makes things worse.

The Court begins its twenty-five-page analysis by introducing the new labels "textual defamation" and "extrinsic defamation" for what courts have always called "defamation per se" and "defamation per quod." This case involves textual defamation, the Court explains, which includes both explicit defamation—which is textual ***644** and does not involve extrinsic evidence—and implicit defamation (which the Court now calls defamation by implication)—which exists when a publication's text creates a false and defamatory impression (making it the converse of the substantial-truth doctrine), but is not to be confused with defamation by innuendo, which is actually a type of extrinsic defamation. Textual defamation by implication involves the publication's gist, which may arise implicitly because of the article's as-a-whole gist (in which case the substantial-truth doctrine may apply), but only if it is reasonably capable of a defamatory meaning, which does not mean it is or is not ambiguous, but does mean it is capable of at least one defamatory meaning, and whether it is ambiguous depends on how many meanings it is reasonably capable of, but that does not mean all reasonable readers would perceive all possible implications because that standard when applied in gist cases renders the objectively reasonable reader redundant. Or defamation by implication may arise from a partial or discrete implication, which really means the gist of a part of the article (but the Court doesn't call that a gist), to which implication the substantial-truth doctrine does not apply. But it does not mean that a reasonable reader could perceive a defamatory meaning, and instead means that the implication the plaintiff alleges arises from an objectively reasonable reading, although the implication may or may not be ambiguous. But regardless of whether the defamation by implication arises from the as-a-whole gist or a discrete implication, the decision whether it is reasonably capable of a defamatory meaning must not exert too great a chilling effect on First Amendment activities—a particular concern in implication cases. So the plaintiff has an especially rigorous burden in such cases, which does not impose a heightened standard of meaning and does not make the implication presumptively an opinion, but does require the plaintiff to provide additional affirmative evidence from the text itself that suggests the defendant objectively intended or endorsed the defamatory inference, a likely scenario if the gist is capable of a defamatory meaning but not necessarily likely if the discrete implication is capable of a defamatory meaning, so the court must conduct an especially vigorous review to confirm the defendant's intent to convey the meaning the plaintiff alleges.

Got it?

A few years ago, a group of organizations that tend to care a lot about defamation law appeared as amici curiae in a case and urged us to "scrap the traditional distinction between per se and per quod defamation," complaining of the "labels' needless opacity."[7] We declined the opportunity, but we did note one First Amendment scholar's assertion that the "ostensibly simple classification system ... has gone through so many bizarre twists and turns over the last two centuries that the entire area is now a baffling maze of terms with double meanings, variations upon variations, and multiple lines of precedent."[8] I'm beginning to think the amici and the scholar have a point. They're certainly not alone in their view that "nothing short of a fresh start can bring any sanity, and predictability, to this very important area of the law."[9]

***645** I'm not yet ready to scrap our convoluted principles. I can accept the idea that defamation law must be fairly complicated due to its "frequent collision ... with the overriding constitutional principles of free speech and free press."[10] Despite its "technical complexity," defamation law has "shown remarkable stamina in the teeth of centuries of acid criticism," which "may reflect one useful strategy for a legal system forced against its ultimate better judgment to deal with dignitary harms."[11] But we should always do our best to reduce the confusion, or, at least, avoid adding to it.

The question in this case is pretty simple: For summary-judgment purposes, was Blow's column reasonably capable of a defamatory meaning? We need not—and the Court does not—announce any new substantive legal principles to decide that issue. Applying (but renaming) our existing principles, the Court concludes the column was reasonably capable of conveying the meaning that the Tatums published a deceptive obituary, which is defamatory, but not that their son had a mental illness or that the Tatums exacerbated the problem of

suicide. I agree, but I cannot join the Court's analysis. The answer certainly requires some consideration of the column's implications and gists, and perhaps those are necessarily complicated matters; but if nothing else, we need not rewrite and relabel our existing considerations.

I agree that the Tatums provided some evidence that Blow's column was reasonably capable of conveying the defamatory meaning that the Tatums published a deceptive obituary. I also agree, however, that if the column expressed that assertion, it expressed it as Blow's opinion, not as a fact. Because the column only expressed a potentially defamatory opinion, the Tatums cannot recover for defamation, and we need not also consider whether Blow's opinion was correct or substantially true. For these reasons, I join the Court's judgment and all but parts III.A and III.C of its opinion.

All Citations

554 S.W.3d 614, 46 Media L. Rep. 1717, 61 Tex. Sup. Ct. J. 1090

Footnotes

1 Nathaniel Hawthorne, American Notebook (1841–52), *in* THE AMERICAN NOTEBOOKS 73, 122 (R. Stewart ed., Yale Univ. Press 1932).

2 We draw our recitation of the Tatums' factual and legal allegations from their third amended petition, which was their live petition when the trial court granted The Dallas Morning News's motion for summary judgment.

3 Throughout the rest of this opinion, we refer to The Dallas Morning News as "the paper." Similarly, we refer to Blow and the paper together as "the News."

4 The column, which this opinion attaches as an appendix, spanned two pages. The headline on the second page was slightly different from the headline on the first: "Shrouding Suicide *in Secrecy* Leaves Its Dangers Unaddressed" (emphasis added).

5 The News amended its motion once. The trial court granted summary judgment on the News's Amended Motion for Final Summary Judgment.

6 *See, e.g.*, *Salinas v. Salinas*, 365 S.W.3d 318, 319 (Tex. 2012) (per curiam) (discussing a defamation claim in which defendant accused plaintiff of being "a drug dealer and a corrupt politician," who had "stolen and lied and killed"); *Bentley*, 94 S.W.3d at 569 (discussing public official's defamation action based on plaintiff's statement that "y'all are corrupt, y'all are the criminals, [and] y'all are the ones that oughta be in jail"); *Leyendecker & Assocs., Inc. v. Wechter*, 683 S.W.2d 369, 374 (Tex. 1984) (holding that a letter's explicit accusation that plaintiff "committ[ed] a criminal act by attempting to conspire ... to file fraudulent insurance claims" was textually defamatory and libelous per se); *Cullum v. White*, 399 S.W.3d 173, 178 (Tex. App.—San Antonio 2011, pet. denied) (discussing defamation claim in which defendant accused plaintiff of being a "pathological liar" who was "flagged" for "terrorist activity").

7 *See, e.g.*, *Turner*, 38 S.W.3d at 113 (mentioning that the plaintiff "strenuously argued that the broadcast's 'gist' was both false and defamatory .... [but] regarded libel by implication as a separate theory"); *Leatherwood*, 49 S.W.2d at 1109–10 (discussing a letter's "innuendo" concurrently with "all reasonable implications thereof or inferences to be drawn therefrom").

8 *See, e.g.*, Elizabeth Blanks Hindman, *When Is the Truth Not the Truth? Truth Telling and Libel by Implication*, 12 COMM. L. & POL'Y 341, 363 (2007) ("[*Turner*] took up the issue of libel by implication ...."); *see also* Thomas B. Kelley & Steven D. Zansberg, *Libel by Implication*, COMM. LAW., Spring 2002, at 3, 10 (discussing *Turner*); John P. Border et al., *Recent Developments in Media Law and Defamation Torts*, 37 TORT & INS. L.J. 563, 578–79 (2002) (discussing *Turner* immediately under the heading "Libel by Implication").

9 *See* *KBMT Operating Co. v. Toledo*, 492 S.W.3d 710, 723 (Tex. 2016) ("[T]he question is whether [plaintiff] submitted some evidence that the gist of [defendant's] broadcasts was false." (emphasis omitted)); *Lipsky*, 460 S.W.3d at 594 (discussing "the gist of [plaintiff's] statements"); *Neely*, 418 S.W.3d at 56–57 (reversing summary judgment because plaintiff "raised a genuine issue of material fact" as to broadcast's gist).

1 *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 171, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967) (Black, J., concurring).

2 Arlen W. Langvardt, *Media Defendants, Public Concerns, and Public Plaintiffs: Toward Fashioning Order from Confusion in Defamation Law*, 49 U. PITT. L. REV. 91, 94 (1987).

3 Rodney A. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 63 (1983); *see also* Lisa K. West, *Milkovich v. Lorain Journal Co.—Demise of the Opinion Privilege in Defamation*, 36 VILL. L. REV. 647, 687 n.22 (1991) (addressing the "confusing state" of defamation law).

4 *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 506 S.E.2d 497, 514 (1998) (Toal, J., concurring).

5 *Id.*

6 *Mittelman v. Witous*, 135 Ill.2d 220, 142 Ill.Dec. 232, 552 N.E.2d 973, 978 (1989), *abrogated by* *Kuwik v. Starmark Star Mktg. & Admin., Inc.*, 156 Ill.2d 16, 188 Ill.Dec. 765, 619 N.E.2d 129 (1993).

7 *Waste Mgmt. v. Tex. Disposal Sys. Landfill, Inc.*, 434 S.W.3d 142, 146 (Tex. 2014).

8 *Id.* (quoting 2 RODNEY SMOLLA, LAW OF DEFAMATION § 7:1 (2d ed. 2010)).

9 *Holtzscheiter*, 506 S.E.2d at 514 (Toal, J., concurring); *see also* Ty Camp, *Dazed and Confused: The State of Defamation Law in Texas*, 57 BAYLOR L. REV. 303, 304 (2005) (attempting to "clear up the [defamation] statute and the case law and provide attorneys with a rule that is clear and easy to apply").

10 11 Lawrence R. Ahern, III, et al., *West's Legal Forms, Debtor & Creditor Non–Bankruptcy* § 10:52 (4th ed. 2017) (commentary).

11 Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 341 (1966).

TAB 7

S. C. v. Tex. Dep't of Family & Protective Services

(Tex.App. – Austin Nov. 18, 2020)

2020 WL 6750561
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.

Court of Appeals of Texas, Austin.

S. C., Appellant
v.
TEXAS DEPARTMENT OF FAMILY
AND PROTECTIVE SERVICES, Appellee

NO. 03-19-00965-CV
|
Filed: November 18, 2020

FROM THE 421ST DISTRICT COURT OF CALDWELL COUNTY, NO. 19-A-226, THE HONORABLE CHRIS SCHNEIDER, JUDGE PRESIDING

Attorneys and Law Firms

Brenda L. Kinsler, for Appellee.

Juliana Johnson, Jacqueline McNutt, Frances V. Dunham, for Appellant.

Before Chief Justice Rose, Justices Baker and Triana

MEMORANDUM OPINION

Jeff Rose, Chief Justice

***1** S.C. appeals from the trial court's order dismissing her petition to adopt Z.R., Z.A., and K.R. [1] We will affirm the trial court's order.

PROCEDURAL AND FACTUAL BACKGROUND

S.C. is the children's maternal great-aunt. After the children's parents' rights were terminated in early November 2018, the Texas Department of Family and Protective Services was named permanent managing conservator. *See* Tex. Fam. Code §§ 161.206-.208. S.C. filed a petition in intervention seeking to adopt the children on February 27, 2019. The Department moved to strike, arguing that the petition was untimely, that the pleadings were deficient, and that S.C. lacked standing to file the petition. S.C. then filed a petition to modify the parent-child relationship, which the Department again sought to dismiss on the same grounds. At a hearing held in May 2019, S.C. agreed to the motion to strike her petition in intervention, and the trial court granted the Department's motion to strike her petition to modify.

The next day, S.C. filed the underlying petition for adoption. [2] *See generally id.* §§ 162.001-.026 (provisions governing adoption). The Department moved to strike, asserting that S.C. lacked standing, had no right to possession or access under an existing court order, did not have the Department's consent to the suit, and did not fall within any statutory exceptions. In June, an associate judge held a hearing and issued a letter stating his intention to grant the Department's motion to strike. S.C. filed a request for a de novo hearing, and in December 2019, the trial court held a hearing. At the conclusion of the hearing, the court granted the Department's motion to strike. S.C. now appeals from the trial court's order granting the Department's motion and dismissing her petition for adoption.

DISCUSSION

When the relationship between a child and her living parents is terminated, a suit affecting the parent-child relationship generally may not be filed by a former parent, the child's father, or "a family member or relative by blood, adoption, or marriage of either a former parent whose parent-child relationship has been terminated or of the father of the child." *Id.* § 102.006(a). That bar does not apply to a person who has "a continuing right to possession of or access to the child under an existing court order" or the consent of the child's managing conservator, guardian, or legal custodian. *Id.* § 102.006(b). Section 102.006 also allows a suit by the child's adult sibling or grandparent, "an aunt who is a sister of a parent of the child, or an uncle who is a brother of a parent of the child," provided that the suit is filed within ninety days after the date the parents' rights are terminated. *Id.* § 102.006(c).

***2** S.C. argues for the first time on appeal that the trial court's application of section 102.006 violated her constitutional rights to due process and equal protection, depriving her of "a liberty interest to associate as traditional relatives," leveling an "as applied" challenge to the constitutionality of those provisions. [3] As a general rule, an argument—including a

challenge to a statute's constitutionality—is not preserved for appellate review unless it was first raised before the trial court. *See, e.g.*, *In re L.M.I.*, 119 S.W.3d 707, 711 (Tex. 2003); *A.C. v. Texas Dep't of Fam. & Protective Servs.*, 577 S.W.3d 689, 709 (Tex. App.—Austin 2019, pet. denied).[4] However, even if S.C. had preserved these issues for appellate review, as explained below, we would overrule her contentions.

Courts start from a strong presumption that a statute is constitutionally sound and when possible interpret it in a manner that renders it constitutional. *See* *Walker v. Gutierrez*, 111 S.W.3d 56, 66 (Tex. 2003); *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 873 (Tex. 2000); *In re A.M.*, 312 S.W.3d 76, 85 (Tex. App.—San Antonio 2010, pet. denied). The party challenging a statute has the burden to establish its unconstitutionality. *Walker*, 111 S.W.3d at 66; *A.M.*, 312 S.W.3d at 86. In an "as applied" challenge, the party must show that the statute is unconstitutional when applied to her circumstances. *Texas Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 518 n.16 (Tex. 1995); *A.M.*, 312 S.W.3d at 86.

As observed in *A.M.*, a case in which an aunt and a grandmother challenged the constitutionality of section 102.006, the statute in question here, "the challenged procedure is the application of standing requirements" that bar a party from petitioning to adopt the children. 312 S.W.3d at 86. "The governmental interest is the State's interest in promoting the welfare of children and ensuring that 'children's lives are not held in limbo while judicial processes crawl forward.' " *Id.* at 86-87 (quoting *In re B.L.D.*, 113 S.W.3d 340, 353 (Tex. 2003)). "The goal of establishing a stable, permanent home for a child is a compelling state interest." *Id.* at 87.

S.C. asserts that the private interest at stake is her "liberty interest to associate as traditional relatives including aunts, uncles, cousins, and grandparents in certain circumstances." Put another way, she asserts that as great-aunt, she has "a fundamental interest in the parent/child relationship which was extended to traditional relatives in *Moore v. City of East Cleveland.*"[5] *See* 431 U.S. 494 (1977). We will assume for the sake of argument that S.C. has a protected liberty interest to associate with the children as their great-aunt. *But see Connor v. Deckinga*, No. 4:10-CV-855-Y, 2013 WL 991251, at *8-9 (N.D. Tex. Mar. 14, 2013) (holding that grandmother did not clearly establish constitutional right to custody of grandchildren); *In re I.M.S.*, No. 14-07-00638-CV, 2008 WL 5059179, at *3-4 (Tex. App.—Houston [14th Dist.] Dec. 2, 2008, no pet.) (mem. op.) (noting that grandparent had not cited "case law establishing that grandparents have a common law right to possession of or access to their grandchildren" and rejecting argument "that grandparents have a fundamental right to possession or access because the United States Supreme Court has not expressly rejected such a right").

***3** The issue thus requires a weighing of the risk that S.C.'s asserted liberty interest will be erroneously deprived by the application of section 102.006's limits on standing. *See L.H. v. Texas Dep't of Fam. & Protective Servs.*, No. 03-13-00348-CV, 2014 WL 902555, at *2 (Tex. App.—Austin Mar. 6, 2014, no pet.) (mem. op.) (section 102.006 "does not confer standing but limits the standing of persons who would otherwise have standing"). As noted earlier, section 102.006 generally bars a relative from seeking to adopt a child if the person is related to a parent whose rights were terminated. Tex. Fam. Code § 102.006(a)(3). The statute exempts from that limitation someone who has "a continuing right to possession of or access to the child under an existing court order" or the consent of the child's managing conservator or guardian. *Id.* § 102.006(b). It also exempts an adult sibling, grandparent, blood aunt, or blood uncle who seeks to adopt the child within ninety days of the termination of parental rights. *Id.* § 102.006(c); *see* *A.M.*, 312 S.W.3d at 87 ("section 102.006 is not an absolute bar to a relative seeking to adopt a child related by blood" because relative has standing if she files suit within ninety days).

S.C. argues that the fact that section 102.006(c) does not apply to her as the children's great-aunt, as opposed to aunt, violates her rights. However, S.C. did not file any of her petitions within ninety days of the date the children's parents' rights were terminated, and as noted by the *A.M.* court, section 102.006(c)—and its ninety-day deadline—"is published law," and "[t]he rule is too elementary to require the citation of authority that all persons are conclusively presumed to know the law." 312 S.W.3d at 87 (quoting *E.H. Stafford Mfg. Co. v. Wichita Sch. Supply Co.*, 23 S.W.2d 695, 697 (Tex. 1930)). Thus, S.C. as great-

aunt cannot show that the subsection's limitations on which relatives have standing violate her rights as applied to her and her circumstances.[6] *See id.* ("imposing the 90-day deadline furthers the compelling governmental interest of providing stability for the child"). We overrule S.C.'s first issue, challenging the constitutionality of subsection (c) as applied to her.

We next turn to S.C.'s second issue, challenging subsection (b), which allows someone to seek to adopt if she has a "continuing right to possession of or access to the child under an existing court order" or if the child's guardian or managing conservator consent. Tex. Fam. Code § 102.006(b). S.C. argues that the trial court erred "in applying a strict adherence to [subsection] 102.006(b) ... by not finding an exception to the 90-day bar for standing based upon an implied in fact contract between" S.C. and the Department, which was created when the Department led her to believe that she was "being considered as adoptive placement." S.C. does not assert that she has a continuing right to possession under a court order, that the children were living with her and D.C., that they had a visitation order, or that there were any other orders in place that related to her.[7] She thus has not shown that subsection (b) might somehow apply to her situation, even if flexibly applied. Whether S.C. was led to believe that she would be considered as an adoptive placement does not seem to bear on whether subsection (b) is unconstitutional as applied to these circumstances.

***4** Therefore, even if her challenges had been preserved, S.C. has not shown that section 102.006 is unconstitutional as applied. We overrule S.C.'s issues on appeal.

CONCLUSION

Having overruled S.C.'s appellate issues, we affirm the trial court's order granting the Department's motion to strike and dismissing S.C.'s petition.

All Citations

Not Reported in S.W. Rptr., 2020 WL 6750561

Footnotes

1 For the sake of privacy, we refer to the family members by their initials. *See* Tex. Fam. Code § 109.002(d); Tex. R. App. P. 9.8.

2 The petition was filed by both S.C. and her husband D.C. Many of the pleadings filed by S.C. were also filed on behalf of D.C. However, D.C. did not file a notice of appeal, and we thus limit our discussion to the facts as relevant to S.C.

3 The Fourteenth Amendment guards against State deprivation of life, liberty, or property rights without due process of law, U.S. Const. amend. XIV, and the Texas Constitution requires due course of law, Tex. Const. art. I, § 19. Due process, "although incapable of precise definition, expresses the requirement of fundamental fairness," "determined by 'considering any relevant precedents and then ... assessing the several interests that are at stake.' " *In re B.L.D.*, 113 S.W.3d 340, 352 (Tex. 2003) (quoting *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 24-25 (1981)). We consider the private interest affected by the governmental action, the governmental interest promoted by the statute and the challenged proceeding, and the risk of erroneous deprivation of the private interest due to the procedures used. *Id.*

4 *See also In re R.B.*, 225 S.W.3d 798, 801-03 (Tex. App.—Fort Worth 2007, no pet.) (noting differing rules on preservation of constitutional arguments in criminal and civil cases; explaining that when civil court has jurisdiction over claim and relevant statute is determined to be unconstitutional on its face, judgment is voidable, not void; and stating that if "constitutional claim would not render the trial court's order void, it is not fundamental error and cannot be asserted for the first time on appeal").

5 In that case, Moore, who lived with her son, one of his children, and a grandson by another child, challenged the constitutionality of an ordinance that limited occupancy in a home to a single family, narrowly defined to

include only a husband or wife, their unmarried children, their parents, and up to one dependent child's spouse and children. *Moore v. City of E. Cleveland*, 431 U.S. 494, 495-97 & n.2 (1977). The Court observed that "certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause," *id.* at 501; noted that the ordinance served its purported goals of preventing overcrowding and traffic "marginally, at best," *id.* at 500; and cautioned against drawing a line at "the first convenient, if arbitrary boundary—the boundary of the nuclear family," *id.* at 502. The Court also noted the "venerable" tradition of "uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children" and held that "the Constitution prevents East Cleveland from standardizing its children and its adults by forcing all to live in certain narrowly defined family patterns." *Id.* at 504-05. Although *Moore* does state that families have an interest in defining themselves more freely than the ordinance had done, we do not read it as obviously extending a "fundamental interest in the parent/child relationship" to S.C. simply by dint of her status as great-aunt. *See In re I.S.*, No. 05-15-01450-CV, 2016 WL 3005721, at *3-4 (Tex. App.—Dallas May 23, 2016, pet. denied) (mem. op.) (concluding that because appellant aunt had not "established a 'broader family' relationship" with child, "*Moore* does not support Aunt's argument" that she had liberty interest in relationship with child as extended in *Moore* "to traditional relatives, including aunts and uncles").

6 S.C. argues that the Department failed to tell her that there was a ninety-day deadline. However, even if the ninety-day deadline should be extended to S.C. as great-aunt, as noted above, the ninety-day deadline is published law, *see* *In re A.M.*, 312 S.W.3d 76, 87 (Tex. App.—San Antonio 2010, pet. denied) (quoting *E.H. Stafford Mfg. Co. v. Wichita Sch. Supply Co.*, 23 S.W.2d 695, 697 (Tex. 1930)), S.C. was represented by counsel, and there is no indication that she or her attorney were unaware of the date the parents' rights were terminated.

7 S.C. filed motions asking the trial court to waive the requirement that the Department consent to her petition and to place the children with her, but she does not make any arguments related to those motions, nor do such motions raise any issues related to subsection (b).

End of Document

TAB 8

D Magazine Partners, L.P. v. Rosenthal

(Tex. 2017)

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Dallas Morning News, Inc. v. Tatum, Tex., May 11, 2018

529 S.W.3d 429
Supreme Court of Texas.

D MAGAZINE PARTNERS, L.P. d/b/
a D Magazine, Magazine Limited Partners,
L.P., and Allison Media, Inc., Petitioners,
v.
Janay Bender ROSENTHAL, Respondent

No. 15-0790
|
Argued October 4, 2016
|
OPINION DELIVERED: March 17, 2017
|
Rehearing Overruled September 29, 2017

Synopsis

Background: Subject of magazine article brought action against magazine for defamation and for violations of Texas Deceptive Trade Practices–Consumer Protection Act (DTPA) and Identity Theft Enforcement and Protection Act (ITEPA) after magazine published article describing subject's government benefits and allegedly accusing her of welfare fraud. The 134th Judicial District Court, Dallas County, dismissed DTPA and ITEPA claims but denied the motion to dismiss as to defamation claims. Magazine appealed. The Dallas Court of Appeals, 475 S.W.3d 470, affirmed. Magazine filed petition for review.

Holdings: The Supreme Court, Lehrmann, J., held that:

[1] subject established prima facie case of magazine's negligence in publishing article, but

[2] publisher was entitled to attorney fees after trial court dismissed other claims.

Affirmed in part, reversed in part, and remanded.

Guzman, J., filed concurring opinion.

Procedural Posture(s): On Appeal; Motion to Dismiss.

West Headnotes (13)

[1] **Constitutional Law** Defamation

Notwithstanding constitutional protections of freedom of the press, states maintain a legitimate interest in the compensation of individuals for the harm inflicted on them by defamatory falsehood. U.S. Const. Amend. 1; Tex. Const. art. 1, § 8.

2 Cases that cite this headnote

[2] **Libel and Slander** Nature and elements of defamation in general

The elements of a claim of defamation include: (1) the defendant published a false statement; (2) that defamed the plaintiff; (3) with the requisite degree of fault regarding the truth of the statement (negligence if the plaintiff is a private individual); and (4) damages (unless the statement constitutes defamation per se).

39 Cases that cite this headnote

[3] **Libel and Slander** Presumptions and Burden of Proof

In establishing a prima facie case of defamation, because of the importance of cultivating and protecting freedom of expression, the plaintiff bears the burden of proving falsity if the alleged defamatory statements were made by a media defendant over a matter of public concern. U.S. Const. Amend. 1; Tex. Const. art. 1, § 8.

10 Cases that cite this headnote

[4] **Libel and Slander** Construction of language used

In making the initial determination of whether a publication is capable of a defamatory meaning, a court examines its "gist"; that is, the court construes the publication as a whole in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive it.

20 Cases that cite this headnote

[5] **Libel and Slander** Truth of part of defamatory matter; substantial truth

For purposes of a claim of defamation, under the "substantial truth doctrine," a publication's truth or falsity depends on whether the publication taken as a whole is more damaging to the plaintiff's reputation than a truthful publication would have been.

9 Cases that cite this headnote

[6] **Libel and Slander** Construction of language used

In determining whether magazine article was defamatory, court was required to evaluate publication as a whole rather than focusing on individual statements.

4 Cases that cite this headnote

[7] **Libel and Slander** Crimes against the government and violation of laws concerning elections and the mail

Reasonable view of gist of allegedly defamatory magazine article was that subject of article fraudulently obtained Supplemental Nutrition Assistance Program (SNAP) benefits; article was published under heading "CRIME" and was accompanied by subject's mug shot from prior unrelated charge, article stated that subject "must have been less than forthcoming" in obtaining benefits, article contained instances in which subject, at least by implication, either withheld information or reported it inaccurately, and article parenthetically stated that falsifying an affidavit of indigency was a felony.

2 Cases that cite this headnote

[8] **Libel and Slander** Malice

Courts apply a negligence standard in cases involving a private plaintiff seeking defamation damages from a media defendant; under that standard, the defendant is negligent if it knew or should have known a defamatory statement was false, unless the content of the false statement would not warn a reasonably prudent editor or broadcaster of its defamatory potential.

14 Cases that cite this headnote

[9] **Libel and Slander** Malice

Subject of allegedly defamatory magazine article, who was a private citizen, established prima facie case of magazine's negligence in publishing article; much of article was premised on personal information about subject purportedly obtained from Health and Human Services Commission, magazine never contacted Commission about article, and magazine's editor-at-large did not ask subject about any of article's specific statements when editor asked subject what she had to say about committing fraud.

3 Cases that cite this headnote

[10] **Libel and Slander** Presumptions and Burden of Proof

Although truth is generally a defense to defamation, the burden shifts to the plaintiff to prove falsity in cases involving matters of public concern.

4 Cases that cite this headnote

[11] **Pleading** Nature and scope of defense

An affirmative defense is based on a different set of facts from those establishing the cause of action and defeats the plaintiff's claim without regard to the truth of the plaintiff's assertions.

4 Cases that cite this headnote

[12] **Libel and Slander** Criticism and Comment on Public Matters; Public Figures

Magazine was not entitled to dismissal of defamation action based on fair-comment privilege, where reasonable construction of article's gist was that subject of article fraudulently obtained Supplemental Nutrition Assistance Program (SNAP) benefits, but Health and Human Services Commission had found that

subject had not acted improperly in obtaining those benefits. Tex. Civ. Prac. & Rem. Code Ann. § 73.002.

4 Cases that cite this headnote

[13] Antitrust and Trade Regulation Attorney fees

Under Texas Citizens Participation Act (TCPA), magazine was entitled to attorney fees after trial court dismissed claims brought against magazine by subject of magazine article for violations of Texas Deceptive Trade Practices–Consumer Protection Act and Identity Theft Enforcement and Protection Act, even though trial court denied motion to dismiss defamation claim. Tex. Civ. Prac. & Rem. Code Ann. § 27.009(a)(1); Tex. Bus. & C. Code §§ 17.41 et seq., 521.001 et seq.

17 Cases that cite this headnote

***430** ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

Attorneys and Law Firms

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Opinion

Justice Lehrmann delivered the opinion of the Court.

A free press is essential to a healthy democracy. Through conscientious and diligent reporting, the press holds public officials accountable and helps citizens stay informed on matters of public concern. Accordingly, both the U.S. Constitution and the Texas Constitution robustly protect freedom of speech. But, these safeguards are not unlimited and do not categorically deprive individuals of legal recourse when they are injured by false and defamatory speech. The line between the rights of the press and the rights of defamed individuals is not easily drawn. This elusive boundary underlies today's dispute about the propriety of a defamation lawsuit's early dismissal under the Texas Citizens Participation Act (TCPA).

In this case, the plaintiff—a private citizen who was the subject of a magazine article about her receipt of food stamps—sued the magazine, asserting defamation and other claims stemming from allegations that the article falsely accused her of committing welfare fraud. When the magazine moved to dismiss the suit under the TCPA, the trial court denied the motion as to the defamation claim, granted it as to the other claims asserted, and denied the magazine's request for attorney's fees. The court of appeals affirmed, holding that the plaintiff was entitled to proceed on her defamation claim. The court also concluded that it lacked jurisdiction over the appeal of the trial court's denial of attorney's fees.

The magazine presents two primary issues here. First, it asserts that the court of appeals improperly relied on Wikipedia as authority in its opinion. Second, it argues that the plaintiff failed to establish a prima facie case of defamation sufficient to defeat the magazine's dismissal motion. We agree with the magazine that the court of appeals' reliance on Wikipedia led to an unduly narrow interpretation of the article's title that, in turn, impacted the court's analysis of the plaintiff's defamation claim. As to the second point, we hold that a reasonable person could construe the article as a whole to accuse the plaintiff of fraudulently obtaining public benefits and that the plaintiff presented sufficient evidence in support of the defamation elements to survive the magazine's motion for early dismissal. Finally, on the ancillary issue of attorney's fees, we disagree with the court of appeals' conclusion that it lacked jurisdiction to consider the magazine's appeal of the trial court's denial of its request for attorney's fees in connection with the partially granted motion to dismiss, and we conclude that the trial court erred in awarding no fees. We affirm the court of appeals' judgment in part, reverse it in part, and remand the case to the trial court for further proceedings.

I. Background

In March 2013, D Magazine published an article under the heading "CRIME" titled "THE PARK CITIES WELFARE QUEEN." In the subheading, the article identifies Janay Rosenthal as a "University Park mom" who "has figured

out how to get food stamps while living in the lap of luxury." Rosenthal's mug shot from a prior, unrelated arrest features prominently next to the title. The body of the article, discussed in more detail below, goes on to ***432** describe how Rosenthal "pulls it off" despite the assumption that someone in her situation would "never qualify." D Magazine printed the article, attributed to an "ANONYMOUS PARK CITIES PARENT," and also published it online.

The Texas Health and Human Services Commission is responsible for administering food stamps, now called Supplemental Nutrition Assistance Program (SNAP) benefits, in Texas. Before publication, no one from D Magazine contacted the Commission for comment. After preparing the article for print, editor-at-large Tim Rogers called Rosenthal to ask for her comments. Rosenthal told Rogers she was being harassed by her fiancé's ex-girlfriend and expressed concern that Rogers was working with her alleged harasser. Rogers suggested that she call D Magazine from its public listing to verify his identity, but she did not follow up.

After publication, the Commission's chief counsel sent Rogers a letter about the article, which counsel described as having alleged that Rosenthal "committed fraud in applying for and receiving SNAP benefits." The letter stated that the Commission had "audio recordings that indicate that the information [in the article] was obtained by deception," and the letter requested that all of Rosenthal's personally identifiable information be removed from the online version.

After reading the article, Rosenthal contacted the Commission to inquire whether she had committed any wrongdoing in obtaining SNAP benefits. The Commission investigated and sent Rosenthal a letter explaining that its "investigation found no evidence anyone has fraudulently obtained or otherwise abused state benefits." Rosenthal forwarded the letter to D Magazine.

Rosenthal sued D Magazine [1] for defamation and also asserted claims under the Texas Deceptive Trade Practices–Consumer Protection Act and the Identity Theft Enforcement and Protection Act. D Magazine moved for dismissal of all claims and sought attorney's fees under the Texas Citizens Participation Act. The trial court granted the motion as to the statutory claims but denied it "in all other respects as the Court finds that Plaintiff has established by clear and specific evidence a *prima facie* case of defamation." D Magazine brought an interlocutory appeal. TEX. CIV. PRAC. & REM. CODE § 54.014(a)(12) (authorizing an interlocutory appeal from an order denying a TCPA motion to dismiss).

A divided court of appeals affirmed, holding that Rosenthal established a prima facie case for each element of the defamation claim by clear and specific evidence. 475 S.W.3d 470, 487 (Tex. App.—Dallas 2015). The court determined that the "gist of the article included the assertion that [Rosenthal] had committed welfare fraud" by "submitting false information to [the Commission] to continue to receive SNAP benefits to which she otherwise would not have been entitled." *Id.* at 483. As part of its analysis, the court relied on a Wikipedia-supplied definition of "welfare queen" to determine the meaning of the term contained in the article's title. *Id.* at 482 n.8. Having concluded the article accused Rosenthal of committing welfare fraud, the court of appeals—relying on the Commission's investigation—determined that there was evidence the article's gist was untrue ***433** and defamatory. *Id.* at 483–84. We granted D Magazine's petition for review. [2]

II. Free Speech and the TCPA

A. TCPA Framework

One of the foundational principles of American democracy is the freedom to comment on matters of public concern. *See* *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002) ("The right to think is the beginning of freedom, and speech must be protected ... because speech is the beginning of thought."). Federal constitutional protections for speech were "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (quoting *Roth v. United States*, 354 U.S. 476, 484, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957)). The Texas Constitution also explicitly protects freedom of expression, declaring that "[e]very person shall be at liberty to speak, write or publish his opinions on any subject ... and no law shall ever be passed curtailing the liberty of speech or of the press." TEX. CONST. art. I, § 8. Protections for the press are especially vital because of the pivotal role it plays in the

dissemination of information to the public. *N.Y. Times Co. v. United States*, 403 U.S. 713, 717, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971) (Black, J., concurring) ("In the First Amendment, the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy.").

[1] However, while freedom of the press is critically important to the functioning of our democratic society, members of the press are also "responsible for the abuse of that privilege." TEX. CONST. art. I, § 8. In turn, states maintain a legitimate interest in "the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); *see also* *Kinney v. Barnes*, 443 S.W.3d 87, 91 (Tex. 2014) (noting that courts have long recognized "a cause of action for damages to a person's reputation inflicted by the publication of false and defamatory statements").

The tension between the "need for a vigorous and uninhibited press" and "the legitimate interest in redressing wrongful injury" necessarily comes into play in cases addressing First Amendment limitations on defamation liability. *Gertz*, 418 U.S. at 342, 94 S.Ct. 2997. And in today's world, we must be especially mindful of this longstanding yet delicate balance, as modern technology allows information to be easily and widely disseminated without necessarily being subjected to the sort of rigorous verification processes that conventional media sources are expected to employ. Maintaining that balance of allowing the press the freedom to perform its critical societal function while protecting the rights of individuals harmed by false or misleading reporting remains an essential task, and courts continue to struggle "to define the proper accommodation between these competing concerns." *Id.*

The TCPA is also designed to balance these policies. On the one hand, the statute shields "citizens who petition or speak on matters of public concern from retaliatory lawsuits that seek to intimidate or silence them." *In re Lipsky*, 460 S.W.3d 579, 584 (Tex. 2015). On the other hand, the statute ***434** "protect[s] the rights of a person to file meritorious lawsuits for demonstrable injury." TEX. CIV. PRAC. & REM. CODE § 27.002. Under the TCPA, a defendant may file a motion to dismiss a legal action that "is based on, relates to, or is in response to a party's exercise of the right of free speech." *Id.* § 27.003(a). To avoid dismissal, the plaintiff must establish a prima facie case for each element of the asserted claims by clear and specific evidence. *Id.* § 27.005(c). Clear and specific evidence means that the plaintiff "must provide enough detail to show the factual basis for its claim." *Lipsky*, 460 S.W.3d at 591. If the plaintiff satisfies this burden, the defendant may still obtain dismissal by "establish[ing] by a preponderance of the evidence each essential element of a valid defense" to the claim. TEX. CIV. PRAC. & REM. CODE § 27.005(d). When considering the motion to dismiss, the court considers both the pleadings and any supporting and opposing affidavits. *Id.* § 27.006(a).

B. Defamation Framework

[2] **[3]** In this case, the parties do not dispute that the TCPA applies to Rosenthal's defamation claim and that she had the burden to establish a prima facie case of each element of defamation to avoid dismissal of the claim. These elements include: (1) the defendant published a false statement; (2) that defamed the plaintiff; (3) with the requisite degree of fault regarding the truth of the statement (negligence if the plaintiff is a private individual); and (4) damages (unless the statement constitutes defamation per se). *Lipsky*, 460 S.W.3d at 593; *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998). Because of the importance of cultivating and protecting freedom of expression, the plaintiff bears the burden of proving falsity if the alleged defamatory statements were made by a media defendant over a matter of public concern. *KBMT Operating Co. v. Toledo*, 492 S.W.3d 710, 713–14 (Tex. 2016); *Neely v. Wilson*, 418 S.W.3d 52, 62 (Tex. 2013).

[4] **[5]** In making the initial determination of whether a publication is capable of a defamatory meaning, we examine its "gist." *Neely*, 418 S.W.3d at 63. That is, we construe the publication "as a whole in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive it." *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 114 (Tex. 2000); *see also* *Bentley v. Bunton*, 94 S.W.3d 561, 579 (Tex. 2002) ("It is well settled that 'the meaning of a publication and thus whether it is false and defamatory, depends on a reasonable person's perception of the entirety of a publication and not merely on individual statements.' " (quoting *Turner*, 38

S.W.3d at 115)). Consistent with this approach, under the "substantial truth doctrine" a publication's truth or falsity depends on whether the publication "taken as a whole is more damaging to the plaintiff's reputation than a truthful [publication] would have been." *KBMT Operating Co.*, 492 S.W.3d at 714 (quoting *Neely*, 418 S.W.3d at 63).

In *Neely*, we reaffirmed the importance of assessing a publication's gist in evaluating a defamation claim. 418 S.W.3d at 63–64. We explained that a publication "with specific statements that err in the details but that correctly convey the gist of a story is substantially true." *Id.* (citing *Turner*, 38 S.W.3d at 115). Conversely, even if all the publication's individual statements are literally true, the story "can convey a false or defamatory meaning by omitting or juxtaposing facts." *Id.* (quoting *Turner*, 38 S.W.3d at 114).

III. Analysis of Defamation Elements

A. The Article's Gist

The primary dispute between D Magazine and Rosenthal is over the gist of the ***435** article. D Magazine contends the article is about the Commission's decision to give SNAP benefits to a person living in an expensive home in a wealthy school district despite a criminal history of theft. Rosenthal disputes this characterization and argues the article's gist is that she defrauded the Commission to obtain benefits.

As noted, the court of appeals agreed with Rosenthal that the article accuses her of committing welfare fraud. In reaching its conclusion, the court of appeals cited Wikipedia to define one of the terms in the article's title, and this definition played an important role in the court's gist analysis. Because that analysis is crucial to this case, we first examine the propriety of the court's reliance on Wikipedia as authority in its opinion.

1. Wikipedia

The court of appeals began its gist analysis with a discussion of the article's title, "THE PARK CITIES WELFARE QUEEN." 475 S.W.3d at 482. Citing Wikipedia, along with additional sources cited in the Wikipedia article, the court stated:

> The term "Welfare Queen" has two meanings; it can mean either (1) a woman who has defrauded the welfare system by using false information to obtain benefits to which she is not legally entitled, and it can also mean (2) a woman who has exploited the welfare system by having children out of wedlock and avoiding marital relationships for the purpose of continuing to qualify legally for government benefits.

Id. The court explained that the second definition does not apply to Rosenthal and that the article's title therefore necessarily references a woman "who is committing fraud to receive government-assistance benefits illegally." *Id.* at 483. D Magazine and several amici[3] challenge the court's reliance on Wikipedia, contending that Wikipedia is an inappropriate source for judicial opinions.

Wikipedia is a self-described "online open-content collaborative encyclopedia." *Wikipedia: General Disclaimer*, https://en.wikipedia.org/wiki/Wikipedia:General_disclaimer (last visited Mar. 13, 2017). This means that, except in certain cases to prevent disruption or vandalism, anyone can write and make changes to Wikipedia pages. *Wikipedia: About*, https://en.wikipedia.org/wiki/Wikipedia:About (last visited Mar. 13, 2017). Volunteer editors can submit content as registered members or anonymously. *Id.* Each time an editor modifies content, the editor's identity or IP address and a summary of the modification, including a time stamp, become available on the article's "history" tab. Jason C. Miller & Hannah B. Murray, *Wikipedia in Court: When and How Citing Wikipedia and Other Consensus Websites Is Appropriate*, 84 ST. JOHN'S L. REV. 633, 637 (2010). Wikipedia is one of the largest reference websites in the world, with over "70,000 active contributors working on more than 41,000,000 articles in 294 languages." *Wikipedia: About*, *supra.*

References to Wikipedia in judicial opinions began in 2004 and have increased each year, although such references

are still included in only a small percentage of opinions. Jodi L. Wilson, *Proceed with Extreme Caution: Citation to Wikipedia in Light of Contributor Demographics and Content Policies*, 16 VAND. J. ENT. & TECH. L. 857, 868 (2014). These cites often relate to nondispositive matters or are included in string citations. But, some courts "have ***436** taken judicial notice of Wikipedia content, based their reasoning on Wikipedia entries, and decided dispositive motions on the basis of Wikipedia content." Lee F. Peoples, *The Citation of Wikipedia in Judicial Opinions*, 12 YALE J. L. & TECH. 1, 3 (2009–2010). While there has been extensive research on Wikipedia's accuracy, "the results are mixed—some studies show it is just as good as the experts, [while] others show Wikipedia is not accurate at all." Michael Blanding, *Wikipedia or EncyclopaediaBritannica: Which Has More Bias?*, FORBES (Jan. 20, 2015), http://www.forbes.com/sites/hbsworkingknowledge/2015/01/20/wikipedia-or-encyclopaedia-britannica-which-has-more-bias/#5c254ac51ccf.

Any court reliance on Wikipedia may understandably raise concerns because of "the impermanence of Wikipedia content, which can be edited by anyone at any time, and the dubious quality of the information found on Wikipedia."[4] Peoples, *supra* at 3. Cass Sunstein, legal scholar and professor at Harvard Law School, also warns that judges' use of Wikipedia "might introduce opportunistic editing." Noam Cohen, *Courts Turn to Wikipedia, but Selectively*, N.Y. TIMES (Jan. 29, 2007), http://www.nytimes.com/2007/01/29/technology/29wikipedia.html. The Fifth Circuit has similarly warned against using Wikipedia in judicial opinions, agreeing "with those courts that have found Wikipedia to be an unreliable source of information" and advising "against any improper reliance on it or similarly unreliable internet sources in the future." *Bing Shun Li v. Holder*, 400 Fed.Appx. 854, 857 (5th Cir. 2010); *accord Badasa v. Mukasey*, 540 F.3d 909, 910–11 (8th Cir. 2008).

For others in the legal community, however, Wikipedia is a valuable resource. Judge Richard Posner has said that "Wikipedia is a terrific resource ... because it [is] so convenient, it often has been updated recently and is very accurate." Cohen, *supra.* However, Judge Posner also noted that it "wouldn't be right to use it in a critical issue." *Id.* Other scholars agree that Wikipedia is most appropriate for "soft facts," when courts want to provide context to help make their opinions more readable. *Id.* Moreover, because Wikipedia is constantly updated, some argue that it can be "a good source for definitions of new slang terms, for popular culture references, and for jargon and lingo including computer and technology terms." Peoples, *supra* at 31. They also argue that open-source tools like Wikipedia may be useful when courts are trying to determine public perception or community norms. *Id.* at 32. This usefulness is lessened, however, by the recognition that Wikipedia contributors do not necessarily represent a cross-section of society, as research has shown that they are overwhelmingly male, under forty years old, and living outside of the United States. Wilson, *supra* at 885–89.

Given the arguments both for and against reliance on Wikipedia, as well as the variety of ways in which the source may be utilized, a bright-line rule is untenable. Of the many concerns expressed about Wikipedia use, lack of reliability is paramount and may often preclude its use as a source of authority in opinions. At the least, we find it unlikely Wikipedia could suffice as the sole source of authority on an issue of any significance to a case. That said, Wikipedia can often be useful as a ***437** starting point for research purposes. *See* Peoples, *supra* at 28 ("Selectively using Wikipedia for ... minor points in an opinion is an economical use of judges' and law clerks' time."). In this case, for example, the cited Wikipedia page itself cited past newspaper and magazine articles that had used the term "welfare queen" in various contexts and could help shed light on how a reasonable person could construe the term.

[6] However, the court of appeals utilized Wikipedia as its primary source to ascribe a specific, narrow definition to a single term that the court found significantly influenced the article's gist. Essentially, the court used the Wikipedia definition as the lynchpin of its analysis on a critical issue. As a result, the court narrowly read the term "welfare queen" to necessarily implicate fraudulent or illegal conduct, while other sources connote a broader common meaning. *See, e.g.*, Oxford Living Dictionaries, https://en.oxforddictionaries.com/definition/welfare_queen (last visited Mar. 13, 2017) (broadly defining "welfare queen" as a "woman perceived to be living in luxury on benefits obtained by exploiting or defrauding the welfare system"); YourDictionary, http://www.yourdictionary.com/welfare-queen (last visited Mar. 13, 2017) (broadly defining "welfare queen" as a "woman collecting welfare, seen as doing so out of laziness, rather than genuine need"). In addition, and independent of the Wikipedia concerns, the court of appeals' overwhelming emphasis on a single term in determining the article's gist departed from our jurisprudential

mandate to evaluate the publication as a whole rather than focus on individual statements.

Our own analysis of the article's gist is governed by this important principle. Accordingly, we will consider the article as a whole in order to determine whether a reasonable person could view it as accusing Rosenthal of defrauding the Commission to obtain SNAP benefits.

2. Gist Analysis

[7] We begin our gist analysis with a discussion of the article's contents. As noted, the article is published under the heading "CRIME" and is accompanied by Rosenthal's mug shot from a prior unrelated charge.[5] The article states under the aforementioned "Welfare Queen" title that Rosenthal, described as a "University Park mom," has "figured out how to get food stamps while living in the lap of luxury." It then invites the reader to see how Rosenthal "pulls it off" despite the assumption that one living in the affluent Park Cities would "never qualify."

For example, the article states that Rosenthal had to "prove she qualified" for SNAP in order to obtain benefits and that, although "we can't say for sure" what Rosenthal told the Commission, "public records indicate that [she] must have been less than forthcoming" in renewing her application. The article notes that Rosenthal's address on file with the Commission matches an "old address" in North Dallas that is listed on her driver's license. It also states that Rosenthal listed this same address on an affidavit of indigency she filed in district court, notes that "[f]alsifying such a document is a felony," and identifies another court document in which Rosenthal averred "under oath" that her address had changed to one in University Park "on the tax rolls for $1.15 million." Noting that the University Park home was owned by a ***438** man Rosenthal had identified as her fiancé and that a Facebook photo showed Rosenthal wearing a diamond ring, the article also states that Rosenthal left blank the part of the application requiring applicants to identify people who give them gifts or pay their bills. The final portion of the article notes that Rosenthal has "numerous theft-related arrests and convictions" and concludes that "even if Rosenthal did report her run-ins with the law, the state still might award benefits" because the Commission "only check[s] for felony drug convictions."

The article never expressly accuses Rosenthal of lying or fraudulently obtaining benefits, and D Magazine insists that each statement in the article is literally, or at least substantially, true.[6] But the article's gist is based on "a reasonable person's perception of the entirety of [the article] and not merely on individual statements." *Turner*, 38 S.W.3d at 115. Viewing the article as a whole, we conclude that a reasonable person could perceive it as accusing Rosenthal of providing false information to the Commission (either affirmatively or by omission) in order to obtain benefits to which she was not entitled. The entire article is under the stark heading "CRIME" and is accompanied by an unrelated mug shot. It affirmatively states that Rosenthal "must have been less than forthcoming," at least in renewing her SNAP application, and follows that statement with examples throughout the article of instances in which Rosenthal, at least by implication, either withheld information from or reported it inaccurately to the Commission. In sum, a reasonable person could construe the article to accuse Rosenthal of fraudulently obtaining thousands of dollars of SNAP benefits.

D Magazine's arguments to the contrary are unavailing. For example, D Magazine asserts that the "CRIME" heading is consistent with the article's criticism of SNAP, contending that the article is about how someone with a history of theft, like Rosenthal, is nevertheless able to obtain SNAP benefits. While Rosenthal's history of theft is discussed at the end of the article, it is not the focus. And it does not convince us that D Magazine's construction of the article as a whole is the only reasonable one. *See Musser v. Smith Protective Servs., Inc.*, 723 S.W.2d 653, 654 (Tex. 1987) (noting that the initial question of law to be decided in a libel action is whether "the words used [were] reasonably capable of a defamatory meaning"). To the contrary, a reasonable person could certainly conclude that an article under the heading "CRIME" is in fact about the commission of a crime. And, as discussed above, that conclusion would be supported by the article's contents.

D Magazine also contends that the article's statement that Rosenthal "must have been less than forthcoming" is at most speculation, noting the prefatory disclaimer that "we can't say for sure what she told the [Commission]." We disagree. First, the article does not say Rosenthal "may" have been less than forthcoming; it says "must." This language indicates that she *did* withhold required information from the Commission and, in any event, the statement cannot be considered in a vacuum. Moreover, the article goes on

to discuss specific information in the Commission's records and to cite other sources that purportedly contradict that information. Considered in context, the disclaimer carries little weight.

Further, the article juxtaposes statements in ways that strongly imply wrongdoing. ***439** For example, it states that Rosenthal supplied a North Dallas address in an affidavit of indigency—the same address listed in the Commission's records—and then parenthetically states that "[f]alsifying such a document is a felony." And immediately after noting that Rosenthal did not report any gifts or money received from others, the article states that she has "relationships" to nine other households that are in a living trust for her daughter, implying the existence of significant assets not reported to the Commission. But Rosenthal presented evidence in response to the dismissal motion that the "households" the article mentions are vacant lots—none worth more than $9,000—that her brother put in a living trust in her daughter's name without her knowledge. Rosenthal also presented evidence that neither she nor her daughter ever received any payments from the trust. Again, while not expressly accusing Rosenthal of lying, these juxtaposed statements are consistent with the general implication that Rosenthal was "less than forthcoming" with the Commission in order to obtain benefits.

To arrive at its version of the article's gist, D Magazine does the very thing of which it accuses the court of appeals: it considers the article's statements individually instead of in context. Properly evaluating the article "as a whole in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive it," *Neely*, 418 S.W.3d at 80, we hold that a reasonable view of the article's gist is that Rosenthal fraudulently obtained SNAP benefits. [7]

B. Prima Facie Case of Defamation

As noted, to survive D Magazine's motion to dismiss, Rosenthal had to establish a prima facie case of each of the following elements of her defamation claim: (1) D Magazine published a false statement; (2) the statement defamed her; (3) D Magazine acted with negligence regarding the truth of the statement; and (4) she suffered damages or the article is defamatory per se. *See* *Lipsky*, 460 S.W.3d at 593. The article's gist informs our analysis and is dispositive of the second and fourth elements. Because the article could reasonably be construed to accuse Rosenthal of committing a crime, it is defamatory per se, and Rosenthal need not show actual damages. *See* *Hancock v. Variyam*, 400 S.W.3d 59, 63–64 (Tex. 2013) ("Historically, defamation *per se* has involved statements that are so obviously hurtful to a plaintiff's reputation that the jury may presume general damages, including for loss of reputation and mental anguish."); *see also* *Lipsky*, 460 S.W.3d at 596 (citing accusing someone of committing a crime as an example of defamation per se). Rosenthal also presented clear and specific evidence that the article's gist is not substantially true; specifically, she presented evidence that the Commission conducted an investigation and concluded that she engaged in ***440** no wrongdoing in obtaining SNAP benefits.

[8] The final disputed element of the claim is whether D Magazine acted with the requisite degree of fault. In Texas, courts apply a negligence standard in cases involving a private plaintiff seeking defamation damages from a media defendant. *Neely*, 418 S.W.3d at 61. Under that standard, the defendant is negligent if it "knew or should have known a defamatory statement was false," unless the content of the false statement would not "warn a reasonabl[y] prudent editor or broadcaster of its defamatory potential." *Id.* at 72 (quoting *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809, 820 (Tex. 1976)).

[9] We agree with the court of appeals' conclusion that Rosenthal has provided sufficient evidence to make a prima facie case of D Magazine's negligence in publishing the article. 475 S.W.3d at 486–87. Rogers testified that D Magazine discussed the substance of the article with the anonymous author and reviewed various public records, such as the affidavit of indigency mentioned in the article, property tax records showing the value of the Park Cities home and the properties in the name of Rosenthal's daughter's living trust, and public records regarding Rosenthal's criminal history. Notably, the article itself recognized that information provided to the Commission is confidential, yet much of the article was premised on personal information about Rosenthal purportedly obtained from the Commission. [8] And the record does not reflect that D Magazine ever contacted the Commission about the article, despite the magazine's assertion in this lawsuit that the article was intended to be a critique of the program administered by that very agency.

Rosenthal testified that, when Rogers called her about the story, she told him that she was being harassed and expressed concern that her harasser was involved in the story. Although Rogers testified that the harasser was not the story's author, he did not expressly dispute her possible involvement, nor did he provide any other details about the author's identity and credentials or how the magazine confirmed the accuracy of the information purportedly obtained from the Commission. Rosenthal testified that Rogers asked her "what [she] had to say about ... committing food stamp fraud" but did not ask about any of the article's specific statements. She also testified that she did not return Rogers' call because he told her the magazine "was publishing the Article regardless of what [she] had to say."[9]

In sum, we agree with the court of appeals that Rosenthal presented evidence that D Magazine failed to take reasonable steps to verify the accuracy of the story's gist and should have known the gist was false. We hold that the pleadings and affidavits established a prima facie case of D Magazine's negligence in publishing the story.

C. Defenses

D Magazine argues that, even if we conclude that Rosenthal established a prima facie case of defamation, it is still entitled to dismissal under the TCPA because it established two affirmative defenses—truth and the fair comment privilege—by a preponderance of the evidence. *See* TEX. CIV. PRAC. & REM. CODE § 27.005(d). We disagree.

***441** **[10]** **[11]** First, although truth is generally a defense to defamation, the burden shifts to the plaintiff to prove falsity in cases involving matters of public concern. *Neely*, 418 S.W.3d at 56, 62. Falsity is thus an element of Rosenthal's defamation claim. By contrast, an affirmative defense, such as the statute of limitations, is "based on a different set of facts from those establishing" the cause of action and "defeats the plaintiff's claim without regard to the truth of the plaintiff's assertions." *Zorrilla v. Aypco Constr. II, LLC*, 469 S.W.3d 143, 156 (Tex. 2015) (citations omitted). Because falsity is an element of Rosenthal's claim, at this stage of the proceedings she was required to make a prima facie case by clear and specific evidence that the gist of the article was not substantially true. TEX. CIV. PRAC. & REM. CODE § 27.005(c). As discussed, Rosenthal has met this burden.

[12] Second, D Magazine has failed to prove the fair comment privilege applies. The fair comment privilege is an affirmative defense to a defamation action extending to publications that are "reasonable and fair comment[s] on or criticism[s] of ... matter[s] of public concern published for general information." *Id.* § 73.002(a), (b)(2). We have said that "if a comment is based upon a substantially false statement of fact the defendant asserts or conveys as true, the comment is not protected by the fair comment privilege." *Neely*, 418 S.W.3d at 70. In light of our conclusion that a reasonable construction of the article's gist is that Rosenthal fraudulently obtained SNAP benefits, and the Commission's findings that Rosenthal did not act improperly in obtaining those benefits, we hold that D Magazine is not entitled to dismissal based upon the fair comment privilege.

D. Attorney's Fees

D Magazine argues that the trial court erred in denying its request for attorney's fees under the TCPA, which requires the trial court to award reasonable attorney's fees to the movant if the court dismisses "a legal action" under that Act. *Id.* § 27.009(a)(1). The TCPA defines "legal action" as "a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief." *Id.* § 27.001(6). As noted, the trial court dismissed Rosenthal's statutory claims, including claims brought on behalf of her minor daughter, but not her defamation claim. The trial court awarded no attorney's fees.

D Magazine makes two arguments on this issue. First, it argues that it was entitled to dismissal of all claims, including the defamation claim, and that the trial court therefore erred in failing to award fees. As we agree with the trial court's refusal to dismiss the defamation claim, we reject this argument.

[13] Second, D Magazine argues that, even if the trial court properly denied its motion to dismiss with respect to Rosenthal's defamation claim, D Magazine is still entitled to an award of attorney's fees with respect to the claims the trial court did dismiss. The court of appeals concluded that it lacked jurisdiction over this issue because the Civil Practice and Remedies Code authorizes interlocutory appeals only of orders *denying* a TCPA motion to dismiss, and D Magazine's claim for attorney's fees is premised on the trial court's partial *grant* of a motion to dismiss. We disagree. The trial court issued a single order that partially denied D Magazine's

motion to dismiss, including its request for attorney's fees, and D Magazine was entitled to an interlocutory appeal of that order. *Id.* § 51.014(a)(12) (authorizing an appeal from an interlocutory order that "denies a motion to dismiss filed under [the TCPA]").

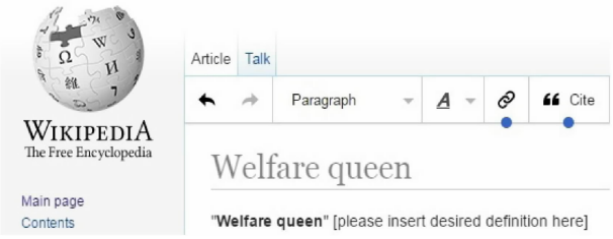
***442** Addressing the merits of the argument in the interest of judicial economy, we hold the trial court erred in denying the fee request. The trial court dismissed the statutory claims Rosenthal asserted on behalf of herself and her minor daughter, and each of those claims constituted a "legal action" under the TCPA's broad definition of the term. D Magazine was therefore entitled to an award of reasonable attorney's fees. *Id.* § 27.009(a)(1). We express no opinion on how the continuation of the defamation claim affects the proper amount of such a fee, leaving that to the trial court's discretion on remand.

IV. Conclusion

Texas and federal law recognize the importance of protecting free speech, particularly on matters of public concern. Still, publications can and do cross the line from protected free speech to actionable defamation. Here, Rosenthal presented clear and specific evidence sufficient to support a prima facie case of defamation. We therefore agree with the trial court and the court of appeals that dismissal of the claim under the TCPA is not warranted at this stage of the proceedings. However, the trial court erred in failing to award D Magazine attorney's fees in light of its dismissal of other claims. Accordingly, we affirm the court of appeals' judgment in part, reverse it in part, and remand the case to the trial court for further proceedings.

Justice Guzman filed a concurring opinion.

Justice Guzman, concurring.



[**Editor's Note:** The preceding image contains the reference for footnote [1]]

The Court holds that Janay Bender Rosenthal may proceed with her defamation lawsuit against D Magazine because the gist of "The Park Cities Welfare Queen" article, considered under the appropriate legal standard, is false and defamatory.[2] I agree with the Court's analysis and join the Court's opinion and judgment. I write separately, however, to emphasize the perils of relying on *Wikipedia: The Free Encyclopedia*[3] as an authoritative source for ***443** any controverted, decisive, or critical issue. As a general proposition, I believe Wikipedia is not a sufficiently reliable source of information to serve as the leading authority on a case-determinative matter, particularly when the court's reliance is *sua sponte* without notice to the parties, as it was in this case.[4]

Wikipedia has many strengths and benefits,[5] but reliance on unverified, crowd-generated information to support judicial rulings is unwise. Mass-edited collaborative resources, like Wikipedia, are malleable by design,[6] raising serious concerns about the accuracy and completeness of the information, the expertise and credentials of the contributors, and the potential for manipulation and bias. In an age when news about "fake news" has become commonplace, long-standing concerns about the validity of information obtained from "consensus websites" like Wikipedia are not merely the antiquated musings of luddites.[7] To the contrary, as current events punctuate with clarity, courts must remain vigilant in guarding against undue reliance on sources of dubious reliability. A collaborative encyclopedia that may be anonymously and continuously edited undoubtedly fits the bill.[8]

Legal commentators may debate whether and to what extent courts could properly rely on online sources like Wikipedia, but the most damning indictment of Wikipedia's authoritative force comes directly from Wikipedia:

***444** • "WIKIPEDIA MAKES NO GUARANTEE OF VALIDITY"

• "Please be advised that nothing found here has necessarily been reviewed by people with the expertise required to provide you with complete, accurate or reliable information."

• "**Wikipedia cannot guarantee the validity of the information found here.**"

• "Wikipedia is not uniformly peer reviewed."

- "[A]ll information read here is without any implied warranty of fitness for any purpose or use whatsoever."
- "Even articles that have been vetted by informal peer review or *featured article* processes may later have been edited inappropriately, just before you view them."[9]

Indeed, "Wikipedia's radical openness means that any given article may be, at any given moment, in a bad state: for example, it could be in the middle of a large edit or it could have been recently vandalized."[10] Even if expeditiously remediated, transient errors are not always obvious to the casual reader. As Wikipedia states more pointedly, "Wikipedia is a wiki, which means that anyone in the world can edit an article, deleting accurate information or adding false information, which the reader may not recognize. Thus, you ***probably shouldn't be citing Wikipedia.***"[11]

Apart from these candid self-assessments, which no doubt apply with equal force to other online sources and encyclopedias, a more pernicious evil lurks—"opportunistic editing."[12] Because "[a]nyone with Internet access can write and make changes to Wikipedia articles" and "can contribute anonymously, [or] under a pseudonym," reliance on Wikipedia as an authoritative source for judicial decision-making incentivizes self-interested manipulation.[13] Case in point: a Utah court of appeals recently described how the Wikipedia definition of "jet ski" provided "stronger support" for one of the parties in a subsequent appeal than it had when considered by the court in the parties' previous appeal.[14] The court observed the difficulty of discerning whether the change was instigated by the court's prior opinion, ***445** perhaps "at the instance of someone with a stake in the debate."[15]

Still, some have argued Wikipedia is "a good source for definitions of new slang terms, for popular culture references, and for jargon and lingo including computer and technology terms."[16] Perhaps, but not necessarily. While Wikipedia's "openly editable" model may be well suited to capturing nuances and subtle shifts in linguistic meaning, there is no assurance that any particular definition actually represents the commonly understood meaning of a term that may be central to a legal inquiry.[17] In truth, Wikipedia's own policies[18] disclaim the notion: "**Wikipedia is not a dictionary, phrasebook, or a slang, jargon or usage guide.**"[19] Whatever merit there may be to crowdsourcing the English language, Wikipedia simply lacks the necessary safeguards to prevent abuse and assure the level of certainty and validity typically required to sustain a judgment in a legal proceeding.[20]

***446** Take, for example, the Wikipedia entry for "welfare queen," which was first created in November 2006 by the user Chalyres.[21] Since the entry was first drafted, 239 edits have been made by 146 users.[22] But there is no reliable way to determine whether these edits (1) deleted or added accurate information, (2) deleted or added false or biased information,[23] (3) were made by individuals with expertise on the term's usage, or (4) were made by individuals actually representative of the community.

As a court, one of our "chief functions" is "to act as an animated and authoritative dictionary."[24] In that vein, we are routinely called upon to determine the common meaning of words and phrases in contracts, statutes, and other legal documents.[25] Though we often consult dictionaries in discharging our duty,[26] rarely, if ever, is one source alone sufficient to fulfill the task. To that end, I acknowledge that Wikipedia may be useful as a "*starting point* for serious research,"[27] but it must never be considered "an endpoint," at least in judicial proceedings.[28]

Wikipedia's valuable role in today's technological society cannot be denied. Our society benefits from the fast, free, and easily-accessible information it provides. A wealth of information is now available at the touch of a few key strokes, and a community of Wikipedia editors serves to increase the accuracy and truth of that information, promoting the public good through those efforts. However, in my view, Wikipedia properly serves the judiciary only as a compendium—a source for sources—and not as authority for any disputed, ***447** dispositive, or legally consequential matter.[29]

All Citations

529 S.W.3d 429, 45 Media L. Rep. 1457, 60 Tex. Sup. Ct. J. 617

Footnotes

1 The named defendants are D Magazine Partners, L.P. d/b/a D Magazine, Magazine Limited Partners, L.P., and Allison Media, Inc. Over the course of this litigation, the parties and courts have referred to these defendants collectively as D Magazine. We will do the same.

2 We have jurisdiction over interlocutory appeals "in which the justices of the courts of appeals disagree on a question of law material to the decision." TEX. GOV'T CODE § 22.225(c).

3 The Texas Press Association, Texas Association of Broadcasters, Reporters Committee for Freedom of the Press, and Freedom of Information Foundation of Texas submitted an amicus brief in support of D Magazine's petition for review.

4 The history tab on each page does time stamp changes in entries and keeps past versions available. This is only useful, however, if those citing Wikipedia include in their citation the exact date and time they accessed the page. The Harvard Journal of Law and Technology has introduced a citation form for Wikipedia that includes the specific time the page was accessed. Wagner, *supra* at 235.

5 The "CRIME" heading also appears on the magazine's cover, which lists the titles of the various articles within that issue and places the heading over the title of the article about Rosenthal.

6 Rosenthal disputes the article's statement that she has been convicted of theft, noting that she has pleaded no-contest to shoplifting charges but has never been convicted.

7 The court of appeals held that the article's gist was "a combination of" the parties' descriptions, holding that a "reasonable person would conclude the article was a criticism of SNAP, which allowed [Rosenthal], who had been convicted of theft, to receive benefits while living in a $1.15 million home and while defrauding [the Commission] by filing false information with [the Commission]." 475 S.W.3d at 482. D Magazine argues that the court of appeals' version of the gist is internally inconsistent: either the Commission knowingly allowed Rosenthal to receive SNAP benefits while living in an expensive home and despite a history of theft, or Rosenthal defrauded the system by submitting false information to obtain benefits. We need not decide whether the gist could be broad enough to include both of these points. The average reader could conclude that the gist of the article was that Rosenthal obtained SNAP benefits by providing false information, both affirmatively and by omission, to the Commission.

8 No evidence indicates that D Magazine itself was directly involved in obtaining any information from the Commission.

9 D Magazine disputes this assertion, but at this stage of the proceedings we assume its truth.

1 Screenshot of unsaved edits to *Welfare Queen*, WIKIPEDIA, https://en.wikipedia.org/wiki/Welfare_queen.

2 *See* TEX. CIV. PRAC. & REM. CODE § 27.005(b), (c) ("[A] court shall dismiss a legal action ... [that] is based on, relates to, or is in response to the party's exercise of ... the right of free speech ... [unless] the party bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question.").

3 https://www.wikipedia.org.

4 475 S.W.3d 470, 482 n.8 (Tex. App.—Dallas 2015); *see* Eugene Volokh, *Questionable Use of Wikipedia by the Seventh Circuit?*, VOLOKH CONSPIRACY (July 30, 2008), http://bit.ly/2mWmg0I (link shortened from http://volokh.com/2008/07/30/questionable-use-of-wikipedia-by-the-seventh-circuit/) ("If the judges wanted to argue [the meaning of a key term] based on their experience, based on logic, or based on contrary lexicographic authorities ... that's fine, and they did that in some measure. But they cited Wikipedia as the lead authority supporting their conclusion, and as the source for their important and controversial definition; and this strikes me as troubling.") (citing *Rickher v. Home Depot, Inc.*, 535 F.3d 661, 666–67 (7th Cir. 2008)).

5 *See, e.g.*, Eola Barnett & Roslyn Baer, *Embracing Wikipedia as a Research Tool for Law: To Wikipedia or not to Wikipedia?*, 45 LAW TCHR. 194, 210 (2011) ("There are arguments for accepting the discerning use of Wikipedia, particularly as an informal and initial starting point for legal and incidental research and not discarding Wikipedia outright. Wikipedia has a role to play in the public domain dissemination of information

and features which make it a viable option for initiating research."); Diane Murley, *In Defense of Wikipedia*, 100 LAW LIBR. J. 593, 595 (2008) ("In general, students and lawyers should not be citing to articles from Wikipedia, or any other encyclopedia. However, Wikipedia can be a great quick reference source or a starting point for identifying other, authoritative sources."); Beth Simone Noveck, *Wikipedia and the Future of Legal Education*, 57 J. LEGAL EDUC. 3, 4 (2007) ("Unlike Google, which presents a hit list of search results without context, Wikipedia includes hyperlinks to other materials and reintroduces the serendipity of browsing and discovering new sources. At the very least, this is an excellent way for students and legal professionals to begin their research."); Rachel Anderson, Marc-Tizoc Gonzalez & Stephen Lee, *Toward a New Student Insurgency: A Critical Epistolary*, 94 CAL. L. REV. 1879, 1901 n.92 (2006) ("While Wikipedia is not usually used in academic works, its articles can provide excellent introductions to specialized knowledge or encyclopedic overviews of obscure events.").

6 *See* Lee F. Peoples, *The Citation of Wikipedia in Judicial Opinions*, 12 YALE J. L. & TECH. 1, 3 (2009).

7 *See generally* Jason C. Miller & Hannah B. Murray, *Wikipedia in Court: When and How Citing Wikipedia and Other Consensus Websites is Appropriate*, 84 ST. JOHN'S L. REV. 633 (2010).

8 *Wikipedia: About*, WIKIPEDIA, https://en.wikipedia.org/wiki/Wikipedia:About (last visited Mar. 8, 2017).

9 *Wikipedia: General Disclaimer*, WIKIPEDIA, http://bit.ly/2npqBaH (link shortened from https://en.wikipedia.org/wiki/Wikipedia:General_disclaimer) (last visited Mar. 8, 2017) (emphases in original).

10 *Wikipedia: Researching with Wikipedia*, WIKIPEDIA, http://bit.ly/2mEub2k (link shortened from https://en.wikipedia.org/wiki/Wikipedia:Researching_with_Wikipedia#Citing_Wikipedia) (last visited Mar. 8, 2017) (explaining, in a nutshell, that Wikipedia should not be used, by itself, for primary research on any topic other than Wikipedia).

11 *Wikipedia: Citing Wikipedia*, WIKIPEDIA, http://bit.ly/2mTfTLH (link shortened from https://en.wikipedia.org/wiki/Wikipedia:Citing_Wikipedia#A_caution_before_citing_Wikipedia) (last visited Mar. 8, 2017) (emphasis in original).

12 *See generally Fire Ins. Exch. v. Oltmanns*, 285 P.3d 802, 808 n.3 (Utah Ct. App. 2012) (Voros, J., concurring) ("Among its shortcomings—and strengths—is Wikipedia's fluidity. Anyone can edit a Wikipedia entry at any time, making it vulnerable to 'opportunistic editing.' Thus, 'an unscrupulous lawyer (or client) could edit the Web site entry to frame the facts in a light favorable to the client's cause.' " (quoting Noam Cohen, *Courts Turn to Wikipedia, but Selectively*, N.Y. TIMES (Jan. 29, 2007), http://www.nytimes.com/2007/01/29/technology/29wikipedia.html)).

13 *Wikipedia: About*, WIKIPEDIA, https://en.wikipedia.org/wiki/Wikipedia:About (last visited Mar. 8, 2017).

14 *Fire Ins. Exch. v. Oltmanns*, 370 P.3d 566, 569 n.3 (Utah Ct. App. 2016), *cert. granted*, 379 P.3d 1182 (Utah 2016).

15 *Id.*

16 Lee F. Peoples, *The Citation of Wikipedia in Judicial Opinions*, 12 YALE J. L. & TECH. 1, 31 (2009); *see also id.* at 32 ("The collaborative and democratic nature of Wikipedia entries makes them potentially attractive sources for courts to consider when called upon to determine the perception of the public or community standards."); *Rickher v. Home Depot, Inc.*, 535 F.3d 661, 666–67 (7th Cir. 2008) (relying on Wikipedia definition of "wear and tear" in analysis of key contract language); *Fire Ins. Exch.*, 285 P.3d at 806 n.1 (noting "where an understanding of the vernacular or colloquial is key to the resolution of a case ... Wikipedia is tough to beat"); *id.* at 807–09 (Voros, J., concurring) (defending the use of Wikipedia as a source for definitions).

17 *See English Mountain Spring Water Co. v. Chumley*, 196 S.W.3d 144, 149 (Tenn. Ct. App. 2005) (rejecting Wikipedia as authority for defining "bottled water" as a "beverage" because "this source is open to virtually anonymous editing by the general public, the expertise of its editors is always in question, and its reliability is indeterminable"); *cf.* Order of Affirmance at 3–4, *Nev. Dep't of Motor Vehicles v. Junge*, No. 49350, 125 Nev. 1080, 281 P.3d 1221 (Nev. July 7, 2009) (concluding "a reasonable mind would not accept the Urban Dictionary entries alone as adequate to support a conclusion that [a certain word] is offensive or inappropriate" because the user-contributed definitions "can be personal to the user and do not always reflect generally accepted definitions for words").

18 Wikipedia policies "have wide acceptance among editors and describe standards that all users should normally follow." *Wikipedia: Policies and Guidelines*, WIKIPEDIA, http://bit.ly/2*I*TKPfA (link shortened from https://en.wikipedia.org/wiki/Wikipedia:Policies_and_guidelines) (last visited Mar. 8, 2017).

19 *Wikipedia: Wikipedia Is not a Dictionary*, WIKIPEDIA, http://bit.ly/2n1JVxu (link shortened from https://en.wikipedia.org/wiki/Wikipedia:Wikipedia_is_not_a_dictionary) (last visited Mar. 8, 2017) (emphasis in original).

20 *Cf.* *Gharda USA, Inc. v. Control Sols., Inc.*, 464 S.W.3d 338, 348 (Tex. 2015) ("Qualified experts may offer opinion testimony if that testimony is both relevant and based on a reliable foundation."); *Bostic v. Georgia-Pacific Corp.*, 439 S.W.3d 332, 349 (Tex. 2014) ("In concluding that studies showing more than a doubling of the risk may be supportive of legal causation, provided that other indicia of reliability are met, we explained that this standard corresponds to the legal requirement that the plaintiff prove his case by a preponderance of the evidence."); *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 800 (Tex. 2006) ("Admission of expert testimony that does not meet the reliability requirement is an abuse of discretion."); *Tex. Dep't of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 199 (Tex. 2004) ("In the absence of express statutory language prohibiting judicial review, a legislative intent to prohibit judicial review must be established by specific legislative history or other reliable evidence of intent."); *Miga v. Jensen*, 96 S.W.3d 207, 213 (Tex. 2002) ("Lost profits are damages for the loss of net income to a business measured by reasonable certainty."); *cf. also*TEX. R. CIV. P. 166a(c) (authorizing summary judgment based on interested-party affidavit only if "the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted"); TEX. R. EVID. 201(b) (limiting judicial notice of adjudicative facts to those "not subject to reasonable dispute," meaning "(1) generally known within the trial court's territorial jurisdiction or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned").

21 *Information for "Welfare Queen"*, WIKIPEDIA, http://bit.ly/2mk0iBT (link shortened from https://en.wikipedia.org/w/index.php?title=Welfare_queen&action=info#mw-pageinfo-watchers) (last visited Mar. 8, 2017).

22 *Statistics for Welfare Queen*, WIKIHISTORY, http://bit.ly/2mQu4*I*7 (link shortened from https://tools.wmflabs.org/xtools/wikihistory/wh.php?page_title=Welfare_queen) (last visited Mar. 8, 2017).

23 At times, edits also may add offensive and racist content. *See, e.g.*, http://bit.ly/2mJqGYj (link shortened from https://en.wikipedia.org/w/index.php?title=Mexicans&diff=362223560&oldid=362223553) (last visited Mar. 8, 2017) (showing an example of offensive and racist edit to the Wikipedia entry "Mexicans").

24 ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 415 (2012) (quoting LORD MACMILLAN, LAW AND OTHER THINGS 163 (1938)).

25 *Id.*

26 *See, e.g.*, *Paxton v. City of Dallas*, 509 S.W.3d 247, 257–58 (Tex. 2017).

27 *Wikipedia: Researching with Wikipedia*, WIKIPEDIA, http://bit.ly/2mEub2k (link shortened from https://en.wikipedia.org/wiki/Wikipedia:Researching_with_Wikipedia#Citing_Wikipedia) (last visited Mar. 8, 2017) (emphasis in original); *see* sources cited *supra* note 5.

28 *Wikipedia: Researching with Wikipedia*, WIKIPEDIA, http://bit.ly/2mEub2k (link shortened from https://en.wikipedia.org/wiki/Wikipedia:Researching_with_Wikipedia#Citing_Wikipedia) (last visited Mar. 8, 2017); *see* R. Jason Richards, *Courting Wikipedia*, 44 TRIAL 62 (2008) ("To be sure, Wikipedia is a useful tool from which legal professionals may *begin* their research. However, because the site's content is subject to random manipulation by anyone with an Internet connection, relying on it as an authoritative source in legal pleadings and opinions is reckless." (emphasis in original)).

29 *See Wikipedia: No Original Research*, WIKIPEDIA, http://bit.ly/2f3qc8x (link shortened from https://en.wikipedia.org/wiki/Wikipedia:No_original_research) (last visited Mar. 8, 2017) (stating that Wikipedia adheres to a "[n]o original research" policy and that "all material added to articles must

be *attributable* to a reliable, published source, even if not actually *attributed*" (emphases in original)); *Wikipedia: Researching with Wikipedia*, WIKIPEDIA, https://en.wikipedia.org/wiki/Wikipedia:Researching_with_Wikipedia#Citing_Wikipedia (last visited Mar. 9, 2017) ("It will usually be more acceptable to cite those *original sources* rather than Wikipedia since it is, by nature, a *secondary or tertiary source.*" (emphases in original)); *see also* Daniel J. Baker, *A Jester's Promenade: Citations to Wikipedia in Law Reviews, 2002–2008*, 7 I/S: J.L. & POL'Y FOR INFO. SOC'Y 361, 369 (2012).

TAB 9
Rowan Oil Co. v. Tex. Employment Comm'n
(Tex. 1953)

152 Tex. 607
Supreme Court of Texas.

ROWAN OIL CO. et al.
v.
TEXAS EMPLOYMENT COMMISSION et al.

No. A-4013.
|
June 17, 1953.
|
As Amended on Denial of Rehearing Dec. 2, 1953.

Synopsis

Suit to recover moneys paid by plaintiffs to the State Employment Commission as unemployment compensation taxes. From a judgment of the 53rd District Court, Travis County, for defendants, plaintiffs appealed. The Austin Court of Civil Appeals, Third Supreme Judicial District, 253 S.W.2d 673, affirmed, and plaintiffs brought error. The Supreme Court, Wilson, J., held that where corporate employing unit was forced to reorganize in order to eliminate possibly ultra vires acts on its part, and its two successor corporations continued substantially same operations as old company conducted with same employees doing same jobs under same ownership, successor corporations would be entitled to predecessor corporation's experience rating, for unemployment compensation tax purposes, if they acquired predecessor's business subsequent to enactment of amendment obviating necessity for operation of reorganized business by single employing unit as condition to retention of earned experience rate.

Reversed and remanded with directions.

Calvert, J., Hickman, C. J., and Brewster and Griffin, JJ., dissented.

West Headnotes (6)

[1] **Taxation** Refunding or recovery of tax paid

Suit to recover money paid, but allegedly not due, as unemployment compensation taxes was not an appeal from an administrative tribunal to which substantial evidence rule would have application. Vernon's Ann.Civ.St. arts. 5221b–1 et seq., 5221b–12(j), 7057b.

4 Cases that cite this headnote

[2] **Taxation** Rate

Where corporate employing unit was forced to reorganize in order to eliminate possibly ultra vires acts on its part, and its two successor corporations continued substantially same operations as old company conducted with same employees doing same jobs under same ownership, successor corporations would be entitled to predecessor corporation's experience rating, for unemployment compensation tax purposes, if they acquired predecessor's business subsequent to enactment of amendment obviating necessity for operation of reorganized business by a single employing unit as condition to retention of earned experience rate. Vernon's Ann.Civ.St. arts. 1302, 1359, 5221b–5(c) (7).

[3] **Unemployment Compensation** Purpose and intent of provisions

Unemployment Compensation Construction of Statutes

One purpose of the Unemployment Compensation Act is to prevent unemployment, and act should be construed so as to reward employers providing stable employment and so as to encourage employers to provide stable employment. Vernon's Ann.Civ.St. art. 5221b–1 et seq.

4 Cases that cite this headnote

[4] **Taxation** Lien and priority

Where transfer of oil leases from predecessor corporation to one of successor corporations did not become final until approved by federal Department of Interior in December, 1949, successor corporation would be deemed not to have "acquired" predecessor's business until after that date, for purposes of amendment

obviating necessity for operation of reorganized business by a "single employing unit" as a prerequisite to retention of its earned experience rate, notwithstanding that, as between parties, transfer might be regarded as one upon a condition subsequent. Vernon's Ann.Civ.St. arts. 1302, 1359, 5221b-5(c) (7).

[5] **Statutes** Social Security, public assistance, and other government payments

Taxation Validity

Statute could not release any unemployment compensation contributions which accrued before its passage. Vernon's Ann.St.Const. art. 2, § 1; art. 3, § 55.

[6] **States** Sessions and meetings

One session of Legislature does not have power to construe acts or declare intent of past session. Vernon's Ann.St.Const. art. 2, § 1.

13 Cases that cite this headnote

Attorneys and Law Firms

***608** ****141** Tilley, Hyder & Law, Fort Worth, for petitioners.

John Ben Shepperd, Atty. Gen., J. A. Amis, Jr., and Sam Lane, Asst. Attys. Gen., and Lee G. Williams and C. H. Messer, Austin, for respondents.

Opinion

WILSON, Justice.

This is a suit for refund of contributions paid the Texas ***609** Employment Commission under Art. 5221b, Vernon's Ann.Civ.St. Because of limitations upon the charter powers of a corporation doing business in Texas, the Rowan Drilling Company was reorganized into the Rowan Oil Company and Rowan Drilling Company, Inc. There seems to be no dispute that the two new companies will continue substantially the same operations as the old company conducted with the same employees doing the same jobs under the same ownership. The practical effect of the reorganization is to eliminate possible ultra vires acts. The Texas Employment Commission has fixed contribution rates for the new companies greater than the rate of the old Rowan Drilling Company because that body ruled that the new companies are not entitled under the law to the benefit of the experience rating of the old company.

[1] We must first determine whether this proceeding is an appeal from an administrative tribunal in which the trial court's function is to test the Commission's ruling by the substantial evidence rule or whether it is an original action to recover an alleged improper levy of taxes in which the trial court should use its ordinary fact-finding procedure.

The two new companies filed a petition in the district court seeking, among other things, a refund of all moneys paid under the new rate.

The trial court treated this case as an appeal from an order of an administrative agency. After hearing evidence it rendered judgment that plaintiffs take nothing because the administrative decision was reasonably supported by substantial evidence. This has been affirmed by the Court of Civil Appeals on this one ground. 253 S.W.2d 673.

Art. 5221b, Vernon's Ann.Civ.St., contains no provision granting an employing unit an appeal from an adverse ruling of the Employment Commission denying a refund.

Prior to the amendment in 1947 of the unemployment compensation statutes, Art. 5221b, by the Fiftieth Legislature, Acts 50th Leg., Ch. 379, p. 769, an employing unit aggrieved by a contribution rate assessed against it by the Employment Commission was given no right by Art. 5221b to resort to the courts. Because the 'contributions' are an excise tax, Friedman v. American Surety Co., 137 Tex. 149, 151 S.W.2d 570; State v. The Praetorians, 143 Tex. 565, 186 S.W.2d 973, 158 A.L.R. 596, it had the remedy of paying the disputed contribution under ***610** protest and suing to recover under the general statute governing the payment of taxes under protest, Art. 7057b, Vernon's Ann.Civ.St. The case of James v. Consolidated Steel Corp., Ltd., Tex.Civ.App., Austin, 195 S.W.2d 955, 960, writ refused, N.R.E., allowed the employing unit to bring an action for recovery even though the request for refund of contributions had not been made to the Commission as required by Art. 5221b-12(j) as then worded. The court said:

> '* * * But the above quoted language of Sub. (j) of Art. 5221b-12 is the only provision we find in said Act relating to any claim which an employing unit might have for recovery of contributions. The method therein prescribed is permissive and not mandatory, and prescribes no procedure for hearing, appeal, or resort to the courts by the aggrieved party who may be dissatisfied with the decision of the Commission. The absence of such provisions is, we think, significant. * * *'

**142 After the James decision, the Fiftieth Legislature amended Art. 5221b-12(j) by inserting subsection j(2) [1] into Section 12.

The general statute governing the payment of taxes under protest is Art. 7057b. It requires, first, that the taxes be paid under protest; and, second, that the suit be filed within ninety days. Thus the 1947 amendment to Art. 5221b made a significant change in the situation of an employing unit in that it was not required to pay the contribution under protest. Instead it had four years ('notwithstanding' the provisions of Art. 7057b) to request a refund and then one year to 'commence an action' after the request for refund had been denied.

The 1947 amendment to Art. 5221b did not create a right to an appeal from an order of the administrative agency. It established a procedure by which contributions paid but not legally due could be recovered under Art. 5221b without resort to Art. 7057b. It follows that this suit is an original action permitted by Art. 5221b to recover money paid but not due. As such, it is *611 in no sense an appeal from an administrative tribunal but is similar to an action brought under Art. 7057b to recover taxes paid under protest. The substantial evidence rule has no application in such an action.

The State moved for judgment on the basis that this proceeding was a 'review' of an administrative order and that:

> '* * * the burden in cases of review of administrative decisions under the substantial evidence rule imposes a burden on the Plaintiffs to go forward and show that the decision of the Commission was illegal, arbitrary or capricious. There has been no evidence offered of that nature by Plaintiffs in this case. There is, on the other hand, substantial evidence in the record on which the Commission's decision was reasonably based. We, therefore, move for judgment.'

The trial court recited in his judgment that:

> 'After the plaintiffs had presented their evidence and rested their case, the defendants moved for judgment on the ground that plaintiffs had failed to discharge their burden of showing that the administrative decision of the Texas Employment Commission was illegal, arbitrary or capricious; that is, that said administrative decision was not reasonably supported by substantial evidence introduced in the trial court.'

The trial court then based its judgment upon its determination of whether or not the order of the Commission was reasonably supported by substantial evidence. The Court of Civil Appeals based its decision squarely on this same ground. We hold this to be error.

[2] Petitioners tersely stated the reason for the reorganization in a document filed with the Commission and introduced in evidence from which we quote:

> 'Rowan Drilling Company (the Delaware corporation) transacted business in Texas and other states from 1934 until October 1, 1948. During this 14 year period, the company provided employment **143 security to Texas citizens in furtherance of the declared public policy

> of this State, annually contributed to the Unemployment Compensation Fund, and systematically accumulated an account balance and experience rating. During this period, and as an incident to its charter purpose of drilling oil and gas wells on a contract basis, the company acquired oil and gas leases and properties. The operation of an oil company involves ***612** one charter purpose. The drilling of wells on a contract basis involves a different charter purpose. Since our Texas statutes limit corporations to the exercise of a single charter purpose as enumerated in Article 1302, and since there are certain prohibitions against corporate ownership of real estate (Article 1359), Rowan Drilling Company was engaging in ultra vires corporate activity; and the management of the company therefore deemed it a requirement of law that the company be reorganized. Under Article 1302, Rowan could operate either a drilling business or an oil business. It could not do both.'

The particular language as then worded of Art. 5521b-5(c)(7) with which we are concerned is:

> '* * * (i) immediately after such change the employing enterprises of the predecessor employing unit or units are continued solely through a single employing unit as successor thereto; * * *.'

In State v. Dallas Liquor Warehouse, 147 Tex. 495, 217 S.W.2d 654, we held that the formation of two corporations out of one old employing unit prevented the carrying forward of the old rate under 5221b-5(c)(7), V.A.C.S. as then worded. It is obvious that if the law requires one corporation to operate a drilling company and another and separate one to operate an oil producing company and if it is an ultra vires act for either to perform the function of the other, then the two new corporations cannot be a single employing unit under the Dallas Liquor Warehouse case without again falling into the very ultra vires operation the reorganization was designed to prevent.

In 1949 the Legislature considered this problem. Art. 5221b was amended in such a way that if the new corporation 'acquires a part of the organization, trade or business' of its predecessor 'subsequent to the thirtieth day of June, 1949,' the test becomes:

> '* * * and (ii) immediately after such acquisition the successor employing unit continued operation of substantially the same organization, trade or business or part thereof acquired; * * *.'

This language differs from the language it replaced in that the operation of a reorganized business need no longer be through a 'single employing unit' in order to retain its earned experience rate. Under the wording of the amendment the old operation could be split into two or more separate operations and both be entitled to the old rate if each successor continued ***613** to operate a part of the old business. Apparently the Legislature had in mind the very situation presented at bar. Therefore, we must determine whether either of the new companies acquired a part of the old business after June 30, 1949. If they did, they are entitled to a transfer of the old experience rate.

[3] **[4]** The uncontroverted proof in this case establishes that the transfer of certain New Mexico oil leases did not become final until approved by the U. S. Department of Interior in December 1949. As between the parties, this might be regarded as a transfer upon condition subsequent happening after June 30, 1949. But it did not become a transfer of title until finally approved by the U. S. Department of Interior. In view of the fact that one purpose of Art. 5221b is to prevent unemployment and that the whole structure of the act tends to stabilize employment by rewarding ****144** the employer who provides stable employment, we construe the word 'acquired' so as to carry out the announced policy of the act. Clearly this policy should give this employer the benefit of its earned rate and by so doing encourage it to provide stable employment. Accordingly we hold that the oil company

in acquiring the business of its predecessor acquired a part of it subsequent to June 30, 1949, and is therefore within the amendment and entitled to its refund. There is evidence in the record which would support a finding that the transfer to the drilling company had been completed prior to June 30, 1949. However, there is also testimony that the entire reorganization was contingent upon the federal approval of the assignment of the New Mexico leases. Upon this record we hold that the question of whether the drilling company acquired a part of the predecessor business subsequent to June 30, 1949 is one of fact.

[5] **[6]** We make no comment upon the recently enacted Senate Bill No. 34 except to say that because of Article III, Section 55, Texas Constitution, Vernon's Ann.St., the Act cannot release any contributions which accrued (i. e. became a fixed liability) before its passage and neither does one session of the Legislature have the power to construe the Acts or declare the intent of a past session. Section 1, Article II, Texas Constitution; Snyder v. Compton, 87 Tex. 374, 28 S.W. 1061; Plucknett, A Concise History of the Common Law, pp. 292-304.

We cannot determine from this record the status of the refund nor how much should be allocated to the oil company. The judgments of the trial court and of the Court of Civil Appeals are reversed and the case is remanded for a full development of the facts.

***614** GRIFFIN and CALVERT, JJ., dissenting.

On Petition for Rehearing.

Rehearing denied.

CALVERT, Justice (dissenting).

On original submission of this cause I filed a memorandum dissent. Further consideration on rehearing leaves me in disagreement in a number of particulars on which I have concluded to express my views at greater lenght. Accordingly, this opinion will be substituted for my original dissent.

In the first place, I disagree with the majority holding that the case was erroneously tried and decided in the courts below under the substantial evidence rule.

Whatever may be the merits of the substantial evidence rule, it is now deeply implanted in the body of our law governing judicial review of administrative orders and decisions. It has been applied in so many cases and to the decisions of so many administrative agencies that it would be pointless to review all of them. Most recently it was applied in the review of an order of the Board of Water Engineers (Board of Water Engineers v. Colorado River Municipal Water Dist., Tex.Sup., 254 S.W.2d 369, 372), and that in spite of a provision in the statute involved that trial should be 'de novo' and a legislative injunction that on the trial the court should 'determine independently all issues of fact and of law with respect to the validity and reasonableness' of the acts of the Board complained of.

As is pointed out in the majority opinion, prior to amendment of Art. 5221b-12(j), V.A.C.S., by the Fiftieth Legislature there was no provision in the Unemployment Compensation Law relating to the recovery of contributions required of and paid by an employer, and so it was held in the James case that the procedure for recovery thereof was governed by the general tax statute, Art. 7057b, V.A.C.S. In the light of the James decision and presumptively with knowledge thereof the Legislature amended Art. 5221b-12(j) by incorporating therein the provision shown in the footnote to the majority opinion. Under the amendment the procedure required was quite different from procedure under the ****145** general tax statute. As is pointed out in the majority opinion, protest was made unnecessary to the right of recovery and the time for filing of suit was extended. The most significant change, however, was that as a prerequisite to the ***615** right to sue the employer was required to seek and obtain an administrative ruling on an application for refund. It was provided that only after this was done could the employer 'commence an action'.

In order to implement the statutory requirement for an administrative decision which would not be summary and therefore arbitrary, the Employment Commission has made provision for full hearing on such applications, and the record in this case reflects that a hearing and a re-hearing were accorded the plaintiffs, with an administrative decision of the fact question basic to the plaintiffs' right of recovery-whether the business of the old corporation was acquired by the two new corporations before or after June 30, 1949. It is in just such procedural situations that this court has held time and again that the substantial evidence rule is applicable. I can find

no distinguishing feature in this statute, nor does the majority opinion point to any.

The opinion seems to place some emphasis on the provision that if the Commission denied the application the employer may 'commence an action'. But this is no distinguishing feature. Art. 6049c, sec. 8, V.A.C.S., provides that any interested person dissatisfied with a ruling or order of the Railroad Commission relating to oil and gas matters shall have the right to 'file a suit'. That article does not mention the taking of an appeal, but this court has held that trial of such a suit is governed by the substantial evidence rule. Gulf Land Co. v. Atlantic Refining Co., 134 Tex 59, 131 S.W.2d 73; Trapp v. Shell Oil Co., 145 Tex. 323, 198 S.W.2d 424. The same wording is found in the statute involved in Board of Water Engineers v. Colorado River Municipal Water Dist., supra, and the same holding was made. There is no distinction between 'commencing an action' and 'filing a suit.' The phrases mean the same thing.

Moreover, if the question whether this proceeding was in the nature of an appeal or the institution of a completely independent suit is doubtful, the caption of the Act should dispel that doubt. The caption specifically sets out that the Act provides 'Providing for refund of contributions and penalties erroneously paid, and for an appeal to the Courts after payment of contributions alleged to be due'. This Act amending the unemployment law was passed by the Legislature with full knowledge of judicial use of the substantial evidence rule in reviewing administrative decisions, and if it had intended that the substantial ***616** evidence rule should not be applied in suits arising thereunder it could have so provided.

I also disagree with the majority holding that approval by the Federal government of the transfer of the New Mexico leases after June 30, 1949 entitles the new oil company, as a matter of law, to a full recovery.

This case was tried before the Commission and the trial court and was presented in the Court of Civil Appeals and in this court on one and only one theory; that the entire reorganization of the old company into the two new companies and all consequent transfers of properties were contingent on final approval of the transfer of the New Mexico leases as a matter of law and there was therefore no acquisition by the new companies of any of the property or business of the old company until December, 1949. This was the fact issue decided adversely to the plaintiffs by the Commission, the trial court and the Court of Civil Appeals. It has been rejected also by this court, as is evidenced by the holding that the evidence on the issue is conflicting, creating a fact question to be determined by the trial court on a retrial of the drilling company's suit under rules applicable to the trial of ordinary civil suits. The majority has held, however, that since a 'part' (the New Mexico leases) of the part of the old company's business (all of the producing part of the business) was acquired after June 30, 1949, the new oil ****146** company is entitled as a matter of law to a fully recovery.

The statute, Art. 5221b-5(c)(7), as amended by Acts of the 51st Legislature in 1949, provides: 'If, subsequent to the thirtieth day of June, 1949, an employing unit * * * acquires a part of the organization, trade or business of an employer, such acquiring successor employing unit and such predecessor may jointly make written application to the Commission for that compensation experience of such predecessor employer which is attributable to the organization, trade or business or the part thereof acquired * * *,' which application shall be approved by the Commission if it finds that '* * * (iv) in the event of the acquisition of only a part of a predecessor employer's organization, trade or business, such acquisition was a part to which a definitely identifiable and segregable part of the predecessor's compensation experience was and is attributable * * *.'

Actually, under the statute, it is not the contribution rate of the old company to which the new company succeeds; rather, ***617** it is the 'compensation experience.' 'Compensation experience' is defined in the statute and is composed of two factors which automatically determine the rate, to wit: (1) the employer's total taxable pay roll for the three preceding years 'on which contributions have been paid to the Commission', and (2) wages paid for the same three year period to former employees who have been paid benefits for one full week of unemployment.

Whatever right of succession the oil company has in this case it has only by virtue of the terms of the foregoing statute. Properly interpreted the statute does not mean that if a new company acquires a part of the organization, trade or business of a predecessor employer before June 30, 1949, and another part subsequent to June 30, 1949, the new company will succeed to the compensation experience of the old company attributable to both such parts, as the majority has held. It means simply what it says-that as to any part acquired subsequent to June 30, 1949, the new company shall succeed to such compensation experience of the old company

as the Commission may find is definitely identifiable and segregable and attributable to the part subsequently acquired. The only basis, conceivable to me, on which may rest the majority holding that the new oil company is entitled to a recovery as a matter of law, is that the evidence shows conclusively that the final acquisition by the new oil company of the property and business transferred to it prior to June 30, 1949, was contingent on approval of the transfer of the New Mexico leases. But the evidence in this respect is no stronger (actually it is the same) than the evidence that final acquisition by the new drilling company of the property and business transferred to it prior to June 30, 1949, was also contingent on final approval of the transfer of the New Mexico leases, and the majority has said that the evidence on that phase of the case is conflicting.

We cannot say that the New Mexico leases constitute a segregable 'part' of the old company's business so as to divorce that 'part' of the business from the part transferred to the drilling company-as the majority has done-without saying at the same time that it constitutes a segregable 'part' of the part transferred to the oil company. And if this part (the New Mexico leases) is the only part of the new oil company's business that we can say as a matter of law was acquired after June 30, 1949, we are then confronted with the statutory provision that as to that part the new oil company is entitled to succeed to the old company's compensation experience which is attributable ***618** to that part and is definitely identifiable therewith, rather than to the compensation experience that is attributable to and definitely identifiable with all of the part of the old company's business (all of the oil production business) acquired by the new oil company as the majority has held. Since there is in this record no evidence that 'a definitely identifiable and segregable part' of the old company's 'compensation experience' (total taxable pay roll for the three-year period on which contributions were paid and 'benefit ****147** wages' for the same period) is attributable to the New Mexico leases, it seems to me that the plaintiff has completely failed to make proof that is essential to any recovery whatever and that it is therefore clearly error to render judgment for the new oil company.

It seems to me that this case should be decided on the same theory on which it has been tried and presented, that is, that the reorganization and transfer of the business and properties of the old company was final before June 30, 1949, or that such reorganization and transfer was wholly contingent on approval of the New Mexico leases and therefore not final until after June 30, 1949. By deciding it on the theory on which it has been tried and presented we will avoid the complications which have been noted above.

I think the case should be decided under the substantial evidence rule, and if the majority is of the opinion that the administrative decision is not supported by substantial evidence the judgments of the courts below should be reversed and judgment here rendered for all plaintiffs. Personally, I feel that the administrative decision is supported by substantial evidence and that the judgment of the Court of Civil Appeals should be affirmed. Evidence which I deem to be substantial and which supports the judgments below may be summarized briefly as follows: (1) The plan of reorganization as stated in a report made to the Commission provided for a transfer of all assets and liabilities of the old company to the two new companies effective at 7 o'clock a. m., October 1, 1948. (2) All transfers and conveyances to the new companies are absolute on their face and are dated October 1, 1948. (3) The permit of the old company to do business in Texas was surrendered on October 1, 1948. (4) Letters from the secretary-treasurer of the old company and of the new drilling company to the Texas Employment Commission, dated September 28, 1948, stated that the reorganization was effective October 1, 1948, and inquired what the new rate of contribution would be for each of the new companies. ***619** (5) In an application for review and redetermination of contribution rate filed by the drilling company with the New Mexico Commission in January 1949 it was stated that 'reorganization was accomplished on October 1, 1948.' If the reorganization was not complete at the time of this application, there was no basis for the application. (6) After October 1, 1948, old company transacted no business in Texas, all business being transacted by two new companies. (7) All income for last three months of 1948 and for 1949 was reported as income of new companies, no income being reported by old company for that period. It is not to be denied that there is also strong evidence that the reorganization and all transfers and conveyances made pursuant thereto were contingent on final approval of transfer of the Federal leases which did not occur until December, 1949, but it is not the duty of the courts to determine which evidence preponderates; it is their duty only to see if the administrative decision is reasonably supported by substantial evidence. Hawkins v. Texas Co., 146 Tex. 511, 209 S.W.2d 338, 340.

Even if the majority is correct in refusing to decide this case under the substantial evidence rule, the judgments of the courts below should be reversed in their entirety so that the trial court may try the critical issue-whether the

reorganization and ensuing transfers and conveyances of parts of the business of the old company to the two new companies was contingent on final approval of transfer of the New Mexico leases. If the trier of the facts finds that they were contingent the plaintiffs would be entitled to succeed to the old company's compensation experience and to a refund of the taxes paid in excess of the legal rate based thereon. If the trier of the facts found that these matters were not so contingent then the plaintiffs would not be entitled to a recovery.

HICKMAN, C. J., and BREWSTER and GRIFFIN, JJ., join in this opinion.

All Citations

152 Tex. 607, 263 S.W.2d 140

Footnotes

1 'When an employing unit has made a payment to the Commission of contributions and/or penalties alleged to be due and has, within four (4) years from the date on which such contributions and/or penalties would have become due had such contributions and/or penalties been legally collectible by the Commission from such employing unit, made application to the Commission for a refund thereof and such application for refund has been denied by the Commission, such employing unit may within one (1) year after the denial of such application for refund commence an action in any Court of competent jurisdiction in Travis County, Texas, against the Commission for a refund of the contributions and/or penalties so paid to the Commission, the provisions of Article 7057(b), Revised Civil Statutes of Texas of 1925, as amended, to the contrary notwithstanding. Such action shall be de novo; and such recovery, if any, shall be without interest.'

End of Document

TAB 10

Outlet Co. v. Int'l

Sec. Group, Inc.

(Tex.App. – San Antonio 1985)

693 S.W.2d 621
Court of Appeals of Texas,
San Antonio.

The OUTLET COMPANY and
Baxter Gentry, Appellants,
v.
International Sec. Group., Inc.

No. 04–83–00602–CV.
|
April 24, 1985.
|
Rehearing Denied June 12, 1985.

Synopsis

Libel action was brought arising out of television news broadcast which alleged that plaintiff was engaged in gun smuggling scheme. The 224th District Court, Bexar County, Carolyn Spears, J., entered judgment in favor of plaintiff and awarded damages totaling $1,600,000, and broadcaster appealed. The Court of Appeals, Storey, J., assigned, held that: (1) plaintiff did not waive his cause of action for libel; (2) plaintiff sustained his burden of proving falsity of broadcaster's assertions; (3) evidence supported finding of malice; and (4) award of damages was excessive.

Affirmed on condition of remittitur.

Procedural Posture(s): On Appeal.

West Headnotes (31)

[1] Stipulations Stipulations as to judgment and review

In libel action, stipulation that plaintiff "waived damages to reputation" was to be understood as waiver not of injury to reputation but instead as waiver of one element to be considered by jury in assessing general or actual damage; thus defamation plaintiff did not waive his cause of action for libel.

1 Cases that cite this headnote

[2] Libel and Slander Presumption as to damage; special damages

False statement which charges a person with a commission of a crime is libelous per se.

1 Cases that cite this headnote

[3] Libel and Slander Mental suffering and emotional distress

Plaintiff who was libeled was entitled to recover his actual damages for mental anguish without offering proof of injury to his reputation.

1 Cases that cite this headnote

[4] Libel and Slander Person defamed

Individual may be defamed, even if not named, if those who knew him understand from the publication that it referred to him.

2 Cases that cite this headnote

[5] Libel and Slander Person defamed

In libel action arising out of television news broadcast which alleged that plaintiff was engaged in gun smuggling scheme, evidence showed that broadcasts were of and concerning plaintiff and would lead ordinary persons to believe that plaintiff was involved in gun smuggling, as plaintiff was known to be president and sole stockholder of named corporation and plaintiff was identified in broadcast by name as well as by the phrase "the management."

2 Cases that cite this headnote

[6] Libel and Slander Criticism and Comment on Public Matters; Public Figures

Defamation plaintiff who was president and sole stockholder of corporation alleged to be involved in gun smuggling scheme was not shown to be a public figure, as there was no evidence that plaintiff assumed any role of special prominence in society or that he had thrust himself to the forefront of any particular public controversy in order to influence its resolution.

1 Cases that cite this headnote

[7] **Appeal and Error** Questions of law

In libel action, no harm resulted in submitting question to jury of whether defamation plaintiff was public figure, even though it is generally conceded that such question is one for decision by court.

[8] **Libel and Slander** Nature and elements of defamation in general

If simple negligence standard is employed for determining liability in case of libel against private individual, individual may recover only actual damages, and the negligence finding may not be predicated upon a factual misstatement whose content would not warn a reasonably prudent editor of its defamatory potential.

[9] **Libel and Slander** Justification and mitigation

Burden was on defamation plaintiff to prove falsity of broadcaster's assertions, rather than on the broadcaster to prove their truth.

1 Cases that cite this headnote

[10] **Libel and Slander** Justification and mitigation

Libel and Slander Mental suffering and emotional distress

Defamation plaintiff sustained his burden of proving falsity of broadcaster's assertions that plaintiff was engaged in gun smuggling scheme, and thus plaintiff was entitled to recover his actual damages for mental anguish without proof of other injury.

[11] **Libel and Slander** On ground of malice or recklessness

Exemplary damages are recoverable in defamation action only upon finding from clear and convincing evidence that the defamatory statement was made from malice.

[12] **Libel and Slander** Malice

Malice may be established in defamation action by proving knowledge of falsity or by proving reckless disregard amounting to willful conduct; a finding with respect to either standard which is supported by the requisite proof is sufficient.

[13] **Appeal and Error** Tort cases and personal injuries in general

Court of Appeals must independently decide whether evidence in record in defamation action affords clear and convincing proof of malice.

[14] **Libel and Slander** Malice

Failure of broadcaster to investigate without more cannot establish requisite disregard for truth for purposes of proving malice in defamation action.

[15] **Libel and Slander** Intent, malice, or good faith

Evidence supported finding of malice in libel action arising out of television news broadcast which alleged that plaintiff was engaged in gun smuggling scheme, as reporter virtually conceded that he made no effort to verify assertions of unnamed source or the statements contained in the broadcast, broadcaster had knowledge of defamatory potential, broadcast was staged so as to depict a cloak and dagger episode, and there was lack of competent evidence that gun smuggling scheme was in fact underway.

1 Cases that cite this headnote

[16] **Libel and Slander** Libel

Award of damages totaling $500,000 in libel action arising out of television news broadcast which alleged that plaintiff was engaged in gun smuggling scheme was so excessive as to compel conclusion that the jury acted from passion, prejudice or some other improper motive, as

injury was transitory in nature and was little more than anger, embarrassment and frustration.

[17] **Libel and Slander** Elements of Compensation

In asserting personal injury damages in libel action, each case must stand on its own facts.

[18] **Libel and Slander** Mental suffering and emotional distress

Mental anguish, as injury in libel action, must be more than mere disappointment, anger, resentment or embarrassment.

1 Cases that cite this headnote

[19] **Libel and Slander** Presumptions and Burden of Proof

Where defamation plaintiff waived injury to reputation as element of his damages, jury could not presume damages but was bound by the proof offered on the issue of mental anguish.

1 Cases that cite this headnote

[20] **Libel and Slander** Libel

Jury award of $1 million as punitive damages was excessive in libel action arising out of television news broadcast which alleged that plaintiff was engaged in gun smuggling scheme.

[21] **Constitutional Law** Punitive damages

Award of punitive damages against media defendant is not unconstitutional as prior restraint upon exercise of a constitutional right. U.S.C.A. Const.Amend. 1.

[22] **Appeal and Error** Expert evidence

In libel action arising out of television news broadcast which alleged that plaintiff was engaged in gun smuggling scheme, any error in allowing plaintiff's expert to project profits of plaintiff's corporation, for purposes of determining special damages, was harmless.

[23] **Libel and Slander** Libel

In libel action arising out of television news broadcast which alleged that plaintiff was engaged in gun smuggling scheme, it was proper to award special damages of $100,000 for plaintiff's economic loss arising out of loss in value of stock in plaintiff's corporation.

[24] **Libel and Slander** Nature and elements of defamation in general

Libel and Slander Malice

In libel action arising out of television news broadcast which alleged that plaintiff was engaged in gun smuggling scheme, it was proper to apply ordinary negligence standard to knowledge of falsity, to apply same standard to the act of making the broadcast, and to apply constitutional standard of malice, and these issues were not duplicitous or immaterial.

[25] **Libel and Slander** Nature and elements of defamation in general

Libel and Slander On ground of malice or recklessness

In libel action, ordinary negligence is necessary to show right to actual damages and a finding of malice is necessary for punitive damages.

[26] **Libel and Slander** Intent, malice, and good faith in general

In libel action, trial court did not err in submitting both constitutional standard for malice and common-law standard for malice, even though affirmative answer to either issue was sufficient to support award for punitive damages.

[27] **Libel and Slander** Nature and elements of defamation in general

Defamation may not be predicated upon a factual misstatement unless the content of the statement would warn a prudent broadcaster of its defamatory potential.

[28] **Appeal and Error** Immaterial issues

There is nothing inherently prejudicial in submitting an immaterial issue.

[29] **Appeal and Error** Immaterial issues

Standard of review in determining whether it was improper to submit immaterial issues is to determine if the unnecessary issues amounted to such a denial of rights as was reasonably calculated to cause and probably did cause the rendition of an improper judgment.

1 Cases that cite this headnote

[30] **Appeal and Error** Documentary evidence

In libel action arising out of television news broadcast which alleged that plaintiff was engaged in gun smuggling scheme, any error in admitting into evidence certain stilled portions of the video broadcast was harmless, as entire text of broadcast was before the jury as was the entire video portion and broadcaster did not demonstrate that it was prejudiced in any way.

[31] **Trial** Cumulative evidence in general

In libel action arising out of television news broadcast which alleged that plaintiff was engaged in gun smuggling scheme, trial court did not abuse discretion in allowing plaintiff, as final witness, to controvert testimony of earlier witness who testified that broadcast did not affect bank's decision to turn down a loan to plaintiff's corporation, as plaintiff's testimony was merely cumulative of other testimony before the jury.

Attorneys and Law Firms

***623** Paul M. Green, Mark J. Cannan, Lang, Cross & Ladon Firm, San Antonio, for appellants.

James L. Branton, Susan Combs, San Antonio, for appellees.

Before BUTTS, TIJERINA and STOREY [*], JJ. (Assigned).

***624** OPINION

STOREY, Justice (Assigned).

Richard C. Medlin sued The Outlet Company, the operator of television station KSAT, for libel arising out of a television news broadcast which alleged that Medlin was engaged in a multi-million dollar gun smuggling scheme. The trial court's judgment awarded Medlin general, special and exemplary damages totaling $1,600,000.00 based upon jury findings of falsity and malice. Among its several points of error the broadcaster urges that Medlin could not sustain a cause of action for libel because he had before trial waived any right to recover for injury to his reputation. Additionally, the broadcaster complains that the broadcast was not proved to be directed to Medlin, that it was not proved to be false, and that the evidence was legally and factually insufficient to support the finding of malice and the various elements of damage. We conclude that no reversible error is shown in the points of error presented for review. We conclude further, however, that the damages awarded are excessive and that this case must be reversed and remanded unless appropriate remittitur is filed.

The threshold question presented is whether an action for libel may be maintained in the face of an affirmative waiver of damages for injury to reputation as an element of actual damages. The broadcaster seems to contend that, while other compensable injuries may result from a defamation, they must be predicated upon an injury to reputation and that claims not predicated upon such injury are by definition not actions for defamation. On the other hand, Medlin points to the disjunctive language of the Texas libel statute, TEX.REV.CIV.STAT.ANN. art. 5430 (Vernon 1958) as setting forth at least four distinct ways, including injury to reputation, by which an individual may suffer injury from defamation. Alternatively, Medlin contends that he did not waive his cause of action for injury to reputation, but only waived the injury to reputation as an element to be considered in determining his actual damages.

[1] We look to the nature of the waiver presented to the trial court. At or near the time of trial Medlin presented a motion in limine requesting the court to exclude "any testimony as to plaintiff's character or reputation in the community, as plaintiff hereby waives damages to reputation as an issue." The parties consider this motion to be in the nature of a stipulation. Taken with the further colloquy among the court and lawyers as shown in the record we understand this stipulation to be a "waiver" not of the injury to reputation but instead as a waiver of one element to be considered by the jury in assessing general or actual damage. This was obviously the interpretation of the trial court because it defined actual damages to "include mental anguish and suffering, humiliation and embarrassment" while omitting any reference to damage to reputation in its definition.

[2] **[3]** Furthermore, a false statement which charges a person with the commission of a crime, as is the case here, is libelous per se and "the law presumes a statement which is libelous per se defames a person and injures his reputation." *Leyendecker & Associates, Inc. v. Wechter,* 683 S.W.2d 369 (1984) (on rehearing). Because of this presumption, Medlin was entitled to recover his actual damages for mental anguish without offering proof of injury to his reputation. *Id.* at 374. We observe in this connection that neither party offered evidence concerning reputation and that no complaint is made on appeal of the admission or exclusion of such evidence. Additionally, no attempt was made by bill of exception or otherwise to demonstrate an attack upon reputation in mitigation of damages. Having concluded that Medlin did not waive his cause of action for libel by waiving injury to reputation as an element of damages we proceed to the broadcaster's remaining points of error.

***625** The broadcaster contends that there was no evidence or insufficient evidence to show that the broadcasts were "of and concerning" Medlin. The jury found that the broadcasts would lead ordinary persons to believe that Medlin was involved in "gun smuggling." The texts of the two broadcasts were as follows:

BROADCASTS

PRE–BROADCAST

MICHELLE MARSH: A multi-million dollar gun smuggling scheme, some controversial decisions by the U.S. Supreme Court, and a dollar that looks like a quarter, but it's still worth 100 pennies. Those stories and much more, coming up.

JULY 2nd

MICHELLE MARSH: Newswatch has learned that a federal investigation is underway into a multi-million dollar business in San Antonio. A business, allegedly dealing with gun smuggling. Baxter Gentry reports.

BAXTER GENTRY: This is an investigation looking into the alleged flow of weapons from San Antonio into Central America. It's pointed at an elite security business here in San Antonio.

This is the International Security Group, a San Antonio based firm in a warehouse district on the city's northeast side. ISG provides protection for businessmen and high government officials against terrorism attacks. Most of the clients are from Latin America. Building highly sophisticated bullet proof cars and training bodyguards are two aspects of this business that has grossed 6 million dollars so far this year. One former employee of ISG is afraid of appearing on camera, but he talked with us about how the company was allegedly involved in smuggling weapons.

QUESTION: How were you involved?

ANSWER: I loaded shotguns and ammo into secret compartments in the cars.

QUESTION: Where were they going?

ANSWER: To Guatemala I think.

QUESTION: Did you know it was illegal to do that?

ANSWER: I asked, but never got an answer.

Ron Wolters, the agent in charge of the Federal Firearms Office does not [sic] have an answer. It is illegal. Wolters says his investigators are looking into the alleged scheme but would not comment on any specific questions.

> We were allowed inside the plant to talk with ISG President Richard Medlin. Medlin says the charges are unfounded and that the man in our report is simply a disgruntled employee trying to make his company look bad. Medlin, who refused to appear on camera for security reasons, says that neither he or [sic] his company have ever been involved in smuggling guns.
>
> JULY 3rd
>
> MICHELLE MARSH: Last night we stated during this newscast that authorities were investigating a multi-million dollar gun smuggling scheme. We'd like to clarify that statement. The possibility that the people at the International Security Group based here in San Antonio are or have been involved in gun smuggling is under investigation. The extent of such an operation or the amount of money involved is not known. The management at International Security Group denies any knowledge of such a gun smuggling operation and today asked that all employees with knowledge of such an operation to take that information to proper authorities.

[4] **[5]** It has been held that, with respect to identity, the asserted libel must refer to some ascertained or ascertainable person. The individual need not be named if those who knew him understand from the publication that it referred to him. *Newspapers, Inc. v. Matthews,* 161 Tex. 284, 339 S.W.2d 890, 894 (1960). We believe the ***626** rule in Texas with respect to identity to be that set forth in W. PROSSER, HANDBOOK OF THE LAW OF TORTS 583 (2d ed. 1955):

> A publication may clearly be defamatory as to somebody, and yet on its face make no reference to the individual plaintiff ... He need not, of course, be named and the reference may be an indirect one; and it is not necessary that every listener understand it, so long as there are some who reasonably do.

Id. at 543, *cited with approval in Poe v. San Antonio Express News Corp.,* 590 S.W.2d 537, 542 (Tex.Civ.App.—San Antonio 1979, writ ref'd n.r.e.) and *Gibler v. Houston Post Co.,* 310 S.W.2d 377, 385 (Tex.Civ.App.—Houston 1958, writ ref'd n.r.e.). Here, Medlin was known to be the president of International Security Group, Inc. and its sole stockholder. Hence, he was identified by name as well as by the phrase "the management." There was no evidence offered tending to prove the broadcast was not directed to Medlin. We are persuaded that the texts themselves point directly to Medlin and taken with the testimony of witnesses who so understood the broadcast, the jury finding in this respect is amply supported.

[6] **[7]** Nor can we agree with the broadcaster's contention that Medlin was shown to be a public figure. There is no evidence that he assumed any role of special prominence in society or that he had thrust himself to the forefront of any particular public controversy in order to influence its resolution, the tests laid down in *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 345, 94 S.Ct. 2997, 3009, 41 L.Ed.2d 789, 808 (1974). Of course, the broadcasts themselves could not serve to make Medlin a public figure. *Hutchinson v. Proxmire,* 443 U.S. 111, 135, 99 S.Ct. 2675, 2688, 61 L.Ed.2d 411, 431 (1979). While it is generally conceded that the question of whether a defamation plaintiff is a public figure is one for decision by the court, we conclude that no harm resulted in submitting the question to the jury in this case.

The broadcaster next complains that there was no evidence or, alternatively, insufficient evidence to support certain of the jury findings. The jury found that the broadcast taken as a whole had the effect of causing ordinary persons to believe that Medlin was involved in the criminal activity of gun smuggling. It found further that the published statement was false, that the broadcasters knew or should have known the statement was false, that the subject matter would warn a prudent broadcaster of its defamatory potential, that the broadcasters failed to use ordinary care, that "from clear and convincing evidence" the broadcasters were motivated by malice, and that the broadcasts were made with gross indifference or reckless disregard amounting to willful conduct. The jury also found the broadcasts were not fair, true and impartial accounts of a matter of public concern. Specifically, the broadcaster questions the evidentiary support for the findings of falsity, malice and willful conduct.

[8] Consistent with the Supreme Court's holding in *Gertz,* the Texas Supreme Court in *Foster v. Laredo Newspapers, Inc.,* 541 S.W.2d 809 (Tex.1976), adopted the simple negligence standard for determining liability in the case of

libel against a private individual. However, as required by *Gertz,* if this lesser standard is employed the individual may recover only actual damages, and the negligence finding may not be predicated upon a factual misstatement whose content would not warn a reasonably prudent editor of its defamatory potential. *Foster,* 541 S.W.2d at 819–20. Here, therefore, if the finding of falsity is supported in the evidence Medlin is entitled to recover his actual damages because of the finding of fault, that is, negligence, and the further finding that the broadcaster should have been warned of the statement's defamatory potential—two findings whose evidentiary support are not questioned. Thus, the only remaining evidentiary attacks on appeal are to the findings of falsity, malice and willful conduct. We will review at one time the evidence as it relates to these findings.

***627** In discharging his burden of proving the falsity of the broadcaster's assertions, Medlin testified that neither he nor International Security Group were ever involved in gun smuggling. Four other witnesses who were closely related to the affairs of International Security Group confirmed this testimony. Additionally, Ron Wolters, the agent in charge of the local Bureau of Alcohol, Tobacco & Firearms, testified that his earlier investigations of International Security Group had uncovered no evidence of gun smuggling. Wolters also testified that there was no investigation under way at the time of the broadcast.

On the other hand, the broadcaster presented no direct evidence at trial tending to connect Medlin with a gun smuggling scheme. Its only evidence was the text of the broadcast which quoted an anonymous source as stating "I loaded shotguns and ammo into secret compartments in the cars." And in response to the question "Where were they going?" the source stated, "To Guatemala I think." The anonymous source remains anonymous and, of course, did not testify at trial. This exchange, is at best equivocal, but even if taken to mean that both cars and guns were going to Guatemala, it was hearsay and, consequently, without probative effect to demonstrate in fact that gun smuggling was in progress. Additionally, Baxter Gentry, the news reporter, testified at trial that his source never told him there were secret compartments in the vehicles or that any weapons ever left the gates of International Security Group.

[9] **[10]** While the burden is on Medlin to prove the falsity of the broadcaster's assertions rather than on the broadcaster to prove their truth, *see A.H. Belo Corp. v. Rayzor,* 644 S.W.2d 71, 80 (Tex.App.—Fort Worth 1982, writ ref'd n.r.e.), we are persuaded that Medlin has sustained his burden and that the jury finding of falsity is supported in the evidence. We conclude, therefore, that having proved the defamatory statement, fault, knowledge of defamatory potential and falsity, the tests set forth in *Foster v. Laredo Newspapers, Inc.* have been met, and, because the statement was libelous per se, Medlin is entitled to recover his actual damages for mental anguish without proof of other injury. Additionally, upon the same proof an award of special damages is authorized if such damages are shown to exist.

[11] **[12]** **[13]** We now consider the propriety of the award of exemplary damages. It is clear that exemplary damages are recoverable only upon a finding from "clear and convincing evidence" that the defamatory statement was made from malice. Malice may be established by proving knowledge of falsity, the constitutional standard, or by proving reckless disregard amounting to willful conduct,—the so called "ill will" standard. *See Gertz,* 418 U.S. at 342, 94 S.Ct. at 3008, 41 L.Ed.2d at 807. A finding with respect to either standard which is supported by the requisite proof is sufficient. Furthermore, this court must independently decide whether the evidence in the record affords "clear and convincing" proof. *Bose v. Consumers Union of United States, Inc.,* 466 U.S. 485, ——, 104 S.Ct. 1949, 1965, 80 L.Ed.2d 502, 523 (1984), *see also, New York Times v. Sullivan,* 376 U.S. 254, 285, 84 S.Ct. 710, 729, 11 L.Ed.2d 686, 709 (1964).

Here, the jury found malice which was defined in *New York Times v. Sullivan* as "made ... with knowledge that it was false or with reckless disregard of whether it was false or not." *Sullivan,* 376 U.S. at 279–80, 84 S.Ct. at 726, 11 L.Ed.2d at 706. In a separate issue the jury found the statement was "made with gross indifference to or reckless disregard of the rights of Mr. Medlin so as to amount to a willful or wanton act." The broadcaster urges that there is no evidence and, alternatively, insufficient evidence to support these findings. We cannot agree.

[14] **[15]** The reporter, Gentry, virtually conceded that he made no effort to verify the assertions of his unnamed source or the statements contained in the broadcast. The failure to investigate without more cannot establish reckless disregard for truth. ***628** *Gertz,* 418 U.S. at 332, 94 S.Ct. at 3003, 41 L.Ed.2d at 801. In connection with the failure to investigate, however, we deem it important to observe that

the subject matter of this broadcast was found by the jury to be such that a prudent broadcaster should be aware of its defamatory potential. The jury finding to this effect is not attacked on appeal. With knowledge of this potential it would seem appropriate that the failure to investigate should take on greater significance. In this context we review the additional evidence which goes to support the jury finding of actual malice.

The reporter, Gentry, videotaped and recorded the interview with his anonymous source before interviewing Medlin. The Medlin interview resulted in a categorical denial of any wrongdoing, yet the source interview was aired as originally taped. Indeed, Gentry testified that his purpose in interviewing Medlin was "to get a reaction or response" rather than to ascertain the accuracy of the "source" information. For example, there was uncontroverted testimony at trial that the vehicles in question were not equipped with secret compartments capable of storing weapons, yet no effort was made at the plant-site interview with Medlin to inspect any vehicle for secret compartments. These circumstances would tend to demonstrate that the broadcast was in the making without concern for what further investigation might disclose.

Furthermore, it is apparent that the broadcast was "staged" so as to depict a "cloak and dagger" episode. The video showed the anonymous source in shadows so as to conceal his identity with a voice-over by Gentry narrating the interview. The video included background graphics of weapons, and scenes of armed men in dark glasses riding in black Cadillacs. These circumstances tended to demonstrate an effort to dramatize and sensationalize rather than to report essential facts.

The video broadcast included footage of the Bureau of Alcohol, Tobacco & Firearms agent, with voice-over by Gentry. This created the illusion of a live interview in which Wolters was affirming that gun smuggling was illegal, and that an investigation into gun smuggling activities was presently underway. Yet at trial Wolters testified that he had not appeared on camera during the interview with Gentry. Wolters' testimony in this regard was uncontroverted and the only reasonable inference to be drawn is that file footage of Wolters was used in an attempt to lend authenticity to the narration. Wolters testified that he could not have stated to Gentry that an investigation was underway because, in fact, there was none. While in the broadcast, Gentry quoted his source as saying "I loaded shotguns and ammo into secret compartments in the cars," he, Gentry, testified at trial that he was never told of secret compartments. He testified further that he had never heard that any cars carrying weapons had left the gates of the International Security Group plant.

Finally, considerable testimony by media experts was presented at trial which criticized adversely the investigative reporting resulting in this broadcast. We find it unnecessary to evaluate this testimony. We are persuaded that the foregoing facts taken with the failure to verify—with knowledge of defamatory potential—and a lack of any competent evidence that a gun smuggling scheme was in fact underway, are sufficient to support the jury finding of actual malice.

[16] The broadcaster urges that the actual damages awarded by the jury bear no relationship to those proved at trial—it suggests a remittitur but suggests no amount. We agree that the award is so excessive as to compel the conclusion that the jury acted from passion, prejudice or some other improper motive and that remittitur should be ordered.

"Actual damage" was defined by the trial court to "include mental anguish and suffering, humiliation and embarrassment." The proof of this injury was supplied wholly by the testimony of Medlin and his wife. Medlin testified that he experienced "anger and hurt." A meeting with his employees to discuss the allegations made by the broadcasts resulted in "one of probably the hardest times in my life." ***629** Mrs. Medlin characterized Medlin as being "shocked and embarrassed" and "I know it was hard for him to deal with all the phone calls and having to explain ... it was very frustrating." Yet, Mrs. Medlin acknowledged that none of the friends and relatives who called believed that Medlin was engaged in illegal activity. No further evidence of injury was offered.

[17] **[18]** There is no certain standard by which personal injury damages may be ascertained. Each case must stand on its own facts and review of other cases offer little help. The uncertainty is compounded where, as here, the injury is mental anguish not associated with bodily injury. Mental anguish has been characterized as " 'intense pain of body or mind' " and as a " 'high degree of mental suffering.' ... It must be something more than worry and vexation...." *McAllen Coca Cola Bottling Co., Inc. v. Alvarez,* 581 S.W.2d 201, 205 (Tex.Civ.App.—Corpus Christi 1979, no writ). It must be more than mere disappointment, anger, resentment or embarrassment. *Gill v. Snow,* 644 S.W.2d 222, 224 (Tex.App.—Fort Worth 1982, no writ).

[19] We view the injury proved here as transitory in nature —little more than anger, embarrassment and frustration. A different conclusion might be reached had not Medlin waived injury to reputation as an element of his damages. A different question would then be presented because of the "presumed" injury, its severity and continuing nature. Here, the jury could not presume damages but was bound by the proof offered on the issue of mental anguish. For these reasons, we are compelled to the conclusion that the jury acted from passion, prejudice or some other improper motive in arriving at actual damages. The result is so excessive as to "shock the sense of justice and conscience of this court," and dictates that we order a remittitur of one-half the jury award.

For yet another reason we are persuaded that remittitur is appropriate in this case. The U.S. Supreme Court has consistently cautioned state courts with respect to the delicate line to be observed in considering the impact of defamation law upon the first amendment freedoms of speech and press. An example is found in *Gertz v. Robert Welch, Inc.:*

> The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms.... More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.
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>
> [A]nd all awards must be supported by competent evidence concerning the injury....

418 U.S. 323, 349–50, 94 S.Ct. 2997, 3011–12, 41 L.Ed.2d 789, 811 (1974).

We consider this court no less bound to observe the fine line existing between these first amendment rights.

[20] **[21]** For like reasons we consider the jury award of $1,000,000.00 as punitive damages to be excessive. In this regard we reject the broadcaster's contention that the award of punitive damages against a media defendant is unconstitutional as a prior restraint upon the exercise of a constitutional right. *See id.* at 349, 94 S.Ct. at 3011–12, 41 L.Ed.2d at 811. However, it is clear that the courts consider the punishment of error as running the risk of "inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press.... [which] may lead to intolerable self-censorship." *Id.* at 340, 94 S.Ct. at 3007, 41 L.Ed.2d at 805–06.

Here, Medlin has recovered his actual as well as his special damages. Consequently, little is left to be served by the award of punitive damages except to punish and to set an example for others—both inviting a cautious and restrictive exercise of free speech and press. This consideration together with the circumstances which we have considered with respect to the actual damage award lead us to conclude that the ***630** punitive damage award is excessive. We will therefore order that one-half of the punitive damages awarded be remitted.

The broadcaster also complains of the admission of certain testimony offered to prove special damages, that is, Medlin's economic loss arising out of loss in value of his stock in International Security Group. Specifically, complaint is made of expert testimony projecting profits and expert opinion evidence based on assumptions not supported by the evidence. We do not understand the broadcaster to dispute the fact that economic loss was suffered, or to complain that the amount of the loss as found by the jury was excessive.

The record shows that International Security Group commenced the manufacture and sale of security vehicles in January 1977. At the time of the broadcast in July 1979, it was selling in about 28 foreign countries and employed about 198 workers. Individual sales of vehicles in 1977 numbered 50, in 1978 about 120, and the first six months of 1979 about 190. Gross sales in 1977 and 1978 totaled about $2 million and $4.3 million dollars yielding profits of $8,000.00 and $132,000.00 respectively. Gross sales for the first six months of 1979 were $6 million, and after the broadcast no sales were made. International Security Group soon after became bankrupt.

The testimony is conflicting regarding the reasons for International Security Group's failure—whether because its suppliers and credit sources withdrew their support because of the broadcast, or because of other reasons not directly related to the broadcast. The jury obviously believed the broadcasts to be a significant reason because it awarded Medlin $100,000.00 as special damages arising out of loss of value in his stock. This was a small fraction of the value to which Medlin's experts testified.

[22] **[23]** The broadcaster complains that the court erred in allowing Medlin's expert to project profits because the business did not have a history of profits. It also complains that the expert, in calculating the value of the business, assumed as an intangible asset certain patents which Medlin had never assigned to the International Security Group. We conclude that if admission of this testimony was error, it was harmless. We are thus persuaded, first, because the jury awarded only a fraction of the value asserted. Second, and more importantly, the uncontroverted evidence shows that in 1978 Medlin paid $120,000.00 for 10% of the stock of International Security Group. There is no claim that this sale and purchase was not an arm's length transaction, and we believe it to be the most reliable evidence of the value of Medlin's stock before the broadcast. Here also, the jury's award is a small fraction of the value demonstrated by this evidence. We find no reason in the record to disturb the jury's finding with respect to special damages.

[24] **[25]** The broadcaster next urges that the court erred in submitting three special issues which it claims to be duplicitous of other issues thus "highlighting plaintiff's case." We are not persuaded that the issues are duplicitous or immaterial. Rather, it appears that out of an abundance of caution the court submitted issues which were shades of others submitted. For example, in Issue No. 3 the court applied the ordinary negligence standard to knowledge of falsity. Issue No. 5 applied the same standard to the act of making the broadcast and Issue No. 8 inquired of the *New York Times* standard of malice. Under the holdings of *Gertz* and *Foster* none of these issues are immaterial because ordinary negligence is necessary to show a right to actual damages and a finding of malice is necessary for punitive damages.

[26] Similarly, Issue No. 8, the *New York Times* standard for malice, and Issue No. 9, the Texas common law standard for malice, are shades of one another. While *Foster* seemed to adopt the *New York Times* standard, the common law standard has never been disapproved. Although an affirmative answer to either issue is sufficient to support an award for punitive damages, ***631** we cannot agree that the court erred in submitting both.

[27] **[28]** **[29]** We do not consider Special Issue No. 5 to be duplicitous of any other issue. This issue inquired whether the content of the broadcast would warn a prudent broadcaster of its defamatory potential. Both *Gertz* and *Foster* teach that a defamation may not be predicated upon a factual misstatement unless the content of the statement would warn a prudent broadcaster of its defamatory potential. Finally, we observe that there is nothing inherently prejudicial in submitting an immaterial issue. Our standard of review is to determine if the unnecessary issues amounted to such a denial of rights as was reasonably calculated to cause and probably did cause the rendition of an improper judgment. *Fisher v. Leach,* 221 S.W.2d 384, 390 (Tex.Civ.App.—San Antonio 1949, writ ref'd n.r.e.); TEX.R.CIV.P. 434. We conclude that such is not shown in this case.

[30] The broadcaster next complains that the court erred in admitting into evidence certain "stilled" portions of the video broadcast. It argues that separate scenes and sentences of a defamatory statement may not be isolated from the whole and independently examined. Here it appears that the stills were offered in connection with the examination of the reporter, Gentry, for the purpose of demonstrating the editing process by which the entire broadcast was prepared. These circumstances are distinguished from those in *Houston v. Interstate Circuit, Inc.* 132 S.W.2d 903 (Tex.Civ.App.—Galveston 1939, no writ), relied upon by the broadcaster. There the question was whether the motion picture as a whole was libelous. Here the entire text of the broadcast was before the jury as was the entire video portion. The same effect could be accomplished by stopping the video at selected intervals and the broadcaster makes no effort to show how the continuous showing of the entire broadcast might have persuaded the jury that the statement was not false. In short, the broadcaster has not attempted to demonstrate that it was prejudiced in any way. We conclude that if error existed, it was harmless.

[31] Finally, the broadcaster complains that Medlin was allowed to impeach the testimony of an earlier witness without having established a predicate for the impeaching testimony. We cannot agree that a predicate was not established. The next to last witness to testify was John Yoggerst, a bank loan officer, who testified that the broadcasts did not affect his loan committee's decision to turn down a loan to International Security Group. When Yoggerst had left the courtroom, Medlin, the final witness, was allowed to take the stand and controvert his testimony. We view Medlin's testimony as merely cumulative of other testimony before the jury, because early in the trial there was considerable testimony that International Security Group's failure was partially caused by the refusal of suppliers and lenders to extend further credit. The admission of this cumulative

testimony does not demonstrate such an abuse of discretion by the trial court as to warrant reversal.

We conclude, therefore, that the points of error presented for review contain no grounds for reversal; however, we are persuaded that the amounts awarded as actual and punitive damages are excessive. Consequently, the case must be reversed unless a remittitur is filed for the excess. We grant the appellee fifteen (15) days from the date of our judgment to remit one-half of the actual damages and one-half of the punitive damages found—a total remittitur of $750,000.00; otherwise, the case will be reversed and remanded for a new trial.

Affirmed on condition of remittitur.

All Citations

693 S.W.2d 621

Footnotes

* Assigned to this case by the Chief Justice of the Supreme Court of Texas as authorized pursuant to Paragraph (d) of Article 1812, Texas Revised Civil Statutes as amended by H.B. 2244 (Acts 1983, 68th Leg., p. 1912, Ch. 354, Sec. 1, effective June 16, 1983).

TAB 11
In re Lester
(Tex. 2020)

602 S.W.3d 469

Editor's Note: Additions are indicated by Text and deletions by ~~Text~~ .

Supreme Court of Texas.

IN RE Colton LESTER, Relator

No. 18-1041

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Argued January 29, 2020

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OPINION DELIVERED: May 15, 2020

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Rehearing Denied June 19, 2020

Synopsis

Background: Defendant petitioned for a writ of mandamus, after being convicted of and serving part of his sentence for online solicitation of a minor despite the statute having been ruled unconstitutional, and after Comptroller of Public Accounts denied defendant's application for wrongful-imprisonment compensation.

[Holding:] The Supreme Court, Devine, J., held that defendant was actually innocent, and thus was entitled to wrongful-imprisonment compensation.

Petition conditionally granted.

Boyd, J., filed dissenting opinion.

Blacklock, J., filed dissenting opinion in which Boyd, J., joined in part.

Procedural Posture(s): Petition for Writ of Mandamus.

West Headnotes (11)

[1] **Courts** Appellate or Supreme Courts

The Supreme Court has exclusive jurisdiction to mandamus the Comptroller of Public Accounts, as an executive officer of the State. Tex. Gov't Code Ann. § 22.002(c).

[2] **States** State expenses and charges and statutory liabilities

Defendant was actually innocent of crime of attempted online solicitation of minor, and thus was entitled to wrongful-imprisonment compensation under Tim Cole Act, even though defendant did attempt to sexually proposition a minor over text message, where Court of Criminal Appeals had declared the criminal statute unconstitutional before defendant engaged in his conduct, making conduct not a crime when it was committed. Tex. Civ. Prac. & Rem. Code Ann. § 103.001(a)(2)(B); Tex. Penal Code Ann. § 33.021(b).

3 Cases that cite this headnote

[3] **Habeas Corpus** Criminal liability; innocence

There are two types of actual-innocence claims in state habeas law: first, substantive claims in which a petitioner asserts that newly discovered evidence establishes an applicant's innocence, and second, procedural claims that provide a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.

1 Cases that cite this headnote

[4] **Courts** Other particular matters, rulings relating to

Courts Appellate jurisdiction of Supreme Court in general

Law-of-the-case doctrine did not apply, and Supreme Court's determination of whether defendant was actually innocent, as would allow him to obtain wrongful-imprisonment compensation under Tim Cole Act, did not encroach on Court of Criminal Appeals' criminal-law jurisdiction, despite contention that Court of Criminal Appeals did not adjudicate actual innocence on defendant's habeas petition, so construing disposition differently would have intruded on jurisdiction; Supreme Court was

considering petition for writ of mandamus rather than subsequent appeal of defendant's criminal case, and Tim Cole Act was civil statute. Tex. Civ. Prac. & Rem. Code Ann. § 103.001(a)(2)(B).

3 Cases that cite this headnote

[5] **Appeal and Error** As law of the case in general

The law-of-the-case doctrine only applies in a subsequent appeal in the same case.

[6] **Appeal and Error** Imprisonment and incidents thereof

States State expenses and charges and statutory liabilities

The Tim Cole Act regarding wrongful-imprisonment compensation is a civil statute that the Supreme Court interprets de novo. Tex. Civ. Prac. & Rem. Code Ann. § 103.001 et seq.

[7] **States** State expenses and charges and statutory liabilities

Wrongful-imprisonment compensation is not limited to only those cases in which the Court of Criminal Appeals expressly states that the petitioner is actually innocent. Tex. Civ. Prac. & Rem. Code Ann. §§ 103.001(a)(2)(B), 103.051(b-1).

[8] **States** State expenses and charges and statutory liabilities

Actual innocence, as would allow wrongful-imprisonment compensation, asks whether the petitioner did not, in fact, commit the charged offense or any of the lesser-included offenses. Tex. Civ. Prac. & Rem. Code Ann. § 103.001(a)(2)(B).

[9] **States** State expenses and charges and statutory liabilities

Actual innocence, as would allow wrongful-imprisonment compensation, is not an inquiry into the legal status of a petitioner's conviction or the legal status of the statute in question; rather, actual innocence is an inquiry of historical fact. Tex. Civ. Prac. & Rem. Code Ann. § 103.001(a)(2)(B).

[10] **Statutes** Effect of Total Invalidity

An unconstitutional statute is legally void from its inception.

1 Cases that cite this headnote

[11] **States** State expenses and charges and statutory liabilities

Actual-innocence claims under the Tim Cole Act for wrongful-imprisonment compensation encompasses substantive claims in which a petitioner asserts that newly discovered evidence establishes an applicant's innocence, procedural claims that provide a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits, and the narrow class of cases in which the petitioner's actions were not criminal at the time the acts were committed. Tex. Civ. Prac. & Rem. Code Ann. § 103.001(a)(2)(B).

1 Cases that cite this headnote

West Codenotes

Recognized as Unconstitutional

Tex. Penal Code Ann. § 33.021(b)

***471** ON PETITION FOR WRIT OF MANDAMUS

Attorneys and Law Firms

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Opinion

Justice Devine delivered the opinion of the Court, in which Chief Justice Hecht, Justice Green, Justice Guzman, Justice Lehrmann, Justice Busby, and Justice Bland joined.

The sole issue in this original mandamus proceeding is whether relator Colton Lester is entitled to wrongful-imprisonment compensation under the Tim Cole Act.[1] We conclude that Lester is entitled to Tim Cole Act compensation because the conduct for which he was imprisoned was not a crime at any time during his criminal proceedings. We therefore conditionally grant Lester's petition for writ of mandamus.

I

This is an egregious case of the criminal-justice system gone wrong. In 2013, the Court of Criminal Appeals ruled that Section 33.021(b) of the Texas Penal Code (Online Solicitation of a Minor) was unconstitutional. *Ex parte Lo*, 424 S.W.3d 10 (Tex. Crim. App. 2013). In 2014, seventeen-year-old Lester attempted to sexually proposition a minor over text message. Lester was charged with attempted online solicitation of a minor under Section 33.021(b), a third-degree felony, even though the Court of Criminal Appeals had already declared the statute unconstitutional. Unaware that his prosecution was illegal, Lester pleaded guilty to the charge and received a five-year deferred adjudication sentence. Lester's probation was later revoked, and Lester was sentenced to three years in prison. He ultimately served two years in prison before obtaining relief on his first petition for a writ of habeas corpus. After his release, Lester applied for compensation under the Tim Cole Act. His application was denied. Lester then filed an application to cure, but that application was also denied. Lester subsequently filed this original proceeding.

***472** **[1]** The Tim Cole Act entitles certain wrongfully imprisoned individuals to compensation from the State. The Texas Comptroller of Public Accounts has the duty to determine eligibility for Tim Cole Act compensation. TEX. CIV. PRAC. & REM. CODE § 103.051(b)(1). This duty is purely ministerial. *Id.* § 103.051(b-1). The Act further provides that an applicant may challenge the Comptroller's denial of compensation by bringing an action for mandamus relief. *Id.* § 103.051(d)–(e). This Court has exclusive jurisdiction to mandamus the Comptroller, as an executive officer of the State, and thus the mandamus action must be filed as an original proceeding here. *See* TEX. GOV'T CODE § 22.002(c) (providing that only the Supreme Court has authority to issue writs of mandamus against executive officers of the state); *In re Smith*, 333 S.W.3d 582, 585 (Tex. 2011).

[2] The Tim Cole Act provides several avenues for compensation, but only one is at issue here. Texas Civil Practice & Remedies Code Section 103.001(a)(2)(B) provides that a wrongfully imprisoned person is entitled to compensation if the person "has been granted relief in accordance with a writ of habeas corpus that is based on a court finding or determination that the person is actually innocent of the crime for which the person was sentenced." Lester contends that he is "actually innocent" of the crime of online solicitation of a minor because the Court of Criminal Appeals had already declared Section 33.021(b) unconstitutional before Lester sent the offending text message.

II

[3] In *In re Allen*, 366 S.W.3d 696, 706 (Tex. 2012), we acknowledged that "actual innocence" is a "legal term of art [that] has acquired a technical meaning in the habeas corpus context." There are two types of actual-innocence claims in Texas habeas law. *Id.* at 703 (citing *Ex parte Franklin*, 72 S.W.3d 671, 675 (Tex. Crim. App. 2002)). First, *Herrera* claims are substantive claims in which a petitioner "asserts that newly discovered evidence establishes an applicant's innocence." *Id.*; *see also* *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203

(1993). "The most familiar *Herrera*-type cases are those in which DNA testing leads to exoneration of the applicant." *Allen*, 366 S.W.3d at 703. Second, *Schlup* claims are procedural claims that provide a "gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Id.* at 704 (quoting *Schlup v. Delo*, 513 U.S. 298, 315, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995)). Thus, a petitioner may succeed on a *Schlup* claim only if the petitioner's claims for habeas relief are procedurally barred.

Here, Lester does not have any "newly discovered evidence" on which to base a *Herrera* claim. Lester's habeas petition also was not procedurally barred, eliminating the need for a *Schlup* gateway claim. Thus, Lester does not have either type of actual-innocence claim currently recognized in Texas habeas law.

However, habeas actual-innocence jurisprudence—and our related decision in *Allen*—is based on the assumption that the petitioner's alleged conduct was criminal at the time it was committed. For example, in *Allen*, petitioner Billy Frederick Allen was charged with murder. 366 S.W.3d at 701. There was no question—before, during, or after Allen's criminal trial—that Allen's alleged actions, if proven, constituted a crime. Rather, Allen relied on newly discovered exculpatory evidence to successfully argue that (1) he probably did not commit the crime, so the court should consider his procedurally barred successive habeas petition (a *Schlup* claim); and (2) his counsel was unconstitutionally deficient, ***473** entitling him to relief. *Ex parte Allen*, Nos. AP-75580, AP-75581, 2009 WL 282739 (Tex. Crim. App. Feb. 4, 2009). We ultimately concluded that Allen was entitled to Tim Cole Act compensation because his successful *Schlup* claim brought him within the "narrow class of cases that satisfy the actual innocence standard." *Allen*, 366 S.W.3d at 710. But again, our decision assumed that Allen's conduct would have been criminal had the state been able to prove that Allen in fact committed the murders for which he was charged.

Here, as a matter of historical fact, Lester's conduct was not a crime at the time it was committed because the Court of Criminal Appeals had already declared the online-solicitation statute unconstitutional. Lester is therefore actually innocent in the same way that someone taking a stroll in the park is actually innocent of the crime of walking on a sidewalk. No such crime exists. Just because existing actual-innocence jurisprudence does not contemplate something as outrageous as Lester's case does not mean that Lester, who committed no crime, is anything but actually innocent.

Our decision today does not conflict with the Court of Criminal Appeals' decision in *Ex parte Fournier*, 473 S.W.3d 789 (Tex. Crim. App. 2015). In *Fournier*, as in this case, the petitioners sought habeas relief on the ground that their convictions for online solicitation of a minor under Section 33.021(b) were unconstitutional. *Id.* at 790. Although the *Fournier* Court concluded that the petitioners were entitled to habeas relief, the Court held that the petitioners were not "actually innocent" of the crime for which they were convicted. *Id.* at 793. The Court reasoned that the petitioners were not "actually innocent" of the crime of online solicitation of a minor because the "conduct on which the criminal prosecution was based still exists as a matter of historical fact." *Id.*

[4] **[5]** **[6]** The State urges us to adopt *Fournier*'s reasoning here: Lester admits that he, in fact, sent the text message in question, so the State reasons that Lester cannot be "actually innocent" of the crime. Again, however, the *Fournier* decision assumes that the underlying conduct would have been a crime if proven. *See* *id.* at 797 (Alcala, J., concurring) ("[The petitioners] did commit acts that, at the time those acts were committed, were considered criminal under the laws of this State." (emphasis added)). Indeed, *Fournier* acknowledged that a petitioner is actually innocent when the petitioner "did not, in fact, commit the charged offense or any of the lesser-included offenses." *Id.* at 792 (quoting *State v. Wilson*, 324 S.W.3d 595, 598 (Tex. Crim. App. 2010)). The *Fournier* petitioners were charged under Section 33.021(b) before the Court of Criminal Appeals declared the statute unconstitutional. *Id.* at 790. Thus, the *Fournier* petitioners did, "in fact, commit the charged offense" of online solicitation of a minor. *Id.* at 792. In contrast, the Court of Criminal Appeals

had already declared Section 33.021(b) unconstitutional at the time Lester sent the offending text message, and Lester's prosecution under that statute was illegal from its inception. Lester therefore could not have "commit[ted] the charged offense" of online solicitation of a minor because that offense, in fact, no longer existed. *Id.*; *see also* *Reyes v. State*, 753 S.W.2d 382, 383 (Tex. Crim. App. 1988) ("[A]n unconstitutional statute, as a general rule, amounts to nothing and accomplishes nothing and is no law."). Lester did not commit acts that, at the time those acts were committed, were criminal under the laws of the State. *See* *Fournier*, 473 S.W.3d at 797 (Alcala, J., concurring). Thus, *Fournier* is consistent ***474** with our holding today. [2]

Both dissents see *Fournier* differently. Justice Blacklock's dissent observes that the Court of Criminal Appeals used similar language in its orders granting relief in this case and in *Fournier*. *Post* at 481. Thus, because the Court of Criminal Appeals expressly rejected the *Fournier* petitioners' actual-innocence theory, Justice Blacklock concludes that we must do the same here. Justice Blacklock also emphasizes that the Tim Cole Act requires an applicant's supporting papers to "clearly indicate on their face" that the applicant was granted relief on actual-innocence grounds. *Id.* at 479; TEX. CIV. PRAC. & REM. CODE § 103.051(b-1). In light of *Fournier*, Justice Blacklock argues, Lester could not have made such a showing. *Post* at 481.

[7] However, this approach elevates form over substance. At bottom, Justice Blacklock would limit Tim Cole Act compensation to only those cases in which the Court of Criminal Appeals expressly states that the petitioner is actually innocent. *See id.* at 478. We do not see the Act as so limited. First, the Act does not include this express requirement. And second, from a practical perspective, such a limited approach would essentially prohibit any further litigation about who is eligible for compensation under the Act. We have already declined to adopt such a rigid approach. *See* *Allen*, 366 S.W.3d at 709–10 (holding that the petitioner was entitled to Tim Cole Act compensation, even though the Court of Criminal Appeals did not "explicitly state that its holding [was] based on actual innocence").

Justice Boyd's dissent takes yet another view of *Fournier*. Justice Boyd first observes the "well-established principle[ ]" that an unconstitutional statute is void from its inception. *Post* at 478. Thus, according to Justice Boyd, all individuals convicted under an unconstitutional statute must either be actually innocent from the beginning or not actually innocent at all. *Id.* at 478. Put differently, the statute was void at all times; therefore, Justice Boyd argues, all convictions secured under the statute are equally void, regardless of whether the conviction occurred before or after the Court of Criminal Appeals declared the statute unconstitutional. Thus, there can be no difference between the legal status of the *Fournier* petitioners' convictions (secured before the statute was declared unconstitutional) and Lester's conviction (secured after the statute was declared unconstitutional). Because *Fournier* held that the petitioners in that case were not actually innocent, Justice Boyd contends that Lester also cannot be actually innocent.

***475** **[8]** **[9]** **[10]** However, this approach blurs the lines between the distinct concepts of actual innocence and legal innocence. Lester and the *Fournier* petitioners are all legally innocent because their convictions were secured under an unconstitutional statute that was void from its inception. However, actual innocence asks a different question: whether the petitioner "did not, in fact, commit the charged offense or any of the lesser-included offenses." *Fournier*, 473 S.W.3d at 792 (quoting *Wilson*, 324 S.W.3d at 598). Thus, actual innocence is not an inquiry into the legal status of a petitioner's conviction or the legal status of the statute in question. Rather, actual innocence is an inquiry of historical fact. The *Fournier* petitioners did, in fact, commit the crime of online solicitation because they committed certain acts that met each element of the online-solicitation offense that was in force at that time. In contrast, as a matter of historical fact, Lester's actions did not constitute an offense at the time he committed them. Lester is therefore actually innocent, while the *Fournier* petitioners are not. But nothing about the historical nature of the actual innocence inquiry undermines the longstanding rule that an unconstitutional statute is legally void from its inception. *See* *Reyes*, 753 S.W.2d at 383.

III

[11] Finally, we acknowledge that parts of our *Allen* decision suggest that actual innocence under the Tim Cole Act is limited to only *Herrera* or *Schlup* claims. *See* *Allen*, 366 S.W.3d at 708–09. However, that limiting language was immaterial to *Allen*'s central holding—which we leave undisturbed—that *Schlup* claims are actual-innocence claims under the Tim Cole Act. *See* *id.* at 710. While we acknowledge Justice Blacklock's view that *Allen* should govern in its entirety, *post* at 481, the *Allen* decision did not contemplate the type of patently unjust (and unconstitutional) prosecution before us today. We now hold that actual innocence under the Tim Cole Act encompasses *Herrera* claims, *Schlup* claims, and that "narrow class of cases" in which the petitioner's actions were not criminal at the time the acts were committed. *See* *Allen*, 366 S.W.3d at 710.

The Court of Criminal Appeals, in granting Lester habeas relief, determined that Lester's conviction was "not valid" because the Court had declared the online-solicitation statute unconstitutional before Lester's conviction. Lester is therefore entitled to compensation under the Tim Cole Act because he "has been granted relief in accordance with a writ of habeas corpus that is based on a court finding or determination that the person is actually innocent of the crime for which the person was sentenced." TEX. CIV. PRAC. & REM. CODE § 103.001(a)(2)(B). Lester is actually innocent because his wrongful conviction is based on conduct that was not a crime. The Comptroller concluded, however, that Lester's application for wrongful-imprisonment compensation "did not meet the actual innocence requirement of [this provision]." Because it did and the Comptroller's duty under the Act is purely ministerial, we direct the Comptroller to compensate Lester under the terms of the Tim Cole Act. We assume that the Comptroller will comply, and a writ of mandamus will issue only in the event he fails to do so.

The petition for writ of mandamus is conditionally granted.

Justice Boyd filed a dissenting opinion.

Justice Blacklock filed a dissenting opinion, in which Justice Boyd joined as to Part I.

Justice Boyd, dissenting.

***476** As the Court correctly observes, this is "an egregious case of the criminal-justice system gone wrong." *Ante* at 483. And I applaud the Court's diligent effort to right that wrong. As JUSTICE BLACKLOCK correctly observes, however, the issue before us is not whether we think the state should compensate Colton Lester for wrongful imprisonment, but whether the Tim Cole Act authorizes such compensation under these circumstances. The Act authorizes compensation for a person who has "been granted relief in accordance with a writ of habeas corpus that is based on a court finding or determination that the person is *actually innocent* of the crime for which the person was sentenced." TEX. CIV. PRAC. & REM. CODE § 103.001(a)(2)(B) (emphasis added). I join section I of JUSTICE BLACKLOCK's dissenting opinion, concluding that Lester's right to compensation depends not on whether we think Lester was "actually innocent" of the crime for which he was sentenced, but on whether the Court of Criminal Appeals granted Lester habeas relief for that reason. And I agree with JUSTICE BLACKLOCK that the Court of Criminal Appeals did not grant Lester relief based on actual innocence. But I agree with that conclusion for a completely different reason.

In 2014, Lester (then seventeen years old) sent a text message attempting to sexually proposition a minor. When charged with the crime of attempted online solicitation of a minor in violation of Texas Penal Code section 33.021(b), [1] he pleaded guilty. The court initially granted him five years of deferred adjudication, but he violated the terms of community supervision two years later. The court then declared him guilty of the offense and sentenced him to three years in prison.

But in 2013, the year *before* Lester sent the offending text message, the Texas Court of Criminal Appeals declared section 33.021(b) facially unconstitutional because it prohibited constitutionally protected speech and was not narrowly drawn to impose the least restrictive means to achieve the government's compelling interest in protecting children from sexual abuse. *See* *Ex parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013). When Lester engaged in the offending conduct in 2014, section 33.021(b) remained in the Penal Code as it existed in 2013. In 2015, the legislature amended the Code, revising section 33.021(b) to require an intent to commit particular offenses rather than

an intent to arouse or gratify a person's sexual desire.[2] The Court of Criminal Appeals ***477** has not yet considered whether the 2015 amendments corrected the constitutional problems identified in *Lo*.

Meanwhile, after serving two years of his prison sentence, Lester obtained a writ of habeas corpus setting aside his conviction based on the statute's unconstitutionality as declared in *Lo*. The writ did not expressly find or determine that Lester was actually innocent of the offense. Nevertheless, he sought compensation for wrongful imprisonment under the Tim Cole Act.

Lester is not the only person convicted under section 33.021(b) who later sought relief based on actual innocence. In 2015, the Court of Criminal Appeals granted habeas relief to two others on the ground that (as the Court had declared in *Lo*) the statute was unconstitutional. *Ex parte Fournier*, 473 S.W.3d 789, 796 (Tex. Crim. App. 2015). But the Court of Criminal Appeals specifically refused to grant relief on the ground of actual innocence. *Id.* Because the applicants in *Fournier* did "not contest that they engaged in the conduct for which they were convicted" and the "conduct on which the criminal prosecution was based still exists as a matter of historical fact," the Court concluded that they did "not assert true claims of actual innocence for which [habeas] relief may be granted." *Id.* at 793.

Lester finds himself in the same predicament. He does not deny that he engaged in conduct the Penal Code prohibited, and his conduct still exists as a matter of historical fact. Although he obtained habeas relief based on *Lo*'s declaration that the statute was unconstitutional, *Fournier* requires the conclusion that the relief was not based on actual innocence.

Instead of disagreeing with and rejecting the Court of Criminal Appeals' decision in *Fournier*, the Court attempts to distinguish it on the ground that the applicants in that case committed the offending conduct before *Lo* declared the statute unconstitutional, while Lester committed the conduct after *Lo*. According to the Court, Lester (unlike the *Fournier* applicants) obtained habeas relief declaring him actually innocent because his conduct was not "criminal at the time it was committed." *Ante* at 472. But the Court's attempt to distinguish this case from *Fournier* rests on a misunderstanding of the effect of the *Lo* decision declaring section 33.021(b) unconstitutional. I cannot agree with the Court's distinction because, as we explain in another case decided today, unconstitutional laws are void *ab initio* and invalid from inception. *See Ex parte E.H.* 602 S.W.3d 486, 500 (Tex. May 15, 2020).

The United States Supreme Court explained long ago that an "unconstitutional law is void, and is no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void." *Ex parte Siebold*, 100 U.S. 371, 376, 25 L.Ed. 717 (1879). As a matter of law, section 33.021(b) was " 'void from its inception ... as if it had never been,' " and "is to be considered no statute at all." *Smith v. State*, 463 S.W.3d 890, 895 (Tex. Crim. App. 2015) (quoting *Reyes v. State*, 753 S.W.2d 382, 383 (Tex. Crim. App. 1998)). And, as we explain today in *E.H.*, "in the absence of the statute, no 'offense' ever occurred" under section 33.021(b), at least prior to its amendment in 2015. *E.H.*, 602 S.W.3d at ——; *see Offense*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A violation of the law; ... a crime ...."). If (as the Court of Criminal Appeals concluded) the applicants in ***478** *Fournier* were entitled to habeas relief, they were entitled to that relief because section 33.021(b) was never valid to begin with, not because it became invalid when the Court of Criminal Appeals issued its decision in *Lo*. Under *Fournier*, those applicants, like Lester, were entitled to habeas relief, but they were not "actually innocent" of engaging in the conduct the statute prohibited.

Contrary to these well-established principles, the Court's holding today can only be correct if an unconstitutional statute is not *completely* void and ineffective until a court declares it to be unconstitutional. Under the Court's analysis, section 33.021(b) retained some unidentified effect after *Lo* declared it unconstitutional, prohibiting the *Fournier* applicants from being actually innocent because they committed the conduct before *Lo* but making Lester actually innocent because he committed the

conduct after *Lo*. But an unconstitutional statute is void from its inception. *E.H.*, 602 S.W.3d at 494. Its " 'unconstitutionality dates from the time of [the statute's] enactment, and not merely from the date of the decision so branding it.' " *Reyes*, 753 S.W.2d at 383–84 (quoting 16 AM. JUR. 2d *Constitutional Law* § 256 (1979)).

As the Court explains, Lester "could not have 'commit[ted] the charged offense' of online solicitation of a minor because that offense, in fact, no longer existed." *Ante* at 473. But under *Fournier*, his habeas relief was not based on a finding or determination of actual innocence. For both Lester and the *Fournier* applicants, the offense "no longer existed" from the time section 33.021(b) was enacted in 2007 because *Lo* declared the statute unconstitutional in 2013. Regardless of when the person committed the offending conduct, the conviction cannot stand because the statute's unconstitutionality prevented an offense from ever occurring. But whether the person committed the conduct before or after *Lo*, the person is not actually innocent because "*Lo* is irrelevant to whether [the person's] conduct was in fact committed." *Fournier*, 473 S.W.3d at 793. Because Lester cannot meet the Tim Cole Act's requirement of "actual innocence," I would deny the petition for the writ of mandamus. I therefore respectfully dissent.

Justice Blacklock, joined by Justice Boyd as to Part I only, dissenting.

No provision of the Tim Cole Act authorizes compensation in "egregious case[s] of the criminal-justice system gone wrong." *Ante* at 476. Try as it might to make the Act conform to its sense of what Colton Lester deserves, the Court cannot alter the Act's stubbornly narrow text or what the Court of Criminal Appeals (CCA) and this Court have already decided about "actual-innocence" claims and eligibility for wrongful-imprisonment compensation. Lester pleaded guilty to online solicitation of a minor for sex. His conviction was vacated. But he is not "actually innocent," as that concept is understood in habeas corpus law. No court has ever found him to be "actually innocent" (until today), and the Tim Cole Act comes nowhere close to mandating that Texas taxpayers compensate him. The Court's outrage over Lester's prosecution does not change what the Tim Cole Act says or how this Court and the CCA have previously understood "actual-innocence" claims. Lester is not entitled to compensation, and his petition should be denied.

I respectfully dissent.

I.

The Act states that a wrongfully imprisoned person is entitled to compensation if the person "has been granted relief in accordance with a writ of habeas corpus ***479** that is based on a court finding or determination that the person is actually innocent of the crime for which the person was sentenced." TEX. CIV. PRAC. & REM. CODE § 103.001(a)(2)(B). This statutory right to compensation is not triggered by the claimant's "actual innocence" in some abstract sense. In other words, it does not matter whether this Court thinks Lester deserves to be called "actually innocent." Under the statute's text, all that matters is whether *another* court, presented with a habeas corpus petition, has *already* granted relief to Lester "based on a court finding or determination that [Lester] is actually innocent." *Id.* Again, it does not matter whether Lester was "actually innocent" under whatever theory of "actual innocence" this Court announces. Under the statute, what matters is whether the habeas relief Lester *actually obtained* was based on "a court finding or determination" that he "is actually innocent." *Id.*

This Court's decision in *In re Allen* accurately stated the proper standards for deciding wrongful-imprisonment compensation claims. 366 S.W.3d 696, 706 (Tex. 2012). The standards dictated by the Act and by *Allen* look nothing like the "actual-innocence" analysis the Court applies today. The Act requires that we focus exclusively on whether the criminal courts granted habeas relief on "actual-innocence" grounds, as that term is understood in habeas corpus law. Whether we think the applicant is "actually innocent," as we believe that concept should be understood, has nothing to do with it. "Whether compensation may be awarded under the TCA depends, in the first instance, on determinations in the criminal courts of the merits of the applicant's conviction." *Id.* at 703. "The term 'actual innocence' has a particular meaning within habeas corpus jurisprudence, in that it is a particular type of claim 'that may be raised in a collateral attack on a conviction.' " *Id.* at 706 (quoting *Ex parte Tuley*, 109 S.W.3d 388, 390 (Tex. Crim.

App. 2002)). "Therefore, in order for [Lester] to be eligible for compensation under the TCA, the Court of Criminal Appeals' determination must be based on actual innocence." *Id.* at 709. In *Allen*, we did not ask, as the Court does today, whether it was fair or just or "outrageous" to think of Allen as "anything but actually innocent." *Ante* at 473. Instead, we did what the statute commands. We limited the analysis to "whether the court order [awarding habeas relief] was granted or rendered on the basis of the claimant's actual innocence." *Allen*, 366 S.W.3d at 709.

As explained above, section 103.001(a)(2)(B) limits the inquiry to an examination of the habeas-granting court's basis for relief. And as *Allen* recognizes, other provisions of the Tim Cole Act reinforce this limitation. "To apply for compensation under this subchapter, the claimant must file with the comptroller's judiciary section," among other things "(2) a verified copy of the pardon, court order, motion to dismiss, and affidavit, as applicable, justifying the application for compensation." *Id.* § 103.051(a)(2). And then, crucially:

> In determining the eligibility of a claimant, the comptroller shall consider only the verified copies of documents filed under Subsection (a)(2). If the filed documents do not *clearly indicate on their face* that the person is entitled to compensation under Section 103.001(a)(2), the comptroller shall deny the claim.

Id. § 103.051(b–1) (emphasis added). Thus, the question we should be asking is not merely whether the CCA's grant of habeas relief to Lester "is based on a court finding or determination that [Lester] is actually innocent." *Id.* § 103.001(a)(2)(B). The proper question is whether the CCA's order and related papers "clearly indicate on their face" that Lester received habeas ***480** relief "based on a court finding or determination that [he] is actually innocent." *Allen*, 366 S.W.3d at 709 (describing the correct inquiry as "whether the Court of Criminal Appeals' decision clearly indicated on its face that the writ was based on a court finding or determination of actual innocence.").

Despite the statute's plain text and *Allen*'s clear and accurate instruction for how to apply the text, the Court's opinion all but ignores what ought to be the controlling document in this case: the CCA decision granting habeas relief to Lester. Only if *that decision* is "based on a court finding or determination of actual innocence" is Lester entitled to compensation. The decision is worth quoting in its entirety:

> Pursuant to the provisions of Article 11.07 of the Texas Code of Criminal Procedure, the clerk of the trial court transmitted to this Court this application for a writ of habeas corpus. *Ex parte Young*, 418 S.W.2d 824, 826 (Tex. Crim. App. 1967). Applicant was convicted of attempted online solicitation of a minor and sentenced to imprisonment. TEX. PENAL CODE § 33.021(b). There was no direct appeal.
>
> In *Ex parte Lo*, this Court declared the statute of conviction, § 33.021(b), unconstitutional. *Ex parte Lo*, 424 S.W.3d 10 (Tex. Crim. App. 2013). The trial court, with the State's agreement, finds that Applicant's conviction is not valid in light of *Ex parte Lo*. This Court agrees. *Ex parte Chance*, 439 S.W.3d 918 (Tex. Crim. App. 2014).
>
> Relief is granted. The judgment of conviction for attempted online solicitation of a minor in cause number 23,538 from the 258th District Court of Polk County is set aside, and the cause is remanded to the trial court to dismiss the indictment.

Ex parte Lester, No. WR-88,227-01, 2018 WL 1736686, at *1 (Tex. Crim. App. April 11, 2018). In these three short paragraphs, the CCA granted habeas relief to Lester "in light of *Ex parte Lo*," in which the CCA declared the online-solicitation statute unconstitutionally overbroad. *Id.* The CCA did not mention "actual innocence," much less "clearly indicate" that it was granting relief on that basis. The overbreadth of the online-solicitation statute—not Lester's "actual innocence"—formed the basis of the CCA's grant of relief to Lester.

Allen makes clear that when deciding what "actual innocence" means, we must look to what it means in the CCA's habeas corpus decisions. 366 S.W.3d at 703–07 (analyzing the CCA's understanding of "actual-innocence" claims in the habeas context). At first glance, it might seem odd that this Court is bound by the CCA's understanding of the statutory term "actual innocence" when we are deciding what a non-criminal statute like the Tim Cole Act means. Recall, however, that the inquiry is not whether the claimant is "actually innocent" as this Court understands that term. The inquiry is whether the CCA or another criminal court granted habeas relief based on a "finding or determination" of "actual innocence." Deciding what another court based its decision on can be tricky business, but it is what the statute commands us to do. In so doing, we cannot use our own impression of the equities of the case to discover a "finding or determination" of "actual innocence" that the CCA itself never made. Instead, we must look to what the CCA actually said in its ruling, and what it has said about "actual-innocence" findings in related cases, an approach we previously ratified in *Allen*. The statute does not authorize us to announce new theories of "actual innocence" never recognized by the CCA and then claim that CCA rulings *in the past* were premised ***481** on our newly announced theory of "actual innocence." We must not put words in another court's mouth.

Under the Act's text and *Allen*, we must ask whether the CCA considered itself to be granting relief on the basis of "actual innocence," as that term is understood in habeas corpus law, when it granted Lester's habeas petition. Once the inquiry is properly defined, there is no question Lester cannot establish eligibility for compensation. To begin with, the CCA has explicitly disavowed the notion that habeas relief based on the criminal statute's unconstitutionality is tantamount to habeas relief based on "actual innocence." In *Ex parte Fournier*, the CCA rejected the argument that "*Lo* entitles [a]pplicants to [habeas] relief under an 'actual innocence' theory." 473 S.W.3d 789, 790 (Tex. Crim. App. 2015). The CCA squarely held in *Fournier* that applicants whose convictions are overturned based on *Ex parte Lo* have not been granted relief based on claims for "actual innocence." *Id.* at 710.

The Court seems to acknowledge that, under *Fournier*, most applicants who have had their online-solicitation convictions overturned under *Ex parte Lo* are not entitled to wrongful-imprisonment compensation because their habeas relief was not based on their "actual innocence." It claims Lester's case is distinguishable because he committed online solicitation of a minor after *Ex parte Lo* was decided. *Ante* at 471. Thus, the Court reasons, there was "no crime" for Lester to commit, and he is every bit as "actually innocent" as a person walking down the sidewalk. *Id.* at 473. As explained below, it is an oversimplification to say there was "no crime" for Lester to commit. *Infra* at 473. But even if the Court is right—even if the crime of online solicitation of a minor ceased to exist for all purposes the moment *Ex parte Lo* was decided—that does not mean the habeas relief Lester received from the CCA was based on "a finding or determination that [he] is actually innocent." It does not matter whether *Fournier* and this case are "distinguishable" by virtue of their timing relative to *Ex parte Lo*. What matters is whether the CCA order granting habeas relief to Lester is distinguishable from the comparable order in *Fournier* and the many other cases in which the CCA has granted relief in light of *Ex parte Lo*. The CCA has clarified that those orders do not grant relief on the basis of "actual innocence." *Fournier*, 473 S.W.3d at 791. Only if the order granting habeas relief to Lester or the supporting papers "clearly indicate on their face" that the CCA granted Lester's relief on grounds related to the timing of his prosecution after *Ex parte Lo* can Lester's case be distinguished from *Fournier* in a meaningful way.

Lester comes nowhere close to meeting this burden. He did not even argue to the CCA that he should be granted habeas relief under an "actual-innocence" theory due to his having been prosecuted after *Ex parte Lo*. Even if he had argued it, what matters is whether the CCA made a "finding or determination that [Lester] is actually innocent" because his prosecution came after *Ex parte Lo*. The CCA made no such "finding or determination." Quite the opposite, in fact. The passage in which the CCA described its reasons for granting relief to Lester reads: "The trial court, with the State's agreement, finds that Applicant's conviction is not valid in light of *Ex parte Lo*. This Court agrees. *Ex parte Chance*, 439 S.W.3d 918 (Tex. Crim. App. 2014)." *Ex parte Lester*, 2018 WL 1736686, at *1. Thus, the CCA granted habeas relief to Lester because it "agree[d]" that

Lester's "conviction is not valid in light of *Ex parte Lo*." This is *exactly* the same reason the CCA gave for granting habeas relief in *Fournier*, where it made clear it was *not* ***482** ruling on the basis of "actual innocence": "Although we find against Applicants in their claims for actual innocence relief, Applicants are entitled to relief under *Lo* and our subsequent decision in *Ex parte Chance*." *Fournier*, 473 S.W.3d at 796.

Not only do the CCA's decisions in *Ex parte Lester* and *Fournier* cite the exact same reason for granting habeas relief, they cite the exact same case—*Ex parte Chance*, 439 S.W.3d 918 (Tex. Crim. App. 2014) (per curiam). Chance committed his crime in 2008, and his direct appeals were exhausted in 2011, *Chance v. State*, No. 09-10-00506-CR, 2011 WL 303884, at *1 (Tex. App.—Beaumont Jan. 27, 2011), two years before *Ex parte Lo*. By citing *Ex parte Chance* in granting Lester's habeas petition, the CCA indicated it believed it was granting relief to Lester for the same reasons it had already granted relief to Chance. The CCA explained its reasoning in *Chance* as follows:

> Applicant, through counsel, filed this habeas application based on the *Lo* decision and asks that his convictions be set aside. The trial court recommends granting relief. After considering the trial court's findings and the parties' objections and responses regarding them, this Court agrees with the trial court, and relief is granted.

439 S.W.3d at 918. If the CCA thought the timing of Lester's prosecution and conviction had anything to do with its grounds for granting him habeas relief, it would have said so. By justifying its ruling in Lester's case with a citation to *Chance*, where the crime and conviction occurred before *Ex parte Lo*, the CCA confirmed that its reasons for granting relief had nothing to do with a distinction between pre-*Lo* and post-*Lo* prosecutions. In all these cases—*Fournier*, *Chance*, *Lester*, and others [1]—the CCA granted relief for the same reason: *Ex parte Lo*'s determination that the online-solicitation statute is unconstitutional. And in *Fournier*, the CCA rejected the argument that petitioners appealing to *Ex parte Lo* are entitled to relief on an "actual-innocence" theory. *Fournier*, 473 S.W.3d at 796. As far as the CCA is concerned, Lester is just one more petitioner in a long line of cases governed by *Ex parte Lo* and *Fournier*. That's the end of it. We should take the CCA at its word instead of trying to put words in its mouth.

Finally, there is no reason to wonder whether the CCA secretly harbored extra reasons for granting Lester's petition, reasons related to his post-*Lo* prosecution. By citing *Chance* as an analogous case, the CCA left no doubt about the matter. But even if the CCA had left some ambiguity in its decision, that would not be enough ***483** for Lester, who is only entitled to compensation if the CCA papers "clearly indicate" that Lester "has been granted relief in accordance with a writ of habeas corpus that is based on a court finding or determination that the person is actually innocent." TEX. CIV. PRAC. & REM. CODE § 103.001(a)(2)(B). Lester cannot even begin to make that showing. He appeals to sympathy for his unusual circumstances, and he raises irrelevant factual distinctions between his situation and that of the petitioners in *Allen* and *Fournier*—none of which has anything to do with the statutory standards governing wrongful-imprisonment compensation. He does not and cannot show that the CCA's grant of habeas relief to him "clearly indicate[s]" that the CCA made a "finding or determination" that he is "actually innocent."

In my view, the Comptroller would have committed a clear abuse of discretion had it *awarded* compensation to Lester on this record. Whether or not this is an "egregious case of the criminal-justice system gone wrong," *ante* at 476, we should let the Legislature and the CCA take care of the criminal-justice system. We should stay in the box drawn for us by the Tim Cole Act. We should deny Lester's petition.

II.

In addition to misconstruing the statute, the Court also misconstrues the effect of *Ex parte Lo* on the legal landscape. In so doing, the Court overrules *sub silentio* its prior, correct statement—just three years ago—regarding judicial declarations of the unconstitutionality of statutes: "When a court declares a law unconstitutional, the law remains in place unless and until the body that enacted it repeals it, even though the government may no longer constitutionally enforce it." *Pidgeon v. Turner*, 538 S.W.3d 73, 88 n.21 (Tex. 2017) (holding that Texas's traditional marriage laws may retain some legal effect despite *Obergefell v. Hodges*, 574 U.S. 1118, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015)). After today, that statement from *Pidgeon* hangs from a thread (though it remains correct). Under today's decision, statutes declared unconstitutional by courts no longer exist. *Ante* at 480. Anyone prosecuted under such a statute is not just protected from prosecution by the Constitution. He is just as "actually innocent" as a person taking a walk in the park. [2] *Ante* at 473.

I disagree, and I would stick with the way *Pidgeon* sees it. Although lawyers and judges frequently speak of courts "striking down" or "nullifying" statutes, more careful consideration of the matter readily exposes the deficiency of this colloquial rhetoric of judicial supremacy. Courts are not legislatures. The Texas Constitution reserves the law-making and law-rescinding powers to the Legislature, and it prohibits the judiciary from "exercis[ing] any power properly attached to either of the other[ ] [branches]." Tex. Const. art. II, § 1. "The power of judicial review ... permits a court to enjoin executive officials from taking steps to enforce a statute. ... But the statute continues to exist, even after a court opines that it violates the Constitution ...." Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 936 (2018); *see also* *Winsness v. Yocom*, 433 F.3d 727, 728 (10th Cir. 2006) (McConnell, J.) ("There is no procedure in American law for courts or other agencies of government—other than the legislature itself—to ***484** purge from the statute books, laws that conflict with the Constitution as interpreted by the courts.").

That a statute continues to exist and to have potential legal consequences after a court declares it unconstitutional is vividly demonstrated by the history of this very case. Lester admitted to violating a criminal statute. When he did so, *Ex parte Lo* had already announced the CCA's view that the online-solicitation statute is unconstitutional and that courts in Texas should not enforce it. While the local police may perhaps be excused for not staying abreast of the CCA's opinions, the prosecutors should have done so, and it was ultimately the job of Lester's counsel to raise the defense of the statute's unconstitutionality. Had his counsel done so, the prosecution would no doubt have ended swiftly. But Lester's counsel did not raise it. Instead, Lester pleaded guilty, and his conviction became a final judgment. When his probation was revoked, he was sentenced to three years in prison. There were many points along this path at which someone should have raised *Ex parte Lo* on Lester's behalf. But that did not happen. And because it did not happen, Lester's conviction gave rise to a procedurally valid final judgment and sentence of imprisonment, which both Lester and the prison system were obligated to follow and which only ceased to be binding when Lester succeeded in a habeas corpus action. All of those real-world events flowed from the statute, which continued to exist and have ongoing legal consequences in cases where *Ex parte Lo* was not raised as a defense.

The Court analogizes Lester's case to someone arrested for the dystopian non-crime of walking in the park. *Ante* at 473. But the two are nothing alike. The Legislature, on behalf of the people of Texas, decided to criminalize online solicitation of a minor to protect children from sexual predators on the internet. The Legislature, which swears the same oath to uphold the Constitution that judges do, did not think a statute criminalizing prurient sexual interaction with children was unconstitutional. Otherwise, they would not have enacted it. The Governor did not think it unconstitutional either. He signed it. The Court of Criminal Appeals disagreed. It thought the statute unconstitutionally overbroad. Courts tend to have the last word on such matters, and this was no exception, despite a few hiccups. [3]

Unlike someone walking in the park, Lester admitted to doing something the legislative and executive branches deemed criminal. His elected prosecutors believed he deserved to be punished for it. His counsel did not figure out the problem. The judges overseeing his case never asked how it could be that someone like Lester is being punished. It is utterly inconceivable that a prosecution for the non-crime of walking down the street could ever go anywhere near as far as Lester's prosecution did. That is because the two scenarios are nothing alike. Yes, in a perfect world, everyone in the criminal-justice ***485** system would stay more up-to-date on CCA opinions. But this is not a perfect world, as this case demonstrates.

Prosecuting someone for predatory behavior that has been criminalized by statute—in ignorance of court decisions declaring the statute unconstitutional—bears no resemblance to maliciously prosecuting someone for blameless behavior everyone knows is not a crime.

On top of that, the CCA has never held that the Constitution entitles Lester or anyone else to commit the acts for which they were convicted under the online-solicitation statute. It almost certainly does not. Under the First Amendment overbreadth doctrine, "a law may be declared unconstitutional on its face, even if it may have some legitimate application and even if the parties before the court were not engaged in activity protected by the First Amendment." *State v. Johnson*, 475 S.W.3d 860, 864–65 (Tex. Crim. App. 2015) (citing *United States v. Stevens*, 559 U.S. 460, 473, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010)). This is an exception to the general rule that prohibits facial injunctions unless the challenger can "establish that no set of circumstances exists under which the Act would be valid." *Rust v. Sullivan*, 500 U.S. 173, 183, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991) (quoting *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)). As the CCA understood the law, Mr. Lo did not have to prove that the Constitution protected his behavior in order to win habeas relief based on the online-solicitation statute's overbreadth. *Ex parte Lo*, 424 S.W.3d at 20. He only had to demonstrate that the protected speech of other hypothetical defendants might be chilled if they remained under threat of prosecution for online solicitation. [4] *Id.* at 19. Because of the unusual position of petitioners like Lester—convicted of violating an unconstitutional statute but unable to demonstrate the Constitution protects their behavior—there is vigorous disagreement on the CCA about whether these petitioners, including Lester, should ever have had their sentences vacated. *See Ex parte Lester*, 2018 WL 1736686, at *2 (Yeary, J., concurring) (disagreeing "with the Court's decision to grant relief on that basis" because "the applicant should first demonstrate that the statute was applied unconstitutionally in his case."); *Fournier*, 473 S.W.3d at 805 (Yeary, J., joined by Keller, C.J., dissenting) ("Applicants today have made no showing that the statute that we struck down in *Lo* was unconstitutional as it applied to their conduct. Without such a showing, I am reluctant to extend to them the benefit of a retroactive application of *Ex parte Lo*."). Because Lester's habeas relief was based on First Amendment overbreadth, there is no reason to think his actions were constitutionally protected and no basis to compare his situation to that of a person "convicted" of the non-crime of walking down the street.

* * *

As the Court interprets the Tim Cole Act, the Legislature has done something quite surprising. It has decided to pay ***486** people who admit to committing acts the Legislature itself deemed criminal. By invoking the "actual-innocence" standard from habeas corpus law, however, the Legislature attempted to make sure this very outcome would not occur. The Court's decision today skirts around the statutory text, deviates from prior decisions of this Court and the CCA, and misapprehends the effect of judicial declarations of a statute's unconstitutionality. We should apply the statute exactly as written and deny Lester's petition.

I respectfully dissent.

All Citations

602 S.W.3d 469

Footnotes

1 The Tim Cole Act is codified in Chapter 103 of the Texas Civil Practice & Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE §§ 103.001–.154. The chapter is titled "Compensation to Persons Wrongfully Imprisoned," but since 2009 the statute has been known as the Tim Cole Act. *See* Act of May 27, 2009, 81st Leg., R.S., ch. 180, § 1, 2009 Tex. Gen. Laws 523 ("This Act shall be known as the Tim Cole Act."). Tim Cole died of an asthma attack in 1999 while incarcerated for aggravated sexual assault. DNA evidence later

cleared Cole of the charges, and in 2010 Cole received the State's first posthumous pardon. *See* *In re Smith*, 333 S.W.3d 582, 583 n.1 (Tex. 2011).

2 In its amicus brief, the State Prosecuting Attorney asserts that the law-of-the-case doctrine prohibits this Court from concluding that Lester is actually innocent under the Tim Cole Act. Specifically, the Prosecuting Attorney contends that the Court of Criminal Appeals did not adjudicate the issue of Lester's actual innocence; thus, "[t]his Court would intrude upon the [Court of Criminal Appeals'] jurisdiction if it construed the [Court of Criminal Appeals'] disposition contrary to the plain text of its order granting relief." However, as the Prosecuting Attorney acknowledges in its brief, the law-of-the-case doctrine only applies in a "subsequent appeal in the same case." *Briscoe v. Goodmark Corp.*, 102 S.W.3d 714, 716 (Tex. 2003). This mandamus action is not a subsequent appeal of Lester's criminal case; it is not part of Lester's criminal case at all. The Tim Cole Act is a civil statute that this Court interprets de novo. *Allen*, 366 S.W.3d at 703. Thus, our decision today —which concerns only the meaning of "actual innocence" under the Tim Cole Act—does not encroach on the Court of Criminal Appeals' criminal-law jurisdiction. *See* TEX. CONST. art. V, § 3 (providing that this Court's jurisdiction "shall extend to all cases except [ ] criminal law matters").

1 At the time the code provided:

> A person who is 17 years of age or older commits an offense if, with the intent to arouse or gratify the sexual desire of any person, the person, over the Internet, by electronic mail or text message or other electronic message service or system, or through a commercial online service, intentionally:
>
> (1) communicates in a sexually explicit manner with a minor; or
>
> (2) distributes sexually explicit material to a minor.

See Act of May 21, 2007, 80th Leg., R.S., ch. 610, § 2, 2007 Tex. Gen. Laws 1167, 1167–68 (current version at TEX. PENAL CODE § 33.021(b)).

2 The 2015 amendments revised the statute as follows:

> A person who is 17 years of age or older commits an offense if, with the intent to commit an offense listed in Article 62.001(5)(A), (B), or (K), Code of Criminal Procedure ~~arouse or gratify the sexual desire of any person~~ , the person, over the Internet, by electronic mail or text message or other electronic message service or system, or through a commercial online service, intentionally:
>
> (1) communicates in a sexually explicit manner with a minor; or
>
> (2) distributes sexually explicit material to a minor.

See Act of May 11, 2015, 84th Leg., R.S., ch. 61, § 2, 2015 Tex. Gen. Laws 1036, 1036 (current version at TEX. PENAL CODE § 33.021(b)).

1 In *Ex parte Mitcham*, the CCA granted relief to a petitioner who, like Lester, was prosecuted after *Ex parte Lo* had already declared the statute unconstitutional. 542 S.W.3d 561 (Tex. Crim. App. 2018). Once again, the CCA's explanation of its decision simply stated: "This Court, in *Ex parte Lo*, held unconstitutional the online solicitation of a minor statute for which Applicant was convicted. *Ex parte Lo*, 424 S.W.3d 10 (Tex. Crim. App. 2013). Applicant filed this habeas application based on the *Lo* decision and asks that his conviction be set aside." *Id.* As with Lester, the CCA gave no indication that it considered Mitcham's entitlement to habeas relief to be any different from the many petitioners whose prosecutions came before *Ex parte Lo* and whose entitlement to relief under an "actual-innocence" theory is barred by *Fournier*. Under the Court's decision today, Mitcham will also be eligible for an award of taxpayer funds. Mitcham, who was 26 years old at the time of his crime, pleaded guilty to the charge of "intentionally distribut[ing] over the Internet sexually explicit material, to-wit: a picture of his penis, to M.S., a minor" with "the intent to arouse or gratify [his] sexual desire." I doubt Mitcham's victim and her family consider his conviction "an egregious case of the criminal justice system gone wrong."

2 Until recently, “taking a walk in the park” might have been thought the quintessential example of innocent conduct no free government would criminalize. Since the coronavirus crisis began, walking in the park has become a subversive act of civil disobedience in many places. Texas, thankfully, has for the most part not gone that far.

3 At least one current member of the Court of Criminal Appeals maintains that *Ex parte Lo* was wrongly decided. *Ex parte Chavez*, 542 S.W.3d 583 (Tex. Crim. App. 2018) (Yeary, J., dissenting) (“Once again, the Court today grants post-conviction relief to an applicant whose conduct, as I see it, fails to even remotely constitute protected speech. ... Because our decision in *Lo* could potentially mislead members of the Legislative Department concerning their legitimate authority to regulate conduct, I believe that the Court should reconsider whether it was decided correctly.”). If this judge convinced four of his colleagues of this position, the CCA would overturn *Ex parte Lo*. At that point, I presume Lester would no longer be “actually innocent,” even as the Court sees it. Yet he and others like him would already have been paid by the Comptroller.

4 The First Amendment overbreadth doctrine is so eager to make sure no constitutionally protected speech is discouraged that it releases sexual predators from prison to ensure others can exercise First Amendment rights without fear of prosecution. The doctrine thus contemplates that securing First Amendment liberties is important enough to trump the State's interest in protecting children from sex crimes. So in this area of the law, the government's desire to protect its most vulnerable citizens from harm may be insufficient to justify laws that infringe constitutionally protected liberties. One wonders whether the government's desire to protect vulnerable citizens from a virus might be subject to similar analysis.

End of Document

TAB 12

Milkovich v. Lorain Journal Co.

(1990)

KeyCite Yellow Flag - Negative Treatment
Not Followed on State Law Grounds Levin v. McPhee, 2nd Cir.(N.Y.), July 17, 1997

110 S.Ct. 2695
Supreme Court of the United States

Michael MILKOVICH, Sr., Petitioner,
v.
LORAIN JOURNAL CO. et al.

No. 89–645.
|
Argued April 24, 1990.
|
Decided June 21, 1990.

Synopsis

Former high school wrestling coach brought defamation action against newspaper and reporter. The Court of Common Pleas, Lake County, entered directed verdict against coach, and coach appealed. The Court of Appeals, 65 Ohio App.2d 143, 416 N.E.2d 662, reversed and remanded. The Ohio Supreme Court dismissed the ensuing appeal. On remand, the Court of Common Pleas entered summary judgment for defendants, and coach appealed. The Court of Appeals affirmed. The Ohio Supreme Court, 15 Ohio St.3d 292, 473 N.E.2d 1191, reversed and remanded. On remand, the Court of Common Pleas entered summary judgment for defendants. Coach appealed. The Court of Appeals, 46 Ohio App.3d 20, 545 N.E.2d 1320,affirmed. The Ohio Supreme Court dismissed the ensuing appeal. After grant of certiorari, the Supreme Court, Chief Justice Rehnquist, held that: (1) separate constitutional privilege for "opinion" was not required in addition to established safeguards regarding defamation to ensure freedom of expression guaranteed by First Amendment, and (2) reasonable fact finder could conclude that statements in reporter's column implied assertion that high school coach perjured himself in judicial proceeding, and implication that coach committed perjury was sufficiently factual to be susceptible of being proved true or false and might permit defamation recovery.

Reversed and remanded.

Justice Brennan, filed dissenting opinion in which Justice Marshall joined.

Procedural Posture(s): On Appeal; Motion for Summary Judgment; Motion for Judgment as a Matter of Law (JMOL)/ Directed Verdict.

West Headnotes (7)

[1] **Res Judicata** Public Officials and Employees

High school coach who was not party to school superintendent's defamation suit was not bound in coach's own defamation suit that involved same newspaper column by court's statements in superintendent's suit that coach could not be considered other than public figure for purposes of controversy at issue, under Ohio law; coach was not party to proceedings involving superintendent.

10 Cases that cite this headnote

[2] **Federal Courts** Review of State Courts

Ruling of Ohio Supreme Court that an allegedly defamed high school coach was not a public figure or public official for purposes of newspaper column continued to be law of the case on that issue, where Ohio Court of Appeals did not address public-private figure question on remand.

35 Cases that cite this headnote

[3] **Federal Courts** Particular Cases, Contexts, and Questions

Determination in defamation suit by school superintendent that newspaper column was constitutionally protected opinion would not be considered a determination on independent state constitutional grounds precluding federal review in separate defamation suit by school coach arising from same newspaper column on theory State Constitution was relied upon to recognize opinion privilege for defamation purposes; decision in superintendent's suit relied heavily on federal decisions interpreting scope of First Amendment protection accorded defamation defendants. U.S.C.A. Const.Amend. 1.

147 Cases that cite this headnote

[4] **Constitutional Law** Opinion

Separate constitutional privilege for "opinion" was not required in addition to established safeguards against defamation liability to ensure freedom of expression guaranteed by First Amendment. U.S.C.A. Const.Amend. 1.

172 Cases that cite this headnote

[5] **Libel and Slander** Criticism and comment on public matters and publication of news

Where statement of "opinion" on matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of truth in order to recover. U.S.C.A. Const.Amend. 1.

882 Cases that cite this headnote

[6] **Libel and Slander** Criticism and Comment on Public Matters; Public Figures

Where statement of "opinion" on matter of public concern reasonably implies false and defamatory facts involving private figure, plaintiff must show that false implications were made with some level of fault to support recovery. U.S.C.A. Const.Amend. 1.

651 Cases that cite this headnote

[7] **Libel and Slander** Weight and Sufficiency

Reasonable fact finder could conclude that statements in reporter's column implied assertion that high school coach perjured himself in judicial proceeding, and implication that coach committed perjury was sufficiently factual to be susceptible of being proved true or false and might permit defamation recovery by coach against reporter and newspaper. U.S.C.A. Const.Amend. 1.

492 Cases that cite this headnote

****2696** *Syllabus* *

***1** While petitioner Milkovich was a high school wrestling coach, his team was involved in an altercation at a match with another high school's team. Both he and School Superintendent Scott testified at an investigatory hearing before the Ohio High School Athletic Association (OHSAA), which placed the team on probation. They testified again during a suit by several parents, in which a county court overturned OHSAA's ruling. The day after the court's decision, respondent Lorain Journal Company's newspaper published a column authored by respondent Diadiun, which implied that Milkovich lied under oath in the judicial proceeding. Milkovich commenced a defamation action against respondents in the county court, alleging that the column accused him of committing the ****2697** crime of perjury, damaged him in his occupation of teacher and coach, and constituted libel *per se.* Ultimately, the trial court granted summary judgment for respondents. The Ohio Court of Appeals affirmed, considering itself bound by the State Supreme Court's determination in Superintendent Scott's separate action against respondents that, as a matter of law, the article was constitutionally protected opinion.

Held:

1. The First Amendment does not require a separate "opinion" privilege limiting the application of state defamation laws. While the Amendment does limit such application, *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, the breathing space that freedoms of expression require to survive is adequately secured by existing constitutional doctrine. ***2** Foremost, where a media defendant is involved, a statement on matters of public concern must be provable as false before liability can be assessed, *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783, thus ensuring full constitutional protection for a statement of opinion having no provably false factual connotation. Next, statements that cannot reasonably be interpreted as stating actual facts about an individual are protected, see, *e.g.,* *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler,* 398 U.S. 6, 90

S.Ct. 1537, 26 L.Ed.2d 6, thus assuring that public debate will not suffer for lack of "imaginative expression" or the "rhetorical hyperbole" which has traditionally added much to the discourse of this Nation. The reference to "opinion" in dictum in *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 339–340, 94 S.Ct. 2997, 3006–3007, 41 L.Ed.2d 789, was not intended to create a wholesale defamation exemption for "opinion." Read in context, the *Gertz* dictum is merely a reiteration of Justice Holmes' "marketplace of ideas" concept, see *Abrams v. United States,* 250 U.S. 616, 630, 40 S.Ct. 17, 22, 63 L.Ed. 1173. Simply couching a statement—"Jones is a liar"—in terms of opinion—"In my opinion Jones is a liar"—does not dispel the factual implications contained in the statement. Pp. 2702–2707.

2. A reasonable factfinder could conclude that the statements in the Diadiun column imply an assertion that Milkovich perjured himself in a judicial proceeding. The article did not use the sort of loose, figurative, or hyperbolic language that would negate the impression that Diadiun was seriously maintaining Milkovich committed perjury. Nor does the article's general tenor negate this impression. In addition, the connotation that Milkovich committed perjury is sufficiently factual that it is susceptible of being proved true or false by comparing, *inter alia,* his testimony before the OHSAA board with his subsequent testimony before the trial court. Pp. 2707–2708.

3. This decision balances the First Amendment's vital guarantee of free and uninhibited discussion of public issues with the important social values that underlie defamation law and society's pervasive and strong interest in preventing and redressing attacks upon reputation. Pp. 2707–2708.

46 Ohio App.3d 20, 545 N.E.2d 1320 (1989), reversed and remanded.

REHNQUIST, C.J., delivered the opinion of the Court, in which WHITE, BLACKMUN, STEVENS, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post,* p. 2708.

Attorneys and Law Firms

Brent L. English argued the cause for petitioner. With him on the brief was *John D. Brown.*

***3** *Richard D. Panza* argued the cause for respondents. With him on the brief were *William G. Wickens, David Herzer, Richard A. Naegle, P. Cameron DeVore,* and *Marshall J. Nelson.* *

* Briefs of *amici curiae* urging affirmance were filed for Dow Jones & Co. et al. by Robert D. Sack, Richard J. Tofel, Richard M. Schmidt, Jr., Devereux Chatillon, Douglas P. Jacobs, Barbara L. Wartelle, Harvey L. Lipton, Laura R. Handman, Slade R. Metcalf, Richard J. Ovelmen, Deborah R. Linfield, Jane E. Kirtley, and Bruce W. Sanford; and for the American Civil Liberties Union et al. by Henry R. Kaufman.

Louis A. Colombo and *David L. Marburger* filed a brief for the Ohio Newspaper Association et al. as *amicus curiae.*

Opinion

Chief Justice REHNQUIST delivered the opinion of the Court.

Respondent J. Theodore Diadiun authored an article in an Ohio newspaper implying that petitioner Michael Milkovich, a local high school wrestling coach, lied under oath ****2698** in a judicial proceeding about an incident involving petitioner and his team which occurred at a wrestling match. Petitioner sued Diadiun and the newspaper for libel, and the Ohio Court of Appeals affirmed a lower court entry of summary judgment against petitioner. This judgment was based in part on the grounds that the article constituted an "opinion" protected from the reach of state defamation law by the First Amendment to the United States Constitution. We hold that the First Amendment does not prohibit the application of Ohio's libel laws to the alleged defamations contained in the article.

This lawsuit is before us for the third time in an odyssey of litigation spanning nearly 15 years.[1] Petitioner Milkovich, now retired, was the wrestling coach at Maple Heights High ***4** School in Maple Heights, Ohio. In 1974, his team was involved in an altercation at a home wrestling match with a team from Mentor High School. Several people were injured. In response to the incident, the Ohio High School Athletic Association (OHSAA) held a hearing at which Milkovich and H. Don Scott, the Superintendent of Maple Heights Public Schools, testified. Following the hearing, OHSAA placed the Maple Heights team on probation for a year and declared the team ineligible for the 1975 state tournament. OHSAA also censured Milkovich for his actions during the altercation. Thereafter, several parents and wrestlers sued OHSAA in the

Court of Common Pleas of Franklin County, Ohio, seeking a restraining order against OHSAA's ruling on the grounds that they had been denied due process in the OHSAA proceeding. Both Milkovich and Scott testified in that proceeding. The court overturned OHSAA's probation and ineligibility orders on due process grounds.

The day after the court rendered its decision, respondent Diadiun's column appeared in the News–Herald, a newspaper which circulates in Lake County, Ohio, and is owned by respondent Lorain Journal Co. The column bore the heading "Maple beat the law with the 'big lie,' " beneath which appeared Diadiun's photograph and the words "TD Says." The carryover page headline announced "... Diadiun says Maple told a lie." The column contained the following passages:

" '... [A] lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple–Mentor wrestling meet of last Feb. 8.

" 'A lesson which, sadly, in view of the events of the past year, is well they learned early.

" 'It is simply this: If you get in a jam, lie your way out.

***5** " 'If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.

" 'The teachers responsible were mainly head Maple wrestling coach, Mike Milkovich, and former superintendent of schools H. Donald Scott.

. . . . .

" 'Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.

" 'But they got away with it.

" 'Is that the kind of lesson we want our young people learning from their high school administrators and coaches?

" 'I think not.' " *Milkovich v. News–Herald,* 46 Ohio App.3d 20, 21, 545 N.E.2d 1320, 1321–1322 (1989). [2]

****2699** ***6** Petitioner commenced a defamation action against respondents in the Court of Common Pleas of Lake County, Ohio, alleging that the headline of Diadiun's article and the ***7** nine passages quoted above "accused plaintiff of committing the crime of perjury, an indictable offense in the State of Ohio, and damaged plaintiff directly in his life-time occupation ****2700** of coach and teacher, and constituted libel per se." App. 12. The action proceeded to trial, and the court granted a directed verdict to respondents on the ground that the evidence failed to establish the article was published with "actual malice" as required by *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). See App. 21–22. The Ohio Court of Appeals for the Eleventh Appellate District reversed and remanded, holding that there was sufficient evidence of actual malice to go to the jury. See *Milkovich v. Lorain Journal,* 65 Ohio App.2d 143, 416 N.E.2d 662 (1979). The Ohio ***8** Supreme Court dismissed the ensuing appeal for want of a substantial constitutional question, and this Court denied certiorari. 449 U.S. 966, 101 S.Ct. 380, 66 L.Ed.2d 232 (1980).

On remand, relying in part on our decision in *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), the trial court granted summary judgment to respondents on the grounds that the article was an opinion protected from a libel action by "constitutional law," App. 55, and alternatively, as a public figure, petitioner had failed to make out a prima facie case of actual malice. *Id.,* at 55–59. The Ohio Court of Appeals affirmed both determinations. *Id.,* at 62–70. On appeal, the Supreme Court of Ohio reversed and remanded. The court first decided that petitioner was neither a public figure nor a public official under the relevant decisions of this Court. See *Milkovich v. News–Herald,* 15 Ohio St.3d 292, 294–299, 473 N.E.2d 1191, 1193–1196 (1984). The court then found that "the statements in issue are factual assertions as a matter of law, and are not constitutionally protected as the opinions of the writer.... The plain import of the author's assertions is that Milkovich, *inter alia,* committed the crime of perjury in a court of law." *Id.,* at 298–299, 473 N.E.2d, at 1196–1197. This Court again denied certiorari. 474 U.S. 953, 106 S.Ct. 322, 88 L.Ed.2d 305 (1985).

Meanwhile, Superintendent Scott had been pursuing a separate defamation action through the Ohio courts. Two years after its *Milkovich* decision, in considering Scott's appeal, the Ohio Supreme Court reversed its position on Diadiun's article, concluding that the column was

"constitutionally protected opinion." *Scott v. News–Herald,* 25 Ohio St.3d 243, 254, 496 N.E.2d 699, 709 (1986). Consequently, the court upheld a lower court's grant of summary judgment against Scott.

The *Scott* court decided that the proper analysis for determining whether utterances are fact or opinion was set forth in the decision of the United States Court of Appeals for the District of Columbia Circuit in *Ollman v. Evans,* 242 U.S.App.D.C. 301, 750 F.2d 970 (1984), cert. denied, ***9** 471 U.S. 1127, 105 S.Ct. 2662, 86 L.Ed.2d 278 (1985). See *Scott,* 25 Ohio St.3d, at 250, 496 N.E.2d, at 706. Under that analysis, four factors are considered to ascertain whether, under the "totality of circumstances," a statement is fact or opinion. These factors are: (1) "the specific language used"; (2) "whether the statement is verifiable"; (3) "the general context of the statement"; and (4) "the broader context in which the statement appeared." *Ibid.* The court found that application of the first two factors to the column militated in favor of deeming the challenged passages actionable assertions of fact. *Id.,* at 250–252, 496 N.E.2d, at 706–707. That potential outcome was trumped, however, by the court's consideration of the third and fourth factors. With respect to the third factor, the general context, the court explained that "the large caption 'TD Says' ... would indicate to even the most gullible reader that the article was, in fact, opinion." *Id.,* at 252, 496 N.E.2d, at 707.[3] As for the fourth factor, the "broader context," the court reasoned that because the ****2701** article appeared on a sports page—"a traditional haven for cajoling, invective, and hyperbole"—the article would probably be construed as opinion. *Id.,* at 253–254, 496 N.E.2d, at 708.[4]

***10** **[1]** **[2]** **[3]** Subsequently, considering itself bound by the Ohio Supreme Court's decision in *Scott,* the Ohio Court of Appeals in the instant proceedings affirmed a trial court's grant of summary judgment in favor of respondents, concluding that "it has been decided, as a matter of law, that the article in question was constitutionally protected opinion." 46 Ohio App.3d, at 23, 545 N.E.2d, at 1324. The Supreme Court of Ohio dismissed petitioner's ensuing appeal for want of a substantial constitutional question. App. 119. We granted certiorari, 493 U.S. 1055, 110 S.Ct. 863, 107 L.Ed.2d 947 (1990), to consider the important questions raised by the Ohio courts' recognition of a constitutionally required "opinion" exception to the application of its defamation laws. We now reverse.[5]

****2702** ***11** Since the latter half of the 16th century, the common law has afforded a cause of action for damage to a person's reputation by the publication of false and defamatory statements. See L. Eldredge, Law of Defamation 5 (1978).

***12** In Shakespeare's Othello, Iago says to Othello:

> "Good name in man and woman, dear my lord,
>
> Is the immediate jewel of their souls.
>
> Who steals my purse steals trash;
>
> 'Tis something, nothing;
>
> 'Twas mine, 'tis his, and has been slave to thousands;
>
> But he that filches from me my good name
>
> Robs me of that which not enriches him,
>
> And makes me poor indeed." Act III, scene 3.

Defamation law developed not only as a means of allowing an individual to vindicate his good name, but also for the purpose of obtaining redress for harm caused by such statements. Eldredge, *supra,* at 5. As the common law developed in this country, apart from the issue of damages, one usually needed only allege an unprivileged publication of false and defamatory matter to state a cause of action for defamation. See, *e.g.,* Restatement of Torts § 558 (1938); *Gertz* ***13** *v. Robert Welch, Inc.,* 418 U.S., at 370, 94 S.Ct., at 3022 (WHITE, J., dissenting) ("Under typical state defamation law, the defamed private citizen had to prove only a false publication that would subject him to hatred, contempt, or ridicule"). The common law generally did not place any additional restrictions on the type of statement that could be actionable. Indeed, defamatory communications were deemed actionable regardless of whether they were deemed to be statements of fact or opinion. See, *e.g.,* Restatement of Torts, *supra,* §§ 565–567. As noted in the 1977 Restatement (Second) of Torts § 566, Comment *a:*

> "Under the law of defamation, an expression of opinion could be defamatory if the ****2703** expression was sufficiently derogatory of another

> as to cause harm to his reputation, so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.... The expression of opinion was also actionable in a suit for defamation, despite the normal requirement that the communication be false as well as defamatory.... This position was maintained even though the truth or falsity of an opinion—as distinguished from a statement of fact—is not a matter that can be objectively determined and truth is a complete defense to a suit for defamation."

However, due to concerns that unduly burdensome defamation laws could stifle valuable public debate, the privilege of "fair comment" was incorporated into the common law as an affirmative defense to an action for defamation. "The principle of 'fair comment' afford[ed] legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact." 1 F. Harper & F. James, Law of Torts § 5.28, p. 456 (1956) (footnote omitted). As this statement implies, comment was generally privileged when it concerned a matter of public concern, was upon true or privileged facts, represented the actual opinion of the speaker, and was not made ***14** solely for the purpose of causing harm. See Restatement of Torts, *supra,* § 606. "According to the majority rule, the privilege of fair comment applied only to an expression of opinion and not to a false statement of fact, whether it was expressly stated or implied from an expression of opinion." Restatement (Second) of Torts, *supra,* § 566, Comment *a.* Thus under the common law, the privilege of "fair comment" was the device employed to strike the appropriate balance between the need for vigorous public discourse and the need to redress injury to citizens wrought by invidious or irresponsible speech.

In 1964, we decided in *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, that the First Amendment to the United States Constitution placed limits on the application of the state law of defamation. There the Court recognized the need for "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, at 279–280, 84 S.Ct., at 726. This rule was prompted by a concern that, with respect to the criticism of public officials in their conduct of governmental affairs, a state-law " 'rule compelling the critic of official conduct to guarantee the truth of all his factual assertions' would deter protected speech." *Gertz v. Robert Welch, Inc., supra,* 418 U.S., at 334, 94 S.Ct., at 3004 (quoting *New York Times, supra,* 376 U.S., at 279, 84 S.Ct., at 725).

Three years later, in *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967), a majority of the Court determined "that the *New York Times* test should apply to criticism of 'public figures' as well as 'public officials.' The Court extended the constitutional privilege announced in that case to protect defamatory criticism of nonpublic persons 'who are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.' " *Gertz, supra,* 418 U.S., at 336–337, 94 S.Ct., at 3005 ***15** quoting *Butts, supra,* at 164, 87 S.Ct., at 1996 (Warren, C.J., concurring in result)). As Chief Justice Warren noted in concurrence, "[o]ur citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials.' " *Butts, supra,* at 164, 87 S.Ct., at 1996. The Court has also determined that both for public officials and public figures, a showing of *New York Times* malice is subject to a clear and convincing standard ****2704** of proof. *Gertz, supra,* 418 U.S., at 342, 94 S.Ct., at 3008.

The next step in this constitutional evolution was the Court's consideration of a private individual's defamation actions involving statements of public concern. Although the issue was initially in doubt, see *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), the Court ultimately concluded that the *New York Times* malice standard was inappropriate for a private person attempting to prove he was defamed on matters of public interest. *Gertz v. Robert Welch, Inc., supra.* As we explained:

> "Public officials and public figures usually enjoy significantly greater access to the channels of effective

> communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.
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> . . . . .
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> "[More important,] public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual."
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> *Id.* 418 U.S., at 344–345, 94 S.Ct., at 3009 (footnote omitted).

Nonetheless, the Court believed that certain significant constitutional protections were warranted in this area. First, we held that the States could not impose liability without requiring some showing of fault. See *id.,* at 347–348, 94 S.Ct., at 3010–3011 ("This approach ... recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury ***16** to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation"). Second, we held that the States could not permit recovery of presumed or punitive damages on less than a showing of *New York Times* malice. See 418 U.S., at 350, 94 S.Ct., at 3012 ("Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship ...").

Still later, in *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986), we held that "the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern." *Id.,* at 777, 106 S.Ct., at 1564. In other words, the Court fashioned "a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages." *Id.,* at 776, 106 S.Ct., at 1563. Although recognizing that "requiring the plaintiff to show falsity will insulate from liability some speech that is false, but unprovably so," the Court believed that this result was justified on the grounds that "placement by state law of the burden of proving truth upon media defendants who publish speech of public concern deters such speech because of the fear that liability will unjustifiably result." *Id.,* at 777–778, 106 S.Ct., at 1564.

We have also recognized constitutional limits on the *type* of speech which may be the subject of state defamation actions. In *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler,* 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970), a real estate developer had engaged in negotiations with a local city council for a zoning variance on certain of his land, while simultaneously negotiating with the city on other land the city wished to purchase from him. A local newspaper published certain articles stating that some people had characterized the developer's negotiating position as "blackmail," and the developer sued for libel. Rejecting a contention that liability could be premised on the notion that the word "blackmail" implied the developer had committed the actual crime of blackmail, we held that "the imposition of ***17** liability on such a basis was constitutionally impermissible—that as a matter of constitutional law, the word 'blackmail' in these circumstances was not slander when spoken, and not libel when reported in the Greenbelt News Review." *Id.,* at 13, 90 S.Ct., at 1541. ****2705** Noting that the published reports "were accurate and full," the Court reasoned that "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the developer's] negotiating position extremely unreasonable." *Id.,* at 13–14, 90 S.Ct., at 1541–1542. See also *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 50, 108 S.Ct. 876, 879, 99 L.Ed.2d 41 (1988) (First Amendment precluded recovery under state emotional distress action for ad parody which "could not reasonably have been interpreted as stating actual facts about the public figure involved"); *Letter Carriers v. Austin,* 418 U.S. 264, 284–286, 94 S.Ct. 2770, 2781–2782, 41 L.Ed.2d 745 (1974) (use of the word "traitor" in literary definition of a union "scab" not basis for a defamation action under federal labor law since used "in a loose, figurative sense" and was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members").

The Court has also determined that "in cases raising First Amendment issues ... an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.' " *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485, 499, 104 S.Ct. 1949, 1958, 80 L.Ed.2d 502 (1984) (quoting *New York Times,* 376 U.S., at 284–286, 84 S.Ct., at 728–729). "The question whether the evidence

in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." *Harte–Hanks Communications, Inc. v. Connaughton,* 491 U.S. 657, 685, 109 S.Ct. 2678, 2694, 105 L.Ed.2d 562 (1989).

[4] Respondents would have us recognize, in addition to the established safeguards discussed above, still another First–Amendment-based protection for defamatory statements which are categorized as "opinion" as opposed to "fact." For ***18** this proposition they rely principally on the following dictum from our opinion in *Gertz:*

> "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact." 418 U.S., at 339–340, 94 S.Ct., at 3007 (footnote omitted).

Judge Friendly appropriately observed that this passage "has become the opening salvo in all arguments for protection from defamation actions on the ground of opinion, even though the case did not remotely concern the question." *Cianci v. New Times Publishing Co.,* 639 F.2d 54, 61 (CA2 1980). Read in context, though, the fair meaning of the passage is to equate the word "opinion" in the second sentence with the word "idea" in the first sentence. Under this view, the language was merely a reiteration of Justice Holmes' classic "marketplace of ideas" concept. See *Abrams v. United States,* 250 U.S. 616, 630, 40 S.Ct. 17, 22, 63 L.Ed. 1173 (1919) (dissenting opinion) ("[T]he ultimate good desired is better reached by free trade in ideas—... the best test of truth is the power of the thought to get itself accepted in the competition of the market").

Thus, we do not think this passage from *Gertz* was intended to create a wholesale defamation exemption for anything that might be labeled "opinion." See *Cianci, supra,* at 62, n. 10 (The "marketplace of ideas" origin of this passage "points strongly to the view that the 'opinions' held to be constitutionally protected were the sort of thing that could be corrected by discussion"). Not only would such an interpretation be contrary to the tenor and context of the passage, but it would also ignore the fact that expressions of "opinion" may often imply an assertion of objective fact.

If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of ****2706** facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts ***19** upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar." As Judge Friendly aptly stated: "[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.' " See *Cianci, supra,* at 64. It is worthy of note that at common law, even the privilege of fair comment did not extend to "a false statement of fact, whether it was expressly stated or implied from an expression of opinion." Restatement (Second) of Torts, § 566, Comment *a* (1977).

Apart from their reliance on the *Gertz* dictum, respondents do not really contend that a statement such as, "In my opinion John Jones is a liar," should be protected by a separate privilege for "opinion" under the First Amendment. But they do contend that in every defamation case the First Amendment mandates an inquiry into whether a statement is "opinion" or "fact," and that only the latter statements may be actionable. They propose that a number of factors developed by the lower courts (in what we hold was a mistaken reliance on the *Gertz* dictum) be considered in deciding which is which. But we think the " 'breathing space' " which " '[f]reedoms of expression require in order to survive,' " *Hepps,* 475 U.S., at 772, 106 S.Ct., at 1561 (quoting *New York Times, supra,* 376 U.S., at 272, 84 S.Ct., at 721), is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between "opinion" and fact.

Foremost, we think *Hepps* stands for the proposition that a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, like the present, where a media defendant ***20** is involved.[6] Thus, unlike the statement, "In my opinion Mayor Jones is a liar," the statement, "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin," would not be actionable. *Hepps* ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection.[7]

Next, the *Bresler–Letter Carriers–Falwell* line of cases provides protection for statements that cannot "reasonably [be] interpreted as stating actual facts" about an individual. *Falwell,* 485 U.S., at 50, 108 S.Ct., at 879. This provides assurance that public debate will not suffer for lack of "imaginative expression" or the "rhetorical hyperbole" which has traditionally added much to the discourse of our Nation. See *id.,* at 53–55, 108 S.Ct., at 880–882.

[5] **[6]** The *New York Times–Butts–Gertz* culpability requirements further ensure that debate on public issues remains "uninhibited, robust, and wide-open." *New York Times,* 376 U.S., at 270, 84 S.Ct., at 720. Thus, where a statement of "opinion" on a matter ****2707** of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth. Similarly, where such a statement involves a private figure on a matter of public concern, a plaintiff must show that the false connotations were made with some level of fault ***21** as required by *Gertz.* [8] Finally, the enhanced appellate review required by *Bose Corp.* provides assurance that the foregoing determinations will be made in a manner so as not to "constitute a forbidden intrusion of the field of free expression." *Bose Corp.,* 466 U.S., at 499, 104 S.Ct., at 1959 (quotation omitted).

[7] We are not persuaded that, in addition to these protections, an additional separate constitutional privilege for "opinion" is required to ensure the freedom of expression guaranteed by the First Amendment. The dispositive question in the present case then becomes whether a reasonable factfinder could conclude that the statements in the Diadiun column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding. We think this question must be answered in the affirmative. As the Ohio Supreme Court itself observed: "[T]he clear impact in some nine sentences and a caption is that [Milkovich] 'lied at the hearing after ... having given his solemn oath to tell the truth.' " *Scott,* 25 Ohio St.3d, at 251, 496 N.E.2d, at 707. This is not the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining that petitioner committed the crime of perjury. Nor does the general tenor of the article negate this impression.

We also think the connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false. A determination whether petitioner lied in this instance can be made on a core of objective evidence by comparing, *inter alia,* petitioner's testimony before the OHSAA board with his subsequent testimony before the trial court. As the *Scott* court noted regarding the plaintiff in that case: "[W]hether or not H. Don Scott did indeed perjure himself is certainly verifiable by a perjury action with evidence adduced from the transcripts and witnesses present at ***22** the hearing. Unlike a subjective assertion the averred defamatory language is an articulation of an objectively verifiable event." *Id.,* at 252, 496 N.E.2d, at 707. So too with petitioner Milkovich. [9]

The numerous decisions discussed above establishing First Amendment protection for defendants in defamation actions surely demonstrate the Court's recognition of the Amendment's vital guarantee of free and uninhibited discussion of public issues. But there is also another side to the equation; we have regularly acknowledged the "important social values which underlie the law of defamation," and recognized that "[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation." ****2708** *Rosenblatt v. Baer,* 383 U.S. 75, 86, 86 S.Ct. 669, 676, 15 L.Ed.2d 597 (1966). Justice Stewart in that case put it with his customary clarity:

> "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.
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> . . . . .
>
> "The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. ***23** Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored." *Id.,* at 92–93, 86 S.Ct., at 679–680 (concurring opinion).

We believe our decision in the present case holds the balance true. The judgment of the Ohio Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed.

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

Since this Court first hinted that the First Amendment provides some manner of protection for statements of opinion,[1] notwithstanding any common-law protection, courts and commentators have struggled with the contours of this protection and its relationship to other doctrines within our First Amendment jurisprudence. Today, for the first time, the Court addresses this question directly and, to my mind, does so cogently and almost entirely correctly. I agree with the Court that under our line of cases culminating in *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 777, 106 S.Ct. 1558, 1564, 89 L.Ed.2d 783 (1986), only defamatory statements that are capable of being proved false are subject to liability under state libel law. See *ante,* at 2704.[2] I also agree with the Court that the "statement" ***24** that the plaintiff must prove false under *Hepps* is not invariably the literal phrase published but rather what a reasonable reader would have understood the author to have said. See *ante,* at 2704–2705 (discussing *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler,* 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970); *Letter Carriers v. Austin,* 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974); *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988)).

In other words, while the Court today dispels any misimpression that there is a so-called opinion privilege *wholly in addition* to the protections we have already found to be guaranteed by the First Amendment, it determines that a protection for statements of pure opinion is dictated by *existing* First Amendment doctrine. As the Court explains, "full constitutional protection" extends to any statement relating to matters of public concern "that cannot 'reasonably [be] interpreted as stating actual facts' about an individual." ****2709** *Ante,* at 2706. Among the circumstances to be scrutinized by a court in ascertaining whether a statement purports to state or imply "actual facts about an individual," as shown by the Court's analysis of the statements at issue here, see *ante,* at 2707 and n. 9, are the same indicia that lower courts have been relying on for the past decade or so to distinguish between statements of fact and statements of opinion: the type of language used, the meaning of the statement in context, whether the statement is verifiable, and the broader social circumstances in which the statement was made. See, *e.g., Potomac Valve & Fitting Inc. v. Crawford Fitting Co.,* 829 F.2d 1280 (CA4 1987); *Janklow v. Newsweek, Inc.,* 788 F.2d 1300 (CA8 1986); *Ollman v. Evans,* 242 U.S.App.D.C. 301, 750 F.2d 970 (1984), cert. denied, 471 U.S. 1127, 105 S.Ct. 2662, 86 L.Ed.2d 278 (1985).

***25** With all of the above, I am essentially in agreement. I part company with the Court at the point where it applies these general rules to the statements at issue in this case because I find that the challenged statements cannot reasonably be interpreted as either stating or implying defamatory facts about petitioner. Under the rule articulated in the majority opinion, therefore, the statements are due "full constitutional protection." I respectfully dissent.

I

As the majority recognizes, the kind of language used and the context in which it is used may signal readers that an author is not purporting to state or imply actual, known facts. In such cases, this Court has rejected claims to the contrary and found that liability may not attach "as a matter of constitutional law." *Ante,* at 2704. See, *e.g., Bresler, supra* (metaphor); *Letter Carriers, supra* (hyperbole); *Falwell, supra* (parody). In *Bresler,* for example, we found that Bresler could not recover for being accused of "blackmail" because the readers of the article would have understood the author to mean only that Bresler was manipulative and extremely unreasonable. See *ante,* at 2704. In *Letter Carriers,* we found that plaintiffs could not recover for being accused of being "traitor[s]" because the newsletter's readers would have understood that the author meant that plaintiffs' accurately reported actions were reprehensible and destructive to the social fabric, not that plaintiffs committed treason. See *ante,* at 2705.

Statements of belief or opinion are like hyperbole, as the majority agrees, in that they are not understood as actual assertions of fact about an individual, but they may be actionable if they *imply* the existence of false and defamatory facts. See *ante,* at 2706. The majority provides some general guidance for identifying when statements of opinion imply assertions of fact. But it is a matter worthy of further attention ***26** in order "to confine the perimeters of [an] unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be

inhibited." *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485, 505, 104 S.Ct. 1949, 1962, 80 L.Ed.2d 502 (1984). Although statements of opinion *may* imply an assertion of a false and defamatory fact, they do not *invariably* do so. Distinguishing which statements do imply an assertion of a false and defamatory fact requires the same solicitous and thorough evaluation that this Court has engaged in when determining whether particular exaggerated or satirical statements could reasonably be understood to have asserted such facts. See *Bresler, supra; Letter Carriers, supra; Falwell, supra.* As Justice Holmes observed long ago: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner,* 245 U.S. 418, 425, 38 S.Ct. 158, 159, 62 L.Ed. 372 (1918).

For instance, the statement that "Jones is a liar," or the example given by the majority, "In my opinion John Jones is a liar"—standing ****2710** alone—can reasonably be interpreted as implying that there are facts known to the speaker to cause him to form such an opinion. See *ante,* at 2706. But a different result must obtain if the speaker's comments had instead been as follows: "Jones' brother once lied to me; Jones just told me he was 25; I've never met Jones before and I don't actually know how old he is or anything else about him, but he looks 16; I think Jones lied about his age just now." In the latter case, there are at least six statements, two of which may arguably be actionable. The first such statement is factual and defamatory and may support a defamation action by Jones' brother. The second statement, however, that "I think Jones lied about his age just now," can be reasonably interpreted in context only as a statement that the speaker infers, from the facts stated, that Jones told a particular lie. It is clear to the listener that the speaker does ***27** not actually know whether Jones lied and does not have any other reasons for thinking he did.[3] Thus, the only fact implied by the second statement is that the speaker drew this inference. If the inference is sincere or nondefamatory, the speaker is not liable for damages.[4]

***28** II

The majority does not rest its decision today on any finding that the statements at issue explicitly state a false and defamatory fact. Nor could it. Diadiun's assumption that Milkovich must have lied at the court hearing is patently conjecture.[5] The majority finds Diadiun's statements actionable, however, because it concludes that these statements imply a factual assertion that Milkovich perjured himself at the judicial proceeding. ****2711** I disagree. Diadiun not only reveals the facts upon which he is relying but he makes it clear at which point he runs out of facts and is simply guessing. Read in context, the statements cannot reasonably be interpreted as implying such an assertion as fact. See *ante,* at 2698–2699, n. 2 (reproducing the column).

Diadiun begins the column by noting that, on the day before, a Court of Common Pleas had overturned the decision by the Ohio High School Athletic Association (OHSAA) to suspend the Maple Heights wrestling team from that year's state tournament. He adds that the reversal was based on due process grounds. Diadiun emphasizes to the audience that he was present at the wrestling meet where the brawl that led to the team's suspension took place and that he was present at the hearing before the OHSAA. He attributes the brawl to Maple Heights coach Milkovich's wild gestures, ranting and egging the crowd on against the competing team from Mentor. He then describes Milkovich's testimony before the OHSAA, characterizing it as deliberate misrepresentation ***29** "attempting not only to convince the board of [his] own innocence, but, incredibly, shift the blame of the affair to Mentor." *Ante,* at 2699, n. 2. Diadiun then quotes statements allegedly made by Milkovich to the commissioners to the effect that his wrestlers had not been involved in the fight and his gestures had been mere shrugs.

At that point in the article, the author openly begins to surmise. Diadiun says that it "*seemed* " that Milkovich's and another official's story contained enough contradictions and obvious untruths that the OHSAA board was able to see through it and that "[*p*]*robably* " the OHSAA's suspension of the Maple Heights team reflected displeasure as much at the testimony as at the melee. *Ante,* at 2699, n. 2 (emphasis added). Then Diadiun guesses that by the time of the court hearing, the two officials "*apparently* had their version of the incident polished and reconstructed, and the judge *apparently* believed them." *Ibid.* (emphasis added). For the first time, the column quotes a third party's version of events. The source, an OHSAA commissioner, is described—in evident contrast to Diadiun—as having attended the proceeding. The column does not quote any testimony from the court proceeding, nor does it describe what Milkovich said in court. There is only a vague statement from the OHSAA commissioner that the testimony "sounded pretty darned unfamiliar."[6] For the first time, Diadiun fails ***30** to claim any firsthand

knowledge, after stressing that he had personally attended both the meet and the OHSAA hearing. After noting again that the judge ruled in Milkovich's and Maple Heights' favor, Diadiun proclaims: "Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth." *Ibid.*

No reasonable reader could understand Diadiun to be impliedly asserting—as fact—that Milkovich had perjured himself. Nor could such a reader infer that Diadiun had further information about Milkovich's court testimony on which his belief was based. It is plain from the column that Diadiun did not attend the court hearing. Diadiun also clearly had no detailed second hand information about what Milkovich had said in court. Instead, ****2712** what suffices for "detail" and "color" are quotations from the OHSAA hearing—old news compared to the court decision which prompted the column—and a vague quotation from an OHSAA commissioner. Readers could see that Diadiun was focused on the court's reversal of the OHSAA's decision and was angrily supposing what must have led to it. [7]

***31** Even the insinuation that Milkovich had repeated, in court, a more plausible version of the misrepresentations he had made at the OHSAA hearing is preceded by the cautionary term "apparently"—an unmistakable sign that Diadiun did not know what Milkovich had actually said in court. "[C]autionary language or interrogatories of this type put the reader on notice that what is being read is opinion and thus weaken any inference that the author possesses knowledge of damaging, undisclosed facts.... In a word, when the reasonable reader encounters cautionary language, he tends to 'discount that which follows.' " *Ollman v. Evans,* 242 U.S.App.D.C., at 314, 750 F.2d, at 983, quoting *Burns v. McGraw–Hill Broadcasting Co.,* 659 P.2d 1351, 1360 (Colo.1983). See also B. Sanford, Libel and Privacy: The Prevention and Defense of Litigation 145 (1987) (explaining that many courts have found that words like "apparent" reveal "that the assertion is qualified or speculative and is not to be understood as a declaration of fact"); *Information Control Corp. v. Genesis One Computer Corp.,* 611 F.2d 781, 784 (CA9 1980) (explaining that a statement phrased in language of apparency "is less likely to be understood as a statement of ***32** fact rather than as a statement of opinion"); *Gregory v. McDonnell Douglas Corp.,* 17 Cal.3d 596, 603, 131 Cal.Rptr. 641, 644, 552 P.2d 425, 429 (1976) (finding a letter "cautiously phrased in terms of apparency" did not imply factual assertions); *Stewart v. Chicago Title Ins. Co.,* 151 Ill.App.3d 888, 894, 104 Ill.Dec. 865, 868, 503 N.E.2d 580, 583 (1987) (finding a letter "couched in language of opinion rather than firsthand knowledge" did not imply factual assertions). Thus, it is evident from what Diadiun actually wrote that he had no unstated reasons for concluding that Milkovich perjured himself.

Furthermore, the tone and format of the piece notify readers to expect speculation and personal judgment. The tone is pointed, exaggerated, and heavily laden with emotional rhetoric and moral outrage. Diadiun never says, for instance, that Milkovich committed perjury. He says that "[a]nyone who ****2713** attended the meet ... knows in his heart" that Milkovich lied—obvious hyperbole as Diadiun does not purport to have researched what everyone who attended the meet knows in his heart.

The format of the piece is a signed editorial column with a photograph of the columnist and the logo "TD Says." Even the headline on the page where the column is continued—"Diadiun says Maple told a lie," *ante,* at 2698—reminds readers that they are reading one man's commentary. While signed columns may certainly include statements of fact, they are also the "well recognized home of opinion and comment." *Mr. Chow of New York v. Ste. Jour Azur S.A.,* 759 F.2d 219, 227 (CA2 1985). Certain formats—editorials, reviews, political cartoons, letters to the editor—signal the reader to anticipate a departure from what is actually known by the author as fact. See *Ollman v. Evans, supra,* at 317, 750 F.2d, at 986 ("The reasonable reader who peruses [a] column on the editorial or Op–Ed page is fully aware that the statements found there are not 'hard' news like those printed on the front page or elsewhere in the news sections of the newspaper"); R. Smolla, Law of Defamation § 6.12(4), n. 252 (1990) (collecting ***33** cases); Zimmerman, Curbing the High Price of Loose Talk, 18 U.C.D.L.Rev. 359, 442 (1985) (stressing the need to take into account "the cultural common sense of the ordinary listener or reader"). [8]

III

Although I agree with the majority that statements must be scrutinized for implicit factual assertions, the majority's scrutiny in this case does not "hol [d] the balance true," *ante,* at 2708, between protection of individual reputation

and freedom of speech. The statements complained of neither state nor imply a false assertion of fact, and, under the rule the Court reconfirms today, they should be found not libel " 'as a matter of constitutional law.' " *Ante,* at 2704, quoting *Bresler,* 398 U.S., at 13, 90 S.Ct., at 1541. Readers of Diadiun's column are signaled repeatedly that the author does not actually know what Milkovich said at the court hearing and that the author is surmising, from factual premises made explicit in the column, that Milkovich must have lied in court. [9]

**2714 *34 Like the "imaginative expression" and the "rhetorical hyperbole" which the Court finds have "traditionally added much to the discourse of our Nation," *ante,* at 2706, conjecture is intrinsic to "the free flow of ideas and opinions on matters of public interest and concern" that is at "the heart of the First Amendment." *Falwell,* 485 U.S., at 50, 108 S.Ct., at 879. The public and press regularly examine the activities of those who affect our lives. "One of the perogatives of American citizenship is the right to criticize men and measures." *Id.,* at 51, 108 S.Ct., at 879 (quoting *Baumgartner v. United States,* 322 U.S. 665, 673–674, 64 S.Ct. 1240, 1244–1245, 88 L.Ed. 1525 (1944)). But often only some of the facts are known, and solely through insistent prodding—through conjecture as well as research—can important public questions be subjected to the "uninhibited, robust, and wide-open" debate to which this country is profoundly committed. *New York Times Co. v. Sullivan,* 376 U.S. 254, 270, 84 S.Ct. 710, 720, 11 L.Ed.2d 686 (1964).

Did NASA officials ignore sound warnings that the Challenger Space Shuttle would explode? Did Cuban–American *35 leaders arrange for John Fitzgerald Kennedy's assassination? Was Kurt Waldheim a Nazi officer? Such questions are matters of public concern long before all the facts are unearthed, if they ever are. Conjecture is a means of fueling a national discourse on such questions and stimulating public pressure for answers from those who know more. " 'The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.' " *Id.,* at 269, 84 S.Ct., at 720 (quoting *Stromberg v. California,* 283 U.S. 359, 369, 51 S.Ct. 532, 535, 75 L.Ed. 1117 (1931)).

What may be more disturbing to some about Diadiun's conjecture than, say, an editorial in 1960 speculating that Francis Gary Powers was in fact a spy, despite the Government's initial assurances that he was not, is the naiveté of Diadiun's conclusion. The basis of the court decision that is the subject of Diadiun's column was that Maple Heights had been denied its right to due process by the OHSAA. Diadiun, as it happens, not only knew this but included it in his column. But to anyone who knows what "due process" means, it does not follow that the court must have believed some lie about what happened at the wrestling meet, because what happened at the meet would not have been germane to the questions at issue. There may have been testimony about what happened, and that testimony may have been perjured, but to anyone who understands the patois of the legal profession there is no reason to assume—from the court's decision—that such testimony must have been given.

Diadiun, therefore, *is* guilty. He is guilty of jumping to conclusions, of benightedly assuming that court decisions are always based on the merits, and of looking foolish to lawyers. He is not, however, liable for defamation. Ignorance, without more, has never served to defeat freedom of speech. "The constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are *36 offered.' " *New York Times, supra,* at 271, 84 S.Ct., at 721 (quoting *NAACP v. Button,* 371 U.S. 415, 445, 83 S.Ct. 328, 344, 9 L.Ed.2d 405 (1963)).

I appreciate this Court's concern with redressing injuries to an individual's reputation. But as long as it is clear to the reader that he is being offered conjecture and not solid information, the danger to reputation is **2715 one we have chosen to tolerate in pursuit of " 'individual liberty [and] the common quest for truth and the vitality of society as a whole.' " *Falwell, supra,* 485 U.S., at 50–51, 108 S.Ct., at 879 (quoting *Bose Corp.,* 466 U.S., at 503–504, 104 S.Ct., at 1960–1961). Readers are as capable of independently evaluating the merits of such speculative conclusions as they are of evaluating the merits of pure opprobrium. Punishing such conjecture protects reputation only at the cost of expunging a genuinely useful mechanism for public debate. "In a society which takes seriously the principle that government rests upon the consent of the

governed, freedom of the press must be the most cherished tenet." *Edwards v. National Audubon Society, Inc.,* 556 F.2d 113, 115 (CA2), cert. denied *sub nom. Edwards v. New York Times Co.,* 434 U.S. 1002, 98 S.Ct. 647, 54 L.Ed.2d 498 (1977).

It is, therefore, imperative that we take the most particular care where freedom of speech is at risk, not only in articulating the rules mandated by the First Amendment, but also in applying them. " 'Whatever is added to the field of libel is taken from the field of free debate.' " *New York Times, supra,* at 272, 84 S.Ct., at 721 (quoting *Sweeney v. Patterson,* 76 U.S.App.D.C. 23, 24, 128 F.2d 457, 458, cert. denied, 317 U.S. 678, 63 S.Ct. 160, 87 L.Ed. 544 (1942)). Because I would affirm the Ohio Court of Appeals' grant of summary judgment to respondents, albeit on somewhat different reasoning, I respectfully dissent.

All Citations

497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1, 58 USLW 4846, 60 Ed. Law Rep. 1061, 17 Media L. Rep. 2009

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 The Court has previously denied certiorari twice in this litigation on various judgments rendered by the Ohio courts. See *Lorain Journal Co. v. Milkovich,* 474 U.S. 953, 106 S.Ct. 322, 88 L.Ed.2d 305 (1985); *Lorain Journal Co. v. Milkovich,* 449 U.S. 966, 101 S.Ct. 380, 66 L.Ed.2d 232 (1980).

2 In its entirety, the article reads as follows:
"Yesterday in the Franklin County Common Pleas Court, judge Paul Martin overturned an Ohio High School Athletic Assn. decision to suspend the Maple Heights wrestling team from this year's state tournament.
"It's not final yet—the judge granted Maple only a temporary injunction against the ruling—but unless the judge acts much more quickly than he did in this decision (he has been deliberating since a Nov. 8 hearing) the temporary injunction will allow Maple to compete in the tournament and make any further discussion meaningless.
"But there is something much more important involved here than whether Maple was denied due process by the OHSAA, the basis of the temporary injunction.
"When a person takes on a job in a school, whether it be as a teacher, coach, administrator or even maintenance worker, it is well to remember that his primary job is that of educator.
"There is scarcely a person concerned with school who doesn't leave his mark in some way on the young people who pass his way—many are the lessons taken away from school by students which weren't learned from a lesson plan or out of a book. They come from personal experiences with and observations of their superiors and peers, from watching actions and reactions.
"Such a lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple–Mentor wrestling meet of last Feb. 8.
"A lesson which, sadly, in view of the events of the past year, is well they learned early.
"It is simply this: If you get in a jam, lie your way out.
"If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.
"The teachers responsible were mainly head Maple wrestling coach, Mike Milkovich, and former superintendent of schools H. Donald Scott.
"Last winter they were faced with a difficult situation. Milkovich's ranting from the side of the mat and egging the crowd on against the meet official and the opposing team backfired during a meet with Greater Cleveland

Conference rival Metor [*sic*], and resulted in first the Maple Heights team, then many of the partisan crowd attacking the Mentor squad in a brawl which sent four Mentor wrestlers to the hospital.

"Naturally, when Mentor protested to the governing body of high school sports, the OHSAA, the two men were called on the carpet to account for the incident.

"But they declined to walk into the hearing and face up to their responsibilities, as one would hope a coach of Milkovich's accomplishments and reputation would do, and one would certainly expect from a man with the responsible poisition [*sic*] of superintendent of schools.

"Instead they chose to come to the hearing and misrepresent the things that happened to the OHSAA Board of Control, attempting not only to convince the board of their own innocence, but, incredibly, shift the blame of the affair to Mentor.

"I was among the 2,000–plus witnesses of the meet at which the trouble broke out, and I also attended the hearing before the OHSAA, so I was in a unique position of being the only non-involved party to observe both the meet itself and the Milkovich–Scott version presented to the board.

"Any resemblance between the two occurrances [*sic*] is purely coincidental.

"To anyone who was at the meet, it need only be said that the Maple coach's wild gestures during the events leading up to the brawl were passed off by the two as 'shrugs,' and that Milkovich claimed he was 'Powerless to control the crowd' before the melee.

"Fortunately, it seemed at the time, the Milkovich–Scott version of the incident presented to the board of control had enough contradictions and obvious untruths so that the six board members were able to see through it.

"Probably as much in distasteful reaction to the chicanery of the two officials as in displeasure over the actual incident, the board then voted to suspend Maple from this year's tournament and to put Maple Heights, and both Milkovich and his son, Mike Jr. (the Maple Jaycee coach), on two-year probation.

"But unfortunately, by the time the hearing before Judge Martin rolled around, Milkovich and Scott apparently had their version of the incident polished and reconstructed, and the judge apparently believed them.

" 'I can say that some of the stories told to the judge sounded pretty darned unfamiliar,' said Dr. Harold Meyer, commissioner of the OHSAA, who attended the hearing. 'It certainly sounded different from what they told us.'

"Nevertheless, the judge bought their story, and ruled in their favor.

"Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.

"But they got away with it.

"Is that the kind of lesson we want our young people learning from their high school administrators and coaches?

"I think not." App. to Pet. for Cert. A138—A139.

3 The court continued:

"This position is borne out by the second headline on the continuation of the article which states: '... *Diadiun says* Maple told a lie.' ... The issue, in context, was not the statement that there was a legal hearing and Milkovich and Scott lied. Rather, based upon Diadiun's having witnessed the original altercation and OHSAA hearing, it was his view that any position represented by Milkovich and Scott less than a full admission of culpability was, in his view, a lie.... A review of the context of the statements in question demonstrates that Diadiun is not making an attempt to be impartial and no secret is made of his bias.... While Diadiun's mind is certainly made up, the average reader viewing the words in their internal context would be hard pressed to accept Diadiun's statements as an impartial reporting of perjury." *Scott,* 25 Ohio St.3d, at 252–253, 496 N.E.2d, at 707–708 (emphasis in original).

4 Specifically, the court reasoned as follows:

"It is important to recognize that Diadiun's article appeared on the sports page—a traditional haven for cajoling, invective, and hyperbole.... In this broader context we doubt that a reader would assign the same weight to Diadiun's statement as if it had appeared under the byline 'Law Correspondent' on page one of the newspaper.... On balance ... a reader would not expect a sports writer on the sports page to be particularly

knowledgeable about procedural due process and perjury. It is our belief that 'legal conclusions' in such a context would probably be construed as the writer's opinion." *Scott, Id.,* at 253–254, 496 N.E.2d, at 708.

5 Preliminarily, respondents contend that our review of the "opinion" question in this case is precluded by the Ohio Supreme Court's decision in *Scott v. News-Herald,* 25 Ohio St.3d 243, 496 N.E.2d 699 (1986). First, respondents claim that the determination by the Ohio Supreme Court in *Milkovich v. News–Herald,* 15 Ohio St.3d 292, 298, 473 N.E.2d 1191, 1196 (1984), that petitioner is not a public official or figure was overruled in *Scott.* Thus, since petitioner has failed to establish actual malice, his action is precluded under *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), and *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967). This contention is meritless. Respondents rely on the following statements made by the Ohio Supreme Court in its discussion of Scott's status as a public official: " 'To say that Milkovich nevertheless was not a public figure for purposes of discussion about the controversy is simply nonsense,' " 25 Ohio St.3d, at 247, 496 N.E.2d, at 704 (quoting *Milkovich v. Lorain Journal Co.,* 474 U.S. 953, 964, 106 S.Ct. 322, 330, 88 L.Ed.2d 305 (1985) (BRENNAN, J., dissenting from denial of certiorari)), and "we overrule *Milkovich* in its restrictive view of public officials and hold a public school superintendent is a public official for purposes of defamation law." 25 Ohio St.3d, at 248, 496 N.E.2d, at 704. However, it is clear from the context in which these statements were made that the court was simply supporting its determination that Scott was a public official, and that as relates to petitioner Milkovich, these statements were pure dicta. But more importantly, petitioner Milkovich was not a party to the proceedings in *Scott* and thus would not be bound by anything in that ruling under Ohio law. See *Hainbuchner v. Miner,* 31 Ohio St.3d 133, 137, 509 N.E.2d 424, 427 (1987) ("It is universally recognized that a former judgment, in order to be *res judicata* in a subsequent action, must have been rendered in an action in which the parties to the subsequent action were adverse parties") (quotation omitted). Since the Ohio Court of Appeals did not address the public-private figure question on remand from the Ohio Supreme Court in *Milkovich* (because it decided against petitioner on the basis of the opinion ruling in *Scott*), the ruling of the Ohio Supreme Court in *Milkovich* presumably continues to be law of the case on that issue. See *Hawley v. Ritley,* 35 Ohio St.3d 157, 160, 519 N.E.2d 390, 393 (1988) ("[T]he decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels").

Nor is there any merit to respondents' contention that the Court of Appeals below alternatively decided there was no negligence in this case even if petitioner were regarded as a private figure, and thus the action is precluded by our decision in *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). Although the appellate court noted that "the instant cause does not present any material issue of fact as to negligence or 'actual malice,' " *Milkovich v. News–Herald,* 46 Ohio App.3d 20, 24, 545 N.E.2d 1320, 1325 (1989), this statement was immediately explained by the court's following statement that the *Scott* ruling on the opinion issue had accorded respondents absolute immunity from liability. See 46 Ohio App.3d, at 24, 545 N.E.2d, at 1325. The court never made an evidentiary determination on the issue of respondents' negligence.

Next, respondents concede that the *Scott* court relied on the United States Constitution as well as the Ohio Constitution in its recognition of an opinion privilege, Brief for Respondents 18, but argue that certain statements made by the court evidenced an intent to independently rest the decision on state-law grounds, see 25 Ohio St.3d, at 244, 496 N.E.2d, at 701 ("We find the article to be an opinion, protected by Section 11, Article I of the Ohio Constitution ..."); *id.,* at 245, 496 N.E.2d, at 702 ("These ideals are not only an integral part of First Amendment freedoms under the federal Constitution but are independently reinforced

in Section 11, Article I of the Ohio Constitution ..."), thereby precluding federal review under *Michigan v. Long,* 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). We similarly reject this contention. In the *Milkovich* proceedings below, the Court of Appeals relied completely on *Scott* in concluding that Diadiun's article was privileged opinion. See 46 Ohio App.3d, at 23–25, 545 N.E.2d, at 1324–1325. *Scott* relied heavily on federal decisions interpreting the scope of First Amendment protection accorded defamation defendants, see, *e.g.,* 25 Ohio St.3d, at 244, 496 N.E.2d, at 701 ("The federal Constitution has been construed to protect published opinions ever since the United States Supreme Court's opinion in *Gertz v. Robert Welch, Inc.* ..."), and concluded that "[b]ased upon the totality of circumstances it is our view that Diadiun's article was constitutionally protected opinion both with respect to the federal Constitution and under our state Constitution." *Id.,* at 254, 496 N.E.2d, at 709. Thus, the *Scott* decision was at least "interwoven with the federal law," and was not clear on its face as to the court's intent to rely on independent state grounds, yet failed to make a "plain statement ... that the federal cases ... [did] not themselves compel the result that the court ... reached." *Long, supra,* 463 U.S., at 1040–1041, 103 S.Ct., at 3476. Under *Long,* then, federal review is not barred in this case. We note that the Ohio Supreme Court remains free, of course, to address all of the foregoing issues on remand.

6 In *Hepps* the Court reserved judgment on cases involving nonmedia defendants, see 475 U.S., at 779, n. 4, 106 S.Ct., at 1565, n. 4, and accordingly we do the same. Prior to *Hepps,* of course, where public-official or public-figure plaintiffs were involved, the *New York Times* rule already required a showing of falsity before liability could result. 475 U.S., at 775, 106 S.Ct., at 1563.

7 We note that the issue of falsity relates to the *defamatory* facts implied by a statement. For instance, the statement, "I think Jones lied," may be provable as false on two levels. First, that the speaker really did not think Jones had lied but said it anyway, and second that Jones really had not lied. It is, of course, the second level of falsity which would ordinarily serve as the basis for a defamation action, though falsity at the first level may serve to establish malice where that is required for recovery.

8 Of course, the limitations on presumed or punitive damages established by *New York Times* and *Gertz* also apply to the type of statements at issue here.

9 In their brief, *amici* Dow Jones et al. urge us to view the disputed statements "[a]gainst the background of a high profile controversy in a small community," and says that "[t]hey related to a matter of pressing public concern in a small town." Brief for Dow Jones et al. as *Amici Curiae* 27. We do not have the same certainty as do *amici* that people in a "small town" view statements such as these differently from people in a large city. Be that as it may, however, *amici* err in their factual assumption. Maple Heights is located in Cuyahoga County, Ohio, and in the 1980 census had a population of 29,735. Mentor is located in Lake County, Ohio, and in the 1980 census had a population of 42,065. Lake County adjoins Cuyahoga County on the east, and in the 1980 census had a population of 212,801. Both Maple Heights and Mentor are included in the Cleveland standard consolidated statistical area, which in 1980 had a population of 2,834,062. The high schools of both Mentor and Maple Heights played in the Greater Cleveland Conference.

1 See, *e.g.,* *New York Times Co. v. Sullivan,* 376 U.S. 254, 292, n. 30, 84 S.Ct. 710, 732, n. 30, 11 L.Ed.2d 686 (1964) ("Since the Fourteenth Amendment requires recognition of the conditional privilege for honest misstatements of fact, it follows that a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact"); *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 339–340, 94 S.Ct. 2997, 3006–3007, 41 L.Ed.2d 789 (1974) ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas").

2 The defendant in the *Hepps* case was a major daily newspaper and, as the majority notes, see *ante,* at 2704, the Court declined to decide whether the rule it applied to the newspaper would also apply to a nonmedia

defendant. See 475 U.S., at 779, n. 4, 106 S.Ct., at 1565, n. 4. I continue to believe that "such a distinction is 'irreconcilable with the fundamental First Amendment principle that "[t]he inherent worth of ... speech in terms of its capacity for informing the public does not depend upon the identity of the source, whether corporation, association, union, or individual." ' " *Id.,* at 780, 106 S.Ct., at 1565 (BRENNAN, J., concurring) (citations omitted).

3 The Restatement (Second) of Torts § 566, Comment *c* (1977), makes a similar observation. It explains that a statement that "I think C must be an alcoholic" is potentially libelous because a jury might find that it implies the speaker knew undisclosed facts to justify the statement. In contrast, it finds that the following statement could not be found to imply any defamatory facts:

"A writes to B about his neighbor C: 'He moved in six months ago. He works downtown, and I have seen him during that time only twice, in his backyard around 5:30 seated in a deck chair with a portable radio listening to a news broadcast, and with a drink in his hand. I think he must be an alcoholic.' "

Yet even though clear disclosure of a comment's factual predicate precludes a finding that the comment implies other defamatory facts, this does not signify that a statement, preceded by only a partial factual predicate or none at all, necessarily implies other facts. The operative question remains whether reasonable readers would have actually interpreted the statement as implying defamatory facts. See *ante,* at 2706, n. 7; see generally Note, 13 Wm. Mitchell L.Rev. 545 (1987); Comment, 74 Calif.L.Rev. 1001 (1986); Zimmerman, Curbing the High Price of Loose Talk, 18 U.C.D.L.Rev. 359 (1985).

4 See *ante,* at 2706, n. 7 (noting that under *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986), "the issue of falsity relates to the defamatory facts *implied* by a statement" (emphasis changed)). *Hepps* mandates protection for speech that does not actually state or imply false and defamatory facts—independently of the *Bresler–Letter Carriers–Falwell* line of cases. Implicit in the constitutional rule that a plaintiff must prove a statement false to recover damages is a requirement to determine first what statement was actually made. The proof that *Hepps* requires from the plaintiff hinges on what the statement can reasonably be interpreted to mean. For instance, if Riley tells his friends that Smith cheats at cards and Smith then proves that he did not rob a convenience store, Smith cannot recover damages for libel on that basis because he has proved the wrong assertion false. Likewise, in the example in text, Jones cannot recover for defamation for the statement "I think Jones lied about his age just now" by producing proof that he did not lie about his age because, like Smith, he would have proved the wrong assertion false. The assertion Jones must prove false is that the speaker had, in fact, drawn the inference that Jones lied.

5 Conjecture, when recognizable as such, alerts the audience that the statement is one of belief, not fact. The audience understands that the speaker is merely putting forward a hypothesis. Although the hypothesis involves a factual question, it is understood as the author's "best guess." Of course, if the speculative conclusion is preceded by stated factual premises, and one or more of them is false and defamatory, an action for libel may lie *as to them.* But the speculative conclusion itself is actionable only if it implies the existence of another false and defamatory fact.

6 The commissioner is quoted as having said: " 'I can say that some of the stories told to the judge sounded pretty darned unfamiliar.... It certainly sounded different from what they told us.' " *Ante,* at 2699, n. 2. This quotation might also be regarded as a stated factual premise on which Diadiun's speculation is based. However, Milkovich did not complain of the quotation in his pleadings. In any event, it is unlikely that it would be found defamatory. Diadiun had already characterized the testimony of the two officials before the OHSAA as "obvious untruths." Thus, the commissioner's alleged assertion that the testimony in court was different is quite nebulous. It might indicate that the officials told the truth in court, in contrast to the version given to the commissioners, or that the officials discussed entirely different issues, rather than that they told a new lie.

7 Both state and federal courts have found that audiences can recognize conjecture that neither states nor implies any assertions of fact, just as they can recognize hyperbole. For example, in *Potomac Valve & Fitting, Inc. v. Crawford Fitting Co.,* 829 F.2d 1280, 1290 (CA4 1987), the court found that a disparaging

statement about a product test in an industry newsletter, set forth following a list of seven observations about the test's methodology, "readily appears to be nothing more than the author's personal inference from the test results. The premises are explicit, and the reader is by no means required to share [the author's] conclusion."

For the same reason, the court in *Dunlap v. Wayne,* 105 Wash.2d 529, 540, 716 P.2d 842, 849 (1986), concluded: "Arguments for actionability disappear when the audience members know the facts underlying an assertion and can judge the truthfulness of the allegedly defamatory statement themselves." See also *National Assn. of Government Employees, Inc. v. Central Broadcasting Corp.,* 379 Mass. 220, 226, 396 N.E.2d 996, 1000 (1979) (finding that, as listeners were told the facts upon which a radio talk show host based her conclusion, they "could make up their own minds and generate their own opinions or ideas which might or might not accord with [the host's]").

The common-law doctrine of fair comment was also premised on such an observation. Where the reader knew or was told the factual foundation for a comment and could therefore independently judge whether the comment was reasonable, a defendant's unreasonable comment was held to defame " 'himself rather than the subject of his remarks.' " Hill, Defamation and Privacy Under the First Amendment, 76 Colum.L.Rev. 1205, 1229 (1976) (quoting *Popham v. Pickburn,* 158 Eng.Rep. 730, 733 (Ex.1862) (Wilde, B.)). "As Thomas Jefferson observed in his first Inaugural Address ... error of opinion need not and ought not be corrected by the courts 'where reason is left free to combat it.' " *Potomac, supra,* at 1288–1289, quoting Thomas Jefferson's first Inaugural Address (The Complete Jefferson 385 (S. Padover ed. 1943)).

8 The readers of Diadiun's column would also have been alerted to regard any implicit claim of impartiality by Diadiun with skepticism because Diadiun's newspaper is published in the county in which Mentor High School —home to the team that was allegedly mauled at the wrestling meet—is located. Where readers know that an author represents one side in a controversy, they are properly warned to expect that the opinions expressed may rest on passion rather than factual foundation. See, *e.g., Potomac Valve & Fitting Inc. v. Crawford Fitting Co.,* 829 F.2d, at 1290 (explaining that the contents of a company's newsletter would be understood as reflecting the professional interests of the company rather than as "a dispassionate and impartial assessment" of a test of a competitor's product); *Information Control Corp. v. Genesis One Computer Corp.,* 611 F.2d 781, 784 (CA9 1980) (recognizing that statements in the early weeks of litigation by one side about the other were likely to include unsubstantiated charges, but that these "are highly unlikely to be understood by their audience as statements of fact").

9 Milkovich does not challenge the accuracy of any of Diadiun's stated premises. Nor does he complain or proffer proof that Diadiun had not, in fact, concluded from the stated premises that Milkovich must have lied in court. There is, therefore, no call to consider under what circumstances an insincere speculation would constitute a false and defamatory statement under *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986). However, I would think that documentary or eyewitness testimony that the speaker did not believe his own professed opinion would be required before a court would be permitted to decide that there was sufficient evidence to find that the statement was false and submit the question to a jury. Without such objective evidence, a jury's judgment might be too influenced by its view of what was said. As we have long recognized, a jury "is unlikely to be neutral with respect to the content of speech and holds a real danger of becoming an instrument for the suppression of those 'vehement, caustic, and sometimes unpleasantly sharp attacks,' ... which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail." *Monitor Patriot Co. v. Roy,* 401 U.S. 265, 277, 91 S.Ct. 621, 628, 28 L.Ed.2d 35 (1971) (quoting *New York Times,* 376 U.S., at 270, 84 S.Ct., at 720). See also *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485, 510–511, and n. 29, 104 S.Ct. 1949, 1964–1965, and n. 29, 80 L.Ed.2d 502 (1984) (discussing the risks of submitting various questions to juries where freedom of speech is at stake); *Gertz,* 418 U.S., at 349, 94 S.Ct., at 3011 (expressing concern about juries

punishing unpopular opinion rather than compensating individuals for injuries sustained by the publication of a false fact); R. Smolla, Law of Defamation §§ 6.05(3)(a)–(c) (1990); Zimmerman, 18 U.C.D.L.Rev., at 430.

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TAB 13
Bentley v. Bunton
(Tex. 2002)

94 S.W.3d 561
Supreme Court of Texas.

Bascom W. BENTLEY, III, Petitioner,
v.
Joe Ed BUNTON and Jackie Gates, Respondents.

No. 00–0139.
|
Argued Feb. 21, 2001.
|
Decided Aug. 29, 2002.
|
Rehearing Denied Feb. 13, 2003.

Synopsis
Local district judge sued host and cohost of call-in talk show televised on public-access channel for defamation. The Third Judicial District Court, Anderson County, entered judgment on jury verdict awarding judge actual and punitive damages against each defendant separately. Host and cohost appealed. The Tyler Court of Appeals affirmed judgment against talk show host, but reversed judgment against cohost. Talk show host and judge filed petitions for review. The Supreme Court, Hecht, J., held that: (1) host's repeated accusations that judge was corrupt, as a matter of verifiable fact, were defamatory; (2) jury could have reasonably concluded that cohost, by listing his own examples of judge's alleged corruption, made defamatory statement; (3) evidence conclusively established that host's charges that judge was corrupt were utterly and demonstrably false; (4) evidence supported finding that host acted with actual malice; (5) evidence of cohost's actual malice was not clear and convincing; and per an equally divided court; (6) judge was entitled to recover actual damages for injury to his reputation and for mental anguish and punitive damages against host; (7) First Amendment required appellate review of amounts awarded for non-economic damages; and (8) award of $7 million in mental anguish damages was excessive.

Judgment accordingly.

Phillips, C.J., filed an opinion concurring in part and dissenting in part, and concurring in the judgment, in which Enoch and Hankinson, JJ., joined.

Baker, J., concurred in part and filed a dissenting opinion.

West Headnotes (42)

[1] **Constitutional Law** Relation between state and federal rights

Nothing in the language or purpose of the state constitution's free expression clause authorizes the Supreme Court to afford greater weight in the balancing of interests to free expression than the Court would under the First Amendment. U.S.C.A. Const.Amend. 1; Vernon's Ann.Texas Const. Art. 1, § 8.

4 Cases that cite this headnote

[2] **Constitutional Law** Examination of state constitution before federal constitution

Where parties have not argued that differences in state and federal constitutional guarantees are material to the case, and none is apparent, the Supreme Court would limit its analysis to the First Amendment and simply assume that its concerns are congruent with those of the state constitution's free expression clause. U.S.C.A. Const.Amend. 1; Vernon's Ann.Texas Const. Art. 1, § 8.

13 Cases that cite this headnote

[3] **Libel and Slander** Construction of language used

The meaning of a "publication," and thus whether it is false and defamatory, depends on a reasonable person's perception of the entirety of a publication and not merely on individual statements.

30 Cases that cite this headnote

[4] **Constitutional Law** Opinion

Whether a publication is an actionable statement of fact or a constitutionally protected expression of opinion depends on a reasonable person's perception of the entirety of a publication and not merely on individual statements. U.S.C.A. Const.Amend. 1; Vernon's Ann.Texas Const. Art. 1, § 8.

41 Cases that cite this headnote

[5] **Constitutional Law** Questions of law or fact

How principles for distinguishing between an actionable statement of fact and a constitutionally protected expression of opinion apply in a given case are questions of law. U.S.C.A. Const.Amend. 1; Vernon's Ann.Texas Const. Art. 1, § 8.

11 Cases that cite this headnote

[6] **Constitutional Law** Opinion

The analysis for distinguishing between an actionable statement of fact and a constitutionally protected expression of opinion focuses on a statement's verifiability and the entire context in which it was made. U.S.C.A. Const.Amend. 1; Vernon's Ann.Texas Const. Art. 1, § 8.

51 Cases that cite this headnote

[7] **Libel and Slander** Public officers in general

Accusing a public official of corruption is ordinarily defamatory per se.

11 Cases that cite this headnote

[8] **Libel and Slander** Judicial officers

Repeated accusations of host of call-in talk show televised on public-access channel that judge was corrupt, as a matter of verifiable fact, were defamatory; even though host's ravings were often classic soapbox oratory and host often said that it was his opinion that judge was corrupt, host plainly and repeatedly stated that his accusations of corruption were based on objective, provable facts, he cited specific cases and occurrences and pointed to court records and public documents, he claimed to have made lengthy investigations and interviews, and he invited judge to appear on show, not to debate issues, but to answer factual allegations and disprove that he was corrupt.

8 Cases that cite this headnote

[9] **Libel and Slander** Publication and discussion of news

Statements are not incapable of defamation or absolutely protected from liability merely because they are made on public access television; a soap box, electronic or wooden, does not lift a speaker above the law of liability for defamation.

1 Cases that cite this headnote

[10] **Libel and Slander** Judicial officers

Even assuming that cohost's response of "yeah" to statement of host of cable television show that judge was corrupt was ambiguous, jury could have reasonably concluded that cohost, by listing his own examples of judge's alleged corruption, examples which host had not mentioned but immediately endorsed, was expressing statements that were capable of defamatory meaning.

1 Cases that cite this headnote

[11] **Libel and Slander** Falsity

To recover for defamation, a public official must prove that defamatory statements made about him were false.

23 Cases that cite this headnote

[12] **Libel and Slander** Truth as justification in general

Host and cohost of call-in talk show televised on public-access channel were not required, in defamation action brought by judge, to prove as an affirmative defense that their statements that judge was corrupt were true.

2 Cases that cite this headnote

[13] **Libel and Slander** Actionable Words in General

Libel and Slander Falsity

That a statement is defamatory, that is, injurious to reputation, does not mean that it is false, and vice versa.

8 Cases that cite this headnote

[14] **Libel and Slander** Falsity

Evidence regarding eight situations in which host of local cable television show accused judge of dishonest, unethical, shady, and unscrupulous conduct in office conclusively established that host's charges that judge was corrupt were utterly and demonstrably false as a matter of law.

[15] **Evidence** Effect of introducing part of document or record

Fact that two videotapes containing about 60 minutes of broadcasts of cable public-access television show, in which show's host and cohost repeatedly stated judge was corrupt, were excerpted from 12 90–minute programs and that results of viewer polls on whether judge was corrupt were not offered into evidence in defamation action did not render excerpts misleading; host of show did not explain how his assertions that judge was corrupt could have appeared less offensive if viewed as part of a longer broadcast.

[16] **Constitutional Law** Public employees and officials

First Amendment protections for speech about a public official turn on the speaker's degree of awareness that the statements made are false. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[17] **Constitutional Law** Public employees and officials

"Actual malice," within context of First Amendment's prohibition against a public official's recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice, means knowledge of, or reckless disregard for, the falsity of a statement. U.S.C.A. Const.Amend. 1.

28 Cases that cite this headnote

[18] **Libel and Slander** Criticism and comment on public matters and publication of news

Reckless disregard for the falsity of an allegedly defamatory statement about a public official, as an element of actual malice, requires more than a departure from reasonably prudent conduct and mere negligence is not enough.

8 Cases that cite this headnote

[19] **Libel and Slander** Criticism and comment on public matters and publication of news

To establish reckless disregard for the falsity of an allegedly defamatory statement about a public official, as an element of actual malice, there must be evidence that the defendant in fact entertained serious doubts as to the truth of his publication, that is, evidence that the defendant actually had a high degree of awareness of the probable falsity of his statements.

56 Cases that cite this headnote

[20] **Libel and Slander** Criticism and comment on public matters and publication of news

The failure to investigate the facts before speaking as a reasonably prudent person would do is not, standing alone, evidence of a reckless disregard for the truth, as an element of actual malice in defamation action brought by public official for a defamatory falsehood relating to his official conduct, but evidence that a failure to investigate was contrary to a speaker's usual practice and motivated by a desire to avoid the

truth may demonstrate the reckless disregard required for actual malice.

24 Cases that cite this headnote

[21] **Constitutional Law** Public employees and officials

In determining whether the First Amendment standard for actual malice in defamation action brought by public official for a defamatory falsehood relating to his official conduct has been satisfied, the reviewing court must consider the factual record in full. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[22] **Libel and Slander** Criticism and comment on public matters and publication of news

The boundaries of actual malice, and particularly reckless disregard, in defamation action brought by public official for a defamatory falsehood relating to his official conduct cannot be fixed by the defining words alone but must be determined by the applications of those words to particular circumstances.

2 Cases that cite this headnote

[23] **Libel and Slander** Criticism and comment on public matters and publication of news

The actual malice standard in defamation action brought by public official for a defamatory falsehood relating to his official conduct requires that a defendant have, subjectively, significant doubt about the truth of his statements at the time they are made.

9 Cases that cite this headnote

[24] **Libel and Slander** Intent, malice, or good faith

To disprove actual malice in defamation action brought by public official for a defamatory falsehood relating to his official conduct, a defendant may certainly testify about his own thinking and the reasons for his actions, and may be able to negate actual malice conclusively, but the defendant's testimony that he believed what he said is not conclusive, irrespective of all other evidence.

5 Cases that cite this headnote

[25] **Libel and Slander** Intent, malice, or good faith

The defendant's state of mind can and, indeed, must usually be proved by circumstantial evidence of actual malice in a defamation action brought by public official for a defamatory falsehood relating to his official conduct.

17 Cases that cite this headnote

[26] **Libel and Slander** Criticism and comment on public matters and publication of news

A lack of care or an injurious motive in making a statement is not alone proof of actual malice in defamation action brought by public official for a defamatory falsehood relating to his official conduct, but care and motive are factors to be considered.

11 Cases that cite this headnote

[27] **Libel and Slander** Criticism and comment on public matters and publication of news

An understandable misinterpretation of ambiguous facts does not show actual malice, in defamation action brought by public official for a defamatory falsehood relating to his official conduct, but inherently improbable assertions and statements made on information that is obviously dubious may show actual malice.

23 Cases that cite this headnote

[28] **Libel and Slander** Criticism and comment on public matters and publication of news

For purposes of establishing actual malice in defamation action brought by public official for a defamatory falsehood relating to his official conduct, imagining that something may be true is not the same as belief.

1 Cases that cite this headnote

[29] **Constitutional Law** Public employees and officials

The First Amendment not only protects a public official's critics from liability for defamation absent proof that they acted with actual malice, it also requires that such proof be made by clear and convincing evidence. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[30] **Appeal and Error** Libel and slander

A fact finder's determinations at trial as to actual malice in defamation action brought by public official for a defamatory falsehood relating to his official conduct must reviewed independently on appeal.

1 Cases that cite this headnote

[31] **Appeal and Error** Libel and slander

The independent review of evidence of actual malice required by the First Amendment in defamation action brought by public official for a defamatory falsehood relating to his official conduct is unlike the evidentiary review to which appellate courts are accustomed in that the deference to be given the fact finder's determinations is limited. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[32] **Appeal and Error** Deference given to lower court in general

Appeal and Error Credibility and Number of Witnesses

On questions of law, the Supreme Court ordinarily does not defer to a lower court at all, but the sufficiency of disputed evidence to support a finding cannot be treated as a pure question of law when there are issues of credibility.

2 Cases that cite this headnote

[33] **Appeal and Error** Libel and slander

An independent review of evidence of actual malice in defamation action brought by public official for a defamatory falsehood relating to his official conduct should begin with a determination of what evidence the jury must have found incredible and, as long as the jury's credibility determinations are reasonable, that evidence is to be ignored; next, undisputed facts should be identified, and, finally, a determination must be made whether the undisputed evidence along with any other evidence that the jury could have believed provides clear and convincing proof of actual malice.

8 Cases that cite this headnote

[34] **Libel and Slander** Intent, malice, or good faith

A defendant in a defamation action brought by a public official cannot automatically insure a favorable verdict by testifying that he published with a belief that the statements were true; the finder of fact must determine whether the publication was indeed made in good faith.

1 Cases that cite this headnote

[35] **Libel and Slander** Intent, malice, or good faith

Jury did not act unreasonably in rejecting testimony of host of call-in talk show televised on public-access channel regarding his motives and beliefs in repeatedly making defamatory statements that judge was corrupt and in finding that host acted with "actual malice" and "malice," even though host testified that whenever he had made statements about judge he believed them to be true and that his intent was not to embarrass or defame judge but only to promote good government, provide information, and correct any perception of injustice.

1 Cases that cite this headnote

[36] **Libel and Slander** Criticism and comment on public matters and publication of news

Evidence that host of call-in talk show televised on public-access channel never made his allegations of corruption against judge in good faith, that he expressed doubt to friend that there was any basis for charges, that he deliberately ignored people who could have answered all of his questions, that he dared judge to appear on his show but made no attempt to hear him privately, and that he hounded judge relentlessly and ruthlessly for months supported findings that host carried on personal vendetta against judge without regard for truth of his allegations and that he acted with actual malice, even though host attempted to make some minimal investigation before airing his allegations.

4 Cases that cite this headnote

[37] **Libel and Slander** Criticism and comment on public matters and publication of news

While a defendant's ill will toward a public official does not equate to, and must not be confused with, actual malice, such animus may suggest actual malice required for official to maintain defamation action.

4 Cases that cite this headnote

[38] **Libel and Slander** Criticism and comment on public matters and publication of news

Evidence of actual malice of cohost of call-in talk show televised on public-access channel regarding statements that judge was corrupt was not clear and convincing; cohost's reaction on only two instances in which he chimed in during host's allegations was ambiguous, and even in context of host's ongoing verbal assaults against judge in cohost's presence, evidence did not establish that cohost knew or had reckless disregard for whether he was himself communicating a falsehood.

2 Cases that cite this headnote

[39] **Libel and Slander** Injury to reputation

Libel and Slander Mental suffering and emotional distress

As a matter of law, judge was entitled to recover actual damages for injury to his reputation and for mental anguish caused by statements of host of call-in talk show televised on public-access channel that judge was corrupt, which statements were defamatory per se. (Per an equally divided court.)

56 Cases that cite this headnote

[40] **Libel and Slander** On ground of malice or recklessness

Judge was entitled to punitive damages in defamation action without proving that host of call-in talk show, televised on public-access channel, who broadcast statements that judge was corrupt was personally vindictive toward him, based on finding that they acted with actual malice. (Per an equally divided court.)

[41] **Libel and Slander** Slander

Jury's award of $7 million in mental anguish damages to judge in defamation action strongly suggested its disapprobation of conduct of host of cable television show, who broadcast that judge was corrupt, more than a fair assessment of judge's injury and, thus, First Amendment required appellate review of amounts awarded for non-economic damages to ensure that any recovery only compensated judge for actual injuries and was not a disguised disapproval of host. (Per an equally divided court.) U.S.C.A. Const.Amend. 1.

30 Cases that cite this headnote

[42] **Libel and Slander** Slander

Although testimony of judge and his friends that corruption accusations repeatedly leveled against him on local cable access television show deprived judge of sleep, caused him embarrassment, impugned his honor and integrity, disrupted his family, and caused judge to be depressed supported finding that judge suffered mental anguish as a result of statements of show's host and cohost, none of this was evidence that judge suffered mental anguish

damages in the amount of $7 million, more than 40 times the amount awarded him for damage to his reputation. (Per an equally divided court.)

46 Cases that cite this headnote

Attorneys and Law Firms

***566** Mike A. Hatchell, Molly H. Hatchell, Hatchell P.C., Tyler, George Chandler, Reich Chandler, Chandler Law Offices, Lufkin, Darrin M. Walker, Law Office of Darrin Walker, Kingwood, for Petitioner.

Robert L. Crider, Palestine, Armando De Diego, The Law Office of Armando De Diego, Dallas, Ronald D. Wren, Bedford, for Respondents.

Opinion

Justice HECHT delivered the opinion for the Court with respect to Parts I, III, IV, and V, in which Justice OWEN, Justice BAKER (except for Part V–D), Justice JEFFERSON, and Justice RODRIGUEZ joined, with respect to Part II, in which Chief Justice PHILLIPS, Justice ENOCH, Justice OWEN, Justice BAKER, Justice HANKINSON, Justice JEFFERSON, and Justice RODRIGUEZ joined, and with respect to Part VII, in which Chief Justice PHILLIPS, Justice ENOCH, Justice OWEN, Justice HANKINSON, Justice JEFFERSON, and Justice RODRIGUEZ joined, and an opinion with respect to Part VI, in which Justice OWEN, Justice JEFFERSON, and Justice RODRIGUEZ joined.

For months, the host of a call-in talk show televised on a public-access channel ***567** in a small community repeatedly accused a local district judge of being corrupt. A co-host on some of the shows expressed agreement with the accusations but never himself used the word "corrupt". The judge sued both of them for defamation. Based on conclusive proof that the accusations were false and defamatory, and on jury findings that the defendants acted with actual malice as well as a specific intent to cause injury, the trial court rendered judgment awarding the plaintiff actual and punitive damages assessed by the jury against each defendant separately. Notwithstanding the jury's finding that the defendants conspired together, the court refused to hold them jointly liable for the actual damages each caused. The plaintiff and both defendants appealed. The court of appeals affirmed the judgment against the talk show host who made the repeated accusations and reversed the judgment against his co-host.[1] The liable defendant and the plaintiff seek review here.

The legal and evidentiary issues raised by the parties are too numerous and varied to summarize at this point, but principal among them are these:

- Does article I, section 8 of the Texas Constitution restrict liability for defamation of a public official more than the First Amendment to the United States Constitution?
- Under the circumstances presented here, are accusations that a public official is corrupt actionable statements of fact or protected expressions of opinion?
- Can a person be liable for defamation if all he does is express agreement with another's defamatory statements?
- Were the accusations of corruption in this case false as a matter of law?
- Can a person who falsely accuses a public official of being corrupt be proved by clear and convincing evidence to have acted with actual malice despite his assertions that he sincerely believed the accusations?
- Under the circumstances, are awards of $7 million for mental anguish damages and $1 million punitive damages excessive as a matter of law either under Texas common law or the First Amendment?

We agree with the court of appeals that only the one defendant is liable for defamation, but we conclude that the jury's finding of $7 million in mental anguish damages has no evidentiary support and is excessive as a matter of law by constitutional standards. We remand the case to the court of appeals for further proceedings.

I

"Q&A", a live, ninety-minute, call-in television talk show, began broadcasting weekly in 1990 on a public-access channel available to cable subscribers in and between Palestine and nearby Elkhart, two towns in Anderson County in East Texas. At that time, the population of Palestine, the county seat, was about 18,000, and the population of Elkhart was just over 1,100.[2] All of the participants in "Q&A"—including the self-described hosts,

producer, director, investigators, reporters, and cameraman —were unpaid volunteers. The privately produced programs generally consisted of one or two hosts talking about various subjects of local interest, either by themselves or with guests or callers. Programs were often rerun during the week. ***568** Program content ranged from informational to editorial.

Defendant Joe Ed Bunton, a Palestine native, helped start "Q&A". Bunton had returned to Palestine several years earlier after college and fifteen years in the army, and had been elected to one term on the city council. He was defeated in his bid for re-election, as well as in three successive attempts to regain a seat on the council. After his first defeat, he became interested in public-access television as a means of increasing his involvement in grass-roots politics. Bunton began hosting "Q&A" programs in 1994. In his brief in this Court, Bunton describes "Q&A" as "a wide-open, sometimes caustic and/or an uncivilized public forum, which has become the electronic soapbox for Palestine, Texas."

In the spring of 1995, Bunton learned of a criminal case that had been pending for two years in the 369th District Court before Judge Bascom Bentley III, one of four judges whose districts included Anderson County. Bentley, himself a lifelong resident of the county, had been appointed to the district court in 1989, elected in 1990, and re-elected in 1994. He had previously served as Palestine city attorney, county attorney, and judge of the county court at law. The defendant in the case, a young man named Curbo, had been charged with robbery (purse-snatching), and in March 1993, Judge Bentley had placed him on what the Texas Code of Criminal Procedure calls "community supervision"—a kind of probation—for five years with his adjudication of guilt deferred.[3] Barely eight weeks later, Curbo had been arrested for credit card abuse.[4] Court records reflected that in June 1993 the district attorney filed a motion to adjudicate Curbo's guilt on the robbery charge and that Judge Bentley released Curbo on his personal recognizance—that is, without a surety bond[5] —without ruling on the motion. From these records, Bunton surmised, without discussing the case with Curbo's lawyer or the district attorney, that Bentley's release of Curbo was improper, and furthermore, that Bentley had left the motion pending for criminal design: so that he could use the threat of further proceedings against Curbo to pressure Curbo's father, then a mayoral candidate, into acting as directed in the event he became mayor. Bentley, Bunton supposed, could control Curbo's father by threatening to adjudicate Curbo and sentence him to prison. Had Bentley been so motivated, his conduct would undisputedly have been criminal.[6] In fact, however, Curbo's release without a surety bond had been requested by Curbo's lawyer without objection from the district attorney and was clearly within Bentley's discretion,[7] and the case had remained pending because neither Curbo's probation officer nor the district attorney believed that Curbo, who suffered from learning disabilities, should be incarcerated. Accordingly, neither Curbo's lawyer nor the district attorney had ever requested a ruling on the motion to adjudicate. Moreover, Curbo's father was not elected mayor.

***569** Bunton also learned early in 1995 that Anderson County Sheriff Mickey Hubert had refused to arrest one of his own deputies, Danny Harding, on a warrant that an assistant district attorney had helped procure without the approval of the district attorney, who had determined that evidence concerning Harding should first be presented to the grand jury. After what Bunton called an "investigation" of the circumstances, he concluded that Hubert had violated article 2.18 of the Texas Code of Criminal Procedure ("Custody of Prisoners")[8] and section 39.02(a)(1) of the Texas Penal Code ("Abuse of Official Capacity"),[9] even though the district attorney had had the warrant recalled. Bunton also concluded that Bentley, who had not issued the warrant and was in no way involved in the matter, was responsible for failing to convene a court of inquiry to determine whether Hubert had violated the law[10] and to have him arrested.[11]

On the "Q&A" program broadcast on June 6, 1995, a videotape excerpt of which is in the record, Bunton announced that the topic for discussion would be "corruption at the courthouse". He charged that Bentley's release of Curbo and the delay in resolving the case "makes the system look corrupt". He asserted that his accusations against the judicial system in Anderson County were "true". He admonished Bentley to "clear this case off your docket and quit hanging it over these people's heads". He also discussed the Harding matter and explained why he thought Bentley and Hubert had both acted illegally. Bunton claimed to have made lengthy investigations of both matters, reviewing records and interviewing employees at the courthouse. He dared Bentley and Hubert to call in or come on the program and show that his allegations were untrue:

> Bascom, you and Mickey call in and say it ain't true. Say, "Joe Ed, you're lying. You're telling untrue things about it." I dare you. You're welcome to come in here. You can come out here. You can call in here. The fact is, y'all are corrupt,

> y'all are the criminals, y'all are the ones that oughta be in jail.

After the program, Bentley telephoned Bunton's home and left word for him to call back. Bunton did not return the call. Bentley also called "Q&A" and asked a volunteer there to tell Bunton to stop calling him corrupt. The volunteer acknowledged that Bunton was "going too far" but said that Bunton was "out of control" and there was nothing to be done.

***570** A videotape of the "Q&A" program two weeks later, on June 20, shows Bunton reporting that Bentley had threatened to sue for defamation based on the June 6 program. In fact, Bentley did not sue until almost eight months later. On the program, Bunton asserted: "I stand by everything that I said that night and I'm gonna give you more tonight about this issue." Bunton again challenged Bentley to come on the program and deny the allegations. Bunton repeatedly stated that Bentley was not doing his job or earning his salary. He asserted that his accusations were supported by records at the courthouse. Holding up copies of some records that he had obtained, Bunton said: "You can't sue anybody for slander when they're telling the truth, and this is the truth, and there is no libel or slander in this, not on our part. If it is, it's on the part of the records in the courthouse, and I don't believe that's the case." Later in the program, Bunton referred to a "clique" of public officials and others in Palestine, Bentley included, who often lunched together. Bunton finished by saying that "the five most corrupt political officials at the county level, in alphabetical order, would be Bentley, [District Judge Sam] Bournias, [District Judge Jerry] Calhoon, [District Attorney Jeffrey] Herrington, and [Sheriff Mickey] Hubert—top five, the most corrupt public officials."

The videotape of the June 27 "Q&A" program shows Bunton inviting viewers to call in and register their views on whether Bentley was corrupt. At the bottom of the television screen was this legend: "Q&A POLL: IS JUDGE BENTLEY CORRUPT?" Bunton then told viewers he would again discuss Bentley's "corruptness, my opinion, but you'll have to make up your own opinion." Bunton recounted his version of the Curbo case as he had on the June 6 and June 20 broadcasts, based on what he again said was an "investigation" of the facts and records which he said could be obtained at the courthouse. He reiterated that he had invited Bentley to be on the program to disprove the allegations of corruption but that Bentley had not accepted the invitation and had instead threatened suit. Bunton said he welcomed the suit because "the facts are with us and this is the truth, and therefore it is not slander." He repeated that his assertions were based on public records and complained that although he had provided copies to the local newspaper, it had not written a story.

On the same program, Bunton again referred to "self-confessed clique-ers" who were Bentley's "cronies" and continued: "You know, last week one of the things that we did, or I did, was that I came up with what I think are the five most corrupt elected officials in Anderson County, and in alphabetical order they are Judge Bentley, Judge Bournias, Judge Calhoon, District Attorney Jeff Herrington, and Sheriff Mickey Hubert." In response to reports he had heard that Judge Bentley was, in Bunton's words, "rather nervous and upset and just not himself" because of the allegations on "Q&A", Bunton stated: "Well, Judge, you can expect this kind of pressure to stay on you, the full-court 'Q&A' press is gonna stay onto you until you straighten up, or what really'd be better, Bascom, is just resign and get off the bench, would be the best thing you could do for Anderson County." Again referring to public records, Bunton said Bentley "is corrupt, that's my opinion."

When a person called in to say that he did not see why Bentley should be criticized for being lenient with a young offender like Curbo, Bunton responded: "This is my suspicion —there's no way to prove this, but this is what my concern is." Bunton then reiterated his allegation that Bentley had delayed resolution of the Curbo ***571** case to "use" Curbo's father, who had been a candidate for mayor. He hypothesized that

> [Curbo's] father would be told, "We need you to vote for this this way," and he says, "No, I don't want to do that," and they'll say, "Look, your son is looking at forty years in the state pen, and I, we could have him sentenced, and he will not get out of prison while you're alive, and you know what kind of ties we have within the Texas Department of Criminal Justice, and we can pick his roommate, and it will not be an enjoyable time in the Texas Department of Correction."

Importantly, Bunton added this:

> Judge Bentley has been one of the hardest people for 'Q&A' to finally get some things that we could really dig our teeth in and were confident to go on the air on and go after him on because he is very, very slick. Okay? And we've known this, and we've

> known what he's been doing for a long time, but it's been difficult to pin down.

However, Bunton claimed, court records showed that his allegations were factual. "The center of evil," he said, "is in that courthouse."

Another caller, who described herself as "a good friend of Judge Bentley's", stated that the judge was "a wonderful man" and "a wonderful father". In response, Bunton asked: "All right, let me ask you this: Have you seen these records of what's gone on in this case?" When the caller said she had not, Bunton offered to make the records he had available to her, saying: "I think when you see the facts, you will have only one opinion." "The question is," Bunton went on, "is Judge Bentley corrupt? And my opinion is, based on the facts, he is."

About the same time as these broadcasts, during the summer of 1995, Bunton happened to meet a long-time friend going into a store. At trial, the friend testified as follows:

> We—like I say, I've known [Bunton] for quite some time, and we spoke to each other as we came in [the store]. And as we began to talk, he began to speak more and more about the injustices in Palestine and Anderson County politics, and that there was some—a particular group of people referred to as "the clique" that were responsible for some of the shortcomings that we had in our government. And he was—he was telling me that he was wanting to expose all of them, and he'd bring it all to the surface, and anything that was not right with the system, he wanted to bring it out.... [H]e said that he had investigated and done a lot of research on all of the members—on a lot of the members he said were a part of this clique here in Palestine, and he was able to get quite a bit of information on quite a few of them that had done something that he felt like was wrong and needed to be aired. He said that the one that he really couldn't get anything on that bothered him was old Bascom Bentley.... [M]y response was that I told him I didn't think he would ever find anything on him because I didn't really think there was anything to find. But he said, "No, he's—he's in with that clique, and he has—he's known to associate with them. He goes out to eat with them at lunch. He's right in there with them, and he's doing something. I just don't know what it is."

Notably, Bunton did not deny this account of the conversation at trial.

Defendant Jackie Gates first appeared on "Q&A" on July 11 as a guest, discussing the local Crime Stoppers' list of most wanted criminals. He soon joined the program as Bunton's co-host. The two shared a military background, Gates having retired ***572** from the Air Force as a colonel with thirty-two years' service. Gates had lived in Palestine since 1990. Like Bunton and the others involved in "Q&A", Gates was an unpaid volunteer, acting from time to time as host, investigator, reporter, director, and cameraman.

Gates had never seen "Q&A" before July 11 because he was not a cable television subscriber, so he was not at first aware of the allegations Bunton had made in June that Bentley was corrupt and criminal. But he was soon made aware by Bentley himself. On October 2, Gates attended a hearing on a criminal case over which Judge Bentley was presiding. The defendant, Gerald Battles, was complaining of ineffective assistance of counsel in prior proceedings, and Gates, who was not an attorney, had been advising him. When the hearing concluded, Bentley asked Gates to step into his chambers, where they engaged in what both later recalled was a "cordial" conversation. Bentley began by warning Gates that "it was a dangerous, dangerous game for him to get involved in giving advice to inmates". Bentley then turned to "Q&A" and Bunton. He complained to Gates that Bunton's accusations of corruption were "not right". Gates agreed and told Bentley that Bunton was "a lot of times out of control" and that he, Gates, had joined the program to clean it up and stop the name-calling. At trial, Gates testified consistently that he disagreed with Bunton's accusations that Bentley was corrupt and criminal but that he could not control what Bunton said on television. Although Gates testified that he once told Bunton off the air not to call Bentley corrupt, in fact Gates

appeared on many "Q&A" programs when Bunton repeated the accusation, and on the air Gates never protested.

Gates was on "Q&A" on January 30, 1996, when Bunton repeatedly referred to Bentley as "the most corrupt", "the number one corrupt", and "the ultimate corrupt" elected official in Anderson County. On that program, Bunton made four additional allegations against Bentley. One was that Bentley, along with the other district judges in Anderson County, had failed to supervise the county auditor [12] and county commissioners court, [13] who, Bunton said, should have discovered years earlier that the district attorney was not properly depositing money paid on "hot checks" and forfeited property funds in the county treasury. Another allegation was that Bentley had failed to report two other district judges, Judge Bournias and Judge Calhoon, for judicial misconduct [14] for dismissing petitions Bunton had filed to remove the district attorney. [15] A third allegation was that Bentley had contributed to the election campaigns of candidates for county judge, an officer who presides over the county commissioners court and is thus ***573** subject to the general supervisory control of the district court. [16] Finally, Bunton alleged that Bentley had given a criminal defendant, Carroll Neal too light a sentence for cattle theft and then refused to recognize Neal's "good time" credit given by the sheriff. Bentley, Bunton said, was "the most corrupt elected official, and if you don't believe that, all you need to do is start digging around the courthouse".

On the February 1 "Q&A" program, Bunton repeated, with Gates present, that Bentley had made contributions to candidates for county judge. "That really raises a question about his integrity," Bunton stated. "It's just more to prove that he deserves to be in the number one position of corrupt elected officials. We can talk about the Curbo deal, but it's one thing on top of the other. Judge Bascom Bentley III is the most corrupt elected official." Two weeks later Gates co-hosted the show as Bunton announced a "Bentley Hot Line"—a telephone number viewers could call to report anything Bentley had done that was "outrageous that might put a bad light on his profession as a judge or his character". Bunton coached callers on how to report on Bentley without revealing their identity. Gates testified at trial that he remembered encouraging viewers at one point to call the "hot line" with both good and bad information about Bentley to give "the entire story," but the videotapes in the record do not contain any such statement by Gates.

Gates never himself used the word "corrupt" with reference to Bentley, but there is evidence that he nevertheless expressed agreement with Bunton's accusations, despite having told Bentley during their meeting in Bentley's chambers that he did not think Bentley was corrupt. During the March 7 program, a videotape shows that Bunton looked directly at Gates, who was seated beside him, while he listed the top five corrupt officials in Anderson County, with Bentley being number one. Later in the program, when Bunton told a caller that district attorney Herrington was the number one corrupt official, she reminded him that he had earlier said Herrington was number two. "He is," Bunton replied. When Gates attempted to correct him with, "Well, you said ...," Bunton interrupted, "Bascom Bentley's number one." "Yeah," Gates replied. Asked at trial to explain what he had meant by saying "yeah", Gates testified, "I think it was a spontaneous reaction more than anything, is all I can say."

As the program continued, Bunton again returned to the Curbo case. Looking over at Gates, Bunton admonished an imaginary Bentley thus: "Now either you're just grossly incompetent or you're awful lazy, and we believe that it has to do with why you're number one on our corrupt list—is because we believe that this is corruption and cronyism tied to the mayor's race last year." Told that Bentley's sister had called in to complain that her brother was being slandered, Bunton replied: "I'm not slandering her brother because the fact of it is to be slander it has to not be true.... Unfortunately, your brother is corrupt. He is the most corrupt elected official in Anderson County, in my opinion."

On one occasion, Gates seemed to join Bunton in his accusations against Bentley. The videotape of the December 26, 1996 "Q&A" program shows Bunton stating:

> There's judges in this town that says their kids come home from school and say, "Daddy, the kids at school are saying you're corrupted." Well, I'm sorry that Judge Bentley's children [he has four] say that to him. But you know ***574** what? He is corrupted, and it's a shame that your parents disgrace you like that. And they can change. All they gotta do is do right. But Judge Bentley's been caught big-time....

Bunton and Gates, together, then listed occurrences that showed Bentley was corrupt:

> BUNTON: Bascom Bentley is exactly the same way. He is corrupt. The Curbo deal does it. The Neal deal does it. I mean it's one thing after another:—

> GATES: Clarence George Gray [who had not previously been mentioned], Gerald Battles [the criminal defendant Gates had advised the day Gates met with Bentley in chambers]—
>
> BUNTON: —Clarence Gray, Gerald—
>
> GATES: —and there's some others besides—
>
> BUNTON: —and there's others.
>
> GATES: —Gerald Battles.
>
> BUNTON: And it's broken a lot of people's belief that Bascom Bentley is a shining star of Anderson County. But let me tell you what: Bascom Bentley is the most corrupt elected official other than maybe [District Attorney] Jeff Herrington.

On February 6, 1996, Bentley sued Bunton, Gates, and others associated with "Q&A". The case came to trial a year later. At trial, Gates admitted that he never had any knowledge that Bentley was corrupt or criminal, but Bunton continued to assert that Bentley was both corrupt—by which he testified he meant dishonest, unethical, shady, and unscrupulous, as the word is commonly defined [17]—and criminal. To prove that his accusations of corruption and criminal conduct were in fact true, Bunton testified to the six matters that had been discussed on various Q&A programs—the Curbo and Neal cases, the Harding warrant, the political contributions, and the several failures to oversee county officials and to report judicial misconduct—and to two other cases in which Bentley had revoked a criminal defendant's probation—that of Rory Beavers in one and Nathan Meyer in the other—and another judge had granted a new trial. Bentley testified at length, reviewing the details of these assertions and explaining how his conduct had been proper. Bentley also offered expert testimony by Cindy Garner, the district attorney in neighboring Houston County, and Sam Hicks, Curbo's lawyer. The evidence regarding all eight matters asserted by Bunton to show that Bentley was corrupt may be fairly summarized as follows:

- *The Curbo case.* Although it is unusual for a court to release a defendant on personal recognizance pending a hearing on a motion to adjudicate guilt following a probation violation, it is clearly within a court's discretion to do so. [18] A hearing on the motion was postponed by agreement of the district attorney and Hicks to give the boy a chance to mend his ways before facing incarceration. The agreement was not in writing, and Bunton was not aware of it because he did not talk with the district attorney or Hicks, which he could have done. Hicks testified that the pendency ***575** of the motion was to Curbo's benefit and could not reasonably have been construed as an effort to coerce Curbo's father in any way.

- *The Harding warrant.* Bentley was not involved in any way in either the issuance or the recall of the warrant for Harding's arrest, and he had no duty to have the sheriff arrested for not executing the warrant or to convene a court of inquiry.

- *The "hot check" and forfeited property funds.* Although for a time the district attorney did not deposit payments made by defendants on hot checks and forfeited property funds in the county treasury as required by law, [19] the mistake was thoroughly investigated and no wrongdoing was found. Garner testified that Bentley had nothing to do with these funds and was not required by law to force the county auditor or the commissioners court to take remedial action sooner.

- *The petitions to remove the district attorney.* Bunton filed two petitions to remove the district attorney. After an investigation, both were dismissed, one by Judge Calhoon and the other by Judge Bournias. Bentley had nothing to do with either petition, and he was not required to report Judge Calhoon and Judge Bournias to the Judicial Conduct Commission for acting illegally. On the contrary, neither petition had merit; both were found to have been based on personal vendettas, unfounded rumors, and a lack of knowledge of the criminal justice system.

- *Bentley's campaign contributions.* After a runoff primary election for county judge, Bentley contributed $100 to both the winner and the loser. The winner was not opposed in the general election. Bentley's campaign treasurer received oral approval for such contributions from the Texas Ethics Commission.

- *The Neal, Meyer, and Beavers cases.* In each of these criminal cases, Bentley's rulings were set aside. In the Neal case, Bentley erroneously attempted to issue an order nunc pro tunc correcting a sentencing

order that failed to recite the plea bargain that the defendant would not be given "good time" credit. Neal was ordered released. In the Meyer case, the defendant's lawyer misunderstood Bentley to say that he would not grant a motion to revoke probation and therefore did not offer evidence. When Bentley denied the motion, Meyer moved for a new trial, and Bentley recused. Judge Calhoon ordered that Meyer be given a new trial. In the Beavers case, after sentencing the defendant, Bentley recused, and another judge granted the defendant a new trial. None of the cases involved anything other than at most an error of law by Bentley. Garner testified that it would not be reasonable for anyone to conclude that Bentley was corrupt on account of his handling of the Neal case, and Judge Calhoon testified to the same effect regarding the Meyer case.

Bentley acknowledged at trial that he had not incurred any monetary loss as a result of Bunton's and Gates's conduct, but he offered evidence regarding the injury to his reputation and the mental stress he ***576** had suffered. Bunton and Gates, he testified,

> have taken time from me. They have ruined moments with my family, with my friends. They have—they have put a cloud over my home, my four children. And Jackie Gates, yes, sir, Mr. Gates—perhaps even more than Mr. Bunton—they have—I have—I have agonized because my name means something to me.... In a lot of ways, it's all I've got, and I've—the day I became judge, I appreciated that I had a position of trust, and that of all people I needed to maintain my integrity and try to be a virtuous man. I've got four children that I don't want embarrassed, and every time Mr. Gates or the rest of them opened their mouth, I know how it hurt them, how it hurt my sister, how it hurt my family.

Bentley testified that the accusation against him had been "the worst thing that's happened to me in my life", going "to the very heart of what my whole life is about." Everywhere he went, he said, people would say that they had heard him called corrupt, although "most of them are well-meaning and a lot of them said it was joking". Bentley testified that he spent time worrying at home about the accusations, and that he worried about the effect on his family and the treatment of his children by their peers at school. Bentley's wife testified that the entire episode had been a "tragedy" that had "ruined Bascom's life and my children's life". Her husband, she said, had lost sleep, suffered stress, and would never be the same. A long-time friend of Bentley's testified:

> Well, I think it's impacted him a lot. I've known him, like I said, for fifteen or twenty years, and I think—I think he's been downcast. I think he's been depressed and he's been sad. It's unfortunate, but I've seen a major change in the demeanor of the judge. I don't know what else I can say, but it's kinda sad the way it has affected him and his family as well.

When Bentley rested his case-in-chief, the court directed a verdict for all of the defendants except Bunton and Gates. At the close of all of the evidence, the trial court granted Bentley's motion for a partial directed verdict that Bunton's accusations of corruption and criminality were defamatory per se. The jury then found that:

- Bunton published defamatory statements about Bentley with "actual malice" and with "malice";
- Gates agreed with Bunton's defamatory statements and published his agreement with "actual malice" and with "malice";
- Bunton and Gates conspired to publish defamatory statements about Bentley;
- Bunton's conduct caused Bentley to suffer $150,000 damages in past and future loss of character and reputation, and $7 million in past mental anguish;
- Gates's conduct caused Bentley to suffer $25,000 damages in past loss of character and reputation and $70,000 in past mental anguish; and

- punitive damages should be assessed, $1 million against Bunton and $50,000 against Gates.

Based on this verdict, the trial court rendered judgment awarding Bentley actual and punitive damages and prejudgment interest totaling $9,560,410.40 against Bunton and $163,739.72 against Gates. The trial court refused to hold the defendants jointly liable for all of the damages, despite the jury's finding that they had conspired to defame Bentley.

***577** Bunton and Gates appealed from the judgment against them, and Bentley appealed from the denial of joint liability. The court of appeals affirmed the judgment against Bunton but reversed the judgment against Gates.[20] The court concluded that:

- the jury's finding that Bunton acted with actual malice was supported by clear and convincing evidence;[21]
- Bunton had the burden of proving that his statements were true, and failed to do so;[22]
- the jury's findings of actual damages caused by Bunton were supported by legally and factually sufficient evidence;[23]
- there is no evidence that Gates defamed Bunton;[24] and
- Bunton and Gates were not jointly liable as co-conspirators because Bentley did not request a jury finding on what damages were caused by the conspiracy itself and the evidence did not conclusively establish that all of the damages Bunton caused were attributable to the conspiracy, such as damages resulting from statements made before the conspiracy was formed and never ratified by Gates.[25]

Bentley and Bunton petitioned for review, and we granted both petitions.[26] They, along with respondent Gates, have raised numerous issues. We begin (in Part II) with the defendants' threshold claim that the Texas Constitution affords them greater protection than the First Amendment. We then consider the issues related to liability: whether the defendants' statements were capable of defamatory meaning (Part III), whether those statements were false (Part IV), and whether the defendants acted with actual malice (Part V). Next we turn to the issues related to damages (Part VI). Finally, we consider the appropriate action in light of our conclusions (Part VII).

II

Bunton and Gates claim the protections of article I, section 8 of the Texas Constitution, as well as those of the First Amendment to the United States Constitution. Article I, section 8 states:

> Freedom of speech and press; libel
>
> Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. In prosecutions for the publication of papers, investigating the conduct of officers, or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.[27]

Both defendants point out that this Court has sometimes called the state guarantee of free speech "broader",[28] but neither of ***578** them explains how differences in the two constitutional provisions affect this case. The mere assertion that the state provision is broader than the federal means nothing. As we said in *Commission for Lawyer Discipline v. Benton:*

> This Court has recognized that "in some aspects our free speech provision is broader than the First Amendment." However, to assume automatically "that the state constitutional provision *must* be more protective than its federal counterpart illegitimizes any effort to determine state constitutional standards." If the Texas Constitution is more protective of a particular type of speech, "it must be because of the text, history, and purpose of the provision."[29]

Bunton and Gates make no attempt to show how the text, history, or purpose of the state constitutional provision affords them greater protection than the First Amendment.

[1] If anything, in the context of defamation, the First Amendment affords more protection. Recently, in *Turner v. KTRK Television, Inc.,* we explained:

> Although we have recognized that the Texas Constitution's free speech guarantee is in some cases broader than the federal guarantee, we have also recognized that "broader protection, if any, cannot come at the expense of a defamation claimant's right to redress." Unlike the United States Constitution, the Texas Constitution expressly guarantees the right to bring reputational torts. The Texas Constitution's free speech provision guarantees everyone the right to "speak, write or publish his opinions on any subject, *being responsible for abuse of that privilege.*" Likewise, the Texas Constitution's open courts provision guarantees that "[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person *or reputation,* shall have remedy by due course of law." While we have occasionally extended protections to defamation defendants greater than those offered by the United States Constitution, we have based these protections on the common law, not the Texas Constitution. [30]

As CHIEF JUSTICE PHILLIPS correctly stated several years ago, after thoroughly reviewing the history of article I, section 8, "[N]othing in the language or purpose of the Texas Free Expression Clause authorizes us ... to afford greater weight in the balancing of interests to free expression than we would under the First Amendment...." [31]

***579** **[2]** In some cases we have applied state constitutional provisions before considering similar provisions of the federal constitution, [32] but in others we have not. [33] No rigid order of analysis is necessary, despite occasional language to the contrary in some of our opinions. [34] Where, as here, the parties have not argued that differences in state and federal constitutional guarantees are material to the case, and none is apparent, we limit our analysis to the First Amendment and simply assume that its concerns are congruent with those of article I, section 8.

III

We now turn to Bunton's and Gates's arguments that their statements were expressions of opinion rather than statements of fact and were not capable of defamatory meaning.

A

[3] **[4]** It is well settled that "the meaning of a publication, and thus whether it is false and defamatory, depends on a reasonable person's perception of the entirety of a publication and not merely on individual statements." [35] This is also true in determining whether a publication is an actionable statement of fact or a constitutionally protected expression of opinion.

[5] To distinguish between fact and opinion, we are bound to use as our guide the United States Supreme Court's latest word on the subject, *Milkovich v. Lorain Journal Co.* [36] In that case a newspaper, the *Lorain Journal,* reported that a high school wrestling coach, Milkovich, had "lied" during a judicial proceeding which overturned a state athletic association's sanction imposed on his team. The Court rejected the newspaper's argument that its statements were constitutionally protected opinion. The Court began its analysis by explaining that early common law did not distinguish between factual statements and opinions in imposing liability for defamation, but

> due to concerns that unduly burdensome defamation laws could stifle valuable public debate, the privilege of "fair comment" was incorporated into the common law as an affirmative defense to an action for defamation. "The principle of 'fair comment' afforded legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact." [37]

After surveying the constitutional limitations on defamation liability in its own opinions, the Court concluded that it was unnecessary to create a separate privilege for "opinion" defined by some multi-factor test, as some courts had done. [38] "[W]e ***580** think the ' " 'breathing space' " ' which ' " '[f]reedoms of expression require in order to survive,' " ' " the Court said, "is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between 'opinion' and fact." [39] Included in that doctrine, the Court explained, are the following principles:

- "a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, like the present, where a media defendant is involved" and "where public-official or public-figure plaintiffs [are] involved;" [40]

- the Constitution protects "statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual" made in debate over public matters in order to "provide[ ] assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation;"[41]

- "where a statement of 'opinion' on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth", and "where such a statement involves a private figure on a matter of public concern, a plaintiff must show that the false connotations were made with some level of fault";[42] and

- "the enhanced appellate review required by *Bose Corp.* [*v. Consumers Union of United States, Inc.,* 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984)] provides assurance that the foregoing determinations will be made in a manner so as not to 'constitute a forbidden intrusion of the field of free expression.' "[43]

How these principles apply in a given case are, of course, questions of law.[44]

[6] The analysis prescribed by *Milkovich* supplants various proposed dichotomies between fact and opinion. For example, more than a decade before *Milkovich,* section 566 of the *Restatement (Second) of Torts* set out a rule making a statement of ***581** opinion actionable "only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion."[45] Six years before *Milkovich, Prosser and Keeton on Torts* proposed a three-part classification of opinions as either deductive, evaluative, or informational.[46] About the same time, the United States Court of Appeals for the District of Columbia Circuit in *Ollman v. Evans* designed a four-part test for distinguishing between fact and opinion.[47] In lieu of such distinctions, *Milkovich* focuses the analysis on a statement's verifiability and the entire context in which it was made.[48]

With this direction, we examine the evidence in this case.

B

Bunton referred to Bentley's actions as "criminal" only once, which was during the June 6 "Q&A" broadcast. After describing the Curbo case, in which he faulted Bentley for having released the defendant on a personal bond and delayed final adjudication, Bunton suddenly exclaimed: "y'all"—referring to Bentley and Sheriff Hubert—"are corrupt, y'all are the criminals, y'all are the ones that oughta be in jail." Nothing that preceded this statement would have led a reasonable person to think that Bunton was asserting that Bentley had actually committed a crime. Bunton barely alluded to the theory he later espoused that Bentley had handled the case in a way to pressure the defendant's father, which, if true (it was not), would undoubtedly have been criminal. All Bunton said on this subject during the June 6 program was that Bentley should "quit hanging [the case] over these people's heads". By itself, Bunton's single, excited reference to Bentley as a "criminal" might be taken to be rhetorical hyperbole, although hardly of any sort that, in the words of *Milkovich,* "has traditionally added much to the discourse of our Nation."[49] In context, however, Bunton's characterization of Bentley's conduct as criminal is only part of Bunton's efforts over many months to prove Bentley corrupt.

[7] By calling Bentley "corrupt", Bunton testified that he intended the word's ordinary meaning—dishonest, unethical, shady, and unscrupulous—and we think that is what any reasonable viewer would have understood. While the word may be merely epithetic in the context of amorphous criticism,[50] it may also be used as a ***582** statement of fact that can be proved true or false,[51] just like the word "liar" applied to Coach Milkovich. Examples abound. When the Athenian court accused Socrates of corrupting the minds of the young, it intended to indict, not merely insult.[52] Corrupt conduct, determined as a matter of fact, may be punished under Texas law in numerous situations.[53] Accusing a public official of corruption is ordinarily defamatory *per se.* As *Prosser and Keeton on the Law of Tort* states: "it is actionable without proof of damage to say of a ... public officer that he has ... used his office for corrupt purposes ... since these things obviously discredit [one] in his chosen calling."[54] Consistent with this rule, we held in *A.H. Belo & Co. v. Looney* that detailed accusations of corruption against a public official are not protected opinion, explaining:

> "There is a broad distinction between fair and legitimate discussion in regard to the conduct of a public man, and the imputation of corrupt motives, by which that conduct may be supposed to be governed. And if one goes out of his way to asperse the ... character of a public man, and to ascribe to him base and corrupt motives, he must do so at ***583** his peril; and must either prove the truth of what he says, or answer in damages to the party injured."[55]

Although *Looney*'s allocation of the burden of proof is no longer correct,[56] in other respects the opinion appears to express the sentiment of most courts. The Maryland Supreme Court has observed:

> The greater number of Courts have held that the imputation of a corrupt or dishonorable motive in connection with established facts is itself to be classified as a statement of fact and as such not to be within the defense of fair comment.[57]

[8] Whether Bunton's repeated accusations that Bentley was corrupt were statements of fact or expressions of opinion depends, according to *Milkovich,* on their verifiability and the context in which they were made. As the court in *Ollman* stated: "It is one thing to be assailed as a corrupt public official by a soapbox orator and quite another to be labelled corrupt in a research monograph detailing the causes and cures of corruption in public service."[58] But much ground lies between these two extremes. While "Q&A" certainly never delivered anything approaching a research monograph on Bentley's conduct in office, and Bunton's ravings were often classic soapbox oratory, Bunton plainly and repeatedly stated that his accusations of corruption were based on actual fact. He cited specific cases and occurrences and pointed to court records and public documents. He claimed to have made lengthy investigations and interviewed courthouse employees and others. It had been hard, he told a friend and one viewer who called in to the program, to find a basis for accusing Bentley. He claimed to have looked into the law pertaining to personal bonds, case disposition guidelines, judicial ethics, the sheriff's responsibilities, and the district court's supervisory responsibility over the county auditor and county commissioners court. When challenged by viewers who called in, Bunton refused to argue about whether Bentley was a good or bad judge or person; on the contrary, he told one caller that Bentley's personal character was irrelevant. Bunton constantly insisted that his charges were borne out by objective, provable facts. Indeed, he invited Bentley to appear on the show, not to debate the issues, but to answer the factual allegations and disprove that he was corrupt. It is true that Bunton often also said that it was his opinion that Bentley was corrupt. But as the Supreme Court explained in *Milkovich:*

> If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar." As Judge Friendly aptly stated: ***584** "[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.' " See *Cianci* [*v. New Times Publishing Co.,* 639 F.2d 54, 64 (2d Cir., 1980)]. It is worthy of note that at common law, even the privilege of fair comment did not extend to "a false statement of fact, whether it was expressly stated or implied from an expression of opinion." Restatement (Second) of Torts, § 566, Comment *a* (1977).[59]

Furthermore, Bunton repeatedly insisted that evidence he had seen but had not disclosed supported his assertions. He had reviewed many public records, he said, and talked with courthouse employees. Much other information was publicly available, he continually assured viewers, to substantiate Bentley's corruption in office. He encouraged callers to investigate this information for themselves and to report other misconduct that he strongly suggested could be found for the looking. Even under the common law rule stated in section 566 of the *Restatement (Second) of Torts* (to which *Milkovich* referred) that requires an implication of undisclosed facts for an opinion to be actionable, Bunton's statements were defamatory.

Throughout the trial, Bunton insisted that his statements that Bentley was corrupt were verifiably true and could be proved. Bunton's attorney told the jury in his opening statement:

> We're going to prove the truth of each and every statement, or we're going to prove that there was an investigation in an attempt to learn the truth, the truth

> was concealed. There was no disregard for the truth. There was an attempt to get it.

During the presentation of the evidence, Bunton identified eight discrete instances that he said showed Bentley's corrupt conduct in office. He cited to details himself, and attempted to elicit factual and expert testimony from other witnesses, not merely to substantiate his personal opinions, but to prove his statements true. In his summation, Bunton's attorney went over each instance on which Bunton had based his charges of corruption and attempted to show how they had been proved true. Bunton's consistent position at trial that his accusations of corruption were true is a compelling indication that he himself regarded his statements as factual and not mere opinion, right up until the jury returned its verdict.

[9] An important part of the context of the defendants' statements here is that they were made on public access television. Federal law permits local authorities to require cable television operators to provide public access channels. [60] Commenting on that law, a committee of the U.S. House of Representatives observed:

> Public access channels are often the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet. They provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas. [Public, educational, and governmental] channels also contribute to an informed citizenry by bringing local schools into the home, and by showing the public local government at work. [61]

***585** Public access programming is not network news. Usually, it is informal and is not professionally scripted or produced. It often does not project the credibility that other television broadcasts have. "Q&A" was in this mold —in Bunton's words, "a wide-open, sometimes caustic and/or an uncivilized public forum". Bunton's accusations on "Q&A" must be considered in that context. By the same token, however, statements are not incapable of defamation or absolutely protected from liability merely because they are made on public access television. A soap box, electronic or wooden, does not lift a speaker above the law of liability for defamation. Besides, as the congressional committee noted, public access television is not only a "soap box" forum but also provides educational and governmental information.

The clear import of Bunton's statements on "Q&A" was that Bentley was corrupt as a matter of verifiable fact, as Bunton continued to assert at trial. Accordingly, we reject Bunton's argument on appeal that his accusations of corruption were constitutionally protected opinion.

C

[10] Gates also argues that his own comments on two "Q&A" programs were opinion and in any event were not capable of defamatory meaning.

The videotapes of "Q&A" program excerpts played at trial showed Gates and Bunton sitting side by side numerous times while Bunton asserted that Bentley was corrupt. For the most part, Gates exhibited no reaction to Bunton's statements, but on two programs Gates seemed to express his agreement with Bunton's statements that Bentley was corrupt. On one occasion, Gates attempted to correct Bunton's misstatement to a caller that district attorney Herrington was the most corrupt official in Anderson County. Bunton interrupted that Bentley was "number one", and Gates replied, "Yeah." On the other occasion, Bunton stated that "one thing after another" showed that Bentley was corrupt, citing two situations he had previously described. Gates then named two other situations, adding "and there's some others besides." At trial, Gates explained that he did not intend to express agreement with Bunton on either occasion. The first time, Gates said, his "yeah" was merely an acknowledgment that Bunton had corrected himself. In Gates's words: "I think it was a spontaneous reaction more than anything, is all I can say." The second time, Gates explained, he was merely helping Bunton list the examples Bunton had cited without meaning to endorse any of them himself.

The jury did not believe Gates; rather, they found that "Jackie Gates agreed with Joe Ed Bunton's defamatory statements concerning Bascom Bentley being corrupt". The jury saw Gates on the videotaped programs and on the witness stand, and they were entitled to judge his credibility by his demeanor and testimony. Even if we assume that Gates's "yeah" on the one occasion was ambiguous, the jury could reasonably conclude that on the second occasion when Gates not only appeared to concur in Bunton's assertions but listed examples of his own, examples which Bunton had not mentioned but immediately endorsed, Gates was expressing his agreement with Bunton's defamatory statements.

The jury was not, of course, entitled to base their conclusion simply on Gates's ***586** and Bunton's joint appearances on "Q&A" programs. We do not suggest for a moment that a talk show host is liable for a guest's statements to which the host does not voice objection. The mere fact that people appear together is no evidence that they agree; on the contrary, television interviews more often than not indicate nothing about the host's views, much less the broadcaster's. But the jury had much more than mere joint appearances to support their finding. The jury could reasonably have determined that Gates was not being truthful in discounting his statement since he had been present on many "Q&A" programs when Bunton accused Bentley of corruption and had never protested, even though he testified that he told Bentley that he was joining "Q&A" to discourage Bunton from continuing to make the accusations. The evidence permitted the jury to find that Gates did not merely hold Bunton's coat at the stoning of Bentley, but threw rocks himself.

Judging Gates's words from the perspective of a reasonable listener, as we must, we conclude that they could easily have been considered defamatory as the jury found.

IV

Next, we consider Bunton's and Gates's arguments that their statements were not false.

A

[11] **[12]** Bunton and Gates contend that Bentley has the burden of proving that they made false statements about him because he is a public official and also because they are media defendants. We agree that to recover for defamation, a public official like Bentley must prove that defamatory statements made about him were false.[62] Accordingly, we need not consider whether Bunton and Gates's use of public access television casts them as "media defendants" or whether, if it did, a plaintiff against them who was not a public figure would also be required to prove falsity.[63] The court of appeals erred in holding that the defendants were required to prove as an affirmative defense that ***587** their statements were true.[64] We have not required proof of falsity to be by more than a preponderance of the evidence,[65] and neither has the United States Supreme Court.[66] If the evidence is disputed, falsity must be determined by the finder of fact.

[13] In this case, the trial court refused Gates's request to inquire of the jury whether statements about Bentley were false. The court appears to have been of the view that the issue was subsumed in Bentley's motion for a partial directed verdict that Bunton's statements were defamatory per se, even though the falsity of those statements was not mentioned in the argument or ruling on the motion. That a statement is defamatory—that is, injurious to reputation—does not mean that it is false, and vice versa. After the verdict was returned, the defendants argued that the issue of falsity had not been raised by Bentley's motion. The court disagreed, reciting in its judgment that by granting Bentley's motion it had "ruled as a matter of law that [Bunton] had published false and defamatory statements about [Bentley] by accusing him of being corrupt and a criminal."

The defendants argue that because the trial court denied them a jury finding on falsity and the evidence on that issue was disputed, they are entitled to a new trial. Bentley argues that no finding was necessary because the evidence conclusively established that the statements about him were false, as the trial court determined by granting his motion for partial directed verdict. Alternatively, Bentley argues that by finding that Bunton and Gates acted with actual malice—that is, knowledge of, or reckless disregard for, the falsity of their statements—the jury implicitly found that their statements were false, and that implicit finding is supported by at least some evidence.

Strictly as a matter of logic, the jury's finding that Bunton and Gates acted with actual malice does not necessarily imply that the statements made were false, inasmuch as the jury could have believed, as they were instructed, that Bunton and Gates acted "with reckless disregard as to [the] *truth or* falsity" of the statements. As a practical matter, however, it is highly unlikely that the jury would have found that Bunton and Gates made true statements with actual malice —that is, with reckless disregard for whether the statements were true. Bentley's implied finding argument is therefore not without force. But we need not determine whether a finding of falsity can be implied from the verdict in this case because, as we explain below, Bentley proved conclusively that the statements that he was corrupt and criminal were false. Accordingly, we accept the trial court's statement in its judgment that it determined the issue as a matter of law.

B

[14] Bunton based his statements that Bentley was corrupt —by which Bunton meant dishonest, unethical, shady, and unscrupulous—on the eight situations we have already described in detail, and nothing else. Accordingly, the issue before us is whether Bentley proved without contradiction that none of those situations ***588** showed that he was criminal or corrupt in any way. Without repeating unnecessarily the evidence we have already set out, we examine each of the eight bases Bunton has claimed for his accusations:

The Curbo case: First, Bunton suggested on the June 6, 1995 "Q&A" program that Bentley acted improperly in releasing Curbo without a surety bond, although Bunton now tells us in his brief that he "never made the allegation that the bond matter made Bentley corrupt." Bentley's action was authorized by statute, [67] and Curbo's attorney, Hicks, testified that there was nothing unusual about Curbo's release without bond. Next, Bunton asserted on various programs that Bentley delayed a final adjudication in the case to pressure Curbo's father in the event he was elected mayor. Bentley testified that he had no such motive, Hicks testified that the charge was "a load of bull", and in any event, Curbo's father was not elected mayor. Further, Bunton argues that the case should not have been delayed so long or at the request of the district attorney. Bentley and Hicks testified that the delay was proper and benefitted Curbo by giving him one last chance to correct his ways. Their testimony was supported by letters in the court file from Curbo's probation officer. There was no evidence that delay was improper. Finally, Bunton makes two arguments he did not raise at trial: that Bentley had improper ex parte discussions with Curbo's probation officer, and that it was illegal for the district attorney and Curbo's attorney to revise the terms of Curbo's probation. There is no evidence to support either argument; on the contrary, Hicks testified that Bentley did "absolutely nothing" improper in handling the Curbo case, and that the charge that Bentley's conduct in the case was corrupt was "a lie."

The Harding warrant: Bunton asserts that Bentley had a legal duty to require the sheriff to execute an arrest warrant that Bentley did not issue and that the district attorney caused to be withdrawn. Bentley testified that he was not connected with the incident in any way, and as a matter of law, he had no legal duty to require the sheriff to execute a warrant that had been withdrawn.

The "hot check" and confiscated property funds: Bunton contends that if Bentley had properly supervised the county auditor and the county commissioners court, they would have discovered sooner that the district attorney was not properly depositing the money that defendants paid on "hot checks" and the money obtained from property forfeitures in the county treasury as the law required, but was administering those funds himself. While district courts have general supervisory control over county commissioners courts, [68] there is no suggestion or claim that this jurisdiction was invoked, much less that any district court exercised it improperly. And while district courts in most counties, including Anderson County, have the power to appoint and remove a county auditor, under certain circumstances, [69] there is no evidence that Bentley or the other district judges in Anderson County exercised their authority improperly. On the contrary, Houston County District Attorney Garner, who investigated the handling of the funds, testified that Bentley had "nothing to do" with them, that there was "no possibility" that he could have been corrupt on account of the way they were handled, and that in fact there was no wrongdoing at all in connection with the funds, either on the ***589** part of Anderson County District Attorney Herrington or anyone else. No evidence contradicts Garner's testimony.

The petitions to remove the district attorney: Bunton complains that Bentley should have reported two of his colleagues, Judge Bournias and Judge Calhoon, for judicial misconduct in denying petitions Bunton filed to remove the district attorney. Bentley testified that he had nothing to do with either petition. Garner, who investigated the petitions, reported that there was no basis for them, and that they had been motivated entirely by personal vendettas, unfounded rumors, and a lack of knowledge of the criminal justice system. There is no evidence or authority that the rulings were incorrect, or that Bentley would have had a duty to report the judges even if they had ruled in error.

Bentley's campaign contributions: Bentley contributed to both the winner and loser of the runoff election in the Democratic primary for county judge of Anderson County, after that election was over. Bunton argues that the contributions were improper because the district judges supervise the county judge. [70] Bentley testified that his contributions were meant to help each candidate defray lingering expenses and were proper. Bentley volunteered that he would not have contributed to any opposed candidate. Bunton testified that even though the winning primary

candidate had no announced opposition in the general election, the possibility of a write-in campaign remained. No such campaign occurred, and there is no evidence that it was ever more than an abstract possibility. There is no evidence or legal basis for thinking that Bentley's contributions were corrupt, even if they had been made to opposed candidates. Moreover, Bentley's campaign treasurer testified that he received oral approval for the contributions from the Texas Ethics Commission. As a matter of law, Bentley's contributions were not improper, let alone corrupt.

The Neal, Meyer, and Beavers cases: Bentley's rulings in each of these three cases was determined to have been erroneous. In the *Neal* case, he improperly attempted to issue a nunc pro tunc sentencing order. District Attorney Garner testified that it was "totally unreasonable" to think that Bentley's conduct in the case was criminal or corrupt. In the *Meyer* case, Judge Calhoon ordered a new trial after Bentley revoked Meyer's probation, based upon counsel's asserted misunderstanding of Bentley's rulings. Judge Calhoon testified at trial that it "makes no sense" that anyone, even a layman, would "interpret[ ]", "interpolate[ ]", or "pull[ ] out" of his decision that Bentley was corrupt or criminal. In the *Beavers* case, Bentley testified that he had only made an error in judgment, and there was no other evidence regarding the case. As to all three cases, there was evidence that Bentley's actions were not criminal or corrupt, and no evidence that his rulings were dishonest or unethical. In each case, all that can be said is that Bentley was found, on ordinary review, to have committed an error in judgment. As one court has noted: "Where an official having discretion in a certain matter acts upon his judgment in good faith, although erroneously, such act is not corrupt". [71]

[15] Bunton also contends that his statements about Bentley were taken out of context. The trial court admitted into evidence two videotapes containing about sixty minutes of "Q&A" broadcasts excerpted ***590** from twelve ninety-minute programs. One of the excerpts received in evidence was twenty-one minutes long, one was eleven minutes long, and three others were more than five minutes long. Bunton argues that the excerpts misleadingly lifted his statements out of context, but he does not explain how his assertions that Bentley was corrupt could have appeared less offensive if viewed as part of a longer broadcast. His only specific complaint is that Bentley did not offer in evidence the results of the "Q&A" viewer polls on whether he was corrupt. That omission does not make the videotapes misleading. Nothing about the excerpts themselves, which we have reviewed, indicates that they are misleading in any way. Moreover, Bunton did not offer into evidence tapes or transcripts of the entire programs that were excerpted or of other programs not shown at all that would cast his comments in a different light. Gates offered a videotape of one program that was excluded because it had not been timely produced during discovery. That tape is not in our record, and there is no indication that it would have shed a different light on the others. Bunton's argument that the broadcast excerpts were misleading simply has no support in the record, and therefore we reject it.

In sum, the evidence not only supports but conclusively establishes that Bunton's charges that Bentley was corrupt were utterly and demonstrably false as a matter of law. As Garner testified, in twelve years of practice she had never known Bentley to engage in any conduct that could remotely be called criminal or corrupt. At trial, Gates did not disagree, and Bunton offered no evidence whatever to the contrary.

V

Next, we consider Bunton's and Gates's arguments that they did not act with actual malice.

A

[16] **[17]** In the seminal case of *New York Times Co. v. Sullivan,* [72] the United States Supreme Court held that to protect our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials," [73] the First Amendment precludes a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice. [74] Since then, the Supreme Court has explained that "[t]he phrase 'actual malice' is unfortunately confusing in that it has nothing to do with bad motive or ill will" [75] —common connotations of the word "malice" but rather is "a shorthand to describe the First Amendment protections for speech injurious to reputation". [76] Those protections for speech about a public official turn on the speaker's degree of awareness that the statements made are false. In the Supreme Court's words:

> ***591** Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection. [77]

Thus, actual malice means knowledge of, or reckless disregard for, the falsity of a statement. [78]

[18] **[19]** **[20]** **[21]** Knowledge of falsehood is a relatively clear standard; reckless disregard is much less so. Reckless disregard, according to the Supreme Court, is a subjective standard [79] that "focus[es] on the conduct and state of mind of the defendant." [80] It requires more than "a departure from reasonably prudent conduct." [81] Mere negligence is not enough. [82] There must be evidence " 'that the defendant in fact entertained serious doubts as to the truth of his publication,' " [83] evidence "that the defendant actually had a 'high degree of awareness of ... [the] probable falsity' " [84] of his statements. Thus, for example, the failure to investigate the facts before speaking as a reasonably prudent person would do is not, standing alone, evidence of a reckless disregard for the truth, [85] but evidence that a failure to investigate was contrary to a speaker's usual practice and motivated by a desire to avoid the truth may demonstrate the reckless disregard required for actual malice. [86] As the Supreme Court has observed, "Although courts must be careful not to place too much reliance on such factors [i.e., motive and care], a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence, and it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry." [87] "In determining whether the constitutional standard has been satisfied, the reviewing court must consider the factual record in full." [88]

[22] While these concepts assist in understanding and applying the "reckless disregard" standard, the Supreme Court has cautioned that the phrase "cannot be fully encompassed in one infallible definition." [89] "The mental element of 'knowing ***592** or reckless disregard' required under the *New York Times* test ... is not always easy of ascertainment." [90] "Inevitably its outer limits will be marked out through case-by-case adjudication, as is true with so many legal standards for judging concrete cases". [91] This does not mean that courts must

> "scrutinize carefully every jury verdict in every libel case, in order to ascertain whether the final judgment leaves fully protected whatever First Amendment values transcend the legitimate state interest in protecting the particular plaintiff who prevailed." [T]his approach would lead to unpredictable results and uncertain expectations.... [92]

The import of the Supreme Court's admonitions is that the boundaries of actual malice, and particularly reckless disregard, cannot be fixed by the defining words alone but must be determined by the applications of those words to particular circumstances. Actual malice is defined in important part by example. Necessarily, then, to more fully understand "reckless disregard", we must survey the Supreme Court's application of the standard in concrete cases.

The Supreme Court's most recent application of the "reckless disregard" standard was in *Harte–Hanks Communications, Inc. v. Connaughton.* [93] Connaughton, a candidate for judicial office, had persuaded a certain Stephens a few weeks before the election to give him a recorded statement regarding instances in which she had bribed an employee in the incumbent judge's office. Stephens's sister, Thompson, was present along with a number of other people when Stephens gave Connaughton her statement. A few days before the election Thompson told the local newspaper that Connaughton had used "dirty tricks" to get Stephens's statement, intending to present it to the incumbent judge privately and force the judge's resignation before the election. The newspaper published Thompson's account of the events as true. Connaughton sued, and a jury found that the newspaper had acted with actual malice. The jury awarded Connaughton $5,000 in compensatory damages and $195,000 in punitive damages, the trial court rendered judgment on the verdict, and the court of appeals affirmed. The Supreme Court held that while "[t]here is little doubt that 'public discussion of the qualifications of a candidate for elective office presents what is probably the strongest possible case for application of the [actual malice standard],' " [94] the newspaper acted with actual malice because: it ignored the fact that all of the persons present when Stephens gave her statement denied that Connaughton had acted improperly; it declined to listen to the Stephens tape itself and did not interview Stephens; Thompson's story was highly improbable given that Connaughton had not misused the tape but had simply turned it over to law enforcement authorities; and

Thompson's hesitating demeanor at the newspaper offices reflected in her taped interview suggested a lack of veracity ***593** as compared with Connaughton. [95]

The Supreme Court in *Harte–Hanks* noted how similar the facts in that case were to those in *Curtis Publishing Co. v. Butts.* [96] In *Curtis Publishing,* the *Saturday Evening Post* published an article accusing Wally Butts, the athletic director of the University of Georgia, of having fixed a football game with Paul "Bear" Bryant, football coach at the University of Alabama. The story was based on an affidavit by an insurance salesman who claimed to have overheard a telephone conversation a week before the game in which Butts described for Bryant his plays and game plan. Butts had retired before the story ran. The article concluded:

> The chances are that Wally Butts will never help any football team again.... The investigation by university and Southeastern Conference officials is continuing; motion pictures of other games are being scrutinized; where it will end no one so far can say. But careers will be ruined, that is sure. [97]

Butts sued. To prove that the magazine had acted with actual malice, Butts offered evidence at trial that although the editors recognized the seriousness of the charges being made and the importance of a full investigation, they ignored elementary precautions; that they ignored the fact that their informant was on probation for bad check charges and sought no independent corroboration, even though another person also claimed to have overheard the conversation; that the reporter did not view films of the game or consult with football experts to determine whether the game appeared to have been fixed the way it was played; and that "the Saturday Evening Post was anxious to change its image by instituting a policy of 'sophisticated muckraking,' and the pressure to produce a successful expose might have induced a stretching of standards." [98] The jury awarded Butts $60,000 in actual damages and $3 million in punitive damages, but the trial court reduced the total to $460,000 by remittitur. The court of appeals affirmed. The Supreme Court also affirmed, concluding that the evidence clearly showed that the magazine had acted with actual malice in publishing the article after a "grossly inadequate" investigation, [99] despite Butts's denial of the allegations, and "with full knowledge of the harm that would likely result from publication of the article." [100]

By contrast, the Supreme Court just as readily concluded that actual malice had not been proved in a companion case to *Curtis Publishing, Associated Press v. Walker.* [101] There, a reporter had provided an eyewitness account of the violence that occurred when federal marshalls attempted to enforce a federal court decree that James Meredith be permitted to enroll at the University of Mississippi. The reporter stated that Walker, a private citizen and retired army veteran, had led a riot against the marshalls. Walker claimed that this was false and that in fact, while ***594** he was present at the time, he had counseled restraint. A jury found that Walker had been defamed, had suffered $500,000 in actual damages, and should have been awarded $300,000 in punitive damages. The trial court rendered judgment for the actual damages but not the punitive damages, concluding that there was no evidence of malice to support such an award. The Supreme Court determined that Walker was a public figure subject to the actual malice standard because he had purposefully thrust himself "into the 'vortex' of an important public controversy;" [102] that discrepancies in the published account were insignificant; that the reporter was experienced and reliable; and that the evidence supported the trial court's determination that there was no evidence of ill will, a complete lack of care, or conscious indifference of Walker's rights.

In *Time, Inc. v. Pape,* [103] *Time Magazine* reported on a federal commission's study of police brutality. The study stated in essence that *allegations* in specific cases demonstrated a problem that demanded discussion, thus encouraging the reader to believe that the allegations were probably true while stressing that they were only allegations—a statement the Supreme Court said could "fairly be characterized as extravagantly ambiguous." [104] In its story, *Time* set out some of the circumstances described in the study but did not state that they were merely allegations. One officer mentioned in the story sued. The trial court directed a verdict for the defendant, but the court of appeals reversed. The Supreme Court upheld the trial court, concluding:

> *Time*'s omission of the word "alleged" amounted to the adoption of one of a number of possible rational interpretations of a document that bristled with ambiguities. The deliberate choice of such an interpretation, though arguably reflecting a misconception, was not enough to create a jury issue of "malice" under *New York Times.* [105]

In a very different context, the Supreme Court reiterated its view that actual malice cannot be based on a misinterpretation of ambiguous facts that is not unreasonably erroneous. In *Bose Corp. v. Consumers Union of United States, Inc.,* [106] a writer for *Consumer Reports* described a Bose sound system as making instruments sound as if they were "wander[ing] about the room." [107] Bose sued for product disparagement. At trial, the writer testified that the system actually made instruments sound as if they were moving along the wall, which he said meant the same thing as what he had published. The trial court found that the two descriptions were plainly at odds, that the published comment was false, that the defendant's efforts at trial to explain away the error showed actual malice, and that Bose should recover about $125,000 in actual damages. The Supreme Court agreed with the court of appeals' reversal of the judgment, concluding that the writer's adoption of a new description of the system at trial proved only that he had "a capacity for rationalization", [108] not that he knew he was wrong at the time he first reviewed the sound ***595** system. The earlier description merely "reflect[ed] a misconception," [109] the Supreme Court said, which was not the equivalent of actual malice.

As already noted, the mere failure to investigate the facts, by itself, is no evidence of actual malice. Thus, in *Beckley Newspapers Corp. v. Hanks,* [110] the Supreme Court held that a newspaper's failure to conduct an investigation before criticizing a county clerk for opposing fluoridation of the local water supply was no evidence of actual malice. The Supreme Court cited its decision in the *New York Times* case, which concluded that the newspaper's failure to check its own files to determine the accuracy of an advertisement critical of the local government's handling of racial unrest before having it published was no evidence of actual malice, especially since the newspaper had relied on a number of credible people in making the statements it did. [111] But there was other evidence of actual malice in *New York Times:* the statements made, though reasonable, were not entirely true, and when the newspaper was confronted with the errors, it at first refused to retract the statements. The Supreme Court did not dismiss the libel claims in that case but remanded them for a new trial. [112]

Finally, in *St. Amant v. Thompson,* [113] Thompson, a deputy sheriff, sued St. Amant, a candidate for public office, for quoting Albin, a member of a local union involved in an internal union dispute, as saying that Thompson had misused his office to help the union president. A jury awarded Thompson $5,000. The Supreme Court held that Thompson had not proved actual malice with evidence that St. Amant had no personal knowledge of Albin's statements, that he had made no attempt to verify those statements, and that he had acted without regard for the injury Thompson might suffer. On the contrary, the Court reasoned, the evidence showed that St. Amant reasonably believed Albin, whom he had known for several months, because "Albin seemed to St. Amant to be placing himself in personal danger by publicly airing the details of the dispute." [114] Reflecting on the consequences of the actual malice standard, the Supreme Court explained:

> It may be said that such a test puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity. Concededly the reckless disregard standard may permit recovery in fewer situations than would a rule that publishers must satisfy the standard of the reasonable man or the prudent publisher. But *New York Times* and succeeding cases have emphasized that the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies. Neither lies nor false communications serve the ends of the First ***596** Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones. [115]

While insisting that evidence of actual malice be convincing, the Supreme Court stressed that proof of actual malice could not be defeated with simply the defendant's self-serving protestations of sincerity:

> The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will

> be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports. [116]

[23] **[24]** **[25]** **[26]** **[27]** **[28]** To summarize, the actual malice standard requires that a defendant have, subjectively, significant doubt about the truth of his statements at the time they are made. To disprove actual malice, a defendant may certainly testify about his own thinking and the reasons for his actions, and may be able to negate actual malice conclusively. [117] But his testimony that he believed what he said is not conclusive, irrespective of all other evidence. 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. Imagining that something may be true is not the same as belief.

B

[29] **[30]** The First Amendment not only protects a public official's critics from liability for defamation absent proof that they acted with actual malice, it also requires that such proof be made by clear and convincing evidence [118] and that the fact finder's determinations at trial be reviewed independently on appeal. [119] The Supreme Court has not defined "clear and convincing evidence" for purposes of determining actual malice but has noted that in ***597** other contexts the phrase has been used to mean "evidence which 'produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.' " [120] Similarly, we have held, generally as well as for the purpose of proving actual malice, that evidence is clear and convincing if it supports a firm conviction that the fact to be proved is true. [121] We apply that standard in this case. The Supreme Court has explained the requirement of independent appellate review of the evidence regarding actual malice as follows:

> The requirement of independent appellate review reiterated in *New York Times Co. v. Sullivan* is a rule of federal constitutional law. It emerged from the exigency of deciding concrete cases; it is law in its purest form under our common-law heritage. It reflects a deeply held conviction that judges—and particularly Members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution. The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice." [122]

[31] **[32]** The independent review required by the First Amendment is unlike the evidentiary review to which appellate courts are accustomed in that the deference to be given the fact finder's determinations is limited. Indeed, the Supreme Court has stated that "[t]he question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." [123] On questions of law we ordinarily do not defer to a lower court at all. [124] But the sufficiency of disputed evidence to support a finding cannot be treated as a pure question of law when there are issues of credibility. No constitutional imperative can enable appellate courts to do the impossible —make crucial credibility determinations without the benefit of seeing witnesses' demeanor. If the First Amendment precluded consideration of credibility, the defendant would almost always be a sure winner as long as he could bring himself to testify in his own favor. His assertions as to his own state of mind, if they could not be disbelieved on appeal, would surely prevent proof of actual malice by clear and convincing evidence absent a "smoking gun"—something

like a defendant's confession on the verge of making a statement that he did not believe it to be true. The First Amendment does not afford even a media defendant such protection. In the Supreme Court's words, "[w]e have not gone so far ... as to accord the press absolute immunity in its coverage of public figures or elections." ***598** [125] The independent review on appeal required by the First Amendment does not forbid any deference to a fact finder's determinations; it limits that deference. How far is the difficulty.

For practical direction, we have the Supreme Court's review of the evidence in *Harte–Hanks*. There, as we have already explained, a newspaper reported that Connaughton, a judicial candidate, had used "dirty tricks" to obtain a recorded statement from one Stephens concerning her efforts to bribe an employee in the office of Connaughton's opponent, the incumbent judge, and that he intended to present the statement to the judge privately to force him to resign. The newspaper report was based almost entirely on information provided by Stephens's sister, Thompson. A jury found that the newspaper had acted with actual malice. The Supreme Court described the independent review process as follows:

> In determining whether the constitutional standard has been satisfied, the reviewing court must consider the factual record in full. Although credibility determinations are reviewed [in the federal courts] under the clearly-erroneous standard because the trier of fact has had the "opportunity to observe the demeanor of the witnesses," the reviewing court must " 'examine for [itself] the statements in issue and the circumstances under which they were made to see ... whether they are of a character which the principles of the First Amendment ... protect.' " [126]

Following this procedure, the Court first determined that the jury must have disbelieved the following testimony by newspaper employees in order to find that the newspaper had acted with actual malice:

- that the reason the newspaper did not interview Stephens herself was that Connaughton did not put her in contact with the newspaper;
- that the reason the newspaper did not listen to the tapes of Stephens's statements was that it did not believe the tapes would provide any additional information; and
- that they had believed that Thompson's allegations were substantially true. [127]

The jury could not have found this evidence credible and still have found that the newspaper had acted with actual malice. That is, had the jury believed that the newspaper thought that Thompson's allegations were true or that no further investigation of the facts would be productive, it could not have found actual malice. These credibility determinations were not clearly erroneous. The Supreme Court then determined that the following evidence was undisputed:

- Connaughton and others had denied Thompson's allegations;
- the newspaper knew before it published the story that "Thompson's most serious charge—that Connaughton intended to confront the incumbent judge with the tapes to scare him into resigning and otherwise not to disclose the existence of the tapes—was not only highly improbable, but inconsistent with the fact that Connaughton had actually arranged a lie detector test for Stephens and then delivered the tapes to the police"; [128] and
- ***599** Thompson's "hesitant, inaudible, and sometimes unresponsive and improbable tone" in her interview with the newspaper (which was taped) raised "obvious doubts about her veracity." [129]

Finally, disregarding what the jury reasonably found to be incredible and considering only what was undisputed or what the jury could have believed, the Supreme Court concluded:

> Accepting the jury's determination that petitioner's explanations for [its failure to interview Stephens or listen to her recorded statement] were not credible, it is likely that the newspaper's inaction was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of Thompson's charges. Although failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of the truth is in a different category. [130]

In sum, the Supreme Court explained, "[w]hen [the findings the jury must have made to reach the verdict it did] are considered alongside the undisputed evidence, the conclusion that the newspaper acted with actual malice inexorably follows." [131]

[33] We are constrained, of course, to follow this same approach. Hence, an independent review of evidence of actual malice should begin with a determination of what evidence the jury must have found incredible. In *Harte–Hanks,* that evidence comprised the defendant's self-serving assertions regarding its motives and its belief in the truth of its statements. As long as the jury's credibility determinations are reasonable, that evidence is to be ignored. Next, undisputed facts should be identified. In *Harte–Hanks,* those facts included the denial of Thompson's allegations by Connaughton and others, and the improbability of those allegations given other facts and what the Supreme Court itself could tell from Thompson's taped interview was an obvious lack of credibility. [132] Finally, a determination must be made whether the undisputed evidence along with any other evidence that the jury could have believed provides clear and convincing proof of actual malice.

[34] This process goes a long way toward avoiding the possibility foreseen and discounted by the Supreme Court in *St. Amant* that, because the actual malice standard focuses on a defendant's subjective state of mind, a defendant could insulate himself from liability by his own self-serving testimony. "The defendant in a defamation action brought by a public official cannot ... automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith." [133] The fact finder may choose with reason to disregard the defendant's testimony, and if it does, so must the appellate court in its independent review. That does not mean, of course, that the plaintiff can prevail merely because the jury chooses not to believe the defendant. The jury's decisions regarding credibility must be reasonable. Moreover, it remains the plaintiff's burden to adduce clear and convincing evidence of actual malice. The evidence may well not rise to ***600** that level even apart from the defendant's own testimony.

With this understanding of actual malice, clear and convincing evidence, and the review we are required to undertake, we turn to the evidence of this case.

C

After five days of trial, at which Bentley, Bunton, and Gates all appeared and testified extensively in person, the jury found clear and convincing evidence that Bunton had published defamatory statements about Bentley with "actual malice". The jury also found from a preponderance of the evidence that Bunton had acted with "malice". The trial court correctly defined "actual malice" and "clear and convincing evidence" for the jury as follows:

> A defamatory statement is made with "actual malice" if it is made with actual knowledge that it is false or with reckless disregard as to its truth or falsity.
>
> "Reckless disregard as to its truth or falsity" means a high degree of awareness of probable falsity, to an extent that the person publishing the statement entertained serious doubts as to the truth of the publication.
>
> "Clear and convincing evidence" is that measure or degree of proof that will produce in the mind of the jury a firm belief or conviction as to the truth of the allegations sought to be established.

The trial court defined "malice" as follows:

> "Malice" means a specific intent by the defendant to cause substantial injury to the claimant, or an act or omission which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others, and of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others. [134]

[35] We begin our review of the evidence by determining what testimony the jury necessarily rejected in finding that Bunton acted with "actual malice" and "malice". Bunton testified at trial that whenever he had made statements about

Bentley he believed them to be true at the time and that he still believed they were true. In this regard at least, the jury must have found Bunton not to be a credible witness. His testimony concerning his subjective beliefs is inconsistent with the jury's verdict. Furthermore, the jury must have disbelieved Bunton's testimony that his intent was not to embarrass or defame Bentley but only to promote good government, provide information, and correct any perception of injustice. Bunton's testimony about his intentions is likewise inconsistent with the jury's verdict. We see nothing unreasonable in the jury's decision not to believe Bunton. Thus, just as the Supreme Court in *Harte–Hanks* disregarded the defendant's testimony regarding its motives and beliefs, we must disregard Bunton's testimony of the same sort here.

[36] Next, we determine what facts were established conclusively. First, Bunton knew by his own admission, at least after the June 6, 1995 "Q&A" broadcast, that Bentley denied the allegations that had been made. Bentley telephoned Bunton to discuss the allegations, but Bunton did not return the call. Instead, Bunton dared Bentley to appear on a "Q&A" show. Bentley testified that he feared he could not appear with Bunton on the show without being further unfairly abused. Also, ***601** the videotapes of "Q&A" broadcasts in evidence establish that Bunton knew that others besides Bentley believed the allegations to be false. Second, it is undisputed that Gates told Bunton that he, Gates, did not believe Bentley was corrupt. Third, Bunton does not dispute his friend's account of their conversation, in which Bunton stated that "he really couldn't get anything on ... old Bascom Bentley", and that Bentley was "doing something", "I just don't know what it is." This occurred after Bunton had "investigated" the Curbo case and during the same time that he was accusing Bentley of being corrupt. Thus, while Bunton was telling the "Q&A" viewing audience that Bentley was corrupt in his handling of the Curbo case, he was confiding in a friend that "he really couldn't get anything on ... old Bascom Bentley" except that he ate lunch with "that clique". Bunton also acknowledged in one broadcast that it had been "difficult to pin down" any misconduct by Bentley. Fourth, the occurrences on which Bunton based his allegations of corruption did not prove those charges, as a matter of law. Remarkably, long after Curbo's father was defeated in his bid for mayor, Bunton continued to accuse Bentley of delaying the Curbo case to pressure Curbo's father as mayor. Fifth, in broadcasts stretching over many months, Bunton repeatedly accused Bentley not only of being corrupt—by which he meant dishonest, unethical, shady, and unscrupulous—but also of not doing his job or earning his salary, going to lunch with a "clique", and being "grossly incompetent or ... awful lazy" and a "disgrace" to his children.

Finally, we consider this undisputed evidence in light of the entire record. Apart from Bunton's own self-serving assertions that are inconsistent with the jury's verdict and must therefore be ignored, the only evidence that he did not act with actual malice is that he attempted to make some investigation before airing his allegations. Specifically, Bunton stated that he obtained court records and did legal research to support his allegations. The jury could have believed this testimony and still found that he acted with actual malice, and therefore we must credit this evidence in our own assessment of the record. But we do not consider it to have much weight when there is no evidence that Bunton's investigation ever led him to contact any one of a number of other people involved in the circumstances he criticized. He did not ask the district attorney, defense counsel, or the probation officer about the delay in the Curbo case. Curbo's lawyer testified at trial that the delay benefitted his client, and the probation officer wrote the court that the case was being handled appropriately. Bunton did not ask the sheriff, the county auditor, or any member of the county commissioners court about the handling of the "hot check" and confiscated property funds, he did not call the Texas Ethics Commission about the propriety of Bentley's contributions to two county judge candidates, he did not ask a lawyer about any of the rulings for which he faulted Bentley in various cases, and he ignored the investigation into his own charges of misconduct against the district attorney. We are mindful that a failure to investigate the facts is not, by itself, any evidence of actual malice, but what is so striking about the record in this case is the complete absence of any evidence that a single soul, besides Gates, ever concurred in Bunton's accusations of misconduct against Bentley. All those who could have shown Bunton that his charges were wrong Bunton deliberately ignored. Even after Bunton encouraged "Q&A" viewers to report any misconduct by Bentley, and went so far as to instruct on how that could be done anonymously, ***602** the record is silent as to whether anyone ever responded.

From our thorough review of the record and our detailed recitation of the evidence, whether Bunton's actual malice has been proved by clear and convincing evidence is not, we think, a close question. We are convinced, by no small margin, that Bunton never made his allegations against Bentley in good faith, that he expressed doubt to a friend that there was any basis for the charges he was making, and that he deliberately ignored people who could have answered all of

his questions. The fact that Bunton dared his victims to appear on his show but made no attempt to hear them privately strongly supports our conclusion.

[37] Moreover, while a defendant's ill will toward a plaintiff does not equate to, and must not be confused with, actual malice, such animus may suggest actual malice.[135] Bunton hounded Bentley relentlessly and ruthlessly for months, despite the threat of suit and at least one entreaty from Gates, asserting that Bentley was not earning his salary, that he was part of a clique of local leaders who lunched together, that he should resign, that he had been "very, very slick" to avoid being caught, and that he was "either ... just grossly incompetent, or ... awful lazy". Bunton told Bentley's sister that Bentley was corrupt and stated that Bentley had disgraced his own children. Bunton even coached callers on how to register complaints about Bentley anonymously. This evidence that Bunton carried on a personal vendetta against Bentley without regard for the truth of his allegations also indicates actual malice.

Accordingly, we conclude that the evidence that Bunton acted with actual malice in defaming Bentley was clear and convincing. CHIEF JUSTICE PHILLIPS's contrary conclusion is, in our view, the product of faulty analysis that granulates the evidence tending to show actual malice but amalgamates all of the contrary evidence. Because no single piece of evidence proves actual malice, and there is some evidence to the contrary, he concludes that Bentley has not met his burden. We think, however, that when the evidence is viewed as a whole, as it must be, it convincingly shows Bunton's actual malice. It is simply unfair for CHIEF JUSTICE PHILLIPS to dismiss what he describes as Bunton's "protracted verbal barrage"[136] of "defamatory falsehoods"[137] against Bentley as "ill manners, legal mistakes, and ineffective investigation."[138] Nor were Bunton's erroneous charges merely due to a lack of legal training, as CHIEF JUSTICE PHILLIPS suggests; on the contrary, there was unchallenged testimony at trial that no reasonable person could have believed Bunton's accusations.

D

[38] Unlike Bunton, Gates testified that he never believed Bentley was corrupt. Gates never used the word "corrupt" in discussing Bentley's conduct, but there is evidence to support the jury's finding that he agreed with Bunton's allegations on two "Q&A" broadcasts. If he knew he was communicating a falsehood, then there can be no question that he acted with actual malice because he himself ***603** acknowledges that he did not believe the allegations of corruption. But a defendant cannot be said to have made a statement with actual malice if he did not know or have reckless disregard for whether the statement communicated a falsehood. In *Turner v. KTRK Television, Inc.,* we held that while a message may be false and defamatory as a whole, even though no single statement is false, proof of actual malice requires clear and convincing evidence that the defendant "knew or strongly suspected that the publication as a whole could present a false and defamatory impression...."[139] Here, too, we think that the actual malice standard focuses on the defendant's state of mind regarding the import of the statements actually made. If in response to the statement that P is a felon, D says, "Yes, indeed," knowing full well that P is not a felon, the evidence is clear and convincing that D has acted with actual malice. Even though his own words are neutral in isolation, in context he can hardly deny that he knew he was communicating agreement with what he knew was false. But had D replied only, "Do tell," the evidence of actual malice is nil. D could quite credibly argue that his response was but a polite acknowledgment of the statement and that he had no reasonable idea he would be taken to have endorsed it. Thus, with respect to Gates, we think that the actual malice standard requires clear and convincing evidence that on one of the two occasions in question, either he knew that what he said communicated that Bentley was corrupt, or else he had reckless disregard for whether he had communicated that message.

We have already described the two occasions, both of which occurred on "Q&A" broadcasts, a videotape of which was before the jury. In one, Bunton had told a caller that the district attorney, not Bentley, was the most corrupt official in Anderson County. As Gates started to correct Bunton, Bunton interrupted and corrected himself, saying "Bascom Bentley's number one." "Yeah," Gates replied. At trial, Gates testified that he thought "yeah" "was a spontaneous reaction more than anything". On the other occasion, Bunton listed two situations showing that Bentley was corrupt. Gates then named two other situations and added, "and there's some others besides." Gates did not offer an explanation of this occasion at trial, but he now says, in argument on appeal, that he was merely helping Bunton list the situations Bunton had himself mentioned in the past. Gates did testify that he bore Bentley no ill will, and that he had told Bunton that he did not believe Bentley was corrupt.

The jury found that Gates's remarks communicated his agreement with Bunton's allegations that Bentley was corrupt, and that in so doing Gates acted with "actual malice" and "malice", as those words were defined by the trial court in the charge (which we have quoted above). In reviewing the evidence following the procedure set out in *Harte–Hanks,* we must first disregard Gates's testimony that "yeah" was only a spontaneous reaction, that he ever told Bunton that Bentley was not corrupt, and that he bore Bentley no ill will; all of this testimony is inconsistent with the verdict and could not have been believed by the jury. The jury reasonably refused to believe Gates. Thus, we must consider the effect of Gates's statements on their face, without benefit of Gates's explanations, in light of the undisputed evidence and the remainder of the record.

Two facts are undisputed. One is that Gates never believed Bentley was corrupt. ***604** Gates admits this himself. The other is that Gates participated with Bunton on numerous "Q&A" programs over a period of many months, listening to Bunton repeatedly accuse Bentley of being corrupt, and never took issue with one of Bunton's accusations. Indeed, on one occasion Gates helped Bunton list examples of Bentley's corrupt conduct. In addition, except for Gates's testimony, which we must disregard, the record is silent on whether Gates ever disagreed with Bunton that Bentley was corrupt. Gates's counsel asked Bunton whether Gates "disagree[d] with you on occasion when discussing Judge Bentley on the air." Bunton answered: "Colonel Gates and I have had a lot of disagreements, not about the facts, but a disagreement in direction, in technique." Although Gates did not dispute that he told Bentley he would ask Bunton to stop calling Bentley corrupt, Gates did not adduce any evidence to show that he did so.

Were the two "Q&A" shows in which Gates chimed in during Bunton's allegations isolated instances, we certainly could not find clear and convincing evidence in this record that Gates either knew or had reckless disregard for whether he was communicating that Bentley was corrupt, something he knew was false. But the two shows cannot be viewed in isolation. Gates knew what Bunton's allegations were. He had sat next to Bunton as Bunton repeated them on many occasions. Still, Gates remained silent all but twice, and both times his reaction was ambiguous. From the videotapes of those two occasions, we cannot say, even in the context of Bunton's ongoing verbal assaults against Bentley in Gates's presence, that Gates knew or had reckless disregard for whether he was himself communicating a falsehood.

The jury's finding of Gates's ill will and spite toward Bentley cannot prove actual malice by itself and does not alter our conclusion. Although the issue is a close one, we hold that the evidence of Gates's actual malice was not clear and convincing.

VI

Regarding damages, Bunton argues that the evidence does not support any award of actual or punitive damages to Bentley, and alternatively, that the amounts of actual and punitive damages determined by the jury are without support in the evidence and exceed First Amendment limitations.

[39] **[40]** The first argument need not long detain us. Our law presumes that statements that are defamatory per se injure the victim's reputation and entitle him to recover general damages, including damages for loss of reputation and mental anguish. [140] Bunton does not contest that if, as we have now held, Bunton's statements were false statements of fact and not merely expressions of opinion, then they were defamatory per se, as the trial court ruled. As a matter of law then, Bentley was entitled to recover actual damages for injury to his reputation and for mental anguish. Moreover, from the evidence we have summarized above, the jury could readily have found that Bentley's reputation was in fact injured and that he in fact suffered mental anguish on account of the defendants' conduct. Also, because the defendants acted with actual malice, Bentley is entitled to punitive damages without proving that the defendants ***605** were personally vindictive toward him, [141] although again, the evidence supports the jury's finding that in fact Gates and Bunton acted "with specific intent ... to cause substantial injury", as found by the jury.

Bunton's second argument—that the amounts of damages awarded are not supported by the evidence or permitted by the First Amendment—requires more analysis.

A

[41] The jury found that Bunton caused Bentley $7 million in mental anguish damages and $150,000 in damages to his

character and reputation. Non-economic damages like these cannot be determined by mathematical precision; by their nature, they can be determined only by the exercise of sound judgment. But the necessity that a jury have some latitude in awarding such damages does not, of course, give it carte blanche to do whatever it will, and this is especially true in defamation actions brought by public officials.

In *Gertz v. Robert Welch, Inc.,* the United States Supreme Court held that state law may set a lesser standard of culpability than actual malice for holding a media defendant liable for defamation of a private plaintiff, but under any lesser standard the plaintiff can recover "only such damages as are sufficient to compensate him for actual injury." [142] Noting that damages may be presumed without proof of injury in certain defamation cases, such as those involving defamation per se, the Court expressed concern that "[t]he largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms." [143] The Court expressed the same concern regarding punitive damages. [144]

Although the Court did not consider whether limitations should be placed on damage awards when a defendant is shown to have acted with actual malice, we think that similar concerns are raised. Damage awards left largely to a jury's discretion threaten too great an inhibition of speech protected by the First Amendment. This case is a prime example. The jury's award of $7 million in mental anguish damages strongly suggests its disapprobation of Bunton's conduct more than a fair assessment of Bentley's injury. The possibility that a jury may exercise such broad discretion in determining the amount to be awarded unrestrained by meaningful appellate review poses a real threat to all members of the media.

Accordingly, we conclude that the First Amendment requires appellate review of amounts awarded for non-economic damages in defamation cases to ensure that any recovery only compensates the plaintiff for actual injuries and is not a disguised disapproval of the defendant. Exercising that review in this case, we conclude that while the record supports Bentley's recovery of some amount of mental anguish damages, it does not support the amount of those damages found by the jury.

B

[42] Moreover, under our common law the latitude necessarily accorded a jury in assessing non-economic damages does not ***606** insulate its verdict from appellate review for evidentiary support. Just as a jury's prerogative of assessing the credibility of evidence does not authorize it to find liability when there is no supporting evidence or no liability in the face of unimpeachable evidence, so a large amount of mental anguish damages cannot survive appellate review if there is no evidence to support it, or a small amount of damages when the evidence of larger damages is conclusive. The jury is bound by the evidence in awarding damages, just as it is bound by the law.

Our law distinguishes between appellate review for no evidence and insufficient evidence. The courts of appeals are authorized to determine whether damage awards are supported by insufficient evidence—that is, whether they are excessive or unreasonable. We have rejected the view that that authority displaces their obligation, and ours, to determine whether there is any evidence at all of the *amount* of damages determined by the jury. In *Saenz v. Fidelity & Guaranty Insurance Underwriters,* we explained:

> Not only must there be evidence of the existence of compensable mental anguish, there must also be some evidence to justify the amount awarded. We disagree with the court of appeals that "[t]ranslating mental anguish into dollars is necessarily an arbitrary process for which the jury is given no guidelines." [*Fidelity & Guaranty Insurance Underwriters v. Saenz,* 865 S.W.2d 103, 114 (Tex.App.-Corpus Christi 1993)]. While the impossibility of any exact evaluation of mental anguish requires that juries be given a measure of discretion in finding damages, that discretion is limited. Juries cannot simply pick a number and put it in the blank. They must find an amount that, in the standard language of the jury charge, "would fairly and reasonably compensate" for the loss. Compensation can only be for mental anguish that causes "substantial disruption in ... daily routine" or "a high degree of mental pain and distress". *Parkway* [*v. Woodruff,* 901 S.W.2d 434, 444 (Tex.1995)]. There must be evidence that the amount found is fair and reasonable compensation, just as there must be evidence to support any other jury finding. Reasonable compensation is no easier to determine than reasonable behavior—often it may be harder—but

the law requires factfinders to determine both. And the law requires appellate courts to conduct a meaningful evidentiary review of those determinations. One court of appeals has suggested the contrary. *See* *State Farm Mut. Auto. Ins. Co. v. Zubiate,* 808 S.W.2d 590, 601 (Tex.App.-El Paso 1991, writ denied); *Daylin, Inc. v. Juarez,* 766 S.W.2d 347, 352 (Tex.App.-El Paso 1989, writ denied); *Brown v. Robinson,* 747 S.W.2d 24, 26 (Tex.App.-El Paso 1988, no writ). We disapprove that language in those cases. [145]

We concluded in *Saenz* that there was no evidence to support the $250,000 damages for mental anguish awarded by the jury.

This case is far clearer than *Saenz.* The record leaves no doubt that Bentley suffered mental anguish as a result of Bunton's and Gates's statements. Bentley testified that the ordeal had cost him time, deprived him of sleep, caused him embarrassment in the community in which he had spent almost all of his life, disrupted his family, and distressed his children at school. The experience, he said, was the worst of his life. Friends testified that he had been depressed, that his honor and integrity had been impugned, that his family ***607** had suffered, too, adding to his own distress, and that he would never be the same. Much of Bentley's anxiety was caused by Bunton's relentlessness in accusing him of corruption. But all of this is no evidence that Bentley suffered mental anguish damages in the amount of $7 million, more than forty times the amount awarded him for damage to his reputation. The amount is not merely excessive and unreasonable; it is far beyond any figure the evidence can support.

The other amounts of actual damages found by the jury are well within a range that the evidence supports. We do not consider whether the awards were unreasonable; that issue was for the lower courts. We conclude only that no evidence permitted the jury to make the findings it did.

C

Gates and Bunton argue that the amounts of punitive damages determined by the jury were excessive by constitutional standards, but they clearly were not. Punitive damages were a fraction of the actual damages found by the jury. Even if mental anguish damages were reduced, as we conclude they must be, there is evidence to support the punitive damages set by the jury. However, because we conclude that there is no evidence to support part of the actual damage award, punitive damages must be reassessed as well. [146]

VII

We come finally to what our judgment should be, given the division of the Court. Seven of the eight MEMBERS of the Court participating in the decision of this case agree that the judgment of the court of appeals that Bentley take nothing from Gates should be affirmed. Only JUSTICE BAKER disagrees. Judgment will be rendered accordingly. Regarding Bunton, the Court is more deeply divided. JUSTICE BAKER would render judgment against Bunton and Gates, jointly and severally, for all the damages found by the jury. Three MEMBERS of the Court—CHIEF JUSTICE PHILLIPS, JUSTICE ENOCH, and JUSTICE HANKINSON—would render judgment that Bentley take nothing from Bunton or Gates. The other four MEMBERS of the Court—JUSTICE OWEN, JUSTICE JEFFERSON, JUSTICE RODRIGUEZ, and I—would remand the case to the court of appeals to reconsider the excessiveness of the jury's award of mental anguish damages against Bunton in view of this opinion. It may be that Bentley's action against him must be retried, but the court of appeals is free to suggest a remittitur.

The Court has faced similar divisions before. In *Diamond Shamrock Refining and Marketing Co. v. Mendez,* [147] three JUSTICES would have rendered judgment for the plaintiff, three would have rendered judgment for the defendant, and three would have remanded the case for a new trial. A majority of the Court nevertheless joined in a judgment remanding the case as being the judgment most consistent with their respective views. Also, in *National County Mutual Fire Insurance Co. v. Johnson,* [148] four JUSTICES concluded that an insurance policy provision was valid, four concluded that it was entirely invalid, and one concluded that the provision was only partially invalid. A majority of the Court joined in a judgment invalidating the provision in part. Likewise, today a majority of the Court—all but JUSTICE BAKER—join in the judgment ***608** remanding this cause to the court of appeals for further proceedings, although the reasons for the remand are advanced by only four justices.

Judgment accordingly.

Chief Justice PHILLIPS filed an opinion concurring in part and dissenting in part, and concurring in the judgment, in which Justice ENOCH and Justice HANKINSON joined.

Justice BAKER filed a dissenting opinion.

Justice O'NEILL did not participate in the decision.

Chief Justice PHILLIPS, joined by Justice ENOCH and Justice HANKINSON, concurring in part and dissenting in part.

I

A

The United States Supreme Court has long recognized "the privilege for the citizen-critic of government," declaring: "It is as much his duty to criticize as it is the official's duty to administer." *New York Times Co. v. Sullivan,* 376 U.S. 254, 282, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). The Constitution therefore protects any speech about public officials and public figures unless it is both 1) provably false, *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 19, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990), and 2) made with either knowledge of its falsity, *New York Times,* 376 U.S. at 279–80, 84 S.Ct. 710, or serious doubt as to its truth, *St. Amant v. Thompson,* 390 U.S. 727, 731, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968). Obviously, this high degree of protection "exacts a correspondingly high price from the victims of defamatory falsehood" who may be "unable to surmount the barrier" of that privilege. *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 342, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

> "It is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast, and the advantages derived are so great, that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great."

New York Times, 376 U.S. at 281, 84 S.Ct. 710 (quoting with approval *Coleman v. MacLennan,* 78 Kan. 711, 98 P. 281, 286 (1908)).

Undoubtedly, Joe Ed Bunton subjected Judge Bascom Bentley III to a protracted verbal barrage. I agree with the Court that as a matter of law at least some of these statements were defamatory falsehoods. But I also believe that Bentley failed to prove by clear and convincing evidence that Bunton made his statements with actual malice, as that term is used in defamation jurisprudence.

In my own independent appellate review, as required in *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485, 511, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984), I cannot find clear and convincing evidence that Bunton either knew that his statements were false or entertained serious doubts about their truth. The Court's opinion is a judicial miscellany of Bunton's ill manners, legal mistakes, and ineffective investigation, from which a conclusion is concocted that Bunton did not believe his allegations that Bentley was corrupt. Taken separately or together, the incidents the Court recites establish only objective unreasonableness, not the subjective state-of-mind required to prove actual ***609** malice. I would reverse the court of appeals' judgment and render judgment that Bentley take nothing against Bunton.

B

Unlike Bunton's words, Colonel Jackie Gates' public statements on the Q&A cable-access call-in show were not false and defamatory on their face. However, a reasonable listener could have understood two of Gates' comments to express a defamatory meaning—agreement that Judge Bascom Bentley was corrupt—due to their juxtaposition with Joe Ed Bunton's words.

To prove public-official defamation when the defendant's words could be understood as defamatory or as not, the plaintiff must prove by clear and convincing evidence that the defendant either knew or strongly suspected at the time

he spoke that his words would carry a defamatory meaning to the ordinary listener. *See* *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 120 (Tex.2000); *see also* *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964) ("[O]nly those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions."). If this showing is made, the public-official plaintiff must also prove by clear and convincing evidence that the defendant either knew the defamatory meaning was false, *New York Times*, 376 U.S. at 279–80, 84 S.Ct. 710, or seriously doubted its truth, *St. Amant*, 390 U.S. at 731, 88 S.Ct. 1323. I agree that Bentley has failed to carry his burden as to Gates.

II

The United States Supreme Court tailored the actual malice test to discourage the self-censorship that libel law might otherwise impose on political speech. In *New York Times*, the Times had published a defamatory advertisement containing significant factual errors. *New York Times*, 376 U.S. at 256–59, 84 S.Ct. 710. The Times possessed the correct information in its own news files but failed to consult them. *Id.* at 287, 84 S.Ct. 710. This evidence, the Court held, "support[ed] at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice." *Id.* at 288, 84 S.Ct. 710. This new "actual malice" standard was entirely distinct from common law malice, focusing on knowledge rather than motive.

The *New York Times* Court believed the Constitution required the actual malice test in order to protect free debate and preserve political liberty. Quoting from *Speiser v. Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958), the Court observed:

> A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.... Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." The rule thus dampens the vigor and limits the variety of public debate.

New York Times, 376 U.S. at 279, 84 S.Ct. 710. The Court rejected the notions that either the reputations of public officials or the desirability of accurate information ***610** were sufficiently important to justify traditional defamation standards. Thus, the Court observed:

> Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of the judge or his decision. This is true even though the utterance contains "half-truths" and "misinformation." Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice ... [J]udges are to be treated as men of fortitude, able to thrive in a hardy climate.

New York Times, 376 U.S. at 272–73, 84 S.Ct. 710 (citations omitted).

Truthful speech has value. False speech mistakenly believed to be true, while valueless, should be protected to avoid self-censorship of truthful speech. Known falsehood is neither valuable nor necessary to preserve free debate and thus has no constitutional protection.

III

A

To recover for defamation, the public-official plaintiff must prove by clear and convincing evidence that the defendant spoke with actual malice. Actual malice is a legal term of

art, wholly distinct from the more venerable common law malice. The actual malice inquiry is subjective, focused on the defendant's actual state of mind regarding truth, not the reasonableness of or the reasons for his speech. Thus, the plaintiff must prove that when the defendant spoke he either knew his statements were false or had reckless disregard for their truth. *New York Times,* 376 U.S. at 280, 84 S.Ct. 710. Reckless disregard is also a subjective standard that is not synonymous with common law recklessness. For reckless disregard to exist, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant,* 390 U.S. at 731, 88 S.Ct. 1323. Or put another way, the defendant must have made his false and defamatory allegations with a "high degree of awareness of their probable falsity." *Garrison,* 379 U.S. at 74, 85 S.Ct. 209.

When reviewing public-official defamation cases for clear and convincing evidence of actual malice, we defer to the jury only on credibility issues. After determining what testimony the jury must have disbelieved to reach its verdict, we review those findings for clear error. *Harte–Hanks Communications, Inc. v. Connaughton,* 491 U.S. 657, 688, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989). Otherwise, the New York Times standard mandates a searching independent review of all factual evidence. *Id.;* *Bose Corp.,* 466 U.S. at 511, 104 S.Ct. 1949; *New York Times,* 376 U.S. at 285, 84 S.Ct. 710. This federal constitutional standard takes precedence over the limitations on our factual review established in the Texas Constitution. *Turner,* 38 S.W.3d at 120. [1]

***611** B

In finding clear and convincing evidence of actual malice, this Court offers several facts that "were established conclusively" to support its conviction "by no small margin," that Bunton acted with actual malice. 94 S.W.3d at 602. None of these facts, taken singly or together, come close to proving the Court's case that Bunton doubted the truth of his allegations. That Bunton dared Bentley on television to appear live on Q&A rather than returning a private telephone call may establish a breach of etiquette, but it is not evidence of a public figure defamation. [2] That Bunton knew that others disagreed with his allegations is also no evidence of actual malice. [3] That Bunton confessed uncertainty to a friend that "[Bentley's] doing something; I just don't know what it is," and that he acknowledged on a broadcast that Bentley was "difficult to pin down," suggests that he firmly believed Bentley was, in fact, doing *something* wrong. [4] Far from showing by clear and convincing evidence that he was consciously indifferent to the truth, these remarks indicate that he was trying, in his own limited way, to bring to his viewing audience the truth. The Court also points to other harsh, though nondefamatory, epithets that Bunton hurled at Bentley in the course of his broadcasts. But even Bentley does not claim that accusations that he disgraced his children, was lazy, or lunched with a clique are any proof that Bunton did not really believe that Bentley was corrupt.

Most disturbingly, the Court finds clear and convincing evidence of actual malice because "the occurrences on which Bunton based his allegations of corruption did not prove those charges, as a matter of law." *Id.* at 600. I agree that Bentley conclusively established that at least some of Bunton's charges were false as a matter of law. But I strenuously disagree that the falsity of some or all of Bunton's charges proves that Bunton *knew* they were false at the time he made them. *See* *Bose Corp.,* 466 U.S. at 491 n. 6, 512–13, 104 S.Ct. 1949 (holding that trial court erred when it reasoned that speaker must have known his statements were false at the time he made them because they were, in fact, clearly false).

Moreover, the Court points to evidence of personal animus to suggest that Bunton acted with actual malice. Even if there were such evidence, it would not satisfy the *New York Times* standard. *See* ***612** *Beckley Newspapers Corp. v. Hanks,* 389 U.S. 81, 82, 88 S.Ct. 197, 19 L.Ed.2d 248 (noting actual malice cannot be based merely on defendant's " 'bad or corrupt motive,' " " 'personal spite, ill will or a desire to injure plaintiff' "). But, in fact, there is not a shred of evidence in the record to suggest that Bunton had a pre-existing feud with Bentley, or that his desire to harm Bentley's career came from any source except his mistaken belief that Bentley was corrupt. Thus, the Court uses Bunton's erroneous statements to prove that he acted with ill will, then points to that ill will to establish motive for his false statements. The Court substitutes circular reasoning for constitutional analysis.

C

Most of all, the Court relies on the purposeful-avoidance doctrine of *Harte–Hanks Communications, Inc.*, 491 U.S. at 692–93, 109 S.Ct. 2678. *Harte–Hanks* was a narrow holding, grounded in facts more egregious than those presented here. Before publishing a story attacking the integrity of a candidate for public office, the defendant newspaper was offered access to a tape of a conversation that would have shown whether the story was true or false. *Id.* at 683, 109 S.Ct. 2678. The paper's reporters deliberately chose not to listen to it. *Id.* The Supreme Court concluded that the newspaper's purposeful avoidance of the truth was sufficient to prove that it in fact had serious doubts about the truth of its story. *Id.* at 683–84, 692, 109 S.Ct. 2678.

There is no evidence here that Bunton knew of and had access to a specific piece of evidence that he knew would prove or disprove his allegations, yet consciously chose not to learn of its contents. The Court points out that Bunton did not call either the district attorney or the defense lawyer for further information in the Curbo case. 94 S.W.3d at 601. But unlike the newspaper reporters in *Harte–Hanks,* who inexplicably refused to review independent documentary evidence, Bunton repeatedly went to the courthouse and reviewed the official public documents on the Curbo case. There is no evidence that Bunton knew of the off-the-record agreement between the attorneys and the probation officer, and thus no evidence that he had any reason to suspect that he needed to contact them in order to obtain additional, dispositive information that could not be found in the public records.

The Court further argues that Bunton deliberately avoided the truth because he did not contact the county commissioners' court about the hot check and confiscated property funds, 94 S.W.3d at 601. But Bentley himself testified about a Q&A letter to the county commissioners' court requesting information about the funds. Bentley was further questioned about the letter's complaint that the district attorney had responded to Q&A's freedom of information request by notifying Q&A that it would have to pay a $45,000 copying bill before a representative could view the fund records.

In addition, the Court asserts that Bunton "ignored the investigation into his own charges of misconduct against the district attorney." *Id.* at 601. The outside prosecutor, Garner, who investigated Bunton's complaints did recommend that no action be taken against the district attorney. But she also testified at trial that the district attorney had indeed failed to deposit the funds properly, and that his "mistakes" could be considered "official misconduct."

Although the Court claims that Bunton "deliberately ignored" "all those who could have shown Bunton that his charges were wrong," *id.* at 601, Bunton chose to publish his allegations on Q&A, a live call-in show ***613** that neither screened nor time-delayed its viewer calls and afforded him no opportunity to avoid or suppress the views of any person who chose to publicly contradict his comments. Bentley himself testified at trial that he refused to appear on Q&A and deliberately chose to respond to Bunton only through this lawsuit, rather than by exercising his own First Amendment right to confront and correct Bunton before the public. *See* *Gertz,* 418 U.S. at 344, 94 S.Ct. 2997 ("The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significant[ ] ... access to the channels of effective communication.").

Harte–Hanks did not base its actual malice finding on the reporters' general failure to investigate all possible sources of information, but on their conscious avoidance of specific evidence that would conclusively establish the truth or falsity of their story. Bunton's actions are at most the failure to investigate held not to be actual malice in *St. Amant,* not the purposeful avoidance held to establish subjective doubt in *Harte–Hanks.*

The actual malice test is not a cookbook, in which three teaspoons of objective unreasonableness can automatically substitute for one teaspoon of subjective doubt. In *St. Amant,* the Court held that the circumstantial evidence of objective unreasonableness proved only that—unreasonableness, not subjective doubt. 390 U.S. at 731, 88 S.Ct. 1323. The Court reached this conclusion despite evidence that the defendant had no personal knowledge of the truth or falsity of his comments and had completely failed to conduct any investigation of his allegations before publishing them. *Id.* at 730–33, 88 S.Ct. 1323. By contrast, the circumstantial evidence that reporters purposefully avoided dispositive evidence in *Harte–Hanks* tended to show, not only objectively unreasonable behavior, but subjective doubt. The tendency to confuse these cases and use objective evidence as an automatic *substitute* for subjective doubt, rather than a possible *indicator* of subjective doubt, has prompted the Supreme Court to admonish: "[C]ourts must be careful not

to place too much reliance on such factors." *Harte–Hanks,* 491 U.S. at 668, 109 S.Ct. 2678. "The standard is a subjective one—there must be sufficient evidence to permit the conclusion that the defendant actually had a 'high degree of awareness of ... probable falsity.' " *Id.* at 688, 109 S.Ct. 2678 (quoting *Garrison,* 379 U.S. at 74, 85 S.Ct. 209).

In the end, circumstantial evidence of falsity must prove, by clear and convincing evidence, not merely that the defendant's actions were objectively unreasonable or that a prudent man would not have published his allegations, but that he in fact knew his statements were false or seriously doubted that they were true. *St. Amant,* 390 U.S. at 731, 88 S.Ct. 1323 (quoted in *Harte–Hanks,* 491 U.S. at 667, 109 S.Ct. 2678). And circumstantial evidence of ill will must prove not that the defendant intended to harm the plaintiff and perhaps did not investigate as thoroughly as he might have, but that he intended to harm the plaintiff by publishing known or probable lies. *Garrison,* 379 U.S. at 74, 85 S.Ct. 209. Only such "calculated falsehood" is actual malice. *Id.* at 75, 85 S.Ct. 209.

D

Looking at the record as a whole, I find much evidence, not dependent on Bunton's credibility at trial, suggesting that he believed his charges were true and that he did not recklessly disregard the truth or ***614** falsity of his charges. [5] Bunton's specific allegations were made after extensive, if not very effective, research. He filed open records requests with local officials, then filed follow-up complaints when some of those requests were denied. He made numerous trips to the courthouse to read and copy public records. Often, he went on the day of his Q&A broadcast to obtain the most current information, displaying his latest photocopies in front of the television camera as he spoke. He publicly dared Bentley to either telephone Q&A or appear live on the show to refute the charges. He told callers they were "welcome" to come on the show and demonstrate that his allegations were untrue and invited them to review the facts for themselves, expressing his certainty that they could come to only one conclusion about Bentley—that he was corrupt. When Bentley threatened to sue for defamation, Bunton responded on air that he would welcome a lawsuit, because Bentley would have to testify under oath. Bunton told a friend, Tucker Farris, that he believed Bentley's clique was responsible for injustices in local government, and that Bunton wanted to bring to the surface "anything that was not right with the system." On the air, he insisted, "You can't sue anybody for slander when they're telling the truth. And this is the truth, and there is no libel or slander in this." Bunton knew that only truthful charges were absolutely protected from suit and was trying to meet that standard. On one show, Bunton described Bentley as "one of the hardest people for Q&A to finally get some things that we could really dig our teeth in and were confident to go on the air on and go after him on because he is very, very slick." Far from making unfounded or untruthful accusations, this statement suggests that Bunton did not air his accusations until he had confidence in them.

At trial, Bentley's lawyers would not allow Bunton to outline for the jury Bentley's obligations under the Code of Judicial Conduct because he had no legal training and was "not qualified" to give opinions on such "highly complicated" legal issues. Yet this Court finds clear and convincing evidence of actual malice because Bunton misunderstood Bentley's obligations under the laws of the state and that Code.

Most, though not all, of the underlying facts Bunton used to support his accusations were accurate. It was only Bunton's conclusions that were faulty. To a layperson, it might well be plausible that dormant case dockets, individuals erroneously thrown back into jail after finishing their sentences, campaign contributions to candidates for judicial positions Bentley supervised, and appellate court reversals would suggest corruption. Bunton was also correct when he complained that Bentley did not order an audit despite receiving monthly reports revealing that a county official over whom he had supervisory authority had not deposited public funds as required by law, and that Bentley took no action after learning that a local sheriff had refused to exercise an arrest ***615** warrant. However clear it may be to attorneys that none of these actions prove corrupt or criminal behavior, surely there is not clear and convincing evidence that no member of the public could genuinely suspect corruption.

To insist that ordinary citizens understand the legal system's intricacies (perhaps by consulting a lawyer, as the Court helpfully suggests, 94 S.W.3d at 601) before they comment on a judge's performance is an unconstitutional restriction on free speech. A misunderstanding that no rational and responsible lawyer could make may still be made by laypeople. *See Time, Inc. v. Pape,* 401 U.S. 279, 289–92, 91 S.Ct. 633, 28 L.Ed.2d 45 (1971) (misrepresenting allegations contained in

a complaint as true facts was not actual malice); *Turner,* 38 S.W.3d at 121 (juxtaposing true facts to create defamatory false impression was not actual malice because nonlawyer may not have understood legal significance of chosen words and omitted information). As the Supreme Court explained:

> And since "... erroneous statement is inevitable in free debate, and ... it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need ... to survive,' ..." only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions. For speech concerning public affairs is more than self-expression; it is the essence of self-government.

Garrison, 379 U.S. at 74–75, 85 S.Ct. 209 (quoting *New York Times,* 376 U.S. at 271–72, 84 S.Ct. 710).

IV

A

I agree with the Court that Judge Bascom Bentley has failed to prove by clear and convincing evidence that Colonel Jackie Gates acted with actual malice. Gates' words were not defamatory on their face, and could only be understood as defamatory due to their juxtaposition with Bunton's words, which the trial court held were defamatory as a matter of law. Gates' words carry two possible meanings, one innocent, which Gates claims, and one defamatory, which Bentley advocates.

To find actual malice when the defamation is not evident on the face of the comments but a reasonable listener could have understood the words to be defamatory, our independent *Bose* review requires the public-official plaintiff to prove by clear and convincing evidence not only that the speaker had at least serious doubts of the truth of that defamatory interpretation, *see* *St. Amant,* 390 U.S. at 731, 88 S.Ct. 1323, but also that the speaker knew or strongly suspected that his words would convey that defamatory meaning. *See* *Turner,* 38 S.W.3d at 120; *see also* *Garrison,* 379 U.S. at 75, 85 S.Ct. 209 ("[O]nly those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions."). As one scholar explains:

> [W]hether the speaker means to say something true and it is understood to mean something false, or to say something benign and it is understood to mean something defamatory, innocent or negligent misstatement is fully protected by the "actual malice" standard. It is for this reason that implications perceived in a statement but not intended by the speaker cannot be actionable in public official or public figure cases.

SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 5.5.1.2 (3d ed.2002) (citing *Turner,* 38 S.W.3d at 120). ***616** Under common law, statements are judged by the meaning reasonably understood by listeners. Under the First Amendment, statements must be judged by what the publisher intended them to mean. *See id.* § 5.5.1.2.

Several notable cases have required the same showing. In *Saenz v. Playboy Enters., Inc.,* an article in the defendant magazine said:

> And the U.S. adviser who had been Mitrione's predecessor for four years, whose office was on the first floor of the Montevideo *jefatura,* where torture reportedly took place and the screams of the victims reverberated, who by his own account had intimate and influential relations with the Uruguayan police, was Adolph Saenz.
>
> From Montevideo, allegations of torture by his police clients would follow Saenz through subsequent assignments....

841 F.2d 1309, 1312 (7th Cir.1988). According to the court, this could have meant either that Saenz was complicit with torture, which was defamatory, or that he was in a position to know about it, which was not. *Id.* at 1315.

The court held that to prove actual malice, a public figure plaintiff must prove not only that the defendant had at least

serious doubts about the truth of his statements, but also that "where the plaintiff is claiming defamation by innuendo, he also must show with clear and convincing evidence that the defendants intended or knew of the implications that the plaintiff is attempting to draw from the allegedly defamatory material." *Id.* at 1318. If anything, evidence that no reasonable person could have concluded that Saenz was involved in torture bolsters the defendants' claim that they did not intend to accuse him. *See id.* at 1318–19.

In *Newton v. Nat'l Broad. Co.,* 930 F.2d 662, 667 (9th Cir.1990), which we cited in *Turner,* the district court had found actual malice where a broadcast created the impression that Newton, a famous entertainer, held a hidden ownership in a Las Vegas hotel for Mafia sources and deceived state gaming authorities under oath. In merely limiting but not completely overturning a large jury verdict for Newton, the district court concluded that even if NBC had left a defamatory impression unintentionally, it "should have foreseen" that viewers could perceive the defamatory impression. *Newton,* 930 F.2d at 680. Therefore, NBC showed a reckless disregard for the truth.

The Ninth Circuit reversed. "Negligence, weighed against an objective standard like the one used by the district court, can never give rise to liability in a public figure defamation case" under *New York Times. Id.* "Such an approach eviscerates the First Amendment protections established by *New York Times.* It would permit liability to be imposed not only for what was not said but also for what was not intended to be said." *Id.* at 681.

In *Fong v. Merena,* 66 Haw. 72, 655 P.2d 875, 876 (1982), Merena displayed a sign on his lawn and around town which read:

Ushijima/Fong
Voted "Yes"
Pension/Pay Raise

Merena claimed that the sign meant that Ushijima had voted for the pension bill and Fong had voted for the pay raise legislation. *Id.* at 877. He did not realize, he said, that readers might think both politicians had voted for both bills. *Id.* Fong argued that Merena knew that he had not voted for the pension bill, and that the sign could reasonably be interpreted to say that he had. The Hawaii Supreme Court, reversing a lower court judgment, held:

> ***617** It has not been clearly and convincingly shown that in making the publication, Merena believed it was false. On the contrary, he claims that it was accurate, and depending on how one views the sign there is merit to his contention. The fact that it could have been construed otherwise is not, we think, sufficient to prove that Merena acted with actual malice.

Id.

B

Bentley argues that Gates made two on-air defamatory statements. In the first, Gates interrupted Bunton's exchange with a caller, who was unsuccessfully trying to point out to Bunton that he had just called another local official, not Bentley, the most corrupt local government official. When Bunton corrected himself and clarified that Bentley was in fact the most corrupt, Gates said, "yeah." In the second exchange, Bunton was listing the reasons he believed Bentley was corrupt, and Gates added two items to Bunton's list and noted there were others.

I conclude that both of these statements are genuinely ambiguous; it is possible that Gates intended to express agreement with Bunton's defamatory comments, but it is also plausible that he did not. As I have discussed, Bentley bears the burden to show by clear and convincing evidence that Gates knew or strongly suspected that listeners would interpret his statements as agreement with the substance of Bunton's comments.

Bentley has failed to meet this burden. He has not even argued, let alone proved, that Gates intended his comments to convey an accusation that Bentley was corrupt. Here, as in *Saenz,* Bentley has tried to prove only that a reasonable listener could have understood Gates' words to convey a defamatory meaning that Gates could not reasonably have believed, *see* *Saenz,* 841 F.2d at 1318–19, in part because Gates admitted that he had no personal knowledge of

Bentley's corruption. *See* *St. Amant,* 390 U.S. at 730, 733, 88 S.Ct. 1323 (lack of personal knowledge of basis for defamatory statement is not evidence of actual malice). That is no evidence of Gates' subjective intent. The First Amendment does not permit a defendant to be liable for a defamatory meaning he did not either know or strongly suspect his words would convey. I conclude that Bentley has not carried his burden to clearly and convincingly prove actual malice against Gates.

V

New York Times and its progeny are designed to encourage valuable public debate by protecting false, defamatory speech that is made in error. Bentley has not clearly and convincingly proved that Bunton published the type of calculated falsehood about a public official that is beyond the protection of the First Amendment. Therefore, I believe that Bentley is just the type of public official who must, so that vigorous public debate can be guaranteed, forfeit the civil recovery a private citizen might obtain if similarly defamed. While the Court reaches the correct result in rendering judgment for Gates, it errs in failing to render judgment for Bunton as well.

Justice BAKER dissenting.

I agree with the Court's conclusion that there is clear and convincing evidence that Bunton acted with actual malice in defaming Bentley. However, I disagree with the Court's conclusion that such evidence does not exist to support Gates's liability. And, contrary to the court of appeals' determination, I would hold that Gates and Bunton are jointly and severally liable based ***618** on the jury's finding that they conspired to defame Bentley. Finally, I am appalled at the Court's remarkable holding about the mental anguish damages award. Specifically, the Court improperly conducts a factual sufficiency review on mental anguish damages based on a tenuous and entirely incorrect conclusion that the United States Supreme Court requires such a review. Because I, for one, cannot ignore our well-established legal principles that (1) impose joint and several liability on co-conspirators, and (2) preclude this Court from conducting factual sufficiency reviews and issuing advisory opinions, I dissent.

I. GATES'S LIABILITY: DEFAMATION, CONSPIRACY, AND JOINT AND SEVERAL LIABILITY

I disagree with the Court's holding that no clear and convincing evidence exists to support the jury's finding that Gates acted with actual malice. To the contrary, though Gates contends he never believed Bentley was corrupt, he participated on Bunton's program numerous times when Bunton repeatedly talked about Bentley's alleged corruption. And, on at least two of those occasions, Gates agreed with Bunton's statements, and Gates even listed additional examples of Bentley's alleged corruption. Based on the Court's extensive discussion about defamation jurisprudence and the actual malice standard, I conclude that this is clear and convincing evidence to support the jury's finding that Gates acted with actual malice.

The jury also found that Bunton and Gates conspired to defame Bentley. The jury assessed the damages Bunton and Gates each caused individually, but the trial court refused to hold them jointly and severally liable for the total damages. In response to Bentley's argument that the trial court erred in refusing to impose joint and several liability on Bunton and Gates, the court of appeals conceded that conspirators can be held jointly liable for acts done in furtherance of a conspiracy. 94 S.W.3d at 577. However, the court of appeals concluded that, "[i]n order to be entitled to judgment for joint and several liability, Bentley was required to secure a jury finding on the amount of damages he suffered as a result of the conspiracy itself." 94 S.W.3d at 577 (citing *Belz v. Belz,* 667 S.W.2d 240, 243 (Tex.App.-Dallas 1984, writ ref'd n.r.e.)). The court of appeals explained that Gates could not be liable for the damages the jury awarded against Bunton, because many of the defamatory acts occurred before Gates's involvement in the Q&A program. 94 S.W.3d at 577. The court of appeals concluded that, to impose joint and several liability, a separate finding on the conspiracy damages was required but not submitted, and Bentley waived any objection to the charge as submitted. 94 S.W.3d at 577. Consequently, the court of appeals rejected Bentley's argument that the trial court should have held Gates and Bunton jointly and severally liable. 94 S.W.3d at 607.

A. APPLICABLE LAW

A civil conspiracy is "a combination by two or more persons to accomplish an unlawful purpose, or to accomplish a lawful purpose by unlawful means." *Firestone Steel Products Co. v. Barajas,* 927 S.W.2d 608, 614 (Tex.1996); *see also State v. Standard Oil Co.,* 130 Tex. 313, 107 S.W.2d 550, 559 (Tex.1937). "The essential elements are: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result." *Massey v. Armco Steel Co.,* 652 S.W.2d 932, 934 (Tex.1983) (citations omitted).

***619** A party who joins in a conspiracy is jointly and severally liable "for *all acts done by any of the conspirators* in furtherance of the unlawful combination." *Carroll v. Timmers Chevrolet, Inc.,* 592 S.W.2d 922, 926 (Tex.1979) (quoting *State v. Standard Oil,* 107 S.W.2d at 559) (emphasis added); *see also Akin v. Dahl,* 661 S.W.2d 917, 921 (Tex.1983) ("[O]nce a civil conspiracy is found, each co-conspirator is responsible for the action of any of the co-conspirators which is in furtherance of the unlawful combination."). Thus, if a conspiracy is proven, it can extend liability in tort beyond the active wrongdoer to those conspirators who may have merely planned, assisted, or encouraged the wrongdoer's acts. *See Carroll,* 592 S.W.2d at 926. All the plaintiff must show for the alleged conspirators to be held jointly and severally liable is that they acted "in pursuance of the *common purpose* of the conspiracy." *Carroll,* 592 S.W.2d at 928 (citing *Berry v. Golden Light Coffee Co.,* 160 Tex. 128, 327 S.W.2d 436, 440 (Tex.1959)) (emphasis added). "The gist of a civil conspiracy is the damage resulting from commission of a wrong which injures another, and not the conspiracy itself." *Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp.,* 435 S.W.2d 854, 856 (Tex.1968).

B. ANALYSIS

The court of appeals' holding ignores the fact that all members of a conspiracy are liable for their co-conspirators' wrongful acts. And, even if a co-conspirator's acts occurred before the conspiracy formed, all the conspiring parties are liable for those acts, as long as those acts are made in furtherance of the "common goal" of the conspiracy-in this case, defaming Bentley. *See Akin,* 661 S.W.2d at 921; *Carroll,* 592 S.W.2d at 926.

Here, the jury found that Bunton published defamatory statements about Bentley with "actual malice" and "malice." The jury also found that Gates agreed with Bunton's defamatory statements and published his agreement with "actual malice" and "malice." Finally, the jury found that Bunton and Gates conspired to publish defamatory statements about Bentley. Thus, both Bunton and Gates acted with actual malice, and Bentley established the elements of the conspiracy. Accordingly, under Texas law, Gates and Bunton are jointly and severally liable "for all acts done by any of the conspirators" in furtherance of the "common purpose" of the conspiracy. *Carroll,* 592 S.W.2d at 926; *see also Akin,* 661 S.W.2d at 921. In other words, our jurisprudence does not require the trial court to separately submit each co-conspirator's civil conspiracy damages. When the jury found that liability for a civil conspiracy existed, this finding requires the legal conclusion to impose joint and several liability on the co-conspirators.

Because the co-conspirators' common purpose in this case was to defame Bentley, the trial court was obligated to impose joint and several liability on Gates for all the damages arising from the common purpose, including those damages arising from defamatory statements made before Gates "joined" the conspiracy. *See Akin,* 661 S.W.2d at 921; *Carroll,* 592 S.W.2d at 926. Therefore, I would reverse the court of appeals' holding about Bunton's and Gates's joint and several liability and render the judgment the trial court should have rendered based on the jury's verdict. That is, Bunton and Gates, as co-conspirators, were jointly and severally liable for the total damages the jury found against each individual co-conspirator defendant.

II. MENTAL ANGUISH DAMAGES

A. APPLICABLE LAW

The United States Supreme Court has held that plaintiffs in state courts may not ***620** recover presumed or punitive damages for defamation if they do not show liability based on actual malice, which is "knowledge of falsity or reckless

disregard for the truth." *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 349, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). Thus, defamed plaintiffs who need only prove a lower culpability standard than actual malice may only recover compensation for "actual injury." *Gertz,* 418 U.S. at 349. However, actual injuries are not limited to out-of-pocket losses. *Gertz,* 418 U.S. at 350. "Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and *mental anguish and suffering.*" *Gertz,* 418 U.S. at 350 (emphasis added); *see also* *Time, Inc. v. Firestone,* 424 U.S. 448, 460, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976).

In Texas, the standard for reviewing an excessive damages complaint is factual sufficiency of the evidence. *See* *Maritime Overseas Corp. v. Ellis,* 971 S.W.2d 402, 406 (Tex.1998); *Rose v. Doctors Hosp.,* 801 S.W.2d 841, 847–48 (Tex.1990); *Pope v. Moore,* 711 S.W.2d 622, 624 (Tex.1986). Further, Texas jurisprudence dictates that the standard for reviewing whether a trial court should have ordered a remittitur is factual sufficiency. *Rose,* 801 S.W.2d at 847–48; *Larson v. Cactus Util. Co.,* 730 S.W.2d 640, 641 (Tex.1987). Because whether damages are excessive and whether a remittitur is appropriate are factual determinations that are final in the court of appeals, this Court lacks jurisdiction to review such findings, consider excessive damages complaints, and suggest remittiturs. TEX. CONST. art. V, § 6; TEX. GOV'T CODE § 22.225(a); TEX.R.APP. P. 46; *Akin,* 661 S.W.2d at 921; *Sweet v. Port Terminal R.R. Ass'n,* 653 S.W.2d 291, 295 (Tex.1983); *Hall v. Villarreal Dev. Corp.,* 522 S.W.2d 195, 195 (Tex.1975).

B. ANALYSIS

Because the Court concludes that clear and convincing evidence exists to prove Bunton acted with actual malice in defaming Bentley, the Court's remaining constitutionally appropriate inquiry is solely whether there is legally sufficient evidence to support the damages awarded. *See* TEX. CONST. art. V, § 6; TEX. GOV'T CODE § 22.225(a); *see also Hall,* 522 S.W.2d at 195 (Texas Supreme Court lacks jurisdiction to entertain factual insufficiency points.). But, ignoring our jurisprudence and the constitutional restraints on this Court's appellate review power, the Court impermissibly conducts a factual sufficiency review of the record—heavily putting its thumb on the scale—to conclude that the mental anguish damages award "is not merely excessive and unreasonable; it is far beyond any figure the evidence can support." 94 S.W.3d at 606. The Court explains that "while the record supports Bentley's recovery of some amount of mental anguish damages, it does not support the amount of those damages found by the jury." 94 S.W.3d at 605. And then, based on no authority whatsoever, the Court remands the case to the court of appeals "to reconsider" the excessiveness of the jury's mental anguish damages award or "to suggest" a remittitur. 94 S.W.3d at 607.

The Court asserts two reasons for why this case permits the Court to review the excessiveness of the jury's mental anguish damages award. First, relying on *Gertz,* the Court holds that "the First Amendment requires appellate review of amounts awarded for non-economic damages in defamation cases to ensure that any recovery only compensates the plaintiff for actual injuries and is not a disguised disapproval of the defendant." 94 S.W.3d at 605. The Court reasons that the possibility that a jury may award significant damages "unrestrained ***621** by meaningful appellate review" poses a threat to First Amendment speech. 94 S.W.3d at 605.

But the Court misreads and misapplies *Gertz* and can only have done so purposely. Thus, the Court uses this First Amendment case as a mere guise to reach a damages issue that this Court otherwise cannot consider. In *Gertz,* the U.S. Supreme Court expressly limited its holding that defamed private plaintiffs may recover compensation only for "actual injuries" to situations in which state law sets a lower culpability standard than actual malice. *Gertz,* 418 U.S. at 349, 94 S.Ct. 2997. The Supreme Court stated: "[T]he private defamation plaintiff who established liability *under a less demanding standard* than [that stated by *New York Times v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)] may recover only such damages as are sufficient to compensate him for *actual injury.*" *Gertz,* 418 U.S. at 349, 94 S.Ct. 2997 (emphasis added). Thus, a reviewing court is authorized to review damage awards and limit a defamed plaintiff's damages to those reflecting "actual injury" when the culpability standard is less than actual malice. *Gertz,* 418 U.S. at 349, 94 S.Ct. 2997.

In contrast, when a state court applies the actual malice standard the Supreme Court announced in *New York*

Times, 376 U.S. at 279–80, 84 S.Ct. 710, for determining liability for defaming public figures, *Gertz*'s concern about the type and amount of damages is no longer an issue. Under the *New York Times* test, the First Amendment "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times,* 376 U.S. at 279–80, 84 S.Ct. 710. Thus, a public figure plaintiff who shows the defamatory statements were made with actual malice can recover both actual and punitive damages, as long as "competent evidence" supports the damages award. *Herbert v. Lando,* 441 U.S. 153, 164 & n. 12, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979).

Here, Bentley is a public figure, and the trial court required the jury to find actual malice before imposing liability on Bunton and Gates. Consequently, *Gertz*'s requirement that state courts limit damages to those reflecting actual injury when the state's law creates a lower culpability standard for private plaintiff defamation cases simply does not apply.

Additionally, even if we assume that *Gertz*'s constitutional concerns about damages applies in a public figure defamation case in which actual malice is the culpability standard, the Court improperly relies on *Gertz* to reverse the mental anguish damages award. The Court assumes that "actual injury" under *Gertz* excludes mental anguish, and therefore, *Gertz* authorizes the Court to specially scrutinize the mental anguish damages here. However, the Court refuses to recognize that, in the face of its desire to apply First Amendment rights to limit damages, the Gertz Court explicitly included mental anguish damages as "actual injuries" that a private defamed plaintiff can recover. *Gertz,* 418 U.S. at 349–50, 94 S.Ct. 2997. And, in a later case, the Supreme Court reaffirmed that a private plaintiff may recover mental anguish damages even under a lower culpability standard and required only that the actual damages awarded be supported by "competent evidence." *See* *Time, Inc.,* 424 U.S. at 460, 96 S.Ct. 958.

In *Time, Inc.,* the U.S. Supreme Court did not apply the *New York Times* actual malice test because the plaintiff was not a public figure. ***622** *Time, Inc.,* 424 U.S. at 454–55. After refusing to apply the actual malice standard, the Supreme Court flatly rejected Time's argument that *Gertz* did not permit a recovery for mental anguish damages, because, according to Time, "the only compensable injury in a defamation case is that which may be done to one's reputation." *Time, Inc.,* 424 U.S. at 460, 96 S.Ct. 958. The Supreme Court stated: "In [*Gertz*] we made it clear that States could base awards on elements other than injury to reputation, specifically listing 'personal humiliation, and mental anguish and suffering' as examples of injuries which might be compensated consistently with the Constitution upon a showing of fault." *Time, Inc.,* 424 U.S. at 460, 96 S.Ct. 958.

Here, the Court does not go so far as the defendant in *Time, Inc.* to assert that *Gertz* does not allow a defamed plaintiff to recover mental anguish damages. The Court instead reads *Gertz* to mandate "appellate review of non-economic damages in defamation cases to ensure that any recovery only compensates the plaintiff for actual injuries." 94 S.W.3d at 605. But again, even if we assume *Gertz* applies to public figure defamation cases, nothing in *Gertz* even suggests that this Court must apply special appellate scrutiny other than the review this Court typically conducts when examining mental anguish damages awards. The Supreme Court expressly held in *Time, Inc.* that mental anguish is an actual injury for which defamed private plaintiffs may recover damages.

In sum, the Court relies on a defamation case that holds contrary to what the Court reads it to say, and stretches that case's holding beyond recognition, to impermissibly review the mental anguish damages award in a manner contrary to the Court's established no evidence review. Furthermore, *Gertz*'s constitutional concern that a jury's discretion in awarding damages not "inhibit the vigorous exercise of First Amendment freedoms" is not an issue here, because that case and its progeny recognize that a defamed private plaintiff may recover mental anguish damages as actual injury even when state law does not require an actual malice showing. *See* *Gertz,* 418 U.S. at 349, 94 S.Ct. 2997; *see also* *Time, Inc.,* 424 U.S. at 460, 96 S.Ct. 958; *Herbert,* 441 U.S. at 164 & n. 12, 99 S.Ct. 1635. Finally, and most importantly, *Gertz*'s concern that damage awards for defamed private plaintiffs not chill First Amendment rights is otherwise protected in First Amendment cases (like the present case) that involve public figures. That is because, before imposing liability, the Supreme Court requires that a public figure defamation plaintiff produce clear and convincing evidence

that the defendant acted with actual malice. *See, e.g., New York Times,* 376 U.S. at 279–80, 84 S.Ct. 710. And, when a public figure defamation plaintiff has met this onerous burden of proving actual malice, the Supreme Court has upheld the compensatory and punitive damages awarded. *See, e.g., Harte–Hanks Communications v. Connaughton,* 491 U.S. 657, 661, 693, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989).

The Court also relies on Texas common law to impermissibly conduct a factual sufficiency review of the mental anguish damages award. The Court acknowledges that courts of appeals have authority to consider excessive damages complaints, but it further contends that this Court has "rejected the view that [the courts of appeals'] authority displaces [this Court's] obligation to determine whether there is any evidence at all of the amount of damages determined by the jury." 94 S.W.3d at 606 (citing and quoting *Saenz v. Fidelity & Guar. Ins. Underwriters,* 925 S.W.2d 607, 612 (Tex.1996)). But *Saenz* is totally inapplicable.

***623** In *Saenz,* this Court applied a traditional no evidence review to a $250,000 mental anguish damages award that a plaintiff recovered against her workers' compensation insurance carrier. *Saenz,* 925 S.W.2d at 612. The Court acknowledged the *Parkway Co. v. Woodruff,* 901 S.W.2d 434, 444 (Tex.1995), factors for proving mental anguish and discussed the limited evidence the plaintiff offered to show her mental anguish. Then, the Court concluded that there was "no evidence ... that Saenz suffered mental anguish or that $250,000 would be fair and reasonable compensation." *Saenz,* 925 S.W.2d at 614. Thus, the Court rendered judgment that the plaintiff take nothing. *Saenz,* 925 S.W.2d at 614.

Here, unlike *Saenz* where the Court held there was no evidence of mental anguish at all, the Court observes that "[t]he record leaves no doubt that Bentley suffered mental anguish as a result of Bunton's and Gates's statements." 94 S.W.3d at 606. As the Court explains, Bentley testified that the ordeal had cost him time, deprived him of sleep, caused him embarrassment in the community in which he had spent almost all of his life, disrupted his family, and distressed his children at school. Bentley said this experience was the worst of his life. Friends testified that Bentley had been depressed, that his honor and integrity had been impugned, that his family had suffered, too, adding to his own distress, and that he never would be the same. And Bunton's relentlessness in accusing Bentley of corruption caused him much anxiety. 94 S.W.3d at 606.

But, after listing this parade of horribles, the Court remarkably holds that, while this evidence supports Bentley's recovering "some amount of mental anguish damages," this is no evidence that Bentley suffered mental anguish damages amounting to $7 million. 94 S.W.3d at 606, –07. Then, based on this amazing conclusion, the Court holds that a remand is necessary for the court of appeals to "reconsider" the excessiveness of the jury's mental anguish damages award, advises that the court of appeals suggest a remittitur, and opines that the case may need to be retried. 94 S.W.3d at 607. It is no surprise to me that the Court cites no authority for remanding the case with these instructions. For there is none. And, the Court entirely glosses over the fact, as it must to reach its conclusion, that the court of appeals already considered the excessive damages complaint. Indeed, the court of appeals concluded, "[t]here is nothing in the record to suggest that the jury was guided by anything other than a conscientious consideration of the evidence and the instructions of the trial court. We conclude that the evidence is legally and factually sufficient to support the jury's award of $7,150,000." 94 S.W.3d at 607. Yet the Court ignores this holding, inappropriately assumes a fact-finder role, and sends the case back to the court of appeals.

The U.S. Supreme Court has recognized that the Constitution does not "impose upon the States any limitations as to how, within their own judicial systems, factfinding tasks shall be allocated." *Time, Inc.,* 424 U.S. at 461, 96 S.Ct. 958. A state may apply its methods for making factual determinations, as long as some element of the state court system determines that the defendants are at fault. *Time, Inc.,* 424 U.S. at 464, 96 S.Ct. 958. This statement certainly demonstrates that our state's rules for appellate courts' reviewing claims of excessive damages—factual sufficiency in the courts of appeals only—applies to reviewing mental anguish damage awards in defamation cases. TEX. CONST. art. V, § 6; TEX. GOV'T CODE § 22.225(a); *Sweet,* 653 S.W.2d at 294–95; *see also Maritime Overseas,* 971 S.W.2d at 406; ***624** *Rose,* 801 S.W.2d at 847–48; *Pope,* 711 S.W.2d at 624.

Thus, contrary to the Court's holding, it is clear that the First Amendment does not require this Court to review

the evidence supporting the mental anguish damages award to determine if it is "reasonable"—a proxy for factual sufficiency review. Simply put, the Court oversteps its constitutional appellate review boundaries to conduct what effectively results in a factual sufficiency review of the mental anguish damages award and issues a wholly advisory opinion to the court of appeals about those damages. Applying our traditional legal sufficiency standard for reviewing damages awards, I would hold that there is some evidence to support the damages the jury awarded. *See* *Bradford v. Vento,* 48 S.W.3d 749, 754 (Tex.2001).

III. DISPOSITION

The Court's writings in this case suggest three different views about this case's final disposition: (1) JUSTICE HECHT holds that Bunton is liable while Gates is not and that a remand is required for the court of appeals to reconsider the mental anguish damages award; (2) CHIEF JUSTICE PHILLIPS holds that Bunton and Gates are not liable and thus the Court should enter a take nothing judgment against Bentley; and (3) I would hold that Bunton and Gates are liable and thus the Court should enter the judgment the trial court should have rendered based on the jury's verdict and determine Bunton and Gates jointly and severally liable.

Despite these three clearly distinctive, non-majority positions about the case's final outcome, JUSTICE HECHT'S remand disposition wins the day, because seven Justices join in the judgment "remanding this cause to the court of appeals for further proceedings." *See* 94 S.W.3d at 607. It completely escapes me how three Justices who agree with this remand disposition can join CHIEF JUSTICE PHILLIPS' opinion that neither Gates nor Bunton are liable. Though these Justices agree that no liability exists whatsoever, they join in a judgment that remands to the court of appeals solely to reassess the damages awarded.

The Court's split on the disposition certainly suggests that this case, particularly JUSTICE HECHT'S writing about why a remand is necessary, should not carry any precedential value. Indeed, when the U.S. Supreme Court is dead-locked in a case because a Justice is recused, the Supreme Court renders a judgment that affirms the lower court's judgment "by an equally divided Court" and that "judgment is without force as precedent." *See* *Ohio ex rel. Eaton v. Price,* 364 U.S. 263, 264, 80 S.Ct. 1463, 4 L.Ed.2d 1708 (1960). Similarly, because JUSTICE HECHT does not have a majority for his remand rationale, this case should have no precedential value.

IV. CONCLUSION

"Oh what a tangled web we weave,
When first we practise to deceive!"

SIR WALTER SCOTT,*Marmion,* canto vi., stanza 17.

The Court's writing is nothing more than an epistle of the First Amendment Gospel according to JUSTICE HECHT, the effect of which is to transmogrify Texas law about reviewing mental anguish damages awards in defamation cases. I would hold that there is clear and convincing evidence to support the jury's findings that Gates and Bunton acted with actual malice in defaming Bentley. And, because the jury found Bunton and Gates were co-conspirators, I would impose joint and several liability for the damages the jury ***625** awarded. Because the Court holds otherwise, I dissent.

All Citations

94 S.W.3d 561, 45 Tex. Sup. Ct. J. 1172

Footnotes

1 176 S.W.3d 1 (Tex.App.-Tyler 1999).
2 TEXAS ALMANAC 157 (1995).
3 *See* TEX.CODE CRIM. PROC. art. 42.12, § 5(a).
4 *See* TEX. PENAL CODE § 32.31.
5 *See* TEX.CODE CRIM. PROC. arts. 17.03, 17.031, 17.04.

6 *See, e.g.,* TEX. PENAL CODE §§ 36.02 (bribery), 36.03 (coercion of public servant or voter), 39.02 (abuse of official capacity).

7 *See* TEX.CODE CRIM. PROC. art. 17.03(a) (stating that with certain exceptions not applicable here, "a magistrate may, in the magistrate's discretion, release the defendant on his personal bond without sureties or other security").

8 *Id.* art. 2.18 ("When a prisoner is committed to jail by warrant from a magistrate or court, he shall be placed in jail by the sheriff. It is a violation of duty on the part of any sheriff to permit a defendant so committed to remain out of jail, except that he may, when a defendant is committed for want of bail, or when he arrests in a bailable case, give the person arrested a reasonable time to procure bail; but he shall so guard the accused as to prevent escape.").

9 TEX. PENAL CODE § 39.02(a)(1) ("A public servant commits an offense if, with intent to obtain a benefit or with intent to harm or defraud another, he intentionally or knowingly ... violates a law relating to the public servant's office or employment....").

10 *See* TEX.CODE CRIM. PROC. art. 52.01(a) ("When a judge of any district court of this state, acting in his capacity as magistrate, has probable cause to believe that an offense has been committed against the laws of this state, he may request that the presiding judge of the administrative judicial district appoint a district judge to commence a Court of Inquiry.").

11 *See id.* art. 2.10 ("It is the duty of every magistrate to preserve the peace within his jurisdiction by the use of all lawful means; to issue all process intended to aid in preventing and suppressing crime; to cause the arrest of offenders by the use of lawful means in order that they may be brought to punishment.").

12 *See* TEX. LOC. GOV'T CODEE §§ 84.002 (providing for the appointment of a county auditor in certain counties by the district judges), 84.009 (providing for removal of the county auditor by the appointing judges).

13 *See* TEX. CONST. art. V, § 8 ("The District Court shall have ... general supervisory control over the County Commissioners Court...."); TEX. GOV'T CODE § 24.020 ("The district court has ... general supervisory control over the commissioners court....").

14 *See* TEX.CODE JUD. CONDUCT Canon 3(D)(1) ("A judge who receives information clearly establishing that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the State Commission on Judicial Conduct or take other appropriate action.").

15 *See* TEX. LOC. GOV'T CODEE § 87.015 (providing for petitions for the removal of a district attorney and other officers).

16 See note 13, *supra.*

17 *See* WEBSTER'S THIRD NEW INT'L DICTIONARY at 512 (1961) (defining "corrupt" as "depraved, evil: perverted into a state of moral weakness or wickedness", "of debased political morality: characterized by bribery, the selling of political favors, or other improper political or legal transactions or arrangements").

18 *See* TEX.CODE CRIM. PROC. arts. 17.03, 17.031, 17.04.

19 *See id.* arts. 59.06 ("Disposition of Forfeited Property"), 103.004 ("Disposition of Collected Money").

20 176 S.W.3d 1 (Tex.App.-Tyler 1999).

21 *Id.* at ——.

22 *Id.* at ——.

23 *Id.* at ——.

24 *Id.* at ——.

25 *Id.* at ——.

26 44 Tex. Sup.Ct. J. 196–197 (Dec. 21, 2000)44 Tex. Sup.Ct. J. 196–197 (Dec. 21, 2000).

27 TEX. CONST. art. I, § 8.

28 *Turner v. KTRK Television, Inc.,* 38 S.W.3d 103, 116 (Tex.2000) ("we have recognized that the Texas Constitution's free speech guarantee is in some cases broader than the federal guarantee"); *Commission for Lawyer Discipline v. Benton,* 980 S.W.2d 425, 434 (Tex.1998) ("This Court has recognized that 'in some aspects our free speech provision is broader than the First Amendment.' "); *Cain v. Hearst Corp.,* 878 S.W.2d 577, 584 (Tex.1994) ("this Court [has] recognized that in some aspects our free speech provision is broader than the First Amendment"); *Ex parte Tucci,* 859 S.W.2d 1, 5 (Tex.1993) (" 'article one, section eight ... provides greater rights of free expression than its federal equivalent' "); *Davenport v. Garcia,* 834 S.W.2d 4, 8 (Tex.1992) ("we have recognized that in some aspects our free speech provision is broader than the First Amendment"); *Casso v. Brand,* 776 S.W.2d 551, 556 (Tex.1989) ("our state free speech guarantee may be broader than the corresponding federal guarantee"); *O'Quinn v. State Bar of Tex.,* 763 S.W.2d 397, 402 (Tex.1988) ("it is quite obvious that the Texas Constitution's affirmative grant of free speech is more broadly worded than the first amendment's proscription of Congress from abridging freedom of speech").

29 980 S.W.2d at 434 (citations omitted, emphasis in original).

30 38 S.W.3d at 116–117 (citations omitted, emphasis in original).

31 *Tucci,* 859 S.W.2d at 32 (Phillips, C.J., concurring).

32 *E.g., HL Farm Corp. v. Self,* 877 S.W.2d 288, 290 (Tex.1994); *R Communications, Inc. v. Sharp,* 875 S.W.2d 314, 315 (Tex.1994); *Tucci,* 859 S.W.2d at 5 (plurality opinion).

33 *E.g., Commission for Lawyer Discipline,* 980 S.W.2d at 429–430; *Operation Rescue v. Planned Parenthood, Inc.,* 975 S.W.2d 546, 556 (Tex.1998); *Tilton v. Marshall,* 925 S.W.2d 672 (Tex.1996); *Texas Ass'n of Bus. v. Texas Air Control Bd.,* 852 S.W.2d 440 (Tex.1993).

34 *See, e.g., Davenport,* 834 S.W.2d at 17–18.

35 *Turner,* 38 S.W.3d at 115.

36 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990); *cf. Carr v. Brasher,* 776 S.W.2d 567, 570 (Tex.1989) (noting at that time that the United States Supreme Court had not provided guidance on the issue).

37 497 U.S. at 13, 110 S.Ct. 2695.

38 *See, e.g., Ollman v. Evans,* 750 F.2d 970 (D.C.Cir.1984) (en banc) (announcing a four-part test for distinguishing assertions of fact from expressions of opinion); *see also* Robert D. Sack, *Protection of Opinion Under the First Amendment: Reflections on Alfred Hill, "Defamation and Privacy Under the First Amendment",* 100 COLUM. L.REV. 294, 323–325 (2000); *cf. Carr,* 776 S.W.2d at 570 (noting but not applying the *Ollman* factors).

39 497 U.S. at 19, 110 S.Ct. 2695 (quoting *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 772, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986) (quoting *New York Times Co. v. Sullivan,* 376 U.S. 254, 272, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964))).

40 *Id.* at 19–20, 20 n. 6, 110 S.Ct. 2695 (citing *Hepps,* 475 U.S. at 779, 106 S.Ct. 1558).

41 *Id.* at 20, 110 S.Ct. 2695 (citing *Greenbelt Coop. Pub. Ass'n, Inc. v. Bresler,* 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970); *National Ass'n of Letter Carriers v. Austin,* 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974); and *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988)).

42 *Id.* (citing *New York Times v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Curtis Pub. v. Butts,* 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967) (plurality opinion); and *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974)).

43 *Id.* at 21, 110 S.Ct. 2695.

44 *Id.* at 19–21, 110 S.Ct. 2695; *see* *Carr,* 776 S.W.2d at 570; *see also* ROBERT D. SACK, SACK ON DEFAMATION § 4.3.7, at 4–54 (3d ed. 2002) ("The vast majority of courts, and all of the federal circuits, agree that whether a statement is fact or opinion is a matter of law for the court to decide.").

45 RESTATEMENT (SECOND) OF TORTS § 566 (1977).

46 W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 113A, at 813–814 (5th ed. 1984).

47 750 F.2d 970 (D.C.Cir.1984) (en banc); *cf.* *Carr v. Brasher,* 776 S.W.2d 567, 570 (Tex.1989) (noting but not applying the *Ollman* factors).

48 *See* RODNEY A. SMOLLA, LAW OF DEFAMATION § 6.12[1] at 6.44–6.47 (2d ed. 2001); BRUCE W. SANFORD, LIBEL & PRIVACY § 5.3.2, at 148–149 (2d ed. 2001).

49 497 U.S. at 20, 110 S.Ct. 2695 (citation omitted).

50 *See, e.g.,* *600 West 115th St. Corp. v. Von Gutfeld,* 80 N.Y.2d 130, 589 N.Y.S.2d 825, 603 N.E.2d 930, 937 (1992) (concluding that statement made at public hearing on a building permit application that the plaintiff's conduct " 'is as fraudulent as you can get and it smells of bribery and corruption' " was merely opinion, given the lack of factual specificity and the tenor of its presentation, a "rambling, table-slapping monologue" and "angry, unfocused diatribe"); *Rinaldi v. Holt, Rinehart & Winston, Inc.,* 42 N.Y.2d 369, 397 N.Y.S.2d 943, 366 N.E.2d 1299, 1306–1308 (1977) (suggesting that statements that a judge was "probably corrupt" were opinions that had not been proven factually false); *Maynard v. Daily Gazette Co.,* 191 W.Va. 601, 447 S.E.2d 293, 299 (1994) (holding that editorial stating that college athletic director's conduct was part of the "corruption of college athletics" did not actually accuse the director of corruption and was thus merely opinion); *Price v. Viking Penguin, Inc.,* 881 F.2d 1426, 1445 (8th Cir.1989) (holding that author's quotation of an attorney calling an FBI agent "corrupt and vicious" was unverifiable opinion); *Silvester v. American Broad. Cos.,* 650 F.Supp. 766, 772 (S.D.Fla.1986) (holding that an unspecific claim that " 'jai alai is a totally corrupt industry' " was "a statement of opinion ... too general to support an action for libel"); *cf.* *Greenbelt Coop. Pub. Ass'n, Inc. v. Bresler,* 398 U.S. 6, 14, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970) (concluding that accurate newspaper reports of heated debates before city council in which the plaintiff's negotiating efforts were criticized as "blackmail" could not have been reasonably understood by any reader to refer to the commission of a crime).

51 *See, e.g., Moore v. Leverett,* 52 S.W.2d 252, 255 (Tex. Comm'n App.1932, holding approved) ("To make a statement that a public officer is actuated by evil or corrupt motives in a public undertaking is to make a statement of fact which should be justified like any other statement of fact in order to exonerate the person making the statement."); *Silsdorf v. Levine,* 59 N.Y.2d 8, 462 N.Y.S.2d 822, 449 N.E.2d 716, 720–721 (1983) (holding that accusations of "corruptness" in an open letter were not merely opinion because they purported to be factual); *Kelly v. Schmidberger,* 806 F.2d 44, 49 (2d Cir.1986) (stating that assertions of mishandling church property were factual, suggesting corrupt or criminal conduct, and were therefore actionable).

52 PLATO, SOCRATES' DEFENSE 24b (in THE COLLECTED DIALOGUES OF PLATO 10 (edited by Edith Hamilton and Huntington Cairns, Pantheon Books 1961)) ("Socrates is guilty of corrupting the minds of the young, and in believing in deities of his own invention instead of the gods recognized by the state. Such is the charge.").

53 *See, e.g.,* TEX. AGRIC. CODEE § 59.003 (stating that a farm and ranch finance program board member may be liable for an official act or omission that is corrupt); TEX. CIV. PRAC. & REM.CODE § 171.088(a) (stating that an arbitration award may be set aside if obtained by corruption or if an arbitrator was corrupt); TEX. FIN.CODE § 12.106 (stating that an employee of the banking department is not liable for an official act or omission unless it is corrupt); *id.* § 14.055 (same for an employee of the consumer credit commission); *id.* § 89.006 (same for an employee of the savings and loan department); TEX. GOV'T CODE § 52.024 (stating that the court reporter certification board may refuse to certify an applicant convicted of a crime involving corruption); *id.* § 52.029(a) (stating that a court reporter may be sanctioned for corruption); TEX. LOC. GOV'T CODEE § 22.077(a) (stating that a municipal officer may be removed for corruption).

54 W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 112, at 791–792 (5th ed.1984).

55 112 Tex. 160, 246 S.W. 777, 783 (1922) (quoting *Negley v. Farrow,* 60 Md. 158 (1883)).

56 See note 62, *infra.*

57 *A.S. Abell Co. v. Kirby,* 227 Md. 267, 176 A.2d 340, 343 (1961) (citing PROSSER ON TORTS 622 (2d ed.1955) and THAYER, LEGAL CONTROL OF THE PRESS § 66 (3d ed.1956)), cited in SACK, *supra* note 44, § 4.3.6, at 4–52 n. 220.

58 *Ollman v. Evans,* 750 F.2d 970, 983 (D.C.Cir.1984) (en banc).

59 *Milkovich,* 497 U.S. at 18–19, 110 S.Ct. 2695.

60 47 U.S.C. § 531.

61 *Report of the Committee on Energy and Commerce on the Cable Franchise Policy and Communications Act of 1984,* H.R.Rep. No. 98–934, at 30 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4667, *and cited in* *Denver Area Educ. Telecomm. Consortium, Inc. v. Federal Communications Comm'n,* 518 U.S. 727, 734, 739, 116 S.Ct. 2374, 135 L.Ed.2d 888 (1996).

62 *New York Times Co. v. Sullivan,* 376 U.S. 254, 279–280, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (requiring that a public figure or public official prove falsity); *Turner v. KTRK Television, Inc.,* 38 S.W.3d 103, 117–120 (Tex.2000). *See also* *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 777, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986) (stating that if the defamatory speech is of public concern and the defendant is a member of the media, the plaintiff has the burden of proving falsity, but reserving the question of who has the burden if the defendant is not a member of the media); *Milkovich v. Lorain Journal, Co.,* 497 U.S. 1, 19–20, 20 n. 6, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990) (same); *McIlvain v. Jacobs,* 794 S.W.2d 14, 15 (Tex.1990) (applying *Hepps,* 475 U.S. at 787, 106 S.Ct. 1558). *Cf.* *Randall's Food Markets, Inc. v. Johnson,* 891 S.W.2d 640, 646 (Tex.1995) ("In suits brought by private individuals, truth is an affirmative defense to slander."); TEX. CIV. PRAC. & REM.CODE § 73.005 ("The truth of the statement in the publication on which an action for libel is based is a defense to the action."); SACK, *supra* note 44, § 3.3.2.2, at 3–9 to 3–12 (3d ed. 2001) (stating that the plaintiff may have the burden of proving the falsity of a statement of public interest even if the defendant is not a member of the media, but that the common law rule that truth is a defense to be pleaded and proved by the defendant may apply in cases where the speech is about a nonpublic subject); SMOLLA, *supra* note 48, § 5.07 at 5.11–.13 (2d ed. 2001) (stating that the assignment of the burden of proof of falsity is an unresolved question in many contexts); BRUCE W. SANFORD, LIBEL & PRIVACY § 6.3–6.3.3, at 213–219 (2d ed. 2001).

63 *See* Sack, *supra* note 38, at 326–327 (stating that the burden of proof on a plaintiff who is not a public official or a public figure suing media defendants is an open question, and citing cases).

64 176 S.W.3d at ——.

65 *Turner,* 38 S.W.3d at 117.

66 *See* *Harte–Hanks Communications, Inc. v. Connaughton,* 491 U.S. 657, 661 n. 2, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989)("There is some debate as to whether the element of falsity must be established by clear and convincing evidence or by a preponderance of the evidence. We express no view on this issue." (citations omitted)).

67 See note 5, *supra.*

68 See note 13, *supra.*

69 See note 15, *supra.*

70 See note 13, *supra.*

71 *State v. District Court,* 206 Wis. 600, 240 N.W. 406, 409 (1932).

72 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

73 *Id.* at 270, 84 S.Ct. 710.

74 *Id.* at 279–280, 84 S.Ct. 710. *See also* *Huckabee v. Time Warner Entertainment Co.,* 19 S.W.3d 413, 420 (Tex.2000).

75 *Harte–Hanks Communications, Inc. v. Connaughton,* 491 U.S. 657, 666 n. 7, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989). *See* *Huckabee,* 19 S.W.3d at 420.

76 *Masson v. New Yorker Magazine, Inc.,* 501 U.S. 496, 511, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991).

77 *Garrison v. Louisiana,* 379 U.S. 64, 75, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964) (quoting *Chaplinsky v. New Hampshire,* 315 U.S. 568, 572, 62 S.Ct. 766, 86 L.Ed. 1031 (1942)).

78 *New York Times v. Sullivan,* 376 U.S. at 279–280, 84 S.Ct. 710; *Huckabee,* 19 S.W.3d at 420.

79 *Harte–Hanks,* 491 U.S. at 688, 109 S.Ct. 2678.

80 *Herbert v. Lando,* 441 U.S. 153, 160, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979).

81 *Harte–Hanks,* 491 U.S. at 688, 109 S.Ct. 2678; *Herbert,* 441 U.S. at 160, 99 S.Ct. 1635; *St. Amant v. Thompson,* 390 U.S. 727, 731, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968).

82 *Garrison,* 379 U.S. at 79, 85 S.Ct. 209.

83 *Harte–Hanks,* 491 U.S. at 688, 109 S.Ct. 2678 (quoting *St. Amant,* 390 U.S. at 731, 88 S.Ct. 1323).

84 *Harte–Hanks,* 491 U.S. at 688, 109 S.Ct. 2678 (quoting *Garrison v. Louisiana,* 379 U.S. 64, 74, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964)).

85 *St. Amant,* 390 U.S. at 733, 88 S.Ct. 1323 (citing *New York Times,* 376 U.S. at 287–288, 84 S.Ct. 710).

86 *Harte–Hanks,* 491 U.S. at 667–668, 109 S.Ct. 2678.

87 *Id.* at 668, 109 S.Ct. 2678 (citations omitted).

88 *Id.* at 688, 109 S.Ct. 2678.

89 *St. Amant,* 390 U.S. at 730, 88 S.Ct. 1323.

90 *Monitor Patriot Co. v. Roy,* 401 U.S. 265, 276, 91 S.Ct. 621, 28 L.Ed.2d 35 (1971).

91 *St. Amant,* 390 U.S. at 730–731, 88 S.Ct. 1323.

92 *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 343, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) (quoting *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29, 63, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971) (Harlan, J., dissenting)).

93 491 U.S. 657, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989).

94 *Id.* at 686, 109 S.Ct. 2678 (quoting *Ocala Star–Banner Co. v. Damron,* 401 U.S. 295, 300, 91 S.Ct. 628, 28 L.Ed.2d 57 (1971)).

95 *Harte–Hanks,* 491 U.S. at 691, 109 S.Ct. 2678.

96 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967).

97 *Id.* at 137, 87 S.Ct. 1975 (plurality opinion).

98 *Id.* at 158, 87 S.Ct. 1975 (plurality opinion).

99 *Id.* at 156, 87 S.Ct. 1975 (plurality opinion).

100 *Id.* at 170, 87 S.Ct. 1975 (Warren, C.J., concurring).

101 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967).

102 *Id.* at 155, 87 S.Ct. 1975 (plurality opinion).

103 401 U.S. 279, 91 S.Ct. 633, 28 L.Ed.2d 45 (1971).

104 *Id.* at 287, 91 S.Ct. 633.

105 *Id.* at 290, 91 S.Ct. 633.

106 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984).

107 *Id.* at 488, 104 S.Ct. 1949.

108 *Id.* at 512, 104 S.Ct. 1949.

109 *Id.* at 513, 104 S.Ct. 1949.

110 389 U.S. 81, 84–85, 88 S.Ct. 197, 19 L.Ed.2d 248 (1967) (per curiam).

111 *New York Times Co. v. Sullivan,* 376 U.S. 254, 287–288, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

112 *Id.* at 284, 84 S.Ct. 710.

113 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968).

114 *Id.* at 733, 88 S.Ct. 1323.

115 *Id.* at 731–732, 88 S.Ct. 1323.

116 *Id.* at 732, 88 S.Ct. 1323.

117 *See* *WFAA–TV, Inc. v. McLemore,* 978 S.W.2d 568, 574 (Tex.1998).

118 *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29, 55, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971) (proof must be with "convincing clarity", citing *New York Times v. Sullivan,* 376 U.S. at 285, 84 S.Ct. 710); *Turner v. KTRK Television, Inc.,* 38 S.W.3d 103, 119 (Tex.2000).

119 *Harte–Hanks Communications, Inc. v. Connaughton,* 491 U.S. 657, 685–686, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989); *Bose Corp. v. Consumers Union,* 466 U.S. 485, 510–511, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984).

120 *Cruzan v. Director, Missouri Dept. of Health,* 497 U.S. 261, 285 n. 11, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990) (citing *In re Jobes,* 108 N.J. 394, 529 A.2d 434, 441 (1987), regarding the proof necessary to justify the withdrawal of life support).

121 *Huckabee v. Time Warner Entertainment Co.,* 19 S.W.3d 413, 422(Tex.2000).

122 *Bose,* 466 U.S. at 510–511, 104 S.Ct. 1949.

123 *Harte–Hanks,* 491 U.S. at 685, 109 S.Ct. 2678 (citing *Bose,* 466 U.S. at 510–511, 104 S.Ct. 1949).

124 *Walker v. Packer,* 827 S.W.2d 833, 840 (Tex.1992).

125 *Harte–Hanks,* 491 U.S. at 688, 109 S.Ct. 2678.

126 *Id.* (citation omitted).

127 *Id.* at 690, 109 S.Ct. 2678.

128 *Id.* at 691, 109 S.Ct. 2678.

129 *Id.*

130 *Id.* at 692, 109 S.Ct. 2678 (citation omitted).

131 *Id.* at 690–691, 109 S.Ct. 2678.

132 *Id.*

133 *St. Amant v. Thompson,* 390 U.S. 727, 732, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968).

134 *See* TEX. CIV. PRAC. & REM.CODE § 41.001(7).

135 *Duffy v. Leading Edge Prods., Inc.,* 44 F.3d 308, 315 n. 10 (5th Cir.1995); *see* SACK, *supra* note 44, § 5.5.2, at 5–77 to 5–78; SMOLLA, *supra* note 48, §§ 3.15–3.16, at 3 –42.1 to 3–42.2.

136 *Post* at 608.

137 *Id.*

138 *Id.*

139 38 S.W.3d 103, 120 (Tex.2000) (citation omitted).

140 *See* *Leyendecker & Assoc., Inc. v. Wechter,* 683 S.W.2d 369, 374 (Tex.1984); *City of Tyler v. Likes,* 962 S.W.2d 489, 495 (Tex.1997).

141 *Leyendecker,* 683 S.W.2d at 374–375.

142 418 U.S. 323, 349–350, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

143 *Id.* at 349, 94 S.Ct. 2997.

144 *Id.* at 350, 94 S.Ct. 2997.

145 925 S.W.2d 607, 614 (Tex.1996).

146 *Tatum v. Preston Carter Co.,* 702 S.W.2d 186, 187–188 (Tex.1986).

147 844 S.W.2d 198 (Tex.1992).

148 879 S.W.2d 1 (Tex.1993).

1 The jury in our case arguably made inconsistent factual findings. In its first three answers, the jury found that “Gates agreed with Joe Ed Bunton's defamatory statements concerning Bascom Bentley being corrupt,” that he “publish[ed] his agreement with Joe Ed Bunton's defamatory statements concerning Bascom Bentley being corrupt,” and that “Gates acted with actual malice in publishing his agreement with Joe Ed Bunton's defamatory statements concerning Bascom Bentley being corrupt” by “clear and convincing evidence.” If the first question inquires about Gates' objective conduct on Q&A, it duplicates the second question about publication. If the first question asks about Gates' actual subjective agreement, then his publication could not have involved actual malice, a standard which requires Gates to have disbelieved or seriously doubted that Bentley was corrupt. Because I believe that there is not clear and convincing evidence of actual malice against either defendant, I need not decide whether a conflict exists, and, if so, what legal implications would follow.

2 On the air, Bunton mentioned receiving a telephone call from “somebody ... claiming to be Judge Bentley,” which suggests that he did not realize that Bentley himself had placed the call.

3 Although the Court erroneously claims that there is no evidence anyone other than Gates agreed with Bunton's allegations, 94 S.W.3d at 590, the record does suggest that some of his viewers agreed with him. While testifying at trial about Q&A's periodic viewer polls asking whether or not Bentley was corrupt, Bentley testified: “I nearly won one time, I think.”

4 The Court claims that this conversation proves that Bunton was privately admitting his lack of evidence against Bentley to a friend, “while he was telling the Q&A viewing audience that Bentley was corrupt.” 94 S.W.3d at 601. In fact, the witness testified at the 1997 trial that the conversation took place “sometime in the summer of 1995.” Without a specific date, I cannot assume that it occurred after Bunton's June 6, 1995 broadcast, during which he first accused Bentley of corruption.

5 Rather than determining which testimony the jury must have disbelieved in order to find actual malice and then accepting those findings if not clearly erroneous, as required by *Harte–Hanks,* 491 U.S. at 688, 109 S.Ct. 2678, the Court has disregarded all of Bunton's exculpatory testimony even though it is not all inconsistent with the jury's verdict. Further, the jury's inconsistent findings regarding Gates, discussed in note 1, *supra,* raise the significant possibility that the jury may have also erroneously found actual malice against Bunton despite crediting his exculpatory testimony claiming subjective belief. Because I believe that there is not clear and convincing evidence of actual malice against Bunton with or without his exculpatory testimony, I proceed using only the evidence the Court has not disputed.

CERTIFICATE OF SERVICE

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