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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 21-0978

In the Supreme Court of Texas

THE LILITH FUND FOR REPRODUCTIVE EQUITY,

Petitioner,

v.

MARK LEE DICKSON & RIGHT TO LIFE EAST TEXAS,

Respondents.

ON PETITION FOR REVIEW FROM THE
SEVENTH COURT OF APPEALS AT AMARILLO, TEXAS
CAUSE NO. 07-21-00005-CV

PETITION FOR REVIEW

Douglas S. Lang
State Bar No. 11895500
dlang@thompsoncoburn.com
Jennifer R. Ecklund
State Bar No. 24045626
jecklund@thompsoncoburn.com
Elizabeth G. Myers
State Bar No. 24047767
emyers@thompsoncoburn.com
John P. Atkins
State Bar No. 24097326
jatkins@thompsoncoburn.com

THOMPSON COBURN LLP
2100 Ross Ave., Ste. 3200
Dallas, Texas 75201
(972) 629-7100 (phone)
(972) 629-7171 (fax)

ATTORNEYS FOR PETITIONER
LILITH FUND

IDENTITY OF PARTIES AND COUNSEL

Petitioner:

Lilith Fund

Counsel for Petitioner:

Douglas S. Lang
State Bar No. 11895500
dlang@thompsoncoburn.com
Jennifer R. Ecklund
State Bar No. 24045626
jecklund@thompsoncoburn.com
Elizabeth G. Myers
State Bar No. 24047767
emyers@thompsoncoburn.com
John P. Atkins
State Bar No. 24097326
jatkins@thompsoncoburn.com

THOMPSON COBURN, LLP
2100 Ross Ave., Ste. 3200
Dallas, Texas 75201
(972) 629-7100 (phone)
(972) 629-7171 (fax)

Respondents:

Mark Lee Dickson, Right to Life East Texas

Counsel for Respondents:

Jonathan F. Mitchell
Texas Bar No. 24075463
Mitchell Law PLLC
111 Congress Ave., Suite 400
Austin, Texas 78701
512-686-3940
jonathan@mitchell.law

D. Bryan Hughes
Texas Bar No. 00793995
Law Office of D. Bryan Hughes
110 North College, Ave., Suite 207
903-581-1776 (phone)
bryan@hughesfirm.com

H. Dustin Fillmore III
Texas Bar No. 06996010
Charles W. Fillmore
Texas Bar No. 00785861
The Fillmore Law Firm, LLP
1200 Summit Ave., Suite 860
Fort Worth, Texas 76102
817-332-2351 (phone)
817-870-1859 (fax)
dusty@fillmorefirm.com
chad@fillmorefirm.com

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioner the Lilith Fund for Reproductive Equity ("**Lilith Fund**" or "**Petitioner**") now files its Petition for Review pursuant to Texas Rule of Appellate Procedure 53, and would show the Court as follows:

STATEMENT OF THE CASE

Nature of the Case:	Mark Lee Dickson and Right to Life East Texas, after persuading multiple cities to pass an ordinance calling Lilith Fund a "criminal organization," repeatedly and publicly characterized Lilith Fund as a criminal organization engaged in criminal acts. Lilith Fund sued Mr. Dickson and Right to Life East Texas for defamation, and the Defendants-Respondents filed a Motion to Dismiss under the Texas Citizens Participation Act ("TCPA").
Trial Court:	The Hon. Amy Meachum, 53rd Judicial District Court, Travis County Texas.
Trial Court Disposition:	Defendants-Respondents' TCPA Motion was denied by operation of law.
Parties on Appeal:	Appellants: Mark Lee Dickson and Right to Life East Texas. Appellees: Lilith Fund.
Court of Appeals:	Initially Third Court of Appeals in Austin, transferred to the Seventh Court of Appeals in Amarillo (C.J. Quinn, J. Parker, and J. Doss).

Court of Appeals Disposition:	On September 2, 2021, the Court of Appeals reversed (unanimously) the trial court. Petitioners moved for rehearing on September 17, 2021, and the Court requested a response, which was filed on September 30, 2021. The Court of Appeals denied rehearing on October 7, 2021. No additional motions for rehearing or *en banc* reconsideration are pending.

JURISDICTION

This Court has jurisdiction because this case presents one or more "question(s) of law that [are] important to the jurisprudence of the state." *See* TEX. GOV'T CODE ANN. § 22.001(a).

ISSUES PRESENTED

With respect to the decision of the Court of Appeals, the issue on appeal is:

1. Respondents authored, campaigned for passage, and caused a city to pass an ordinance declaring abortion a crime and declaring Lilith Fund to be a "criminal organization" and then repeatedly claimed, in public and on social media, that Lilith Fund was a criminal organization engaged in actual violations of the law. Are these statements expressions of opinion or rhetorical hyperbole, or are they statements of actionable fact given that accusing another of criminal conduct constitutes defamation *per se*?

Because several critical issues were raised in the Court of Appeals (but not ruled on), the following issues may also be presented by this case:

2. Did Petitioners produce "clear and specific evidence" of the following elements of their defamation cause of action:

    a. That Respondents' statements are false since when the statements were made, abortion was legal (and regulated) throughout Texas as prescribed by *Roe v. Wade*;

    b. That Respondents acted with "actual malice" or "negligence," where the record shows that Respondents knew that *Roe* was binding and thus that their statements are literally false, or that Respondents knew enough that their statements were at least made with reckless disregard for the truth, and certainly with negligence;

    c. That Respondent Right to Life East Texas is jointly or derivatively liable with Respondent Dickson, where it is uncontested that Respondent Dickson is a director of that entity,

and Dickson made multiple of the defamatory posts from Respondent Right to Life East Texas's Facebook page?

3. Did Respondents conclusively demonstrate the application of the defense of truth or substantial truth "as a matter of law" where it is clear that the statements are literally false because Lilith Fund has committed no crimes?

STATEMENT OF FACTS

The Court of Appeals correctly stated the nature of the case, except as described in this Statement of Facts. Lilith Fund is a non-profit organization located in Austin that provides information and financial assistance to women in need of an abortion; it does not itself *provide* abortion services. CR 307-08.

Beginning in June of 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 87, declaring various reproductive rights organizations, including Lilith Fund, to be "criminal organizations." CR 142, APP.47. The ordinance 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 Lilith Fund for Reproductive Equality [sic] [.]

Id. The ordinance purports to make abortion, and "knowingly aid[ing]" an abortion occurring in the city, illegal. *Id.* But the ordinance provides that it cannot be enforced by any government official unless and until *Roe* and

Casey are overturned. CR 143-44, APP.48-49; *see Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

After the passage of the ordinance, Respondents made several other statements. On June 11, 2019, Dickson stated:

> Congratulations Waskom, Texas for becoming the first city in … the Nation to become a "Sanctuary City for the Unborn" by ordinance. … [A]bortion is now OUTLAWED in Waskom, Texas! … All organizations that perform abortions and assist others in obtaining abortions (including … The Lilith Fund for Reproductive Equality [sic]…) are now declared to be criminal organizations in Waskom, Texas.

CR 250-51. This message was repeated on RLET's Facebook page. CR 302-03.

On July 2, 2019, Dickson posted statements about Lilith Fund, and explained why it was included on the "criminal organization" list:

> 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 innocent lives. ***This is why the Lilith Fund and NARAL Pro-Choice Texas are listed as criminal organizations in Waskom, Texas.***

CR 220 (emphasis added). On July 3, 2019, Dickson clarified that his statements were to be understood literally when he said: "We said what we

meant and we meant what we said. Abortion is illegal in Waskom, Texas." CR 293. Further, on that same day, from RLET's Facebook Account, Dickson said: "I would like to thank NARAL Pro-Choice Texas and the Lilith Fund for reminding all of us just how out of touch both of their ***criminal organizations*** are with the women they claim to represent." CR 297 (emphasis added).

Then, on November 26, 2019, Dickson claimed on his Facebook Page:

> 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.

CR 198-99 (emphasis added).

On January 25, 2020, Dickson told CNN that the purpose of enacting these ordinances is to cause people to believe that providing assistance to anyone in search of an abortion is genuinely against the law, saying "[t]he 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 289.

In response to these false statements, Lilith Fund requested in writing that Respondents clarify that they did not have reason to believe Lilith Fund 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 171. Respondents did not respond.

The record shows Respondents instead continued to make similar statements. CR 176 ("Is abortion literally murder? Yes."); CR 178 ("I have no reason to retract anything that I said[,]"). These statements were made

months after Waskom had removed Dickson's "criminal organizations" list from their ordinances.[1]

[1] *See* CR 116, n. 9. This Court may take judicial notice of the fact that, for instance, Waskom has not listed Lilith Fund as a "criminal organization" since March 10, 2020. TEX. R. EVID. 204; *see also* APP.52-58.

SUMMARY OF THE ARGUMENT

Lilith Fund's Petition should be granted because (1) the Court of Appeals' decision conflicts with a Fifth Court of Appeals decision in a near-identical and related case;[2] (2) this case involves free speech, the law of defamation, and the Texas Citizens Participation Act ("**TCPA**"), all of which it would be helpful for the Court to provide additional guidance regarding; and (3) the Court of Appeals' error was substantial and is likely to misguide the resolution of future cases.

Although focused on a single question—whether the challenged statements are opinion or hyperbole on the one hand, or actionable statements of fact on the other—the Court of Appeals erred significantly in at least three ways, each of which could cause lasting harm to the law of defamation in Texas if permitted to stand:

First, the Court of Appeals erred when it held that what determines whether a false statement of fact is actually protected opinion or hyperbole "masquerading" as fact is whether a hypothetical "reasonable person"

[2] *Dickson v. The Afiya Ctr.*, 05-20-00988-CV, --- S.W.3d ---, 2021 WL 4771538 (Tex. App.—Dallas Sept. 8, 2021), *reconsideration en banc denied sub nom. Dickson v. Afiya Ctr.*, 05-20-00988-CV, 2021 WL 4963435 (Tex. App.—Dallas Oct. 25, 2021, pet. filed), APP.77-95.

would believe the false statement, rather than whether that "reasonable person" would believe the author *intended* the statement to be believed.

Contrary to the Court of Appeals' view, this Court has specifically held that what matters is what the "reasonable person" reading the statement would think the author *intended*. *Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d 614, 638 (Tex. 2018) (verifiable fact statement can only constitute opinion "if the entire context in which it was made discloses that it was not *intended* to assert a fact.") (emphasis added), APP.116-17. Since there is no doubt that a "reasonable person" reading Respondents' statements in their full context would believe Respondents intended their words to be taken literally, the Court of Appeals was wrong to hold that Respondents' statements were statements of opinion or hyperbole.

Second, the Court of Appeals assumed that no reasonable person would be deceived by Respondents' words because individual Texans are "presumed to know [the law][,]" and so they would know that Respondents' defamatory statements were not true. *Dickson v. Lilith Fund for Reprod. Equity*, 07-21-00005-CV, 2021 WL 3930728, at *5 (Tex. App.—Amarillo Sept. 2, 2021, no pet. h.), *reh'g denied* (Oct. 7, 2021), APP.10. This standard, imported by the Court of Appeals from a very different area of the law,

should not be applied to the "reasonable person" audience member in the defamation context. Indeed, the Court of Appeals went even further, suggesting that the reasonable reader has a "penchant for reasonable investigation." *Id.* at *6, APP.12. But as a matter of law it is the duty of the *author* not to negligently write defamatory statements, not the duty of the reader to investigate the author's claims, so any investigatory duty lies with the author.

Third, the Court of Appeals interpreted the initiating act of the defamation—Dickson's own drafting and campaign for passage of the Waskom ordinance that originally declared Lilith Fund a criminal organization—as solely part of the context in which Dickson spoke, and not part of his campaign of disinformation. However, in context, Dickson's efforts regarding the ordinance form the foundation of, and not merely the background to, Respondents' defamatory statements.

ARGUMENT

The Court of Appeals reversed and remanded the District Court's denial of Respondents' Motion to Dismiss under the TCPA because, in its view, the "context" of the statements rendered them inactionable opinion or hyperbole "masquerading" as fact. *See Lilith Fund*, 2021 WL 3930728, at *5, APP.11. Petitioner respectfully submits that the Court of Appeals erred, and that the TRAP 56.1 factors support granting a Petition for Review in this case.

A. TRAP Rule 56.1 Factors Support Review

The Court of Appeals' decision below contradicts, and expressly takes issue with, the Fifth District Court of Appeals' unanimous panel decision in *Dickson v. The Afiya Ctr.*, 05-20-00988-CV, --- S.W.3d ---, 2021 WL 4771538 (Tex. App.—Dallas Sept. 8, 2021), *reconsideration en banc denied sub nom. Dickson v. Afiya Ctr.*, 05-20-00988-CV, 2021 WL 4963435 (Tex. App.—Dallas Oct. 25, 2021, pet. h.), APP.77-95. That case, which is already the subject of a Petition for Review before this Court in Case No. 21-1039,[3] relates to the same set of defamatory statements, and is different only because the plaintiffs (and thus venues) are different. Consequently, this is a case in which the "court

[3] *Dickson et al., v. Afiya Center, et al.*, Case No. 21-1039 (Pet. filed December 6, 2021).

of appeals' decision conflicts with a decision of another court of appeals on an important point of law." *See* TRAP 56.1(a)(2).

This case involves the constitutionally important question of the line between defamatory speech and political opinion or rhetorical hyperbole, and may also involve important line drawing regarding when the *New York Times v. Sullivan*[4] "actual malice" standard applies. *See* TRAP 56.1(a)(4). Clearly defining these lines is critically important for defamation cases, and because cases involving the TCPA are increasingly common, the Court of Appeals' decision implicates important questions of state law that, even if previously addressed by this Court, merit additional clarification. *See* TRAP 56.1(a)(6).

The Court of Appeals also made a serious mistake of law of significant state-wide importance. *See* TRAP 56.1(a)(5).

B. The Court of Appeals erred when it held that the challenged statements were opinion or hyperbole.

Although many issues were argued below, and if this Petition is granted, many issues may ultimately be argued to this Court, the decision of the Court of Appeals boils down to a single one: whether the statements

[4] 376 U.S. 254, 279-81 (1964).

Lilith Fund complains of, (*i.e.*, that petitioner, Lilith Fund, is a "criminal organization" along with other organizations that are "advocates for the murder of innocent lives"[5]), are statements of fact, or statements of opinion or hyperbole. Lilith Fund respectfully asserts the Court of Appeals erred in finding Respondents' words to be statements of opinion or hyperbole for three reasons.

1. **The Court of Appeals misstated the standard for opinions "masquerading" as facts, leading it to categorize verifiably false statements intended to deceive as "opinion."**

The Court of Appeals misapplied the "reasonable person" standard which is the foundation of the basic analysis of what makes a statement an "opinion." The Court of Appeals explained its disagreement with the Fifth Court of Appeals' decision in *Afiya Center* as stemming from the Fifth Court's focus on whether the "reasonable person" as the reader would have thought Respondents *intended* their accusations to be taken literally. *Lilith Fund*, 2021 WL 3930728 at *6, APP.13. The Court of Appeals noted incorrectly that even verifiable statements may sometimes be "opinion masquerading as fact," and explained that in identifying whether a statement falls into this category,

[5] CR 220.

"the focus is ***not*** on what the speaker intended but on what a reasonable person would believe." *Id.* (emphasis added).

But the Fifth Court in *Afiya Center* had it right, and the Court of Appeals in this case had it wrong. As this Court has explained, 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." *Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d 614, 638 (Tex. 2018), APP.116-17. The focus is not, as the Court of Appeals would have it, whether the reader would believe the statement. It is whether the context shows that a reader would think the speaker intended to *be believed*. The Court of Appeals' misplacement of the centerpiece of the analysis resulted in the erroneous conclusion that the Respondents' statements are inactionable opinion.

For the same reason, the Court of Appeals erred in finding the statements hyperbolic, as this also turns on intention. The Court of Appeals itself notes, again citing the Fifth Court in *Afiya Center*, that the gravamen of whether a statement is hyperbolic is whether an "ordinary reader" would view it as "unintended to be taken literally." *Lilith Fund*, 2021 WL 3930728, at *3, APP.6; *see also Afiya Center*, 2021 WL 4771538, at *13 ("to qualify as rhetorical hyperbole … a statement must be understood by an ordinary

reader as … not intended to be taken literally."), APP.93. This is consistent with United States Supreme Court precedent, which also describes hyperbole in intentional terms, holding in the seminal *Milkovich* case that certain statements were not hyperbole where they were "not the sort of … hyperbolic language ***which would negate the impression that the writer was seriously maintaining*** that petitioner committed the crime[.]" *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990) (emphasis added). What matters in deciding whether a statement is hyperbole is ***not*** whether the statement is actually believed, but whether a reasonable reader has enough clues to "negate the impression that the writer was seriously maintaining" the truth of his statements. *Id.*

On this record, there is no question that Respondents' statements were meant to be taken literally or would be read that way by a "reasonable person." Dickson repeatedly shows that he is "seriously maintaining" the factual truth of his statements. None of Dickson's repeated statements, in which he speaks in terms of literal truth, is couched in uncertain or careful terms.

In fact, the record shows that the purpose of the statements, and the ordinance campaign as a whole, is to persuade people that they should fear

criminal penalties for engaging in actions that are legal under current law. For example, "[t]he 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 289; *see also* CR 372-73 (Dickson admitting he read a law review article—written by his counsel—that suggested "sabre-rattling" tactics of this kind to induce compliance with unconstitutional laws). It could not be clearer that the statements are intended to be understood literally when Dickson said in the context of all his statements, "[w]e said what we meant and we meant what we said. Abortion is illegal in Waskom, Texas." CR 293.

Moreover, Respondents have maintained, as their primary argument throughout the case below,[6] and in their Petition in the *Afiya Center* case,[7] that their statements are literally true. That includes the statement that the

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[6] *See Lilith Fund*, 2021 WL 3930728, Appellants' Br., pp. 17-27, 40-43. Respondents argue that the statements are true because the laws struck down by *Roe v. Wade* render the Lilith Fund's assistance with the provision of abortion services actually criminal. *E.g. id.* at 41-42 ("So it is entirely truthful for an ordinance to declare the Lilith Fund a "criminal organization" based on its admitted violations of Article 4512.2 [one of the statutes struck down by *Roe*]. It is equally truthful to publish statements that declare or insinuate that Lilith Fund is engaged in "criminal activity[.]")

[7] *See* Pet. Rev., *Dickson et al., v. Afiya Center, et al.*, Case No. 21-1039, pp. viii ("The state of Texas has never repealed it's pre-*Roe v. Wade* statutes that outlaw abortion…[t]he law of Texas defines the crime of murder to include the intentional or knowing killing of an unborn child.").

Lilith Fund *is*, *in fact*, a "criminal organization." Indeed, this Court found in *Bentley v. Bunton* that a litigant's consistent position that his statements are true is compelling:

> 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.

Bentley v. Bunton, 94 S.W.3d 561, 584 (Tex. 2002), APP.141.

Yet it is true that—as a secondary, defensive argument—Respondents did argue "opinion" and "hyperbole" below. Even though they claim they uttered the "truth," Respondents asked the Court of Appeals not to take them literally.[8] But it is wholly inconsistent for Respondents to contend their statements are literally true and in the next breath say they are mere opinion. In any case, *Bentley* makes clear that couching factual statements *as* opinion does not make them statements of opinion. *Bentley*, 94 S.W.3d at 583-84 (rejecting argument that couching of statements as "opinion" protected

[8] *See Lilith Fund*, 2021 WL 3930728, Appellants' Br., pp. 44-46 (Respondents' entire argument in their brief below on opinion and hyperbole); Respondents' Appellants' Brief states in part: ". . . Mr. Dickson is equally entitled to his opinion that abortion is *not* a constitutional right, and that entities that flout the state's abortion statues should be described and regarded as 'criminal organizations.'"(Emphasis original) App. Br. 44)

them), APP.140. If the mere use of the word "opinion" in Respondents' arguments describing what they said formed part of the basis for the Court of Appeals' decision, that too would have been error.

2. <u>Reasonable persons are not presumed to know the law in deciding defamatory meaning.</u>

The Court of Appeals also erred in assuming that no reasonable person could believe Respondents' claims that Lilith Fund was a criminal organization on the basis that a person is presumed to know the law. *Lilith Fund*, 2021 WL 3930728, at *5, APP.10. That presumption does not come from the law of defamation, as the Court of Appeals' 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). This presumption is often paired with its corollary, which is that ignorance of the law cannot excuse its violation. *Thompson v. State*, 9 S.W. 486 (Tex. App. 1888, no pet.).

The fiction of legal omniscience does not fit into the mold of the "reasonable person" as audience to a potentially defamatory statement. What the law says is that such a person is a "reasonable reader" of "ordinary intelligence" who exercises some "care and prudence[.]" *Tatum*, 554 S.W.3d

at 630-31, APP.110-11. But such a person surely knows less about the law than the average lawyer, and even the most experienced lawyer does not know the whole of the law. It is an extreme and unjustified stretch to suggest that a "reasonable person" reading Respondents' words could not believe that the Lilith Fund was not, in some way, a "criminal organization" after the Waskom ordinance was passed and Respondents repeatedly called Lilith Fund a "criminal organization."

Imposing the presumption that all Texans "know the law" on the "reasonable person" audience member would also permit a defense of opinion or hyperbole in every single *per se* defamation case involving an allegation of criminality where the plaintiff demonstrates the statement is false by proving the described conduct was legal.

For instance, if a business was accused of tax fraud because it allegedly used "illegal loopholes," it would have no recourse against the speaker for reputational harm if these purported "loopholes" were actually used, but were, in fact, legal. That is because, although the fact that the conduct was legal would make the accusation of criminality false, the "reasonable person" in the audience, informed by her purported knowledge of the law, would be held not to be able to believe the fraud allegations to begin with.

The Court of Appeals' imposition of the presumption that all Texans are deemed to "know the law" for purposes of defamation does not have any limiting principle that would prevent results of this kind.

The Court of Appeals' errors go even further because it also imposes on the "reasonable person" a "penchant for reasonable investigation."[9] The Court of Appeals cites no authority for assuming the "reasonable person" who reads defamatory statements would undertake a "reasonable investigation."

If this "penchant" exists at all in the law of defamation, it is a duty imposed on the *speaker*, not a characteristic of the reasonable people in his audience. As the Fifth Court of Appeals explained: "[w]e conclude that anyone making a serious investigation into the status of Texas criminal law would learn that the overwhelming body of that law confirms that a mother's termination of a pregnancy is not a crime and is certainly not murder." *Afiya Center*, 2021 WL 4771538, at *11, APP.91. An inadequate

[9] "Even if what Dickson uttered could be characterized as statements of fact and even if some readers were to believe them, the context surrounding those utterances would lead a reasonable person of ordinary learning with a penchant for reasonable investigation to see them as opinion masquerading as fact or rhetorical hyperbole masquerading as fact." *Lilith Fund*, 2021 WL 3930728, at *6, APP.12.

investigation may establish a lack of reasonable diligence and thus show a negligent state of mind for the purposes of a defamation claim. *Id.* n. 8. However, if this standard was imposed on the audience, then negligent speech could never be defamatory, since the *audience's* reasonable investigation would always negate the defamatory effect of the speaker's negligence.

There is simply no legal or factual basis to conclude that a reasonable person could not believe that Respondents' statements were true (even if that was necessary), particularly where Respondents continue to proclaim *their* belief in the literal truth of their statements, and where Facebook posts and testimony in the record show that many people *do*, in fact, believe Respondents' lies. *E.g.*, CR 148-63; 252-57; 299 (example Facebook posts apparently taking Respondents' statements at face value); CR 309-10 (Affidavit of Executive Director of Lilith Fund stating that the ordinance campaign and Respondents' statements have caused many others to make posts and communications to Lilith Fund alleging the truth of Respondents' criminal allegations).

3. The Waskom Ordinance was part of the defamation, not merely context for it.

Dickson claims he wrote the ordinance. CR 87.[10] That ordinance purports to outlaw abortion, and contained public enforcement provisions designed to be triggered when *Roe v. Wade* was overturned. CR 142-44, APP.47-49. The Court of Appeals considered this ordinance to be an act purely attributable to Waskom, and as mere context for Dickson's words. *Lilith Fund*, 2021 WL 3930728, at *5, APP.9. But Dickson's drafting and campaign for passage of the ordinance is both context and statement, as those efforts are the foundation of Respondents' statements and not mere background. The ordinance adds the weight of government credibility to Respondents' defamatory statements.

Whether Respondents' statements are opinion depends (in this case) on whether a reasonable person would believe Respondents intended to be taken literally. *See supra*, pp. 18-20. The existence of an ordinance declaring Lilith Fund to be a criminal organization, and purporting to outlaw abortion,

[10] Respondents did not below take issue with Lilith Fund's characterization of the ordinance itself as one of the defamatory statements at issue in this case. CR 11-13 (Lilith Fund's Original Petition, setting out the defamatory effect of the ordinance), APP.35-37. Respondents have by this time waived any complaint with respect to this characterization.

only reinforces that Respondents' statements are to be interpreted as literal, and thus not opinion or hyperbole.

This Court should consider the distressing implications of the Court of Appeals' holding. For instance, anti-gay activists could seek to induce cities in Texas where homosexuality is politically disfavored to declare homosexuals criminals, so that they can, with impunity, defame homosexuals not just as "deviant" or "immoral," but as violators of the Texas Penal Code or city ordinance. In another city, residents might disfavor the personal possession of firearms, and anti-gun activists could defame law-abiding gun owners as criminals if they were to convince a city to "criminalize" all handgun ownership despite *D.C. v. Heller*.[11] The Court of Appeals' holding that Respondent Dickson's statements were opinion or hyperbole is not only incorrect, it sets dangerous precedent that could be abused.

C. Conclusion

If the accusation that Lilith Fund is a "criminal organization" had not

[11] 554 U.S. 570, 635 (2008) (holding law that banned handgun possession in the home unconstitutional).

been originally made in an ordinance that Dickson drafted, which conferred on his claims the imprimatur of the government; if the accusation had not been repeatedly described, by Dickson himself, as being literal; if the accusation had not been intended, as demonstrated by Dickson's own words to reporters, to instill the fear of criminal punishment; and if Dickson's campaign had not been intended to persuade the general public that Lilith Fund should be considered a criminal organization, it is unlikely this case would have been filed. However, all of these things, shown by clear and specific evidence, form the basis for a defamation claim against Respondents.

Lilith Fund has never argued that any person who calls abortion murder, or who calls abortion providers or funders "criminals," is liable for defamation. Lilith Fund does not believe this case extends beyond the narrow context created by Respondents' carefully organized disinformation campaign. Despite Respondents' claims, Lilith Fund is not, legally or factually, a criminal organization. It is a law-abiding part of Texas society, as are its employees, volunteers, and clients.

Lilith Fund filed suit to clear its name, and asks only that it be allowed to proceed as any other citizen or business, falsely accused of criminal acts,

would be entitled.

PRAYER

For these reasons, Lilith Fund requests that this Petition be granted, that the decision of the Court of Appeals be reversed, that the decision of the trial court be reinstated, and that the matter be remanded to the trial court for discovery and trial on the merits. Lilith Fund requests any other relief to which it is entitled.

Respectfully submitted,

/s/Douglas S. Lang
Douglas S. Lang
State Bar No. 11895500
dlang@thompsoncoburn.com
Jennifer R. Ecklund
State Bar No. 24045626
jecklund@thompsoncoburn.com
Elizabeth G. Myers
State Bar No. 24047767
emyers@thompsoncoburn.com
John P. Atkins
State Bar No. 24097326
jatkins@thompsoncoburn.com

THOMPSON COBURN LLP
2100 Ross Ave., Ste. 3200
Dallas, Texas 75201
(972) 629-7100 (phone)
(972) 629-7171 (fax)

ATTORNEYS FOR PETITIONER LILITH FUND

CERTIFICATE OF SERVICE

On December 22, 2021, this document was served electronically on the following counsel of record for Respondents via email and via the Court's electronic filing system.

Jonathan F. Mitchell
Texas Bar No. 24075463
Mitchell Law PLLC
111 Congress Ave., Suite 400
Austin, Texas 78701
512-686-3940
jonathan@mitchell.law

D. Bryan Hughes
Texas Bar No. 00793995
Law Office of D. Bryan Hughes
110 North College, Ave., Suite 207
903-581-1776 (phone)
bryan@hughesfirm.com

H. Dustin Fillmore III
Texas Bar No. 06996010
Charles W. Fillmore
Texas Bar No. 00785861
The Fillmore Law Firm, LLP
1200 Summit Ave., Suite 860
Fort Worth, Texas 76102
817-332-2351 (phone)
817-870-1859 (fax)
dusty@fillmorefirm.com
chad@fillmorefirm.com

Attorneys for Respondents

/s/ John P. Atkins
John P. Atkins

Counsel for Petitioner

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 4,490 words, excluding the portions of the brief exempted by Rule 9.4.(i)(1).

/s/ John P. Atkins
John P. Atkins

Counsel for Petitioner

No. 21-0978

In the Supreme Court of Texas

THE LILITH FUND FOR REPRODUCTIVE EQUITY,
Petitioner,

v.

MARK LEE DICKSON & RIGHT TO LIFE EAST TEXAS,
Respondents.

ON PETITION FOR REVIEW FROM THE
SEVENTH COURT OF APPEALS AT AMARILLO, TEXAS
CAUSE NO. 07-21-00005-CV

APPENDIX TO PETITION FOR REVIEW

Douglas S. Lang
State Bar No. 11895500
dlang@thompsoncoburn.com
Jennifer R. Ecklund
State Bar No. 24045626
jecklund@thompsoncoburn.com
Elizabeth G. Myers
State Bar No. 24047767
emyers@thompsoncoburn.com
John P. Atkins
State Bar No. 24097326
jatkins@thompsoncoburn.com

THOMPSON COBURN LLP
2100 Ross Ave., Ste. 3200
Dallas, Texas 75201
(972) 629-7100 (phone)
(972) 629-7171 (fax)

ATTORNEYS FOR PETITIONER
LILITH FUND

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TAB 1
Opinion of the Court of Appeals

In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-21-00005-CV

MARK LEE DICKSON AND RIGHT TO LIFE EAST TEXAS, APPELLANTS

V.

LILITH FUND FOR REPRODUCTIVE EQUITY, APPELLEE

On Appeal from the 53rd District Court
Travis County, Texas
Trial Court No. D-1-GN-20-003113, Honorable Amy Clark Meachum, Presiding

September 2, 2021

MEMORANDUM OPINION

Before QUINN, CJ., and PARKER and DOSS, JJ.

"Abortion is Freedom," so said Lilith. "'Abortion is Freedom' in the same way that a wife killing her husband would be freedom – Abortion is Murder," so said Dickson. "Roe v. Wade, 410 U.S. 113 (1973) . . . and any other rulings or opinions from the Supreme Court that purport to establish or enforce a 'constitutional right' to abort a pre-born child, are declared to be unconstitutional usurpations of judicial power," so said the City of Waskom. And, a municipal ordinance purporting to criminalize abortion, which ordinance

the litigants concede the municipality lacked authority to enact. These circumstances underlie the defamation suit from which this appeal arose. But, does the debate surrounding them depict defamation or protected opinion? That is the dispositive question before us.

In 2019, the City of Waskom, in Harrison County, Texas, enacted a municipal ordinance decrying *Roe* and outlawing abortion in all but a few forms. Other rural cities followed suit. Under the ordinance, entities participating or facilitating abortions were also designated to be criminal organizations. Mark Lee Dickson, an outspoken advocate for the ordinance, accused the Lilith Fund for Reproductive Equity of being a criminal organization and committing murder under that ordinance because it helped others obtain abortions permissible within the scope of *Roe*. Lilith returned volley by purchasing a billboard in Waskom declaring "Abortion is Freedom." Dickson then referred to the billboard in describing Lilith (and NARAL Pro-Choice Texas) as "advocates for the murder of those innocent lives."

Lilith sued Dickson and the entity he represented, Right to Life East Texas, for defamation and conspiracy. Would a person of reasonable intelligence and learning, and who uses care and prudence in evaluating circumstances believe Dickson is alleging Lilith committed a criminal act? The answer to that question controls the disposition of this appeal. We answer "no" because the accusation is an "opinion masquerading as fact" under the entire context of the conversation being had.

The appeal comes to us as another mole to show its head in the field laid by the Texas Citizens Participation Act (TCPA).[1] TEX. CIV. PRAC. & REM. CODE ANN. § 27.001

[1] *See Western Mktg. v. AEG Petroleum, LLC*, 616 S.W.3d 903, 909 (Tex. App.—Amarillo 2021, pet. filed) (describing an interlocutory appeal involving the TCPA as mimicking "a game of 'whack-a-mole';

et seq. (West & Supp. 2020). The trial court denied, through silence, the motion of Dickson and Right to Life East Texas (East TX) to dismiss the defamation and conspiracy suit. In denying their TCPA motion, the trial court allegedly erred. We agree, reverse, and remand.[2]

We do not belabor disposition of the appeal by dissertation on the standard of review applicable in TCPA appeals. Others have expounded upon it at sufficient length. *See, e.g.*, *Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 891 (Tex. 2018) (discussing same); *Zilkha-Shohamy v. Corazza*, No. 03-20-00380-CV, 2021 Tex. App. LEXIS 5698, at *8–11 (Tex. App.—Austin July 16, 2021, no pet. h.) (mem. op.) (same); *Casey v. Stevens,* 601 S.W.3d 919, 922–24 (Tex. App.—Amarillo 2020, no pet.) (doing same).

Furthermore, all parties agree that the TCPA applies. The debate concerns two areas, though. One involves whether Lilith established a prima facie case for each element of its claims through clear and specific evidence. TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c) (stating that a court may not dismiss a legal action if the party bringing it "establishes by clear and specific evidence a prima facie case for each essential element of the claim in question"). The other concerns whether Dickson established an affirmative defense or other ground entitling him to dismissal as a matter of law. *Id.* § 27.005(d) (obligating the trial court to dismiss the action "if the moving party establishes an affirmative defense or other grounds on which the moving party is entitled to judgment

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as soon as the court disposes of one, another pops up. And each leads down the tortuous winding TCPA mole-hole").

[2] Because this appeal was transferred from the Third Court of Appeals, we are obligated to apply its precedent when available in the event of a conflict between the precedents of that court and this Court. *See* TEX. R. APP. P. 41.3.

as a matter of law"). Irrespective of whether approached as an element of defamation or a defense to it, the result is the same. On the record before us, we conclude as a matter of law that Dickson's comments were inactionable opinion as discussed below.

We begin our journey through the mole field by addressing argument pertaining to the elements of defamation. Dickson contends that Lilith failed to establish a prima facie case on each one. The elements of the claim consist of 1) the publication of a false statement of fact to a third party, 2) that was defamatory and concerned the plaintiff, and 3) was made with the requisite degree of fault. *Dallas Morning News, Inc. v. Hall*, 579 S.W.3d 370, 377 (Tex. 2019); *Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d 614, 623 (Tex. 2018). Such a statement of fact must be more than false, abusive, unpleasant, or objectionable; it must be defamatory. *Rehak Creative Servs. v. Witt*, 404 S.W.3d 716, 728 (Tex. App.—Houston [14th Dist.] 2013, pet. denied). It must be of the ilk that tends to injure one's reputation and "expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation or to publish the natural defects of anyone and thereby expose the person to public hatred, ridicule, or financial injury." TEX. CIV. PRAC. & REM. CODE ANN. § 73.001 (West 2017); *Rehak Creative Servs.*, 404 S.W.3d at 728. And, whether the statement can be viewed as such involves an objective, not subjective, assessment. *Id.* In other words, we look at it through the eyes of an ordinary prudent person with ordinary intelligence and assess how that person would perceive it when viewing its entire context. *Carr v. Brasher,* 776 S.W.2d 567, 570 (Tex. 1989) (stating that the allegedly libelous statement must be construed as a whole, in light of surrounding circumstances based upon how a person of ordinary intelligence would perceive the entire statement); *Freiheit v. Stubbings*, No. 03-

12-00243-CV, 2014 Tex. App. LEXIS 13889, at *5 (Tex. App.—Austin Dec. 31, 2014, no pet.) (mem. op.) (quoting *Carr*, 776 S.W.2d at 570). Such a person is neither "omniscient" nor a "dullard." *See Rehak Creative Servs.*, 404 S.W.3d at 728. An ordinary prudent person is one who uses care and prudence when evaluating circumstances and one who has reasonable intelligence and learning. *Id.* And, unless the words in play are ambiguous, our assessment of their potential for defaming implicates a question of law, *id.* at 728–29, which frees us from deferring to the trial court's interpretation. *Gulf Chem. & Metallurgical Corp. v. Hegar*, 460 S.W.3d 743, 747–48 (Tex. App.—Austin 2015, no pet.) (stating that the reviewing court does not defer to the trial court on questions of law); *see also Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d at 624 (stating that if the court determines the language of the statement is ambiguous then a jury should decide the statement's meaning).

We reemphasize that the obligatory viewpoint is that of the ordinary prudent person considering the entire context of the words. That context generally includes more than the words themselves. A myriad of circumstances, including such things like "accompanying statements, headlines, pictures, and the general tenor and reputation of the source itself" help define that context. *City of Keller v. Wilson*, 168 S.W.3d 802, 811 (Tex. 2005); *Rehak Creative Servs.*, 404 S.W.3d at 729.

Another matter bears mentioning before we turn to our analysis. It concerns certain forms of words or phrases which, again from their context, are opinions or rhetorical hyperbole. Neither may be actionable. *See Scripps NP Operating, LLC v. Carter,* 573 S.W.3d 781, 795 (Tex. 2019) (discussing when opinion may be non-actionable); *Backes v. Misko*, 486 S.W.3d 7, 26 (Tex. App.—Dallas 2015, no pet.)

(observing that rhetorical hyperbole is inactionable). The former fall within two categories. The first category encompasses statements which are not verifiable as false. *Scripps NP Operating, LLC*, 573 S.W.3d at 795; *Dallas Morning News, Inc. v. Tatum,* 554 S.W.3d at 639. The second encompasses statements which may be verifiable as false but their entire context nevertheless reveals them to be merely opinions masquerading as fact. *Scripps NP Operating, LLC*, 573 S.W.3d at 795; *Dallas Morning News, Inc. v. Tatum,* 554 S.W.3d at 639. As said in *Dallas Morning News*, "statements that cannot be verified, as well as statements that cannot be understood to convey a verifiable fact [given their entire context], are opinions." *Dallas Morning News, Inc. v. Tatum,* 554 S.W.3d at 639. And, whether the utterances at issue fall within either category also entails a question of law. *Id.*

As for rhetorical hyperbole, such often are characterized as extravagant exaggerations utilized for rhetorical effect, *Campbell v. Clark*, 471 S.W.3d 615, 626–27 (Tex. App.—Dallas 2015, no pet.); *ABC, Inc. v. Gill*, 6 S.W.3d 19, 30 (Tex. App.—San Antonio 1999, pet. denied), or vigorous epithets. *Greenbelt Coop. Pub. Ass'n v. Bresler*, 398 U.S. 6, 14, 90 S. Ct. 1537, 26 L. Ed. 2d 6 (1970). Indeed, a sister court recently described such speech statements that an "ordinary reader" would view as an overstatement or rhetorical flourish and unintended to be taken literally. *Dickson v. Afiya Ctr.*, No. 05-20-00988-CV, 2021 Tex. App. LEXIS 6261, at *37 (Tex. App.—Dallas Aug. 4, 2021, no pet. h.) (mem. op.). We read that court's reference to an "ordinary reader" as meaning the reasonable person to which we previously alluded; after all, it is the eyes of that person through which we peer in gauging whether statements are defamatory. And,

as with opinions, whether an utterance is rhetorical hyperbole, given its context, is a question of law. *See id.* at *11.

We now turn to our analysis of the statements underlying Lilith's suit. They were uttered over a period of time and generally related to the aforementioned ordinance and in response to Lilith's own advocacy. For instance, Dickson congratulated Waskom for being the first to become a sanctuary city, proclaimed that abortion was "outlawed" there, and noted that organizations which perform or assist with obtaining abortions were "criminal organizations." The litany of organizations identified in his message included Lilith. Two other statements by Dickson were:

> "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.
>
> [and]
>
> 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.

All of the foregoing statements pertain to the campaigns of Dickson and East TX to end abortion and pursue the reversal of *Roe v. Wade*. No one can reasonably deny that both topics have been the stuff of ever-increasing discussion and attention even before 1973. Nor can one reasonably deny that abortion and the Supreme Court's decisions on the issue trigger emotional, intellectual, moral, and religious debate.[3] They have and will continue to do so.[4] They have and will continue to influence elections and legislation. One within the legal standard of neither a dullard nor omniscient but, rather, of reasonable intelligence and learning who utilizes care and prudence in evaluating circumstances would know that to be an accurate assessment of the debate's effect.

Similarly, those involved on both sides of the debate have utilized colorful rhetorical devices to garner attention to the issues. On the "pro-choice" side, for example, Lilith refers to abortion as being "freedom." On the "pro-life" side, medical personnel have been called "murderers."[5] The same is true of mothers undergoing an abortion.[6] No doubt,

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[3] *See* Frank Pavone, *Democrats Exalt Their Woman, Pope Francis Exalts His: Column*, USA TODAY, Sept. 4, 2016, https://www.usatoday.com/story/opinion/2016/09/04/mother-teresa-clinton-abortion-francis-democratic-platform-hyde-amendment-beautification-column/89729254 (describing Mother Teresa's stance on abortion as expressed during a National Prayer Breakfast).

[4] Treva B. Lindsey, *A Concise History of the US Abortion Debate*, THE CONVERSATION, June 10, 2019.

[5] *See, e.g.*, Alexa N. D'Angelo, Supporters, Opponents Rally at Planned Parenthood Sites in Arizona, U.S., THE REPUBLIC, Aug. 22, 2018, https://www.azcentral.com/story/news/local/phoenix/2015/08/22/supporters-opponents-rally-planned-parenthood-sites-arizona-us/32203591/; Diana Pearl, *Free Speech Outside the Abortion Clinic*, THE ATLANTIC, Mar. 19, 2015, https://www.theatlantic.com/health/archive/2015/03/free-speech-outside-the-abortion-clinic/388162/; Michael Sheridan, *Rep. Randy Neugebaurer: I Yelled 'Baby Killer' During Rep. Bart Stupak's Speech*, NY DAILY NEWS, Mar. 22, 2010, https://www.nydailynews.com/news/politics/rep-randy-neugebauer-yelled-baby-killer-rep-bart-stupak-speech-article-1.173917.

[6] *See* Frank Pavone, *Democrats Exalt Their Woman, Pope Francis Exalts His: Column*, USA TODAY, Sept. 4, 2016, https://www.usatoday.com/story/opinion/2016/09/04/mother-teresa-clinton-abortion-francis-democratic-platform-hyde-amendment-beautification-column/89729254 (reiterating Mother Teresa's statement that "[T]he greatest destroyer of peace today is abortion, because it is a war against the child, a direct killing of the innocent child, murder by the mother herself. And if we accept that a mother can kill even her own child, how can we tell other people not to kill one another?").

many uttering these words believe in their accuracy, advocate for others to believe it, and have the ability to rationally explain the basis of their belief. Yet, as Lilith implicitly acknowledged, a reasonable person would understand the label to be a non-defamatory opinion or hyperbole given its context.[7]

Another item of context involves the ordinance itself. Its constitutionality is not before us. Nevertheless, the municipal edict frames Dickson's comments. Several observations warrant mention. First, Dickson represented to this Court through his attorney that 1) "because Waskom is a city, it doesn't have the power to create crimes under city law"; 2) "[t]hat is only something the state legislature can do"; and 3) "Waskom doesn't have the authority to make something a crime."[8]

Moreover, the Waskom city council described *Roe* as "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." Nevertheless, enforcement of the alleged criminal aspect of the ordinance was expressly conditioned upon the rescission of *Roe*. The pertinent language consisted of the city council saying that 1) "no punishment shall be imposed upon the mother of the pre-born child that has been aborted" and 2) "[i]f (and only if) the Supreme Court overrules *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), a corporation or entity that commits an unlawful act described in Section C shall be subject to the

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[7] Lilith wrote in its appellee's brief that "[g]enerally calling abortion 'murder' alone is not defamatory."

[8] Because Dickson conceded that Waskom lacked the authority to criminalize abortion, he was actually referring to the Texas statute implicated in *Roe*. Yet, the latter was not a part of the context underlying his comments. He never mentioned the statute in them, only the Waskom ordinance.

maximum penalty permitted under Texas law for the violation of a municipal ordinance governing public health, and each violation shall constitute a separate offense." Conditioning the imposition of any criminal penalty on the rescission of the very Supreme Court precedent the body attacked is novel. Without the risk of punishment being levied, it is unclear if anyone possesses standing to challenge the constitutionality of the ordinance's penal effect before a court for final adjudication. At the same time, it arguably permits individuals to refer to the corporations in terms suggesting illegal conduct. As noted above, the constitutionality of the ordinance is not being challenged on appeal.

Third, while Texans are not presumed to agree with the law, they are presumed to know it. *See S. C. v. Tex. Dep't of Family & Protective Servs.*, No. 03-19-00965-CV, 2020 Tex. App. LEXIS 9122, at *6 (Tex. App.—Austin Nov. 18, 2020, no pet.) (mem. op.) (quoting *E.H. Stafford Mfg. Co. v. Wichita Sch. Supply Co.*, 118 Tex. 650, 655, 23 S.W.2d 695, 697 (1930)). The proverbial reasonable person alluded to earlier would presumably have that knowledge as well. And, an aspect of that knowledge consists of the United States Constitution prescribing that it is "the supreme Law of the Land." U.S. CONST. art. VI, cl. 2. Another aspect consists of the dictate that the United States Supreme Court is the arbiter of what the Constitution says. *See Marbury v. Madison*, 5 U.S. 137, 2 L. Ed. 60 (1803). One cannot escape nor ignore the effect of those legal principles; so, a reasonable person would or should know that a municipality cannot itself reverse Supreme Court precedent such as *Roe* and punish that which it allowed. Waskom acknowledged as much by expressly conditioning the punitive effect of its ordinance on the vitiation of *Roe.*

Again, all the foregoing depicts the context of Dickson's words when pursuing his campaign to end abortion and inspire the eventual nullification of *Roe*. And, that context leads us to conclude that a reasonable person of ordinary learning would deem his accusation about Lilith being a criminal entity engaged in criminal acts as opinion masquerading as a statement of fact uttered in the course of advocating for a change in law. His words differ little from language that even Lilith admits is inactionable, that is, language which likens individuals who facilitate abortion as murderers. Nor does his allusion to the Waskom ordinance as basis for his accusation change our view. The ordinance itself describes abortion as murder, just as many protesters have done over the decades.

Simply put, Dickson's comments were made within the context of a political, ethical, moral, and legal stage built in part by the Waskom city council. He expounded about how Waskom "got it right" in purporting to outlaw abortion while also castigating *Roe* and the court rendering the decision. He urged others to believe that those facilitating abortion were criminals much in the same way that others liken those who perform abortions to murderers. Members on both sides of the debate no doubt believe their positions to be true. Members on both sides offer argument rationalizing their respective positions. And, no doubt, some may well believe Dickson when saying that Lilith is a criminal organization because Waskom enacted an ordinance purporting to nullify Supreme Court precedent. Yet, the legal standard by which we must abide is the "reasonable person." He or she "'does not represent the lowest common denominator, but reasonable intelligence and learning. He or she can tell the difference between satire and sincerity.'" *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 157 (Tex. 2004) (quoting

Patrick v. Superior Court, 22 Cal. App. 4th 814, 821, 27 Cal. Rptr. 2d 883, 887 (1994)). And, "the question [becomes] not whether some actual readers [or listeners] were [misled], as they inevitably will be, but whether the hypothetical reasonable reader could be." *Id.* Putting aside subjective beliefs, we focus on the single objective inquiry of whether the utterance can be reasonably understood as stating actual fact. *See id.* (involving satire). Even if what Dickson uttered could be characterized as statements of fact and even if some readers were to believe them, the context surrounding those utterances would lead a reasonable person of ordinary learning with a penchant for reasonable investigation to see them as opinion masquerading as fact or rhetorical hyperbole masquerading as fact.

Moreover, their entire context is the circumstance which causes us to disagree with the recent conclusions of our sister court in *Dickson v. Afiya Center*. The panel writing that opinion deemed statements uttered by Dickson (mirroring those said here) to be statements of fact rather than opinion. It so concluded because it found them to be verifiable. *Dickson v. Afiya Ctr*., 2021 Tex. App. LEXIS 6261, at *11–13. And, they were verifiable because they purported to represent the status of the criminal law in Texas while existing penal provisions could verify their accuracy or inaccuracy. *Id.* Yet, as mentioned earlier, non-actionable opinion may take two forms, according to our Supreme Court in *Dallas Morning News.* One encompasses statements of fact subject to verification. That is the category upon which the *Afiya Center* court relied. It said nothing of the second category, that being comments appearing to be statements of fact subject to verification but by their entire context are nothing other than opinion masquerading as

fact. That is the category in which we conclude that Dickson's comments fall, as a matter of law.

Admittedly, we agree with the *Afiya Center* panel when it says that simply interjecting the word "abortion" into the discussion does not *ipso facto* make the statements inactionable opinion. Falsely accusing one of "robbing a bank to fund an abortion protest" most likely would not insulate the defamation about robbing a bank merely because the word "abortion" were interjected into the passage. That is not what we have here, though. As explained earlier, Dickson's words were part of the abortion debate itself, as was the municipal enactment to which he referred and which supported his viewpoint. That context is what the *Afiya Center* did not address, and that context is an indisputable part of the entire canvas upon which he left his words.

The same is no less true of the panel's conclusion regarding rhetorical hyperbole. It found that his words were not such because a reasonable person could believe that Dickson "intended the statements literally." *Id.* at *39. A person outside an abortion clinic yelling that those inside are "murderers" no doubt believes and wants others to believe that terminating a fetus' viability is intentionally killing a human life, i.e., murder. If what some person speaking the words believed and intended alone were the test then he or she would be engaging in defamation under the *Afiya Center* analysis. Yet, the focus is not on what the speaker intended but what a reasonable person would believe, given the context involved. The *Afiya Center* panel does not consider the entire context of Dickson's words but only whether he intended them to be taken literally. That is an inaccurate focus. Again, the context of words is all important.

Being opinion, the comments uttered by Dickson and upon which Lilith based its suit are inactionable. They being inactionable, East TX's purported conspiracy to engage in publishing them is equally inactionable. Consequently, the trial court erred in failing to dismiss Lilith's suit under the TCPA.

Thus, we reverse the trial court's *sub silentio* decision denying dismissal and render judgment dismissing the claims of defamation and conspiracy averred by the Lilith Fund for Reproductive Equity against Mark Lee Dickson and Right to Life East Texas. We also remand the cause to the trial court with directions to 1) award Dickson and Right to Life East Texas court costs and reasonable attorney's fees per § 27.009(a)(1) of the Texas Civil Practice and Remedies Code and 2) determine sanctions, if any, per § 27.009(a)(2) of the same.

Brian Quinn
Chief Justice

TAB 2
Judgment of the Court of Appeals

No. 07-21-00005-CV

Mark Lee Dickson and Right to Life East Texas Appellant	§	From the 53rd District Court of Travis County
v.	§	September 2, 2021
The Lilith Fund for Reproductive Equity Appellee	§	Opinion by Chief Justice Quinn

J U D G M E N T

Pursuant to the opinion of the Court dated September 2, 2021, it is ordered, adjudged, and decreed that the judgment of the trial court is reversed and that a judgment is hereby rendered dismissing the claims defamation and conspiracy. It is further ordered, adjudged, and decreed that this cause be remanded to the trial court for further proceedings.

It is further ordered that appellee pay all costs in this behalf expended for which let execution issue.

It is further ordered that this decision be certified below for observance.

o O o

TAB 3
The Texas Citizens Participation Act

CIVIL PRACTICE AND REMEDIES CODE

TITLE 2. TRIAL, JUDGMENT, AND APPEAL

SUBTITLE B. TRIAL MATTERS

CHAPTER 27. ACTIONS INVOLVING THE EXERCISE OF CERTAIN CONSTITUTIONAL RIGHTS

Sec. 27.001. DEFINITIONS. In this chapter:

(1) "Communication" includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.

(2) "Exercise of the right of association" means to join together to collectively express, promote, pursue, or defend common interests relating to a governmental proceeding or a matter of public concern.

(3) "Exercise of the right of free speech" means a communication made in connection with a matter of public concern.

(4) "Exercise of the right to petition" means any of the following:

(A) a communication in or pertaining to:

(i) a judicial proceeding;

(ii) an official proceeding, other than a judicial proceeding, to administer the law;

(iii) an executive or other proceeding before a department of the state or federal government or a subdivision of the state or federal government;

(iv) a legislative proceeding, including a proceeding of a legislative committee;

(v) a proceeding before an entity that requires by rule that public notice be given before proceedings of that entity;

(vi) a proceeding in or before a managing board of an educational or eleemosynary institution supported directly or indirectly from public revenue;

(vii) a proceeding of the governing body of any political subdivision of this state;

(viii) a report of or debate and statements made in a proceeding described by Subparagraph (iii), (iv), (v), (vi), or (vii); or

(ix) a public meeting dealing with a public purpose, including statements and discussions at the meeting or other matters of

public concern occurring at the meeting;

(B) a communication in connection with an issue under consideration or review by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(C) a communication that is reasonably likely to encourage consideration or review of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(D) a communication reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding; and

(E) any other communication that falls within the protection of the right to petition government under the Constitution of the United States or the constitution of this state.

(5) "Governmental proceeding" means a proceeding, other than a judicial proceeding, by an officer, official, or body of this state or a political subdivision of this state, including a board or commission, or by an officer, official, or body of the federal government.

(6) "Legal action" means a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal, declaratory, or equitable relief. The term does not include:

(A) a procedural action taken or motion made in an action that does not amend or add a claim for legal, equitable, or declaratory relief;

(B) alternative dispute resolution proceedings; or

(C) post-judgment enforcement actions.

(7) "Matter of public concern" means a statement or activity regarding:

(A) a public official, public figure, or other person who has drawn substantial public attention due to the person's official acts, fame, notoriety, or celebrity;

(B) a matter of political, social, or other interest to the community; or

(C) a subject of concern to the public.

(8) "Official proceeding" means any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant.

(9) "Public servant" means a person elected, selected, appointed, employed, or otherwise designated as one of the following, even if the person has not yet qualified for office or assumed the person's duties:

(A) an officer, employee, or agent of government;

(B) a juror;

(C) an arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy;

(D) an attorney or notary public when participating in the performance of a governmental function; or

(E) a person who is performing a governmental function under a claim of right but is not legally qualified to do so.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.
Amended by:
Acts 2019, 86th Leg., R.S., Ch. 378 (H.B. 2730), Sec. 1, eff. September 1, 2019.

Sec. 27.002. PURPOSE. The purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Sec. 27.003. MOTION TO DISMISS. (a) If a legal action is based on or is in response to a party's exercise of the right of free speech, right to petition, or right of association or arises from any act of that party in furtherance of the party's communication or conduct described by Section 27.010(b), that party may file a motion to dismiss the legal action. A party under this section does not include a government entity, agency, or an official or employee acting in an official capacity.

(b) A motion to dismiss a legal action under this section must be filed not later than the 60th day after the date of service of the legal action. The parties, upon mutual agreement, may extend the time to file a motion under this section or the court may extend the time to file a motion under this section on a showing of good cause.

(c) Except as provided by Section 27.006(b), on the filing of a motion under this section, all discovery in the legal action is suspended until the court has ruled on the motion to dismiss.

(d) The moving party shall provide written notice of the date and time of the hearing under Section 27.004 not later than 21 days before the date of the hearing unless otherwise provided by agreement of the parties or an order of the court.

(e) A party responding to the motion to dismiss shall file the response, if any, not later than seven days before the date of the hearing on the motion to dismiss unless otherwise provided by an agreement of the parties or an order of the court.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.
Amended by:

Acts 2019, 86th Leg., R.S., Ch. 378 (H.B. 2730), Sec. 2, eff. September 1, 2019.

Sec. 27.004. HEARING. (a) A hearing on a motion under Section 27.003 must be set not later than the 60th day after the date of service of the motion unless the docket conditions of the court require a later hearing, upon a showing of good cause, or by agreement of the parties, but in no event shall the hearing occur more than 90 days after service of the motion under Section 27.003, except as provided by Subsection (c).

(b) In the event that the court cannot hold a hearing in the time required by Subsection (a), the court may take judicial notice that the court's docket conditions required a hearing at a later date, but in no event shall the hearing occur more than 90 days after service of the motion under Section 27.003, except as provided by Subsection (c).

(c) If the court allows discovery under Section 27.006(b), the court may extend the hearing date to allow discovery under that subsection, but in no event shall the hearing occur more than 120 days after the service of the motion under Section 27.003.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.
Amended by:

Acts 2013, 83rd Leg., R.S., Ch. 1042 (H.B. 2935), Sec. 1, eff. June 14, 2013.

Sec. 27.005. RULING. (a) The court must rule on a motion under Section 27.003 not later than the 30th day following the date the hearing on the motion concludes.

(b) Except as provided by Subsection (c), on the motion of a party under Section 27.003, a court shall dismiss a legal action against the moving party if the moving party demonstrates that the legal action is based on or is in response to:

(1) the party's exercise of:

(A) the right of free speech;

(B) the right to petition; or

(C) the right of association; or

(2) the act of a party described by Section 27.010(b).

(c) The court may not dismiss a legal action under this section if 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.

(d) Notwithstanding the provisions of Subsection (c), the court shall dismiss a legal action against the moving party if the moving party establishes an affirmative defense or other grounds on which the moving party is entitled to judgment as a matter of law.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Amended by:

Acts 2013, 83rd Leg., R.S., Ch. 1042 (H.B. 2935), Sec. 2, eff. June 14, 2013.

Acts 2019, 86th Leg., R.S., Ch. 378 (H.B. 2730), Sec. 3, eff. September 1, 2019.

Sec. 27.006. PROOF. (a) In determining whether a legal action is subject to or should be dismissed under this chapter, the court shall consider the pleadings, evidence a court could consider under Rule 166a, Texas Rules of Civil Procedure, and supporting and opposing affidavits stating the facts on which the liability or defense is based.

(b) On a motion by a party or on the court's own motion and on a showing of good cause, the court may allow specified and limited discovery relevant to the motion.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Amended by:

Acts 2019, 86th Leg., R.S., Ch. 378 (H.B. 2730), Sec. 4, eff. September 1, 2019.

Acts 2019, 86th Leg., R.S., Ch. 378 (H.B. 2730), Sec. 5, eff. September 1, 2019.

Sec. 27.007. ADDITIONAL FINDINGS. (a) If the court awards sanctions under Section 27.009(b), the court shall issue findings regarding whether the legal action was brought to deter or prevent the moving party from exercising constitutional rights and is brought for an improper purpose, including to harass or to cause unnecessary delay or to increase the cost of litigation.

(b) The court must issue findings under Subsection (a) not later than the 30th day after the date a request under that subsection is made.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Amended by:

Acts 2019, 86th Leg., R.S., Ch. 378 (H.B. 2730), Sec. 6, eff. September 1, 2019.

Sec. 27.0075. EFFECT OF RULING. Neither the court's ruling on the motion nor the fact that it made such a ruling shall be admissible in evidence at any later stage of the case, and no burden of proof or degree of proof otherwise applicable shall be affected by the ruling.

Added by Acts 2019, 86th Leg., R.S., Ch. 378 (H.B. 2730), Sec. 7, eff. September 1, 2019.

Sec. 27.008. APPEAL. (a) If a court does not rule on a motion to dismiss under Section 27.003 in the time prescribed by Section 27.005, the motion is considered to have been denied by operation of law and the moving party may appeal.

(b) An appellate court shall expedite an appeal or other writ, whether interlocutory or not, from a trial court order on a motion to dismiss a legal action under Section 27.003 or from a trial court's failure to rule on that motion in the time prescribed by Section 27.005.

(c) Repealed by Acts 2013, 83rd Leg., R.S., Ch. 1042, Sec. 5, eff. June 14, 2013.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Amended by:

Acts 2013, 83rd Leg., R.S., Ch. 1042 (H.B. 2935), Sec. 5, eff. June 14, 2013.

Sec. 27.009. DAMAGES AND COSTS. (a) Except as provided by Subsection (c), if the court orders dismissal of a legal action under this chapter, the court:

(1) shall award to the moving party court costs and reasonable attorney's fees incurred in defending against the legal action; and

(2) may award to the moving party sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.

(b) If the court finds that a motion to dismiss filed under this chapter is frivolous or solely intended to delay, the court may award court costs and reasonable attorney's fees to the responding party.

(c) If the court orders dismissal of a compulsory counterclaim under this chapter, the court may award to the moving party reasonable attorney's fees incurred in defending against the counterclaim if the court finds that the counterclaim is frivolous or solely intended for delay.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Amended by:

Acts 2019, 86th Leg., R.S., Ch. 378 (H.B. 2730), Sec. 8, eff. September 1, 2019.

Sec. 27.010. EXEMPTIONS. (a) This chapter does not apply to:

(1) an enforcement action that is brought in the name of this state or a political subdivision of this state by the attorney general, a district attorney, a criminal district attorney, or a county attorney;

(2) a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer;

(3) a legal action seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action;

(4) a legal action brought under the Insurance Code or arising out of an insurance contract;

(5) a legal action arising from an officer-director, employee-employer, or independent contractor relationship that:

(A) seeks recovery for misappropriation of trade secrets or corporate opportunities; or

(B) seeks to enforce a non-disparagement agreement or a covenant not to compete;

(6) a legal action filed under Title 1, 2, 4, or 5, Family Code, or an application for a protective order under Subchapter A, Chapter 7B, Code of Criminal Procedure;

(7) a legal action brought under Chapter 17, Business & Commerce Code, other than an action governed by Section 17.49(a) of that chapter;

(8) a legal action in which a moving party raises a defense pursuant to Section 160.010, Occupations Code, Section 161.033, Health and Safety Code, or the Health Care Quality Improvement Act of 1986 (42 U.S.C. 11101 et seq.);

(9) an eviction suit brought under Chapter 24, Property Code;

(10) a disciplinary action or disciplinary proceeding brought under Chapter 81, Government Code, or the Texas Rules of Disciplinary Procedure;

(11) a legal action brought under Chapter 554, Government Code; or

(12) a legal action based on a common law fraud claim.

(b) Notwithstanding Subsections (a)(2), (7), and (12), this chapter applies to:

(1) a legal action against a person arising from any act of that person, whether public or private, related to the gathering, receiving, posting, or processing of information for communication to the public, whether or not the information is actually communicated to the public, for the creation, dissemination, exhibition, or advertisement or other similar promotion of a dramatic, literary, musical, political, journalistic, or otherwise artistic work, including audio-visual work regardless of the means of distribution, a motion picture, a television or radio program, or an article published in a newspaper, website, magazine, or other platform, no matter the method or extent of distribution; and

(2) a legal action against a person related to the communication, gathering, receiving, posting, or processing of consumer opinions or commentary, evaluations of consumer complaints, or reviews or ratings of businesses.

(c) This chapter applies to a legal action against a victim or alleged victim of family violence or dating violence as defined in Chapter

71, Family Code, or an offense under Chapter 20, 20A, 21, or 22, Penal Code, based on or in response to a public or private communication.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.
Amended by:
Acts 2013, 83rd Leg., R.S., Ch. 1042 (H.B. 2935), Sec. 3, eff. June 14, 2013.
Acts 2019, 86th Leg., R.S., Ch. 378 (H.B. 2730), Sec. 9, eff. September 1, 2019.
Acts 2021, 87th Leg., R.S., Ch. 915 (H.B. 3607), Sec. 3.001, eff. September 1, 2021.

Sec. 27.011. CONSTRUCTION. (a) This chapter does not abrogate or lessen any other defense, remedy, immunity, or privilege available under other constitutional, statutory, case, or common law or rule provisions.
(b) This chapter shall be construed liberally to effectuate its purpose and intent fully.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

TAB 4
Lilith Fund's
Original Petition

CAUSE NO. D-1-GN-20-003113

The Lilith Fund for Reproductive Equity,	§	IN THE DISTRICT COURT
	§	
Plaintiff,	§	
	§	
v.	§	53RD JUDICIAL DISTRICT
	§	
Mark Lee Dickson, and Right to Life East Texas,	§	
	§	
	§	
Defendants.	§	TRAVIS COUNTY, TEXAS

PLAINTIFF'S ORIGINAL PETITION

A "criminal" is a person who breaks the law, not a person with whom you disagree politically. In Texas, calling a person or a business who has committed no crimes "criminal" is *per se* defamation. There is no level of commitment to a particular political outcome and no amount of fervent belief in any one particular political position that relieves a person of his duty to avoid defaming others. Simply put, there are rules that apply to everyone in Texas and one of them is you cannot falsely accuse your political enemies of crimes.

Defendants Mark Lee Dickson ("Dickson") and Right to Life East Texas ("RLET") have been breaking that rule with impunity for months by lying about Plaintiff The Lilith Fund for Reproductive Equity ("Lilith Fund" or "Plaintiff") and other pro-choice organizations. Defendants' lies about Lilith Fund and the other organizations are as simple as they are appalling. They have repeatedly stated that Lilith Fund and the other organizations are literal criminals when Defendants know that is not true. Worse still, Defendants have encouraged others, including members of local government in cities throughout the state, to also lie about Lilith Fund and other organizations.

When Defendants made these false statements and encouraged others to do so, Defendants knew that Lilith Fund and the other organizations had committed no crimes. Abortion is not a

crime in Texas. Abortion is not murder under Texas law. Providing information about abortion is not illegal under Texas law and is, in fact, protected activity and speech. Providing financial assistance to a private citizen is not illegal under Texas law. And none of those things are or ever have been murder under Texas law. Yet, Defendants continue to publicly say that Lilith Fund and other similar organizations are literally "criminal organizations" who are assisting with murder "with malice aforethought."

As described in detail below, Defendants' statements were made before and during coordinated efforts to get various city councils to pass an ordinance that enshrines the lies into the municipal books; they were made at city council meetings, but also online, to news media, or on social media. They were also often made after enactment of various ordinances, in order to confuse the public about the legal effects of those ordinances and to defame Lilith Fund and similar organizations. The available facts disclose that this campaign has been strategic and thorough, and that its principle aims are to (1) defame Lilith Fund and other reproductive justice advocates and (2) confuse the public about the state of the law in support of this defamatory purpose. This conduct continues to the present day, and the defamation is ongoing. Because Defendants refuse to stop lying and refuse to correct the false record they have created, Lilith Fund asks this Court to find the statements are false and defamatory, require Dickson and RLET to set the record straight, and award such damages as are necessary to compensate Lilith Fund for the injuries caused by Defendants' lies.

I.
RELIEF SOUGHT AND DISCOVERY LEVEL

1. Plaintiff seeks monetary relief over $200,000.00 but not more than $1,000,000.00 and intend to conduct discovery under Level Three pursuant to Texas Rule of Civil Procedure 190.4.

II.
PARTIES

2. Plaintiff the Lilith Fund for Reproductive Equity is a Texas nonprofit which may be served with process through the undersigned counsel.

3. Defendant Mark Lee Dickson is a resident and citizen of Texas, and on information and belief may be served with process at .

4. Defendant Right to Life East Texas is a Texas nonprofit organization, and may be served with process through its director, Mark Lee Dickson, at

.

III.
JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction because no other court has exclusive jurisdiction of the subject matter of these causes and the amount in controversy is within the jurisdictional limits of this Court.

6. Venue is proper in Travis County, Texas, pursuant to § 15.017 of the Texas Civil Practice and Remedies Code because Plaintiff resided in Travis County at the time of accrual of the cause of action.

IV.
FACTS

A. Defendants' Campaign and Lies.

7. Defendants, led by Mark Lee Dickson, have been attempting to persuade various cities and local governments to enact a patently unconstitutional ordinance purporting to ban abortion and designating as "criminal" organizations like Planned Parenthood (which provides abortion procedures) and Lilith Fund (which advocates for abortion rights and assists people in obtaining legal abortions by providing information about legal abortions and by providing funding to private citizens, but does not provide abortion procedures). The proposed ordinance, which has now been passed in several localities (with some variations), not only violates almost fifty years of settled Supreme Court precedent in *Roe v. Wade*, *Planned Parenthood v. Casey*, and *Whole Women's Health v. Hellerstedt* and their progeny, it also (as originally enacted by many of the jurisdictions) operates as an unconstitutional bill of attainder, since (as originally enacted) it declared certain groups, including Lilith Fund, to be "criminal" or "unlawful" without any judicial process. Although many cities have now amended their versions to strike Dickson's specific list of political enemies from their code of ordinances, Dickson's statements and advocacy in favor of the original ordinance remain defamatory and evidence an ongoing and concerted effort to perpetuate their lies about Lilith Fund.

8. Dickson's campaign has been going on for months, and the records of the City Council meetings he has attended show that his campaign has been coordinated, not only with Defendant RLET (of which he is the director) but also with other organizations, like Texas Right to Life. The campaign shows the breadth and scope of Dickson's lies, and the endorsement and ratification of them—even the participation in dissemination of them—by RLET.

9. Dickson goes from city to city (cities Dickson does not live in and has no personal connection to), often accompanied by people associated with Texas Right to Life, to spread his lies and pursue his unconstitutional ordinance. His usual practice is to stir up fear that an abortion facility could open within the city limits unless the ordinance is passed when there is no reason to believe that is likely to happen. He typically brings with him stuffed animals, as well as dolls allegedly depicting twelve-week old fetuses.

10. Dickson's first target for the ordinance was Waskom, Texas. The official minutes of the Board of Aldermen for June 11, 2019 reflect that Mark Lee Dickson, "representing Right of Life of East Texas" proposed and advocated for the ordinance, claiming that the city "was at risk with an abortion clinic moving in[.]" Another speaker, Rusty Thomas, apparently asked the board to "make a stand" and "pass the ordinance outlawing abortion." Alderman James King moved to adopt the ordinance, and the motion was seconded by Alderman Russell Allbritton. The Board adopted the ordinance on a 5-0 vote.

11. On July 23, 2019, Dickson spoke to the City Council of Gilmer, Texas. The Council Minutes reflect that Dickson was representing Right to Life East Texas (his attendance is recorded as "Mark Lee Dickson, Right to Life East Texas"). But it wasn't until September 24, 2019, when Dickson again visited the Gilmer City Council (again representing Right to Life East Texas according to the minutes), that Gilmer adopted the ordinance by 4 votes to 1. The minutes reflect that at this meeting Dickson was accompanied by Katherine "Pilcher" (it appears that this is a misspelling of "Pitcher") and John Seago of Texas Right to Life.

12. On September 9, 2019, Dickson attended the meeting of the City Council of Naples, Texas, again apparently accompanied by Katherine Pitcher. Pitcher testified in favor of adoption of Dickson's ordinance, further showing the coordination between Dickson and Texas Right to

Life. Dickson, misidentified in the minutes as "Mark Lee Dickerson" advocated for the ordinance as well. The City Council adopted the ordinance with one opposing vote.

13. The City of Joaquin passed the ordinance on September 17, 2019, though the City Council minutes reflect little about this decision. More informative are the minutes from the City Council for the City of Tenaha on September 23, 2019. Dickson was in attendance at that meeting and claimed that, due to a new fetal heartbeat bill passed by Louisiana, Tenaha was at risk of an abortion clinic opening if it did not pass his ordinance. Tenaha passed the ordinance.

14. Dickson then moved on to the City of Gary, Texas, attending the October 17, 2019 Gary City Council meeting. The City Council voted to table his proposed ordinance. Dickson returned to the Gilmer City Council on January 16, 2020 and made another presentation, after which the Gary City Council adopted Dickson's ordinance.

15. "A citizen" presented Dickson's ordinance to the Big Spring City Council on November 12, 2019. "Several citizens" spoke in favor of the resolution. The minutes do not name these speakers. On December 10, 2019, Dickson's ordinance was again entertained, and "many citizens spoke in favor and against" the ordinance. Finally, on January 14, 2020, "many citizens" again spoke in favor and against the ordinance. The Big Spring City Council then passed the ordinance, though they modified it by substituting the word "unlawful" in for "criminal organizations" when describing (and listing) organizations like Lilith Fund. The ordinance was adopted three votes to two.

16. Dickson was at the November 14 and November 18, 2019 meetings of the City Council for the City of Westbrook, Texas, and presented his ordinance, persuading Westbrook to adopt it.

17. On November 21, 2019 Dickson (described as "President, East Texas Chapter Right to Life") and Katherine Pitcher (described as "Legislative Associate, Texas Right to Life") spoke to the City Council for the City of Rusk, Texas, advocating for the ordinance. The Council tabled the ordinance for later discussion. On January 9, 2020, the City of Rusk took up the ordinance again. Speaking then were Defendant Dickson (described as "Director, Right to Life, East Texas Chapter"), Katherine Pitcher ("Legal and Legislative Dept[.], Texas Right to Life"), and Jackson Melton ("Legal and Legislative Dept[.], Texas Right to Life") among others. After an executive session, the City Council approved the ordinance three votes to two.

18. The prior paragraphs are just a summary of Dickson's initial campaign, and the list is not exhaustive. In addition to the above, the City Council of Colorado City, Texas adopted the ordinance after meetings on December 10, 2019 and January 14, 2020, in which a representative of Texas Right to Life named Rebecca Parma told the council that the ordinance could outlaw abortion constitutionally, that persons who broke the law between enactment and the date *Roe* was overturned could be held retroactively criminally liable, and that the ordinance "was supplied by Texas National Right to Life." Dickson presented the ordinance to the City Council for Wells, Texas on February 10, 2020, and persuaded them to adopt it. Dickson also presented the ordinance to the Whiteface, Texas City Council on March 12, 2020, and persuaded them to pass it three votes to two. The Omaha City, Texas, City Council was persuaded to pass the ordinance on September 9, 2019, but repealed it in favor of a nonbinding resolution on October 14, 2019.

19. In the proposed ordinance itself, and in connection with the above-summarized campaign, Defendants have repeatedly exceeded the bounds of protected political speech. Both in the ordinance itself—which was drafted at Defendant Dickson's behest—and in Defendants' arguments in support of that ordinance, Defendants have repeatedly claimed that the named

organizations, including Lilith Fund, are "criminal organizations," due to their support for abortion, which Defendants characterize as the literal crime of murder.

20. For instance, the text of the ordinances originally adopted in Waskom, Big Spring, Colorado City, Joaquin, and other cities and counties in Texas, includes an express declaration that "[o]rganizations that perform abortions and assist others in obtaining abortions are declared to be criminal [or unlawful] organizations. These organizations include, but are not limited to: … The Lilith Fund for Reproductive Equality [sic]…." A copy of the original Waskom is attached to this Petition as Exhibit A as an example of this language.

21. This alleged criminality is not merely hypothetical or a comment on the moral character of Lilith Fund or other similar organizations. Dickson, in concert with RLET, instead accuses Lilith Fund, and other organizations, of literal murder and of aiding and abetting literal murder in the very text of the proposed and passed ordinances.

22. The text of the ordinance itself shows that this use of the term "murder" is not merely a rhetorical device. The text of the Waskom ordinance, for instance, begins with a series of recitations indicating that abortion is the criminal act of murder:

> WHEREAS, a surgical or chemical abortion is the purposeful and intentional ending of a human life, and is murder "with malice aforethought" since the baby in the womb has its own DNA, and at certain points in pregnancy has its own heartbeat and its own brainwaves[…]

23. This is a recitation—one of the assumed facts intended to justify the ordinance. So this statement is not even defensible as a statement of the intended effect of the ordinance. It is also not true, for the simple reasons that (1) abortion is legal in Texas, as it is everywhere in the United States (within legal parameters, as with any medical procedure), because laws criminalizing abortion are unconstitutional and (2) because abortion has *never* been murder in Texas. Indeed,

even before its anti-abortion law was declared unconstitutional almost fifty years ago, Texas law provided that abortion or assistance with an abortion was a separate offense from murder, punishable by a maximum of five years in prison (or ten if the abortion was done without the consent of the patient). *See* TEX. REV. CIV. STAT. ANN. ART. 4512.1 (recodified version of Texas's unconstitutional prohibition on abortion). The ordinance uses the phrase "malice aforethought,"[1] specifically invoking a historical legal standard associated with the crime of murder, even though Texas law specifically exempts a person who obtains or performs an abortion from the murder law. Tex. Pen. Code. Ann. § 19.06. Moreover, present Texas law authorizes and regulates abortion as a medical procedure, which is incompatible with the position that abortion is "murder" or in any way illegal under Texas law. *See* TEX. HEALTH & SAFETY CODE ANN. § 245.001, *et seq.*

24. But the ordinance goes further than merely stating a legal falsehood. Instead it states a legal falsehood and then accuses Lilith Fund, and other organizations, of committing or abetting this fictional crime. As proposed by Dickson and originally adopted by numerous Texas jurisdictions, the ordinance not only *recites* that abortion is murder, it then *declares* that abortion is murder in Section B.2., then in the immediately following subsection declares that Lilith Fund, and other organizations, are "criminal organizations" because they "perform abortions" or "assist others in obtaining abortions." *See* Ex. A, p. 3. There is no way to read these provisions together except as an assertion that Lilith Fund and the other named organizations are being accused, by Dickson and (on his recommendation) by a legislative body and without any judicial findings or action, of committing or abetting murder.

[1] The accusation by Dickson, enshrined in text drafted at Dickson's and RLET's behest and advocated for, is that abortion is murder "with malice aforethought"—a term taken from criminal law and clearly intended to refer to murder as a specific crime, and not as a moral concept. Although Texas law no longer uses this term, "malice aforethought" is a term commonly associated with the crime of murder, and lends the ordinance a veneer of legitimacy that is likely (and intended) to confuse people about what the law is and whether Defendants' political enemies are criminals.

25. Dickson has admitted that the ordinances were drafted at his behest with the assistance of an unnamed "legal expert" who allegedly clerked for Justice Antonin Scalia. The relevant text of these ordinances is Dickson's responsibility, and RLET has, in its support for this ordinance, ratified its text. Dickson and RLET are responsible for the statements of alleged fact the ordinance contains, including the recitals, and including the specific list of Dickson's political enemies he has encouraged various cities to declare as "criminal," even if many of these cities have since thought better of keeping this list in their ordinance books.

26. To summarize, Defendants' positive assertion, in the text of the very ordinance they had drafted and sought to have enacted, is not that Lilith Fund or the other named organizations have abetted murder in some figurative or rhetorical sense, but that Lilith Fund has abetted actual, criminal murders. Because this accusation of criminality is false, it is *per se* defamatory under Texas law. In drafting this ordinance, and in advocating for its passage, Defendants have defamed Plaintiff.

27. Ultimately, defamation is the purpose of the ordinance; Dickson's campaign is designed to confuse people about the legal status of abortion *and* abortion advocacy, and paint abortion rights organizations like Lilith Fund as criminals. This is revealed by Dickson's own statements. For example, in Dickson's November 26, 2019 Facebook statement, set out below, in which he tries to defend his unconstitutional proscription list, Dickson gives the game away—implicitly admitting that his ordinance will be struck down (by referencing previously unsuccessful attempts to restrict abortion in Texas), while implying that the chilling effect of these ordinances on abortion rights groups will ultimately have been worth it. *See infra*, ¶ 20 ("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.")

B. Dickson's Other Lies.

28. In his own personal statements, Dickson has made even clearer that he is talking about literal, criminal murder and not speaking in moral terms when he accuses Lilith Fund and other abortion-rights groups of criminality. Dickson said in a July 2, 2019 Facebook post responding to two billboards put up in Waskom, Texas by the Lilith Fund and NARAL Pro-Choice Texas, 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.

29. Dickson's statement here is that Lilith Fund (and NARAL Pro-Choice Texas) are criminal organizations merely for *advocating* abortion. This statement was made after the Waskom enactment of the ordinance—it was not a statement made to persuade Waskom to adopt it or to persuade others to support its adoption. And the statement equates abortion with the murder of an adult person, then continues by indicating that this is the justification for these organizations being designated as "criminal organizations" in the ordinance Dickson himself had drafted and persuaded Waskom to pass. Dickson's argument is that Waskom, Texas officially designates the Lilith Fund a "criminal organization" because, he alleges, it abets the crime of murder. His status as the primary advocate for these ordinances and his statements arguing that the ordinance passes

legal muster are very likely to confuse reasonable people into believing that his characterization of Lilith Fund as an organization that commits criminal acts is accurate.

30. Speaking about another version of his ordinance enacted in Big Spring, Texas, Dickson said in a November 26, 2019 Facebook post that:

> 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.

31. Again, these statements are not merely philosophical statements that "abortion is murder" in some moral sense. In light of the ordinance Dickson has advocated, these social media posts argue that Lilith Fund and other similar organizations are *literally* assisting in criminal murder by advocating for abortion rights and educating women about those rights.

32. Further demonstrating that defamation—including confusion about whether abortion rights organizations are presently committing crimes—is the purpose of this entire quixotic ordinance campaign is the statement Dickson made immediately after Waskom, Texas, became the first city to pass his ordinance:

> 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, 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!

33. Again, the point here is that Dickson wants people to believe that these ordinances *really do* criminalize abortion, assisting women to obtain abortions, and advocacy and education in support of abortion rights. Since this statement was made *after* the ordinance was adopted, its intent was not to persuade Waskom to adopt the ordinance, but to persuade people that the ordinance actually does make abortion illegal. Indeed, Dickson specifically claims, in present-tense language, that Waskom has "OUTLAWED" abortion. That way, Dickson has an excuse to falsely claim that his political opponents are committing crimes by opposing his anti-choice agenda, which Dickson then proceeds to do, using his *own ordinance* as cover for that statement.

34. Similarly, Dickson claimed in an interview with CNN, published in a January 25, 2020 article, that "[t]he 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 wants people to genuinely believe that providing abortion services, or assisting others to do so, is *presently* a crime, and that present abortions or assistance therewith—undertaken while *Roe* is still the governing law—will be subject to future penalties if the Supreme Court's view of the constitution changes. Dickson is genuinely trying to persuade people that organizations like Lilith Fund are currently violating the law by providing assistance to women who are seeking abortion services.

35. Dickson repeatedly claims that these ordinances actually outlaw abortion even though his own ordinance shows that he knows this to be false. As Dickson knows, his conning of the city councils of various municipalities to unconstitutionally enshrine his proscription list in city ordinances does not alter the legality of Lilith Fund's actions, or those of any of the other named organizations. Since these organizations have not committed—and are not committing—criminal acts (whether murder or any other crime), his characterization of them is false and defamatory.

C. <u>Conspiracy with Right to Life East Texas.</u>

36. Dickson is the director of RLET. Its resources have been leveraged in support of Dickson's campaign, and RLET supports and advocates for the passage of variants of Dickson's ordinance with defamatory language similar to that described above.

37. RLET has endorsed not only the statements enshrined in the ordinance (including the Waskom and Big Spring ordinances) but also the statements Dickson has made outside of the four corners of these ordinances. RLET posted on Facebook a statement signed by Dickson substantially repeating his July 2, 2019 Facebook post:

> As I have said before, abortion is freedom in the same way that a wife killing her husband is freedom. Abortion is murder. The thought that you can end the life of another innocent human being and not expect to struggle afterwards is a lie. 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. If NARAL Pro-Choice Texas and the Lilith Fund want to spend more money on billboards in those cities we welcome them to do so. After all, the more money they spend on billboards the less money they can spend on funding the murder of innocent unborn children.

38. RLET also reposted Dickson's June 11, 2019 Facebook post, set out above, in which Dickson attempts to persuade people that the adoption of his ordinance *actually means* that Lilith Fund is literally a criminal organization, because the ordinance *he designed* asserts that.

39. RLET's support for this defamatory campaign, and endorsement and publication of Dickson's statements, show that RLET has aided and strengthened Dickson's defamation of Lilith Fund and the other organizations named in Dickson's unconstitutional ordinance.

D. <u>Falsity of the Statements.</u>

40. It is, of course, false that Lilith Fund, or any of the other named organizations, have abetted murder, committed crimes, or are criminal organizations in any sense. Abortion is not illegal anywhere in the United States. Nor is it illegal anywhere in the United States to advocate for abortion rights or assist people in obtaining a legal abortion. Legal abortion is not a crime and is not classified as murder, anywhere in the United States (and, as noted above, even before *Roe*, abortion was not classified as murder in Texas). Dickson's declarations to the contrary were not true when he was shopping his unconstitutional ordinance around, and they are not any more true now that some cities have been defrauded into passing it.

41. The text of the proposed ordinance as enacted *itself* demonstrates that Defendants know that their statements are false. As the Waskom ordinance shows, but as is replicated in all the jurisdictions that have passed variations of Dickson's ordinance, the efficacy of the penalties the ordinance purports to exact are forestalled until a hypothetical future in which *Roe* and *Casey* and their progeny are all overturned:

> Neither the City of Waskom, nor any of its officers or employees, nor any district or county attorney, nor any executive or administrative officer or employee of any state or local government entity, shall take any steps to enforce this ordinance against a person or entity that commits an unlawful act described in Section C, unless and until the Supreme Court overrules Roe v. Wade, 410 U.S. 113

(1973), and Planned Parenthood v. Casey, 505 U.S. 833 (1992), and permits states and municipalities to once again enforce abortion prohibitions.

42. Defendants know that they cannot argue that criminal penalties can issue from the ordinances they have proposed for enactment, because they know that laws forbidding abortion are unconstitutional. Consequently, Defendants *know* that providing legal abortions, advocating for abortion rights, and assisting people in obtaining legal abortions is legal (even in Waskom, and Big Spring, and the other places Defendants have persuaded to adopt their ineffectual ordinance). After all, "[a]n unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby County*, 118 U.S. 425, 442, 6 S. Ct. 1121, 1125, 30 L. Ed. 178 (1886). Although this principle does not literally unwrite or physically remove the laws that have been written when they are struck down as unconstitutional, it does render unconstitutional criminal laws ineffectual such that an offense created by an unconstitutional law is "not a crime." *Ex parte Siebold*, 100 U.S. 371, 376, 25 L. Ed. 717 (1879); *see also Hiett v. United States*, 415 F.2d 664, 666 (5th Cir. 1969) ("It is well settled that if the statute under which appellant has been convicted is unconstitutional, he has not in the contemplation of the law engaged in criminal activity; for an unconstitutional statute in the criminal area is to be considered no statute at all."); *Karenev v. State*, 281 S.W.3d 428, 437 (Tex. Crim. App. 2009); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 760, 115 S. Ct. 1745, 1752, 131 L. Ed. 2d 820 (1995) (Scalia, J. writing in concurrence "a law repugnant to the Constitution is void, and is as no law[.]")

43. There is thus no legal sense in which Lilith Fund has committed *any* crime, and yet Dickson and Defendants have repeatedly characterized it as guilty of abetting the literal crime of murder. This misrepresentation—both of Lilith Fund's actions themselves *and* of the legal status

of same—is defamatory *per se* under Texas law. There is a categorical difference between accusing someone of immorality, and accusing someone of criminality. People can disagree on the morality of actions, as people discussing the abortion issue certainly do, but whether an action is criminal is not a philosophical matter. In advocating for these ordinances, Defendants repeatedly crossed this line, both before and after enactment.

44. To be perfectly clear, Lilith Fund is not arguing it has been defamed because Defendants believe or argue that abortion is murder in some moral sense; instead, Lilith Fund has been defamed because Defendants have falsely accused it of assisting in the commission of the specific crime of murder. Lilith Fund has not been defamed because Defendants hope one day to make abortion a crime, but because Defendants *presently state* that Lilith Fund is, at this moment, breaking the law. These statements are baseless and provably false, and Defendants knew these statements were false when they were uttered as their own statements and the text of the ordinance itself demonstrates. In Texas, this is enough, on its own, to support a claim of defamation, even in the absence of damages.

45. In addition, Lilith Fund has suffered damages to its reputation as a result of Defendants' lies. Although this action seeks compensatory damages, its primary purpose is to set the record straight: Lilith Fund abides by the law. It is not a "criminal organization" engaging in activities that have been "outlawed." It has not once abetted "murder." Dickson's dishonorable campaign of lies transgresses the boundaries of political debate, and Lilith Fund asks this Court to put a stop to it.

V.
CAUSES OF ACTION

Count 1: Defamation, against Defendants Dickson and RLET.

46. Dickson's statements, both in the ordinance he had drafted, and in his arguments in support thereof, can only be reasonably read as accusing Lilith Fund of the literal crime of murder, of abetting the literal crime of murder, or of committing other presently criminal acts.

47. Dickson is the director of Defendant RLET, and regularly makes statements on its behalf. Some of Dickson's defamatory statements have been made specifically via Defendant RLET's outlets, including its Facebook page.

48. Defendant RLET publicized both the ordinance itself (which it has materially supported) and certain of Dickson's defamatory statements (as described above).

49. A reasonable person could be deceived, on the basis of Dickson's and RLET's statements, into believing that Lilith Fund has committed the criminal acts Dickson has accused them of.

50. Dickson and RLET actually knew that their statements regarding Lilith Fund's alleged criminality were false at the time they had the ordinance drafted, advocated for its passage, and made the described statements.

51. These statements are assertions of fact that are provably false.

52. False allegations of criminal acts are *per se* defamatory under Texas law, entitling Lilith Fund to damages.

53. Additionally, these statements have caused Lilith Fund significant reputational harm in an amount to be determined at trial.

Count 2: **Conspiracy to Commit Defamation, against Defendant Right to Life East Texas.**

54. Defendant Right to Life East Texas is directed by Defendant Dickson, and to the extent his statements are not directly attributable to RLET, RLET has taken actions to strengthen, enhance, and publicize Dickson's defamatory statements. As described above, this includes (1) publicizing Dickson's defamatory statements on RLET's own Facebook page, and (2) financially and materially supporting Dickson's campaign to pass ordinances drafted at Dickson's behest that contain defamatory statements.

55. RLET intends, by its support of Dickson's campaign and statements, to further Dickson's defamatory goal of persuading people that Lilith Fund has committed and is committing criminal acts. RLET and Dickson combined together and conspired to further this defamatory goal. To be clear, RLET and Dickson, to the extent they are treated as separate individuals, had the same defamatory goal in mind.

56. RLET's support to Dickson enhanced his defamatory ordinance campaign and brought wider publicity to his defamatory statements, causing reputation damages in an amount to be determined at trial.

VI.
CONDITIONS PRECEDENT

57. All conditions precedent to Lilith Fund's claims for relief have been performed or have occurred.

VII.
REQUEST FOR DISCLOSURE

58. Pursuant to Texas Rule of Civil Procedure 194, Lilith Fund requests that the Defendants disclose, within fifty (50) days of the service of this request, all of the information or material described in Rule 194.2 (a)-(l).

VIII.
REQUEST FOR RELIEF

For the reasons set forth above, Plaintiff requests the following:

(A) Compensatory damages in the amount of more than $100,000 plus pre and post-judgment interest on all sums at the maximum rate allowed by law;

(B) Punitive damages in the amount of more than $300,0000;

(C) Injunctive relief requiring Defendants to delete all present defamatory content from their websites, social media, and any other presently-extant physical or electronic media;

(D) All costs of court;

(E) Any and all costs and reasonable attorneys' fees incurred in any and all related appeals and collateral actions (if any); and

(F) Such other relief to which this Court deems Plaintiff justly entitled.

Respectfully submitted,

By: */s/ Jennifer R. Ecklund*
Jennifer R. Ecklund
Texas Bar No. 24045626
jecklund@thompsoncoburn.com

Elizabeth G. Myers
Texas Bar No. 24047767
emyers@thompsoncoburn.com

John P. Atkins
Texas Bar No. 24097326
jatkins@thompsoncoburn.com

THOMPSON COBURN LLP
1919 McKinney Avenue, Suite 100
Dallas, Texas 75201
Telephone: 972/629-7100
Facsimile: 972/629-7171

ATTORNEYS FOR PLAINTIFF

TAB 5
First Waskom Ordinance

ORDINANCE OUTLAWING ABORTION WITHIN THE CITY OF WASKOM, DECLARING WASKOM A SANCTUARY CITY FOR THE UNBORN, MAKING VARIOUS PROVISIONS AND FINDINGS RELATED THERETO, PROVIDING FOR SEVERABILITY, REPEALING CONFLICTING ORDINANCES, AND ESTABLISHING AN EFFECTIVE DATE.

WHEREAS, the City Alderman of the City of Waskom hereby finds that the United States Constitution has established the right of self-governance for local municipalities;

WHEREAS, a surgical or chemical abortion is the purposeful and intentional ending of a human life, and is murder "with malice aforethought" since the baby in the womb has its own DNA, and at certain points in pregnancy has its own heartbeat and its own brainwaves;

WHEREAS, these babies are the most innocent among us and deserve equal protection under the law as any other member of our American posterity as defined by the United States Constitution;

WHEREAS, the Supreme Court erred in Roe v. Wade, 410 U.S. 113 (1973), when it said that pregnant women have a constitutional right to abort their pre-born children, as there is no language anywhere in the Constitution that even remotely suggests that abortion is a constitutional right;

WHEREAS, 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.");

WHEREAS, 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;

WHEREAS, the recent changes of membership on the Supreme Court indicate that the pro-abortion justices have lost their majority;

WHEREAS, to protect the health and welfare of all residents within the City of Waskom, including the unborn, the City Council has found it necessary to outlaw human abortion within the city limits.

NOW, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF WASKOM, TEXAS, THAT:

A. DEFINITIONS

1. “Abortion” means the death of a child as the result of purposeful action taken before or during the birth of the child with the intent to cause the death of the child. This includes, but is not limited to:

(a) Chemical abortions caused by the morning-after pill, mifepristone (also known as RU-486), and the Plan B pill.

(b) Surgical abortions at any stage of pregnancy.

(c) Saline abortions at any stage of pregnancy.

(d) Self-induced abortions at any stage of pregnancy.

The term “abortion” does NOT include accidental miscarriage.

2. “Child” means a natural person from the moment of conception until 18 years of age.

3. “Pre-born child” means a natural person from the moment of conception who has not yet left the womb.

4. “Abortionist” means any person, medically trained or otherwise, who causes the death of the child in the womb. This includes, but is not limited to:

(a) Obstetricians/gynecologists and other medical professionals who perform abortions of any kind for any reason.

(b) Any other medical doctor who performs abortions of any kind for any reason.

(c) Any nurse practitioner who performs abortions of any kind for any reason.

(d) Any personnel from Planned Parenthood or other pro-abortion organizations who perform abortions of any kind for any reason.

(e) Any remote personnel who instruct abortive women to perform self-abortions at home via internet connection.

(f) Any pharmacist or pharmaceutical worker who sells chemical or herbal abortifacients.

5. “City” shall mean the city of Waskom, Texas.

B. DECLARATIONS

1. We declare Waskom, Texas to be a Sanctuary City for the Unborn.

2. Abortion at all times and at all stages of pregnancy is declared to be an act of murder with malice aforethought, subject only to the affirmative defenses described in Section C.3.

3. Organizations that perform abortions and assist others in obtaining abortions are declared to be criminal organizations. These organizations include, but are not limited to:

(a) Planned Parenthood and any of its affiliates;

(b) Jane's Due Process;

(c) The Afiya Center;

(d) The Lilith Fund for Reproductive Equality;

(e) NARAL Pro-Choice Texas;

(f) National Latina Institute for Reproductive Health;

(g) Whole Woman's Health and Whole Woman's Health Alliance;

(h) Texas Equal Access Fund;

4. 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 abort 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 declared to be null and void in the City of Waskom.

C. UNLAWFUL ACTS

1. ABORTION — It shall be unlawful for any person to procure or perform an abortion of any type and at any stage of pregnancy in the City of Waskom, Texas.

2. AIDING OR ABETTING AN ABORTION — It shall be unlawful for any person to knowingly aid or abet an abortion that occurs in the City of Waskom, Texas. This includes, but is not limited to, the following acts:

(a) Knowingly providing transportation to or from an abortion provider;

(b) Giving instructions over the telephone, the internet, or any other medium of communication regarding self-administered abortion;

(c) Providing money with the knowledge that it will be used to pay for an abortion or the costs associated with procuring an abortion;

(d) Coercing a pregnant mother to have an abortion against her will.

3. AFFIRMATIVE DEFENSES — It shall be an affirmative defense to the unlawful acts described in Sections C.1 and C.2 if the abortion was:

(a) In response to a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that, as certified by a physician, places the woman in danger of death or a serious risk of substantial impairment of a major bodily function unless an abortion is performed.

(b) In response to a pregnancy caused by an act of rape, sexual assault, or incest that was reported to law enforcement;

The defendant shall have the burden of proving these affirmative defenses by a preponderance of the evidence.

4. CAUSING AN ABORTION BY AN ACT OF RAPE, SEXUAL ASSAULT, OR INCEST — It shall be unlawful for any person to cause an abortion by an act of rape, sexual assault, or incest that impregnates the victim against her will and causes her to abort the pre-born child.

5. PROHIBITED CRIMINAL ORGANIZATIONS — It shall be unlawful for a criminal organization described in Section B.3 to operate within the City of Waskom, Texas. This includes, but is not limited to:

(a) Offering services of any type within the City of Waskom, Texas;

(b) Renting office space or purchasing real property within the City of Waskom, Texas;

(c) Establishing a physical presence of any sort within the City of Waskom, Texas;

D. PUBLIC ENFORCEMENT

1. Neither the City of Waskom, nor any of its officers or employees, nor any district or county attorney, nor any executive or administrative officer or employee of any state or local governmental entity, shall take any steps to enforce this ordinance against a person or entity that commits an unlawful act described in Section C, unless and until the Supreme Court overrules Roe v. Wade, 410 U.S. 113 (1973), and Planned Parenthood v. Casey, 505 U.S. 833 (1992), and permits states and municipalities to once again enforce abortion prohibitions.

2. If (and only if) the Supreme Court overrules Roe v. Wade, 410 U.S. 113 (1973), and Planned Parenthood v. Casey, 505 U.S. 833 (1992), a person who commits an unlawful act described in Section C shall be subject to the maximum penalty permitted under Texas law for the violation of a municipal ordinance governing public health, and each violation shall constitute a separate offense.

Provided, that no punishment shall be imposed upon the mother of the pre-born child that has been aborted.

3. If (and only if) the Supreme Court overrules Roe v. Wade, 410 U.S. 113 (1973), and Planned Parenthood v. Casey, 505 U.S. 833 (1992), a corporation or entity that commits an unlawful act described in Section C shall be subject to the maximum penalty permitted under Texas law for the violation of a municipal ordinance governing public health, and each violation shall constitute a separate offense.

E. PRIVATE ENFORCEMENT

1. A person or entity that commits an unlawful act described in Section C.1 or C.2, other than the mother of the pre-born child that has been aborted, shall be liable in tort to any surviving relative of the aborted pre-born child, including the child's mother, father, grandparents, siblings or half-siblings, aunts, uncles, or cousins. The person or entity that committed the unlawful act shall be liable to each surviving relative of the aborted pre-born child for:

(a) Compensatory damages, including damages for emotional distress;

(b) Punitive damages; and

(c) Costs and attorneys' fees.

There is no statute of limitations for this private right of action.

2. Any private citizen may bring a qui tam relator action against a person or entity that commits or plans to commit an unlawful act described in Section C, and may be awarded:

(a) Injunctive relief;

(b) Statutory damages of not less than two thousand dollars ($2,000.00) for each violation, and not more than the maximum penalty permitted under Texas law for the violation of a municipal ordinance governing public health; and

(c) Costs and attorneys' fees;

Provided, that no damages or liability for costs and attorneys' fees may be awarded or assessed against the mother of the pre-born child that has been aborted. There is no statute of limitations for this qui tam relator action.

3. No qui tam relator action described in Section E.2 may be brought by the City of Waskom, by any of its officers or employees, by any district or county attorney, or by any executive or administrative officer or employee of any state or local governmental entity.

F. SEVERABILITY

1. Mindful of Leavitt v. Jane L., 518 U.S. 137 (1996), in which in the context of determining the severability of a state statute regulating abortion the United States Supreme Court held that an explicit statement of legislative intent is controlling, it is the intent of the City Council that every provision, section, subsection, sentence, clause, phrase, or word in this ordinance, and every application of the provisions in this ordinance, are severable from each other. If any application of any provision in this ordinance to any person, group of persons, or circumstances is found by a court to be invalid or unconstitutional, then the remaining applications of that provision to all other persons and circumstances shall be severed and may not be affected. All constitutionally valid applications of this ordinance shall be severed from any applications that a court finds to be invalid, leaving the valid applications in force, because it is the City Council's intent and priority that the valid applications be allowed to stand alone. Even if a reviewing court finds a provision of this ordinance to impose an undue burden in a large or substantial fraction of relevant cases, the applications that do not present an undue burden shall be severed from the remaining provisions and shall remain in force, and shall be treated as if the City Council had enacted an ordinance limited to the persons, group of persons, or circumstances for which the statute's application does not present an undue burden. The City Council further declares that it would have passed this ordinance, and each provision, section, subsection, sentence, clause, phrase, or word, and all constitutional applications of this ordinance, irrespective of the fact that any provision, section, subsection, sentence, clause, phrase, or word, or applications of this ordinance, were to be declared unconstitutional or to represent an undue burden.

2. If any provision of this ordinance is found by any court to be unconstitutionally vague, then the applications of that provision that do not present constitutional vagueness problems shall be severed and remain in force, consistent with the declarations of the City Council's intent in Section F.1

3. No court may decline to enforce the severability requirements in Sections F.1 and F.2 on the ground that severance would "rewrite" the ordinance or involve the court in legislative activity. A court that declines to enforce or enjoins a city official from enforcing a subset of an ordinance's applications is never "rewriting" an ordinance, as the ordinance continues to say exactly what it said before. A judicial injunction or declaration of unconstitutionality is nothing more than a non-enforcement edict that can always be vacated by later courts if they have a different understanding of what the Constitution requires; it is not a formal amendment of the language in a statute or ordinance. A judicial injunction or declaration of unconstitutionality no more "rewrites" an ordinance than a decision by the executive not to enforce a duly enacted ordinance in a limited and defined set of circumstances.

4. If any federal or state court ignores or declines to enforce the requirements of Sections F.1, F.2, or F.3, or holds a provision of this ordinance invalid

on its face after failing to enforce the severability requirements of Sections F.1 and F.2, for any reason whatsoever, then the Mayor shall hold delegated authority to issue a saving construction of the ordinance that avoids the constitutional problems or other problems identified by the federal or state court, while enforcing the provisions of the ordinance to the maximum possible extent. The saving construction issued by the Mayor shall carry the same force of law as an ordinance; it shall represent the authoritative construction of the ordinance in both federal and state judicial proceedings; and it shall remain in effect until the court ruling that declares invalid or enjoins the enforcement of the original provision in the ordinance is overruled, vacated, or reversed.

5. The Mayor must issue the saving construction described in Section F.4 within 20 days after a judicial ruling that declares invalid or enjoins the enforcement of a provision of this ordinance after failing to enforce the severability requirements of Sections F.1 and F.2. If the Mayor fails to issue the saving construction required by Section F.4 within 20 days after a judicial ruling that declares invalid or enjoins the enforcement of a provision of this ordinance after failing to enforce the severability requirements of Sections F.1 or F.2, or if the Mayor's saving construction fails to enforce the provisions of the ordinance to the maximum possible extent permitted by the Constitution or other superseding legal requirements, as construed by the federal or state judiciaries, then any person may petition for a writ of mandamus requiring the Mayor to issue the saving construction described in Section F.4.

G. EFFECTIVE DATE

This ordinance shall go into immediate effect upon majority vote within the Waskom, Texas City Council meeting.

TAB 6
Amended Waskom Ordinance

ORDINANCE NO. 342

ORDINANCE OUTLAWING ABORTION WITHIN THE CITY OF WASKOM, DECLARING WASKOM A SANCTUARY CITY FOR THE UNBORN, MAKING VARIOUS PROVISIONS AND FINDINGS RELATED THERETO, PROVIDING FOR SEVERABILITY, REPEALING CONFLICTING ORDINANCES, AND ESTABLISHING AN EFFECTIVE DATE.

WHEREAS, the City Alderman of the City of Waskom hereby finds that the United States Constitution has established the right of self-governance for local municipalities;

WHEREAS, a surgical or chemical abortion is the purposeful and intentional ending of a human life, and is murder "with malice aforethought" since the baby in the womb has its own DNA, and at certain points in pregnancy has its own heartbeat and its own brainwaves;

WHEREAS, these babies are the most innocent among us and deserve equal protection under the law as any other member of our American posterity as defined by the United States Constitution;

WHEREAS, the Supreme Court erred in Roe v. Wade, 410 U.S. 113 (1973), when it said that pregnant women have a constitutional right to abort their unborn children, as there is no language anywhere in the Constitution that even remotely suggests that abortion is a constitutional right;

WHEREAS, 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.");

WHEREAS, 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;

WHEREAS, the recent changes of membership on the Supreme Court indicate that the pro-abortion justices have lost their majority;

WHEREAS, to protect the health and welfare of all residents within the City of Waskom, including the unborn and pregnant women, the City Council has found it necessary to outlaw human abortion within the city limits.

NOW, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF WASKOM, TEXAS, THAT:

A. DEFINITIONS

1. "Abortion" means the act of using or prescribing an instrument, a drug, a medicine, or any other substance, device, or means with the intent to cause the death of an unborn child of a woman known to be pregnant. The term does not include birth control devices or oral contraceptives. An act is not an abortion if the act is done with the intent to:

(a) save the life or preserve the health of an unborn child;

(b) remove a dead, unborn child whose death was caused by accidental miscarriage; or

(c) remove an ectopic pregnancy.

2. "Child" means a natural person from the moment of conception until 18 years of age.

3. "Unborn child" means a natural person from the moment of conception who has not yet left the womb.

4. "Abortionist" means any person, medically trained or otherwise, who causes the death of the child in the womb. The term does not apply to any pharmacist or pharmaceutical worker who sells birth control devices or oral contraceptives. The term includes, but is not limited to:

(a) Obstetricians/gynecologists and other medical professionals who perform abortions of any kind.

(b) Any other medical professional who performs abortions of any kind.

(c) Any personnel from Planned Parenthood or other pro-abortion organizations who perform abortions of any kind.

(d) Any remote personnel who instruct abortive women to perform self-abortions at home.

5. "City" shall mean the city of Waskom, Texas.

B. DECLARATIONS

1. We declare Waskom, Texas to be a Sanctuary City for the Unborn.

2. Abortion at all times and at all stages of pregnancy is declared to be an act of murder with malice aforethought, subject only to the affirmative defenses described in Section C.3.

3. 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 abort a unborn child, are declared to be unconstitutional usurpations of judicial power, which violate both the Tenth Amendment the Republican Form of Government Clause, and are declared to be null and void in the City of Waskom.

C. UNLAWFUL ACTS

1. ABORTION — It shall be unlawful for any person to procure or perform an abortion of any type and at any stage of pregnancy in the City of Waskom, Texas.

2. AIDING OR ABETTING AN ABORTION — It shall be unlawful for any person to knowingly aid or abet an abortion that occurs in the City of Waskom, Texas. This section does not prohibit referring a patient to have an abortion which takes place outside of the city limits of Waskom, TX. This includes, but is not limited to, the following acts:

(a) Knowingly providing transportation to or from an abortion provider;

(b) Giving instructions over the telephone, the internet, or any other medium of communication regarding self-administered abortion;

(c) Providing money with the knowledge that it will be used to pay for an abortion or the costs associated with procuring an abortion;

(d) Coercing a pregnant mother to have an abortion against her will.

3. AFFIRMATIVE DEFENSE — It shall be an affirmative defense to the unlawful acts described in Sections C.1 and C.2 if the abortion was in response to a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that, as certified by a physician, places the woman in danger of death or a serious risk of substantial impairment of a major bodily function unless an abortion is performed. The defendant shall have the burden of proving this affirmative defense by a preponderance of the evidence.

4. No provision of Section C may be construed to prohibit any action which occurs outside of the jurisdiction of the City.

5. No provision of Section C may be construed to prohibit any conduct protected by the First Amendment of the U.S. Constitution, as made applicable to state and local governments through the Supreme Court's interpretation of the Fourteenth Amendment.

D. PUBLIC ENFORCEMENT

1. Neither the City of Waskom, nor any of its officers or employees, nor any district or county attorney, nor any executive or administrative officer or employee of any state or local governmental entity, shall take any steps to enforce this ordinance

against a person or entity that commits an unlawful act described in Section C, unless and until the Supreme Court overrules Roe v. Wade, 410 U.S. 113 (1973), and Planned Parenthood v. Casey, 505 U.S. 833 (1992), and permits states and municipalities to once again enforce abortion prohibitions.

2. If the Supreme Court overrules Roe v. Wade, 410 U.S. 113 (1973), and Planned Parenthood v. Casey, 505 U.S. 833 (1992), a person who commits an unlawful act described in Section C shall be subject to the maximum penalty permitted under Texas law for the violation of a municipal ordinance governing public health, and each violation shall constitute a separate offense.

Provided, that no punishment shall be imposed upon the mother of the unborn child that has been aborted.

3. If the Supreme Court overrules Roe v. Wade, 410 U.S. 113 (1973), and Planned Parenthood v. Casey, 505 U.S. 833 (1992), a corporation or entity that commits an unlawful act described in Section C shall be subject to the maximum penalty permitted under Texas law for the violation of a municipal ordinance governing public health, and each violation shall constitute a separate offense.

E. PRIVATE ENFORCEMENT

1. A person or entity that commits an unlawful act described in Section C.1 or C.2, other than the mother of the unborn child that has been aborted, shall be liable in tort to any surviving relative of the aborted unborn child, including the child's mother, father, grandparents, siblings or half-siblings, aunts, uncles, or cousins. The person or entity that committed the unlawful act shall be liable to each surviving relative of the aborted unborn child for:

(a) Compensatory damages, including damages for emotional distress;

(b) Punitive damages; and

(c) Costs and attorneys' fees.

There is no statute of limitations for this private right of action.

2. Any private citizen may bring a qui tam relator action against a person or entity that commits or plans to commit an unlawful act described in Section C, and may be awarded:

(a) Injunctive relief;

(b) Statutory damages of not less than two thousand dollars ($2,000.00) for each violation, and not more than the maximum penalty permitted under Texas law for the violation of a municipal ordinance governing public health; and

(c) Costs and attorneys' fees;

Provided, that no damages or liability for costs and attorneys' fees may be awarded or assessed against the mother of the unborn child that has been aborted. There is no statute of limitations for this qui tam relator action.

3. No qui tam relator action described in Section E.2 may be brought by the City of Waskom, by any of its officers or employees, by any district or county attorney, or by any executive or administrative officer or employee of any state or local governmental entity.

4. Private enforcement described in Section E.1 and E.2 may be brought against a person or entity that commits an unlawful act described in Section C upon the effective date of the ordinance, regardless of whether the Supreme Court overrules Roe v. Wade, 410 U.S. 113 (1973), Planned Parenthood v. Casey, 505 U.S. 833 (1992), or permits states and municipalities to once again enforce abortion prohibitions.

F. SEVERABILITY

1. Mindful of Leavitt v. Jane L., 518 U.S. 137 (1996), in which in the context of determining the severability of a state statute regulating abortion the United States Supreme Court held that an explicit statement of legislative intent is controlling, it is the intent of the City Council that every provision, section, subsection, sentence, clause, phrase, or word in this ordinance, and every application of the provisions in this ordinance, are severable from each other. If any application of any provision in this ordinance to any person, group of persons, or circumstances is found by a court to be invalid or unconstitutional, then the remaining applications of that provision to all other persons and circumstances shall be severed and may not be affected. All constitutionally valid applications of this ordinance shall be severed from any applications that a court finds to be invalid, leaving the valid applications in force, because it is the City Council's intent and priority that the valid applications be allowed to stand alone. Even if a reviewing court finds a provision of this ordinance to impose an undue burden in a large or substantial fraction of relevant cases, the applications that do not present an undue burden shall be severed from the remaining provisions and shall remain in force, and shall be treated as if the City Council had enacted an ordinance limited to the persons, group of persons, or circumstances for which the statute's application does not present an undue burden. The City Council further declares that it would have passed this ordinance, and each provision, section, subsection, sentence, clause, phrase, or word, and all constitutional applications of this ordinance, irrespective of the fact that any provision, section, subsection, sentence, clause, phrase, or word, or applications of this ordinance, were to be declared unconstitutional or to represent an undue burden.

2. If any provision of this ordinance is found by any court to be unconstitutionally vague, then the applications of that provision that do not present

constitutional vagueness problems shall be severed and remain in force, consistent with the declarations of the City Council's intent in Section F.1

3. No court may decline to enforce the severability requirements in Sections F.1 and F.2 on the ground that severance would "rewrite" the ordinance or involve the court in legislative activity. A court that declines to enforce or enjoins a city official from enforcing a subset of an ordinance's applications is never "rewriting" an ordinance, as the ordinance continues to say exactly what it said before. A judicial injunction or declaration of unconstitutionality is nothing more than a non-enforcement edict that can always be vacated by later courts if they have a different understanding of what the Constitution requires; it is not a formal amendment of the language in a statute or ordinance. A judicial injunction or declaration of unconstitutionality no more "rewrites" an ordinance than a decision by the executive not to enforce a duly enacted ordinance in a limited and defined set of circumstances.

4. If any federal or state court ignores or declines to enforce the requirements of Sections F.1, F.2, or F.3, or holds a provision of this ordinance invalid on its face after failing to enforce the severability requirements of Sections F.1 and F.2, for any reason whatsoever, then the Mayor shall hold delegated authority to issue a saving construction of the ordinance that avoids the constitutional problems or other problems identified by the federal or state court, while enforcing the provisions of the ordinance to the maximum possible extent. The saving construction issued by the Mayor shall carry the same force of law as an ordinance; it shall represent the authoritative construction of the ordinance in both federal and state judicial proceedings; and it shall remain in effect until the court ruling that declares invalid or enjoins the enforcement of the original provision in the ordinance is overruled, vacated, or reversed.

5. The Mayor must issue the saving construction described in Section F.4 within 20 days after a judicial ruling that declares invalid or enjoins the enforcement of a provision of this ordinance after failing to enforce the severability requirements of Sections F.1 and F.2. If the Mayor fails to issue the saving construction required by Section F.4 within 20 days after a judicial ruling that declares invalid or enjoins the enforcement of a provision of this ordinance after failing to enforce the severability requirements of Sections F.1 or F.2, or if the Mayor's saving construction fails to enforce the provisions of the ordinance to the maximum possible extent permitted by the Constitution or other superseding legal requirements, as construed by the federal or state judiciaries, then any person may petition for a writ of mandamus requiring the Mayor to issue the saving construction described in Section F.4.

G. REPEAL OF PREVIOUS SANCTUARY CITIES ORDINANCE

This ordinance shall supersede and repeal Ordinance No.336 as adopted on June 11,2019 by the City of Waskom, Texas.

H. EFFECTIVE DATE

This ordinance shall go into immediate effect upon majority vote within the Waskom, Texas City Council meeting.

PASSED, ADOPTED, SIGNED and APPROVED,

CITY SEAL Jesse Moore, Mayor

ATTEST: Tammy Lofton, City Secretary

FURTHER ATTESTED BY "WE THE PEOPLE", THE CITIZENS and WITNESSES TO THIS PROCLAMATION, THIS DAY OF MARCH 10, THE YEAR OF OUR LORD 2020.

WITNESS:

WITNESS:

TAB 7
Lilith Fund's Motion for Rehearing

No. 07-21-00005-CV

In the Court of Appeals for the Seventh Judicial District Amarillo, Texas

MARK LEE DICKSON AND RIGHT TO LIFE EAST TEXAS,

Defendants-Appellants,

v.

THE LILITH FUND FOR REPRODUCTIVE EQUITY,

Plaintiff-Appellee.

On Appeal from the 53rd Judicial District Court, Travis County

APPELLEE'S MOTION FOR REHEARING

Jennifer R. Ecklund
State Bar No. 24045626
jecklund@thompsoncoburn.com
Elizabeth G. Myers
State Bar No. 24047767
emyers@thompsoncoburn.com
John P. Atkins
State Bar No. 24097326
jatkins@thompsoncoburn.com

THOMPSON COBURN LLP
2100 Ross Ave., Ste. 3200
Dallas, Texas 75201
(972) 629-7100 (phone)
(972) 629-7171 (fax)

ATTORNEYS FOR PLAINTIFF-APPELLEE

Appellee The Lilith Fund for Reproductive Equity ("Lilith Fund") respectfully moves this Court for rehearing of its order and opinion of September 2, 2021, reversing the 53rd District Court of Travis County's denial of Defendants-Appellants' Motion to Dismiss under the Texas Citizens Participation Act.

The grounds for Appellee's request are (1) the possibility that the Court did not adequately consider in its Opinion of September 2, 2021 (the "Opinion" or "Op.") the factual evidence showing that the purpose of Appellants' statements was not to express political opinion but was specifically to induce literal belief; and (2) that the Court appears to have misapplied the law regarding the "reasonable reader" or "reasonable person" standard by improperly combining it with a legal standard intended to prevent lawbreakers from pleading ignorance of the law.

First, the very act of pairing enactment of an ordinance (which Appellant Mark Lee Dickson ["Dickson"] himself claims to have drafted) by a city with statements promoting the ordinance's literal effectiveness and legality was strategic, and intended specifically to persuade people that abortion is literally illegal in Waskom (and in other cities that passed these ordinances). Similarly, the ordinance declared Lilith Fund was a criminal

organization (at least when passed), and this was designed by Dickson to render his own claims that Appellee was a criminal organization credible. The net effect of the ordinance campaign was to lend credence and the veneer of literal truth to statements that would be normal political hyperbole *but for the context Dickson himself constructed*.

This credibility was necessary for Dickson's purpose, as the record shows. Dickson admitted he read the *Writ-of-Erasure Fallacy* article (written by counsel for Appellants) that recommends such "sabre-rattling" tactics to induce obedience with ineffective statutes, CR 372-73 (Dickson claims he read the article), Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 992-93, 1000-03 (2018). Dickson's statement to CNN confirms that it was his intention for people to believe, quite literally, that abortion was illegal as a result of these ordinances, such that they could be subjected to retroactive and literal legal penalties (not merely prospective ones) if *Roe* were overturned. CR 289.

Dickson's intent is further evidenced by his refusal to take any action—other than doubling down—after Appellee requested a statement "retracting any allegations these organizations have broken or are breaking any laws." CR 171 (retraction request); CR 174, 176 (Dickson's public

responses). This intent for Dickson's words to be taken literally is further evidenced by Appellants' truth defense in this very case.

The Court takes as granted opposing counsel's claim before this Court that cities cannot vary the law. *Op.* at 9. But counsel's statement to the Court was not one of Dickson's defamatory statements, nor were any of those statements couched in such terms. Indeed, none of the statements ever mentions that the ordinance Dickson drafted, promoted, and celebrated has no effect on the law. No reasonable reader heard opposing counsel tell the Court this (now-admitted) truth, and it does not form a part of the context of the statements Dickson made.

Thus the second point; this Court's opinion rests in part upon the proposition that all are presumed to know the law, and that by implication the "reasonable person" reading the defamatory statements knows the whole of the law. *Op.* at 10. But the presumption that all know the law, and the "reasonable person" construct in defamation cases, serve very different purposes and ought not be combined. In *S.C.*, cited by the Court, the "all know the law" presumption buttresses the contention that a party in litigation should have been aware of a deadline. *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.). In *E.H. Stafford*, which *S.C.* quotes, the context is again litigation, and the presumption is held to prevent a party from using an attorney's mistake about the effect of a ruling to remedy a missed deadline. *E.H. Stafford Mfg. Co. v. Wichita Sch. Supply Co.*, 23 S.W.2d 695, 697 (Comm'n App. 1930).

As usually formulated, this presumption that all know the law is phrased with a corollary, which is that ignorance of the law cannot excuse its violation. *Hays v. Cage*, 2 Tex. 501, 515 (1847) (stating the presumption, but noting that at the time the defendant's admission was consistent with what was then jurisprudential law); *Dillard v. Aetna Ins. Co.*, 518 S.W.2d 255, 257 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.) (ignorance of six-month filing requirement was not good cause for failure to comply). But the question in the defamation cases is not whether the "reasonable person" should be excused for conduct violating the law; it is whether some "reasonable person" would, faced with the allegedly defamatory statements in their context, believe them with respect to any legal claims.

It is true that the "reasonable person" or "reasonable reader" is "no dullard." *See New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 157 (Tex. 2004) (quoting *Patrick v. Superior Court*, 27 Cal.Rptr.2d 883, 887 (Cal. Ct. App.

1994)). But that does not imply that they are readers and scholars of the law—as Dickson claims *he* is—for the purposes of deciding whether they would be deceived by (false) criminal accusations. Even a person of "ordinary intelligence" exercising some "care and prudence," *Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d 614, 630-31 (Tex. 2018), presumably knows less about the law than the average lawyer. It is quite a stretch to suggest that a reasonable reader could not be made to believe that abortion was illegal in Waskom after the ordinance was passed (even if the ordinance could not presently be enforced).

Likewise, a reasonable reader could believe that Lilith Fund was literally a criminal organization because Dickson repeatedly said so, saying his lawyer agreed, in the context of an ordinance passed by the City of Waskom saying precisely the same. It is in this context that all of Dickson's statements were made. It is a context created by Appellants, perpetuated by Appellants, and used by Appellants to convince others that their statements were literal, and not hyperbolic.

It makes sense that the "reasonable reader" standard should not incorporate the presumption of perfect knowledge of the law leveled against ignorant lawbreakers. This would permit a defense of opinion or hyperbole

in every single *per se* defamation case involving an allegation of criminality where the plaintiff demonstrates the falsity of the statement by proving the described conduct was legal.

Consider, for example, a business is accused of tax fraud because it paid so little in taxes one year, and specific reference is made to certain tax deductions the are alleged to have been illegal. The business then sues to correct the record, referencing its public filings and public laws to establish it has broken no law. Is the business out of luck, despite having been publicly accused of a specific crime, and potentially having incurred reputational or economic damages, because the "reasonable reader" was on notice of all of those public filings and laws? Is the statement mere "opinion" or "rhetorical hyperbole" because the "reasonable reader," informed by a perfect knowledge of state and federal tax law, would not believe it, even if many actual people would and even if the speaker said repeatedly that he meant such statements literally? Appellee does not believe the precedent supports such an understanding, and to the extent the Court believes it does, Appellee respectfully requests an opportunity to present argument to the Court for an extension or modification of the law.

Dickson's persuasive purpose was clear—his intention was to scare people away from associating with Lilith Fund with the fear of literal retroactive penalty. Dickson himself at least claims to believe that the statements are literally true (though as pointed out in the briefing, his conduct—including his inconsistent stories—displays clear awareness of the likely falsity of his claims). Appellants have defended themselves on the basis of truth, while at the same time asserting defenses of "opinion" and "rhetorical hyperbole," a defense strategy that is at least inconsistent.

This is a correct-the-record defamation case, brought because the truth matters. Appellee recognizes the strange and politically fraught nature of this case, and appreciates the difficulty of the questions presented. Nevertheless it respectfully submits that the Court has erred, and requests rehearing so that it can address the specific issues identified in the Court's ruling in a fulsome way. Appellee further requests any other relief to which it is justly entitled.

A copy of this Court's September 2, 2021 opinion is attached to this Motion as an exhibit.

Respectfully submitted,

Jennifer R. Ecklund
State Bar No. 24045626
jecklund@thompsoncoburn.com
Elizabeth G. Myers
State Bar No. 24047767
emyers@thompsoncoburn.com
John P. Atkins
State Bar No. 24097326
jatkins@thompsoncoburn.com

THOMPSON COBURN LLP
2100 Ross Ave., Ste. 3200
Dallas, Texas 75201
(972) 629-7100 (phone)
(972) 629-7171 (fax)

ATTORNEYS FOR PLAINTIFF-APPELLEE THE LILITH FUND

CERTIFICATE OF SERVICE

On September 17, 2021, this document was served electronically on the following counsel of record for Defendant-Appellants via the Court's electronic filing system.

Jonathan F. Mitchell
Texas Bar No. 24075463
Mitchell Law PLLC
111 Congress Ave., Suite 400
Austin, Texas 78701
512-686-3940
jonathan@mitchell.law

D. Bryan Hughes
Texas Bar No. 00793995
Law Office of D. Bryan Hughes
110 North College, Ave., Suite 207
903-581-1776 (phone)
bryan@hughesfirm.com

H. Dustin Fillmore III
Texas Bar No. 06996010
Charles W. Fillmore
Texas Bar No. 00785861
The Fillmore Law Firm, LLP
1200 Summit Ave., Suite 860
Fort Worth, Texas 76102
817-332-2351 (phone)
817-870-1859 (fax)
dusty@fillmorefirm.com
chad@fillmorefirm.com

Attorneys for Defendant-Appellants

/s/ Jennifer R. Ecklund
Jennifer R. Ecklund

Counsel for Plaintiff-Appellee

CERTIFICATE OF COMPLIANCE

I hereby certify that this Motion conforms with the requirements of Texas Rule of Appellate Procedure 9.4 to the extent applicable and contains 1,441 words, excluding the portions of the brief exempted by Rule 9.4.(i)(1).

/s/ Jennifer R. Ecklund
Jennifer R. Ecklund

Counsel for Plaintiff-Appellee

TAB 8
Appellants' Response to Lilith Fund's Motion for Rehearing

No. 07-21-00005-CV

In the Court of Appeals for the Seventh Appellate District at Amarillo, Texas

MARK LEE DICKSON AND RIGHT TO LIFE EAST TEXAS,

Defendants-Appellants,

v.

THE LILITH FUND FOR REPRODUCTIVE EQUITY,

Plaintiff-Appellee.

On Appeal from the 53rd Judicial District Court, Travis County
Case No. D-1-GN-20-003113
Oral Argument Requested

RESPONSE TO APPELLEE'S MOTION FOR REHEARING

D. BRYAN HUGHES
Texas Bar No. 00793995
Law Office of D. Bryan Hughes
110 North College Avenue, Suite 207
Tyler, Texas 75702-7221
(903) 581-1776 (phone)
bryan@hughesfirm.com

JONATHAN F. MITCHELL
Texas Bar No. 24075463
Mitchell Law PLLC
111 Congress Avenue, Suite 400
Austin, Texas 78701
(512) 686-3940 (phone)
(512) 686-3941 (fax)
jonathan@mitchell.law

(Additional counsel listed inside)

Counsel for Appellants

H. Dustin Fillmore III
Texas Bar No. 06996010
Charles W. Fillmore
Texas Bar No. 00785861
The Fillmore Law Firm, LLP
201 Main Street, Suite 801
Fort Worth, Texas 76102
(817) 332-2351 (phone)
(817) 870-1859 (fax)
dusty@fillmorefirm.com
chad@fillmorefirm.com

Additional Counsel for Appellants

Appellants Mark Lee Dickson and Right to Life East Texas drafted an ordinance that described the Lilith Fund as a "criminal" organization, and they persuaded the city of Waskom (and other cities throughout Texas) to adopt this ordinance as city law. The panel opinion correctly held that these accusations of criminality were constitutionally protected, both as statements of opinion and as statements of rhetorical hyperbole. Nothing in the motion for rehearing undermines the soundness of these conclusions.

The Lilith Fund seeks rehearing on two grounds, neither of which has merit. It first claims that the panel opinion overlooked "factual evidence showing that the purpose of Appellants' statements was not to express political opinion but was specifically to induce literal belief." Mot. for Rehearing at 2. But whether a statement is "fact" or "opinion" does not in any way turn on the "purpose" or mental state of the speaker. It depends on "a reasonable person's perception" of the statements, as the panel opinion correctly observed. *See Bentley v. Bunton*, 94 S.W.3d 561, 579 (Tex. 2002) ("[T]he 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. This is also true in determining whether a publication is an actionable statement of fact or a constitutionally protected expression of opinion." (citation and internal quotation marks omitted)); *see also* Panel Op. at 4 ("[W]hether the statement can be viewed as [defamatory] involves an objective, not subjective, assessment."). So the Lilith Fund's argument about Mr. Dickson's "purpose" and "intent" is a non sequitur, and

does nothing to undermine the panel's conclusion that the defendants' utterances were non-defamatory statements of opinion and rhetorical hyperbole.[1]

The Lilith Fund's second claim is that this Court misapplied the "reasonable person" standard by assuming that a reasonable person would know the law. *See* Panel Op. at 10. The Lilith Fund says that this Court conflated the "reasonable person" standard in defamation law with the principle from criminal law that ignorance of the law is no excuse. *See* Mot. for Rehearing at 4–5. The Court did no such thing. It did not assert that the "reasonable person" knows every intricacy of the law; it merely imputed knowledge of the most basic legal principles that every citizen knows (or should know): That the Constitution of the United States is "the supreme Law of the Land"; that Supreme Court of the United States is "arbiter of what the Constitution says"; and that "a municipality cannot itself reverse Supreme Court precedent such as *Roe* and punish that which it allowed." Panel Op. at 10. The Court relied only on imputed knowledge of these basic ideas in concluding that a "reasonable person" would perceive the defendants' publications as statements of opinion and rhetoric hyperbole. The Court did not hold, and did not come anywhere close to holding, that accusations of criminality are *per se* non-actionable, as the Lilith Fund suggests on page 7 of its motion.

---

1. Mr. Dickson's "purpose" and "intent" would be relevant if the panel had ruled on whether the defendants acted with negligence or actual malice. But the panel never reached the state-of-mind issue, because it ruled that a reasonable person would not perceive the disputed statements as defamatory.

Nothing in the motion for rehearing should lead the panel to alter or reconsider its well-reasoned opinion.

Conclusion

The motion for rehearing should be denied.

Respectfully submitted.

/s/ Jonathan F. Mitchell

D. Bryan Hughes
Texas Bar No. 00793995
Law Office of D. Bryan Hughes
110 North College Avenue, Suite 207
Tyler, Texas 75702-7221
(903) 581-1776 (phone)
bryan@hughesfirm.com

H. Dustin Fillmore III
Texas Bar No. 06996010
Charles W. Fillmore
Texas Bar No. 00785861
The Fillmore Law Firm, LLP
201 Main Street, Suite 801
Fort Worth, Texas 76102
(817) 332-2351 (phone)
(817) 870-1859 (fax)
dusty@fillmorefirm.com
chad@fillmorefirm.com

Jonathan F. Mitchell
Texas Bar No. 24075463
Mitchell Law PLLC
111 Congress Avenue, Suite 400
Austin, Texas 78701
(512) 686-3940 (phone)
(512) 686-3941 (fax)
jonathan@mitchell.law

Counsel for Appellants

Certificate Of Service

I certify that on September 30, 2021, this document was served through the electronic filing manager upon:

Jennifer R. Ecklund
Elizabeth G. Myers
John P. Atkins
Thompson Coburn LLP
1919 McKinney Avenue, Suite 100
Dallas, Texas 75201
(972) 629-7100 (phone)
(972) 629-7171 (fax)
jecklund@thompsoncoburn.com
emyers@thompsoncoburn.com
jatkins@thompsoncoburn.com

Counsel for Plaintiff-Appellee

/s/ Jonathan F. Mitchell
Jonathan F. Mitchell
Counsel for Appellants

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Jonathan Mitchell on behalf of Jonathan Mitchell
Bar No. 24075463
jonathan@mitchell.law
Envelope ID: 57775473
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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Martin Whittaker	24095097	privatrecht@gmail.com	9/30/2021 8:55:59 PM	SENT
Jonathan Mitchell	24075463	jonathan@mitchell.law	9/30/2021 8:55:59 PM	SENT
H. Dustin Fillmore	6996010	dusty@fillmorefirm.com	9/30/2021 8:55:59 PM	SENT
Douglas Hughes	793995	bryan@hughesfirm.com	9/30/2021 8:55:59 PM	SENT
Charles W. Fillmore	785861	chad@fillmorefirm.com	9/30/2021 8:55:59 PM	SENT
Elizabeth Myers		emyers@thompsoncoburn.com	9/30/2021 8:55:59 PM	SENT
John Atkins		jatkins@thompsoncoburn.com	9/30/2021 8:55:59 PM	SENT
Laurie DeBardeleben		ldebardeleben@thompsoncoburn.com	9/30/2021 8:55:59 PM	SENT
Thomas Brejcha		tbrejcha@thomasmoresociety.org	9/30/2021 8:55:59 PM	SENT
Stephen Klein		steve@barrklein.com	9/30/2021 8:55:59 PM	SENT
Linda Carranza		lcarranza@thompsoncoburn.com	9/30/2021 8:55:59 PM	SENT
Kamran Anwar		kanwar@thompsoncoburn.com	9/30/2021 8:55:59 PM	SENT
Jennifer R.Ecklund		jecklund@thompsoncoburn.com	9/30/2021 8:55:59 PM	SENT
Erick G.Kaardal		kaardal@mklaw.com	9/30/2021 8:55:59 PM	SENT

TAB 9
Fifth Court of Appeals Opinion in *Dickson v. Afiya Center*

2021 WL 4771538
Only the Westlaw citation is currently available.

Court of Appeals of Texas, Dallas.

Mark Lee DICKSON and Right to Life East Texas, Appellants
v.
THE AFIYA CENTER and Texas Equal Access Fund, Appellees

No. 05-20-00988-CV
|
Opinion Filed September 8, 2021

Synopsis

Background: Two abortion rights organizations brought a defamation and conspiracy action against an anti-abortion activist and group, asserting activist's statements that called them criminals and murderers were defamatory. Anti-abortion activist and group moved to dismiss under the Texas Citizens Participation Act (TCPA). The 116th District Court, Dallas County, denied anti-abortion activist and group's motion. Anti-abortion activist and group filed an interlocutory appeal.

Holdings: On rehearing, the Court of Appeals, Pedersen, J., held that:

[1] anti-abortion activist's statements were verifiable statements of fact;

[2] anti-abortion activist's statements were false;

[3] abortion rights organizations were not limited-purpose public figures;

[4] circumstantial evidence was sufficient to show anti-abortion activist knew or should have known his statements were made negligently;

[5] anti-abortion activist and group were not entitled to a defense of truth or substantial truth;

[6] anti-abortion activist and group were not entitled to a defense of that statements were constitutionally protected opinions; and

[7] anti-abortion activist and group were not entitled to a defense that statements were rhetorical hyperbole.

Affirmed.

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

West Headnotes (41)

[1] Libel and Slander

An appellate court reviews a trial court's ruling on such a motion to dismiss a defamation action under the Texas Citizens Participation Act (TCPA) de novo. Tex. Civ. Prac. & Rem. Code Ann. § 27.003.

[2] Libel and Slander

In a proceeding under the Texas Citizens Participation Act (TCPA), the appellate court assumes the truth of the nonmovant's evidence in a motion to dismiss a defamation action. Tex. Civ. Prac. & Rem. Code Ann. § 27.003.

[3] Libel and Slander

The elements of the tort of defamation include: (1) the publication of a false statement of fact to a third party (2) that was defamatory concerning the plaintiff, (3) with the requisite degree of fault, and (4) damages, in some cases.

[4] Libel and Slander

Accusing someone of a crime is defamatory per se under common law.

[5] **Libel and Slander**

Accusing someone of a crime, for defamation purposes, is so obviously harmful that general damages, such as mental anguish and loss of reputation, are presumed.

[6] **Libel and Slander**

Generally, "clear and specific evidence," for purposes of a defamation claim, means that the plaintiff must provide enough detail to show the factual basis for its claim.

[7] **Libel and Slander**

The clear and specific evidence standard in a defamation claim does not impose a heightened evidentiary burden or reject the use of circumstantial evidence when determining the nonmovant's prima-facie-case burden.

[8] **Libel and Slander**

In a defamation case implicating the Texas Citizens Participation Act (TCPA), pleadings and evidence that establishes the facts of when, where, and what was said, the defamatory nature of the statements, and how they damaged the plaintiff should be sufficient to resist a TCPA motion to dismiss. Tex. Civ. Prac. & Rem. Code Ann. § 27.003.

[9] **Libel and Slander**

In a defamation case implicating the Texas Citizens Participation Act (TCPA), the appellate court does not scrutinize individual statements; instead, it examines the larger context of the purportedly defamatory conduct by the movant. Tex. Civ. Prac. & Rem. Code Ann. § 27.001 et. seq.

[10] **Libel and Slander**

For purposes of defamation, an actionable statement must assert an objectively verifiable fact, not merely an opinion.

[11] **Libel and Slander**

Merely expressing a defamatory statement in the form of an opinion does not shield it from tort liability because opinions often imply facts.

[12] **Libel and Slander**

For purposes of a defamation claim, even if a 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.

[13] **Libel and Slander**

Determining whether a statement is an actionable fact or non-actionable opinion in a defamation claim is a question of law.

[14] **Libel and Slander**

Anti-abortion activist's statements that abortion rights organizations were criminals and committed murder were verifiable statements of fact, as required to support abortion rights organizations' defamation action after anti-abortion activist and group moved to dismiss the action under the Texas Citizens Participation Act (TCPA); activist's statements regarding the alleged criminality of abortion rights organizations' conduct could be verified by references to the Penal Code, and he continued to make declarations on the salutary effects of a municipal ordinance on the status of the criminal law involving abortion as if they were statements of facts. Tex. Civ. Prac. & Rem. Code Ann. § 27.003; Tex. Penal Code Ann. § 1.03(a).

[15] **Libel and Slander**

Issue of falsity in a defamation action is generally question of fact.

[16] Libel and Slander

A court construes a series of allegedly defamatory statements as whole, in light of surrounding circumstances, and based upon how person of ordinary intelligence would perceive them.

[17] Statutes

As general principle of statutory construction, when term is not defined by statute it bears its common, ordinary meaning, which a court typically determines by looking to dictionary definitions.

[18] Libel and Slander

Anti-abortion activist's statements that abortion rights organizations were criminals and murders were false, as required to support their defamation action after anti-abortion activist and group moved to dismiss under the Texas Citizens Participation Act (TCPA); although municipal ordinance purported to outlaw abortion, it stated on its face that no arm of the government could take any steps to enforce prohibitions that were in conflict with federal law unless and until the right to abortion was overruled, Penal Code specifically created an exception that lawful medical abortions did not fall under definition of criminal homicide, and regardless of activist's stated belief that *Roe v. Wade* was decided incorrectly, abortion was not a crime under state law. Tex. Const. art. 11, § 5; Tex. Civ. Prac. & Rem. Code Ann. § 27.003; Tex. Penal Code Ann. §§ 1.03(a), 19.06.

[19] Libel and Slander

If a person allegedly defamed is a private individual, he must establish defamatory statements were made negligently; a public figure or official must prove actual malice.

[20] Libel and Slander

"Actual malice" in the context of a defamatory statement made about a public figure means that the statement was made with knowledge of its falsity or with reckless disregard for its truth.

[21] Libel and Slander

Courts apply a three-part test to determine whether a party qualifies as a "limited-purpose public figure" to prove actual malice in a defamation action: (1) the controversy at issue must be public both in the sense that people are discussing it and people other than the immediate participants in the controversy are likely to feel the impact of its resolution; (2) the plaintiff must have more than a trivial or tangential role in the controversy; and (3) the alleged defamation must be germane to the plaintiff's participation in the controversy.

[22] Libel and Slander

Whether a party is a limited-purpose public figure to prove actual malice in a defamation action is a question of law for the court.

[23] Libel and Slander

Abortion rights organizations were not "limited-purpose public figures," as would require them to prove that anti-abortion activist acted with actual malice, rather than negligently, in their defamation action after activist made statements calling them criminals and murderers for allegedly violating a municipal ordinance that purported to outlaw abortion; although activist's statements in a social media post did draw many comments from the public, abortion rights organizations were merely targets of the ordinance and social media post, and they otherwise played no part in creating the controversy.

[24] **Libel and Slander**

For purposes of the limited-purpose public figure analysis to prove actual malice in a defamation action, an allegedly defamatory statement cannot be what brought plaintiff into public sphere.

[25] **Libel and Slander**

Circumstantial evidence was sufficient to show anti-abortion activist knew or should have known his statements were made negligently, as would preclude dismissal of abortion rights organizations' defamation and conspiracy action under the Texas Citizens Participation Act (TCPA) after activist made statements that abortion rights organizations were criminals and murderers; municipal ordinance that activist drafted, which purported to outlaw abortion services, specifically stated that abortion was not currently a crime in the state, and activist made a statement on a news show implying he knew abortion was not currently a crime. Tex. Civ. Prac. & Rem. Code Ann. § 27.003.

[26] **Libel and Slander**

Failure to investigate fully is evidence of negligence to support a defamation action for a private individual.

[27] **Conspiracy**

Abortion rights organization sufficiently pled a claim of conspiracy against anti-abortion group for statements an activist made, which claimed abortion rights organizations were criminals and murders, in connection with anti-abortion activist and group's motion to dismiss under the Texas Citizens Participation Act (TCPA) after activist made statements that abortion rights organizations were criminals and murderers; abortion rights organizations' conspiracy claim depended on the anti-abortion group's participation in the alleged defamation, and the trial court had properly refused to dismiss the defamation claim. Tex. Civ. Prac. & Rem. Code Ann. § 27.003.

[28] **Conspiracy**

Civil conspiracy involves combination of two or more persons to accomplish unlawful purpose or to accomplish lawful purpose by unlawful means.

[29] **Conspiracy**

Defendant's liability for conspiracy depends on participation in some underlying tort for which plaintiff seeks to hold at least one of named defendants liable.

[30] **Conspiracy**

In an appeal under the Texas Citizens Participation Act (TCPA), an appellate court does not analyze a trial court's refusal to dismiss a plaintiff's cause of action for conspiracy separately from its refusal to dismiss the plaintiff's underlying cause of action. Tex. Civ. Prac. & Rem. Code Ann. § 27.001 et. seq.

[31] **Libel and Slander**

Abortion rights organizations could claim that anti-abortion group was legally responsible for anti-abortion activist's statements posted on their social media website in connection with anti-abortion activist and group's motion to dismiss a defamation and conspiracy claim under the Texas Citizens Participation Act (TCPA) after activist made statements that abortion rights organizations were criminals and murderers; abortion rights organizations pled their claim against the anti-abortion group directly, rather than derivatively under respondeat superior, and the motion to dismiss under the TCPA was not towards a separate legal action. Tex. Civ. Prac. & Rem. Code Ann. § 27.003.

[32] **Principal and Agent**

Liability for one person's fault may be imputed to another who is himself entirely without fault solely because of a principal-agent relationship between them.

[33] **Appeal and Error**

An appellate court considers all the evidence in determining whether a party established a defensive ground in response to a motion to dismiss under the Texas Citizens Participation Act (TCPA). Tex. Civ. Prac. & Rem. Code Ann. § 27.003.

[34] **Libel and Slander**

Both common law and statute provide that truth and substantial truth are defenses to defamation. Tex. Civ. Prac. & Rem. Code Ann. § 73.005.

[35] **Libel and Slander**

Anti-abortion activist and group failed to establish that they were entitled to judgment as a matter of law on the defense of truth or substantial truth, as would warrant dismissal of abortion rights organizations' defamation and conspiracy action under the Texas Citizens Participation Act (TCPA) after the anti-abortion activist made statements that they were criminals and murderers; although activist believed that abortion statutes continued to impose criminal liability, his belief ignored or rejected the clear language of Penal Code that excepted abortion from the definition of murder, and his reliance on the municipal ordinance, which purported to outlaw abortion, could not conflict with the Penal Codes and other superior authority. Tex. Const. art. 11, § 5; Tex. Civ. Prac. & Rem. Code Ann. § 73.005; Tex. Penal Code Ann. § 19.06.

[36] **Libel and Slander**

A movant seeking to dismiss a defamation action under the Texas Citizens Participation Act (TCPA) cannot carry his step-three burden with self-serving and conclusory affidavits. Tex. Civ. Prac. & Rem. Code Ann. § 27.003.

[37] **Libel and Slander**

Imagining that something may be true is not the same as belief, for purposes of a motion to dismiss a defamation claim under the Texas Citizens Participation Act (TCPA). Tex. Civ. Prac. & Rem. Code Ann. § 27.003.

[38] **Libel and Slander**

Anti-abortion activist and group failed to establish that they were entitled to judgment as a matter of law on the defense of a constitutionally protected opinion, as would warrant dismissal of abortion rights organizations' defamation and conspiracy action under the Texas Citizens Participation Act (TCPA) after the anti-abortion activist made statements that they were criminals and murderers; even though anti-abortion activist had the right to his opinions regarding the validity of *Roe v. Wade* and the criminal status of abortion in the state, he was not sued for his opinions, but rather was sued for publishing statements that called abortion rights organizations criminals and claimed that they committed murder. Tex. Civ. Prac. & Rem. Code Ann. § 27.003.

[39] **Libel and Slander**

Anti-abortion activist and group failed to establish that they were entitled to judgment as a matter of law on the defense that his statements were rhetorical hyperbole, as would warrant dismissal of abortion rights organizations' defamation and conspiracy action under the Texas Citizens Participation Act (TCPA) after the anti-abortion activist made statements that they were criminals and murderers; anti-abortion activist's posts on the group's social media website about a municipal ordinance, which purported to outlaw abortion, could be

reasonably read to believe that activist intended his statements to be taken literally. Tex. Civ. Prac. & Rem. Code Ann. § 27.003.

[40] Libel and Slander

To qualify as rhetorical hyperbole so as to be protected from defamation claim, statement must be understood by ordinary reader as overstatement, rhetorical flourish, that is not intended to be taken literally.

[41] Libel and Slander

A statement that is "rhetorical hyperbole," or extravagant exaggeration that is employed for a rhetorical effect, is not actionable as defamation.

On Appeal from the 116th Judicial District Court, Dallas County, Texas, Trial Court Cause No. DC-20-08104

Attorneys and Law Firms

Elizabeth G. Myers, Jennifer R. Ecklund, John P. Atkins, Dallas, for Appellee.

Jonathan F. Mitchell, D. Bryan Hughes, Charles W. Fillmore, H. Dustin Fillmore III, Fort Worth, for Appellant.

Before Justices Osborne, Pedersen, III, and Nowell

OPINION ON REHEARING

Opinion by Justice Pedersen, III

***1** We deny appellants' August 17, 2021 Motion for Rehearing. On our own motion, we withdraw our August 4, 2021 memorandum opinion and vacate our judgment of that date. We amend one sentence in our original opinion describing the Waskom Ordinance to be certain that it complies faithfully with the record. In all other respects our opinion remains the same. This is now the opinion of the Court.

Appellants Mark Lee Dickson and Right to Life East Texas appeal the trial court's order denying their Second Amended Motion to Dismiss under the Texas Citizens' Participation Act (the Motion to Dismiss). The Motion to Dismiss sought dismissal of all defamation and conspiracy claims brought by appellees, The Afiya Center (TAC) and Texas Equal Access Fund (TEAF). Appellants raise five issues in this Court, contending: appellees failed to produce clear and specific evidence that appellants published a false statement of fact concerning appellees or that appellants acted with actual malice in publishing the statements at issue; appellants established affirmative defenses or constitutional protection of the statements at issue; and appellees failed to produce clear and specific evidence of a conspiracy between appellants or that Right to Life East Texas (RLET) can be held legally responsible for statements published by Dickson. We affirm the trial court's order.

BACKGROUND

Dickson acknowledges in his brief that he "has been encouraging cities throughout Texas to enact ordinances that outlaw abortion within their city limits." Dickson likewise acknowledges his success in this endeavor, identifying seventeen cities that had passed such ordinances at the time of his briefing. The roots of this lawsuit lie in the first such ordinance, which was enacted by the City of Waskom.

The Waskom Ordinance

The original Waskom Ordinance begins with a series of "Findings." For our purposes, the key finding states:

> WHEREAS, a surgical or chemical abortion is the purposeful and intentional ending of a human life, and is murder "with malice aforethought" since the baby in the womb has its own DNA, and at certain points in pregnancy has its own heartbeat and its own brainwaves ...

The ordinance proceeds to a series of four "Declarations," which assert:

1. We declare Waskom, Texas to be a Sanctuary City for the Unborn.

2. Abortion at all times and at all stages of pregnancy is declared to be an act of murder with malice aforethought, subject only to the affirmative defenses described in Section C.3.

3. Organizations that perform abortions and assist others in obtaining abortions are declared to be criminal organizations. These organizations include, but are not limited to:

(a) Planned Parenthood and any of its affiliates;

(b) Jane's Due Process;

(c) The Afiya Center;

(d) The Lilith Fund for Reproductive Equality;

(e) NARAL Pro-Choice Texas;

(f) National Latina Institute for Reproductive Health;

(g) Whole Woman's Health and Whole Woman's Health Alliance;

(h) Texas Equal Access Fund.

***2** 4. The Supreme Court's rulings and opinions in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), *Stenberg v. Carhart*, 530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000), *Whole Woman's Health v. Hellerstedt*, —— U.S. ——, 136 S. Ct. 2292, 195 L.Ed.2d 665 (2016), and any other rulings or opinions from the Supreme Court that purport to establish or enforce a "constitutional right" to abort a pre-born child, are declared to be unconstitutional usurpations of judicial power, which violate both the Tenth Amendment and the Republican Form of Government Clause, and are declared to be null and void in the City of Waskom.

The ordinance goes on to declare abortion and aiding and abetting abortion to be "unlawful acts." In resolution of an earlier lawsuit, the ordinance was amended to remove the list of "criminal organizations," although the ordinance continued to assert that it was an offense to aid and abet an abortion by engaging in conduct such as "[k]nowingly providing transportation to or from an abortion provider" or "[p]roviding money with the knowledge that it will be used to pay for an abortion or the costs associated with procuring an abortion."

The Statements at Issue

Following enactment of the Waskom Ordinance, and during the following months, Dickson made a number of statements on television and on Facebook related to the ordinance he drafted and supported. Along with the ordinance language quoted above, which declared TAC and TEAF to be criminal organizations, appellees referenced five such statements in their petitions—four Facebook posts on Dickson's and RLET's pages and one statement to CNN—and submitted additional Facebook posts during the Motion to Dismiss proceeding.

By way of example, Dickson posted the following statement on Facebook on 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! ... 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 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!

He posted the following on November 26, 2019:

> 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.

And RLET posted this Dickson-authored statement on its Facebook page:

> [A]bortion is freedom in the same way that a wife killing her husband is freedom. Abortion is murder.... Abortion is illegal in Waskom, Texas.

Appellees sued Dickson and RLET, asserting that the statements defamed them by calling them criminal organizations and murderers.

The Motion to Dismiss

Appellants timely filed their Motion to Dismiss in response to appellees defamation claim. In that motion, appellants invoked application of the Texas Citizens' Participation Act (the TCPA) on the bases of their right of free speech, right to petition, and right of association. [1] They charged that TAC and TEAF could not establish by clear and specific evidence (a) that appellants had made a false statement of fact, or (b) that appellants had acted with malice or negligence in making the statements at issue, or (c) that appellees had suffered damages as a result of the statements at issue. However, appellants argued further that—even if TAC and TEAF could establish those elements of their claims by clear and specific evidence—the trial court should still dismiss the claims because the statements were true or substantially true or were constitutionally protected opinion or rhetorical hyperbole, and appellants were thus entitled to judgment as a matter of law. Appellants sought recovery of their costs and attorney's fees. In support of their Motion to Dismiss, appellants submitted copies of what they identify as the Texas abortion statutes; a copy of the amended Waskom Ordinance; and the Affidavit of Mark Lee Dickson.

***3** TAC and TEAF filed their Joint Opposition to Defendants' Second Amended Motion to Dismiss Under The Texas Citizens Participation Act, attaching the following evidence: a copy of the original version of the Waskom Ordinance; copies of each of the published statements relied on in the petitions; the Affidavit of Marsha Jones, co-founder and Executive Director of TAC; the Affidavit of Kamyon Conner, Executive Director of TEAF; and the Declaration of Jennifer Rudenick Ecklund, attorney for TAC and TEAF.

Appellants filed a Reply Brief, which attached a supplemental affidavit from Dickson. [2] The trial court heard the Motion to Dismiss and denied it "on all grounds." This interlocutory appeal followed.

THE TCPA

[1] The purpose of the TCPA is "to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury." TEX. CIV. PRAC. & REM. CODE ANN. § 27.002. The act itself instructs us to construe its provisions liberally "to effectuate its purpose and intent fully." *Id.* § 27.011(b). Litigants invoke the protection of the TCPA through a motion to dismiss, *id.* § 27.003, and we review a trial court's ruling on such a motion de novo, *Vaughn-Riley v. Patterson*, No. 05-20-00236-CV, 2020 WL 7053651, at *2 (Tex. App.—Dallas Dec. 2, 2020, no pet.) (mem. op.).

The TCPA provides a three-step process for determining whether a case should be dismissed. *See generally* *Youngkin v. Hines*, 546 S.W.3d 675, 679–80 (Tex. 2018). At the outset, the movant must demonstrate that the TCPA applies to the legal action brought against it. CIV. PRAC. & REM. § 27.005(b). If the movant meets that burden, then the party bringing the legal action must establish by clear and specific evidence a prima facie case for each essential element of the claim in question. *Id.* § 27.005(c). If the party bringing the action satisfies that requirement, the action will still be dismissed if the movant "establishes an affirmative defense or other grounds on which the moving party is entitled to judgment as a matter of law." *Id.* § 27.005(d). [3]

Step 1: Applicability of the Act

The TCPA applies to a legal action that is based on or is in response to the movant's exercise of the right of free speech, the right to petition, or the right of association. *Id.* § 27.005(b)(1). In both the trial court and this Court, the parties agree that TAC's and TEAF's claims for defamation and conspiracy to defame fall within the TCPA's concept of free speech. Accordingly, we need not address this first step further. *See* *Dallas Morning News, Inc. v. Hall*, 579 S.W.3d 370, 377 (Tex. 2019); *Caracio v. Doe*, No. 05-19-00150-CV, 2020 WL 38827, at *5 (Tex. App.—Dallas Jan. 3, 2020, no pet.) (mem. op.).

Step 2: Clear and Specific Evidence of a Prima Facie Case For the Essential Elements of the Legal Action

[2] Appellants contend that TAC and TEAF have failed to come forward with clear and specific evidence of a prima facie case for the essential elements of their claims for defamation and conspiracy to defame. In this second step, the statute directs us to consider "the pleadings, evidence a court could consider under Rule 166a, Texas Rules of Civil Procedure, and supporting and opposing affidavits stating the facts on which the liability or defense is based." CIV. PRAC. & REM. § 27.006. We consider the pleadings and evidence in the light most favorable to the nonmovant. *Dyer v. Medoc Health Servs., LLC*, 573 S.W.3d 418, 424 (Tex. App.—Dallas 2019, pet. denied); *see also Locke Lord LLP v. Retractable Techs., Inc.*, No. 05-20-00884-CV, 2021 WL 1540652, at *2 (Tex. App.—Dallas Apr. 20, 2021, no pet. h.) (mem. op.). As the supreme court has stated, in a TCPA proceeding "we assume [the] truth" of the nonmovant's evidence. *Rosenthal*, 529 S.W.3d at 440 n.9.

Appellees' Defamation Claim

***4 [3] [4] [5]** The elements of the tort of defamation include "(1) the publication of a false statement of fact to a third party, (2) that was defamatory concerning the plaintiff, (3) with the requisite degree of fault, and (4) damages, in some cases." *In re Lipsky*, 460 S.W.3d 579, 593 (Tex. 2015) (orig. proceeding) (citing *WFAA–TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998)). In this Court, appellants have challenged appellees' proof on the elements of a false statement of fact and the requisite degree of fault. [4]

[6] [7] [8] [9] Generally, clear and specific evidence means that the plaintiff 'must provide enough detail to show the factual basis for its claim.' " *D Magazine Partners, L.P. v. Rosenthal*, 529 S.W.3d 429, 434 (Tex. 2017) (quoting *Lipsky*, 460 S.W.3d at 591). The "clear and specific evidence" standard does not impose a heightened evidentiary burden or reject the use of circumstantial evidence when determining the nonmovant's prima-facie-case burden. *Andrews County v. Sierra Club*, 463 S.W.3d 867 (Tex. 2015). In a defamation case implicating the TCPA, "pleadings and evidence that establishes the facts of when, where, and what was said, the defamatory nature of the statements, and how they damaged the plaintiff should be sufficient to resist a TCPA motion to dismiss." *Lipsky*, 460 S.W.3d at 591. We do not scrutinize individual statements; instead, we examine the larger context of the purportedly defamatory conduct by the movant. *See, e.g.*, *Bentley v. Bunton*, 94 S.W.3d 561, 581 (Tex. 2002) (considering series of statements during "Bunton's efforts over many months to prove Bentley corrupt").

(1) Evidence that Appellants' Statements Were Statements of Fact

[10] [11] [12] [13] Again, TAC and TEAF limit their defamation claim to assertions that they are criminal organizations and that their conduct in assisting a woman terminating her pregnancy literally amounts to murder. [5] To determine whether such assertions were statements of fact, we focus on the statements' verifiability and the context in which they were made. *Id.* at 583. An actionable statement must assert an objectively verifiable fact, not merely an opinion. *Campbell v. Clark*, 471 S.W.3d 615, 625 (Tex. App.—Dallas 2015, no pet.). However, "[m]erely expressing a defamatory statement in the form of an 'opinion' does not shield it from tort liability because opinions often imply facts." *Backes v. Misko*, 486 S.W.3d 7, 24 (Tex. App.—Dallas 2015, pet. denied); *see also, e.g.*, *Bentley*, 94 S.W.3d at 583 ("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. *Bentley*, 94 S.W.3d at 583. Determining whether a statement is actionable fact or non-actionable opinion is a question of law. *Scripps NP Operating, LLC v. Carter*, 573 S.W.3d 781, 795 (Tex. 2019).

***5** **[14]** We ask, then, whether the statements at issue—that TAC and TEAF are criminal organizations and that they commit murder—are verifiable. Can we determine as a matter of fact whether the conduct with which a party has been charged is criminal or is murder? Stated differently, can we verify the status of the law as to a particular offense at the time of a particular statement? We conclude that we can, because our state's criminal law is gathered and written in the Texas Penal Code. And while it is true that a municipal ordinance may also identify conduct that constitutes an offense, *see* TEX. PENAL CODE ANN. § 1.03(a), the Texas Constitution provides that no such ordinance "shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State." TEX. CONST. art. XI, § 5; *City of Richardson v. Responsible Dog Owners of Tex.*, 794 S.W.2d 17, 19 (Tex. 1990).

Appellees' evidence included the statements alleged to be defamatory and identified when they were made and how they were published; appellants do not dispute those fundamental facts. We conclude that the gist of these statements, i.e., that appellees are criminal organizations and that their conduct amounts to murder, can be verified by reference to the Texas Penal Code. Indeed, among the objectives of that code are "by definition and grading of offenses to give fair warning of what is prohibited and of the consequences of violation," and "to safeguard conduct that is without guilt from condemnation as criminal." PENAL § 1.02(2), (4).

We also look to the context in which the statements were made. Dickson purports to pronounce the salutary effect of the Waskom Ordinance on the status of the criminal law involving abortion in Texas; he describes it as "history in the making." He expresses confidence that "[i]n 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." As he describes the effect of this first ordinance, and the effect he anticipates passage of similar ordinances throughout the state will have, he is purporting to inform the public of a change in the criminal law. Dickson claims to have made significant efforts to determine the status of the law, and—based on those efforts—he made statements declaring appellees to be criminal organizations and murderers. We conclude he made those declarations, and continues to make them, as statements of fact. *See generally* *Bentley*, 94 S.W.3d at 585 ("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.").

(2) Evidence that Appellants' Statements Were False.

[15] Appellees' burden on this element was to produce clear and specific evidence that appellants' statements calling TAC and TEAF criminals and asserting that they are committing murder when they provide assistance to a woman seeking to terminate a pregnancy are false. The issue of falsity is generally a question of fact. *Bentley*, 94 S.W.3d at 587 (if evidence is disputed, falsity must be determined by finder of fact). In this case, however—where the gist of the defamation issue turns on the status of the criminal law concerning abortion—much of our analysis must be guided by that law.

[16] We construe a series of allegedly defamatory statements as a whole, in light of the surrounding circumstances, and based upon how a person of ordinary intelligence would perceive them. *See* *Lipsky*, 460 S.W.3d at 594 ("While some of the statements may, in isolation, not be actionable, ... the gist of his statements were that Range was responsible for contaminating his well water and the Railroad Commission was unduly influenced to rule otherwise."). We have concluded that a statement concerning the status of the criminal law is verifiable by reference to the penal code, whether directly or indirectly by comparing a local ordinance to that code. Accordingly, to adjudge appellees' evidence of falsity, we look first to the penal code to discern whether the conduct alleged by appellants could reasonably be declared criminal.

***6** **[17]** The penal code does not define the term "criminal" or its root word, "crime." As a general principle of statutory construction, when a term is not defined by statute it bears its common, ordinary meaning, which we typically determine by looking to dictionary definitions. *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 838 (Tex. 2018). Merriam-Webster defines a "crime" as "an illegal act for which someone can be punished by the government." *Crime*, MERRIAM-WEBSTER.COM DICTIONARY, www.merriam-webster.com/dictionary/crime (last visited

July ___, 2021). Appellees' evidence includes a copy of the original Waskom Ordinance, which ordinance provides:

> Neither the City of Waskom, nor any of its officers or employees, nor any district or county attorney, nor any executive or administrative officer or employee of any state or local governmental entity, shall take any steps to enforce this ordinance against a person or entity that commits an unlawful act described in Section C, unless and until the Supreme Court overrules *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), and permits states and municipalities to once again enforce abortion prohibitions.

[18] Thus, although the ordinance purports to outlaw abortion and any conduct that assists in the procurement of an abortion, it states on its face that no arm of the government can take any steps to enforce those prohibitions "unless and until" the Supreme Court's opinions securing a right to abortion are overruled. Thus, the ordinance itself serves as evidence that assisting women in terminating a pregnancy is not "an illegal act for which someone can be punished by the government," i.e., that such assistance is not a crime.

The statements at issue, submitted by appellees as evidence below, repeatedly declare that abortion is murder. The ordinance asserts: "Abortion at all times and at all stages of pregnancy is declared to be an act of murder with malice aforethought." Appellees argue that the definition of murder in the Texas Penal Code establishes that this is false. The code states that a person commits the offense of murder "if he: (1) intentionally or knowingly causes the death of an individual." PENAL § 19.02(b)(1). And the code defines the term "individual" to mean "a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth." *Id.* § 1.07(a)(26). However, appellees correctly point out that the code makes a specific exception to the chapter on criminal homicide, stating:

> This chapter does not apply to the death of an unborn child if the conduct charged is:
>
> (1) conduct committed by the mother of the unborn child; [or]
>
> (2) a lawful medical procedure performed by a physician or other licensed health care provider with the requisite consent, if the death of the unborn child was the intended result of the procedure.

Id. § 19.06. Thus, the Texas Legislature has created a specific exception to the definition of murder for an abortion performed lawfully.

Section 19.06 became the law in Texas after our statutes outlawing abortion were declared unconstitutional by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). Shortly after *Roe* was decided, the Texas Attorney General was asked to explain the status of Texas law concerning abortion and, after addressing *Roe* and its effect, he stated: "Therefore, there presently are no effective statutes of the State of Texas against abortion, per se." Tex. Att'y Gen. Op. No. H-369, 3 (1974). When appellants made their statements decades later, *Roe v. Wade* and its progeny continued to be binding law in Texas. *See, e.g., Ex parte Twedell*, 158 Tex. 214, 228, 309 S.W.2d 834 (1958) (Texas Supreme Court is "duty bound to follow the Supreme Court of the United States" when construing U.S. Constitution); *see also Ex parte Evans*, 537 S.W.3d 109, 111 (Tex. Crim. App. 2017) ("The ultimate authority on federal constitutional law is the U.S. Supreme Court."). [6]

***7** If further clarification of the status of Texas criminal law regarding abortion were necessary, it was recently supplied by the Presiding Judge of the Texas Court of Criminal Appeals, who stated in unambiguous terms: "A mother choosing to abort her unborn child is not a crime under Texas law." *State v. Hunter*, 624 S.W.3d 589 (Tex. Crim. App. 2021) (concurring in denial of review). The defendant in *Hunter* was charged, *inter alia*, with solicitation to commit capital murder based on text messages sent to his girlfriend requesting that she obtain an abortion. *State v. Hunter*, 606 S.W.3d 836, 837 (Tex. App.—Austin 2020, pet. refused). The trial court granted a defense motion to quash and dismiss the solicitation count of the indictment, and the court of appeals affirmed that order.

Id. Presiding Judge Keller explained her reason for denying the State's petition for review, writing:

> My reason to refuse review is simple: The State's indictment does not charge a crime under the laws of the State of Texas, the Court of Appeals's resolution was correct, and the correct resolution *is so obvious* that we need not grant review. A mother choosing to abort her unborn child is not a crime under Texas law, so the defendant cannot be guilty of the offense of solicitation for soliciting such a crime.

Hunter, 624 S.W.3d 589 (emphasis added). And as to the specific question of the charge of murder, she stated, "[T]he entire homicide chapter of the Penal Code, including the provision proscribing the offense of murder, 'does not apply' to the mother ending the unborn child's life." *Id.*

The Motion to Dismiss contends that the Waskom Ordinance negates section 19.06 of the penal code by declaring abortion to be unlawful within that city. However, neither the Waskom Ordinance, nor any other edict by local government, may conflict with this legislative exception. TEX. CONST. art. XI, § 5. And regardless of appellants' stated belief that *Roe* was incorrectly decided, our attorney general in 1974, and our highest criminal court today, have acknowledged that abortion is not a crime under Texas law.

Our task in this opinion, however, is not to rule on the viability of the Waskom Ordinance. In this preliminary proceeding under the TCPA we must limit our ruling to whether the parties carried their respective burdens under that statute. We conclude that appellees have offered clear and specific evidence—and a cogent legal argument—making a prima facie case that they have not committed a crime generally, or murder specifically, while engaging in any conduct condemned by appellants. Accordingly appellees have carried their step-two burden as to the element of falsity.

We overrule appellants' first issue.

(3) Evidence that Appellants Acted With the Requisite Mental State

[19] **[20]** In their second issue, appellants argue that TAC and TEAF failed to produce clear and specific evidence sufficient to provide a prima facie case that appellants made the statements at issue with actual malice. If the person allegedly defamed is a private individual, he must establish the defamatory statements were made negligently; a public figure or official must prove actual malice. *Lipsky*, 460 S.W.3d at 593. " 'Actual malice' in this context means that the statement was made with knowledge of its falsity or with reckless disregard for its truth." *Id.*

[21] **[22]** **[23]** Appellants contend that appellees are "limited-purpose public figures," and thus, that appellees must establish appellants made their statements with actual malice as opposed to negligence. We apply a three-part test to determine whether a party qualifies as a limited-purpose public figure:

> (1) the controversy at issue must be public both in the sense that people are discussing it and people other than the immediate participants in the controversy are likely to feel the impact of its resolution;
>
> ***8** (2) the plaintiff must have more than a trivial or tangential role in the controversy; and
>
> (3) the alleged defamation must be germane to the plaintiff's participation in the controversy.

Neely v. Wilson, 418 S.W.3d 52, 70 (Tex. 2013). Whether a party is a limited-purpose public figure is a question of law for the court. *Id.* The "controversy at issue" in this case concerns the Waskom Ordinance and its ability to outlaw abortion within the city of Waskom. While we cannot adjudge how large a group of people are "discussing it," appellees' evidence includes Facebook posts, which are followed by many comments from the public. Moreover, appellees' evidence indicates that they have been contacted by a number of people who have heard about—and been confused by—the ordinance and appellants' statements concerning its effect. We also agree with appellants that people other than these parties are likely to feel the impact of its resolution, given that the Waskom Ordinance applies to all the city's residents and that Dickson's efforts have motivated a number of other cities

to adopt similar ordinances. Thus the evidence satisfies the first factor of the *Neely* test.

[24] However, the second and third factors of the test address the role of TAC and TEAF in this controversy. The evidence establishes that TAC and TEAF are solely targets of the ordinance, otherwise playing no role in creating the subject controversy. The Supreme Court has explained that "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Hutchinson v. Proxmire*, 443 U.S. 111, 135, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979). "[T]he allegedly defamatory statement cannot be what brought the plaintiff into the public sphere." *Neely*, 418 S.W.3d at 71. In this case, it was precisely the allegedly defamatory statements—beginning with the ordinance's declaration that TAC and TEAF were criminal organizations—that brought appellees into any public controversy involving the Waskom Ordinance. As the Connor and Jones affidavits state:

> It was not until Defendants began shopping around a draft ordinance in the summer of 2019 that [appellees] even realized that the Defendants and others were alleging [their] mission and operations were in violation of criminal law. Until that time, neither [appellees] nor [their] agents made any public statements or engaged in any debate about the question of whether [appellees were] currently violating any criminal law.

We conclude that these appellees were drawn involuntarily into the controversy spawned by the Waskom Ordinance and that they are not limited purpose public figures. *See* *Neely*, 418 S.W.3d at 71 ("[N]either the United States Supreme Court nor this Court has found circumstances in which a person involuntarily became a limited-purpose public figure.").

[25] Accordingly, to meet their step-two burden on the element of appellants' mental state, appellees need only have offered clear and specific evidence of a prima facie case that appellants made the statements at issue negligently. To carry that burden, TAC and TEAF had to show that appellants knew or should have known that their statements calling appellees criminal organizations and murderers were false. *See* *id.* at 72. They could make this showing of appellants' state of mind through circumstantial evidence. *Bentley*, 94 S.W.3d at 591.

***9** Dickson's affidavits assert his belief that abortion remains a crime in Texas. He asserts that he consulted a lawyer, carefully researched "case law and legal scholarship," and concluded that (a) the Waskom Ordinance successfully rendered abortion unlawful, and thus a criminal offense in that city, and (b) because the Texas Legislature never repealed the abortion statutes declared unconstitutional by the Supreme Court in *Roe*, "the law of Texas continues to define abortion as a criminal offense."[7]

We begin the inquiry—as we did the inquiry into falsity—with the Waskom Ordinance itself. And we look again to the ordinance's directive that the government may not enforce its provisions "unless and until the Supreme Court overrules *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), and permits states and municipalities to once again enforce abortion prohibitions." Just as this provision of the ordinance directly evidences the fact that abortion is not currently a crime, it provides circumstantial evidence that Dickson knew when he drafted the ordinance that abortion was not currently a crime. Likewise, Dickson's statement to CNN about the Waskom Ordinance implies that he knew that abortion was not currently a crime. He told CNN that "[t]he 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." The statement may be ambiguous about what happens now, but it is clear that Dickson understood the penalties would only "come crashing down" *after* the status of the law changes. We conclude that the ordinance Dickson drafted, and his statements about it, evidence—at a minimum—a serious question in his mind as to whether abortion was currently a crime in Texas.

After *Roe* declared Texas's abortion statutes unconstitutional, the Texas Legislature transferred those laws to articles 4512.1 through 4512.6 of the Revised Civil Statutes. Appellants' second legal theory posits that

unconstitutional but unrepealed criminal statutes continue to identify criminal conduct in Texas. This theory relies heavily upon a law review article, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933 (2018), authored by Jonathan Mitchell, who is serving as one of appellants' attorneys of record in this Court. Dickson's affidavit states that, although the article does not address the status of Texas's unconstitutional abortion statutes, it explains that "the Supreme Court lacks any power to formally revoke or 'strike down' statutes that it declares unconstitutional, and that those statutes continue to exist as laws until they are repealed by the legislature that enacted them." Dickson states that this article "further confirmed [his] belief that abortion remains a 'criminal' offense under Texas law, despite the Court's ruling in *Roe v. Wade*."

***10** Appellants' Texas legal authority for this conclusion is limited to a single footnote in a Texas Supreme Court case on an unrelated issue. In *Pidgeon v. Turner*, 538 S.W.3d 73, 75 (Tex. 2017), taxpayers sought an injunction to prohibit the city of Houston from providing employee benefits to same-sex spouses of city employees who had been legally married in other states. The trial court granted the injunction, but while the case was pending on appeal, the United States Supreme Court decided *Obergefell v. Hodges*, and held that states may not exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples. 576 U.S. 644, 675–76, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015). The *Pidgeon* court of appeals reversed the temporary injunction. 538 S.W.3d at 76. The Texas Supreme Court vacated the injunction and remanded the case to the trial court. It concluded that *Obergefell* did not require states to provide the same publicly funded benefits to all married persons, and the parties should have the opportunity to develop that issue, and others, at trial. *Id.* at 86–87. In the course of that discussion, the court dropped this footnote:

> We note that neither the Supreme Court in *Obergefell* nor the Fifth Circuit in *De Leon* "struck down" any Texas law. 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. Thus, the Texas and Houston DOMAs remain in place as they were before *Obergefell* and *De Leon*, which is why Pidgeon is able to bring this claim.

Id. at 88 n.21.

Our colleagues on the El Paso court of appeals have rejected reliance on the *Pidgeon* footnote in another context. In *Zimmerman v. City of Austin*, 620 S.W.3d 473, 476 (Tex. App.—El Paso 2021, pet. filed), Zimmerman challenged the city's allocation of $150,000 for "abortion access logistical support services." He alleged that the City's proposed expenditures were *ultra vires* because they violate the state's abortion laws, which made it a crime to assist a woman in procuring an abortion. *Id.* at 477. He argued that—because the Texas Legislature never repealed the statutes—"they remained in effect for any application outside of that addressed in *Roe v. Wade*." *Id.* at 477–78, 93 S.Ct. 705. He contended that the City's proposed expenditures "would in effect assist women in obtaining an abortion in conflict with these unrepealed statutes." *Id.* at 478.

The El Paso court identified four "problems" with relying on the *Pidgeon* footnote. We summarize them briefly:

> (1) The opinion in *Pidgeon* focused on two facts—*Obergefell* did not directly address the constitutionality of any laws in Texas, and the trial court had not yet had the opportunity to examine the scope and extent of *Obergefell*'s holding as it applied to the Texas laws at issue. *Roe*, in contrast, was fully litigated up to the United States Supreme Court, which specifically declared the Texas abortion statutes unconstitutional.
>
> (2) The rationale expressed by the *Pidgeon* footnote, i.e., that an unconstitutional statute "remains in place unless and until the body that enacted it repeals it," does not necessarily mean the Texas abortion statutes still have any enforceable effect. Even if the court does no more than declare that the courts will not enforce an unconstitutional law, no court would have a basis to enforce the Texas abortion statutes.

(3) The *Pidgeon* footnote has not been validated by subsequent opinions from the Texas Supreme Court. Instead, the Court has more recently treated statutes that have been declared unconstitutional as null and void and has stated that an offense created by an unconstitutional statute "is not a crime." *See, e.g., Ex parte E.H.*, 602 S.W.3d 486, 494 (Tex. 2020) (recognizing that an "unconstitutional law is void, and is no law," and that an offense created by an unconstitutional statute "is not a crime").

(4) The Court of Criminal Appeals recognized over a century ago, when a legislative act is declared to be unconstitutional, the act is "absolutely null and void," and has "no binding authority, no validity [and] no existence." *See Ex parte Bockhorn*, 62 Tex. Crim. 651, 138 S.W. 706, 707 (Tex. Crim. App. 1911) (pronouncing that an unconstitutional law should be viewed as "lifeless," as "if it had never been enacted," given that it was "fatally smitten by the Constitution at its birth).

***11** *Id.* at 484–85. The court concluded that the unconstitutional abortion statutes could not serve as a basis for Zimmerman to challenge the City's budget allocation. *Id.* at 486.

Likewise, we conclude that the *Pidgeon* footnote cannot defeat appellee's evidence and legal argument showing that appellants knew or should have known that appellees were not criminals or murderers under Texas law. To the extent that later cases have not implicitly overruled the footnote, we conclude that it represents no more than an interesting metaphysical theory of where and how unrepealed and unconstitutional statutes exist. The footnote does not support a legal argument that unrepealed and unconstitutional statutes can be enforced in any fashion. To the extent those statutes continue to exist, it is not as part of the criminal law of the State of Texas. A violation of such a statute is not a crime.

[26] We conclude that anyone making a serious investigation into the status of Texas criminal law would learn that the overwhelming body of that law confirms that a mother's termination of a pregnancy is not a crime and is certainly not murder.[8] Thus, we conclude that TAC and TEAF have carried their TCPA step-two burden to make a prima facie case that appellants knew or should have known that their statements declaring appellees criminal organizations and accusing them of murder were false. We overrule appellants' second issue.

Appellees' Conspiracy Claim

[27] Appellees also pleaded a claim against both appellants alleging that they conspired to defame appellees. In their fourth issue, appellants contend that appellees failed to produce clear and specific evidence of a conspiracy between them.

[28] **[29]** A civil conspiracy involves a combination of two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996) (orig. proceeding). "[A] defendant's liability for conspiracy depends on participation in some underlying tort for which the plaintiff seeks to hold at least one of the named defendants liable." *Id.* Thus, appellees' conspiracy claim depends on appellants' participation in the alleged defamation.

[30] In a TCPA appeal, we do not analyze a trial court's refusal to dismiss a plaintiff's cause of action for conspiracy separately from its refusal to dismiss the plaintiff's underlying cause of action. *See Minett v. Snowden*, No. 05-18-00003-CV, 2018 WL 2929339, at *11 (Tex. App.—Dallas June 12, 2018, pet. denied) (mem. op.). Therefore, because we have determined that the trial court properly refused to dismiss appellants' defamation claim, we conclude that it did not err by refusing to dismiss the conspiracy to defame claim as well. *See id.*

We overrule appellant's fourth issue.

Derivative Liability of RLET

[31] In their fifth issue, appellants argue that appellees have failed to produce clear and specific evidence establishing that RLET should be legally responsible for statements published only by Dickson. Appellants acknowledge that two of the statements identified by appellees' petition that were authored by Dickson were posted by RLET on its Facebook page. They contend that all other statements at issue were published only by Dickson.

***12** **[32]** Appellees, however, have pleaded that RLET is liable directly—not derivatively through respondeat superior—for Dickson's statements. Regardless, to the extent that such

derivative liability is or becomes an issue in this case, it is not an issue for the TCPA. A motion to dismiss under the TCPA must be directed at a "legal action." CIV. PRAC. & REM. § 27.003. That term is defined to mean "a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal, declaratory, or equitable relief." *Id.* § 27.001(6). The common law doctrine of respondeat superior is not the equivalent of these requests for relief: it is instead a recognition that "liability for one person's fault may be imputed to another who is himself entirely without fault solely because of the relationship between them." *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 540 (Tex. 2002). Because it is not a separate legal action, we do not address it separately from the underlying cause of action for defamation in a TCPA motion to dismiss. *Jones v. Pozner*, No. 03-18-00603-CV, 2019 WL 5700903, at *1 n.2 (Tex. App.—Austin Nov. 5, 2019, pet. denied) (mem. op.).

We overrule appellants' fifth issue.

Step 3: Proof of Defense as a Matter of Law

[33] In their third issue, appellants contend that—even if appellees have produced clear and specific evidence of the essential elements of their defamation claim—appellants are entitled to judgment based on their defensive theories. Appellants' burden in the proceeding below was to establish such a defense or ground as a matter of law. CIV. PRAC. & REM. § 27.005(d). We consider all the evidence in determining whether appellants established a defensive ground. *D Magazine Partners, L.P. v. Rosenthal*, 475 S.W.3d 470, 480–81, 488 (Tex. App.—Dallas 2015), aff'd in part, rev'd in part, 529 S.W.3d 429 (Tex. 2017).

Truth or Substantial Truth

[34] Both common law and statute provide that truth and substantial truth are defenses to defamation. *Neely*, 418 S.W.3d at 62 (citing CIV. PRAC. & REM. § 73.005, *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 115 (Tex. 2000)). Appellants contend that all statements for which they have been sued are true or, at the very least, substantially true.

[35] Appellants' evidence of this defense is Dickson's affidavit testimony. There he states that he believes the Texas abortion statutes continue to impose criminal liability on anyone who "furnishes the means for procuring an abortion knowing the purpose intended," citing article 4512.2. He also testifies that he believes an ordinance that outlaws abortion within its city limits successfully eliminates the legal status of abortion in that city. And as to the pronouncements of the United States Supreme Court, Dickson states:

> I understand that the Court's decision in *Roe v. Wade* means that the federal judiciary is unlikely to sustain criminal convictions obtained under the Texas abortion statutes for as long as the Court adheres to the notion that abortion is a constitutional right. I also understand that *Roe* makes it unlikely that any prosecutor in Texas will attempt to bring criminal charges against abortion providers for their violations of state law because the courts are unlikely to uphold those convictions until *Roe* is overruled. But none of that changes the fact that the law of Texas continues to define abortion as a criminal offense. I believed (and continue to believe) that it is truthful to call abortion a "crime" under state law even if abortion providers are not currently being prosecuted for their criminal acts. I believed (and continue to believe) that a person or organization that breaks a criminal statute is a "criminal"—regardless of whether they are ultimately prosecuted and punished for their unlawful conduct.

Finally, Dickson asserts that he did not act negligently (or with reckless disregard, as actual malice requires) in making the statements at issue because he "carefully researched the law and consulted with legal counsel" before publishing them.

***13** **[36]** **[37]** A TCPA movant cannot carry his step-three burden with self-serving and conclusory affidavits. *Camp v. Patterson*, No. 03-16-00733-CV, 2017 WL 3378904, at *10 (Tex. App.—Austin Aug. 3, 2017, no pet.) (mem. op.). "Imagining that something may be true is not the same as belief." *Bentley*, 94 S.W.3d at 596.

To reach the legal conclusions he does, Dickson ignores or rejects out of hand: the clear language of penal code section 19.06 excepting abortion from the definition of murder; article XI, section 5 of the Texas Constitution, which prohibits a local government provision from conflicting with the penal code; opinions of the Texas Attorney General, the Texas Supreme Court, and the Texas Court of Criminal Appeals, which acknowledge that once declared unconstitutional, a statute has no legal effect; and the pronouncements of the United States Supreme Court that declare a constitutional right of a woman to terminate a pregnancy. He relies instead upon a law review article and a strained interpretation of a single footnote that subsequent cases may have implicitly overruled. *See In re Lester*, 602 S.W.3d 469, 483 (Tex. 2020) (J. Blacklock dissenting) ("[T]he Court overrules *sub silentio* its prior, correct statement—just three years ago—regarding judicial declarations of the unconstitutionality of statutes ... 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.").

The gist of appellants' statements is that TAC and TEAF are criminal organizations whose conduct amounts to murder. We concluded above that appellees' evidence and legal argument have made a prima facie case that those statements are not true. We have considered appellants' evidence and legal argument in rebuttal to appellees' proof. We conclude that appellants have failed to establish they are entitled to judgment as a matter of law on the defense of truth or substantial truth.

Constitutionally Protected Opinion

[38] Appellants' argument here is straightforward: Dickson argues he has the right to believe that the Supreme Court was wrong in *Roe v. Wade* when it concluded there was a right to abortion in the Constitution. We agree that Dickson has a right to his opinion. But he has not been sued on the basis of that opinion; he has been sued for publishing statements that call TAC and TEAF criminal organizations that commit murder. If those statements are proven at trial to be defamatory, his personal opinions about *Roe v. Wade* will not provide him, or RLET, a defense. Simply put, while Dickson has the right to his opinions, he does not have the right to defame someone who disagrees with those opinions. TAC and TEAF have raised fact issues in support of their defamation claim. Appellants have not established that they are entitled to judgment as a matter of law on the basis of any constitutionally protected opinion.

Rhetorical Hyperbole

[39] **[40]** **[41]** Finally, appellants argue that they are entitled to judgment as a matter of law because their statements were merely rhetorical hyperbole. We have called the concept of rhetorical hyperbole "extravagant exaggeration [that is] employed for rhetorical effect." *Backes*, 486 S.W.3d at 26. Such a statement is not actionable as defamation. *Id.* But to qualify as rhetorical hyperbole so as to be protected from a defamation claim, a statement must be understood by the ordinary reader as an overstatement, a rhetorical flourish, that is not intended to be taken literally. *See, e.g.*, *Greenbelt Co-op. Pub. Ass'n v. Bresler*, 398 U.S. 6, 14, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970) ("even the most careless reader" would recognize that calling a proposal "blackmail" was rhetorical hyperbole used by those who considered the negotiating position extremely unreasonable; the record contained no evidence that anyone thought proposal maker had been charged with a crime); *Marble Ridge Capital LP v. Neiman Marcus Group, Inc.*, 611 S.W.3d 113, 125 (Tex. App.—Dallas 2020, pet. dism'd) (statement concerning "theft of assets" did not qualify as rhetorical hyperbole because reasonable persons would understand the phrase to mean that "entities with a rightful claim to the assets were being harmed by the designations and transactions about which [the party] complained").

***14** Appellants contend that their statements accusing TAC and TEAF of aiding and abetting murder or criminal acts qualify as protected rhetorical hyperbole "so long as the context makes clear that the accusations refer only to plaintiffs' involvement in abortion and nothing more." They support this contention with citations to two sources in which the speakers did not mean either (a) their allegations

that abortion is murder literally or (b) that an activist who identified on his website a doctor who performed abortions was legally responsible for the doctor's murder. *See* *Horsley v. Rivera*, 292 F.3d 695, 702 (11th Cir. 2002) (when doctor who performed abortions was murdered, television host's calling anti-abortionist an "accomplice to murder" was rhetorical hyperbole; no reasonable viewer would conclude host was literally contending that activist could be charged with murder); *see also* 1 Rodney A. Smolla, *Law of Defamation* § 4:13 (2d ed. 2005) (protesters at abortion clinic with signs declaring doctor a murderer "obviously" do not intend charge to be taken literally). These sources do not stand for the proposition that one can use defamatory language and be protected so long as the language refers to abortion in some manner. Instead, they instruct that—to avoid liability for defamation on the basis of rhetorical hyperbole—the speaker must show that a reasonable person would not understand that he meant the statement literally.

In this case, RLET published Dickson's assertion on Facebook: "We said what we meant and we meant what we said. Abortion is illegal in Waskom, Texas." And in a June 14 Facebook post, Dickson posed the key question and then answered it himself:

> Is abortion literally murder?
>
> Yes. The fact that 'abortion is literally murder' is why so many people want to outlaw abortion within the city limits of their cities. If you want to see your city pass an enforceable ordinance outlawing abortion be sure to sign the online petition.

We conclude that a reasonable person reading appellants' statements calling TAC and TEAF criminals and murderers could believe that appellants intended the statements literally. When we consider all the evidence before the trial court, we conclude appellants failed to establish as a matter of law that the statements at issue were merely rhetorical hyperbole.

Appellants have failed to carry their third-step burden to prove they are entitled to judgment as a matter of law on any of their defensive theories. We overrule their third issue.

CONCLUSION

We affirm the trial court's order.

All Citations

--- S.W.3d ----, 2021 WL 4771538

Footnotes

1 The appellees' original petitions, later consolidated by agreement, were both filed on June 11, 2020. Accordingly, this case is governed by the amended version of the TCPA that became effective September 1, 2019. Act of May 17, 2019, 86th Leg., R.S., ch. 378, § 11, 2019 Tex. Sess. Law Serv. 684, 687.

2 The reply also attached affidavits from appellants' counsel, Jonathan Mitchell, and a law professor, Michael Stokes Paulsen. Those affidavits were stricken by the trial court in their entirety, and appellants have not complained of their exclusion in this Court.

3 Prior to the 2019 amendments to the TCPA, the third step provided for dismissal "if the moving party establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim."

4 Appellants do not challenge appellees' evidence as to whether the statements at issue were defamatory, i.e., whether they tended "to injure [appellees'] reputation, to expose [them] to public hatred, contempt, ridicule, or financial injury, or to impeach [their] integrity, honesty, or virtue." *Backes v. Misko*, 486 S.W.3d 7, 24 (Tex. App.—Dallas 2015, pet. denied). Accusing someone of a crime is defamatory per se under Texas common law. *Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d 614, 638 (Tex. 2018). Such an accusation is "so obviously harmful that general damages, such as mental anguish and loss of reputation, are presumed." *Id.* (citing *Lipsky*, 460 S.W.3d at 596). Thus, appellants do not challenge evidence of the element of damages either.

5 In their letter to appellants seeking retraction, appellees stressed: “We are not asking you to change your political views or cease advocating for them. All we ask is that you ... retract[ ] any allegations that these organizations or their agents have broken or are breaking any laws.” Throughout this lawsuit, appellees have similarly limited their action to charges that they have committed crimes; they specifically except from any complaint appellants’ opinions concerning abortion.

6 The Waskom Ordinance recites:

> *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (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[.]

Appellants cite no legal authority for the proposition that a city may, by adopting an ordinance, declare a United States Supreme Court opinion “lawless and illegitimate” and thereby ignore its pronouncements.

7 TAC and TEAF have argued that the Texas Legislature impliedly repealed the abortion statutes by regulating the process of abortion in Texas. In supplemental briefing, appellants point out that the legislature recently included the following statement in a statute that will become effective September 1, 2021:

> The legislature finds that the State of Texas never repealed, either expressly or by implication, the state statutes enacted before the ruling in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), that prohibit and criminalize abortion unless the mother's life is in danger.

Senate Bill 8 § 2. In this opinion, we do not rely upon, and express no opinion concerning, the question of repeal by implication.

8 While discussing the higher standard of actual malice, our supreme court stated: “A failure to investigate fully is not evidence of actual malice; a purposeful avoidance of the truth is.” *Bentley*, 94 S.W.3d at 596. A failure to investigate fully is evidence of negligence.

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TAB 10
Dallas Morning News
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.

Attorneys and Law Firms

Stephen Chambers, 3445 Potomac Ave., Dallas TX 75205, pro se.

Eugene Volokh, Scott & Cyan Banister First, Amendment Clinic, UCLA, School of Law, 405 Hilgard Ave., Los Angeles

CA 90095, Russell Falconer, Gibson, Dunn & Crutcher LLP, 2100 McKinney Avenue, Suite 1100, Dallas TX 75201-6912, James A. Hemphill, Graves Dougherty Hearon & Moody PC, 401 Congress Avenue, Suite 2200, Austin TX 78701, for Amicus Curiae.

Paul C. Watler, Jackson Walker LLP, 2323 Ross Avenue, Suite 600, Bank of America Plaza, Dallas TX 75201, Wallace B. Jefferson, Jefferson & Townsend LLP, 515 Congress Avenue, Suite 2350, Austin TX 78701-3562, Rachel A. Ekery, Alexander Dubose, Jefferson & Townsend LLP, 515 Congress Avenue, Suite 2350, Austin TX 78701-3562, Shannon Z. Teicher, Jackson Walker L.L.P., 2323 Ross Avenue, Suite 600, Dallas TX 75202-2725, for Petitioner.

Joseph D. Sibley IV, Camara & Sibley LLP, 4400 Post Oak Pkwy., Suite 2700, Houston TX 77027, for Respondent.

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 11
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

On December 22, 2021, this document was served electronically on the following counsel of record for Respondents via email and via the Court's electronic filing system.

Jonathan F. Mitchell
Texas Bar No. 24075463
Mitchell Law PLLC
111 Congress Ave., Suite 400
Austin, Texas 78701
512-686-3940
jonathan@mitchell.law

D. Bryan Hughes
Texas Bar No. 00793995
Law Office of D. Bryan Hughes
110 North College, Ave., Suite 207
903-581-1776 (phone)
bryan@hughesfirm.com

H. Dustin Fillmore III
Texas Bar No. 06996010
Charles W. Fillmore
Texas Bar No. 00785861
The Fillmore Law Firm, LLP
1200 Summit Ave., Suite 860
Fort Worth, Texas 76102
817-332-2351 (phone)
817-870-1859 (fax)
dusty@fillmorefirm.com
chad@fillmorefirm.com

Attorneys for Respondents

/s/ John P. Atkins
John P. Atkins

Counsel for Petitioner

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lcarranza@thompsoncoburn.com
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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
H. Dustin Fillmore	6996010	dusty@fillmorefirm.com	12/22/2021 5:16:29 PM	SENT
Charles W. Fillmore	785861	chad@fillmorefirm.com	12/22/2021 5:16:29 PM	SENT
Elizabeth Myers		emyers@thompsoncoburn.com	12/22/2021 5:16:29 PM	SENT
John Atkins		jatkins@thompsoncoburn.com	12/22/2021 5:16:29 PM	SENT
Linda Carranza		lcarranza@thompsoncoburn.com	12/22/2021 5:16:29 PM	SENT
Jennifer R.Ecklund		jecklund@thompsoncoburn.com	12/22/2021 5:16:29 PM	SENT
Laurie DeBardeleben		ldebardeleben@thompsoncoburn.com	12/22/2021 5:16:29 PM	SENT
Jonathan Mitchell		jonathan@mitchell.law	12/22/2021 5:16:29 PM	SENT
D. BryanHughes		bryan@hughesfirm.com	12/22/2021 5:16:29 PM	SENT

Associated Case Party: The Lilith Fund

Name	BarNumber	Email	TimestampSubmitted	Status
Roxanna Lock		rlock@thompsocoburn.com	12/22/2021 5:16:29 PM	SENT
Douglas S.Lang		dlang@thompsoncoburn.com	12/22/2021 5:16:29 PM	SENT