All Cases Cited

by Defendants

In their Initial Motion to Dismiss

Which was Granted on March 18, 2016

Avery v Hearst

15-2186-CV

Guadalupe Co., Texas

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**476 N.W.2d 112
438 Mich. 84, 20 Media L. Rep. 1065
Joseph Judeas LOCRICCHIO and Gary Francell, Plaintiffs-Appellees,
v.
EVENING NEWS ASSOCIATION, Michael Wendland and Jean
Gadomski, Defendants-Appellants,
and
Pete Waldmeir and Bill Giles, Defendants.
Docket No. 86351.
Supreme Court of Michigan.
Argued Oct. 3, 1990.
Decided Aug. 26, 1991.
Rehearing Denied Oct. 17, 1991.**

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[438 Mich. 87] Kitch, Saurbier, Drutchas, Wagner & Kenney, P.C. by Jeremiah J. Kenney, Pamela Hobbs, Detroit, for plaintiffs-appellees.

Butzel Long Gust Klein & Van Zile by Richard E. Rassel, James E. Stewart, Gordon J. Walker, Leonard M. Niehoff, Detroit, for defendants-appellants.

[438 Mich. 88] Honigman Miller Schwartz and Cohn by Herschel P. Fink and Michael A. Gruskin, Detroit, for amici Detroit Free Press, Inc. and Scripps Howard Broadcasting.

Neal Bush, Detroit, Monica Farris Linkner, Berkley, Charles P. Burbach, Southfield, for amicus curiae on behalf of the Michigan Trial Lawyers Ass'n.

Dawn L. Phillips, Bloomfield Hills, for The Michigan Press Ass'n.

Kasiborski, Ronayne & Flaska, A Professional Corp. by John J. Ronayne, III, Detroit, for amicus Post-Newsweek Stations, Michigan, Inc.

OPINION

BRICKLEY, Justice.

Two competing legal regimes collide in libel cases implicating First Amendment

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concerns. Libel law enforces society's "pervasive and strong interest in preventing and redressing attacks upon reputation" caused by false and defamatory statements, [1] while constitutional law safeguards the free flow of ideas and opinions on matters of public interest that lie at "the heart of the First Amendment's protection." [2] The inherent analytical tension between these regimes requires a court both to protect reputational interests, and to accord "breathing space" to

principles of freedom of press and speech. It remains a precarious task to balance these interests in cases, such as this one, that pit private-figure plaintiffs against a report by a media defendant on a matter of public [438 Mich. 89] interest. [3] This case tosses into the balance the tortuous issue of libel by implication, in contrast to specific allegations of defamatory false statements of fact.

For our purposes, the controversy began in 1979, [4] when the Detroit News published a four-part series of articles entitled "The Pine Knob Story." In response, the owners and developers of Pine Knob, plaintiffs Joseph Locricchio and Gary Francell, sued the Evening News Association (hereinafter the Detroit News) and its reporters for libel in 1980. [5] The plaintiffs alleged that the entire tenor of the Pine Knob series falsely implied that plaintiffs were members or associates of organized crime, but did not identify any specific false statements in the articles.

The Detroit News attacked the plaintiffs' failure to identify any specifically false factual statements, and moved for summary judgment. Both the trial court and the Court of Appeals denied the summary judgment motion. The case went to trial.

A jury trial of prodigious length ultimately produced a three million dollar verdict for plaintiff Francell. [6] However, the trial court ruled that the evidence regarding falsity did not support the [438 Mich. 90] jury's verdict, and directed a verdict for the Detroit News. The plaintiffs appealed the posttrial directed verdict, and prevailed. The Court of Appeals, citing its previous opinion on summary judgment, applied the law of the case doctrine to reverse the trial court, and reinstated the jury award.

This appeal can be said to involve essentially two issues. First, did the Court of Appeals err in reversing the trial court's directed verdict and reinstating the jury verdict in favor of the plaintiffs? Second, can a private-figure plaintiff recover damages in a media-defendant/public-interest subject matter libel action where the plaintiff alleges defamatory implication but fails to identify or prove any materially false factual statements or implications or omissions? [7]

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We answer the first question affirmatively, and hold at the outset that the Court of Appeals erred in relying on the law of the case doctrine to reverse the trial court's directed verdict, instead of independently reviewing the record in a libel case of First Amendment import. We find it unnecessary under the facts presented to answer the second question as posed because of a lack of proven falsity in either the underlying facts or in their implication, and hold simply that the plaintiffs[438 Mich. 91] failed to carry their burden of proving either false and defamatory factual statements or false implications. Accordingly, the Court of Appeals erred in reinstating the jury verdict in favor of plaintiffs.

I. Factual Background

The facts presented show that editorial superiors at the Detroit News asked veteran reporters Michael Wendland and Jean Gadomski to investigate rumors of organized crime involvement in the plaintiffs' Pine Knob entertainment complex in 1978. Reporters Wendland and Gadomski conducted an intensive two-month investigation of the Pine Knob facility in 1979. Their investigation reached its apex with an audiotaped interview conducted with the plaintiffs (in the presence of their attorney) in April of 1979.

The interview with the plaintiffs, and the independent research of the Wendland-Gadomski team, sowed the seeds for the four-part "Pine Knob Story" series of articles that ran in the Detroit News from April 22 to 25, 1979. The centrality of the Pine Knob series to this lawsuit leads us to detail the content of the four articles below.

A. The first article: "The Pine Knob Story: How 2 friends and hustle created a big resort, millions in debts and a question: 'Is it Mafia?' "

The first article appeared under the rather sensational headline above. Its opening paragraph described the plaintiffs as "land gamblers ... [p]ower brokers with the right connections--widely suspected to be 'Mafia.' " The article quoted plaintiff Locricchio as conceding "the feeling 'Pine Knob is Mafia' is so widespread that 'even my [438 Mich. 92] mother sometimes has her doubts.' " The article noted that although the plaintiffs "vehemently deny mob involvement, they admit that they are on 'all the computer lists' as organized crime figures."

The first article further noted that plaintiffs agreed to talk to the Detroit News, in their words, to "clear the air." It provided provocative details of the plaintiffs' backgrounds, informing readers, for example, that the plaintiffs "wear silk shirts, drive expensive [cars] and fly about the country in their own twin-engine airplane."

The report asserted that "[Locricchio] is proud of his Sicilian heritage and protective of his large family. He is outgoing and talkative." It described Francell in contrast as "quiet, almost shy," and noted that "Francell is of French and German heritage." The report stated that although the plaintiffs felt "[a]ngered by what they claim is harassment from the FBI, the Internal Revenue Service and state and local law enforcers, they nevertheless say they can see why 'people think we're mob.' "

The report then detailed four key incidents, which essentially comprise the gravamen of plaintiffs' defamation by implication claims, in what the authors described as "the confusing, often incredible story" of how the plaintiffs created Pine Knob. The article summarized these four incidents as consisting of:

1) Two unsolved murders with links to people who figured in Pine Knob's development.

2) A so-called money wash designed to hide the source of a $200,000 loan to Pine Knob.

3) "A $4 million cost overrun" by the plaintiffs in the building of a Las Vegas Hotel theatre.

[438 Mich. 93] 4) Several investors associated with organized crime who either lent or helped [the plaintiffs] raise large sums of money.

The article sketched the history of Pine Knob from the original ownership in the 1950s to the plaintiffs' acquisition in 1971, asserting that "[t]he stories of mob involvement in Pine Knob began with [the acquisition of Pine Knob by reputed organized crime-associated investors in 1962]." The plaintiffs purchased Pine Knob from these investors in 1971.

The authors reported that the plaintiffs confronted financial troubles virtually from the moment they acquired Pine Knob: troubles so severe that by 1972 the partners "needed a tremendous cash flow [but] didn't have it." The report asserted that the plaintiffs' financial condition had so dramatically deteriorated that

[by] the summer of 1972, [the plaintiffs] were in the worst financial bind of their careers. They needed $200,000--"desperately," says Locricchio--to stave off foreclosures on outstanding notes. The partners would get the money. But in doing so, they would become involved in an incredible financial intrigue to be investigated by three federal grand juries. More than anything else, it was that loan that put Locricchio and Francell on the organized crime lists.

The first article ended with a trailer in bold letters that proclaimed: "Tomorrow: A money wash and two murders."

B. The second article: "The Pine Knob Story: How [a] Loan Got Washed."

As promised, the second article appeared under [438 Mich. 94] the above headline on Monday, April 23, 1979. It focused mainly on two incidents: the unsolved 1972 and 1974 murders of Agnes Brush and Harvey Leach, and a $200,000 loan the plaintiffs obtained to finance the Pine Knob complex in 1972.

Page one of the article displayed a photograph of an automobile with its trunk open. The caption under this photograph announced, "Harvey Leach's car was found with his body in the trunk." The authors pointed out that "Locricchio and Francell say they know nothing about either [the Leach or Brush] killing.... A score of police agencies have investigated the murders and have not proved otherwise."

The second article also asserted that "[the plaintiffs] agree that their business connections, when diagramed on a blackboard, make them appear to be 'organized crime figures,' " and paraphrased Locricchio as asserting "that such a diagram, drawn by police agencies, as well as his Sicilian heritage, has unfairly put the sign of the Mafia on Pine Knob."

It recounted that an unknown assailant had stabbed bookkeeper Agnes Bush to death three months after her employer, William Magill, loaned $200,000 to the plaintiffs for Pine Knob financing. The article described the late Harvey Leach as a "Southfield furniture magnate," who "had been working with [the plaintiffs] on construction plans for a chain of furniture stores, called Joshua Doore. Loans negotiated through the same Toronto money broker [that engineered the so-called money wash of the Magill loan] financed the building of those stores."

The article quoted Locricchio's version of how the controversial $200,000 Magill loan originated as follows:

[438 Mich. 95] I called [Pine Knob business associate Adele Volpe] and said I needed $200,000 for a month, two months.... [Volpe] said he couldn't help, but he'd see what he could do. [Volpe] called me back. He said, "I have this friend. His name is Bill Magill. He'll give you the money."

However, because Magill feared that disclosure of his finances might endanger the safety of his daughter, he insisted as a condition that the plaintiffs conceal the source of the loan.

Citing an FBI interview with Magill in 1973, the authors noted that although Magill had never met the plaintiffs, he "withdrew all but $5,000 of his life savings to loan [the plaintiffs] $200,000." It also quoted an investigating FBI agent who asked, "Why on earth would two sensible

people take all their savings and give it to a relative stranger without any security ...?" The article asserted that the plaintiffs failed to repay the Magill loan until 1977, and then only "after Magill began a foreclosure procedure against Pine Knob."

The article then described the intricate method the plaintiffs employed to keep secret the source of the Magill loan with the help of "an old friend, Southfield attorney Fred Gordon." The authors noted that Gordon had "once before ... helped Locricchio find a private money source" by putting Locricchio in touch with reputed organized crime figure Leonard Schultz in the late 1960s. The article quoted Locricchio as explaining that "Freddy [Gordon] had a brainstorm. He said, 'Look, instead of borrowing the money (directly from Magill), we'll use the money for collateral for another loan.' " The article described the logistics of the Magill "money wash" as follows:

On July 25, 1972, [the plaintiffs] picked up the $200,000 from Magill. The next day, Francell [438 Mich. 96] drove to Toronto with the money. Gordon flew there. Together, they entered the offices of Toronto attorney Joseph Burnett, who ran a large, international real estate financing company. Francell gave Burnett the cash. In turn, Burnett gave the Pine Knob partners a $200,000 loan, the check drawn on one of Burnett's companies, thus hiding Magill's role in the transaction. While the transaction was legal, it was highly unorthodox.... (Emphasis supplied.)

The final part of the article discussed the links between "people involved in laundering the $200,000 Magill loan" and the murders of Agnes Brush and Harvey Leach. It noted that "Locricchio and Francell ... are puzzled by the coincidences. But they say they are only coincidences."

C. The third article: "The Pine Knob Story: A brush with bankruptcy."

The third article in the series appeared under the above headline. It focused on the financial problems the plaintiffs experienced in 1975, partly as a result of FBI harassment, and detailed that the plaintiffs had obtained loans from a number of reputed organized crime figures. The article asserted that "[t]he partners were even overdue in paying their accountants" and quoted Locricchio as lamenting, " 'We couldn't get any financing through banks. We were up to here.' " It continued by stating that "[t]he financial difficulties were but part of their troubles, say Locricchio and Francell. At this time the FBI showed up to tell them they were going to be indicted [regarding the $200,000 Magill loan]."

The article pointed out that a federal grand jury ultimately indicted the plaintiffs for "lying about the Magill loan on a mortgage application from a [438 Mich. 97] federally insured bank" in 1977. The plaintiffs pleaded guilty and were fined $500. The article stated that "[i]t is the only time either man has been convicted of a crime."

The article also described how Locricchio had secured a bid from reputed organized crime figures James Tamer and Charles Goldfarb to construct a "Pine Knob-like" music theatre at the

Aladdin Hotel in Las Vegas. The article stated that "Locricchio estimated construction costs [of the music theater] at $6 million ... [i]t ended up costing $10 million." It quoted an affidavit from the 1978 indictment of Goldfarb and Tamer on charges to illegally control the Aladdin's gambling casino "as claiming that Locricchio was secretly offered a 'piece' of the Aladdin in exchange for his [construction] work on the music theater." It also referred to unnamed sources who claimed that "the FBI questioned whether the $4 million cost overrun was possibly an illegal 'bonus' to Locricchio," and described how the FBI tried to get Locricchio to serve as a "snitch" against suspected organized crime involvement in the Aladdin hotel's gambling casino, an offer which he refused.

D. The fourth article: "The Pine Knob Story: Partners Stalked by Mafia-hunters."

The final article in the series appeared under the above headline. Despite the headline, this article really had little to do

with stalking by "Mafia-hunters." The article actually began on an upbeat note, asserting that "[t]he owners of Pine Knob entertainment complex ... are bouncing back from near bankruptcy and a public impression they are 'Mafia.' " It quoted Locricchio as boasting, "We ain't the Rock of Gibraltar yet ... [but the Pine Knob facilities] are so strong that in spite [438 Mich. 98] of all (the problems), we're going to overcome. There's no doubt now."

The article went on to note that the Pine Knob complex turned a $700,000 profit in 1977-78. It quoted Locricchio as chalking up the FBI attention to "his Sicilian heritage and his business success." Locricchio conceded close acquaintances with numerous "alleged Mafia members," but contended that the government harassment because of these acquaintances amounted to guilt by association. The rest of the article described the relationship between the partners. It ended by noting that the "partners worry that the intensive law enforcement investigations into their activities over the last eight years will continue to haunt them."

II. Procedural History

Four important events, outlined as follows, chart the procedural history of this case: the pretrial denial of summary judgment, the trial on the merits, the trial court's directed verdict, and the Court of Appeals reversal of the directed verdict.

A. The Trial Court and Court of Appeals Denials of Summary Judgment.

The plaintiffs' original and subsequent amended complaints alleged "[t]hat by the entire tenor of these publications, Defendants acted in recklessdisregard of the falsity of their publications and said ... that Plaintiffs Locricchio and Francell were persons engaged in organized crime and engaged in a continuing course of criminal misconduct or conduct of an immoral or reprehensible nature in both their personal and business relationships."

The plaintiffs' complaints did not identify a [438 Mich. 99] single false statement that appeared in the Pine Knob articles. The defendants moved for summary judgment before trial. They contended that the absence of allegations of specific false statements in the complaint negated any issue of material fact. The trial court denied the motion.

Rebuked by the denial of summary judgment, the defendants countered with a number of interrogatories that asked the defendants to identify each alleged false statement in the Pine Knob series. The plaintiffs responded tersely:

[T]he defamation allegations contained [in the complaint] are not necessarily based on a false statement(s) in any one particular article, but rather, ... the entire series of articles ... injured the reputations of plaintiffs as the same represented a false portrayal, implication, imputation and/or insinuation....

Unsatisfied with this response, the defendants once again moved for summary judgment on the plaintiffs' libel claims, rearguing that no genuine issue of material fact existed because of the failure of the plaintiffs to allege any specific false statements of fact. Once again, the trial court disagreed, and denied defendant's summary judgment motion.

The Court of Appeals granted leave on interlocutory appeal to resolve the issue and issued its opinion in August 1983. [8] The Court of Appeals rejected the argument that the absence of specific allegations of false statements of fact mandated dismissal on summary judgment. The Court of Appeals relied on three cases to reach this conclusion: Sanders v. Evening News Ass'n, 313 Mich. [438 Mich. 100] 334, 340, 21 N.W.2d 152 (1946), Caldwell v. Crowell-Collier Publishing Co., 161 F.2d 333, 335-336 (CA5, 1947), cert. den.332 U.S. 766, 68 S.Ct. 74, 92 L.Ed. 351 (1947), and Memphis Publishing Co. v. Nichols, 569 S.W.2d 412, 419-420 (Tenn.1978).

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From Sanders, the Court of Appeals extracted the maxim that " '[t]o test its libelous quality, a publication is to be considered as a whole, including the character of the display of its headlines when the article is published in a newspaper, and the language employed therein.' " Id. at 340, 21 N.W.2d 152. From Caldwell and Nichols, the Court of Appeals extrapolated the proposition that "[i]nsinuation, imputation or inference may be as defamatory as a direct, unveiled assertion." Having thus affirmed the theoretical validity of a cause of action for defamation by implication, the Court of Appeals held that "[t]he pleadings give rise to a genuine issue of material fact which is to be left to the trier of facts and cannot be disposed of by summary judgment," and remanded the case for trial.

B. The Trial.

The case proceeded to a sometimes vitriolic trial. One of the most controversial trial issues involved the authenticity and veracity of the tapes and transcripts from the Detroit News' interview of the plaintiffs in 1979. [9] The plaintiffs controverted many of the quotes from the taped interview that appeared in the Pine Knob series. The tape apparently had very poor sound quality and much contention reigned during the trial over what the plaintiffs had actually said or not said on the tape.

Reporter Michael Wendland, the lead author of [438 Mich. 101] the Pine Knob series, provided crucial testimony at trial. At the time of the trial, the law required a private plaintiff suing a media defendant on a report of public interest to prove actual malice. [10] Accordingly, much of Wendland's cross-examination targeted his state of mind regarding the truth of his factual reporting. Specifically, the plaintiffs' attorneys attempted to show that Wendland did not

personally believe either that Locricchio and Francell were actually organized crime members or that Pine Knob was Mafia-owned.

On cross-examination Wendland testified, "I don't think there's organized crime involvement in the ownership of Pine Knob. I think organized crime has been involved in ... helping your clients finance Pine Knob, and I also testified I don't think your clients are organized crime members."

Wendland also testified that he did not use the term "money wash" regarding the $200,000 Magill loan to impute illegality, but rather to convey that "[the loan] was obscuring the source of the funds ... what this loan did ... was to hide the source of the money. And that is certainly unusual. That's a money wash."

The plaintiffs' trial attorney also tried assiduously to show that the Pine Knob series contained factual inaccuracies or omissions. He ultimately secured two admissions from Wendland regarding factual inaccuracies. First, Wendland conceded that the second Pine Knob article erroneously stated that a "score of police agencies" had investigated the plaintiffs regarding the Leach and Brush murders. Wendland could in fact name only fourteen, not twenty agencies, that had investigated [438 Mich. 102] the Leach/Brush murders, including three federal grand juries and the Internal Revenue Service. Wendland explained, "We use [the phrase 'a score'] I think, a lot, you know, meaning a great many, certainly more than a few."

Second, Wendland conceded inaccuracy regarding the picture of Harvey Leach's car under the caption, "Harvey Leach's car was found with his body in the trunk," that appeared in the second article. Wendland testified the caption "should have said--I mean, that makes it sound like it happened today, and my gripe was that it should have said in 1974."

Wendland stood by the factual accuracy of the rest of the series. He conceded that

the question printed throughout the articles, "Is it Mafia?" arguably referred to the plaintiffs, whose names were synonymous with Pine Knob. However, when asked if the articles ever stated an answer to the question "Is it Mafia?" Wendland replied:

I think all four articles answer that question ... if you read ... your client's response to this constant attention, constant rumors, you'll see them saying, "No, we are not Mafia" ... [M]y job is to report the facts, put all the facts out there for people to make up their mind. And that's what we did in this story. [The plaintiffs] over and over again, point it out how these rumors have pervaded over their whole lives and how these rumors are not true.

Pressed by his cross-examiner about the accuracy of the statement attributed to Locricchio in the Pine Knob series " 'that [a hypothetical organized crime diagram] drawn by police agencies, as well as his Sicilian heritage, has unfairly put the sign of the Mafia on Pine Knob,' " Wendland replied that the statement comprised not a direct [438 Mich. 103] quote, but rather [an accurate] "paraphrase of the entire discussion" with the plaintiffs.

The plaintiffs' attorney tried also to show falsity in the first Pine Knob article's assertion that "[s]everal investors associated with organized crime ... either lent or helped Locricchio and

Francell raise large sums of money...." Wendland refused to concede this statement contained material falsity, explaining that

at the very start ... when [the plaintiffs] first bought Pine Knob, one of the parties who owned it was a guy named Arthur Rooks. I think another owner was Alex Kachinko. Both of those people were associated with organized crime, and [the plaintiffs] bought Pine Knob from those people.

* * * * * *

[Pine Knob] was sold, I think, for a little over a million dollars on a land contract. In effect, Mr. Rooks, [Mr.] Kachinko ... became the bankers. They held the land contract. I'm interpreting that to mean, in effect, they lent [plaintiffs] the money.... As the holder of the land contract, they had a very strong interest in Pine Knob ... [the term "lent"] fit into that more than anything else. That's probably not entirely accurate, but it was--in effect, they ended up being owed money, lending money, they had an interest in it.

The plaintiffs' expert, one Professor Robert Bjork, a doctor of cognitive psychology at U.C.L.A., also provided crucial testimony at trial. Theplaintiffs' attorney asked Dr. Bjork whether "the typical readers [of the Pine Knob series would] associate my clients, Mr. Locricchio and Mr. Francell, with [the murders of Agnes Brush and Harvey Leach]?" Bjork replied:

I believe they would end up thinking that somehow[438 Mich. 104] those murders are related somehow to the financial goings-on. I don't believe they would [necessarily] conclude [that] Mr. Locricchio and Mr. Francell were involved personally in some way.

The plaintiffs' attorney also asked Professor Bjork's opinion regarding "whether or not the four [Pine Knob] articles ... when read by a typical reader, created an impression that Mr. Locricchio and Mr. Francell are associated with organized crime?" Bjork replied, "In my opinion ... the typical reader would end up thinking that Mr. Locricchio and Mr. Francell have some kind of connection with organized crime." (Emphasis supplied.)

For their part, the defendants essentially mounted a defense of truth against the plaintiffs' libel allegations. The defendants tried to demonstrate throughout the trial that the plaintiffs did in fact have numerous ties to individuals with organized crime backgrounds, that rumors of organized crime ties to Pine Knob originated long before the publication of the Pine Knob series, and that the articles contained no material falsehoods or omissions of fact.

At the conclusion of the proofs, the trial court instructed the jury that "[i]t is the Plaintiffs' burden of proof to satisfy you by a preponderance of the evidence that the statements or innuendoes complained

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of were false in some material respect and published with actual malice. [11] Plaintiffs will not have satisfied their burden of proving material falsity if you find that the Detroit News articles were substantially true." The defendants moved for a directed verdict, which the trial court took under advisement pending the jury's return of a verdict.

[438 Mich. 105] The jury returned special verdicts in September 1985. It found in respect to plaintiff Francell that the Detroit News published the articles, that the articles contained false and defamatory statement(s), and that the defendants had knowledge that the statement was false or acted with reckless disregard regarding its falsity. The jury awarded Francell three million dollars in actual damages. With respect to plaintiff Locricchio, the jury awarded no damages after finding no publication, i.e., that the defendants did not disseminate false and defamatory facts to a third party through printing, writing, or pictures.

C. The Trial Court's Directed Verdict.

The trial court ruled on the defendant's motion for a directed verdict in December 1986. It approvingly cited the newly released Supreme Court decision in Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986). From Hepps, the trial court extrapolated that "[w]here allegedly defamatory speech is of public concern, the First Amendment demands and Michigan law requires that the plaintiff, whether public official, public figure, or private individual, prove the statements at issue to be false." The trial court then held that "the plaintiffs have failed to prove the publications at issue contained significantly false facts, and a verdict must be directed for the defendant."

The trial court further stated that "[i]nsinuation, imputation, or inference may be as defamatory as a direct unveiled assertion." The trial court nevertheless concluded that "liability cannot be imposed for journalistic inferences arising from the reporting of true facts about matters of public interest and concern. The plaintiff must prove the [438 Mich. 106] false impression arises from untrue, or undisclosed facts."

The trial court then compiled a fourteen-paragraph list of facts that it found "are true; or at least, [that] the plaintiffs have not proven then to be false." The court concluded:

" Plaintiffs purchased Pine Knob from individuals who had been indicted by a federal grand jury for concealing their ownership interests in a Las Vegas hotel.

" Plaintiffs' names appeared on the organized crime lists of the Federal Bureau of Investigation.

" Plaintiffs were personal friends of, or had done business with, innumerable individuals whose names are commonly associated with organized crime, including Leonard Schultz, Dominic Corrado, Joseph Burnett, Fred Gordon, James Tamer, Charles Goldfarb, Harvey Leach, Charles Monazym and Jack Tocco.

" In the course of their investigations, agents of the Federal Bureau of Investigation spoke with plaintiffs' bankers and referred to plaintiffs' as 'crooks.'

" A federal grand jury indicted plaintiffs on three counts of filing false statements on a loan application made to Detroit Bank & Trust.

" Plaintiffs pleaded guilty in federal court to giving false information on an application for a loan, in violation of Federal law.

" The bulk of the financing required to develop Pine Knob occurred after the publication of the 1972 Detroit News Article that plaintiffs claim caused 'all their problems.'

" Plaintiffs' names surfaced in the investigations of both the Agnes Brush and Harvey Leach murders. The Detroit News, in its coverage of those two investigations, never identified plaintiffs as suspects, but the Detroit News did identify (at that time and in the 1979 series) a 61 year old laborer as the only suspect in the Agnes Brush murder.

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" [438 Mich. 107] Plaintiffs told the Federal Bureau of Investigation in 1973 that they were already then tired of hearing rumors that organized crime was connected with their business.

" Plaintiffs furnished a legal memorandum and statements by their attorneys confirming for The Detroit News their allegations that the Federal Bureau of Investigation had harassed them by visiting their lenders and bankers from 1973 through 1977.

" Joseph Locricchio admitted in previous testimony and in this trial that he knew of the Federal Bureau of Investigation's special interest in James Tamer and of the agency's investigation into hidden ownership of the Aladdin Hotel and Casino before he went to Las Vegas at James Tamer's request.

" Despite speculation to the contrary, the only evidence on record shows plaintiffs were turned down in 1976, well before the complained of publications, for loans because of 'high living,' a reputation that they were not prompt with payment of their debts, and rumors of organized crime involvement. No evidence has been introduced, and no banker has testified that they relied on the complained of publications in turning down plaintiffs' loan applications.

" Plaintiffs admit a separation between themselves and their primary lender, Borg Warner, for acts prior to May, 1978 and resulting legal actions in which plaintiffs attributed millions of dollars in damage to the businesses to Borg Warner.

" Plaintiffs admit filing a lawsuit against the Hilton Hotel chain, The Reminder Newspaper, and several individuals, blaming them for the defeat of the referendum that would have allowed plaintiffs proposed hotel and for causing plaintiffs $100,000,000 in damages."

D. The Court of Appeals Reversal of the Directed Verdict.

The plaintiffs appealed the trial court's ruling, [438 Mich. 108] and the Court of Appeals issued a two-page opinion overturning the trial court and reinstating the jury verdict in February 1989. In the view of the Court of Appeals

[t]he legal question in this case was whether plaintiffs could have a cause of action for libel where their allegations of defamation were not based on a specific false statement in any particular article.

The Court reversed the trial court's directed verdict because, "[o]ur first opinion in this case answered that question affirmatively."

The Court of Appeals further opined that "the United States Supreme Court's decision in Philadelphia Newspapers, Inc., supra, [does not] bar[ ] a suit for defamation by implication." The Court of Appeals held accordingly that "[i]n light of our previous opinion and our belief that subsequent law has not eliminated defamation by implication, we reverse the trial court's order granting [the directed verdict] and reinstate the jury's verdict."

III. Analysis

A. The Law of the Case Doctrine, Libel Verdicts, and Independent Appellate Review.

The trial court, in effect, independently reviewed the record to determine whether the jury's verdict conformed to the constitutionally mandated burden of proof regarding falsity. In contrast, the Court of Appeals implicitly relied on the law of the case doctrine to reverse the trial court's directed verdict by adverting to its prior summary judgment ruling that a cause of action exists for [438 Mich. 109] defamation by implication. This Court noted inC.A.F. Investment Co. v. Saginaw Twp., 410 Mich. 428, 454, 302 N.W.2d 164 (1981), that the law of the case doctrine

[a]s generally stated, [provides that] if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same.

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The law of the case doctrine exists primarily to "maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." [12] In this sense, the law of the case doctrine is an analytical cousin of the doctrines of claim and issue preclusion. However, as Justice Holmes recognized almost a century ago, unlike the later doctrines, the law of the case doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." [13]

We do not here question the generally sound principles of efficiency, comity, and finality that animate the law of the case doctrine. However, in a libel case affecting constitutionally protected public discourse, the law of the case doctrine should not have precluded a second review by a subsequent Court of Appeals panel. Indeed, in such cases the law of the case doctrine must yield to a [438 Mich. 110] competing doctrine: the requirement of independent review of constitutional facts. [14]

The determination on summary judgment that the plaintiffs' complaint stated a cause of action for defamation by implication should not have abrogated the appellate court's duty to independently review the record to determine whether, in fact, the plaintiffs carried their burden of proof at trial regarding falsity at the posttrial directed verdict stage. [15] The application of the law of the case doctrine in this case clearly contravened the principle enshrined in the celebrated case of New York Times v. Sullivan, 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), that discourse on matters of public interest should remain "uninhibited, robust, and wide-open...."

Sullivan announced that appellate courts must conduct an independent review of the record to ensure that no "forbidden intrusion on the field of free expression" has occurred in libel cases involving the issue of actual malice. Id. at 285, 84 S.Ct. at 729. [16] Sullivan mandated that reviewing courts in libel cases " 'examine for [themselves] 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.' " Id.

The Supreme Court strongly reiterated the requirement of independent review in Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. [438 Mich. 111] 485, 505, 514, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984). Bose held that "the clearly erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure does not prescribe the standard of review to be applied in reviewing a determination of actual malice in a case governed by New York Times v. Sullivan." The Bose Court reasoned that "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.' " Id. at 511, 104 S.Ct. at 1965.

Similarly, in Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657,

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686, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989), the Supreme Court reviewed the entire record to determine if the evidence supported a finding of actual malice. The Court reaffirmed that "the question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." Id. at 685, 109 S.Ct. at 2694. The Court reiterated that "[o]ur profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, demands that the law of libel carveout an area of 'breathing space' so that protected speech is not discouraged." Id. at 686, 109 S.Ct. at 2695. [17]

[438 Mich. 112] We recognize that, unlike the instant case, the cases from Sullivan to Harte-Hanks involved public figures and, accordingly, mandated independent review for the issue of actual malice. In Gertz v. Welch, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), the Court held that the actual-malice standard of liability for actual damages articulated [438 Mich. 113] in Sullivan does not govern cases, such as the instant one, that involve a media defendant's report on a matter of public interest concerning a private-figure plaintiff.

However, in Philadelphia Newspapers v. Hepps, supra 475 U.S. at 768-769, 106 S.Ct. at 1559-1560, the Supreme Court held that "where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false." In abrogating the common-law presumption of falsity in libel cases, the Court in Hepps created an issue of constitutional fact regarding whether a plaintiff carries the burden of proving falsity.

We therefore conclude that an independent appellate review of the burden of proof with regard to falsity in private-figure, public-interest cases deters "forbidden intrusion on the field of free expression" as a logical corollary to independent review of

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actual malice. Sullivan, supra 376 U.S. at 285, 84 S.Ct. at 729. The Court recognized in Hepps, that imposing liability for true statements amounts to the imposition of liability without fault proscribed by Gertz. A jury verdict against the great weight of the evidence regarding the falsity

requirement, unreviewed by a court, would therefore comprise a forbidden intrusion on protected speech, in the same way as would a failure to review for clear and convincing evidence of actual malice. [18]

In Rouch v. Enquirer & News of Battle Creek, 427 Mich. 157, 398 N.W.2d 245 (1986), this Court, [438 Mich. 114] following Gertz, rejected the actual-malice standard of liability in cases involving private-figure plaintiffs and a media defendant's report on matters of public interest. [19] Our rationale in Rouch in part rested on an acknowledgement of the "even greater protection" afforded defamation defendants by the burden of proof as to falsity. Id. at 198, 398 N.W.2d 245. That protection would indeed ring hollow if, at least in cases implicating public-interest subject matter and media defendants, no effective review existed to ensure compliance with the burden of proof. [20] The Court of Appeals application of the law of the case doctrine accordingly fails to accord the necessary "breathing space" to protected speech. The principle of independent review logically extends to determining whether a plaintiff satisfies her burden of proving falsity. Id.

A remand in this case of plaintiffs' libel claims for further proceedings on the merits would normally flow from our determination that the Court of Appeals erred in relying on the law of the case doctrine to reverse the trial court. [21] However, in [438 Mich. 115] the interest of clarifying the operation of constitutional principles under the facts of this case, of judicial economy, and of the long-suffering litigants, we bypass this customary procedure and conduct an independent review and analysis of the record in the following sections.

B. Analysis of the plaintiffs' defamation claims.

An analysis of the plaintiffs' defamation by implication claims requires an examination of three interlocking factors: the elements of libel under Michigan law, constitutional requirements and principles informing and attenuating Michigan libel law, and the contours of defamation by implication as shaped by the two preceding factors. Our examination of the legal principles of libel law in Michigan, as informed by the First Amendment, leads us to conclude that defamation by implication in private-figure/public-interest media cases requires proof of both defamatory meaning

and falsity, a burden not carried by plaintiffs under these facts.

1. The Essential Elements of Libel: Defamatory Meaning and Falsity.

Michigan law has traditionally defined a defamatory communication as one which " 'tends so to harm the reputation of [persons so] as to lower [them] in the estimation of the community or to deter [others] from associating or dealing with [them].' " Nuyen v. Slater, 372 Mich. 654, 662, n. *, 127 N.W.2d 369 (1964). A cause of action for libel encompasses four components: 1) a false and defamatory statement concerning the plaintiff, 2) an unprivileged communication to a third party, 3) [438 Mich. 116] fault amounting to at least negligence on the part of the publisher, and 4) either actionability of the statement irrespective of special harm or the existence of special harm caused by publication. A cause of action for libel requires a plaintiff to show defamatory meaning as well as falsity, fault, and publication.

Michigan law has also long recognized that the regime of libel law may not impose damages for injuries to reputation arising from a press report of materially true facts about a public figure

on a matter of public interest. In Sanders v. Evening News Ass'n, supra at 337, 21 N.W.2d 152, a former judge of the Common Pleas Court sued the Detroit News for two newspaper articles that exposed " 'the problem of overnight releases of persons arrested for misdemeanors--releases made by the police at the telephoned request of judges.' " Both articles reported an incident where the plaintiff personally intervened to order the release of a person held in custody at a police station. The first article reported that " 'former Judge Joseph Sanders walked into Bethune Station one night, banged his gavel on the startled sergeant's desk, and shouted: " 'Court's in session, the Honorable Joseph Sanders presiding. Bring in Joe Doakes!" ' "

The second article, appearing the following day, stated that " '[there has almost always] been a judge or two, bound to a bondsman or lawyer oreither by affection or campaign contribution, or overimpressed by judicial prerogatives, who has turned the order (of the head of the police department not to release on telephone request) into a farce. Witness the case of ... the impromptu court session held in Bethune Station by former Judge Joseph Sanders.' " Id. at 339, 21 N.W.2d 152.

The Sanders Court reviewed the record and concluded that no liability existed for the first [438 Mich. 117] article "because in his amended declaration plaintiff admits the truth of the ... publication in so far as it could possibly tend to support an action for libel. Since that publication was true, it was not libelous." Id. at 340, 21 N.W.2d 152.

The Court then reviewed the substance of the second article, under the venerable principle that " '[t]o test its libelous quality, a publication is to be considered as a whole, including the character and display of its headlines when the article is published in a newspaper....' " Id. The Court first held that the plaintiff lacked authority to hold court in a police station to release a prisoner, and therefore had acted in his private, not official capacity. It concluded that "[i]n doing so plaintiff acted without lawful authority and it was not libelous for defendants to publish an article to that effect ... [f]urther, it was not libelous to say in the alternative of plaintiff or (he was) over-impressed by judicial prerogatives' since such appears to be the truth from plaintiff's own pleading." Id. at 342-343, 21 N.W.2d 152.

The logic of Sanders, while instructive, does not foreclose every cause of action for defamation by implication. However, the Sanders rationale does prohibit imposing liability on a media defendant for facts it publishes accurately and without material factual omissions about public affairs.

2. Constitutional Liability Requirements: Public discourse, private plaintiffs, and the burden of falsity.

In addition to satisfying Michigan libel law elements, this private-figure/public-interest subject matter libel case must also comply with the constitutional elements of libel law, including falsity and the burden

of proof. The common-law roots of [438 Mich. 118] defamation have been fundamentally altered by a series of cases from the highest court in the land, beginning with Sullivan, supra. The Supreme Court's First Amendment analysis of libel cases since Sullivan has variously employed three important factors to define the parameters of libel liability: the public- or private-figure status of the plaintiff, the media or nonmedia status of the defendant, [22] and the public or private

character of the speech. The Court has most consistently interpreted the First Amendment to accord maximum protection to public speech about public figures. [23]

The Court has acted more ambiguously in the context of private-figure plaintiffs, as presented in this case. In Gertz, the Court focused on the status of the plaintiff and concluded that private-figure plaintiffs deserve more reputational protection than do public-figure plaintiffs for two reasons. First, the Court postulated that unlike public figures, private-figure plaintiffs lack access to "channels of effective communication" that would allow them "a more realistic opportunity to counteract [438 Mich. 119] false statements...." Id. 418 U.S. at 344, 94 S.Ct. at 3009. Second, unlike public figures, private-figure plaintiffs do not voluntarily expose themselves to the risk of defamation by injecting themselves into public controversy. The Court concluded that "[p]rivate individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater." Id.

Just as the Court has postulated that private-figure plaintiffs deserve greater libel law protection vis-a-vis public-figure plaintiffs, it has also consistently recognized that speech on matters of public concern merits heightened protection under the First Amendment. The Court has declared, for example that the First Amendment "embraces at least the liberty to discuss publicly ... all matters of public concern," [24] and similarly that "expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.' " [25]

The Court's protection of speech on the basis of its public character reached its zenith in the plurality opinion of Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971). The plurality in Rosenbloom suggested that the actual-malice standard articulated in Sullivan should extend to both private- and public-figure plaintiffs if the defamatory statement involved "matters of public or general concern." Id. at 44, 91 S.Ct. at 1820. The Court repudiated this position in Gertz, and instead focused on the plaintiff's public or private status to set the standard of liability. However, in Hepps, the Court again emphasized the public [438 Mich. 120] character of the speech (and the danger of

media self-censorship) to set the applicable burden of proof with regard to falsity.

Similarly, in Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749, 759, 105 S.Ct. 2939 2945, 86 L.Ed.2d 593 (1985), the Court emphasized that speech on matters of public concern lies at the heart of the First Amendment, while, "[i]n contrast, speech on matters of purely private concern is of less First Amendment concern." While Gertz prohibited the imposition of punitive damages in private-figure/public-interest cases absent a showing of actual malice, Dun & Bradstreet held that "permitting recovery of presumed and punitive damages in defamation cases absent a showing of 'actual malice' does not violate the First Amendment when the defamatory statements do not involve matters of public concern." Id. at 763, 105 S.Ct. at 2947.

The United States Supreme Court has also "consistently sought to ensure that liability does not arise from true speech on public matters." [26] In Sullivan, supra, 376 U.S. at 271, 84 S.Ct. at 721, the Court stated unequivocally:

Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth ... and especially one that puts the burden of proving truth on the speaker.

Similarly, in Garrison v. Louisiana, 379 U.S. 64, 74, 85 S.Ct. 209, 216, 13 L.Ed.2d 125 (1964), the Court noted that "[t]ruth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." More recently, "[b]oth [Hepps] and [Dun & Bradstreet] evince a special solicitude for speech of public concern and [438 Mich. 121] desire to ensure such speech adequate breathing space, the one by its allocation of burden of proof, the other by its limitation on damages." [27] In parallel fashion, this Court has long recognized, as in Sanders, that Michigan law prohibits libel liability for true speech on matters of public concern.

Although the Court has stated clearly that true speech about matters of public concern may not subject a speaker to libel sanctions, it has paradoxically more extensively elucidated the standard of fault than it has the quantum or quality of falsity in libel cases. [28] At best, it can be said that the Court has struggled analytically to balance private reputational interests against public free expression in the context of falsity. On the one hand, the Court has asserted that "[f]alse statements of fact" are constitutionally valueless because such statements "interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective." [29] On the other hand, the Court has also asserted that "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters." Gertz, supra, 418 U.S. at 341, 94 S.Ct. at 3007.

The more recent decision in Hepps clearly indicates[438 Mich. 122] adherence to the latter paradigm of protecting some degree of falsity to ensure greater First Amendment protection of speech on public interest matters. The Court in Hepps, supra 475 U.S. at 776, 106 S.Ct. at 1563, recognized that

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"forcing the plaintiff to bear the burden of proving falsity [will result in some cases where] plaintiffs cannot meet their burden despite the fact that the speech is in fact false." Nevertheless, the Court ultimately concluded "that the Constitution requires us to tip [the scales] in favor of protecting true speech," despite the dispositive nature of burden of proof in cases presenting ambiguous evidence regarding falsity. Id. In this connection, it seems clear that claims of defamation by implication, which by nature present ambiguous evidence with respect to falsity, face a severe constitutional hurdle.

As noted previously, the requirement that a private plaintiff suing a media defendant for libel in a public interest matter would have to "prove as part of his case, in addition to defendant's fault, that the statements at issue are false" comprised an important factor for our decision in Rouch to strip public interest statements of heightened actual malice protection from liability. Rouch, supra 427 Mich. at 204, 398 N.W.2d 245. However, although Hepps "stands for the proposition that a statement on matters of public concern must be provable as false before there can be liability under state defamation law ... where a media defendant is involved," [30] neither Hepps (nor our decision in Rouch) specified whether the standard of proof with regard to falsity is " 'clear and convincing evidence' or some lesser standard." [31] We need not address that issue in this case because the record does not reveal that the plaintiffs[438 Mich. 123] proved any material falsity by even a preponderance of the evidence.

C. Defamation by implication.

1. The Court of Appeals analysis.

The Court of Appeals recognized that a number of cases have held that a cause of action exists for defamation by implication. [32] However, the cases it relied on bear little relation to the case presented here. The 1947 case of Caldwell v. Crowell-Collier Publishing Co., supra, has little, if any precedential value to present libel law or to the case at bar. In that case, Caldwell, the Governor of Florida, sued a magazine for its editorial contrasting Caldwell's expressed social views on a racial lynching in Florida to those of his counterpart governor of North Carolina. The editorial stated:

[Governor Caldwell] said he did not consider [the incident] a lynching. He went on to opine that the mob had saved courts, etc., considerable trouble ... thus [Governor] Cherry of North Carolina expresses the forward-looking view of these matters, while Caldwell of Florida expresses the old narrow view which has been about as harmful to southern white people as to southern negroes [sic]. [Id. at 334.]

The federal circuit court held that Caldwell had asserted an action for libel, noting that "[i]f the imputations published hold the Governor up as indifferent to a lynching in his State ... they grievously reflect on him in his office, and if false [438 Mich. 124] and unprivileged are actionable per se, injury and damage being implied." Id. at 336.

It is doubtful that the Caldwell decision comprises good law today, and in any event its facts have little bearing on the instant case. Caldwell involved a public-figure plaintiff, whereas this case involves private figures. The old common-law presumption of damages no longer controls libel cases involving public figures, having been supplanted by the Sullivan actual-malice requirement. Moreover, the burden of proof of falsity now lies with the plaintiff, not with the defendant as in Caldwell. Finally, unlike the instant case, the plaintiff in

Caldwell did in fact allege specific false statements of fact and material omissions.

The Court of Appeals also relied on Memphis Publishing Co. v. Nichols, 569 S.W.2d 412 (Tenn.1978), in its summary judgment and reversal of the directed verdict for the defendants. Nichols involved a plaintiff's suit for libel against a newspaper that published an account of a domestic shooting. The news account reported that

"[the shooting incident] took place Thursday night after the suspect arrived at the [plaintiff's] home and found her husband there with Mrs. Nichols. Witnesses said the suspect fired a shot at her husband and then at Mrs. Nichols, striking her in the arm, police reported." [Id. at 414.]

Mrs. Nichols sued the paper, arguing that the article "falsely implied that Mrs. Nichols and ... the assailant's husband, were having an adulterous affair, and were 'caught' by [the assailant]." The proofs at trial showed that "not only were Mrs. Nichols [and the assailant's husband] at the Nichols' home, but so, also, were Mr. Nichols and two neighbors, all of whom were sitting in the [438 Mich. 125] living room, talking, when [the assailant] arrived around three o'clock in the afternoon." Id.

The Tennessee Supreme Court rejected the newspaper's argument that "every material fact in the article quoted ... was true." The court concluded that "[t]he publication of the complete facts could not conceivably have led the reader to conclude that Mrs. Nichols and Mr. Newton had an adulterous relationship. The published statement, therefore, so distorted the truth as to make the entire article false and defamatory." Id. at 420.

As in the instant case, Nichols involved a private-figure plaintiff suing a media defendant about a matter of public interest. However, while well reasoned, the Nichols case incorrectly states the current law of libel with respect to the burden of proving falsity. In Nichols (a 1978 case), the court asserted that a plaintiff "need not show ... that the statement is false. There is a legal presumption of falsity which the defendant may rebut by proving truth as a defense." Id. at 420. As indicated earlier, Hepps, obliterated the common-law presumption of falsity in libel actions.

Moreover, the defamatory implication alleged by the plaintiff in Nichols identified clear-cut and specific material omissions of reported facts, in contrast to the plaintiffs' claims in this case. The information omitted from the Nichols' report damaged the plaintiffs' reputation as effectively as a direct false statement. The defendant's article would have conveyed an undisputedly nondefamatory meaning had it reported that Mrs. Nichols' husband and other people were present during the shooting.

In contrast, in the instant case, the plaintiffs have failed to identify or prove material omissions which, if published, would have rendered the Pine Knob series nondefamatory. Nichols arguably [438 Mich. 126] stands for the proposition that material omissions from reports of true facts are capable of creating a defamatory impression. In the instant case, however, the plaintiffs have not shown that material omissions occurred or how they operated to defame them.

Both the trial court and the Court of Appeals obliquely referred to Herbert v. Lando, 781 F.2d 298 (CA2, 1986). [33] While not precisely on point, Herbert, a public-figure/actual-malice case, is instructive with regard to the operative significance of claims of defamation by implication. Herbert, a retired Army colonel who served in Viet Nam, sued CBS and the Atlantic Monthly for print and broadcast reports that cast doubt on the truth of Herbert's claims that military superiors relieved him

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of his command for reporting war crime atrocities.

Unlike the instant plaintiffs, Herbert specified nine defamatory statements he claimed the defendants published with actual malice. The district court and the federal circuit court rejected each of these claims. Moreover, they rejected Herbert's claims that the overall defamatory effect of the reports comprised a separate basis for recovery.

The federal circuit court distinguished "an overall defamatory impact" from "a particular defamatory implication...." It reasoned that in certain circumstances, "a combination of individual statements [not in themselves defamatory] might lead the reader to draw an inference that is damaging to the plaintiff." However, the court reasoned that [438 Mich. 127] no cause of action would lie where "the defamatory 'impact' of the publication is the same as the defamatory implication conveyed by each of the individual statements." Id. at 307. Because the court had previously found that each defamatory implication alleged by the plaintiff had not been published

with actual malice--i.e., reckless disregard of falsity, it concluded that "to permit Herbert to rest a cause of action ... on the publication's 'overall impact' would be a meaningless gesture, since the defamatory implications of the specific statements and the overall impact of the publications are identical." Id. at 308.

Although the Herbert court recognized the possibility of an "overall impact" separate and apart from the "implications of the specific statements," it applied the same standard of fault--in that case actual malice--to both types of defamation.

2. Cases Cited by the Plaintiffs.

The plaintiffs mistakenly argue that "no constitutional issue is raised by this appeal, and the only legal question [presented] is whether, under the common law of Michigan, implication, insinuation or inference may support a defamation action." On the contrary, the legal question presented whether, in alleging defamation by implication, the plaintiffs carried their burden of proving falsity, is one of constitutional import. In cases challenging reports by the media on matters of public interest, the decision in Hepps, dictates that a private-figure plaintiff bears the burden of proving falsity.

Many of the cases cited by the plaintiffs for the proposition that a cause of action exists for defamation by implication have little bearing on this case. Randall v. Evening News Ass'n, 79 Mich. 266, [438 Mich. 128] 44 N.W. 783 (1890), involved a cartoon that implied a legislator had improperly received funds from the alcohol lobby. The logic of Sullivan would clearly foreclose that case today absent a showing of falsity and actual malice. Bonkowski v. Arlan's Dep't Store, 12 Mich.App. 88, 162 N.W.2d 347 (1968), and Smith v. Fergan, 181 Mich.App. 594, 450 N.W.2d 3 (1989), involved private-figure plaintiffs alleging libel for purely private-interest matters. As noted earlier, the logic of Dun & Bradstreet, supra, suggests that the private-figure/private-interest subject matter configuration does not trigger heightened First Amendment scrutiny. Hodgins Kennels, Inc. v. Durbin, 170 Mich.App. 474, 429 N.W.2d 189 (1988), another case cited by plaintiffs, properly read, does not involve claims of defamation by implication.

The plaintiffs' arguments often confuse the issue of defamatory meaning with the issue of falsity. The plaintiffs cite Schultz v. Reader's Digest Ass'n, 468 F.Supp. 551, 554 (ED Mich, 1979), where the district court held that a published article's "impression that Mr. Schultz may have been involved in 'setting up' Jimmy Hoffa to be murdered ... is clearly defamatory." However, even assuming that the Pine Knob series as a whole conveyed a defamatory impression, the plaintiff still bears the burden of proving underlying falsity. [34]

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Ironically, the plaintiff also cites Doughtery v. Capitol Cities Communications, Inc., 631 F.Supp. [438 Mich. 129] 1566 (ED Mich, 1986), for the proposition that "the defamatory tone of a radio broadcast which resulted from the omission of known facts was capable of supporting plaintiff's defamation action even though plaintiff could not point to a single specific statement in the broadcast that was defamatory and false." In Doughtery, the district court soundly trounced the plaintiff's arguments for defamation by implication after reviewing all the evidence, much as the trial court did in this case. As in this case, the court noted that "[a]lthough plaintiff painstakingly presents his version of the story behind each of the broadcasts ... he does not succeed in uncovering any significant statement about him that is false." Id. at 1569. The court went on to hold that "it is impossible to discern any false information in the broadcasts. Each

statement made had a factual basis, and where they were not factual statements, ... they were [nonactionable statements of opinion]...."

The plaintiffs also cite an extensive list of cases from other jurisdictions to illustrate that defamation by implication is a well-established cause of action. We note that many of these cases are inapplicable to the instant case because they involve either public figures, and focus on the issue of actual malice not at issue here, [35] or involve private plaintiffs on matters of private interest. [36] [438 Mich. 130] In any event, the questions whether a statement is capable of rendering a defamatory implication and whether, in fact, a plaintiff has proved falsity in an implication are separate inquiries. A plaintiff alleging defamation by implication must still prove material falsity. To do otherwise would allow a plaintiff to recover without a showing of falsity, in contravention of the rule announced inHepps. Our review of the plaintiffs' proofs, conducted below, convinces us that the plaintiffs failed to make such a showing.

3. The alleged defamatory implications.

The plaintiffs' primary claim is that the Pine Knob series as a whole falsely implied that plaintiffs were members or associates of organized crime. Although the plaintiffs initially declined to provide any specific allegations of falsity, they argue on appeal that the layout of the Pine Knob articles, including photographs and headlines, as well as the repetition of certain words such as "Mafia," "Sicilian," and "money wash," and indeed certain specific statements, contribute to the overall implication.

Unfortunately for the plaintiffs, an inescapable implication of the Pine Knob series conforms to the facts developed at trial: the plaintiffs had numerous financial and social connections with reputed organized crime figures and these associations contributed in the financing of Pine Knob and prompted intense investigative scrutiny, if not harassment, from law enforcement authorities. [37] Although capable of defamatory interpretation, the implications alleged

by the plaintiffs do not [438 Mich. 131] arise from false facts or material omissions, and, standing alone, are not even proven by the plaintiffs to be false.

The plaintiffs it would seem, want to have it both ways regarding their defamation by implication claims. On the one hand, they assert that the articles as a whole disseminate false implications. On the other, they point to statements or headlines in isolation from the whole, such as the use of the word "lent" in the statement that "[s]everal investors associated with organized crime[ ] either lent or helped Locricchio and Francell raise large sums of money." However, the plaintiffs did directly or indirectly obtain loans and other financial assistance from reputed organized crime figures. Construing the articles as a whole, the plaintiffs have failed to show false implications by a preponderance of the evidence.

Similarly, the headlines in the series, while arguably inflammatory, do not convey false implications apart from the context of the reported facts. The two partners did indeed, through "hustle" create "a big resort, millions in debts, and a question: 'is it Mafia?' " The partners did indeed attempt to create a "money wash" by obscuring the source of the Magill loan. The partners did indeed have a "brush with bankruptcy" in the course of financing Pine Knob. While the headline that the partners were "stalked by Mafia-hunters" was somewhat misleading, since the

"Mafia-hunters" were not stalking the plaintiffs, the headline falls into the category of permissible rhetorical hyperbole.

The most troubling aspect of the Pine Knob series lies in the photograph in the second article of the automobile under the caption, "Harvey Leach's car was found with his body in the trunk." Reporter Wendland conceded that the picture [438 Mich. 132] should have said, "in 1974," and it is also troubling that the caption did not say where the murder occurred. Again, however, the articles must be construed as a whole, and the article later pointed out that intensive investigations by law enforcement agencies failed to link the plaintiffs to the Leach (or Brush) murders. [38]

4. The Burden of Proving Falsity in Defamation by Implication.

It has been said that "there is a great deal of the law of defamation which makes no sense." [39] One might say the same of the case law regarding defamation by implication. As noted earlier, the federal circuits and the various state courts remain divided over both the viability and the analytical contours of a cause of action for defamation by implication. [40] For our part, we are not convinced that defamation by implication is so analytically distinct from defamation by explicitly false facts as to require a departure from the guiding principles of general libel and First Amendment libel law. In the absence of clear authority to the contrary, and in light of the current contours of First Amendment libel law, we conclude that an action for defamation by implication must still conform to the three guiding constitutional principles discussed above: speech on public matters initiates heightened First Amendment protection, [438 Mich. 133] true speech on public affairs cannot accrue liability, and a plaintiff bears the burden of proving falsity. Additionally, a litigant alleging defamation by implication, like any other libel plaintiff, must demonstrate a statement or implication capable of defamatory meaning and prove falsity and fault by, at minimum, a preponderance of the evidence. [41]

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The properly framed issue in this private-figure/public-interest media report case is not whether, in the abstract, a plaintiff can ever prevail by alleging defamation by implication, but rather whether the plaintiffs have proven both statements (or implications) capable of defamatory interpretation and falsity. Our review of the plaintiffs' arguments and the alleged defamatory implications lead us to agree with the trial court that the plaintiffs here failed to carry their burden of proving the falsity either of the statements or the implications at issue.

Conclusion

After a careful review of Michigan libel law, as informed by the latest constitutional pronouncements on the subject, it is our considered judgment that, to the extent this media defendant can be liable for defamation by implication arising from underlying published statements of fact not proven to be false and where no omission of material facts exist, such defamation by implication would at least have to pass the same standards of falsity, [438 Mich. 134] fault, and burden of proof as would establish liability for defamation by statements of fact.

Under the heightened standard of appellate review required in public-interest libel cases, we conclude that the plaintiffs have failed to meet this burden, and, accordingly, we reverse the decision of the Court of Appeals and reinstate the trial court's directed verdict.

ROBERT P. GRIFFIN, RILEY and BOYLE, JJ., concur.

CAVANAGH, Chief Justice (concurring in the result).

I agree with the result reached by my Brother Brickley's opinion. I reach that result, however, by a somewhat different route. For the reasons stated below, I believe plaintiffs' defamation claim is insupportable as a matter of law, and that defendants were entitled to pretrial summary judgment when they so moved in 1982. [1] I therefore agree that defendants are now entitled to a reversal of the Court of Appeals judgment presently before us, and a reinstatement of the circuit court's directed verdict. I adopt Justice Brickley's thorough statement of the facts.

I. Appellate Review of Falsity

At the outset, I must respectfully disagree with my Brother Brickley's conclusion that the underlying factual issue of falsity is subject to independent appellate review as a "constitutional fact" question. See Brickley Op. pp. 124-125, 126-129. While I [438 Mich. 135] sympathize with the free speech concerns which animate my colleague's analysis, I believe that analysis blurs the distinction between the defamation plaintiffs' acknowledged constitutional burden of proving falsity, and the nature of the issue of falsity itself.

As my colleague correctly notes, see Brickley Op. p. 124, the First Amendment requires a defamation plaintiff, at least in a case involving speech of public concern, to bear the burden of proving falsity. See Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986). It does not follow, however, from the fact that constitutional principles require a certain party to bear a certain burden of proof on a certain issue at trial, that an appellate court must or should independently review the merits of the issue. For example, in a criminal case the government is constitutionally required to bear the burden of proving the defendant's guilt beyond a reasonable doubt. Failure to so instruct the jury is grounds for reversal. See In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). But if the

jury is properly so instructed and finds the defendant guilty, constitutional principles have never been thought to require appellate courts to independently review the underlying factual issue of guilt, and thereby substitute their judgment de novo for that of the jury. Rather, appellate courts apply the well-established "sufficiency of the evidence" standard, construing the evidence in the light most favorable to the verdict and asking only whether a rational jury could properly have reached that verdict. See Jackson v. Virginia, 443 U.S. 307, 318-319, 99 S.Ct. 2781, 2788-2789, 61 L.Ed.2d 560 (1979); Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942); People v. Hampton, 407 Mich. 354, 285 N.W.2d 284 (1979). A similarly deferential standard [438 Mich. 136] of appellate review has traditionally been applied to jury verdicts in civil cases. See Kupkowski v. Avis Ford, Inc., 395 Mich. 155, 167-168, 235 N.W.2d 324 (1975); Dodd v. Secretary of State, 390 Mich. 606, 612, 213 N.W.2d 109 (1973).

My colleague would analogize the issue of falsity to the "constitutional fact" issue of "actual malice" in a defamation case, over which appellate courts are constitutionally required to exercise independent review. See, e.g., Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989); Bose Corp. v. Consumers Union, 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984). Another classic example of a constitutional fact question subject to independent appellate review is the voluntariness of a confession. See, e.g., Arizona v. Fulminante, 499 U.S. ----, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). Actual malice and the voluntariness of a confession, however, are mixed questions of fact and law. Falsity, by contrast,

would appear to be a classic issue of pure historical fact. Indeed, with regard to subsidiary factual questions underlying the ultimate issue of actual malice, the Court in Harte-Hanks strongly suggested--and four concurring justices made explicitly clear--that the appellate court need not independently review "the historical facts--e.g., who did what to whom and when." 491 U.S. at 694, 109 S.Ct. at 2699 (White, J., joined by Rehnquist, C.J., concurring); see also id. at 688, 109 S.Ct. at 2696 (opinion of the Court); id. at 697-699, 109 S.Ct. at 2700-2702 (Scalia, J., concurring in the judgment); id. at 696, 109 S.Ct. at 2700 (Kennedy, J., concurring) (indicating agreement with Justice Scalia's analysis). [2]

[438 Mich. 137] Not only does it seem clear that the United States Supreme Court is not inclined to find an independent review standard constitutionally required with regard to the issue of falsity, but this Court's own precedents have consistently viewed the determination of truth or falsity in defamation cases as a purely factual question which should generally be left to the jury. See Steadman v. Lapensohn, 408 Mich. 50, 53-54, 288 N.W.2d 580 (1980); Cochrane v. Wittbold, 359 Mich. 402, 408, 102 N.W.2d 459 (1960). [3]

Hepps, of course, has left unsettled the question whether falsity may be proved merely by a preponderance of the evidence, or whether some higher burden (such as "clear and convincing evidence") is constitutionally

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required. [4] For reasons elaborated below, however, I believe this case can properly be resolved without any further inquiry into the precise scope of either appellate review of falsity or the constitutional burden of proving falsity at trial. I would simply conclude that there is no proper need or basis in this case to adopt the standard of independent appellate review urged by my colleague.

[438 Mich. 138] II. Defamation on the Basis of

Implications From True Facts

I find it useful to begin by noting the issues which the parties do not raise on this appeal. Most significantly, plaintiffs have conceded the truth--or at least that they are unable to prove the material falsity--of all the specific factual statements contained in the four disputed articles. Plaintiffs' claim, in a nutshell, is that the articles, taken as a whole, nevertheless conveyed to the average reader certain vague, overall "implications" which plaintiffs claim to be false. These alleged implications, as defined by plaintiffs themselves, boil down to the proposition that plaintiffs "are Mafia." [5] Defendants, for their part, do not challenge the jury verdict on the ground that plaintiffs failed to prove the requisite degree of fault, nor do they challenge the finding that plaintiffs are private rather than public figures. Defendants' defense is essentially one of truth. Defendants both deny that the implications of which plaintiffs complain can fairly be said to arise from the articles, and they contend in any event that, given the conceded truth of the specific factual statements, any overall implications which do arguably arise therefrom are necessarily privileged as "implications from true facts."

[438 Mich. 139] Plaintiffs' claim is thus vastly different from the more typical or familiar "defamatory implication" claim. Plaintiffs do not allege that any particular factual statement by defendants is reasonably susceptible of conveying a specific factual implication which is provably false. Nor do they contend that defendants, by selectively omitting crucial relevant facts, have

conveyed any misleading factual implication on the basis of otherwise true statements. Rather, they contend that a collection of concededly true factual statements amounts to false defamation because of the inferential or speculative conclusions that the average reader might draw from the totality of those statements. Thus, while it is undoubtedly true, as a general matter, that defamatory implications may be potentially actionable if provably false, the case law cited by plaintiffs reiterating that familiar principle is ultimately inapposite and unhelpful.

I believe the issue in this case, properly framed, is best analyzed by recourse to those cases which have addressed the somewhat elusive problem of "defamation by implications from true facts." While this difficult area of defamation law has not yet been fully explored--and I have no pretensions that this Court can or should presume to offer any definitive solutions today--a number of cases have set forth useful and persuasive analyses of the issue. Perhaps the leading case is Strada v. Connecticut Newspapers, Inc., 193 Conn. 313, 323, 477 A.2d 1005 (1984), where "the plaintiff [sought] to recover from a publication where all the underlying and stated facts [were] proved to be true, or substantially true, claiming that the 'slant' of the article [gave] rise to allegedly false and defamatory implications." In a thoughtful and carefully analyzed opinion, the Connecticut Supreme Court concluded that "[t]he goal of nurturing a free and [438 Mich. 140] active

press in the political arena mandates denial of recovery by a public figure where the allegation of defamation 'depends fundamentally on an interpretation of various aspects of the broadcast, not on anything directly said in it.' " Id.

"When any inference or innuendo does not arise from the omission of material facts, but rather from the editorial choice of layout, the plaintiff may not recover for libel by innuendo. The media would be unduly burdened if, in addition to reporting facts about public officers and public affairs correctly, it had to be vigilant for any possibly defamatory implication arising from the report of those true facts." Id. at 326, 477 A.2d 1005.

It is true that Strada involved the alleged defamation of a public figure, and the court suggested at some points that its rule should be limited to that category of cases. I believe, however, that the gist of Strada's reasoning, if not necessarily its precise contours, properly applies to this case, which, although involving private-figure plaintiffs, involves speech of public concern. [6]

I find highly instructive the reasoning of Woods v. Evansville Press Co., 791 F.2d 480 (CA7, 1986). The court in Woods, while conceding that implied defamatory statements may be actionable, and even assuming for purposes of analysis that the article there at issue could reasonably be read to contain the "defamatory implications" ascribed to it by the plaintiff in that case, see id. at 486, held that

"requiring a publisher to guarantee the truth of all the inferences a reader might reasonably draw [438 Mich. 141] from a publication would undermine the uninhibited, open discussion of matters of public concern. A publisher reporting on matters of general or public interest cannot be charged with the intolerable burden of guessing what inferences a jury might draw from an article and ruling out all possible false and defamatory innuendoes that could be drawn from the article." Id. at 487-488.

The court in Strada cited a case also discussed by my Brother Brickley, Memphis Publishing Co. v. Nichols, 569 S.W.2d 412 (Tenn, 1978), which addressed a claim of defamation by implication from true facts. See Brickley Op., pp. 130-131. I agree with my colleague that Nichols does not support plaintiffs' claim in this case. Indeed, I think the differences between the claims in Nichols and this case are very illustrative. The plaintiff in Nichols was a gunshot victim who alleged that she was falsely defamed by an article describing the shooting, which occurred at the victim's home. The female assailant's husband was present in the victim's home at the time of the shooting, and he was also fired upon. The defendant newspaper published those facts, which were true as far as they went, but failed to report that the victim's own husband, as well as two other neighbors, were also present at the time, and that the group was simply conversing in the living room. By omitting those crucial relevant facts, the article, while technically true, directly and misleadingly implied that the victim and the assailant's husband were caught in an illicit, adulterous relationship. See 569 S.W.2d at 414, 419. As the court held:

"The proper question is whether the meaning reasonably conveyed by the published words is defamatory.... The publication of the complete facts could not conceivably have led the reader to [438 Mich. 142] conclude that [the plaintiff] and [the assailant's husband] had an adulterous relationship. The published statement, therefore, so distorted the truth as to make the entire article false and defamatory." Id. at 420 (emphasis in original).

In this case, by contrast, there is no claim that defendants, by omitting crucial relevant facts, conveyed any skewed or misleading implications. The implications of which plaintiffs complain are simply the ordinary and natural implications that might be expected to flow from the specific factual statements published by defendants,

whether taken separately or together. While many of those statements were undoubtedly defamatory, in that they had a tendency to injure the reputations of plaintiffs, they were also concededly true. While the "overall implications" allegedly conveyed by the articles as a whole may also have been defamatory, their thrust was not misleading or different in kind from that of the concededly true specific statements. Rather, the implications, if any, simply reflected the accumulated thrust of the concededly true stated facts. It logically follows that such implications--even if not themselves capable of being either verified or disproven--would necessarily be protected by the same defense of truthshielding the specific factual statements. This is simply not a case, like Nichols, where the separate factual ingredients of the publication add up to more than the sum of their parts, to the extent that a collection of true facts, by the omission of crucial associated facts, ends up conveying an actionably false implication. True facts, whatever their "implications," cannot become actionable simply because they are collected and published together in a straightforward manner. [7]

[438 Mich. 143] It is significant that plaintiffs, while conceding the truth of all the specific, concrete factual statements in the disputed articles, define the allegedly false "implications" in exceedingly broad and vague terms. Plaintiffs have been unable to define those implications any more specifically than in terms of the vague and perhaps undefinable proposition that they "are Mafia." Yet, while they strenuously assert the general falsity of that proposition, they have not disputed the essential truth of all of defendants' concrete assertions regarding their specific activities and financial ties to commonly-reputed organized-crime figures. [8] Plaintiffs have conceded that they appear on the lists of organized-crime suspects maintained by the Federal Bureau of Investigation. Indeed, plaintiff Locricchio conceded, in an interview before the

disputed articles were even published, that rumors of plaintiffs' ties to organized crime and investigations of them by numerous law enforcement agencies had already become so persistent that he feared his own mother might suspect him.

None of this, of course, necessarily establishes [438 Mich. 144] that plaintiffs "are Mafia"--however that elusive concept may be defined. I would not presume to speculate, and this Court need not decide, whether plaintiffs "are Mafia." It is noteworthy that defendant reporter Michael Wendland stated at trial his belief--which he believed to be consistent with the content and thrust of the disputed articles--that plaintiffs themselves were not directly involved in organized crime, although he believed that organized-crime figures were indirectly involved in financing the Pine Knob development. It is to be hoped, of course, that the average, fair-minded reader would stick to the concededly true facts as presented in the disputed articles, and avoid leaping to speculative or unwarranted conclusions about plaintiffs. But it simply acknowledges human nature to observe that there is no way to guarantee or control what any reader may infer, speculate, or conclude on

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the basis of facts of which he is made aware.

For purposes of this case, it is enough to conclude, as a matter of law, that a defamation defendant cannot be held liable for the reader's possible inferences, speculations, or conclusions, where the defendant has not made or directly implied any provably false factual assertion, and has not, by selective omission of crucial relevant facts, misleadingly conveyed any false factual implication. In sum, the overall implications that may flow from true factual statements straightforwardly presented are ordinarily as privileged for defamation purposes as the statements themselves. Any other conclusion, in my view, would unacceptably inhibit the free reporting of news and information of public concern. [9]

[438 Mich. 145] III. Conclusion

This Court's concern for the freedom to report opinions and truthful information about people is longstanding. In the very first volume of our Reports, we noted that "[i]n this country, and particularly in this western country, great latitude has been allowed to individuals in speaking and writing 'of and concerning' private and public characters...." People v. Jerome, 1 Mich. 142, 144 (1848). In line with this historic concern, and for the reasons detailed above, I agree that the judgment of the Court of Appeals must be reversed, and that the directed verdict in favor of defendants must be reinstated.

LEVIN, Justice (dissenting).

The signers of the lead opinion conclude that Joseph Judeas Locricchio and Gary Francell [1] failed to prove that the Pine Knob series published in the Detroit News falsely implied that they "were members or associates oforganized crime." [2] The concurrence concludes that the Detroit News is not subject to liability because it "has not made or directly implied any provably false factual assertion, and has not, by selective omission of crucial relevant facts, misleadingly conveyed any false factual implication." [3]

I dissent because there was sufficient evidence for submission to the jury that the Detroit News [438 Mich. 146] falsely implied that Locricchio and Francell were members or associates of organized crime.

Michael Wendland, one of the reporters, testified at the trial that he recalled telling Locricchio and Francell, when he interviewed them shortly before the Pine Knob series was run, that "we did not find any organized crime involvement in the ownership of Pine Knob, nor did we think that your clients were members of the Mafia." (Emphasis added.) He added, "I don't believe Gary Francell or Joe Locricchio are members of the Mafia." The follow-up question and answer were:

"Q. You knew that when this headline was written, didn't you?

"A. Yes, I--that was my conclusion."

Nevertheless, the Detroit News published the Pine Knob series which posed the question whether Locricchio's and Francell's investment in Pine Knob was Mafia--"[i]s it Mafia?"--and which linked them to two unsolved murders.

Wendland and another reporter who worked on the story, Jean Gadomski, acknowledged that although they had investigated the Harvey Leach and Agnes Brush murders, as far as they could determine, neither Locricchio nor Francell was a suspect. Nevertheless, the Detroit News Pine

Knob series linked them to the investigation of those homicides in an article which repeated the question, "Is it Mafia?"

The question in the instant case is whether the jury could reasonably conclude that the Pine Knob series implied that Locricchio and Francell were members or associates of organized crime, and that it was defamatory and false. I would answer the question in the affirmative.

[438 Mich. 147] I

The four articles appeared on the front pages of the Detroit News during the four-day period beginning Sunday, April 22, 1979.

The first article began with the headline, "The Pine Knob Story: How 2 friends and hustle created a big resort, millions in debts and a question: 'Is it Mafia?' " Each of the four articles included a caption box, reading:

"In the last eight years Pine Knob, in Oakland County, has developed from a losing ski resort into one of the nation's foremost entertainment complexes, worth millions. During these years the persistent question in Michigan and elsewhere has been 'Is it Mafia?' "

The first article states that "tangled in the confusing, often incredible story of how [Locricchio and Francell] made Pine Knob, are:

"Two unsolved murders. Though separate, the killings share common elements that lead to some of the same people who figured in Pine Knob's development.

"A so-called 'money wash' in which a Toronto firm linked to an associate of Meyer Lansky, the Mafia's key money man, hid the source of a $200,000 Pine Knob loan.

"A $4-million cost overrun by Locricchio and Francell in the building of a glittering theater for Las Vegas' Aladdin Hotel and Casino.

"Several investors associated with organized crime who either lent or helped Locricchio and Francell raise large sums of money."

The tag line at the end of the first article read:

"Tomorrow: A money wash and two murders."

[438 Mich. 148] The second article, headlined, "The Pine Knob story, How loan got 'washed,' " featured a photograph of an automobile with its trunk open. The caption under the photograph read, "Harvey Leach's car was found with his body in the trunk." This article was continued on a later page, which led with the headline, "How vital Pine Knob loan was 'washed' in Toronto," and was accompanied by a picture of Leach. The story traced the $200,000 loan, and described the "laundering" process. The article also contained the following statement:

"While the transaction was legal, it was unorthodox and it attracted the attention of the Ontario Provincial Police, who in turn talked to the FBI."

And with regard to the murders,

"Locricchio and Francell say they know nothing about either killing, and insist it is coincidental that some of the same people were involved in the loans to Leach and Pine Knob. A score of police agencies have investigated the murders and have not proved otherwise.... The only suspect [in the murder of Agnes Brush] was the 61-year-old laborer who worked with Miss Brush."

The third article was headlined "The Pine Knob story, A brush with bankruptcy."

The fourth and last article was headlined, "Partners stalked by Mafia-hunters," and, on the continuing page, "Mafia-hunters stalk Locricchio, Francell."

II

Chief Justice Rehnquist opened his review of the law in one of the most recent pronouncements of the United States Supreme Court, Milkovich v. [438 Mich. 149] Lorain Journal Co., 497 U.S. ----, ----, 110 S.Ct. 2695 2702, 111 L.Ed.2d 1, 13 (1990), with the following:

"Who steals my purse steals trash;

" 'Tis something, nothing;

" 'Twas mine, 'tis his, and has been slave to thousands

"But he that filches from me my good name

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"Robs me of that which not enriches him

"And makes me poor indeed." Othello, act III, scene 3.

In Milkovich, the Court stated that the majority was not persuaded that in addition to the protections of media expression the Court had enunciated, beginning with New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964):

"an additional separate constitutional privilege for 'opinion' is required to ensure the freedom of expression guaranteed by the First Amendment." 497 U.S. at ----, 110 S.Ct. at 2707, 111 L.Ed.2d at 19.

The Court turned to the case at hand and said:

"The dispositive question in the present case then becomes whether or not a reasonable factfinder could conclude that the statements in the Diadiun column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding. We think this question must be answered in the affirmative." Id. (Emphasis added.)

The "dispositive" question, as stated by the United States Supreme Court in Milkovich, whether a reasonable factfinder could conclude that the statements implied an assertion that was defamatory, is long established, and is expressed in the Restatement of Torts as follows:

"Sec. 563. Meaning of the Communication

"The meaning of a communication is that which [438 Mich. 150] the recipient correctly, or mistakenly but reasonably, understands that it was intended to express." 3 Restatement Torts, 2d, Sec. 563, p 162.

The Restatement continues that the court determines whether a communication "is capable of bearing a particular meaning," and "whether that meaning is defamatory." The jury determines whether "a communication, capable of a defamatory meaning, was so understood by its recipient." Id., Sec. 614, p. 311.

In Gustin v. Evening Press Co., 172 Mich. 311, 313, 137 N.W. 674 (1912), this Court affirmed an order of the circuit court overruling a demurrer to plaintiff's declaration for libel. The article was headlined:

"Goes to Australia.

"Alpena Man Turns Over Assets and Seeks New Country."

The Court said that " 'the sting of the libel was contained in the headlines,' " and quoted with approval Justice Cooley's statement in his work on torts that in determining whether words are

libelous, " 'they are to be taken in their plain and natural import, according to the ideas they are calculated to convey to those to whom they are addressed....' " Id., p. 315. [4]

In McNair v. Hearst Corp., 494 F.2d 1309, 1310 (CA9, 1974), the Seattle Post-Intelligencer had published the following headline and first two paragraphs:

"The High Cost of a Divorce"

"Five years ago, Barbara Evans hired a lawyer to represent her in a divorce action.

"[438 Mich. 151] Today the lawyer owns the home, worth between $55,000 and $65,000, which Mrs. Evans received as part of the 1966 divorce settlement...."

The court held that a reasonable reader could interpret these words to mean that Mrs. Evans had paid her attorney the value of her house for her divorce, although the body of the article related the true circumstances that the lawyer was paid $3000 for the divorce, and obtained the house when the estranged husband failed to make the payments:

"Under Washington law whether an article is true will depend on what it is read to say--on how it would ordinarily be understood by persons reading it [citation omitted]. The question here, as we view it, is whether the article as a whole can be said effectively to have eliminated the impact of any false impression created at the outset. In our judgment this question cannot here be answered as matter of law and remains a question for the jury." Id.

In Las Vegas Sun, Inc. v. Franklin, 74 Nev. 282, 286, 329 P.2d 867 (1958), the Supreme Court of Nevada considered a series of articles. The courtsaid that the libelous statements were "found, not in the

body of the article, but in its headline and tag-line". The headline read,

" 'Babies for sale. Franklin black market trade of child told.' "

"The tag-line read:

" 'Tomorrow--Blackmail by Franklin.'

"The body of the article factually recited the manner in which Franklin had secured the relinquishment of a baby for adoption."

[438 Mich. 152] The court considered the newspaper's argument "that the headline and tagline cannot be considered apart from the context in which they were used. Thus, they contend, the headline must be qualified by and read in the light of the article to which it referred, and the tagline must be qualified by and read in the light of the subsequent article to which it referred." Id. at 287, 329 P.2d 867. The court rejected the argument, stating:

"The text of a newspaper article is not ordinarily the context of its headline, since the public frequently reads only the headline. [Citations omitted.] The same is true of a tagline or leader,

since the public frequently reads only the leader without reading the subsequent article to which it refers. The defamation of Franklin contained in the headline was complete upon its face. It was not necessary to read the article in order that the defamatory nature of the statement be understood or connected with Franklin. The same is true of the tag-line." Id.

Nor is it determinative here that the sting of the headline concludes with a question mark--"Is it Mafia?":

"A man cannot libel another, by the publication of language, the meaning and damaging effect of which is clear to all men, and where the identity of the person meant cannot be doubted, and then escape liability through the use of a question mark." Spencer v. Minnick, 41 Okl. 613, 617, 139 P. 130 (1914).

A defamatory statement, "He is a womanizer," or "She is a tramp," would not become less so if phrased, "Is he a womanizer?" or "Is she a tramp?"

[438 Mich. 153] III

This is not a case where a plaintiff seeks to hold a media defendant "liable for the reader's possible inferences, speculations, or conclusions" [5] drawn from a "straightforward" presentation of the facts. The headlines and tag lines, and the persistently posed question, "Is it Mafia?" suggested the inferences, speculations, and conclusions for the reader.

The jury could properly find that a reasonable reader of the Detroit News could understand that the Pine Knob Series not only conveyed the fourteen facts the trial court found to be true, but also that Locricchio and Francell were guilty of a continuing course of criminal wrongdoing generally associated with organized crime and membership or association in the "Mafia," including involvements in the murders of Agnes Brush and Harvey Leach, and an illegal money laundering scheme, and that the communication was defamatory and false.

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1 Rosenblatt v. Baer, 383 U.S. 75, 86, 86 S.Ct. 669, 676, 15 L.Ed.2d 597 (1966). Justice Stewart's concurring opinion underscored that libel law's protection of reputation from defamatory falsehoods "reflects no more than our basic concept of the essential dignity and worth of every human being--a concept at the root of any decent system of ordered liberty." (Stewart, J., concurring). Id. at 92, 86 S.Ct. at 676.

2 First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776, 98 S.Ct. 1407 1415, 55 L.Ed.2d 707 (1978).

3 This opinion elucidates in later sections that "[a] traditionally ... strong affinity [exists] between first amendment jurisprudence and [public discourse]." Post, The constitutional concept of public discourse: Outrageous opinion, democratic deliberation, and Hustler Magazine v. Falwell, 103 Harv L R 603, 627 (1990).

4 The plaintiffs' original action also included allegations of defamation arising from articles published by Detroit News columnist Pete Waldmeir in 1972 and 1977, and an editorial published by Detroit News editor Bill Giles in 1979. Only the Pine Knob series of articles remains at issue on appeal.

5 The plaintiffs also sued for invasion of privacy, intentional infliction of emotional distress, and contractual interference. These counts have been dismissed, and only the libel allegations remain in dispute.

6 The jury inexplicably found no publication of facts to a third party with regard to plaintiff Locricchio and accordingly awarded him zero damages.

7 The parties do not dispute the configuration in this case of private-plaintiff/public-interest/media-defendant. This opinion generally refers to the media/nonmedia status of parties in the descriptive rather than a normative sense. Dicta suggests that a majority of the Supreme Court believes that "in the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities." Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749, 784, 105 S.Ct. 2939 2958, 86 L.Ed.2d 593 (1985), (Brennan, J., dissenting). See note: The burden of proving truth or falsity in defamation: Setting a standard for cases involving nonmedia defendants, 62 NYU L R 812, 840 (1987) (noting that the "Supreme Court has yet to decide whether [the media-nonmedia] distinction is necessary or even viable").

8 This Court subsequently denied interlocutory appeal, and the United States Supreme Court denied certiorari.

9 The reporters had agreed to provide the plaintiffs and their attorney a duplicate copy of the taped interview. At trial, the plaintiffs contended that Detroit News had actually provided a blank copy.

10 Our decision in Rouch v. Enquirer & News of Battle Creek, 427 Mich. 157, 398 N.W.2d 245 (1986), subsequently rejected the actual malice standard of liability in private-figure/public-interest cases.

11 See n. 10.

12 Wright, Miller & Cooper, Federal Practice and Procedure, Sec. 4478, p. 788.

13 Messenger v. Anderson, 225 U.S. 436, 444, 32 S.Ct. 739, 56 L.Ed. 1152 (1912). See also Safir v. Dole, 231 U.S.App.D.C. 63, 718 F.2d 475 (1983) (the law of the case doctrine is discretionary and does not preclude courts from reexamining issues that address their constitutional power).

14 Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688, 109 S.Ct. 2678 2696, 105 L.Ed.2d 562 (1989). "In determining whether [a] constitutional standard has been satisfied, the reviewing court must consider the factual record in full."

15 In any event, the law of the case doctrine does not bind this Court upon review of a decision of the Court of Appeals.

16 The actual malice standard of Sullivan requires a public figure or official to first establish a false utterance, and, second, to prove that "it was [made] with reckless disregard of whether it was false or not." 376 U.S. at 280, 84 S.Ct. at 726.

17 Certainly, the Harte-Hanks Court "construed the constitutional mandate of independent appellate review very narrowly" as compared to Bose and Sullivan. Rassel, Stewart & Niehoff, Connaughton v. Harte-Hanks and the independent review of libel verdicts, 20 U Tol L R 681, 694 (1989).

The concurring opinion of Chief Justice Cavanagh advances Harte-Hanks for the proposition that appellate courts "need not independently review 'the historical facts--e.g., who did what to whom and when....' " Op., p. 114, citing the concurring opinion of Justice White. Initially, it must be said that our reading of Harte-Hanks does not find that "four concurring justices made explicitly clear" that they agree with Justice White's concurrence. In any event, even Justice White, with whom Chief Justice Rehnquist alone concurred conceded that the "reckless disregard component of the ... 'actual malice' standard is not a question of historical fact." Id. at 694, 109 S.Ct. at 2699. (Emphasis supplied.)

Second, appellate analysis of actual malice in libel cases necessarily involves a threshold determination of falsity, since proof of actual malice requires proof of both falsity and reckless disregard of falsity. Third, in reviewing a libel verdict an appellate court does not and should not exercise review of credibility determinations, disregard previous factfindings, or create new factfindings. Rather, the court should exercise independent judgment regarding whether, as a matter of constitutional law the evidence in the record supports the verdict. The Court of Appeals in this case failed to perform an independent evaluation of the evidence in accordance with the constitutional principles enumerated in this opinion.

The trial court, in contrast, clearly conducted an independent review of the existing record. The concurrence suggests that independent review of the burden of proving falsity inherently involves reviewing credibility of witnesses. Yet the record emphatically demonstrates that the trial court did not examine credibility in its independent review of the jury's verdict. Its evaluation concerns not primarily "who did what to whom and when," but whether a constitutionally permissible quantum of evidence supported a judgment consistent with libel law and First Amendment principles. As the Bose Court noted, "the rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or a trial judge." 466 U.S. 501; see also Time v. Pape, 401 U.S. 279, 284, 91 S.Ct. 633, 28 L.Ed.2d 45 (1971): "[I]n cases involving the area of tension between the First and Fourteenth Amendments on the one hand and state defamation laws on the other, we have frequently had occasion to review 'the evidence in the ... record to determine whether it could constitutionally support a judgment' for the plaintiff." The task of the reviewing appellate court in a libel case is not to conduct an inquiry regarding who did what to whom, but rather to independently examine the record as a whole to insure that the burden of proof with respect to falsity has been satisfied.

18 The logic of Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505 2512, 91 L.Ed.2d 202 (1986), supports this reasoning. In Anderson, the Court was "convinced that the inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits.... The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict...." (Emphasis added.)

19 Rouch designated negligence as the applicable standard of liability for actual damages in such cases. The standard of liability is thus now settled law in Michigan and not at issue in this case.

20 It is worth noting in this connection that the doctrine of independent review reflects an inherent distrust of allocating unlimited decisional power to juries in the First Amendment context. Thus, "much of contemporary first amendment doctrine, theory, and commentary is devoted to protecting speech from the jury.... The common wisdom is that if juries were given more decisional power in [First Amendment cases], either by increasing the range of issues they could consider or by granting juries greater immunity from appellate review, free speech would suffer a crippling blow." Schauer, The role of the people in First Amendment theory, 74 Cal L R 761, 765 (1986).

21 Amicus curiae, Michigan Trial Lawyers Association, incorrectly suggest that Bufalino v. Detroit Magazine, Inc., 433 Mich. 766, 449 N.W.2d 410 (1989), mandates a remand in this case. The Bufalino majority acknowledged explicitly that "[w]e can, as a practical matter, simply decide the merits of the issue on the basis of the record before us." Id. at 774, 449 N.W.2d 410. Moreover, unlike Bufalino, a summary judgment case, the instant case comes before us after extensive pretrial and posttrial arguments.

22 It can hardly be disputed that the Supreme Court has rarely "breathed life into the [First Amendment's] press clause [so as to provide] the outlines of a press-speech distinction." Note, Press to trial: The press clause, the libel dilemma, and the media-nonmedia distinction, 39 Syracuse L R 795, 812 (1988). Nevertheless, much of the Court's libel jurisprudence has unequivocally sought to constrain publishers from imposing anti-free speech " 'self-censorship.' " Sullivan, 376 U.S. at 279, 84 S.Ct. at 725. See, e.g., Gertz, 418 U.S. at 347, 94 S.Ct. at 3010 (explicitly restricting its holding to media defendants), Hepps, 475 U.S. at

779, n. 4, 106 S.Ct. at 1565, n. 4 ("Nor need we consider what standards would apply if the plaintiff sues a nonmedia defendant"). See also note, Philadelphia Newspapers v. Hepps, revisited: A critical approach to different standards of protection for media and nonmedia defendants in private plaintiff defamation cases, 58 Geo Wash L R 1268, 1281 (1990): "[A]lthough the [Supreme] Court has never clearly embraced the media-nonmedia distinction, it has never explicitly rejected it either."

23 See, e.g., Hepps 475 U.S. at 775, 106 S.Ct. at 1563. "When the speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law."

24 Thornhill v. Alabama, 310 U.S. 88, 101, 60 S.Ct. 736, 84 L.Ed. 1093 (1940).

25 NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982). See also Thornhill, n. 24, supra, Rosenblatt, supra 383 U.S. at 85, 86 S.Ct. at 675: "There is, first, a strong [constitutional] interest [in protecting] debate on [public issues]."

26 Note, The burden of proving truth or falsity in defamation: Setting a standard for cases involving nonmedia defendants, 62 NYU L R 812, 829 (1987).

27 Note, The fact-opinion determination in defamation, 88 Colum L R 809, 833 (1988).

28 See, e.g., Hepps, supra 475 U.S. at 775, 106 S.Ct. at 1563: "Our opinions to date have chiefly treated the necessary showings of fault rather than falsity." The actual-malice inquiry of public-figure cases generally focuses on the actions and state of mind of the publisher rather than the quantum of proof of falsity adduced by the plaintiff. See, e.g., Herbert v. Lando, 441 U.S. 153, 176, 99 S.Ct. 1635 1648, 60 L.Ed.2d 115 (1979) (requiring plaintiffs in defamation actions to "focus on the editorial process and [to] prove a false publication attended by some degree of culpability").

29 Hustler Magazine v. Falwell, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988). The Holmesian concept of the "marketplace of ideas" plays a central role in all First Amendment jurisprudence. See, e.g., Abrams v. United States, 250 U.S. 616, 630, 40 S.Ct. 17, 22, 63 L.Ed. 1173 (1919) (Holmes, J., dissenting).

30 Milkovich v. Lorain Journal Co., 497 U.S. ----, ----, 110 S.Ct. 2695 2706, 111 L.Ed.2d 1, 18 (1990).

31 Prosser & Keeton (5th ed.), Torts, 1988 supp., Sec. 116A, p. 117.

32 As will be seen, we do not, and need not, disagree in theory with the conclusion of the Court of Appeals that a cause of action for libel by implication might succeed without a direct showing of false statements. We do disagree with its failure to conduct a review of the sufficiency of the evidence of falsity for any such libel by implication, as did the trial court.

33 It must be noted here that no consensus exists within the various federal circuits on the issue of defamation by implication. See, e.g., Price v. Viking Penguin, Inc., 881 F.2d 1426, 1432 (CA8, 1989), cert. den. 493 U.S. 1036, 110 S.Ct. 757, 107 L.Ed.2d 774 (1990) (refusing to recognize defamation by implication). Pierce v. Capital Cities Communications, Inc., 576 F.2d 495 (CA3, 1978), cert. den. 439 U.S. 861, 99 S.Ct. 181, 58 L.Ed.2d 170 (1978); Woods v. Evansville Press Co., 791 F.2d 480, 486 (CA7, 1986) (an implied statement, just as a statement made in direct language, can be defamatory).

34 The Supreme Court's opinion in Milkovich v. Lorain Journal Co., supra, illustrates this principle. The Court in Milkovich noted that "the issue of falsity relates to the defamatory facts implied by a statement. For instance, the statement, 'I think Jones lied' may be provable as false on two levels. First, that the speaker really did not think Jones had lied but said it anyway, and second that Jones really had not lied. It is, of course, the second level of falsity which would ordinarily serve as the basis for a defamation action,

though falsity at the first level may serve to establish malice where that is required for recovery." Id., 497 U.S. at ----, n. 7, 110 S.Ct. at 2706, n. 7, 111 L.Ed.2d at 18, n. 7.

35 See, e.g., Cochran v. Indianapolis Newspapers, Inc., 175 Ind.App. 548, 372 N.E.2d 1211 (1978); Kelly v. Iowa State Ed. Ass'n, 372 N.W.2d 288 (Iowa, 1985); and Catalano v. Pechous, 83 Ill.2d 146, 50 Ill.Dec. 242, 419 N.E.2d 350 (1980). Similarly, the Chief Justice's concurrence urges application of Strada v. Connecticut Newspapers, Inc., 193 Conn. 313, 477 A.2d 1005 (1984). However, our reading of Strada finds that case so replete with language about public figures as to provide virtually no guidance in the instant private plaintiff case.

36 See, e.g., Moritz v. Medical Arts Clinic, PC, 315 N.W.2d 458 (ND, 1982), Geyer v. Steinbronn, 351 Pa.Super. 536, 506 A.2d 901 (1986), and Lewis v. Equitable Life Assurance Co., 389 N.W.2d 876 (Minn, 1986).

37 The evidence at trial indicated that investigative interest by law enforcement agencies (and the resulting adverse effect on the ability of the plaintiffs to obtain traditional sources of financing) predated the publication of the Pine Knob series by a number of years.

38 The statement that "a score" of agencies had investigated the Leach/Brush murders, while technically false, is not defamatory, in that it implies that many agencies tried, but failed, to link the plaintiffs to the murders, thus strengthening an inference that the plaintiffs did not in fact commit the murders.

39 Prosser & Keeton, n. 31 supra, p. 771.

40 See, e.g., note, The art of insinuation: Defamation by implication, 58 Fordham L R 677, 682-683 (1990): "Some courts permit and others prohibit a cause of action for defamation by implication. Unfortunately, they articulate their positions infrequently."

41 Our review has disclosed no case where a plaintiff prevailed by alleging defamation by implication without a showing of either direct or underlying material falsity, or a material omission of true facts. The question what standard of liability would most appropriately apply in such a case--actual malice or negligence--need not be addressed under the facts in this case, and thus remains a question for a future case.

1 The circuit court denied defendants' second motion for summary judgment in 1982, and the Court of Appeals affirmed. We did not approve that decision, but simply denied interlocutory leave to appeal. 419 Mich. 860 (1984). The United States Supreme Court denied certiorari. 469 U.S. 1018 (1984). With the benefit of 20/20 hindsight, this Court, in my view, should have granted leave to appeal in 1984 and should have reversed the Court of Appeals decision at that time.

2 Even while reaffirming independent appellate review in the actual malice context, the Court in Harte-Hanks noted that underlying factual questions like "credibility determinations" are not independently reviewed. See id. at 688, 109 S.Ct. at 2696. Justice Brickley himself suggests that his independent review standard would not extend to "credibility determinations." Op., p. 124, n. 17. Yet the factual issue of falsity will frequently amount to no more and no less than a credibility contest between witnesses at trial. Thus, if Justice Brickley's independent review standard with regard to falsity is to have any real meaning, it would necessarily have to apply even to credibility issues, a province traditionally reserved most jealously for the jury as trier of fact.

3 This is not to suggest, in light of free speech concerns, that a jury's finding with regard to falsity should be immune from any effective appellate scrutiny. For reasons elaborated below, I do not think we need to address in this case whether, for example, appellate review of falsity should be limited to the extremely lenient "sufficiency of the evidence" standard traditionally used to review civil jury verdicts, or whether a more searching standard (such as "clearly erroneous" review) should be employed.

4 See Hepps, 475 U.S. at 779, n. 4, 106 S.Ct. at 1565, n. 4 ("[w]e ... have no occasion to consider the quantity of proof of falsity that a private-figure plaintiff must present").

5 As Justice Brickley notes, plaintiffs, toward the very beginning of this litigation, responded to defendants' interrogatories by stating that

"the defamation allegations ... are not necessarily based on a false statement(s) in any one particular article, but rather, that the entire series of articles, in their entirety, injured the reputations of plaintiffs as the same represented a false portrayal, implication, imputation and/or insinuation that plaintiffs, among other things, are or were members and/or associates of an organized criminal society, otherwise known as the 'Mafia'...."

6 The issue of possible organized-crime involvement in a major business and entertainment development is certainly of public concern.

7 I agree with my Brother Brickley that the one potentially troublesome aspect of the disputed articles is the caption of the photograph in the second article regarding the discovery of Harvey Leach's body in the trunk of his car. See Brickley Op., p. 133. The caption itself fails to note the important facts that the body was discovered in 1974, five years before the articles were published, and that plaintiffs were never implicated in the murder. I also agree, however, that this isolated defect, for which defendant reporter Michael Wendland indicated regret at trial, is not enough to support plaintiffs' claim. The caption, taken by itself, does not refer to either plaintiff, and conveys little comprehensible information at all without the background and context provided by the text of the second article. That text accurately, and with reasonable completeness, describes the known facts associated with Leach's murder, including the fact that intensive investigations by numerous law enforcement agencies never found any connection between plaintiffs and Leach's murder.

8 As the circuit court noted in granting defendants' motion for directed verdict, it is essentially undisputed that "[p]laintiffs were personal friends of, or had done business with, innumerable individuals whose names are commonly associated with organized crime...."

9 My Brother Levin would permit recovery against defendants for publishing concededly true facts, simply because those facts inevitably convey unflattering overall implications about plaintiffs. He does not explain how his analysis takes account of the unique and troublesome issues raised in the area of implications from true facts.

I agree with my colleague, of course, that the mere rephrasing of a statement into the form of a question, whether "Is it Mafia?" or "Is he a womanizer?" cannot immunize the statement. But my colleague overlooks the plethora of concededly true facts in the disputed articles which rendered the provocative headline question a reasonable comment on those facts.

1 The verdict awarded Francell damages and found that Locricchio had no cause for action.

2 Op., p. 114.

3 Cavanagh, C.J., Op., p. 118.

4 1 Cooley, Torts, pp. 409-410.

5 Cavanagh, C.J., Op. p. 118.

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978 S.W.2d 568
26 Media L. Rep. 2385, 41 Tex. Sup. Ct. J. 1394
WFAA-TV, INC., Petitioner,
v.
John McLEMORE, Respondent.
No. 97-0868.
Supreme Court of Texas.
Argued April 1, 1998.
Decided Sept. 24, 1998.

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Paul C. Walter, Rachel Elizabeth Boehm, Dallas, R. Matt Dawson, Corsicana, for petitioner.

Aubrey R. Williams, Greg White, John Alonzo Montez, Felipe Reyna, Waco, for respondent.

HANKINSON, Justice, delivered the opinion for a unanimous Court.

In this defamation suit arising out of the 1993 Bureau of Alcohol, Tobacco and Firearms (ATF) raid on the Branch Davidian compound at Mount Carmel, we decide whether a media plaintiff, one of only a few journalists to report live from the scene of the raid, whose reports were rebroadcast worldwide, and who willingly gave numerous interviews about his role in the failed raid, is a public figure. The plaintiff sued WFAA-TV Channel 8 in Dallas alleging that its news reports concerning his role in the failed raid damaged his reputation in the community. The trial court denied WFAA's motion for summary judgment, and the court of appeals affirmed. 979 S.W.2d 337. Because we conclude that the plaintiff in this case became a limited-purpose public figure after thrusting himself to the forefront of the controversy surrounding the failed ATF assault, we reverse the court of appeals' judgment and render judgment that the plaintiff take nothing.

On February 28, 1993, ATF agents approached the Mount Carmel compound occupied by the Branch Davidians, a small religious sect that had amassed an arsenal of illegal weaponry. Two local media outlets, KWTX-TV Channel 10 in Waco and the Waco Tribune-Herald, learned from various sources that a major law enforcement operation would proceed at Mount Carmel that morning. KWTX-TV dispatched reporter John McLemore and cameraman Dan Mullony to report on the event.

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When the ATF agents attempted to enter one of the buildings on the compound, they became involved in a gunfight with the Davidians. During the battle, four ATF agents and three Davidians were killed, and twenty ATF agents were wounded. McLemore and Mullony, the only

media representatives to follow the agents onto the compound, reported live from the midst of the firefight.

Two days after the gunfight, media reports began to focus on why the ATF raid had failed and what sparked the gunfight. On March 2, 1998, Kathy Fair, a Houston Chronicle reporter, appeared on Nightline, an ABC news show anchored by Ted Koppel. During the show, Koppel and Fair discussed the media's role in the botched ATF raid. Koppel asked what went wrong with the media's coverage, and Fair initially responded that it was too early to determine. She then suggested ATF agents believed they were set up:

I think many officers will tell you that they blame the media, particularly the local media, for the tragedy that occurred here. They think the fact that both the newspaper and the local television station, who were already at the compound, some of whom were reporters for, I believe, the TV station, allegedly were already hiding in the trees when federal agents arrived. And that was the first indication that many of them had that they had been set up, and that's a strong belief I think they have that they have not shared publicly yet, is that they think they were set up.

As soon as the Nightline broadcast ended, KWTX-TV began to receive calls critical of McLemore's role in the raid, even though Fair had not identified him by name.

WFAA picked up the story the next day and began to broadcast reports by Valerie Williams, a WFAA reporter, who repeated Fair's report that ATF agents saw local media hiding in trees at the compound before the attack began. WFAA then broadcast video footage of McLemore while apparently on the compound grounds. Williams then continued her report:

The only reporters at the scene Sunday morning were Steve [sic] McLemore and a television photographer from KWTX-TV in Waco and one or two reporters from the local newspaper. McLemore's news unit was used to transport some of the wounded agents. Currently his bosses are consulting with attorneys before issuing a statement.

Later that evening, WFAA broadcast a similar piece, again repeating excerpts from Nightline, followed by commentary from Williams:

[T]he only reporters at the scene Sunday morning were John McLemore and a photographer.... Wednesday night McLemore's station ... demanded a retraction from Nightline saying, "[T]he rumor that a Waco reporter had tipped the cult about the raid in exchange for permission to be on the compound grounds was completely false. No reporter or photographer from local media was on the compound grounds prior to the raid."

Soon after the reports aired, McLemore sued WFAA-TV, Valerie Williams, A.H. Belo Corporation, Belo Productions, Inc., the Houston Chronicle, and Kathy Fair for defamation, alleging that their news reports of his role in the failed raid damaged his reputation in the community. WFAA moved for summary judgment on six grounds: (1) no defamatory meaning; (2) fair report privilege; (3) fair comment privilege; (4) truth; (5) no actual malice; and (6) neutral reporting privilege. After McLemore nonsuited Williams and the two Belo corporations, the trial court granted summary judgment in favor of the Chronicle and Fair, but denied WFAA's motion for summary judgment.

Affirming the trial court's judgment, the court of appeals concluded that McLemore was a private individual, and as such, he had to prove negligence, not actual malice, in his defamation case. Because WFAA did not move for summary judgment on the grounds that it acted without negligence, the court of appeals determined that the issue was not before it and remanded the defamation action to the trial court for further proceedings consistent with its opinion. 979 S.W.2d at 343.

WFAA now appeals under section 22.225(d) of the Texas Government Code,

which provides this Court with jurisdiction to hear a petition for review from an interlocutory order denying a media party's motion for summary judgment in a defamation case. TEX. GOV'T CODE § 22.225(d); TEX. CIV. PRAC. & REM.CODE § 51.014(6). Specifically, WFAA argues that summary judgment is proper because McLemore is a public figure, and as a matter of law, it did not broadcast its reports with actual malice.

To maintain a defamation cause of action, the plaintiff must prove that the defendant: (1) published a statement; (2) that was defamatory concerning the plaintiff; (3) while acting with either actual malice, if the plaintiff was a public official or public figure, or negligence, if the plaintiff was a private individual, regarding the truth of the statement. See Carr v. Brasher, 776 S.W.2d 567, 569 (Tex.1989)(citing New York Times Co. v. Sullivan, 376 U.S. 254, 279-80, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)). To have prevailed on its motion for summary judgment, WFAA must have disproved at least one essential element of McLemore's defamation claim. See Doe v. Boys Clubs of Greater Dallas, 907 S.W.2d 472, 476-77 (Tex.1995).

Fault is a constitutional prerequisite for defamation liability. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 347, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). Private plaintiffs must prove that the defendant was at least negligent. See Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809, 819 (Tex.1976) (holding that "a private individual may recover damages from a publisher or broadcaster of a defamatory falsehood as compensation for actual injury upon a showing that the publisher or broadcaster knew or should have known that the defamatory statement was false"); see also Gertz, 418 U.S. at 347, 94 S.Ct. 2997 (holding that states may define for themselves the appropriate standard of liability for a publisher of a defamatory falsehood injurious to a private individual "so long as they do not impose liability without fault"). Public officials and public figures must establish a higher degree of fault. They must prove that the defendant published a defamatory falsehood 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 (defining the actual malice standard and applying it to public officials); see also Curtis Pub. Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967) (applying the New York Times actual malice standard to public figures).

Because a defamation plaintiff's status dictates the degree of fault he or she must prove to render the defendant liable, the principal issue in this case is whether McLemore is a public figure. The question of public-figure status is one of constitutional law for courts to decide. See Rosenblatt v. Baer, 383 U.S. 75, 88, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966); Trotter v. Jack Anderson Enters., Inc., 818 F.2d 431, 433 (5th Cir.1987). Public figures fall into two categories: (1) all-purpose, or general-purpose, public figures, and (2) limited-purpose public figures. General-purpose public figures are those individuals who have achieved such pervasive fame or

notoriety that they become public figures for all purposes and in all contexts. See Gertz, 418 U.S. at 351, 94 S.Ct. 2997. Limited-purpose public figures, on the other hand, are only public figures for a limited range of issues surrounding a particular public controversy. See id.

To determine whether an individual is a limited-purpose public figure, the Fifth Circuit has adopted a three-part test:

(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.

Trotter, 818 F.2d at 433 (citing Tavoulareas v. Piro, 817 F.2d 762, 772-73 (D.C.Cir.1987) (en banc)); see also Waldbaum v. Fairchild Pub., Inc. 627 F.2d 1287, 1296-98 (D.C.Cir.1980). Although the Trotter/Waldbaum test does not distinguish between plaintiffs who have voluntarily injected themselves into a controversy and those who are involuntarily

drawn into a controversy, some courts have held that plaintiffs who are drawn into a controversy cannot be categorized as limited-purpose public figures. [1] Because, as we explain below, McLemore clearly voluntarily injected himself into the controversy at issue, we need not decide in this case whether "voluntariness" is a requirement under the limited-purpose public-figure test we apply. Nevertheless, the Trotter/Waldbaum elements provide a "generally accepted test" to determine limited-purpose public-figure status. See, e.g., Little v. Breland, 93 F.3d 755, 757 (11th Cir.1996); Harris v. Quadracci, 48 F.3d 247, 251 (7th Cir.1995); Silvester v. American Broad. Co., 839 F.2d 1491, 1494 (11th Cir.1988); Faigin v. Kelly, 978 F.Supp. 420, 427 (D.N.H.1997); Russo v. Conde Nast Pub., 806 F.Supp. 603, 609 (E.D.La.1992); Brueggemeyer v. American Broad. Co., 684 F.Supp. 452, 455, 457-58 (N.D.Tex.1988).

Applying the Trotter/Waldbaum limited-purpose public-figure elements to this case, we must first determine the controversy at issue. Trotter, 818 F.2d at 433-34; Waldbaum, 627 F.2d at 1296. In Waldbaum, the D.C. Circuit elaborated on how to determine the existence and scope of a public controversy:

To determine whether a controversy indeed existed and, if so, to define its contours, the judge must examine whether persons actually were discussing some specific question. A general concern or interest will not suffice. The court can see if the press was covering the debate, reporting what people were saying and uncovering facts and theories to help the public formulate some judgment.

627 F.2d at 1297. In this case, numerous commentators, analysts, journalists, and public officials were discussing the raid and the reasons why the ATF raid failed. As evidenced by Fair's comments during the Nightline broadcast, as well as reports by The Dallas Morning News and the Fort Worth Star Telegram, the press was actively covering the debate over why the ATF raid failed. Many such discussions focused on the role of the local media in the ATF's failure to

capture the Davidian compound. The controversy surrounding the Branch Davidian raid was public, both in the sense that people were discussing it and people other than the immediate participants in the controversy were likely to feel the impact of its resolution. See Trotter, 818 F.2d at 433; Waldbaum, 627 F.2d at 1297; see also Einhorn v. LaChance, 823 S.W.2d 405, 413 (Tex.App.--Houston [1st Dist.] 1992, writ dism'd w.o.j.). While the court of appeals defined the controversy as limited to "McLemore's personal ethical standards as a journalist," we do not view it so narrowly. Based on the facts outlined above, we conclude that the public controversy at issue is the broader question of why the ATF agents failed to accomplish their mission.

To determine that an individual is a public figure for purposes of the public controversy at issue, the second Trotter/Waldbaum element requires the plaintiff to have had more than a trivial or tangential role in

the controversy. Trotter, 818 F.2d at 433; Waldbaum, 627 F.2d at 1297. In considering a libel plaintiff's role in a public controversy, several inquiries are relevant and instructive: (1) whether the plaintiff actually sought publicity surrounding the controversy, Brewer v. Memphis Pub. Co., 626 F.2d 1238, 1254 (5th Cir.1980); (2) whether the plaintiff had access to the media, see, e.g., Gertz, 418 U.S. at 344, 94 S.Ct. 2997; Curtis, 388 U.S. at 155, 87 S.Ct. 1975; and (3) whether the plaintiff "voluntarily engag[ed] in activities that necessarily involve[d] the risk of increased exposure and injury to reputation," see Brewer, 626 F.2d at 1254; Waldbaum, 627 F.2d at 1294-95; see also Kassel v. Gannett Co., Inc., 875 F.2d 935, 939-40 (1st Cir.1989); Dombey v. Phoenix Newspapers, Inc., 150 Ariz. 476, 724 P.2d 562, 571 (Ariz.1986). "By publishing your views you invite public criticism and rebuttal; you enter voluntarily into one of the submarkets of ideas and opinions and consent therefore to the rough competition in the marketplace." Dilworth v. Dudley, 75 F.3d 307, 309 (7th Cir.1996).

The record reflects that McLemore acted voluntarily to invite public attention and scrutiny on several occasions and in several different ways during the course of the public debate on the failed ATF raid. For example, McLemore was the only journalist to go onto the grounds of the compound, while other reporters assigned to cover the raid did not. By reporting live from the heart of the controversial raid, McLemore assumed a risk that his involvement in the event would be subject to public debate. Following the battle, McLemore spoke to other members of the press about the attempted raid, conveying his pride in his coverage from the midst of the gunfight, and portraying himself as a hero in assisting wounded ATF agents when he remarked that his role in the raid was "at considerable personal risk" and in contrast to other journalists who "were pinned down in a ditch" outside the compound. As a journalist, McLemore had ready, continual access to the various media sources. To one group of reporters, he explained that "as a journalist, I was ... pleased to see that my coverage of this story was being broadcast to a wide audience." Thus, by choosing to engage in activities that necessarily involved increased public exposure and media scrutiny, McLemore played more than a trivial or tangential role in the controversy and, therefore, bore the risk of injury to his reputation. See Brewer, 626 F.2d at 1254.

The third and final element we consider--that the alleged defamation is germane to the plaintiff's participation in the controversy--is also satisfied in this case. See Trotter, 818 F.2d at 433; Waldbaum, 627 F.2d at 1298. McLemore alleges that WFAA defamed him by displaying footage of his coverage from the scene of the compound during the raid, while reporting that federal officials believed a member of the local media informed the Branch Davidians about the

ATF raid. Therefore, the alleged defamation directly relates to McLemore's participation in the controversy. He was on the scene in his role as a journalist, as conveyed by the footage WFAA broadcast, and WFAA's alleged defamatory comments are indeed germane to McLemore's participation in the controversy over the media's role in the failed attack. See Waldbaum, 627 F.2d at 1298-1300 (explaining that a public figure's talents, education, experience, and motives were relevant to the public's decision to listen to him). Accordingly, McLemore reached limited-purpose public-figure status through his employment-related activities when he voluntarily injected himself into the Branch Davidian raid.

We now turn to the fault standard McLemore must meet in order to sustain his defamation claim against WFAA. As a public figure, McLemore must prove that WFAA acted with actual malice in allegedly defaming him. See Curtis, 388 U.S. at 162, 87 S.Ct. 1975 (Warren, C.J., concurring); New York Times, 376 U.S. at 283, 84 S.Ct. 710; see also Bose Corp. v. Consumers Union of the U.S., Inc., 466 U.S. 485, 510-11, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984). Actual malice is a term of art, focusing on the defamation defendant's attitude toward the truth of what it reported. See McCoy v. Hearst Corp., 42 Cal.3d 835, 231 Cal.Rptr. 518, 727 P.2d 711, 736 (Cal.1986). Actual malice is defined as the publication of a statement "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. Reckless disregard is also a term of art. To establish constitutional recklessness, a defamation plaintiff must prove that the publisher "entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968).

A libel defendant is entitled to summary judgment under Texas law if it can negate actual malice as a matter of law. See Randall's Food Mkts., Inc. v. Johnson, 891 S.W.2d 640, 646-47 (Tex.1995); Casso v. Brand, 776 S.W.2d 551, 555 (Tex.1989). A libel defendant can negate actual malice by presenting evidence that shows he or she did not publish the alleged defamatory statement with actual knowledge of any falsity or with reckless disregard for the truth. See Casso, 776 S.W.2d at 559. To negate actual malice in this case, in her affidavit, WFAA reporter Valerie Williams detailed her belief that all of the reports she made were true and set forth the basis of those reports. Specifically, she swore that "[she] believed [her] reports accurately reflected public allegations by responsible, respected and well-informed journalists and news organizations, regarding a highly newsworthy matter and concerned an official investigation by law enforcement officers of a suspected tip-off of the Branch Davidian cult." She explained in detail the foundation of her belief by providing a chronology of the actions she took and the materials she reviewed in preparing her report. This testimony as to Williams' beliefs and the basis for them was sufficient for WFAA to meet its burden of negating actual malice. See Randall's Food Mkts., Inc., 891 S.W.2d at 646-47; Casso, 776 S.W.2d at 559; Carr v. Brasher, 776 S.W.2d 567, 571 (Tex.1989). As McLemore presented no proof controverting these specific assertions, WFAA established as a matter of law that it did not act with actual malice in reporting the ATF's investigation into why the Branch Davidian raid failed, and therefore WFAA was entitled to summary judgment on McLemore's defamation claim.

Accordingly, we reverse the court of appeals' judgment and render judgment that McLemore take nothing.

1 See, e.g., Lerman v. Flynt Distrib. Co., Inc., 745 F.2d 123, 136-37 (2nd Cir.1984) (adopting four-part limited public-figure test, requiring defendant to prove plaintiff: (1) "successfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of litigation; (2) voluntarily injected himself into a public controversy related to the subject of the litigation; (3) assumed a position of prominence in the public controversy; and (4) maintained regular and continuing access to the media"); Fitzgerald v. Penthouse Intern'l, Ltd., 691 F.2d 666, 668 (4th Cir.1982) (adopting five-part limited public figure test, requiring defendant to prove: "(1) the plaintiff had access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in a public controversy; (3) the plaintiff sought to influence the resolution or outcome of the controversy; (4) the controversy existed prior to the publication of the defamatory statements; and (5) the plaintiff retained public figure status at the time of the alleged defamation"); Clark v. American Broad. Co., Inc., 684 F.2d 1208, 1218 (6th Cir.1982) (considering three elements to determine if plaintiff is limited public figure: "first, the extent to which participation in the controversy is voluntary; second, the extent to which there is access to channels of effective communication in order to counteract false statements; and third, the prominence of the role played in the public controversy"); But cf. Gertz, 418 U.S. at 351, 94 S.Ct. 2997 ("More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.").

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WASTE MANAGEMENT OF TEXAS, INC., Petitioner,
v.
TEXAS DISPOSAL SYSTEMS LANDFILL, INC., Respondent.

No. 12–0522.

Supreme Court of Texas.

Argued Dec. 3, 2013.
Decided May 9, 2014.
Rehearing Denied June 27, 2014.

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Justice WILLETT delivered the opinion of the Court.

When the debate is lost, slander becomes the tool of the loser.[1]

This defamation case specifically concerns libel (defamation in written form), but Socrates' perception of slander (defamation in spoken form) applies with no less force.

In 1995, Waste Management of Texas, Inc. (WMT) and Texas Disposal Systems Landfill, Inc. (TDS) competed for waste-disposal and landfill-services contracts with the cities of Austin and San Antonio. Fearing it was losing the bidding debate, WMT anonymously published a community "Action Alert" claiming that TDS's landfills were less environmentally sensitive than they actually were.

The right to speak freely is, of course, an enumerated right enshrined in

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both the Texas [2] and Federal [3] constitutions. But free speech is not absolute [4] and does not insulate defamation.

Today's case distills to this question: To what degree is WMT liable for libel? To answer that question, we consider three separate inquiries: [5]

1. Can a corporation even suffer reputation damages?

2. If so, are those damages economic or non-economic damages for purposes of the statutory cap on exemplary damages?

3. Does the evidence support the damages awarded by the jury?

The amici curiae [6] see this case as an overdue opportunity to scrap the traditional distinction between per se and per quod defamation, [7] citing many commentators [8] and jurisdictions [9] that lament the labels' needless opacity.[10] Amici believe eliminating the distinction would harmonize Texas defamation law and its application. But we need not consider these broader issues to decide today's case.[11]

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We hold that a corporation may suffer reputation damages, and that such damages are noneconomic in nature. Also, while the evidence in this case is sufficient to support the award of remediation costs, the evidence is *not* sufficient to support the award of reputation damages. Finally, we agree that TDS is entitled to exemplary damages, but the amount, along with allowable pre-and post-judgment interest, must be recalculated. Accordingly, we affirm in part and reverse in part the court of appeals' judgment and remand to the court of appeals for further proceedings.

I. Background

In May 1995, TDS and the City of San Antonio began negotiating a contract for TDS to assume operations of San Antonio's Starcrest Transfer Station. The contract would have allowed TDS to haul San Antonio's waste from the Starcrest Station to TDS's landfill, starting in 1997. In 1996, the San Antonio City Council passed an ordinance authorizing the city manager to negotiate and execute a contract in accordance with the proposed agreement between San Antonio and TDS, which was attached and incorporated into the ordinance. But the parties had not yet executed a final contract by 1997—the originally proposed start date.

Concurrently with the San Antonio negotiations in 1996, the City of Austin issued a request for proposals, seeking bids from waste-disposal and landfill-services companies. TDS and WMT submitted bids and were selected to proceed to Phase II of the bidding process.

In early 1997, WMT anonymously published a community “Action Alert” memorandum, which was distributed to environmental and community leaders in Austin, including several Austin City Council members. WMT had hired a consultant, Don Martin, to draft the document. Martin gathered information from several WMT officials, who then approved, as TDS alleged, the document for publication. Martin sent the document to an Austin environmental advocate who

then faxed it to a designated group of recipients. Martin focused the Alert on TDS's proposal with San Antonio regarding Starcrest Station.

The Alert effectively claimed that TDS's landfill was less environmentally sensitive than it actually was and as compared to other area landfills. Specifically, the Alert claimed that TDS's landfill in Travis County (1) had received an exception to federal environmental rules, (2) was operating without a fully synthetic liner, and (3) did not have a leachate collection system to prevent water that had come into contact with waste from contaminating groundwater. The Alert closed by urging readers to contact San Antonio city officials, Travis County officials, and the *San Antonio Express News* with any concerns.

TDS sued WMT in late 1997 for defamation, tortious interference with an existing or prospective contract, and business disparagement. TDS alleged that the Alert caused economic damages by delaying the execution of the San Antonio and Austin waste disposal contracts.[12] TDS sought compensatory and punitive damages and injunctive relief.

After TDS filed suit, WMT published a number of communications concerning TDS and its business. WMT sent a memorandum to the San Antonio Public Works Department, questioning whether the zoning ordinance of the Starcrest Station even permitted TDS to operate the Station. WMT also anonymously issued a memorandum to the San Antonio City Council

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and the Texas Natural Resource Conservation Commission contending that TDS's proposed contract would result in multiple permit violations. Finally, WMT issued a press release claiming TDS had "inspired" a protest demonstration and providing reasons why TDS should not be selected for the Austin contract. TDS amended its original petition to include these publications that post-dated the original Action Alert.[13] TDS later added antitrust claims against WMT for its "attempt to monopolize."

The trial court considered motions for summary judgment and dismissed all of TDS's claims except for defamation.[14]

At trial, TDS requested an instruction on defamation per se and the related issue of presumed damages, but the trial court declined to charge the jury on either. The jury found that WMT's statements were false and that TDS had shown by clear and convincing evidence that WMT knew of their falsity or had serious doubts about their truth. The jury thus made an affirmative finding on actual malice, but it determined that TDS had suffered no actual damages as a result of the publication. The trial court entered a take-nothing judgment against TDS, which TDS appealed.

In a first appeal,[15] the court of appeals reversed, holding that the trial court erred by refusing to include a question about defamation per se in the charge. The court of appeals held that the trial court erred because there were underlying facts regarding whether the meaning and effect of WMT's words tended to affect TDS injuriously in its business. The court of appeals remanded the case for a new trial.

In the second trial, the trial court charged the jury on defamation per se and gave related instructions on presumed damages. The jury returned a verdict in favor of TDS, awarding it $450,592.03 for reasonable and necessary expenses, $0 for lost profits, $5 million for injury to

reputation, and $20 million as exemplary damages based on the jury's finding that WMT published the defamatory statements with malice. The trial court applied the statutory cap to the jury's award of exemplary damages, treating the $5 million award for injury to reputation as non-economic damages,

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and rendered an exemplary damage award of $1,651,184.06. WMT appealed the trial court's judgment, and the court of appeals affirmed.[16]

The parties filed cross-petitions in this Court. In one issue, TDS contends the trial court erred by categorizing its reputation damages as non-economic damages for purposes of the statutory cap on exemplary damages. In ten issues, WMT asserts evidentiary and procedural defects. We first consider whether a for-profit corporation may recover for injury to reputation.

II. A Corporation May Recover Reputation Damages

WMT makes three arguments regarding reputation damages:

1. Corporations cannot suffer such damages.

2. Even if they could, reputational harm is a non-economic injury.

3. Here, the evidence was legally insufficient to sustain the jury's award of $5 million.

WMT argues in its brief that corporations cannot suffer reputation damages because corporations are not people. But WMT's position has not been entirely consistent. At oral argument WMT urged that corporations can *never* suffer reputation damages, but its Response Brief concedes that corporations *may* suffer some types of reputation damages: "lost profits, rehabilitative expenses, and diminished value of the corporation—are the only damages a corporate entity's reputation can sustain." In any event, we discern WMT's contention to be that defamation per se is an inherently personal tort, and that it was designed to address harm that only natural persons may suffer, such as mental anguish, sleeplessness, or embarrassment. We have never adopted such an interpretation. On the contrary, it is well settled that corporations, like people, have reputations and may recover for harm inflicted on them.[17]

Our 1943 decision in *Bell Publishing Co. v. Garrett Engineering Co.* concerned similar facts. In that case, the corporate plaintiff, Garrett, sued an individual, Dr. Gober, and Bell Publishing Company for publishing an allegedly libelous article.[18] The events leading up to the publication involved the City of Temple's decision whether it needed a municipally owned electricity provider.[19] Garrett executed with the city a contract in which Garrett agreed to provide its engineering services if the city decided to build a power plant or purchase the existing privately owned plant.[20] Garrett submitted plans and estimates to the city, held conferences with city officials, and prepared drawings of the necessary buildings and equipment. [21] The city commission then ordered a bond election to be held on financing the project.[22] In response, Dr. Gober wrote an article for

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the *Temple Daily Telegram,* published by defendant Bell.[23]

Dr. Gober addressed his article to the residents of Temple, and generally suggested a call to action to "thresh[ ] out and definitely determin [e] whether or not Temple really needs this proposed utility." [24] Dr. Gober also proposed a "sit-down strike." [25] The article also stated, "[T]here is no person connected with [Garrett Engineering] who is a practical engineer, or who holds a degree of engineering. I am reliably informed that [Garrett] has never done any similar work, and by that I mean that it has never constructed such plant for any other city." [26]

Garrett sued Gober and Bell for libel, alleging that statements in the article were false, made with malice, damaged its reputation, and injured the company financially.[27] The jury found that (1) Garrett did employ at least one person who was an engineer, (2) while Garrett had not built a similar plant for a city, it had supervised the construction of such a plant, and (3) Garrett's damages amounted to $15,000.[28] The trial court entered judgment against both defendants based on the jury's findings.[29] On appeal, the court of appeals, while agreeing the statements were libelous and unprivileged, reversed and remanded for a new trial because the trial court failed to instruct the jury to consider only the damages that resulted from the false statements.[30]

We agreed with the court of appeals that the statements were libelous per se. [31] We considered the law of defamation: "[L]anguage which concerns a person engaged in a lawful occupation 'will be actionable, if it affects him therein in a manner that may as a necessary consequence, or does as a natural or proximate consequence, prevent him deriving therefrom that pecuniary reward which probably he might otherwise have obtained.' " [32] We held that Garrett's corporate claims for defamation per se were actionable.[33] And after examining whether Dr. Gober's statements were privileged or truthful, we upheld the jury's findings and the trial court's judgment entered against both defendants.[34]

We have reaffirmed three times *Bell* 's holding that a corporation may be libeled,[35] including just last year, and see

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no persuasive reason to abandon that settled precedent. Likewise, we decline to apply our defamation jurisprudence any differently when the statements amount to per se defamation. In such cases, "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." [36] If false and disparaging statements injure a corporation's reputation, it can sue for defamation per se just like flesh-and-blood individuals.

III. A Corporation's Reputation Damages are Non–Economic Damages for Purposes of the Statutory Cap on Exemplary Damages

In its sole issue, TDS argues that the trial court erred by categorizing the jury's award of injury to reputation as non-economic damages instead of economic damages, which would result in a higher allowable statutory cap on exemplary damages. TDS contends that reputation damages of a for-profit corporation are economic damages because the text of the 1995 version of the statutory cap did not specifically define non-economic damages, and because it did not expressly exclude reputation damages from the definition of economic damages. TDS says the Legislature defined economic damages as "compensatory damage for pecuniary loss," and several courts of

appeals have defined pecuniary loss as "including money and everything that can be valued in money." Even *Black's Law Dictionary* defines the term as "[a] loss of money or of something having monetary value." [37] Thus, TDS concludes, a corporation's reputation damages are economic under the 1995 text, because they are (1) not specifically defined as non-economic damages, (2) not expressly excluded from the definition of economic damages, and (3) can be specifically valued in money. We disagree.

Section 41.008(b) states:

Exemplary damages awarded against a defendant may not exceed an amount equal to the greater of:

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(1) (A) two times the amount of economic damages; plus

(B) an amount equal to any noneconomic damages found by the jury, not to exceed $750,000; or

(2) $200,000.[38]

Section 41.008(b) remained unchanged as a result of a 2003 amendment. [39]Section 41.001(4) was amended. In 1995, Section 41.001(4) read as follows:

"Economic damages" means compensatory damages for pecuniary loss; the term does not include exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society.[40]

The crux of TDS's argument is that Section 41.001 did not specifically define "non-economic damage"—nor did it expressly exclude injury to reputation from economic damage.

In 2003, the Legislature amended Section 41.001(4) and added an entirely new subsection:

Section 41.001(4) as amended in 2003

"Economic damages" means compensatory damages intended to compensate a claimant for actual economic or pecuniary loss; the term does not include exemplary damages or noneconomic damages.[41]

Added 2003 subsection

"Noneconomic damages" means damages awarded for the purpose of compensating a claimant for physical pain and suffering, mental or emotional pain or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, inconvenience, loss of enjoyment of life, *injury to reputation,* and all other nonpecuniary losses of any kind other than exemplary damages. [42]

TDS avers that the 2003 amendment "recharacterized reputation damages as non-economic," and that we should focus on what the 1995 statute intended—that a for-profit corporation's injury to reputation must be economic because those damages are pecuniary loss and not expressly excluded by the statute's text. We decline to adopt such an interpretation.

Section 41.001(4) defines "economic damages" as "compensatory damages for pecuniary loss." Compensatory damages may be divided into two other categories: pecuniary harm and non-pecuniary harm.[43] So is injury to reputation a pecuniary loss for purposes of Section 41.001(4)? We think not.

Injury to one's person, by pain or humiliation, is not analogous to pecuniary loss.[44] Stated differently, money does not equate to peace of mind. [45] However, damages awarded for this class of injury are classified as compensatory damages.[46] So the tendency to confuse the character of the

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harm with that of the *remedy* is understandable. To be certain, compensatory damages offer a pecuniary remedy for the non-pecuniary harm that a plaintiff has suffered or will likely suffer later.[47]

Non-pecuniary harm includes damages awarded for bodily harm or emotional distress.[48] Similar to general damages, these non-pecuniary damages do not require certainty of actual monetized loss.[49] Instead, they are measured by an amount that "a reasonable person could possibly estimate as fair compensation." [50] Conversely, damages for pecuniary harm do require proof of pecuniary loss for either harm to property, harm to earning capacity, or the creation of liabilities.[51] One leading commentator contrasts pecuniary and non-pecuniary harm this way:

Plaintiffs prove three basic elements of recovery in personal injury actions. (1) Time losses. The plaintiff can recover loss or [sic] wages or the value of any lost time or earning capacity where injuries prevent work. (2) Expenses incurred by reason of the injury. These are usually medical expenses and kindred items. (3) Pain and suffering in its various forms, including emotional distress and consciousness of loss.[52]

Professor Dobbs's first two categories concern pecuniary losses, while his third involves non-pecuniary losses. Applying his categorical delineations for a personal injury to this case, injury to reputation falls into the third category as a non-pecuniary loss, because it is neither time lost nor an expense incurred.

The Second Restatement, in defamation per se cases, also considers injury to reputation to be a non-pecuniary harm.[53] In cases of ordinary defamation the Restatement requires proof of economic or pecuniary loss that reflects a loss of reputation.[54] Said another way, the Restatement generally requires proof of an economic loss that was occasioned by a non-economic injury like slander.[55] But the Restatement takes a special position in defamation per se cases, viewing injury to reputation as a general damage, non-pecuniary harm.[56]

Finally, the draft Third Restatement also classifies injury to reputation as a non-economic harm. The draft Third defines "economic loss" as the "pecuniary damage *not* arising from injury to the plaintiff's person...." [57] By negative implication,

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then, non-economic loss is pecuniary damage *arising from* injury to the plaintiff's person. Convincingly, the draft Third also recognizes that sometimes an economic loss will actually be considered a personal injury if emotional harm is involved that causes pecuniary loss:

Wrongs that might seem to cause only economic loss are sometimes regarded otherwise because the law takes an expansive view of what counts as a personal injury. Defamation, for example, is regarded as inflicting a kind of personal injury: harm to the plaintiff's reputation. If a defendant inflicts emotional harm on the plaintiff, and causes the plaintiff to suffer consequent pecuniary loss, it is likewise a case of personal injury covered not here but in Restatement Third, Torts: Liability for Physical and Emotional Harm.[58]

According to the draft Third, if harm to one's reputation is "a kind of personal injury," it may not be considered an economic loss "because the law takes an expansive view of what counts as a personal injury." [59]

Thus, both the Restatements and commentators recognize the distinction between the non-pecuniary injury and the pecuniary remedy.

Our cases likewise treat an individual's reputation damages as non-economic. [60] In *Bentley v. Bunton,* a local district judge brought a defamation action against a host and co-host of a call-in talk show televised on a public-access television channel.[61] For months, the host of the show had accused the local judge of being corrupt.[62] The trial court rendered judgment in favor of the judge, finding that the host's statements were conclusively proven to be false and defamatory.[63] The jury awarded $7 million to the judge for mental anguish damages.[64] The court of appeals affirmed the judgment against the host but reversed the judgment against the co-host.[65] We granted both parties' petitions for review. Importantly, we noted that mental anguish damages and reputation damages, such as those in Bentley, were non-economic damages.[66]

Though the plaintiff in *Bentley* was an individual, our conclusion focused on the nature of the damage suffered, not on whether the plaintiff was an individual or a corporation. We did not strictly cabin our opinion to an individual's reputation damages. We said generally: " *Non-economic damages like these* [mental anguish, character, and reputation damages] cannot be determined by mathematical precision; by their nature, they can be determined only by the exercise of sound judgment." [67]

Just last year, we reaffirmed that an individual's reputation damages are non-

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economic damages in *Hancock v. Variyam.*[68] In that case, Variyam was the Chief of the Gastroenterology Division of the Texas Tech University Health Sciences Center (the "Division").[69] Hancock worked as an associate professor under Variyam's supervision.[70] After a dispute arose between the two about Hancock's care of patients, Hancock sent a letter to the Chair of the Division, the Dean of the School of Medicine, a Division colleague, and the entity reviewing the Division's application for accreditation for its gastroenterology fellowship.[71]

Hancock wrote that Variyam had a "reputation for lack of veracity" and "deals in half truths, which legally is the same as a lie." [72] Subsequently, the Division's fellowship was not accredited and the Chair of the Department removed Variyam as Chief of the Division.[73] Variyam sued Hancock for defamation. [74]

Regarding damages, we held: "Actual or compensatory damages are intended to compensate a plaintiff for the injury she incurred and include general damages (which are non-economic damages such as for loss of reputation or mental anguish) and special damages (which are economic damages such as for lost income)." [75]

Our decisions in business disparagement cases bolster our conclusion here.

We have previously noted the distinction between business disparagement and defamation cases. To recover for business disparagement "a plaintiff must establish that (1) the defendant published false and disparaging information about it, (2) with malice, (3) without privilege, (4) that resulted in *special damages* to the plaintiff." [76] In *Forbes,* we noted the similarity between the two claims, but that one difference is that one claim seeks to protect reputation interests and the other seeks to protect economic interests against pecuniary loss.[77] That is, a plaintiff seeking damages for business disparagement must prove special damages resulting from the harm; [78] to hold otherwise would subvert a fundamental element of the tort. In contrast, in a defamation case a plaintiff may recover for both general and special damages.[79]

As we explained in *Hancock,* and reaffirm today, general damages in defamation cases "are non-economic damages such as for loss of reputation" while special damages "are economic damages such as for lost income." [80] These delineations remain constant, too, for business disparagement—a tort that seeks to protect the economic interests and which expressly requires a showing of special damages. To a certain extent, then, a defamation claim allows a plaintiff to recover that which would not be recoverable under business disparagement—namely, for a noneconomic injury such as injury to reputation—because disparagement only

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seeks to protect the plaintiff's economic interests while defamation seeks to protect the plaintiff's reputation.[81]

We see no sound basis to depart from our settled precedent treating reputation damages as non-economic damages. Thus, in line with our prior decisions, and the consensus of the Restatement and other commentators on the nature of reputation damages, we hold that, for purposes of the previous version of Section 41.001(4),[82] damages for injury to reputation are non-economic damages. Therefore, the trial court did not err when it calculated the statutory cap on exemplary damages by classifying TDS's reputation damages as non-economic damages. However, for reasons discussed below, we reverse the jury's award of $5 million for reputation damages because the evidence is legally insufficient to support such an award, without evidence of actual damages to TDS's reputation.

IV. The Evidence Was Legally Sufficient to Support the Award of Remediation Costs, But Not the Award of Reputation Damages

WMT contends that the evidence was legally insufficient to support the jury's award to TDS of $5 million in reputation damages, $450,592.03 in remediation costs, and $20 million in exemplary damages.

A party will prevail on its legal-sufficiency challenge of the evidence supporting an adverse finding on an issue for which the opposing party bears the burden of proof if there is a complete absence of evidence of a vital fact or if the evidence offered to prove a vital fact is no more than a scintilla.[83] More than a scintilla exists when the evidence as a whole rises to a level enabling reasonable and fair-minded people to have different conclusions.[84] However, if the evidence is so weak that it only creates a mere surmise or suspicion of its existence, it is regarded as no evidence.[85]

In conducting a legal-sufficiency review, we consider the evidence in the light most favorable to the judgment, crediting evidence that a reasonable fact finder could have considered favorable and disregarding unfavorable evidence unless the reasonable fact finder could not.[86] We indulge every reasonable inference that supports the trial court's findings.[87]

In *Gertz v. Robert Welch, Inc.*, the United States Supreme Court held that the First Amendment restricts the damages that a private individual can obtain from a media defendant for defamation that involves a matter of public concern. [88] Specifically, the Supreme Court held that, unless the plaintiff shows actual malice (*i.e.,* knowledge of falsity or reckless disregard

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for the truth), the First Amendment prohibits awards of presumed and punitive damages for defamatory statements.[89] The Supreme Court has continued to follow this reasoning for private plaintiffs.[90] But the Supreme Court has left open the question of whether presumed or punitive damages are constitutional when there is actual malice and presumably no proof of actual harm in cases such as *Gertz*.[91] That isn't to say that the Supreme Court would completely disallow presumed damages, as the Restatement notes: “In case the Court should hold that nominal damages cannot be recovered in the absence of proof of actual harm, it seems most likely that the restriction will not be held to apply when the defendant had knowledge of the falsity or acted in reckless disregard of it.” [92]

A. Actual Malice

As a public figure, TDS was required to prove that WMT published the Action Alert with actual malice.[93] A statement is published with actual malice if it is made with “knowledge of, or reckless disregard for, the falsity” of the statement.[94] Such statements are not constitutionally protected.[95] To determine whether a statement is made with knowledge of, or reckless disregard for, the falsity, we must consider the factual record in full.[96]

WMT raises several points against the jury's actual malice finding. It contends that (1) the record shows TDS failed to establish the Action Alert's authors' subjective states of mind regarding their reckless disregard for the falsity; (2) the technical, jargon-filled statements, without an explanation of their meaning, cannot be reasonably understood, and thus cannot form a basis for actual malice; and (3) ambiguous semantical differences in the language cannot form a basis for actual malice.[97]

First, WMT argues that TDS did not carry its burden in establishing by

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clear and convincing evidence that the Action Alert's authors, Don Martin and Al Erwin, "entertained serious doubts as to the truth" of the publication—thereby revealing their reckless disregard for the truth. [98] WMT alleges that "[o]ther than the direct testimony of Martin and Erwin ... there was no evidence regarding Martin's or Erwin's state of mind at the time of the Action Alert." But WMT's argument inaccurately presents the issue by not giving credit to the first prong of the actual-malice test: whether Martin had actual knowledge of the falsity. Martin's own testimony conclusively established that he was aware of the falsity. Specifically, Martin testified that he knew TDS's landfill complied with the Environmental Protection Agency rules, and that he knew it would be false to say otherwise. Martin stated that he intended for readers to think that TDS had a "loophole" around such environmental rules. Martin also said that he wanted readers to think TDS's landfill was less environmentally safe. In addition, WMT officials involved with Martin had the same understanding of both the text of the Alert and the falsity it carried with it. Thus, we think the record contains legally sufficient evidence that Martin and WMT published the Action Alert with knowledge of the falsity. Consequently, we need not consider the alternative basis for actual malice, as WMT advances, which questions whether Martin or WMT acted in reckless disregard of the falsity.[99]

Second, WMT contends that the technical, jargon-filled statements in the Alert cannot form a basis to establish actual malice. WMT cites two cases in support of its argument.[100] But neither of these cases rise to the level of responsibility here. Under these facts, Martin and WMT knew of the falsity of the Alert. Both knew that claiming that TDS's landfill had received an exception to EPA rules was false. Both knew that the language in the Alert was not simply inaccurate or made in error; instead, both parties knew it to be incorrect and specifically drafted the language to prevent TDS from obtaining the Starcrest station contract. Thus, the statements in this case are not the type that represent "the sort of inaccuracy that is commonplace in the forum of robust debate to which the *New York Times* rule applies." [101] The statements here—concerning whether TDS's landfill had received an "exception" to EPA rules, or whether TDS accepted hazardous waste—require no technical expertise, and are not simply inaccurate or easily misunderstood; there was evidence they were specifically made to mislead and injure TDS's reputation.

Finally, WMT asserts that ambiguous semantical differences in the language

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cannot form a basis for actual malice. Principally, WMT argues that the Alert's use of the word "exception" over "alternative" is legally insufficient to support an actual-malice finding. WMT relies on *Time, Inc. v. Pape*, contending that the Alert is subject to a "number of possible rational interpretations," which does not create a fact issue on malice for the jury to decide.[102] We disagree. This is not a case of "an understandable misinterpretation of ambiguous facts." [103] Martin and WMT specifically chose the language and drafted the Alert to have negative effects on TDS's business. Martin engineered the Alert's language to influence the reader into thinking that TDS's landfill was operating under an exception to EPA rules and that it was less environmentally safe compared to other area landfills.

We think the evidence is legally sufficient on the issue of whether WMT published the Alert with knowledge of the falsities it contained. We now turn to the sufficiency of the evidence to support the damages awarded by the jury based on its finding of actual malice.

B. Damages

The damages issue is one of constitutional dimension. In *Gertz,* the Supreme Court cautioned 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." [104] Referring to presumed damages in defamation per se cases, the 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.[105] The Court noted, however, that under any lesser standard a plaintiff can recover "only such damages as are sufficient to compensate him for actual injury." [106]

Although the Court's analysis only considered such damages where the defendant was *not* shown to have acted with actual malice,[107] unlike the case here, we extended the Court's reasoning in *Gertz* and applied it to cases in which the defendant *was* found to have acted with actual malice. Such was the case in *Bentley v. Bunton,* which involved an award of non-economic damages. [108] We held that the First Amendment requires appellate review of non-economic damage awards, because any recovery should only compensate the plaintiff for actual injuries and not be a disguised disapproval of the defendant.[109] *Bentley* stated: "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." [110] Even while recognizing that noneconomic damages cannot, by their nature, be determined with mathematical

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precision and that juries must "have some latitude in awarding such damages," [111] we were equally clear that such damages are not immune from no-evidence review on appeal. We held that the evidence must be legally sufficient as to both the existence and the *amount* of such damages, that "[j]uries cannot simply pick a number and put it in the blank," and that instead the amount must fairly and reasonably compensate the plaintiff for his injury.[112] We held under this standard that there was no evidence to support the $7 million in mental anguish damages awarded by the jury, because this amount was excessive, unreasonable, and "far beyond any figure the evidence can support." [113]

In today's case, we must determine whether there was any evidence to support the jury's award in favor of TDS for $450,592.03 in remediation costs and $5 million in reputation damages, and $20 million in exemplary damages, which the trial court statutorily reduced to $1,651,184.06. We hold that the evidence is sufficient to support the award of remediation costs and exemplary damages, but there is no evidence to support the amount awarded for reputation damages.

1. Reputation Damages

The extent of TDS's evidence of injury to its reputation was the testimony of its chief executive officer, Bob Gregory, who testified that TDS's reputation was "priceless." Gregory later estimated that the value of TDS's reputation was in the range of $10 million. At oral argument,

when asked what evidence would quantify TDS's reputation damages, TDS directed us to three separate exhibits in the record that it contended support the $10 million figure. We can find no relationship between the exhibits and the $10 million estimation.

The first exhibit cited by TDS contains 271 pages of invoices for consulting and attorney expenses, carrying costs and depreciation expenses on equipment, [114] "estimated profits," value of time spent, supplies, mileage expenses, and the like. In other words, the first exhibit refers to no evidence quantifying TDS's injury to its reputation. Even Mr. Gregory conceded in his deposition that the first exhibit is a summary of his calculations of "lost profits ... and additional expenses caused by the Action Alert." These special damages, however, are not the sort of general damages that necessarily flow from such a defamatory publication.[115] TDS in fact asked for separate damages for its lost profits and certain expenses in jury question five, in addition to general damages for loss of reputation in question 7. The jury found no lost profits that might correspond to actual loss of reputation going forward.

The second and third exhibits are similarly uninstructive. They concern only the alleged decrease in TDS's "base business"—TDS's business irrespective of the Austin and San Antonio contracts. But none of these exhibits evidences any actual injury to TDS's reputation either; instead,

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they only depict comparisons of the growth (or decline) of local landfill service businesses. They do not reveal any quantity of damages to TDS's reputation. Indeed, TDS conceded at oral argument that these figures are only "indicators ... that give credence to Mr. Gregory's estimates." We cannot agree with TDS's position that these exhibits quantify any amount of reputation damages. The evidence must support the amount awarded by the jury; it must not be an "indicator" that supports the estimates offered by the corporate executive. Without any supporting evidence of actual damages for injury to its reputation, TDS is entitled only to nominal damages in accordance with our decisions on presumed damages in defamation per se cases.[116]

We recognize that assessing injury to reputation is an inexact measurement, but the jury is not unconstrained in its discretion.[117] Awards must both be fair and compensate the plaintiff for the injury, and must not amount to "disguised disapproval of the defendant." [118]

Here, we cannot say that the amount awarded by the jury any more fairly and reasonably compensates TDS for its injury to reputation than it appears to be disapproval of WMT's conduct. There was no evidence that $5 million would reasonably and fairly compensate TDS for damage to its reputation, and we accordingly hold that this award cannot be sustained.

2. Remediation Costs

WMT also challenges the sufficiency of the evidence of TDS's remediation costs. Specifically, WMT contends that TDS cannot show that the Alert caused TDS's remediation costs. On the contrary, TDS's evidence of damages consisted of 271 pages of invoices, expenses, time spent on curative work, supplies, mileage, etc. This type of evidence does not support the award for reputation damages, as we discussed above, but it does provide some evidence of the remediation costs TDS incurred as a result of the Alert. TDS's witnesses, including its chief

executive officer, Bob Gregory, testified that TDS's staff devoted more than $700,000–worth of time [119] and $450,592.03 in out-of-pocket expenses to remedy the Alert's effects.

Although the Alert failed in its purpose to compensably tarnish TDS's image, its publication and the resulting fallout still caused TDS to incur out-of-pocket consultant expenses—expenses that would not have been incurred but for the Alert—which are detailed by the invoices submitted by the consultants. These are exactly the type of special damages one would incur in remedying the effects of a publication similar to the one present here. Therefore, we hold that evidence is sufficient to support the jury's award of remediation costs and affirm that portion of the verdict.

3. Exemplary Damages and Pre- and Post–Judgment Interest

Because the evidence was sufficient to support the jury's finding of actual malice and because TDS established actual damages

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for its remediation costs, TDS is entitled to exemplary damages.[120] We note, however, that because the evidence was insufficient to support part of the actual damages awarded by the jury, the calculation of exemplary damages allowable by statute is necessarily affected.[121] Accordingly, we reverse the court of appeals' judgment affirming the exemplary damages awarded by the trial court and remand the case to the court of appeals for it to reconsider the amount of exemplary damages.

We now turn to the trial court's award of both pre- and post-judgment interest. Because we determine here that the amount of the final judgment rendered by the trial court is not supported by the evidence, we also remand this case to the court of appeals for it to revisit the issue of judgment interest. One might think the recalculation is relatively straightforward, but more is involved. The answer becomes more complicated where, as here, the trial court awarded both pre- and post-judgment interest—both of which are affected by the amount of the final judgment. Another important factor comes into play and asks whether, on appeal, TDS moved for and was granted any extensions of time, because judgment interest does not accrue for the period of any extension.[122] Because our decision today necessitates a review and recalculation of the allowable exemplary damages and pre- and post-judgment interest amounts, we remand to the court of appeals and instruct it to either recalculate the respective amounts or, if necessary, remand to the trial court for further proceedings consistent with this opinion.

V. Conclusion

Summing up:

• A for-profit corporation may recover for injury to its reputation.

• Such recovery is a non-economic injury for purposes of the statutory cap on exemplary damages in the pre–2003 version of the Civil Practice and Remedies Code.

• The evidence here was legally insufficient to support the award of reputation damages, but the evidence *was* sufficient to support the award of remediation costs and thereby exemplary damages.

Accordingly, we affirm in part and reverse in part the court of appeals' judgment. TDS is entitled to actual damages of $450,592.03 for its remediation costs, and nominal damages for injury to its reputation. Moreover, because the jury's finding of actual malice is amply supported by the evidence and because TDS submitted sufficient evidence of actual damages, TDS is entitled to exemplary damages. We remand to the court of appeals for it to reconsider the amount of exemplary damages and pre- and post-judgment interest awards in light of this decision.

Notes:

[1.] This quote is widely, if not verifiably, attributed to Socrates, who taught Plato, who taught Aristotle, who taught Alexander the Great.

[2.].Tex. Const. art. I, § 8.

[3.].U.S. Const. amend. I.

[4.] 4 The Texas Bill of Rights itself acknowledges that free speech is not inviolate. 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*....”) (emphasis added). Several Texas statutes likewise limit speech. *See, e.g.,*Tex. Bus. & Com.Code § 17.01 *et seq.* (prohibiting a false going-out-of-business advertisement, and prohibiting deceptive advertising); Tex. Elec.Code § 253.151 *et seq.* (imposing contribution and expenditure limits in judicial elections). We offer no opinion on the constitutionality of these statutes.

[5.] We distill from the numerous and varied issues raised by WMT the relevant ones necessary to dispose of this appeal.

[6.] Amici supporting WMT include Belo Corporation, Dow Jones & Company, Inc., Fox Television Stations, Inc., NBC Universal Media LLC, News Corp., Reporters Committee for Freedom of the Press, Reuters America, Scripps Media, Inc., and the Texas Association of Broadcasters.

[7.] Defamation per se (on its face) requires no proof of actual monetary damages, while defamation per quod (dependent on context and interpretation) does require such proof. *See* *Hancock v. Variyam,* 400 S.W.3d 59, 63–64 (Tex.2013).

[8.]*See, e.g.,* 1 Robert D. Sack, Sack on Defamation § 2.8.1 (4th ed. 2013) (“No concept in the law of defamation has created more confusion.”); Restatement (Second) of Torts § 568 cmt. b (1977) (describing the imprecise and anachronistic nature of the distinction); William L. Prosser, *Libel Per Quod,* 46 Va. L.Rev. 839, 848–49 (1960) (“[I]n this maze anyone can be forgiven for losing his way.”).

[9] *See, e.g., Hancock,* 400 S.W.3d at 64 (quoting *Salinas v. Salinas*, 365 S.W.3d 318, 320 n. 2 (Tex.2012)) ("[T]he damages a defamation *per se* plaintiff may recover is an issue 'courts have not resolved ... in an entirely consistent manner.' "). For example, cases discarding the distinction between the different categories of defamation or abandoning the doctrine of presumed damages include *Gobin v. Globe Publ'g Co.*, 232 Kan. 1, 649 P.2d 1239, 1242–43 (1982); *Metromedia, Inc. v. Hillman*, 285 Md. 161, 400 A.2d 1117, 1119 (1979); *Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303, 308, 313 (Mo.1993); *W.J.A. v. D.A.*, 210 N.J. 229, 43 A.3d 1148, 1150, 1159–60 (2012); *Smith v. Durden*, 276 P.3d 943, 945 (N.M.2012); *Newberry v. Allied Stores, Inc.*, 108 N.M. 424, 773 P.2d 1231, 1236 (1989); *Memphis Publ'g Co. v. Nichols*, 569 S.W.2d 412, 419 (Tenn.1978).

[10] One First Amendment scholar puts it bluntly: "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." 2 Rodney Smolla, Law of Defamation § 7:1 (2d ed.2010).

[11] Notably, we have used the phrase "per quod" as it relates to defamation law only once in the history of this Court. *See Hancock,* 400 S.W.3d at 64.

[12] TDS ultimately finalized its contracts with both Austin and San Antonio.

[13] The causes of action in TDS's amended petition remained the same: defamation, business disparagement, and tortious interference with current and prospective contracts. WMT moved for partial summary judgment, arguing that these subsequent publications were unrelated to the Action Alert and could not be considered because the amended petition arrived after the respective limitations periods had run. TDS countered, asserting a continuing course of tortious conduct. The trial court ruled for WMT, holding that the amended petition added "new, distinct, and different transactions" that did not relate back to the grounds of liability alleged in TDS's original petition, namely the Action Alert. Liability thus could not rest on the later, time-barred publications. The trial court revisited this issue later, but again resolved it in WMT's favor.

[14] As discussed in note 13, *supra,* the trial court's order granting partial summary judgment to WMT did not fully dispose of the factual issues relating to TDS's claims based on the Action Alert, because the order concerned only whether limitations had run on the later publications. The trial court later granted summary judgment in WMT's favor on TDS's tortious interference claims based on the Action Alert, preserving the defamation and disparagement claims for trial. At the conclusion of the evidence, however, the trial court dismissed TDS's disparagement claim by directed verdict. And because TDS did not raise the dismissal of its disparagement claim in the first appeal—a fact TDS concedes—it is not now before us. For more discussion on the difference between business disparagement and defamation, *see infra* at 19–20.

[15] .219 S.W.3d 563 (Tex.App.–Austin 2007).

[16] .No. 03–10–00826–CV, 2012 WL 1810215 (Tex.App.-Austin May 18, 2012) (mem. op., not designated for publication).

[17] *See* note 35, *infra; see also*Restatement (Second) of Torts § 561 (1977) ("One who publishes defamatory matter concerning a corporation is subject to liability to it ... if the corporation is one for profit, and the matter tends to prejudice it in the conduct of its business or

to deter others from dealing with it."); *id.* § 561 cmt. b ("A corporation for profit has a business reputation and may therefore be defamed in this respect.").

[18].141 Tex. 51, 170 S.W.2d 197, 199–200 (1943).

[19].*Id.* at 200.

[20].*Id.*

[21].*Id.*

[22].*Id.*

[23].*Id.*

[24].*Id.*

[25].*Id.*

[26].*Id.* at 201 (italics omitted).

[27].*Id.*

[28].*Id.* at 202.

[29].*Id.*

[30].*Bell Publ'g Co. v. Garrett Eng'g Co.*, 154 S.W.2d 885, 887 (Tex.Civ.App.-Galveston 1941)*aff'd*,170 S.W.2d at 197.

[31].*Bell Publ'g Co.*, 170 S.W.2d at 202.

[32].*Id.* (quoting *Mo. Pac. Ry. v. Richmond*, 73 Tex. 568, 11 S.W. 555 (1889)).

[33].*Id.*

[34].*Id.* at 204–05. However, we also affirmed the court of appeals's judgment remanding the case to the trial court for a new trial because the trial court should have instructed the jury to award only damages for the statements that it found to be false. *Id.* at 206–207.

[35]. As noted in our prior line of cases involving corporate defamation, we distinguish between a corporation and a business—only the former may sue for defamation. *See, e.g.*, *Neely v. Wilson*, 418 S.W.3d 52, 72 (Tex.2013) ("Our precedent makes clear that corporations may sue to recover damages resulting from defamation."); *Gen. Motors Acceptance Corp. v. Howard*, 487 S.W.2d 708, 712 (Tex.1972) ("[A] corporation, as distinguished from a business, may be libeled."); *Newspapers, Inc. v. Matthews*, 161 Tex. 284, 339 S.W.2d 890, 893 (1960) (citations omitted) ("[T]he very wording of the libel statute precludes its application to a business. It does not alter the situation that a corporation may be libeled or that a partnership may be libeled.");

Bell Publ'g Co., 170 S.W.2d at 203 ("[S]tatements complained of by [Garrett Engineering Co.] impute to it a lack of technical skill and practical experience on its part to perform its contract or to carry on its business and that such inescapable imputations tended to damage plaintiff's business and were actionable.").

We have noted that this type of defamation is one "of the owner of the business and not of the business itself," and that the damages are "of the owner, whether the owner be an individual, partnership or a corporation." *Matthews,* 339 S.W.2d at 893. Our most instructive piece on the distinction between the owner and the business may be found in *Matthews* in which we analyzed the two in light of the libel statute at issue in that case. There, the libel statute defined defamation as affecting "the memory of the dead," "one who is alive," "him," "any one," and "such person." *Id.* (citation omitted). Relying on our prior precedent and the Restatement, we held that while the very wording of the libel statute precluded its application to a business, it did not change the applicability to a corporation. *Id.* (citing *Bell Publ'g Co.,* 170 S.W.2d 197; Restatement of Torts § 561 (1938)). We further noted that the defamation specifically injures the reputation of the owner, *id.*—in other words, not the owner's business. Thus, applying our prior holdings to this case we discern the publication to be defamatory of TDS (the owner) and not the landfill-services operations (the business), and the resulting damages are those TDS suffered as the owner *of* the business.

[36.] *Bentley v. Bunton,* 94 S.W.3d 561, 604 (Tex.2002).

[37.] Black's Law Dictionary 1030 (9th ed.2009).

[38.] Tex. Civ. Prac. & Rem.Code § 41.008(b).

[39.] The 2003 amendment to the Civil Practice and Remedies Code is inapplicable here, given that TDS filed suit in 1997.

[40.] Act of April 6, 1995, 74th Leg., R. S., ch. 19, § 1, 1995 Tex. Gen. Laws 108, 109 (current version at Tex. Civ. Prac. & Rem.Code § 41.001(4)).

[41.] Tex. Civ. Prac. & Rem.Code § 41.001(4).

[42.] *Id.* § 41.001(12) (emphasis added).

[43.] *See* Restatement (Second) of Torts §§ 905, 906 (1979).

[44.] 1 Jacob A. Stein, Stein on Personal Injury Damages § 1:4 (3d ed.2004).

[45.] *Id.*

[46.] *Id.*

[47.] *See id.* (citations omitted).

[48.] Restatement (Second) of Torts § 905 (1979).

[49.] *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 373, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) (White, J., dissenting); 2 Dan B. Dobbs, Law of Remedies § 8.1(4) (2d ed.1993); Restatement (Second) of Torts § 621 cmt. a (1977); *id.*§ 905 cmt. i (1979).

[50.] *See*Restatement (Second) of Torts § 905 cmt. i.

[51.] *Id.*§ 906.

[52.] 2 Dobbs, Law of Remedies § 8.1(1) (footnotes omitted).

[53.] Restatement (Second) of Torts § 905 cmt. a (1979).

[54.] *Id.* § 575 cmt. b (1977).

[55.] *See id.*

[56.] *Id.*§ 905 cmt. a (1979).

[57.] Restatement (Third) of Torts: Liability for Economic Harm § 2 (Tentative Draft No. 1, 2012) (emphasis added).

Sections 1 through 5 of the draft Restatement Third were approved by the membership of the American Law Institute at the 2012 Annual Meeting, subject to the discussion at the Meeting and to editorial prerogative. *Proceedings at 89th Annual Meeting: American Law Institute,* 89 A.L.I. PROC. 22–47 (2012). According to the Institute: "Once it is approved by the membership at an Annual Meeting, a Tentative Draft or a Proposed Final Draft represents the most current statement of the American Law Institute's position on the subject and may be cited in opinions or briefs ... until the official text is published." *Overview, Project Development,*The American Law Institute, http:// www. ali. org/ index. cfm? fuseaction= projects. main (last visited April 25, 2014). Section 2 of the draft Third is consistent with our analysis today.

[58.] Restatement (Third) of Torts: Liability for Economic Harm § 2 cmt. a (Tentative Draft No. 1, 2012).

[59.] *See id.*

[60.] *Bentley,* 94 S.W.3d at 605.

[61.] *Id.* at 566–67.

[62.] *Id.*

[63.] *Id.* at 567.

[64.] *Id.* at 576.

[65.] *Id.* at 577.

[66.] *Id.* at 605.

[67.] *Id.* (emphasis added).

[68.] .400 S.W.3d at 65.

[69.] *Id.* at 62.

[70.] *Id.*

[71.] *Id.*

[72.] *Id.* at 62–63.

[73.] *Id.* at 63.

[74.] *Id.*

[75.] *Id.* at 65.

[76.] *Forbes, Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 170 (Tex.2003) (citing *Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762, 766 (Tex.1987)) (emphasis added).

[77.] *Id.*

[78.] *Id.*

[79.] *See Hancock,* 400 S.W.3d at 65–66.

[80.] *Id.* at 65.

[81.] We note that in situations such as this one, a corporate plaintiff may recover under either a business disparagement or defamation claim—being limited only to economic damages under the former, but having no such limitation under the latter, assuming all other elements are satisfied.

* * *

[82.] Because the amended version of the statute expressly defines reputation damages as non-economic damages, this specific issue will not likely arise in the future.

[83.] *See City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex.2005).

[84.] *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex.1997).

[85.] *See King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex.2003); *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex.1983).

[86.] *City of Keller,* 168 S.W.3d at 807.

[87.] *Id.* at 822.

[88].418 U.S. at 350, 94 S.Ct. 2997.

[89.] *See id.* at 349, 94 S.Ct. 2997.

[90.] *See, e.g.*, *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 310–11, 106 S.Ct. 2537, 91 L.Ed.2d 249 (1986) ("[S]ome form of presumed damages may possibly be appropriate [when an injury is likely to have occurred but is difficult to establish]."); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 774, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986) ("[T]he state interest [in preserving private reputation] adequately supports awards of presumed and punitive damages-even absent a showing of actual malice.") (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985)) (quotations omitted and second brackets supplied).

[91.].Restatement (Second) of Torts § 620 cmt. c (1977).

[92.] *Id.*

[93.] The parties do not challenge the trial court's determination that TDS is a public figure and the issue is one of public concern.

[94.] *Bentley,* 94 S.W.3d at 591.

[95.] *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)).

[96.] *Bentley,* 94 S.W.3d at 591.

[97.] WMT also argues that the trial court erroneously excluded evidence based on hearsay grounds that WMT asserts would have shown that it was not acting with actual malice; instead, it argues, the evidence would have shown that the statements in the Action Alert were reports of views held by others. We disagree. We review a trial court's exclusion of evidence for abuse of discretion. *In re J.P.B.*, 180 S.W.3d 570, 575 (Tex.2005) (per curiam). The trial court determined that the evidence was expert-opinion evidence not subject to the public record exception of the hearsay rule, Tex.R. Evid. 803(8)(A). Because the trial court, at the time, had limited knowledge of the qualifications of the authors of the opinion testimony, and had limited knowledge of the reliability of such testimony, we cannot say that it abused its discretion by excluding the evidence. Even assuming the exclusion was in error, it was harmless because the testimony excluded was in some form effectively obtained from other sources. WMT thus does not show that the exclusion of evidence probably resulted in the rendition of an improper judgment. *See*Tex.R.App. P. 44.1(a)(1). We therefore agree with the court of appeals that the trial court did not reversibly err by excluding the evidence.

[98.] *See St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968).

[99.] Actual malice exists where a statement is made with "knowledge of, *or* reckless disregard for, the falsity." *Bentley,* 94 S.W.3d at 591 (emphasis added).

[100] *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984); *Peter Scalamandre & Sons, Inc. v. Kaufman*, 113 F.3d 556 (5th Cir.1997).

[101] *Bose Corp.*, 466 U.S. at 513, 104 S.Ct. 1949.

[102] .401 U.S. 279, 290, 91 S.Ct. 633, 28 L.Ed.2d 45 (1971).

[103] *Bentley*, 94 S.W.3d at 596.

[104] .418 U.S. at 349, 94 S.Ct. 2997.

[105] *Id.* at 349–50, 94 S.Ct. 2997.

[106] *Id.* at 350, 94 S.Ct. 2997.

[107] *Cf. id.; see also*Restatement (Second) of Torts § 620 cmt. c (1977) (quoting *Gertz*, 418 U.S. at 349, 94 S.Ct. 2997) ("[I]t is possible that the Court will hold that the Constitution requires proof of actual harm as a necessary requisite for the existence of any liability for defamation, 'at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.' ").

[108] *See* 94 S.W.3d at 576.

[109] *Id.* at 605.

[110] *Id.* at 604.

[111] *Id.* at 605.

[112] *Id.* at 606 (quoting *Saenz v. Fid. & Guar. Ins. Underwriters*, 925 S.W.2d 607, 614 (Tex.1996)).

[113] *Id.* at 607.

[114] The equipment at issue involved equipment purchased to operate the Starcrest station. TDS was unable to use the equipment at the station because of a delay, so it capitalized its carrying costs and depreciation costs.

[115] *Cf. Gertz*, 418 U.S. at 373, 94 S.Ct. 2997 (White, J., dissenting); 2 Dobbs, Law of Remedies § 7.2(3); Restatement (Second) of Torts § 621 cmt. a (1977).

[116] *See, e.g., Hancock*, 400 S.W.3d at 65.

[117] *See Saenz*, 925 S.W.2d at 614.

[118] *See Bentley*, 94 S.W.3d at 605.

[119.] WMT also challenges this aspect of TDS's evidence of remediation costs, but the jury only awarded TDS its actual, out-of-pocket expenses, to the penny. Because the jury could have reasonably disregarded TDS's evidence of staff time spent managing the effects of the Alert, so shall we. *See City of Keller,* 168 S.W.3d at 811. We therefore limit our discussion to the amount awarded by the jury.

[120.] *See Fed. Express Corp. v. Dutschmann,* 846 S.W.2d 282, 284 (Tex.1993) (per curiam) ("Recovery of punitive damages requires a finding of an independent tort with accompanying actual damages."); Tex. Civ. Prac. & Rem.Code § 41.004(a).

[121.] *See* Tex. Civ. Prac. & Rem.Code § 41.008(b).

[122.] Tex. Fin.Code § 304.005(b) (Post-judgment interest does not accrue "[i]f a case is appealed and a motion for extension of time to file a brief is granted for a party who was a claimant at trial....").

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893 S.W.2d 309
Samuel WASHINGTON, Appellant,
v.
NAYLOR INDUSTRIAL SERVICES, INC., Appellee.
No. 01-94-00244-CV.
Court of Appeals of Texas,
Houston [1st Dist.].
Feb. 23, 1995.

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Jerald David Mize, Houston, for appellant.

Samuel E. Hooper, Eric R. Miller, Houston, for appellee.

Before OLIVER-PARROTT, ANDELL and COHEN, JJ.

OPINION

COHEN, Justice.

The trial judge granted Naylor Industrial Services, Inc. a take-nothing summary judgment against appellant, Samuel Washington. We affirm.

Washington worked for Naylor from 1986 to 1991, and was subject to random drug testing. Naylor's drug testing policy stated that an employee passed if no drugs were detected by a Gas Chromatography/Mass Spectrometry (GC/MS) test. [1] No preliminary positive drug screening tests, called EMIT tests, were to be reported by the lab to Naylor. Lab results were to be in writing only, marked personal and confidential, and sent to the Naylor Vice-President of Administration. The Vice-President would then direct the lab to confirm any positive screens by further testing, usually GC/MS, before reporting any positive screen.

Washington was sent for his drug test on May 22, 1990. The next day the lab orally informed Mr. Swisher, Vice-President of Naylor, that Washington's EMIT screening was positive for cannabinoids. Prior to June 25, 1990, Swisher told two of Naylor's supervisors, Griffin and Aiton, that Washington had failed the screening test, that the confirmatory test was under way, and that they should not assign Washington hazardous work assignments. Aiton then told Mr. Kelly and Mr. Brown that Washington had failed his drug test. Kelly and Brown were managers supervising Washington's job assignment at the time.

Washington passed the confirming (GC/MS) test.

On June 25, 1990, Aiton apologized to Washington for telling Kelly and Brown that he failed the drug test. Washington was fired in 1991 for competing with Naylor for a contract, a

totally unrelated matter. Washington swore he did not learn he had passed the confirmatory test until after June 26, 1991, the date he filed suit.

In his second amended original petition, Washington alleged slander in counts one through five, [2] negligent infliction of emotional distress in count six, and breach of contract in count seven. Naylor moved for summary judgment, asserting the affirmative defense of truth to all slander claims; the affirmative defenses of limitations and qualified privilege to Swisher's and Aiton's statements; that the "unknown Naylor employee" was not authorized to make any such statements as Naylor's agent; that no cause of action exists for negligent infliction of emotional distress; and that Naylor drug testing

policies did not create an employment contract in an employment at-will relationship.

On September 30, 1993, the court granted to Naylor an interlocutory summary judgment on all counts, of Washington's second amended petition, but denied Naylor's "Motion to Strike Plaintiff's Third Amended Original Petition." The third petition resembled the second, but contained a new count six for intentional infliction of emotional distress.

The new count six was carried forward into Plaintiff's fourth amended original petition, which alleged:

Counts 1-5: Same slander per se counts as before;

Count 6: Intentional Infliction of Emotional Distress;

Count 7: Same Breach of Contract count as before;

Count 8: Defamation;

Count 9: Invasion of Privacy;

Count 10: Negligent Defamation;

Count 11: Grossly Negligent Defamation.

The trial judge granted Naylor's motion for summary judgment as to all counts of Washington's fourth amended original petition, and denied Naylor's motion to strike that petition.

POINT OF ERROR ONE

In his first point of error, Washington asserts that the trial judge erred in granting Naylor's motion for summary judgment on his second amended original petition. [3]

When, as here, no grounds are stated for the court's ruling, the summary judgment will be affirmed if any theory advanced is meritorious. Insurance Co. of North America v. Security Ins. Co., 790 S.W.2d 407, 410 (Tex.App.--Houston [1st Dist.] 1990, no writ).

Truth (Counts One to Four)

Naylor claims the statements were true when made, i.e., it is undisputed that Washington had a positive EMIT test. Washington claims that under Naylor's policy, see footnote 1 above, one cannot "fail" the EMIT test; one can only "pass" it because, under Naylor's policy, a negative EMIT result is deemed conclusive, but a positive EMIT result should not even be reported to Naylor by the laboratory until confirmed by further testing. Thus, Washington argues, the statements that he failed the test were false.

We agree with Naylor. Regardless of how "failing" the drug test is defined, the objective truth is that Washington tested positive on the EMIT test. The laboratory's reporting of that fact may have breached Naylor's policy of confidentiality, but its report was not false, nor were the statements by Swisher and Aiton.

The Supreme Court has recently and unanimously held that a "literally true" statement is a "complete defense" to slander. Randall's Food Market, Inc., v. Johnson, 891 S.W.2d 640, 646 (Tex.1995). The statements here were "literally true."

Qualified Privilege (Counts One to Four)

An employer's accusations are privileged when made to a person having a business interest in the information. Randall's, at 646. Swisher and Aiton plainly had an interest in informing Washington's supervisors about his preliminary drug screen. Washington asserts that because Swisher and Aiton notified Washington's supervisors in violation of Naylor's own drug policy, a fact issue exists about whether the statements were made with malice. This argument assumes, of course, that the statements were false. We have held that the statements were true. Therefore, no privilege is necessary.

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Naylor presented evidence of its good faith, specifically that every communication made by Swisher and Aiton was prompted by the belief Washington tested positive on the preliminary screen and the innocent motive of informing supervisors so that Washington could be scheduled away from hazardous jobs. Washington presented no evidence to dispute that Naylor's executives acted without malice. To show malice, a plaintiff must show "that the defendant in fact entertained serious doubts as to the truth of his publication." Hagler v. Proctor and Gamble Manufacturing Co., 884 S.W.2d 771, 772 (1994). There is no such evidence. Therefore, the judgment in the slander cases (counts 1-4) is also proper on the basis of qualified privilege.

We hold the trial judge did not err in granting Naylor summary judgment on counts one through four of Washington's second amended original petition.

Count Five (Slander Per Se by "Unknown Naylor Employee")

In count five, Washington alleged that an "unknown Naylor employee" told Elizondo that Washington had failed his drug test.

Truth of an alleged defamatory statement is a complete defense to a slander action. It is undisputed that Washington tested positive on the EMIT test for drugs. Even though Naylor's policy provided for termination of only those employees who had a confirmed positive result, that cannot change the fact that independently of Naylor, as a scientific matter, the lab determined that Washington failed the preliminary test.

Because Naylor conclusively proved that its statements were true, summary judgment was proper on count five of Washington's second amended original petition.

Count Seven [4] (Breach of Contract)

Washington had no employment contract with Naylor. He was employed at will. Naylor's internal policies do not constitute a contract with appellant. Vallone v. AGIP Petroleum Co., 705 S.W.2d 757, 759 (Tex.App.--Houston [1st Dist.] 1986, writ ref'd n.r.e.). Moreover, Naylor was free to change its policy, abandon it, or make exceptions to it as it wished. For example, Naylor could have fired appellant, an employee at will, for the positive EMIT result, and he would have had no recourse, despite the policy. Winters v. Houston Chronicle Pub. Co., 795 S.W.2d 723 (Tex.1990). If Naylor could have done that, it was certainly free to act as it did.

We overrule Washington's first point of error.

POINT OF ERROR TWO

In his second point of error, Washington asserts that the trial judge erred in granting Naylor's motion to strike his Fourth Amended Original Petition.

The record shows that the trial judge denied Naylor's motion to strike that petition. Consequently, we overrule Washington's second point of error.

POINT OF ERROR THREE

In point of error three, Washington asserts that the trial judge erred in granting Naylor's motion for summary judgment on his fourth amended original petition.

Counts One through Five (Slander Per Se) & Seven (Breach of Contract)

These counts were the same as in the second amended petition. Therefore, the complaints are without merit for reasons stated above.

Count Six (Intentional Infliction of Emotional Distress)

To recover for intentional infliction of emotional distress, a plaintiff must prove that (1) the defendant acted intentionally or recklessly, (2) the defendant's conduct was "extreme and outrageous," and (3) the defendant caused the plaintiff severe emotional distress. Wornick Co. v. Casas, 856 S.W.2d 732, 734 (Tex.1993). Outrageous conduct is that which goes beyond all possible bounds of

decency and is regarded as atrocious and utterly intolerable in a civilized community. Id. at 734. Whether Naylor's acts were "outrageous" is a question of law. Id.

The evidence shows conclusively that Naylor's communications were prompted by the belief Washington tested positive on the preliminary screen and by the innocent motive of informing supervisors so that Washington could be scheduled away from hazardous jobs. As a matter of law, Naylor's conduct was not outrageous. See Randall's, at 645-46.

The trial judge did not err in granting Naylor's motion for summary judgment on count six of Washington's fourth amended petition.

Count Eight (Defamation)

Count eight of Washington's fourth amended petition is the same as count five of his second amended petition and has been disposed of by our ruling on point of error one.

The trial judge did not err in granting Naylor's motion for summary judgment on count eight of Washington's fourth amended petition.

Counts 10 [5] & 11 (Negligent and Grossly Negligent

Defamation)

In counts 10 and 11 Washington attempts to cast its count five ("unknown Naylor employee"--slander per se) from its second amended original petition as a new claim for negligent and grossly negligent defamation. We overrule these contentions for reasons stated above (count 8).

The trial judge did not err in granting Naylor's motion for summary judgment on counts 10 and 11 of Washington's fourth amended petition.

We overrule Washington's third point of error.

We affirm the judgment.

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1 Naylor's drug policy, a part of its "standard operating procedure procedures" provided in pertinent part:

Once employed, all employees are subject to alcohol/drug screening at least annually on a random basis.

All tests which are initially "negative" shall be deemed conclusive, and the employee shall not be subjected to further testing for the same incident, accident, suspicion, etc.

All "positive" screens shall be confirmed by an independent and detailed chemical analysis. If such confirmation test results in a "negative" finding, the employee shall be conclusively deemed to have passed the screen. No positive screens are to be reported by any laboratory unless and until confirmed as above.

For purposes of this policy, all confirmed "positive" screens (the presence of any detectable amount of a prohibited substance in the body), absent a licensed physician's written statement that such presence is both necessary and non-impairing to judgement, reflex, and performance, constitutes a "failure" of the screen.

Employees failing, or refusing to submit to, a drug/alcohol screen shall be terminated....

2 Count 1 alleges that in 1990, Swisher told Chris Block; Count 2 alleges that in 1990, Swisher told Gerald Aiton; Count 3 alleges that in 1990, Aiton told Alan Kelly; Count 4 alleges that in 1990, Aiton told Lloyd Brown; Count 5 alleges that in 1991, an unknown Naylor employee told Ray Elizondo.

3 When the final judgment was granted, Washington's live pleading was his fourth amended petition. However, we will review Washington's complaints about the interlocutory summary judgment because the second amended petition, which was then the live petition, was virtually identical to the fourth petition and because both briefs present the arguments framed in terms of the second amended petition. The differences in the second and fourth petitions are discussed later.

4 Washington withdrew count 6, his claim of negligent infliction of emotional distress, before the submission date.

5 In his response to Naylor's motion for summary judgment, Washington abandoned count nine.

48 F.3d 879
Mark S. VOJVODICH, Plaintiff-Appellant,
v.
Ralph LOPEZ, Bexar County Sheriff, Individually and in his Official Capacity, Defendant-Appellee.
No. 93-8838.
United States Court of Appeals,
Fifth Circuit.
March 30, 1995.

Philip M. Ross, San Antonio, TX, for appellant.

Kathleen Finck Watel, and Edward Schweninger, Bexar County Dist. Atty's Office, San Antonio, TX, for appellee.

Appeal from the United States District Court for the Western District of Texas.

Before HIGGINBOTHAM, SMITH and PARKER, Circuit Judges.

ROBERT M. PARKER, Circuit Judge:

The plaintiff, Mark S. Vojvodich, brought this action against Sheriff Ralph Lopez, claiming that he was transferred from his previous position in the Bexar County Sheriff's Office because of his political activity and affiliation in violation of his First Amendment rights. The district court granted summary judgment in favor of the sheriff, holding that, because the deputy occupied the position of a "policymaker," his First Amendment rights were outweighed by the sheriff's interest in having a loyal employee. As it applied an incorrect legal standard in determining whether the deputy's rights were infringed, we vacate the district court's summary judgment and remand for further proceedings.

I. BACKGROUND

Deputy Mark Vojvodich worked as a Bexar County Deputy Sheriff for over ten years, during which time he worked his way up the chain of command. In 1992, he was promoted to lieutenant and assigned as commander of the Narcotics Unit of the Bexar County Sheriff's Office (BCSO). The Narcotics Unit is a field command within the Criminal Investigations Division. [1]

Over the years Deputy Vojvodich served as a delegate to the Republican National Committee and as a member of several republican organizations, including the Young Republicans Club and the Republican Mens Club. In 1992, Deputy Vojvodich actively campaigned for the re-election of then-incumbent republican sheriff, Harlon Copeland. Deputy

Vojvodich served on Sheriff Copeland's campaign committee, attended political campaign events and fundraisers, associated with campaign staff at campaign headquarters, donated money to the campaign fund, and urged friends and associates to vote for Copeland. In the election, Sheriff Copeland was opposed by Ralph Lopez, a democrat.

That Deputy Vojvodich supported Sheriff Copeland was well known within the BCSO. In fact, on one occasion a Lopez supporter within the sheriff's office tried to recruit Vojvodich to support Lopez's candidacy, but the deputy refused. On election day, however, Deputy Vojvodich's candidate was defeated. The voters of Bexar County elected Mr. Lopez sheriff, and he assumed his duties on January 1, 1993.

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As part of the transition process, Sheriff Lopez asked Deputy Vojvodich to prepare a report on the operations of the Narcotics Unit. The deputy complied, preparing a forty-page report in which he proffered several recommendations. Concurrently, Deputy Vojvodich continued to direct the day-to-day operations of the unit. Vojvodich claims that, although he had opposed the election of Sheriff Lopez, he continued to serve loyally in his position as narcotics commander.

Sheriff Lopez claims that upon taking office he evaluated the performance of all units within the BCSO. This evaluation, Sheriff Lopez claims, revealed that the Narcotics Unit was not operating productively. Sheriff Lopez asserts that he and Deputy Vojvodich disagreed as to the appropriate manner of improving productivity. When the Narcotics Unit thereafter failed to demonstrate what the sheriff believed to be satisfactory progress, the sheriff transferred Deputy Vojvodich to head the Communications/Dispatch Division. The sheriff insists that the position to which he transferred Vojvodich was equal in prestige to the position previously held by Vojvodich in the Narcotics Unit.

Deputy Vojvodich claims that he was unaware that the sheriff was evaluating the unit. He also disputes the sheriff's assertion that the two disagreed on how to improve the operations of the Narcotics Unit. Vojvodich claims that at no time while he headed Narcotics did the sheriff express dissatisfaction with his performance or that of the unit. In fact, Vojvodich claims, it was not until this litigation that he learned that he was transferred for alleged unsatisfactory performance. Unlike the sheriff, Deputy Vojvodich sees his transfer as a demotion. [2]

Deputy Vojvodich also claims that Sheriff Lopez either failed or refused to promote him to Night Chief, a position that was created during the tenure of the previous sheriff. According to Vojvodich, the Night Chief position was declared by the Civil Service Commission to be a non-exempt, Captain-level position. As such, Deputy Vojvodich argues that, according to the civil service system rules, he should have been promoted to the position because he was the top candidate on the applicable promotion list. Deputy Vojvodich was not promoted, however, and on Sheriff Lopez's recommendation the position was subsequently abolished.

Vojvodich insists that he was transferred and denied the promotion to Night Chief solely because he is a republican and because he supported Lopez's opponent in the general election. Vojvodich filed suit in federal district court alleging that Sheriff Lopez had violated his state and federal constitutional rights.

Lopez disputes any retaliatory motive for his decision to transfer Deputy Vojvodich to Communications/Dispatch or for his recommendation to abolish the Night Chief's position. The sheriff states that he transferred Vojvodich from narcotics because he was not satisfied with the performance of the Narcotics Unit, he disagreed with Deputy Vojvodich regarding the organization of the unit, and he wanted better to utilize Vojvodich's knowledge of and interest in computers and communications technology. Sheriff Lopez likewise denies that any political animus motivated his recommendation to eliminate the Night Chief position, claiming that he favored abolishing the position because he believed it would cause an unnecessary expenditure of funds.

Sheriff Lopez moved for summary judgment on three grounds: that he is entitled to qualified immunity; that Deputy Vojvodich occupied the position of a "policymaker" and thus could be demoted because of his political activities; and that Vojvodich failed to produce evidence that he was transferred because of activities protected by the First Amendment. The district court granted the sheriff's motion based solely on the court's finding that the deputy was a policymaker and thus was subject to the action taken on the grounds of political activity. After so ruling, the court dismissed without prejudice

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the deputy's supplemental state-law claims. Deputy Vojvodich timely appealed the district court's ruling.

II. DISCUSSION

On this appeal, we review only the district court's summary dismissal of Deputy Vojvodich's federal-law claims. We review a summary judgment by examining "the record under the same standards which guided the district court." [3] Summary judgment is appropriate when no genuine issue of material fact exists, and the movant is entitled to judgment as a matter of law. [4] In determining whether the grant was proper, we view all fact questions in the light most favorable to the nonmovant. Questions of law are reviewed de novo. [5]

A.

We may assume without deciding that the district court's factual finding that Deputy Vojvodich was a "policymaker" was not clearly erroneous. [6] Even if this finding is supported, however, the district court erred by granting summary judgment in favor of Sheriff Lopez based solely on its finding that Vojvodich had occupied a policymaking position. The district court apparently believed that Deputy Vojvodich's First Amendment interests were necessarily outweighed by Sheriff Lopez's interests as a matter of law simply because it classified Vojvodich as a policymaker. That is not the case.

Although the fact that a public employee holds a policymaking position is relevant to the required balancing of interests, it is not the ultimate determination. In Branti v. Finkel, [7] the Supreme Court expressly rejected the categorical approach used here by the district court. The Branti Court explained that "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for effective performance of the

public office involved." [8] Indeed, the Supreme Court clearly indicated in Branti that "party affiliation is not necessarily relevant to every policymaking or confidential position." [9]

In Connick v. Myers, [10] the Supreme Court again addressed the First Amendment rights of public employees, and expressly adopted the balancing analysis first recognized in Pickering v. Board of Education. [11] Under Connick and Pickering, the court's task "is to seek 'a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' " [12]

To assert the protections of the First Amendment, the employee must establish, as a threshold matter, that his speech or activity related to a matter of public concern. [13]

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3] In the present case, there can be no question that the claimed activity, associating with political organizations and campaigning for a political candidate, related to a matter of public concern. [14] If the plaintiff meets this burden, the employer then must establish that its interest in promoting the efficiency of the services provided by its employees outweighs the employee's interest in engaging in the protected activity. [15] This analysis in reality is a sliding scale or spectrum upon which " 'public concern' is weighed against disruption." [16]

We have repeatedly recognized that "a stronger showing of disruption may be necessary if the employee's speech more substantially involves matters of public concern." [17] This Court has also noted that in "cases involving public employees who occupy policymaker or confidential positions ... the government's interests more easily outweigh the employee's (as a private citizen)." [18] These general observations, however, do not negate the oft repeated warning that because of the wide variety of situations in which this issue might arise, each case should be considered on its particular facts. [19]

In evaluating particular cases, this Court has looked to the factors discussed by the Supreme Court in Connick. Although not intended to be the exclusive considerations, these factors include (1) the degree to which the employee's protected activity involved a matter of public concern, and the gravity of that concern, (2) whether close working relationships are essential to fulfilling the responsibilities of the public office and the extent to which the employee's protected activities may have affected those relationships, (3) the time, place, and manner of the employee's activities, and (4) the context in which the employee's activities were carried out. [20] A proper consideration of these factors allows a court to balance the plaintiff's interest in the claimed protected activity against the alleged disruption caused by that activity to the effective and efficient fulfillment of the government's public responsibilities.

We have no doubt that the government has a "legitimate interest in maintaining proper discipline in the public service, to the end that its duties may be discharged with efficiency and integrity." [21] In addition, we recognize that "party affiliation may be an acceptable requirement for some types of governmental employment. Thus, if an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and

efficiency." [22] Likewise, a private citizen's right to freedom of speech, even political speech, "is not absolute, insofar as it conflicts with

his role as a public employee." [23]

In the present case, however, Sheriff Lopez has failed to allege that the deputy's political activities had any effect whatever on BCSO operations. In fact, the sheriff insists that Deputy Vojvodich's political activities were wholly irrelevant, and that his employment actions were based entirely on other, nonpolitical factors. Because the sheriff has not alleged that Vojvodich's activities actually or potentially affected the Sheriff's Office's ability to provide services, there simply is no countervailing state interest to weigh against the employee's First Amendment rights. Thus, we cannot affirm the summary judgment in favor of Sheriff Lopez on this basis.

B.

Sheriff Lopez also moved for summary judgment on the alternative grounds that (1) Deputy Vojvodich failed to produce evidence that his transfer was motivated by his political affiliation or activities, and (2) the Sheriff was entitled to qualified immunity. Because it granted summary judgment based solely on the finding that Deputy Vojvodich was a policymaker, the district court did not address either of these alternative grounds.

We may affirm a decision on grounds other than those upon which the district court ruled, so we next consider each of the arguments in turn. When we do so in light of the summary judgment record before us, we conclude that Sheriff Lopez has not established entitlement to summary judgment on either basis.

1. CAUSATION

Sheriff Lopez contends that Deputy Vojvodich failed to submit sufficient evidence to establish that Sheriff Lopez's actions were motivated by Deputy Vojvodich's protected activities. To be entitled to summary judgment, Sheriff Lopez must show the absence of a genuine issue of material fact on the causation element of Vojvodich's claim. We hold that Deputy Vojvodich has presented sufficient evidence on this issue to create a question of fact for the jury.

To show that his political affiliation or activities motivated the Sheriff, Vojvodich provides evidence that (1) he was a republican, and Sheriff Lopez was a democrat, (2) he actively campaigned for the incumbent whom Sheriff Lopez eventually defeated, (3) his support of the incumbent's candidacy was well known within the BCSO generally, and in particular by Sheriff Lopez's supporters there, (4) within three and a half months after Sheriff Lopez assumed office, the Deputy was transferred to a less desirable position with diminished prestige and career opportunity, even though his performance evaluations were satisfactory and the Sheriff had expressed no dissatisfaction with his performance, and (5) within the same timeframe, other BCSO employees who opposed Sheriff Lopez's election were terminated. Based on this evidence, we conclude that a reasonable factfinder could infer that Sheriff Lopez's transfer of Deputy Vojvodich was substantially motivated by the Deputy's party affiliation or his political activities or both.

2. QUALIFIED IMMUNITY

Finally, we address Sheriff Lopez's contention that he is entitled to qualified immunity. State officials are protected by qualified immunity for alleged constitutional torts if their conduct does not violate clearly established law effective at the time of the alleged tort. [24] The first step in this analysis is to determine whether the plaintiff has alleged a violation of a constitutional right at all. [25] As we have already discussed, absent a sufficient showing of disruption of the government's ability to provide services, Vojvodich's activity was constitutionally protected. In addition, we hold that a reasonable factfinder could find that political animus motivated the Sheriff's actions. Thus, Deputy Vojvodich has sufficiently alleged the violation of a constitutional right.

The second step in the qualified immunity analysis is determining whether the

constitutional rights allegedly violated were clearly established at the time the events occurred. In Click v. Copeland, [26] we held that by January of 1988 the law was clearly established that a retaliatory transfer to a less interesting, less prestigious position could implicate the First Amendment, even if the transfer did not result in a decrease in pay. [27] As far back as 1985, the established law in this circuit has been that a public employer cannot retaliate against an employee for expression protected by the First Amendment merely because of that employee's status as a policymaker. [28]

In addition, by January 1992 at the latest, the law was equally clear that, regardless of whether an employee is a policymaker, a public employer cannot act against an employee because of the employee's affiliation or support of a rival candidate unless the employee's activities in some way adversely affect the government's ability to provide services. [29] Therefore, prior to March 1993, it should have been readily apparent to a reasonable sheriff that he could not retaliate against a policymaking deputy for exercising his First Amendment rights unless the deputy's activities had in some way disrupted the sheriff's department. Since Sheriff Lopez has alleged no disruption of governmental functions as a result of Vojvodich's activities, we cannot hold that he is entitled to qualified immunity in the face of Vojvodich's allegations, and we cannot affirm the district court's summary judgment in favor of the defendant on this basis. [30]

III. CONCLUSION

For the reasons given above, the summary judgment of the district court is VACATED and the case is REMANDED for further proceedings consistent with this opinion.

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1 Under Texas law, some sheriffs' departments, of which BCSO is one, may establish a civil service system for their employees. See Tex.Loc. Gov't Code Ann. Sec. 158.032 (West Supp.1995). The BCSO elected to do just that. Accordingly, the Bexar County Civil Service System Commission was created. It adopted rules regarding various aspects of employment with the BCSO, including promotions, disciplinary, grievances, and "other matters" relating to employee advancement and benefits. Id. Sec. 158.035. These rules announce, inter alia, a county policy to promote employees and to administer "all other matters affecting [their employment], including ... transfers [and] demotion[s] ... without regard to ... political affiliation."

Rules of Bexar County Sheriff's Civil Service Comm'n Sec. 4, at 12 (Mar. 14, 1985, as revised through May 21, 1992). The rules also restrict somewhat the political activities of civil service employees.

These rules apply to all department employees except those positions that the sheriff specifically elects to exempt from the civil service system. The Bexar County Sheriff is entitled by law to exempt up to ten positions. See Tex.Local Gov't Code Ann. Sec. 158.038(b). The defendant, Sheriff Ralph Lopez, did not choose to exempt Deputy Vojvodich's position as Narcotics Commander. Accordingly, Deputy Vojvodich held a "non-exempt" position within the BCSO; thus, the terms and conditions of his employment were governed by the rules. Sheriff Lopez does not allege that Deputy Vojvodich violated any rules, even though the deputy was active politically.

2 The former Chief of Criminal Investigations, James De Lesdernier, affirmed that, based on his law enforcement experience, "an involuntary transfer from the position of Narcotics Lieutenant to Communications/Dispatching Lieutenant would be a punitive transfer to a less desirable, less prestigious position." Deputy Vojvodich also stated that his new position offered less job satisfaction, fewer benefits, and that, in his view, the transfer was a "career setback."

3 Walker v. Sears, Roebuck & Co., 853 F.2d 355, 358 (5th Cir.1988).

4 Celotex Corp. v. Catrett, 477 U.S. 317, 322-25, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986).

5 Walker, 853 F.2d at 358.

6 "Policymaker" has been defined, in part, as a public employee "whose responsibilities require more than simple ministerial competence, whose decisions create or implement policy, and whose discretion in performing duties or in selecting duties to perform is not severely limited by statute, regulation, or policy determinations made by supervisors." Stegmaier v. Trammell, 597 F.2d 1027, 1035 (5th Cir.1979). "[C]onsideration should also be given to whether the employee acts as an advisor or formulates plans for the implementation of broad goals." Gonzalez v. Benavides, 712 F.2d 142, 149 (5th Cir.1983) (quoting Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976)).

7 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980).

8 Branti, 445 U.S. at 518, 100 S.Ct. at 1295.

9 Id.

10 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983).

11 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

12 Connick, 461 U.S. at 142, 103 S.Ct. at 1687 (alteration in original) (quoting Pickering, 391 U.S. at 568, 88 S.Ct. at 1734).

13 Connick, 461 U.S. at 146, 103 S.Ct. at 1690.

14 Coughlin v. Lee, 946 F.2d 1152, 1158 (5th Cir.1991).

15 United States Dep't of Justice v. Federal Labor Relations Auth., 955 F.2d 998, 1005 (5th Cir.1992).

16 Click v. Copeland, 970 F.2d 106, 112 (5th Cir.1992); Matherne v. Wilson, 851 F.2d 752, 761 (5th Cir.1988); Gonzalez v. Benavides, 774 F.2d 1295, 1302 (5th Cir.1985), cert. denied, 475 U.S. 1140, 106 S.Ct. 1789, 90 L.Ed.2d 335 (1986).

17 Gonzalez, 774 F.2d at 1302 (citing Connick, 461 U.S. at 152, 103 S.Ct. at 1693); see Kinsey v. Salado Ind. Sch. Dist., 950 F.2d 988, 994 (5th Cir.) (en banc), cert. denied, --- U.S. ----, 112 S.Ct. 2275, 119 L.Ed.2d 201 (1992); id. at 1000 (Goldberg, J., dissenting); Matherne, 851 F.2d at 761; McBee v. Jim Hogg County, Tex., 730 F.2d 1009, 1017 (5th Cir.1984) (en banc).

18 Kinsey, 950 F.2d at 994 (citing Rutan v. Republican Party of Ill., 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990)); see also id. at 998 (Higginbotham, J., concurring).

19 Connick, 461 U.S. at 154, 103 S.Ct. at 1694; Pickering, 391 U.S. at 569, 88 S.Ct. at 1735; McBee, 730 F.2d at 1014.

20 See Connick, 461 U.S. at 151-53, 103 S.Ct. at 1692-93; Kinsey, 950 F.2d at 995-96; McBee, 730 F.2d at 1013.

21 McBee, 730 F.2d at 1013 (citing Connick, 461 U.S. at 150, 103 S.Ct. at 1691).

22 Branti, 445 U.S. at 517, 100 S.Ct. at 1294; see Soderstrum v. Town of Grand Isle, 925 F.2d 135 (5th Cir.1991) (police chief's personal secretary served in position of confidence requiring complete loyalty).

23 Kinsey, 950 F.2d at 992.

24 Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727 2738, 73 L.Ed.2d 396 (1982).

25 Siegert v. Gilley, 500 U.S. 226, 232, 111 S.Ct. 1789 1793, 114 L.Ed.2d 277 (1991).

26 970 F.2d 106 (5th Cir.1992).

27 Id. at 109-11.

28 Gonzalez, 774 F.2d at 1301-02; McBee, 730 F.2d at 1016.

29 See Kinsey, 950 F.2d at 996; id. at 1000 (Goldberg, J., dissenting).

30 Click, 970 F.2d at 112-13 (sheriff's failure to allege disruption fatal to his claim of qualified immunity).

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VIRGINIA
v.
BLACK ET AL.
No. 01-1107.
Supreme Court of United States.
Argued December 11, 2002.
Decided April 7, 2003.

Respondents were convicted separately of violating a Virginia statute that makes it a felony "for any person . . . , with the intent of intimidating any person or group . . . , to burn . . . a cross on the property of another, a highway or other public place," and specifies that "[a]ny such burning ... shall be prima facie evidence of an intent to intimidate a person or group." When respondent Black objected on First Amendment grounds to his trial court's jury instruction that cross burning by itself is sufficient evidence from which the required "intent to intimidate" could be inferred, the prosecutor responded that the instruction was taken straight out of the Virginia Model Instructions. Respondent O'Mara pleaded guilty to charges of violating the statute, but reserved the right to challenge its constitutionality. At respondent Elliott's trial, the judge instructed the jury as to what the Commonwealth had to prove, but did not give an instruction on the meaning of the word "intimidate," nor on the statute's prima facie evidence provision. Consolidating all three cases, the Virginia Supreme Court held that the cross-burning statute is unconstitutional on its face; that it is analytically indistinguishable from the ordinance found unconstitutional in *R. A. V.* v. *St. Paul,* 505 U. S. 377; that it discriminates on the basis of content and viewpoint since it selectively chooses only cross burning because of its distinctive message; and that the prima facie evidence provision renders the statute overbroad because the enhanced probability of prosecution under the statute chills the expression of protected speech.

Held: The judgment is affirmed in part, vacated in part, and remanded.

262 Va. 764, 553 S. E. 2d 738, affirmed in part, vacated in part, and remanded.

JUSTICE O'CONNOR delivered the opinion of the Court with respect to Parts I, II, and III, concluding that a State, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate. Pp. 352-363.

(a) Burning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan, which, following its formation in 1866, imposed a reign of terror throughout the South, whipping, threatening, and murdering blacks, southern whites who disagreed with the Klan, and "carpetbagger" northern whites. The Klan has often used cross burnings as a tool of intimidation and a threat of impending violence,

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although such burnings have also remained potent symbols of shared group identity and ideology, serving as a central feature of Klan gatherings. To this day, however, regardless of whether the message is a political one or is also meant to intimidate, the burning of a cross is a "symbol of hate." *Capitol Square Review and Advisory Bd.* v. *Pinette,* 515 U. S. 753, 771. While cross burning does not inevitably convey a message of intimidation, often the cross burner intends that

the recipients of the message fear for their lives. And when a cross burning is used to intimidate, few if any messages are more powerful. Pp. 352-357.

(b) The protections the First Amendment affords speech and expressive conduct are not absolute. This Court has long recognized that the government may regulate certain categories of expression consistent with the Constitution. See, *e. g., Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 571-572. For example, the First Amendment permits a State to ban "true threats," *e. g., Watts* v. *United States,* 394 U. S. 705, 708 *(per curiam),* which encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals, see, *e. g., ibid.* The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and the disruption that fear engenders, as well as from the possibility that the threatened violence will occur. *R. A. V., supra,* at 388. Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. Respondents do not contest that some cross burnings fit within this meaning of intimidating speech, and rightly so. As the history of cross burning in this country shows, that act is often intimidating, intended to create a pervasive fear in victims that they are a target of violence. Pp. 358-360.

(c) The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence. A ban on cross burning carried out with the intent to intimidate is fully consistent with this Court's holding in *R. A. V.* Contrary to the Virginia Supreme Court's ruling, *R. A. V.* did not hold that the First Amendment prohibits *all* forms of content-based discrimination within a proscribable area of speech. Rather, the Court specifically stated that a particular type of content discrimination does not violate the First Amendment when the basis for it consists

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entirely of the very reason its entire class of speech is proscribable. 505 U. S., at 388. For example, it is permissible to prohibit only that obscenity that is most patently offensive in its prurience — *i.e.,* that which involves the most lascivious displays of sexual activity. *Ibid.* Similarly, Virginia's statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate. Unlike the statute at issue in *R. A. V.,* the Virginia statute does not single out for opprobrium only that speech directed toward "one of the specified disfavored topics." *Id.,* at 391. It does not matter whether an individual burns a cross with intent to intimidate because of the victim's race, gender, or religion, or because of the victim's "political affiliation, union membership, or homosexuality." *Ibid.* Thus, just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm. Pp. 360-363.

JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE, JUSTICE STEVENS, and JUSTICE BREYER, concluded in Parts IV and V that the Virginia statute's prima facie evidence provision, as interpreted through the jury instruction given in respondent Black's case and as applied therein, is unconstitutional on its face. Because the instruction is the same as the Commonwealth's Model Jury Instruction, and because the Virginia Supreme Court had the

opportunity to expressly disavow it, the instruction's construction of the prima facie provision is as binding on this Court as if its precise words had been written into the statute. *E. g., Terminiello* v. *Chicago,* 337 U. S. 1, 4. As construed by the instruction, the prima facie provision strips away the very reason why a State may ban cross burning with the intent to intimidate. The provision permits a jury to convict in every cross burning case in which defendants exercise their constitutional right not to put on a defense. And even where a defendant like Black presents a defense, the provision makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case. It permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself. As so interpreted, it would create an unacceptable risk of the suppression of ideas. *E. g., Secretary of State of Md.* v. *Joseph H. Munson Co.,* 467 U. S. 947, 965, n. 13. The act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation, or it may mean only that the person is engaged in core political speech. The prima facie evidence provision blurs the line between these meanings, ignoring all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut. Thus, Black's conviction cannot stand, and the judgment as

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to him is affirmed. Conversely, Elliott's jury did not receive any instruction on the prima facie provision, and the provision was not an issue in O'Mara's case because he pleaded guilty. The possibility that the provision is severable, and if so, whether Elliott and O'Mara could be retried under the statute, is left open. Also left open is the theoretical possibility that, on remand, the Virginia Supreme Court could interpret the prima facie provision in a manner that would avoid the constitutional objections described above. Pp. 363-368.

JUSTICE SCALIA agreed that this Court should vacate and remand the judgment of the Virginia Supreme Court with respect to respondents Elliott and O'Mara so that that court can have an opportunity authoritatively to construe the cross-burning statute's prima-facie-evidence provision. Pp. 368, 379.

JUSTICE SOUTER, joined by JUSTICE KENNEDY and JUSTICE GINSBURG, concluded that the Virginia statute is unconstitutional and cannot be saved by any exception under *R. A. V.* v. *St. Paul,* 505 U. S. 377, and therefore concurred in the Court's judgment insofar as it affirms the invalidation of respondent Black's conviction. Pp. 380-381, 387.

O'CONNOR, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III, in which REHNQUIST, C. J., and STEVENS, SCALIA, and BREYER, JJ., joined, and an opinion with respect to Parts IV and V, in which REHNQUIST, C. J., and STEVENS and BREYER, JJ., joined. STEVENS, J., filed a concurring opinion, *post,* p. 368. SCALIA, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which THOMAS, J., joined as to Parts I and II, *post,* p. 368. SOUTER, J., filed an opinion concurring in the judgment in part and dissenting in part, in which KENNEDY and GINSBURG, JJ., joined, *post,* p. 380. THOMAS, J., filed a dissenting opinion, *post,* p. 388.

CERTIORARI TO THE SUPREME COURT OF VIRGINIA.

538 U.S. 343
VIRGINIA
v.
BLACK ET AL.
No. 01-1107. Supreme Court of United States.
Argued December 11, 2002. Decided April 7, 2003.

William H. Hurd, State Solicitor of Virginia, argued the cause for petitioner. With him on the brief were *Jerry W. Kilgore,* Attorney General, *Maureen Riley Matsen* and *William E. Thro,* Deputy State Solicitors, and *Alison P. Landry,* Assistant Attorney General.

Deputy Solicitor General Dreeben argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Olson, Assistant Attorney General Boyd, Barbara McDowell, Jessica Dunsay Silver,* and *Linda F. Thome.*

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Rodney A. Smolla argued the cause for respondents. With him on the brief were *James O. Broccoletti, David P. Baugh,* and *Kevin E. Martingayle.*[*]

JUSTICE O'CONNOR announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III, and an opinion with respect to Parts IV and V, in which THE CHIEF JUSTICE, JUSTICE STEVENS, and JUSTICE BREYER join.

In this case we consider whether the Commonwealth of Virginia's statute banning cross burning with "an intent to intimidate a person or group of persons" violates the First Amendment. Va. Code Ann. § 18.2-423 (1996). We conclude that while a State, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate, the provision in the Virginia statute treating any

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cross burning as prima facie evidence of intent to intimidate renders the statute unconstitutional in its current form.

I

Respondents Barry Black, Richard Elliott, and Jonathan O'Mara were convicted separately of violating Virginia's cross-burning statute, § 18.2-423. That statute provides:

"It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.

"Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons."

On August 22, 1998, Barry Black led a Ku Klux Klan rally in Carroll County, Virginia. Twenty-five to thirty people attended this gathering, which occurred on private property with the permission of the owner, who was in attendance. The property was located on an open field just off Brushy Fork Road (State Highway 690) in Cana, Virginia.

When the sheriff of Carroll County learned that a Klan rally was occurring in his county, he went to observe it from the side of the road. During the approximately one hour that the sheriff

was present, about 40 to 50 cars passed the site, a "few" of which stopped to ask the sheriff what was happening on the property. App. 71. Eight to ten houses were located in the vicinity of the rally. Rebecca Sechrist, who was related to the owner of the property where the rally took place, "sat and watched to see wha[t] [was] going on" from the lawn of her in-laws' house. She looked on as the Klan prepared for the gathering and subsequently conducted the rally itself. *Id.,* at 103.

During the rally, Sechrist heard Klan members speak about "what they were" and "what they believed in." *Id.,*

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at 106. The speakers "talked real bad about the blacks and the Mexicans." *Id.,* at 109. One speaker told the assembled gathering that "he would love to take a .30/.30 and just random[ly] shoot the blacks." *Ibid.* The speakers also talked about "President Clinton and Hillary Clinton," and about how their tax money "goes to ... the black people." *Ibid.* Sechrist testified that this language made her "very ... scared." *Id.,* at 110.

At the conclusion of the rally, the crowd circled around a 25- to 30-foot cross. The cross was between 300 and 350 yards away from the road. According to the sheriff, the cross "then all of a sudden ... went up in a flame." *Id.,* at 71. As the cross burned, the Klan played Amazing Grace over the loudspeakers. Sechrist stated that the cross burning made her feel "awful" and "terrible." *Id.,* at 110.

When the sheriff observed the cross burning, he informed his deputy that they needed to "find out who's responsible and explain to them that they cannot do this in the State of Virginia." *Id.,* at 72. The sheriff then went down the driveway, entered the rally, and asked "who was responsible for burning the cross." *Id.,* at 74. Black responded, "I guess I am because I'm the head of the rally." *Ibid.* The sheriff then told Black, "[T]here's a law in the State of Virginia that you cannot burn a cross and I'll have to place you under arrest for this." *Ibid.*

Black was charged with burning a cross with the intent of intimidating a person or group of persons, in violation of § 18.2-423. At his trial, the jury was instructed that "intent to intimidate means the motivation to intentionally put a person or a group of persons in fear of bodily harm. Such fear must arise from the willful conduct of the accused rather than from some mere temperamental timidity of the victim." *Id.,* at 146. The trial court also instructed the jury that "the burning of a cross by itself is sufficient evidence from which you may infer the required intent." *Ibid.* When Black objected to this last instruction on First Amendment grounds,

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the prosecutor responded that the instruction was "taken straight out of the [Virginia] Model Instructions." *Id.,* at 134. The jury found Black guilty, and fined him $2,500. The Court of Appeals of Virginia affirmed Black's conviction. Rec. No. 1581-99-3 (Va. App., Dec. 19, 2000), App. 201.

On May 2, 1998, respondents Richard Elliott and Jonathan O'Mara, as well as a third individual, attempted to burn a cross on the yard of James Jubilee. Jubilee, an African-American, was Elliott's next-door neighbor in Virginia Beach, Virginia. Four months prior to the incident,

Jubilee and his family had moved from California to Virginia Beach. Before the cross burning, Jubilee spoke to Elliott's mother to inquire about shots being fired from behind the Elliott home. Elliott's mother explained to Jubilee that her son shot firearms as a hobby, and that he used the backyard as a firing range.

On the night of May 2, respondents drove a truck onto Jubilee's property, planted a cross, and set it on fire. Their apparent motive was to "get back" at Jubilee for complaining about the shooting in the backyard. *Id.,* at 241. Respondents were not affiliated with the Klan. The next morning, as Jubilee was pulling his car out of the driveway, he noticed the partially burned cross approximately 20 feet from his house. After seeing the cross, Jubilee was "very nervous" because he "didn't know what would be the next phase," and because "a cross burned in your yard ... tells you that it's just the first round." *Id.,* at 231.

Elliott and O'Mara were charged with attempted cross burning and conspiracy to commit cross burning. O'Mara pleaded guilty to both counts, reserving the right to challenge the constitutionality of the cross-burning statute. The judge sentenced O'Mara to 90 days in jail and fined him $2,500. The judge also suspended 45 days of the sentence and $1,000 of the fine.

At Elliott's trial, the judge originally ruled that the jury would be instructed "that the burning of a cross by itself is

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sufficient evidence from which you may infer the required intent." *Id.,* at 221-222. At trial, however, the court instructed the jury that the Commonwealth must prove that "the defendant intended to commit cross burning," that "the defendant did a direct act toward the commission of the cross burning," and that "the defendant had the intent of intimidating any person or group of persons." *Id.,* at 250. The court did not instruct the jury on the meaning of the word "intimidate," nor on the prima facie evidence provision of § 18.2-423. The jury found Elliott guilty of attempted cross burning and acquitted him of conspiracy to commit cross burning. It sentenced Elliott to 90 days in jail and a $2,500 fine. The Court of Appeals of Virginia affirmed the convictions of both Elliott and O'Mara. *O'Mara* v. *Commonwealth,* 33 Va. App. 525, 535 S. E. 2d 175 (2000).

Each respondent appealed to the Supreme Court of Virginia, arguing that § 18.2-423 is facially unconstitutional. The Supreme Court of Virginia consolidated all three cases, and held that the statute is unconstitutional on its face. 262 Va. 764, 553 S. E. 2d 738 (2001). It held that the Virginia cross-burning statute "is analytically indistinguishable from the ordinance found unconstitutional in *R. A. V.* [v. *St. Paul,* 505 U. S. 377 (1992)]." *Id.,* at 772, 553 S. E. 2d, at 742. The Virginia statute, the court held, discriminates on the basis of content since it "selectively chooses only cross burning because of its distinctive message." *Id.,* at 774, 553 S. E. 2d, at 744. The court also held that the prima facie evidence provision renders the statute overbroad because "[t]he enhanced probability of prosecution under the statute chills the expression of protected speech." *Id.,* at 777, 553 S. E. 2d, at 746.

Three justices dissented, concluding that the Virginia cross-burning statute passes constitutional muster because it proscribes only conduct that constitutes a true threat. The justices

noted that unlike the ordinance found unconstitutional in *R. A. V.* v. *St. Paul,* 505 U. S. 377 (1992), the Virginia

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statute does not just target cross burning "on the basis of race, color, creed, religion or gender." 262 Va., at 791, 553 S. E. 2d, at 753. Rather, "the Virginia statute applies to any individual who burns a cross for any reason provided the cross is burned with the intent to intimidate." *Ibid.* The dissenters also disagreed with the majority's analysis of the prima facie provision because the inference alone "is clearly insufficient to establish beyond a reasonable doubt that a defendant burned a cross with the intent to intimidate." *Id.,* at 795, 553 S. E. 2d, at 756. The dissent noted that the burden of proof still remains on the Commonwealth to prove intent to intimidate. We granted certiorari. 535 U. S. 1094 (2002).[1]

II

Cross burning originated in the 14th century as a means for Scottish tribes to signal each other. See M. Newton & J. Newton, The Ku Klux Klan: An Encyclopedia 145 (1991). Sir Walter Scott used cross burnings for dramatic effect in The Lady of the Lake, where the burning cross signified both a summons and a call to arms. See W. Scott, The Lady of The Lake, canto third. Cross burning in this country, however, long ago became unmoored from its Scottish ancestry. Burning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan.

The first Ku Klux Klan began in Pulaski, Tennessee, in the spring of 1866. Although the Ku Klux Klan started as a social club, it soon changed into something far different. The Klan fought Reconstruction and the corresponding drive to allow freed blacks to participate in the political process.

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Soon the Klan imposed "a veritable reign of terror" throughout the South. S. Kennedy, Southern Exposure 31 (1991) (hereinafter Kennedy). The Klan employed tactics such as whipping, threatening to burn people at the stake, and murder. W. Wade, The Fiery Cross: The Ku Klux Klan in America 48-49 (1987) (hereinafter Wade). The Klan's victims included blacks, southern whites who disagreed with the Klan, and "carpetbagger" northern whites.

The activities of the Ku Klux Klan prompted legislative action at the national level. In 1871, "President Grant sent a message to Congress indicating that the Klan's reign of terror in the Southern States had rendered life and property insecure." *Jett* v. *Dallas Independent School Dist.,* 491 U. S. 701, 722 (1989) (internal quotation marks and alterations omitted). In response, Congress passed what is now known as the Ku Klux Klan Act. See "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes," 17 Stat. 13 (now codified at 42 U. S. C. §§ 1983, 1985, and 1986). President Grant used these new powers to suppress the Klan in South Carolina, the effect of which severely curtailed the Klan in other States as well. By the end of Reconstruction in 1877, the first Klan no longer existed.

The genesis of the second Klan began in 1905, with the publication of Thomas Dixon's The Clansmen: An Historical Romance of the Ku Klux Klan. Dixon's book was a sympathetic portrait of the first Klan, depicting the Klan as a group of heroes "saving" the South from blacks and the "horrors" of Reconstruction. Although the first Klan never actually practiced cross burning, Dixon's book depicted the Klan burning crosses to celebrate the execution of former slaves. *Id.,* at 324-326; see also *Capitol Square Review and Advisory Bd.* v. *Pinette,* 515 U. S. 753, 770-771 (1995) (THOMAS, J., concurring). Cross burning thereby became associated with the first Ku Klux Klan. When D. W. Griffith turned Dixon's book into the movie The Birth of a Nation in 1915,

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the association between cross burning and the Klan became indelible. In addition to the cross burnings in the movie, a poster advertising the film displayed a hooded Klansman riding a hooded horse, with his left hand holding the reins of the horse and his right hand holding a burning cross above his head. Wade 127. Soon thereafter, in November 1915, the second Klan began.

From the inception of the second Klan, cross burnings have been used to communicate both threats of violence and messages of shared ideology. The first initiation ceremony occurred on Stone Mountain near Atlanta, Georgia. While a 40-foot cross burned on the mountain, the Klan members took their oaths of loyalty. See Kennedy 163. This cross burning was the second recorded instance in the United States. The first known cross burning in the country had occurred a little over one month before the Klan initiation, when a Georgia mob celebrated the lynching of Leo Frank by burning a "gigantic cross" on Stone Mountain that was "visible throughout" Atlanta. Wade 144 (internal quotation marks omitted).

The new Klan's ideology did not differ much from that of the first Klan. As one Klan publication emphasized, "We avow the distinction between [the] races, ... and we shall ever be true to the faithful maintenance of White Supremacy and will strenuously oppose any compromise thereof in any and all things." *Id.,* at 147-148 (internal quotation marks omitted). Violence was also an elemental part of this new Klan. By September 1921, the New York World newspaper documented 152 acts of Klan violence, including 4 murders, 41 floggings, and 27 tar-and-featherings. Wade 160.

Often, the Klan used cross burnings as a tool of intimidation and a threat of impending violence. For example, in 1939 and 1940, the Klan burned crosses in front of synagogues and churches. See Kennedy 175. After one cross burning at a synagogue, a Klan member noted that if the cross burning did not "shut the Jews up, we'll cut a few

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throats and see what happens." *Ibid.* (internal quotation marks omitted). In Miami in 1941, the Klan burned four crosses in front of a proposed housing project, declaring, "We are here to keep niggers out of your town.... When the law fails you, call on us." *Id.,* at 176 (internal quotation marks omitted). And in Alabama in 1942, in "a whirlwind climax to weeks of flogging and terror," the Klan burned crosses in front of a union hall and in front of a union leader's home on the eve of a labor election. *Id.,* at 180. These cross burnings embodied threats to people whom the

Klan deemed antithetical to its goals. And these threats had special force given the long history of Klan violence.

The Klan continued to use cross burnings to intimidate after World War II. In one incident, an African-American "school teacher who recently moved his family into a block formerly occupied only by whites asked the protection of city police ... after the burning of a cross in his front yard." Richmond News Leader, Jan. 21, 1949, p. 19, App. 312. And after a cross burning in Suffolk, Virginia, during the late 1940's, the Virginia Governor stated that he would "not allow any of our people of any race to be subjected to terrorism or intimidation in any form by the Klan or any other organization." D. Chalmers, Hooded Americanism: The History of the Ku Klux Klan 333 (1980) (hereinafter Chalmers). These incidents of cross burning, among others, helped prompt Virginia to enact its first version of the cross-burning statute in 1950.

The decision of this Court in *Brown* v. *Board of Education,* 347 U. S. 483 (1954), along with the civil rights movement of the 1950's and 1960's, sparked another outbreak of Klan violence. These acts of violence included bombings, beatings, shootings, stabbings, and mutilations. See, *e. g.,* Chalmers 349-350; Wade 302-303. Members of the Klan burned crosses on the lawns of those associated with the civil rights movement, assaulted the Freedom Riders, bombed churches, and murdered blacks as well as whites

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whom the Klan viewed as sympathetic toward the civil rights movement.

Throughout the history of the Klan, cross burnings have also remained potent symbols of shared group identity and ideology. The burning cross became a symbol of the Klan itself and a central feature of Klan gatherings. According to the Klan constitution (called the kloran), the "fiery cross" was the "emblem of that sincere, unselfish devotedness of all klansmen to the sacred purpose and principles we have espoused." The Ku Klux Klan Hearings before the House Committee on Rules, 67th Cong., 1st Sess., 114, Exh. G (1921); see also Wade 419. And the Klan has often published its newsletters and magazines under the name The Fiery Cross. See *id.,* at 226, 489.

At Klan gatherings across the country, cross burning became the climax of the rally or the initiation. Posters advertising an upcoming Klan rally often featured a Klan member holding a cross. See N. MacLean, Behind the Mask of Chivalry: The Making of the Second Ku Klux Klan 142-143 (1994). Typically, a cross burning would start with a prayer by the "Klavern" minister, followed by the singing of Onward Christian Soldiers. The Klan would then light the cross on fire, as the members raised their left arm toward the burning cross and sang The Old Rugged Cross. Wade 185. Throughout the Klan's history, the Klan continued to use the burning cross in their ritual ceremonies.

For its own members, the cross was a sign of celebration and ceremony. During a joint Nazi-Klan rally in 1940, the proceeding concluded with the wedding of two Klan members who "were married in full Klan regalia beneath a blazing cross." *Id.,* at 271. In response to antimasking bills introduced in state legislatures after World War II, the Klan burned crosses in protest. See Chalmers 340. On March 26, 1960, the Klan engaged in rallies and cross burnings throughout the

South in an attempt to recruit 10 million members. See Wade 305. Later in 1960, the Klan became

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an issue in the third debate between Richard Nixon and John Kennedy, with both candidates renouncing the Klan. After this debate, the Klan reiterated its support for Nixon by burning crosses. See *id.,* at 309. And cross burnings featured prominently in Klan rallies when the Klan attempted to move toward more nonviolent tactics to stop integration. See *id.,* at 323; cf. Chalmers 368-369, 371-372, 380, 384. In short, a burning cross has remained a symbol of Klan ideology and of Klan unity.

To this day, regardless of whether the message is a political one or whether the message is also meant to intimidate, the burning of a cross is a "symbol of hate." *Capitol Square Review and Advisory Bd.* v. *Pinette,* 515 U. S., at 771 (THOMAS, J., concurring). And while cross burning sometimes carries no intimidating message, at other times the intimidating message is the *only* message conveyed. For example, when a cross burning is directed at a particular person not affiliated with the Klan, the burning cross often serves as a message of intimidation, designed to inspire in the victim a fear of bodily harm. Moreover, the history of violence associated with the Klan shows that the possibility of injury or death is not just hypothetical. The person who burns a cross directed at a particular person often is making a serious threat, meant to coerce the victim to comply with the Klan's wishes unless the victim is willing to risk the wrath of the Klan. Indeed, as the cases of respondents Elliott and O'Mara indicate, individuals without Klan affiliation who wish to threaten or menace another person sometimes use cross burning because of this association between a burning cross and violence.

In sum, while a burning cross does not inevitably convey a message of intimidation, often the cross burner intends that the recipients of the message fear for their lives. And when a cross burning is used to intimidate, few if any messages are more powerful.

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III
A

The First Amendment, applicable to the States through the Fourteenth Amendment, provides that "Congress shall make no law ... abridging the freedom of speech." The hallmark of the protection of free speech is to allow "free trade in ideas" — even ideas that the overwhelming majority of people might find distasteful or discomforting. *Abrams* v. *United States,* 250 U. S. 616, 630 (1919) (Holmes, J., dissenting); see also *Texas* v. *Johnson,* 491 U. S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"). Thus, the First Amendment "ordinarily" denies a State "the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence." *Whitney* v. *California,* 274 U. S. 357, 374 (1927) (Brandeis, J., concurring). The First Amendment affords protection to symbolic or expressive conduct as well as to actual speech. See, *e. g., R. A. V.* v. *City of St. Paul,* 505 U. S., at

382; *Texas* v. *Johnson, supra,* at 405-406; *United States* v. *O'Brien,* 391 U. S. 367, 376-377 (1968); *Tinker* v. *Des Moines Independent Community School Dist.,* 393 U. S. 503, 505 (1969).

The protections afforded by the First Amendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution. See, *e. g., Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 571-572 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem"). The First Amendment permits "restrictions upon the content of speech in a few limited areas, which are `of such slight social value

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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.'" *R. A. V.* v. *City of St. Paul, supra,* at 382-383 (quoting *Chaplinsky* v. *New Hampshire, supra,* at 572).

Thus, for example, a State may punish those words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky* v. *New Hampshire, supra,* at 572; see also *R. A. V.* v. *City of St. Paul, supra,* at 383 (listing limited areas where the First Amendment permits restrictions on the content of speech). We have consequently held that fighting words — "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction" — are generally proscribable under the First Amendment. *Cohen* v. *California,* 403 U. S. 15, 20 (1971); see also *Chaplinsky* v. *New Hampshire, supra,* at 572. Furthermore, "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg* v. *Ohio,* 395 U. S. 444, 447 (1969) *(per curiam).* And the First Amendment also permits a State to ban a "true threat." *Watts* v. *United States,* 394 U. S. 705, 708 (1969) *(per curiam)* (internal quotation marks omitted); accord, *R. A. V.* v. *City of St. Paul, supra,* at 388 ("[T]hreats of violence are outside the First Amendment"); *Madsen* v. *Women's Health Center, Inc.,* 512 U. S. 753, 774 (1994); *Schenck* v. *Pro-Choice Network of Western N. Y.,* 519 U. S. 357, 373 (1997).

"True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. See *Watts* v. *United States, supra,* at 708 ("political hyberbole" is not a true threat); *R. A. V.* v. *City of St. Paul,* 505 U. S., at 388. The

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speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur." *Ibid.* Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. Respondents do not contest that some cross burnings fit within this meaning of intimidating speech, and rightly so. As noted in Part II, *supra,* the history of cross

burning in this country shows that cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence.

B

The Supreme Court of Virginia ruled that in light of *R. A. V.* v. *City of St. Paul, supra,* even if it is constitutional to ban cross burning in a content-neutral manner, the Virginia cross-burning statute is unconstitutional because it discriminates on the basis of content and viewpoint. 262 Va., at 771-776, 553 S. E. 2d, at 742-745. It is true, as the Supreme Court of Virginia held, that the burning of a cross is symbolic expression. The reason why the Klan burns a cross at its rallies, or individuals place a burning cross on someone else's lawn, is that the burning cross represents the message that the speaker wishes to communicate. Individuals burn crosses as opposed to other means of communication because cross burning carries a message in an effective and dramatic manner.[2]

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The fact that cross burning is symbolic expression, however, does not resolve the constitutional question. The Supreme Court of Virginia relied upon *R. A. V.* v. *City of St. Paul, supra,* to conclude that once a statute discriminates on the basis of this type of content, the law is unconstitutional. We disagree.

In *R. A. V.,* we held that a local ordinance that banned certain symbolic conduct, including cross burning, when done with the knowledge that such conduct would "`arouse anger, alarm or resentment in others on the basis of race, color, creed, religion or gender'" was unconstitutional. *Id.,* at 380 (quoting the St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990)). We held that the ordinance did not pass constitutional muster because it discriminated on the basis of content by targeting only those individuals who "provoke violence" on a basis specified in the law. 505 U. S., at 391. The ordinance did not cover "[t]hose who wish to use `fighting words' in connection with other ideas — to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality." *Ibid.* This content-based discrimination was unconstitutional because it allowed the city "to impose special prohibitions on those speakers who express views on disfavored subjects." *Ibid.*

We did not hold in *R. A. V.* that the First Amendment prohibits *all* forms of content-based discrimination within a proscribable area of speech. Rather, we specifically stated that some types of content discrimination did not violate the First Amendment:

"When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or

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viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class." *Id.,* at 388.

Indeed, we noted that it would be constitutional to ban only a particular type of threat: "[T]he Federal Government can criminalize only those threats of violence that are directed against the President ... since the reasons why threats of violence are outside the First Amendment ... have special force when applied to the person of the President." *Ibid.* And a State may "choose to prohibit only that obscenity which is the most patently offensive *in its prurience — i. e.,* that which involves the most lascivious displays of sexual activity." *Ibid.* (emphasis in original). Consequently, while the holding of *R. A. V.* does not permit a State to ban only obscenity based on "offensive *political* messages," *ibid.,* or "only those threats against the President that mention his policy on aid to inner cities," *ibid.,* the First Amendment permits content discrimination "based on the very reasons why the particular class of speech at issue ... is proscribable," *id.,* at 393.

Similarly, Virginia's statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate. Unlike the statute at issue in *R. A. V.,* the Virginia statute does not single out for opprobrium only that speech directed toward "one of the specified disfavored topics." *Id.,* at 391. It does not matter whether an individual burns a cross with intent to intimidate because of the victim's race, gender, or religion, or because of the victim's "political affiliation, union membership, or homosexuality." *Ibid.* Moreover, as a factual matter it is not true that cross burners direct their intimidating conduct solely to racial or religious minorities. See, *e. g., supra,* at 355 (noting the instances of cross burnings directed at union members); *State* v. *Miller,* 6 Kan. App. 2d 432, 629 P. 2d 748 (1981) (describing

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the case of a defendant who burned a cross in the yard of the lawyer who had previously represented him and who was currently prosecuting him). Indeed, in the case of Elliott and O'Mara, it is at least unclear whether the respondents burned a cross due to racial animus. See 262 Va., at 791, 553 S. E. 2d, at 753 (Hassell, J., dissenting) (noting that "these defendants burned a cross because they were angry that their neighbor had complained about the presence of a firearm shooting range in the Elliott's yard, not because of any racial animus").

The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence. Thus, just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm. A ban on cross burning carried out with the intent to intimidate is fully consistent with our holding in *R. A. V.* and is proscribable under the First Amendment.

IV

The Supreme Court of Virginia ruled in the alternative that Virginia's cross-burning statute was unconstitutionally overbroad due to its provision stating that "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." Va. Code Ann. § 18.2-423 (1996). The Commonwealth added the prima facie provision to the statute in 1968. The court below did not reach whether this provision is severable from the rest of the cross-

burning statute under Virginia law. See § 1-17.1 ("The provisions of all statutes are severable unless ... it is

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apparent that two or more statutes or provisions must operate in accord with one another"). In this Court, as in the Supreme Court of Virginia, respondents do not argue that the prima facie evidence provision is unconstitutional as applied to any one of them. Rather, they contend that the provision is unconstitutional on its face.

The Supreme Court of Virginia has not ruled on the meaning of the prima facie evidence provision. It has, however, stated that "the act of burning a cross alone, with no evidence of intent to intimidate, will nonetheless suffice for arrest and prosecution and will insulate the Commonwealth from a motion to strike the evidence at the end of its case-in-chief." 262 Va., at 778, 553 S. E. 2d, at 746. The jury in the case of Richard Elliott did not receive any instruction on the prima facie evidence provision, and the provision was not an issue in the case of Jonathan O'Mara because he pleaded guilty. The court in Barry Black's case, however, instructed the jury that the provision means: "The burning of a cross, by itself, is sufficient evidence from which you may infer the required intent." App. 196. This jury instruction is the same as the Model Jury Instruction in the Commonwealth of Virginia. See Virginia Model Jury Instructions, Criminal, Instruction No. 10.250 (1998 and Supp. 2001).

The prima facie evidence provision, as interpreted by the jury instruction, renders the statute unconstitutional. Because this jury instruction is the Model Jury Instruction, and because the Supreme Court of Virginia had the opportunity to expressly disavow the jury instruction, the jury instruction's construction of the prima facie provision "is a ruling on a question of state law that is as binding on us as though the precise words had been written into" the statute. *E. g., Terminiello* v. *Chicago,* 337 U. S. 1, 4 (1949) (striking down an ambiguous statute on facial grounds based upon the instruction given to the jury); see also *New York* v. *Ferber,* 458 U. S. 747, 768, n. 21 (1982) (noting that *Terminiello* involved a facial challenge to the statute); *Secretary of State*

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of Md. v. *Joseph H. Munson Co.,* 467 U. S. 947, 965, n. 13 (1984); Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 845-846, n. 8 (1970); Monaghan, Overbreadth, 1981 S. Ct. Rev. 1, 10-12; Blakey & Murray, Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law, 2002 B. Y. U. L. Rev. 829, 883, n. 133. As construed by the jury instruction, the prima facie provision strips away the very reason why a State may ban cross burning with the intent to intimidate. The prima facie evidence provision permits a jury to convict in every cross-burning case in which defendants exercise their constitutional right not to put on a defense. And even where a defendant like Black presents a defense, the prima facie evidence provision makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case. The provision permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself.

It is apparent that the provision as so interpreted "`would create an unacceptable risk of the suppression of ideas.'" *Secretary of State of Md.* v. *Joseph H. Munson Co., supra,* at 965, n. 13 (quoting *Members of City Council of Los Angeles* v. *Taxpayers for Vincent,* 466 U. S. 789, 797

(1984)). The act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation. But that same act may mean only that the person is engaged in core political speech. The prima facie evidence provision in this statute blurs the line between these two meanings of a burning cross. As interpreted by the jury instruction, the provision chills constitutionally protected political speech because of the possibility that the Commonwealth will prosecute — and potentially convict — somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect.

As the history of cross burning indicates, a burning cross is not always intended to intimidate. Rather, sometimes the cross burning is a statement of ideology, a symbol of group

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solidarity. It is a ritual used at Klan gatherings, and it is used to represent the Klan itself. Thus, "[b]urning a cross at a political rally would almost certainly be protected expression." *R. A. V.* v. *St. Paul,* 505 U. S., at 402, n. 4 (White, J., concurring in judgment) (citing *Brandenburg* v. *Ohio,* 395 U. S., at 445). Cf. *National Socialist Party of America* v. *Skokie,* 432 U. S. 43 (1977) *(per curiam).* Indeed, occasionally a person who burns a cross does not intend to express either a statement of ideology or intimidation. Cross burnings have appeared in movies such as Mississippi Burning, and in plays such as the stage adaptation of Sir Walter Scott's The Lady of the Lake.

The prima facie provision makes no effort to distinguish among these different types of cross burnings. It does not distinguish between a cross burning done with the purpose of creating anger or resentment and a cross burning done with the purpose of threatening or intimidating a victim. It does not distinguish between a cross burning at a public rally or a cross burning on a neighbor's lawn. It does not treat the cross burning directed at an individual differently from the cross burning directed at a group of like-minded believers. It allows a jury to treat a cross burning on the property of another with the owner's acquiescence in the same manner as a cross burning on the property of another without the owner's permission. To this extent I agree with JUSTICE SOUTER that the prima facie evidence provision can "skew jury deliberations toward conviction in cases where the evidence of intent to intimidate is relatively weak and arguably consistent with a solely ideological reason for burning." *Post,* at 385 (opinion concurring in judgment in part and dissenting in part).

It may be true that a cross burning, even at a political rally, arouses a sense of anger or hatred among the vast majority of citizens who see a burning cross. But this sense of anger or hatred is not sufficient to ban all cross burnings. As Gerald Gunther has stated, "The lesson I have drawn

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from my childhood in Nazi Germany and my happier adult life in this country is the need to walk the sometimes difficult path of denouncing the bigot's hateful ideas with all my power, yet at the same time challenging any community's attempt to suppress hateful ideas by force of law." Casper, Gerry, 55 Stan. L. Rev. 647, 649 (2002) (internal quotation marks omitted). The prima facie evidence provision in this case ignores all of the contextual factors that are necessary to

decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut.

For these reasons, the prima facie evidence provision, as interpreted through the jury instruction and as applied in Barry Black's case, is unconstitutional on its face. We recognize that the Supreme Court of Virginia has not authoritatively interpreted the meaning of the prima facie evidence provision. Unlike JUSTICE SCALIA, we refuse to speculate on whether *any* interpretation of the prima facie evidence provision would satisfy the First Amendment. Rather, all we hold is that because of the interpretation of the prima facie evidence provision given by the jury instruction, the provision makes the statute facially invalid at this point. We also recognize the theoretical possibility that the court, on remand, could interpret the provision in a manner different from that so far set forth in order to avoid the constitutional objections we have described. We leave open that possibility. We also leave open the possibility that the provision is severable, and if so, whether Elliott and O'Mara could be retried under § 18.2-423.

V

With respect to Barry Black, we agree with the Supreme Court of Virginia that his conviction cannot stand, and we affirm the judgment of the Supreme Court of Virginia. With respect to Elliott and O'Mara, we vacate the judgment

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of the Supreme Court of Virginia, and remand the case for further proceedings.

It is so ordered.

Notes:

* Briefs of *amici curiae* urging reversal were filed for the State of California by *Bill Lockyer,* Attorney General, *Manuel M. Medeiros,* State Solicitor General, *Richard M. Frank,* Chief Assistant Attorney General, and *Angela Sierra,* Deputy Attorney General; for the State of New Jersey et al. by *David Samson,* Attorney General of New Jersey, and *Carol Johnston,* Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Janet Napolitano* of Arizona, *Richard Blumenthal* of Connecticut, *Thomas J. Miller* of Iowa, *J. Joseph Curran, Jr.,* of Maryland, *Thomas F. Reilly* of Massachusetts, *Jennifer M. Granholm* of Michigan, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Roy Cooper* of North Carolina, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Mark L. Shurtleff* of Utah, and *William H. Sorrell* of Vermont; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger.*

Briefs of *amici curiae* urging affirmance were filed for the Council of Conservative Citizens by *Edgar J. Steele;* for the Rutherford Institute by *John W. Whitehead* and *Steven H. Aden;* and for the Thomas Jefferson Center for the Protection of Free Expression by *Robert M. O'Neil* and *J. Joshua Wheeler.*

Martin E. Karlinsky, Howard W. Goldstein, Steven M. Freeman, Frederick M. Lawrence, and *Elliot M. Mincberg* filed a brief for the Anti-Defamation League et al. as *amici curiae.*

1. After we granted certiorari, the Commonwealth enacted another statute designed to remedy the constitutional problems identified by the state court. See Va. Code Ann. § 18.2-423.01 (2002). Section 18.2-423.01 bans the burning of "an object" when done "with the intent of intimidating any person or group of persons." The statute does not contain any prima facie evidence provision. Section 18.2-423.01, however, did not repeal § 18.2-423, the cross-burning statute at issue in this case.

2. JUSTICE THOMAS argues in dissent that cross burning is "conduct, not expression." *Post,* at 394. While it is of course true that burning a cross is conduct, it is equally true that the First Amendment protects symbolic conduct as well as pure speech. See *supra,* at 358. As JUSTICE THOMAS has previously recognized, a burning cross is a "symbol of hate," and a "a symbol of white supremacy." *Capitol Square Review and Advisory Bd.* v. *Pinette,* 515 U. S. 753, 770-771 (1995) (concurring opinion).

JUSTICE STEVENS, concurring.

Cross burning with "an intent to intimidate," Va. Code Ann. § 18.2-423 (1996), unquestionably qualifies as the kind of threat that is unprotected by the First Amendment. For the reasons stated in the separate opinions that Justice White and I wrote in *R. A. V.* v. *St. Paul,* 505 U. S. 377 (1992), that simple proposition provides a sufficient basis for upholding the basic prohibition in the Virginia statute even though it does not cover other types of threatening expressive conduct. With this observation, I join JUSTICE O'CONNOR's opinion.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins as to Parts I and II, concurring in part, concurring in the judgment in part, and dissenting in part.

I agree with the Court that, under our decision in *R. A. V.* v. *St. Paul,* 505 U. S. 377 (1992), a State may, without infringing the First Amendment, prohibit cross burning carried out with the intent to intimidate. Accordingly, I join Parts I-III of the Court's opinion. I also agree that we should vacate and remand the judgment of the Virginia Supreme Court so that that court can have an opportunity authoritatively to construe the prima-facie-evidence provision of Va. Code Ann. § 18.2-423 (1996). I write separately, however, to describe what I believe to be the correct interpretation of § 18.2-423, and to explain why I believe there is no justification for the plurality's apparent decision to invalidate that provision on its face.

I

Section 18.2-423 provides that the burning of a cross in public view "shall be prima facie evidence of an intent to intimidate." In order to determine whether this component

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of the statute violates the Constitution, it is necessary, first, to establish precisely what the presentation of prima facie evidence accomplishes.

Typically, "prima facie evidence" is defined as:

"Such evidence as, in the judgment of the law, is sufficient to establish a given fact ... and which if not rebutted or contradicted, will remain sufficient. [Such evidence], if unexplained or

uncontradicted, is sufficient to sustain a judgment in favor of the issue which it supports, but [it] may be contradicted by other evidence." Black's Law Dictionary 1190 (6th ed. 1990).

The Virginia Supreme Court has, in prior cases, embraced this canonical understanding of the pivotal statutory language. *E.g., Babbitt* v. *Miller,* 192 Va. 372, 379-380, 64 S. E. 2d 718, 722 (1951) ("*Prima facie* evidence is evidence which on its first appearance is sufficient to raise a presumption of fact or establish the fact in question unless rebutted"). For example, in *Nance* v. *Commonwealth,* 203 Va. 428, 124 S. E. 2d 900 (1962), the Virginia Supreme Court interpreted a law of the Commonwealth that (1) prohibited the possession of certain "burglarious" tools "with intent to commit burglary, robbery, or larceny ...," and (2) provided that "[t]he possession of such burglarious tools ... shall be prima facie evidence of an intent to commit burglary, robbery or larceny." Va. Code Ann. § 18.1-87 (1960). The court explained that the prima-facie-evidence provision "cuts off no defense nor interposes any obstacle to a contest of the facts, and `relieves neither the court nor the jury of the duty to determine all of the questions of fact from the weight of the whole evidence.'" *Nance* v. *Commonwealth,* 203 Va., at 432, 124 S. E. 2d, at 903-904; see also *ibid.,* 124 S. E. 2d, at 904 (noting that the prima-facie-evidence provision "`is merely a rule of evidence and not the determination of a fact ...'").

The established meaning in Virginia, then, of the term "prima facie evidence" appears to be perfectly orthodox: It

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is evidence that suffices, on its own, to establish a particular fact. But it is hornbook law that this is true only to the extent that the evidence goes unrebutted. "Prima facie evidence of a fact is such evidence as, in judgment of law, is sufficient to establish the fact; and, *if not rebutted,* remains sufficient for the purpose." 7B Michie's Jurisprudence of Virginia and West Virginia § 32 (1998) (emphasis added).

To be sure, Virginia is entirely free, if it wishes, to discard the canonical understanding of the term "prima facie evidence." Its courts are also permitted to interpret the phrase in different ways for purposes of different statutes. In this case, however, the Virginia Supreme Court has done nothing of the sort. To the extent that tribunal has spoken to the question of what "prima facie evidence" means for purposes of § 18.2-423, it has not deviated a whit from its prior practice and from the ordinary legal meaning of these words. Rather, its opinion explained that under § 18.2-423, "the act of burning a cross alone, with no evidence of intent to intimidate, will ... suffice for arrest and prosecution and will insulate the Commonwealth from a motion to strike the evidence at the end of its case-in-chief." 262 Va. 764, 778, 553 S. E. 2d 738, 746 (2001). Put otherwise, where the Commonwealth has demonstrated through its case in chief that the defendant burned a cross in public view, this is sufficient, at least until the defendant has come forward with rebuttal evidence, to create a jury issue with respect to the intent element of the offense.

It is important to note that the Virginia Supreme Court did not suggest (as did the trial court's jury instructions in respondent Black's case, see *infra,* at 377) that a jury may, in light of the prima-facie-evidence provision, ignore any rebuttal evidence that has been presented and, solely on the basis of a showing that the defendant burned a cross, find that he intended to intimidate. Nor, crucially, did that court say that the presentation of prima facie evidence is always sufficient to get a case to a jury, *i. e.,* that a court may never

direct a verdict for a defendant who has been shown to have burned a cross in public view, even if, by the end of trial, the defendant has presented rebuttal evidence. Instead, according to the Virginia Supreme Court, the effect of the prima-facie-evidence provision is far more limited. It suffices to "insulate the Commonwealth from a motion to strike the evidence *at the end of its case-in-chief,*" but it does nothing more. 262 Va., at 778, 553 S. E. 2d, at 746 (emphasis added). That is, presentation of evidence that a defendant burned a cross in public view is automatically sufficient, on its own, to support an inference that the defendant intended to intimidate *only until* the defendant comes forward with some evidence in rebuttal.

II

The question presented, then, is whether, given this understanding of the term "prima facie evidence," the cross-burning statute is constitutional. The Virginia Supreme Court answered that question in the negative. It stated that "§ 18.2-423 sweeps within its ambit for arrest and prosecution, both protected and unprotected speech." *Ibid.* "The enhanced probability of prosecution under the statute chills the expression of protected speech sufficiently to render the statute overbroad." *Id.,* at 777, 553 S. E. 2d, at 746.

This approach toward overbreadth analysis is unprecedented. We have never held that the mere threat that individuals who engage in protected conduct will be subject to arrest and prosecution suffices to render a statute overbroad. Rather, our overbreadth jurisprudence has consistently focused on whether *the prohibitory terms* of a particular statute extend to protected conduct; that is, we have inquired whether individuals who engage in protected conduct can be *convicted* under a statute, not whether they might be subject to arrest and prosecution. *E. g., Houston* v. *Hill,* 482 U. S. 451, 459 (1987) (a statute "that *make[s] unlawful* a substantial amount of constitutionally protected conduct may be held facially invalid" (emphasis added)); *Grayned* v. *City of Rockford,*

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408 U. S. 104, 114 (1972) (a statute may be overbroad "if in its reach it *prohibits* constitutionally protected conduct" (emphasis added)); *R. A. V.* v. *St. Paul,* 505 U. S., at 397 (White, J., concurring in judgment) (deeming the ordinance at issue "fatally overbroad because it *criminalizes* ... expression protected by the First Amendment" (emphasis added)).

Unwilling to embrace the Virginia Supreme Court's novel mode of overbreadth analysis, today's opinion properly focuses on the question of who may be convicted, rather than who may be arrested and prosecuted, under § 18.2-423. Thus, it notes that "[t]he prima facie evidence provision permits a jury *to convict* in every cross-burning case in which defendants exercise their constitutional right not to put on a defense."[1] *Ante,* at 365 (emphasis added). In such cases, the plurality explains, "[t]he provision permits the Commonwealth to arrest, prosecute, *and convict* a person based solely on the fact of cross burning itself." *Ibid.* (emphasis added). And this, according to the plurality, is constitutionally problematic because "a burning cross is not always intended to intimidate," and nonintimidating cross burning cannot be prohibited. *Ibid.* In particular, the opinion notes that cross burning may serve as "a statement of ideology" or "a

symbol of group solidarity" at Ku Klux Klan rituals, and may even serve artistic purposes as in the case of the film Mississippi Burning. *Ante.* at 365-366.

The plurality is correct in all of this — and it means that some individuals who engage in protected speech may, because

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of the prima-facie-evidence provision, be subject to conviction. Such convictions, assuming they are unconstitutional, could be challenged on a case-by-case basis. The plurality, however, with little in the way of explanation, leaps to the conclusion that the *possibility* of such convictions justifies facial invalidation of the statute.

In deeming § 18.2-423 facially invalid, the plurality presumably means to rely on some species of overbreadth doctrine.[2] But it must be a rare species indeed. We have noted that "[i]n a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 494 (1982). If one looks only to the core provision of § 18.2-423 — "[i]t shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross ..." — it appears *not* to capture any protected conduct; that language is limited in its reach to conduct

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which a State is, under the Court's holding, *ante,* at 363, allowed to prohibit. In order to identify *any* protected conduct that is affected by Virginia's cross-burning law, the plurality is compelled to focus not on the statute's core prohibition, but on the prima-facie-evidence provision, and hence on *the process* through which the prohibited conduct may be found by a jury.[3] And even in that context, the plurality cannot claim that improper convictions will result from the operation of the prima-facie-evidence provision *alone.* As the plurality concedes, the only persons who might impermissibly be convicted by reason of that provision are those who adopt a particular trial strategy, to wit, abstaining from the presentation of a defense.

The plurality is thus left with a strikingly attenuated argument to support the claim that Virginia's cross-burning statute is facially invalid. The class of persons that the plurality contemplates could impermissibly be convicted under § 18.2-423 includes only those individuals who (1) burn a cross in public view, (2) do not intend to intimidate, (3) are nonetheless charged and prosecuted, and (4) refuse to present a defense. *Ante,* at 365 ("The prima facie evidence provision permits a jury to convict in every cross-burning case in which defendants exercise their constitutional right not to put on a defense").

Conceding (quite generously, in my view) that this class of persons exists, it cannot possibly give rise to a viable facial challenge, not even with the aid of our First Amendment

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overbreadth doctrine. For this Court has emphasized repeatedly that "where a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its

overbreadth is not only real, but *substantial* as well, judged in relation to the statute's plainly legitimate sweep." *Osborne* v. *Ohio,* 495 U. S. 103, 112 (1990) (internal quotation marks omitted; emphasis added). See also *Houston* v. *Hill,* 482 U. S., at 458 ("Only a statute that is substantially overbroad may be invalidated on its face"); *Members of City Council of Los Angeles* v. *Taxpayers for Vincent,* 466 U. S. 789, 800 (1984) ("[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge"); *New York* v. *Ferber,* 458 U. S. 747, 771 (1982) ("[A] law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications ..."). The notion that the set of cases identified by the plurality in which convictions might improperly be obtained is sufficiently large to render the statute *substantially* overbroad is fanciful. The potential improper convictions of which the plurality complains are more appropriately classified as the sort of "marginal applications" of a statute in light of which "facial invalidation is inappropriate." *Parker* v. *Levy,* 417 U. S. 733, 760 (1974).[4]

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Perhaps more alarming, the plurality concedes, *ante,* at 364, 365, that its understanding of the prima-facie-evidence provision is premised on the jury instructions given in respondent Black's case. This would all be well and good were it not for the fact that the plurality *facially invalidates* § 18.2-423. *Ante,* at 367 ("[T]he prima facie evidence provision, as interpreted through the jury instruction and as applied in Barry Black's case, is unconstitutional on its face"). I am aware of no case — and the plurality cites none — in which we have facially invalidated an *ambiguous* statute on the basis of a constitutionally troubling jury instruction.[5] And it is altogether

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unsurprising that there is no precedent for such a holding. For where state law is ambiguous, treating jury instructions as binding interpretations would cede an enormous measure of power over state law to trial judges. A single judge's idiosyncratic reading of a state statute could trigger its invalidation. In this case, the troubling instruction — "The burning of a cross, by itself, is sufficient evidence from which you may infer the required intent," App. 196 — was taken verbatim from Virginia's Model Jury Instructions. But these Model Instructions have been neither promulgated by the legislature nor formally adopted by the Virginia Supreme Court. And it is hornbook law, in Virginia as elsewhere, that "[p]roffered instructions which do not correctly state the law ... are erroneous and should be refused." 10A Michie's Jurisprudence of Virginia and West Virginia, Instructions § 15, p. 35 (Supp. 2000).

The plurality's willingness to treat this jury instruction as binding (and to strike down § 18.2-423 on that basis) would be shocking enough had the Virginia Supreme Court offered no guidance as to the proper construction of the prima-facie-evidence provision. For ordinarily we would decline to pass upon the constitutionality of an ambiguous state statute until that State's highest court had provided a binding construction.

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E. g., Arizonans for Official English v. *Arizona,* 520 U. S. 43, 78 (1997). If there is any exception to that rule, it is the case where one of two possible interpretations of the state statute would clearly render it unconstitutional, and the other would not. In that situation, applying the maxim

"*ut res magis valeat quam pereat*" we would do *precisely the opposite* of what the plurality does here — that is, we would adopt the alternative reading that renders the statute constitutional rather than unconstitutional. The plurality's analysis is all the more remarkable given the dissonance between the interpretation of § 18.2-423 implicit in the jury instruction and the one suggested by the Virginia Supreme Court. That court's opinion did not state that, once proof of public cross burning is presented, a jury is permitted to infer an intent to intimidate *solely* on this basis and regardless of whether a defendant has offered evidence to rebut any such inference. To the contrary, in keeping with the black-letter understanding of "prima facie evidence," the Virginia Supreme Court explained that such evidence suffices only to "insulate the Commonwealth from a motion to strike the evidence at the end of its case-in-chief." 262 Va., at 778, 553 S. E. 2d, at 746. The court did not so much as hint that a jury is permitted, under § 18.2-423, to ignore rebuttal evidence and infer an intent to intimidate strictly on the basis of the prosecution's prima facie case. And unless and until the Supreme Court of Virginia tells us that the prima-facie-evidence provision permits a jury to infer intent under such conditions, this Court is entirely unjustified in facially invalidating § 18.2-423 on this basis.

As its concluding performance, in an apparent effort to paper over its unprecedented decision facially to invalidate a statute in light of an errant jury instruction, the plurality states:

"We recognize that the Supreme Court of Virginia has not authoritatively interpreted the meaning of the prima facie evidence provision.... We also recognize the

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theoretical possibility that the court, on remand, could interpret the provision in a manner different from that so far set forth in order to avoid the constitutional objections we have described. We leave open that possibility." *Ante,* at 367.

Now this is truly baffling. Having declared, in the immediately preceding sentence, that § 18.2-423 is "unconstitutional *on its face,*" *ibid.* (emphasis added), the plurality holds out the possibility that the Virginia Supreme Court will offer some saving construction of the statute. It should go without saying that if a saving construction of § 18.2-423 is possible, then facial invalidation is inappropriate. *E. g., Harrison* v. *NAACP,* 360 U. S. 167, 176 (1959) ("[N]o principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them"). So, what appears to have happened is that the plurality has facially invalidated not § 18.2-423, but its own hypothetical interpretation of § 18.2-423, and has then remanded to the Virginia Supreme Court to learn the *actual* interpretation of § 18.2-423. Words cannot express my wonderment at this virtuoso performance.

III

As the analysis in Part I, *supra,* demonstrates, I believe the prima-facie-evidence provision in Virginia's cross-burning statute is constitutionally unproblematic. Nevertheless, because the Virginia Supreme Court has not yet offered an authoritative construction of § 18.2-423, I concur in the Court's decision to vacate and remand the judgment with respect to respondents Elliott and O'Mara. I also agree that respondent Black's conviction cannot stand. As noted above, the jury in

Black's case was instructed that "[t]he burning of a cross, *by itself,* is sufficient evidence from which you may infer the required intent." App. 196 (emphasis

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added). Where this instruction has been given, it is impossible to determine whether the jury has rendered its verdict (as it must) in light of the entire body of facts before it — *including* evidence that might rebut the presumption that the cross burning was done with an intent to intimidate — or, instead, has chosen to ignore such rebuttal evidence and focused exclusively on the fact that the defendant burned a cross.[6] Still, I cannot go along with the Court's decision to affirm the judgment with respect to Black. In that judgment, the Virginia Supreme Court, having erroneously concluded that § 18.2-423 is overbroad, not only vacated Black's conviction, but dismissed the indictment against him as well. 262 Va., at 779, 553 S. E. 2d, at 746. Because I believe the constitutional defect in Black's conviction is rooted in a jury instruction and not in the statute itself, I would not dismiss the indictment and would permit the Commonwealth to retry Black if it wishes to do so. It is an interesting question whether the plurality's willingness to let the Virginia Supreme Court resolve the plurality's make-believe facial invalidation of the statute extends as well to the facial invalidation insofar as it supports dismissal of the indictment against Black. Logically, there is no reason why it would not.

Notes:

1. The plurality also asserts that "even where a defendant like Black presents a defense, the prima facie evidence provision makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case." *Ante,* at 365. There is no basis for this assertion. The Virginia Supreme Court's opinion in *Nance* v. *Commonwealth,* 203 Va. 428, 432, 124 S. E. 2d 900, 903-904 (1962), states, in no uncertain terms, that the presentation of a prima facie case "`relieves neither the court nor the jury of the duty to determine all of the questions of fact from the weight of *the whole evidence.*'" (Emphasis added.)

2. Overbreadth was, of course, the framework of analysis employed by the Virginia Supreme Court. See 262 Va. 764, 777-778, 553 S. E. 2d 738, 745-746 (2001) (examining the prima-facie-evidence provision in a section labeled "OVERBREADTH ANALYSIS" and holding that the provision "is overbroad"). Likewise, in their submissions to this Court, the parties' analyses of the prima-facie-evidence provision focus on the question of overbreadth. Brief for Petitioner 41-50 (confining its discussion of the prima-facie-evidence provision to a section titled "THE VIRGINIA STATUTE IS NOT OVERBROAD"); Brief for Respondents 39-41 (arguing that "[t]he prima facie evidence provision ... render[s] [the statute] overbroad"); Reply Brief for Petitioner 13-20 (dividing its discussion of the prima-facie-evidence provision into sections titled "There Is No Real Overbreadth" and "There Is No Substantial Overbreadth"). This reliance on overbreadth doctrine is understandable. This Court has made clear that to succeed in a facial challenge *without* relying on overbreadth doctrine, "the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States* v. *Salerno,* 481 U. S. 739, 745 (1987). As the Court's opinion concedes, some of the speech covered by § 18.2-423 can constitutionally be proscribed, *ante,* at 363.

3. Unquestionably, the process through which elements of a criminal offense are established in a jury trial may raise serious constitutional concerns. Typically, however, such concerns sound in due process, not First Amendment overbreadth. *E. g., County Court of Ulster Cty.* v. *Allen,* 442 U. S. 140, 156-157 (1979); *Barnes* v. *United States,* 412 U. S. 837, 838 (1973); *In re Winship,* 397 U. S. 358, 359 (1970). Respondents

in this case have not challenged § 18.2-423 under the Due Process Clause, and neither the plurality nor the Virginia Supreme Court relies on due process in declaring the statute invalid.

4. Confronted with the incontrovertible fact that this statute easily passes overbreadth analysis, the plurality is driven to the truly startling assertion that a statute which is not invalid in all of its applications may nevertheless be facially invalidated *even if it is not overbroad.* The *only expression* of that proposition that the plurality can find in our jurisprudence appears in footnote dictum in the 5-to-4 opinion in *Secretary of State of Md.* v. *Joseph H. Munson Co.,* 467 U. S. 947, 965-966, n. 13 (1984). See *id.,* at 975 (REHNQUIST, J., joined by Burger, C. J., and Powell and O'CONNOR, JJ., dissenting). *Stare decisis* cannot explain the newfound affection for this errant doctrine (even if *stare decisis* applied to dictum), because the holding of a *later* opinion (joined by six Justices) flatly repudiated it. See *United States* v. *Salerno, supra,* at 745 (REHNQUIST, C. J., joined by White, Blackmun, Powell, O'CONNOR, and SCALIA, JJ.) (to succeed in a facial challenge without relying on overbreadth doctrine, "the challenger must establish that no set of circumstances exists under which the Act would be valid").

Even if I were willing, as the plurality apparently is, to ignore our repudiation of the *Munson* dictum, that case provides no foundation whatever for facially invalidating a statute under the conditions presented here. Our willingness facially to invalidate the statute in *Munson* without reliance on First Amendment overbreadth was premised on our conclusion that the challenged provision was invalid *in all of its applications.* We explained that "there is no core of easily identifiable and constitutionally proscribable conduct that the statute prohibits." *Munson,* 467 U. S., at 965-966. And we stated that "[t]he flaw in the statute is not simply that it includes within its sweep some impermissible applications, but that in all its applications it operates on a fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud." *Id.,* at 966. Unless the Court is prepared to abandon a contention that it takes great pains to establish — that "the history of cross burning in this country shows that cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence," *ante,* at 360— it is difficult to see how *Munson* has any bearing on the constitutionality of the prima-facie-evidence provision.

5. The plurality's reliance on *Terminiello* v. *Chicago,* 337 U. S. 1 (1949), is mistaken. In that case the Court deemed only the jury instruction, rather than the ordinance under review, to be constitutionally infirm. To be sure, it held that such a jury instruction could *never* support a constitutionally valid conviction, but that is quite different from holding the *ordinance* to be facially invalid. Insofar as the ordinance was concerned, *Terminiello* made repeated references to the as-applied nature of the challenge. *Id.,* at 3 (noting that the defendant "maintained at all times that the ordinance *as applied to his conduct* violated his right of free speech ..." (emphasis added)); *id.,* at 5 (noting that *"[a]s construed and applied* [the provision] at least contains parts that are unconstitutional" (emphasis added)); *id.,* at 6 ("The pinch of the statute is in *its application*" (emphasis added)); *ibid.* ("The record makes clear that petitioner at all times challenged the constitutionality of the ordinance *as construed and applied to him*" (emphasis added)). See also Isserles, Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement, 48 Am. U. L. Rev. 359, 433, n. 333 (1998) (characterizing *Terminiello* as "adopting a court's jury instruction as an authoritative narrowing construction of a breach of the peace ordinance but ultimately confining its decision to overturning the defendant's conviction rather than invalidating the statute on its face").

6. Though the jury may well have embraced the former (constitutionally permissible) understanding of its duties, that possibility is not enough to dissipate the cloud of constitutional doubt. See *Sandstrom* v. *Montana,* 442 U. S. 510, 517 (1979) (refusing to assume that the jury embraced a constitutionally sound understanding of an ambiguous instruction: "[W]e cannot discount the possibility that the jury may have interpreted the instruction [improperly]").

JUSTICE SOUTER, with whom JUSTICE KENNEDY and JUSTICE GINSBURG join, concurring in the judgment in part and dissenting in part.

I agree with the majority that the Virginia statute makes a content-based distinction within the category of punishable intimidating or threatening expression, the very type of distinction

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we considered in *R. A. V.* v. *St. Paul,* 505 U. S. 377 (1992). I disagree that any exception should save Virginia's law from unconstitutionality under the holding in *R. A. V.* or any acceptable variation of it.

I

The ordinance struck down in *R. A. V.,* as it had been construed by the State's highest court, prohibited the use of symbols (including but not limited to a burning cross) as the equivalent of generally proscribable fighting words, but the ordinance applied only when the symbol was provocative "`on the basis of race, color, creed, religion or gender.'" *Id.,* at 380 (quoting St. Paul, Minn., Legis. Code § 292.02 (1990)). Although the Virginia statute in issue here contains no such express "basis of" limitation on prohibited subject matter, the specific prohibition of cross burning with intent to intimidate selects a symbol with particular content from the field of all proscribable expression meant to intimidate. To be sure, that content often includes an essentially intimidating message, that the cross burner will harm the victim, most probably in a physical way, given the historical identification of burning crosses with arson, beating, and lynching. But even when the symbolic act is meant to terrify, a burning cross may carry a further, ideological message of white Protestant supremacy. The ideological message not only accompanies many threatening uses of the symbol, but is also expressed when a burning cross is not used to threaten but merely to symbolize the supremacist ideology and the solidarity of those who espouse it. As the majority points out, the burning cross can broadcast threat and ideology together, ideology alone, or threat alone, as was apparently the choice of respondents Elliott and O'Mara. *Ante,* at 354-357, 363.

The issue is whether the statutory prohibition restricted to this symbol falls within one of the exceptions to *R. A. V.*'s general condemnation of limited content-based proscription

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within a broader category of expression proscribable generally. Because of the burning cross's extraordinary force as a method of intimidation, the *R. A. V.* exception most likely to cover the statute is the first of the three mentioned there, which the *R. A. V.* opinion called an exception for content discrimination on a basis that "consists entirely of the very reason the entire class of speech at issue is proscribable." 505 U. S., at 388. This is the exception the majority speaks of here as covering statutes prohibiting "particularly virulent" proscribable expression. *Ante,* at 363.

I do not think that the Virginia statute qualifies for this virulence exception as *R. A. V.* explained it. The statute fits poorly with the illustrative examples given in *R. A. V.,* none of which involves communication generally associated with a particular message, and in fact, the majority's discussion of a special virulence exception here moves that exception toward a more

flexible conception than the version in *R. A. V.* I will reserve judgment on that doctrinal development, for even on a pragmatic conception of *R. A. V.* and its exceptions the Virginia statute could not pass muster, the most obvious hurdle being the statute's prima facie evidence provision. That provision is essential to understanding why the statute's tendency to suppress a message disqualifies it from any rescue by exception from *R. A. V.*'s general rule.

II

R. A. V. defines the special virulence exception to the rule barring content-based subclasses of categorically proscribable expression this way: prohibition by subcategory is nonetheless constitutional if it is made "entirely" on the "basis" of "the very reason" that "the entire class of speech at issue is proscribable" at all. 505 U. S., at 388. The Court explained that when the subcategory is confined to the most obviously proscribable instances, "no significant danger of idea or viewpoint discrimination exists," *ibid.,* and the explanation

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was rounded out with some illustrative examples. None of them, however, resembles the case before us.[1]

The first example of permissible distinction is for a prohibition of obscenity unusually offensive "in its prurience," *ibid.* (emphasis deleted), with citation to a case in which the Seventh Circuit discussed the difference between obscene depictions of actual people and simulations. As that court noted, distinguishing obscene publications on this basis does not suggest discrimination on the basis of the message conveyed. *Kucharek* v. *Hanaway,* 902 F. 2d 513, 517-518 (1990). The opposite is true, however, when a general prohibition of intimidation is rejected in favor of a distinct proscription of intimidation by cross burning. The cross may have been selected because of its special power to threaten, but it may also have been singled out because of disapproval of its message of white supremacy, either because a legislature thought white supremacy was a pernicious doctrine or because it found that dramatic, public espousal of it was a civic embarrassment. Thus, there is no kinship between the cross-burning statute and the core prurience example.

Nor does this case present any analogy to the statute prohibiting threats against the President, the second of *R. A. V.*'s examples of the virulence exception and the one the majority relies upon. *Ante,* at 362. The content discrimination in that statute relates to the addressee of the threat and reflects the special risks and costs associated with threatening the President. Again, however, threats against the President are not generally identified by reference to the content of any message that may accompany the threat, let alone any viewpoint, and there is no obvious correlation in fact between victim and message. Millions of statements are made about the President every day on every subject

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and from every standpoint; threats of violence are not an integral feature of any one subject or viewpoint as distinct from others. Differential treatment of threats against the President, then, selects nothing but special risks, not special messages. A content-based proscription of cross burning, on the other hand, may be a subtle effort to ban not only the intensity of the intimidation

cross burning causes when done to threaten, but also the particular message of white supremacy that is broadcast even by nonthreatening cross burning.

I thus read *R. A. V.*'s examples of the particular virulence exception as covering prohibitions that are not clearly associated with a particular viewpoint, and that are consequently different from the Virginia statute. On that understanding of things, I necessarily read the majority opinion as treating *R. A. V.*'s virulence exception in a more flexible, pragmatic manner than the original illustrations would suggest. *Ante,* at 363. Actually, another way of looking at today's decision would see it as a slight modification of *R. A. V.*'s third exception, which allows content-based discrimination within a proscribable category when its "nature" is such "that there is no realistic possibility that official suppression of ideas is afoot." *R. A. V., supra,* at 390. The majority's approach could be taken as recognizing an exception to *R. A. V.* when circumstances show that the statute's ostensibly valid reason for punishing particularly serious proscribable expression probably is not a ruse for message suppression, even though the statute may have a greater (but not exclusive) impact on adherents of one ideology than on others, *ante,* at 362-363.

III

My concern here, in any event, is not with the merit of a pragmatic doctrinal move. For whether or not the Court should conceive of exceptions to *R. A. V.*'s general rule in a more practical way, no content-based statute should survive even under a pragmatic recasting of *R. A. V.* without a high probability that no "official suppression of ideas is afoot,"

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505 U. S., at 390. I believe the prima facie evidence provision stands in the way of any finding of such a high probability here.

Virginia's statute provides that burning a cross on the property of another, a highway, or other public place is "prima facie evidence of an intent to intimidate a person or group of persons." Va. Code Ann. § 18.2-423 (1996). While that language was added by amendment to the earlier portion of the statute criminalizing cross burning with intent to intimidate, *ante,* at 363 (plurality opinion), it was a part of the prohibitory statute at the time these respondents burned crosses, and the whole statute at the time of respondents' conduct is what counts for purposes of the First Amendment.

As I see the likely significance of the evidence provision, its primary effect is to skew jury deliberations toward conviction in cases where the evidence of intent to intimidate is relatively weak and arguably consistent with a solely ideological reason for burning. To understand how the provision may work, recall that the symbolic act of burning a cross, without more, is consistent with both intent to intimidate and intent to make an ideological statement free of any aim to threaten. *Ante,* at 354-357. One can tell the intimidating instance from the wholly ideological one only by reference to some further circumstance. In the real world, of course, and in real-world prosecutions, there will always be further circumstances, and the factfinder will always learn something more than the isolated fact of cross burning. Sometimes those circumstances will show an intent to intimidate, but sometimes they will be at least equivocal, as in cases where a white supremacist group burns a cross at an initiation ceremony or political rally visible to the public. In such a case, if the factfinder is aware of the prima facie evidence provision, as the jury was in

respondent Black's case, *ante,* at 349-350, the provision will have the practical effect of tilting the jury's thinking in favor of the prosecution. What is significant is not that the provision

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permits a factfinder's conclusion that the defendant acted with proscribable and punishable intent without any further indication, because some such indication will almost always be presented. What is significant is that the provision will encourage a factfinder to err on the side of a finding of intent to intimidate when the evidence of circumstances fails to point with any clarity either to the criminal intent or to the permissible one. The effect of such a distortion is difficult to remedy, since any guilty verdict will survive sufficiency review unless the defendant can show that, "viewing the evidence in the light most favorable to the prosecution, [no] rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia,* 443 U. S. 307, 319 (1979). The provision will thus tend to draw nonthreatening ideological expression within the ambit of the prohibition of intimidating expression, as JUSTICE O'CONNOR notes. *Ante,* at 365-366 (plurality opinion).

To the extent the prima facie evidence provision skews prosecutions, then, it skews the statute toward suppressing ideas. Thus, the appropriate way to consider the statute's prima facie evidence term, in my view, is not as if it were an overbroad statutory definition amenable to severance or a narrowing construction. The question here is not the permissible scope of an arguably overbroad statute, but the claim of a clearly content-based statute to an exception from the general prohibition of content-based proscriptions, an exception that is not warranted if the statute's terms show that suppression of ideas may be afoot. Accordingly, the way to look at the prima facie evidence provision is to consider it for any indication of what is afoot. And if we look at the provision for this purpose, it has a very obvious significance as a mechanism for bringing within the statute's prohibition some expression that is doubtfully threatening though certainly distasteful.

It is difficult to conceive of an intimidation case that could be easier to prove than one with cross burning, assuming

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any circumstances suggesting intimidation are present. The provision, apparently so unnecessary to legitimate prosecution of intimidation, is therefore quite enough to raise the question whether Virginia's content-based statute seeks more than mere protection against a virulent form of intimidation. It consequently bars any conclusion that an exception to the general rule of *R. A. V.* is warranted on the ground "that there is no realistic [or little realistic] possibility that official suppression of ideas is afoot," 505 U. S., at 390.[2] Since no *R. A. V.* exception can save the statute as content based, it can only survive if narrowly tailored to serve a compelling state interest, *id.,* at 395-396, a stringent test the statute cannot pass; a content-neutral statute banning intimidation would achieve the same object without singling out particular content.

IV

I conclude that the statute under which all three of the respondents were prosecuted violates the First Amendment, since the statute's content-based distinction was invalid at the time of the

charged activities, regardless of whether the prima facie evidence provision was given any effect in any respondent's individual case. In my view, severance of the prima facie evidence provision now could not eliminate the unconstitutionality of the whole statute at the time of the respondents' conduct. I would therefore affirm the judgment of the Supreme Court of Virginia vacating the respondents' convictions and dismissing the indictments. Accordingly, I concur in the Court's judgment as to respondent Black and dissent as to respondents Elliott and O'Mara.

Notes:

1. Although three examples are given, the third may be skipped here. It covers misleading advertising in a particular industry in which the risk of fraud is thought to be great, and thus deals with commercial speech with its separate doctrine and standards. *R. A. V.,* 505 U. S., at 388-389.

2. The same conclusion also goes for the second *R. A. V.* exception relating to "`secondary effects.'" 505 U. S., at 389 (citing *Renton* v. *Playtime Theatres, Inc.,* 475 U. S. 41, 48 (1986)). Our "secondary effects" jurisprudence presupposes that the regulation at issue is "unrelated to the suppression of free expression." *Ibid.*

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JUSTICE THOMAS, dissenting.

In every culture, certain things acquire meaning well beyond what outsiders can comprehend. That goes for both the sacred, see *Texas* v. *Johnson,* 491 U. S. 397, 422-429 (1989) (REHNQUIST, C. J., dissenting) (describing the unique position of the American flag in our Nation's 200 years of history), and the profane. I believe that cross burning is the paradigmatic example of the latter.

I

Although I agree with the majority's conclusion that it is constitutionally permissible to "ban ... cross burning carried out with the intent to intimidate," *ante,* at 363, I believe that the majority errs in imputing an expressive component to the activity in question, see *ante,* at 362 (relying on one of the exceptions to the First Amendment's prohibition on content-based discrimination outlined in *R. A. V.* v. *St. Paul,* 505 U. S. 377 (1992)). In my view, whatever expressive value cross burning has, the legislature simply wrote it out by banning only intimidating conduct undertaken by a particular means. A conclusion that the statute prohibiting cross burning with intent to intimidate sweeps beyond a prohibition on certain conduct into the zone of expression overlooks not only the words of the statute but also reality.

A

"In holding [the ban on cross burning with intent to intimidate] unconstitutional, the Court ignores Justice Holmes' familiar aphorism that `a page of history is worth a volume of logic.'"

Texas v. *Johnson, supra,* at 421 (REHNQUIST, C. J., dissenting) (quoting *New York Trust Co.* v. *Eisner,* 256 U. S. 345, 349 (1921)).

"The world's oldest, most persistent terrorist organization is not European or even Middle Eastern in origin. Fifty years before the Irish Republican Army was organized,

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a century before Al Fatah declared its holy war on Israel, the Ku Klux Klan was actively harassing, torturing, and murdering in the United States. Today ... its members remain fanatically committed to a course of violent opposition to social progress and racial equality in the United States." M. Newton & J. Newton, The Ku Klux Klan: An Encyclopedia vii (1991) (hereinafter Newton & Newton).

To me, the majority's brief history of the Ku Klux Klan only reinforces this common understanding of the Klan as a terrorist organization, which, in its endeavor to intimidate, or even eliminate those it dislikes, uses the most brutal of methods.

Such methods typically include cross burning — "a tool for the intimidation and harassment of racial minorities, Catholics, Jews, Communists, and any other groups hated by the Klan." *Capitol Square Review and Advisory Bd.* v. *Pinette,* 515 U. S. 753, 770 (1995) (THOMAS, J., concurring). For those not easily frightened, cross burning has been followed by more extreme measures, such as beatings and murder. J. Williams, Eyes on the Prize: America's Civil Rights Years, 1954-1965, p. 39 (1987). As the Government points out, the association between acts of intimidating cross burning and violence is well documented in recent American history. Brief for United States as *Amicus Curiae* 3-4, and n. 2.[1]

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Indeed, the connection between cross burning and violence is well ingrained, and lower courts have so recognized:

"After the mother saw the burning cross, she was crying on her knees in the living room. [She] felt feelings of frustration and intimidation and feared for her husband's life. She testified what the burning cross symbolized to her as a black American: `Nothing good. Murder, hanging, rape, lynching. Just anything bad

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that you can name. It is the worst thing that could happen to a person.' ... Mr. Heisser told the probation officer that at the time of the occurrence, if the family did not leave, he believed someone would return to commit murder.... *Seven months after the incident, the family still lived in fear.... This is a reaction reasonably to be anticipated from this criminal conduct.*" *United States* v. *Skillman,* 922 F. 2d 1370, 1378 (CA9 1991) (emphasis added).

But the perception that a burning cross is a threat and a precursor of worse things to come is not limited to blacks. Because the modern Klan expanded the list of its enemies beyond blacks and "radical[s]" to include Catholics, Jews, most immigrants, and labor unions, Newton &

Newton ix, a burning cross is now widely viewed as a signal of impending terror and lawlessness. I wholeheartedly agree with the observation made by the Commonwealth of Virginia:

"A white, conservative, middle-class Protestant, waking up at night to find a burning cross outside his home, will reasonably understand that someone is threatening him. His reaction is likely to be very different than if he were to find, say, a burning circle or square. In the latter case, he may call the fire department. In the former, he will probably call the police." Brief for Petitioner 26.

In our culture, cross burning has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence.

B

Virginia's experience has been no exception. In Virginia, though facing widespread opposition in the 1920's, the Klan developed localized strength in the southeastern part of the Commonwealth, where there were reports of scattered raids and floggings. Newton & Newton 585. Although the Klan was disbanded at the national level in 1944, *ibid.,* a series of

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cross burnings in Virginia took place between 1949 and 1952. See 262 Va. 764, 771, n. 2, 553 S. E. 2d 738, 742, n. 2 (2001) (collecting newspaper accounts of cross burnings in Virginia during that time period); see also Cross Fired Near Suffolk Stirs Probe, Burning Second in Past Week, Richmond Times-Dispatch, Jan. 23, 1949, section 2, p. 1, App. 313, 314-315 (The second reported cross burning within a week in 1949 "brought to eight the number which have occurred in Virginia during the past year. Six of the incidents have occurred in Nansemond County. Four crosses were burned near Suffolk last Spring, and about 150 persons took part in the December 11 cross burning near Whaleyville. No arrests have been made in connection with any of the incidents").

Most of the crosses were burned on the lawns of black families, who either were business owners or lived in predominantly white neighborhoods. See Police Aid Requested by Teacher, Cross is Burned in Negro's Yard, Richmond News Leader, Jan. 21, 1949, p. 19, App. 312; Cross Fired Near Suffolk Stirs Probe, Burning Second in Past Week, *supra,* at 313; Cross is Burned at Reedville Home, Richmond News Leader, Apr. 14, 1951, p. 1, App. 321. At least one of the cross burnings was accompanied by a shooting. Cross Burned at Manakin, Third in Area, *supra* n. 1, at 318. The crosses burned near residences were about five to six feet tall, while a "huge cross reminiscent of the Ku Klux Klan days" that burned "atop a hill" as part of the initiation ceremony of the secret organization of the Knights of Kavaliers was 12 feet tall. Huge Cross is Burned on Hill Just South of Covington, Richmond Times-Dispatch, Apr. 14, 1950, p. 6, App. 316. These incidents were, in the words of the time, "*terroristic [sic]*" and "un-American act[s], designed to *intimidate* Negroes from seeking their rights as citizens." Cross Fired Near Suffolk Stirs Probe, Burning Second in Past Week, *supra,* at 315 (emphasis added).

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In February 1952, in light of this series of cross burnings and attendant reports that the Klan, "long considered dead in Virginia, is being revitalized in Richmond," Governor Battle announced that "Virginia `might well consider passing legislation' to restrict the activities of the Ku Klux Klan." "State Might Well Consider" Restrictions on Ku Klux Klan, Governor Battle Comments, Richmond Times-Dispatch, Feb. 6, 1952, p. 7, App. 321. As newspapers reported at the time, the bill was "to ban the burning of crosses and other similar evidences of *terrorism.*" Name Rider Approved by House, Richmond News Leader, Feb. 23, 1952, p. 1, App. 325 (emphasis added). The bill was presented to the House of Delegates by a former FBI agent and future two-term Governor, Delegate Mills E. Godwin, Jr. "Godwin said law and order in the State were impossible if organized groups could *create fear by intimidation.*" Bill to Curb KKK Passed By the House, Action is Taken Without Debate, Richmond Times-Dispatch, Mar. 8, 1952, p. 5, App. 325 (emphasis added).

That in the early 1950's the people of Virginia viewed cross burning as creating an intolerable atmosphere of terror is not surprising: Although the cross took on some religious significance in the 1920's when the Klan became connected with certain southern white clergy, by the postwar period it had reverted to its original function "as an instrument of intimidation." W. Wade, The Fiery Cross: The Ku Klux Klan in America 185, 279 (1987).

Strengthening Delegate Godwin's explanation, as well as my conclusion, that the legislature sought to criminalize terrorizing *conduct* is the fact that at the time the statute was enacted, racial segregation was not only the prevailing practice, but also the law in Virginia.[2] And, just two years

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after the enactment of this statute, Virginia's General Assembly embarked on a campaign of "massive resistance" in response to *Brown* v. *Board of Education,* 347 U. S. 483 (1954). See generally *Griffin* v. *School Bd. of Prince Edward Cty.,* 377 U. S. 218, 221 (1964); *Harrison* v. *Day,* 200 Va. 439, 448-454, 106 S. E. 2d 636, 644-648 (1959) (describing massive resistance as legislatively mandated attempt to close public schools rather than desegregate).

It strains credulity to suggest that a state legislature that adopted a litany of segregationist laws self-contradictorily intended to squelch the segregationist message. Even for segregationists, violent and terroristic conduct, the Siamese twin of cross burning, was intolerable. The ban on cross burning with intent to intimidate demonstrates that even segregationists understood the difference between intimidating and terroristic conduct and racist expression. It is simply beyond belief that, in passing the statute now under review, the Virginia Legislature was concerned with anything but penalizing conduct it must have viewed as particularly vicious.

Accordingly, this statute prohibits only conduct, not expression. And, just as one cannot burn down someone's house to make a political point and then seek refuge in the First Amendment, those who hate cannot terrorize and intimidate to make their point. In light of my conclusion that

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the statute here addresses only conduct, there is no need to analyze it under any of our First Amendment tests.

II

Even assuming that the statute implicates the First Amendment, in my view, the fact that the statute permits a jury to draw an inference of intent to intimidate from the cross burning itself presents no constitutional problems. Therein lies my primary disagreement with the plurality.

A

"The threshold inquiry in ascertaining the constitutional analysis applicable to [a jury instruction involving a presumption] is to determine the nature of the presumption it describes." *Francis* v. *Franklin,* 471 U. S. 307, 313-314 (1985) (internal quotation marks omitted). We have categorized the presumptions as either permissive inferences or mandatory presumptions. *Id.,* at 314.

To the extent we do have a construction of this statute by the Virginia Supreme Court, we know that both the majority and the dissent agreed that the presumption was "a statutorily supplied *inference,*" 262 Va., at 778, 553 S. E. 2d, at 746 (emphasis added); *id.,* at 795, 553 S. E. 2d, at 755 (Hassell, J., dissenting) ("Code § 18.2-423 creates a statutory *inference*" (emphasis added)). Under Virginia law, the term "inference" has a well-defined meaning and is distinct from the term "presumption." *Martin* v. *Phillips,* 235 Va. 523, 526, 369 S. E. 2d 397, 399 (1988).

"A presumption is a rule of law that compels the fact finder to draw a certain conclusion or a certain inference from a given set of facts.[1] The primary significance of a presumption is that it operates to shift to the opposing party the burden of producing evidence tending to rebut the presumption.[2] No presumption, however, can operate to shift the ultimate burden of persuasion from the party upon whom it was originally cast.

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"[1] In contrast, *an inference,* sometimes loosely referred to as a presumption of fact, *does not compel a specific conclusion. An inference merely applies to the rational potency or probative value of an evidentiary fact to which the fact finder may attach whatever force or weight it deems best.* 9 J. Wigmore, Evidence in Trials at Common Law § 2491(1), at 304 (Chad. rev. 1981).

"[2] *An inference, on the other hand, does not invoke this procedural consequence of shifting the burden of production. Id.*"

Ibid. (some citations omitted; emphasis added).

Both the majority and the dissent below classified the clause in question as an "inference," and I see no reason to disagree, particularly in light of the instructions given to the jury in Black's case, requiring it to find guilt beyond a reasonable doubt both as to the fact that "the defendant burned or caused to be burned a cross in a public place," and that "he did so with the intent to intimidate any person or group of persons," 262 Va., at 796, 553 S. E. 2d, at 756 (Hassell, J., dissenting) (quoting jury instructions in Black's case).

Even though under Virginia law the statutory provision at issue here is characterized as an "inference," the Court must still inquire whether the label Virginia attaches corresponds to the

categorization our cases have given such clauses. In this respect, it is crucial to observe that what Virginia law calls an "inference" is what our cases have termed a "permissive inference or presumption." *County Court of Ulster Cty.* v. *Allen,* 442 U. S. 140, 157 (1979).[3] Given that this

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Court's definitions of a "permissive inference" and a "mandatory presumption" track Virginia's definitions of "inference" and "presumption," the Court should judge the Virginia statute based on the constitutional analysis applicable to "inferences": they raise no constitutional flags unless there is "no rational way the trier could make the connection permitted by the inference." *Ibid.* As explained in Part I, *supra, not* making a connection between cross burning and intimidation would be irrational.

But even with respect to statutes containing a mandatory irrebuttable presumption as to intent, the Court has not shown much concern. For instance, there is no scienter requirement for statutory rape. See, *e. g.,* Tenn. Code Ann. § 39-13-506 (1997); Ore. Rev. Stat. Ann. § 163.365 (1989); Mo. Rev. Stat. § 566.032 (2000); Ga. Code Ann. § 16-6-3 (1996). That is, a person can be arrested, prosecuted, and convicted for having sex with a minor, without the government ever producing any evidence, let alone proving beyond a reasonable doubt, that a minor did not consent. In fact, "[f]or purposes of the child molesting statute ... consent is irrelevant. The legislature has determined in such cases that children under the age of sixteen (16) cannot, as a matter of law, consent to have sexual acts performed upon them, or consent to engage in a sexual act with someone over the age of sixteen (16)." *Warrick* v. *State,* 538 N. E. 2d 952, 954 (Ind. App. 1989) (citing Ind. Code § 35-42-4-3 (1988)). The legislature finds the behavior so reprehensible that the intent is satisfied by the mere act committed by a perpetrator. Considering

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the horrific effect cross burning has on its victims, it is also reasonable to presume intent to intimidate from the act itself.

Statutes prohibiting possession of drugs with intent to distribute operate much the same way as statutory rape laws. Under these statutes, the intent to distribute is effectively satisfied by possession of some threshold amount of drugs. See, *e. g.,* Del. Code Ann., Tit. 16, § 4753A (1987); Mass. Gen. Laws, ch. 94C, § 32E (West 1997); S. C. Code Ann. § 44-53-370 (West 2000). As with statutory rape, the presumption of intent in such statutes is irrebuttable — not only can a person be arrested for the crime of possession with intent to distribute (or "trafficking") without any evidence of intent beyond quantity of drugs, but such person cannot even mount a defense to the element of intent. However, as with statutory rape statutes, our cases do not reveal any controversy with respect to the presumption of intent in these drug statutes.

Because the prima facie clause here is an inference, not an irrebuttable presumption, there is all the more basis under our due process precedents to sustain this statute.

B

The plurality, however, is troubled by the presumption because this is a First Amendment case. The plurality laments the fate of an innocent cross burner who burns a cross, but does so

without an intent to intimidate. The plurality fears the chill on expression because, according to the plurality, the inference permits "the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself." *Ante,* at 365. First, it is, at the very least, unclear that the inference comes into play during arrest and initiation of a prosecution, that is, prior to the instructions stage of an actual trial. Second, as I explained above, the inference is rebuttable and, as the jury instructions given in this case demonstrate, Virginia law still requires

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the jury to find the existence of each element, including intent to intimidate, beyond a reasonable doubt.

Moreover, even in the First Amendment context, the Court has upheld such regulations where conduct that initially appears culpable ultimately results in dismissed charges. A regulation of pornography is one such example. While possession of child pornography is illegal, *New York* v. *Ferber,* 458 U. S. 747, 764 (1982), possession of adult pornography, as long as it is not obscene, is allowed, *Miller* v. *California,* 413 U. S. 15 (1973). As a result, those pornographers trafficking in images of adults who look like minors may be not only deterred but also arrested and prosecuted for possessing what a jury might find to be legal materials. This "chilling" effect has not, however, been a cause for grave concern with respect to overbreadth of such statutes among the Members of this Court.

That the First Amendment gives way to other interests is not a remarkable proposition. What is remarkable is that, under the plurality's analysis, the determination whether an interest is sufficiently compelling depends not on the harm a regulation in question seeks to prevent, but on the area of society at which it aims. For instance, in *Hill* v. *Colorado,* 530 U. S. 703 (2000), the Court upheld a restriction on protests near abortion clinics, explaining that the State had a legitimate interest, which was sufficiently narrowly tailored, in protecting those seeking services of such establishments from "unwanted advice" and "unwanted communication," *id.,* at 708, 716, 717, 729. In so concluding, the Court placed heavy reliance on the "vulnerable physical and emotional conditions" of patients. *Id.,* at 729. Thus, when it came to the rights of those seeking abortions, the Court deemed restrictions on "unwanted advice," which, notably, can be given only from a distance of at least eight feet from a prospective patient, justified by the countervailing interest in obtaining an abortion. Yet, here, the plurality strikes down the statute because one day an individual might wish to burn a cross,

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but might do so without an intent to intimidate anyone. That cross burning subjects its targets, and, sometimes, an unintended audience, see 262 Va., at 782, 553 S. E. 2d, at 748-749 (Hassell, J., dissenting); see also App. 93-97, to extreme emotional distress, and is virtually never viewed merely as "unwanted communication," but rather, as a physical threat, is of no concern to the plurality. Henceforth, under the plurality's view, physical safety will be valued less than the right to be free from unwanted communications.

III

Because I would uphold the validity of this statute, I respectfully dissent.

Notes:

1. *United States* v. *Guest,* 383 U. S. 745, 747-748, n. 1 (1966) (quoting indictment charging conspiracy under 18 U. S. C. § 241 (1964 ed.) to interfere with federally secured rights by, *inter alia,* "burning crosses at night in public view," "shooting Negroes," "beating Negroes," "killing Negroes," "damaging and destroying property of Negroes," and "pursuing Negroes in automobiles and threatening them with guns"); *United States* v. *Pospisil,* 186 F. 3d 1023, 1027 (CA8 1999) (defendants burned a cross in victims' yard, slashed their tires, and fired guns), cert. denied, 529 U. S. 1089 (2000); *United States* v. *Stewart,* 65 F. 3d 918, 922 (CA11 1995) (cross burning precipitated an exchange of gunfire between victim and perpetrators), cert. denied *sub nom. Daniel* v. *United States,* 516 U. S. 1134 (1996); *United States* v. *McDermott,* 29 F. 3d 404, 405 (CA8 1994) (defendants sought to discourage blacks from using public park by burning a cross in the park, as well as by "waving baseball bats, axe handles, and knives; throwing rocks and bottles; veering cars towards black persons; and physically chasing black persons out of the park"); *Cox* v. *State,* 585 So. 2d 182, 202 (Ala. Crim. App. 1991) (defendant participated in evening of cross burning and murder), cert. denied, 503 U. S. 987 (1992); R. Caro, The Years of Lyndon Johnson: Master of the Senate 847 (2002) (referring to a wave of "southern bombings, beatings, sniper fire, and cross-burnings" in late 1956 in response to efforts to desegregate schools, buses, and parks); Newton & Newton 21 (observing that "Jewish merchants were subjected to boycotts, threats, cross burnings, and sometimes acts of violence" by the Klan and its sympathizers); *id.,* at 361-362 (describing cross burning and beatings directed at a black family that refused demands to sell the home); *id.,* at 382 (describing incident of cross burning and brick throwing at home of Jewish officeholder); *id.,* at 583 (describing campaign of cross burning and property damage directed at Vietnamese immigrant fishermen); W. Wade, The Fiery Cross: The Ku Klux Klan in America 262-263 (1987) (describing incidents of cross burning, beatings, kidnaping, and other "terrorism" directed against union organizers in the South); *id.,* at 376 (cross burnings associated with shooting into cars); *id.,* at 377 (cross burnings associated with assaults on blacks); 1 R. Kluger, Simple Justice 378 (1975) (describing cross burning at, and subsequent shooting into, home of federal judge who issued desegregation decisions); Rubinowitz & Perry, Crimes Without Punishment: White Neighbors' Resistance to Black Entry, 92 J. Crim. L. & C. 335, 342, 354-355, 388, 408-410, 419, 420, 421, 423 (Fall 2001-Winter 2002) (noting that an "escalating campaign to eject a [minority] family" from a white neighborhood could begin with "cross burnings, window breaking, or threatening telephone calls," and culminate with bombings; describing other incidents of cross burning accompanied by violence); Cross Burned at Manakin, Third in Area, Richmond Times-Dispatch, Feb. 26, 1951, p. 4, App. 318 (describing 1951 Virginia cross burning accompanied by gunfire).

2. See, *e. g.,* Va. Code Ann. § 18-327 (1950) (repealed 1960) (required separation of "white" and "colored" at any place of entertainment or other public assemblage; violation was misdemeanor); Va. Code Ann. § 20-54 (1960) (repealed 1968) (prohibited racial intermarriage); Va. Code Ann. § 22-221 (1969) (repealed 1972) ("White and colored persons shall not be taught in the same school"); Va. Code Ann. § 24-120 (1969) (repealed 1970) (required separate listings for "white and colored persons" who failed to pay poll tax); Va. Code Ann. § 38-281 (1950) (repealed 1952) (prohibited fraternal associations from having "both white and colored members"); Va. Code Ann. § 53-42 (1967) (amended to remove "race" 1968) (required racial separation in prison); Va. Code Ann. § 56-114 (1974) (repealed 1975) (authorized State Corporation Commission to require "separate waiting rooms" for "white and colored races"); Va. Code Ann. § 56-326 (1969) (repealed 1970) (required motor carriers to "separate" their "white and colored passengers," violation was misdemeanor); §§ 56-390 and 56-396 (repealed 1970) (same for railroads); § 58-880 (repealed 1970) (required separate personal property tax books for "white[s]" and "colored").

3. As the Court explained in *Allen,* a permissive inference or presumption "allows — but does not require — the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant. In that situation the basic fact may constitute prima facie evidence of the elemental fact.... Because this permissive presumption leaves the trier of fact free to credit

or reject the inference and does not shift the burden of proof, it affects the application of the `beyond a reasonable doubt' standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference." 442 U. S., at 157 (citations omitted). By contrast, "[a] mandatory presumption ... may affect not only the strength of the `no reasonable doubt' burden but also the placement of that burden; it tells the trier that he or they *must* find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts." *Ibid.*

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82 S.W.3d 609
UTV OF SAN ANTONIO, INC., d/b/a/ KMOL-TV, Appellant,
v.
ARDMORE, INC., d/b/a Luv N Care, Appellee.
No. 04-01-00647-CV.
Court of Appeals of Texas, San Antonio.
May 29, 2002.

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Jennifer Gibbins Durbin, Allen, Stein & Durbin, P.C., Allen, Stein & Durbin, P.C., San Antonio, for Other.

Sitting: PHIL HARDBERGER, Chief Justice, SARAH B. DUNCAN, Justice, SANDEE BRYAN MARION, Justice.

OPINION

SANDEE BRYAN MARION, Justice.

This is an interlocutory appeal from the trial court's denial of a media defendant's motion for summary judgment on the plaintiffs claims of libel *per se* and exemplary damages. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(6) (Vernon Supp.2002).

Ardmore, Inc. d/b/a Luv N Care ("Ardmore") sued UTV of San Antonio, Inc. d/b/a KMOL TV ("KMOL") and Jennifer Jones for defamation, defamation *per se,* and business disparagement following KMOL's news broadcast about cockroaches at Ardmore's Luv N Care daycare facility. Ardmore later nonsuited Jones. KMOL moved for a no-evidence summary judgment on all of Ardmore's claims and a traditional summary judgment on its affirmative defenses. The trial court rendered summary judgment in favor of KMOL on Ardmore's claims of slander, slander *per se,* libel and business disparagement, but denied KMOL's motion for summary judgment on Ardmore's claims of libel *per se* and exemplary damages. It is from this denial that KMOL now appeals. We hold that KMOL was entitled to summary judgment on its affirmative defense; therefore, we reverse the trial court's judgment.

BURDEN OF PROOF

A private-figure plaintiff, such as Ardmore, who sues a media defendant for libel bears the burden of showing that the defendant negligently made a false statement that was defamatory. *Mcllvain v. Jacobs,* 794 S.W.2d 14, 15 (Tex.1990); *Dolcefino v. Randolph,* 19 S.W.3d 906, 917 (Tex.App.-Houston [14th Dist.] 2000, pet. denied); *Swate v. Schiffers,* 975 S.W.2d 70, 74

(Tex.App.-San Antonio 1998, pet. denied). Pleading libel *per se* eliminates the requirement of pleading or proving special damages, but it does not shift the plaintiffs burden of proving the elements of its cause of action, including the falsity of the allegedly defamatory statement. *Swate,* 975 S.W.2d at 74.

Truth is an affirmative defense in a defamation case, and KMOL had the burden of proof on this issue. *Garcia v.*

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Allen, 28 S.W.3d 587, 593-94 (Tex.App.-Corpus Christi 2000, pet. denied); *Knox* v. Taylor, 992 S.W.2d 40, 54 (Tex.App.-Houston [14th Dist.] 1999, no pet.); *San Antonio Express News v. Dracos,* 922 S.W.2d 242, 247 (Tex.App.-San Antonio 1996, no writ). A media defendant may defeat a libel claim by proving the "substantial truth" of the statement. *McIlvain,* 794 S.W.2d at 15; *Dolcefino,* 19 S.W.3d at 918. Because we hold that KMOL met its burden of proof on its affirmative defense of substantial truth, we address only that issue and we do not address whether KMOL was entitled to summary judgment on other grounds.

THE BROADCAST

In a November 1999 "Troubleshooter" broadcast, KMOL reporter Vicente Arenas reported, among other things, that cockroaches were found at Ardmore's daycare facility, Luv N Care. The report included an interview with Jennifer Jones, a former Luv N Care employee and the mother of a child enrolled at the facility, and information from a public report filed by the Texas Department of Protective and Regulatory Services ("DPRS"). The relevant statements, by Arenas, in the broadcast are as follows:

Jones says the honeymoon was over when she found roaches in a place she never expected ... her son's sippee cup. [On-screen quote from Jones] Jones says she got so mad ... she quit. [On-screen quote from Jones] And she reported the roaches to the state's daycare licensing agency.

Luv N Care wouldn't talk to us on camera ... but the daycare's attorney sent us a letter that says Jones is a disgruntled former employee ... who made a false complaint to get the center in trouble. The center also says a health department inspector found no roaches.

But we found out that during a follow-up visit according to the report a daycare inspector did find roaches on a crockpot and counter-top.

[...]

Luv N Care is changing for the better. It's inspection two weeks ago found no problems.

[...]

New Beginnings on Bandera was another center on corrective action at this time last year. Like Luv N Care it got back on track ... passed inspections. In fact last May an inspector even wrote "great improvements are noted."[....]

SUBSTANTIAL TRUTH

The test used in deciding whether the broadcast is substantially true involves consideration of whether the alleged defamatory statement was more damaging to the plaintiff's reputation, in the mind of the average listener, than a truthful statement would have been. *McIlvain,* 794 S.W.2d at 16; *Dolcefino,* 19 S.W.3d at 918. This test requires that we look to the "gist" of the broadcast. *Id.* If the underlying facts as to the gist of the defamatory charge are undisputed, then we can disregard any variance with respect to items of secondary importance and determine substantial truth as a matter of law. *McIlvain,* 794 S.W.2d at 16.

Ardmore contends the statement that "during a follow-up visit ... according to the report a daycare inspector did find roaches ... on a crockpot and counter-top" was false because it contradicts the very DPRS inspection report the broadcast references and because this statement is contradicted by a Health Department report that KMOL failed to reference in the broadcast. In addition to noting allegations

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by staff members about roaches, the DPRS report mentions roaches in the following sections:

Allegations Roach problem at Center especially in infant areas — roaches have been found on sippee cups & crockpots that heat bottles.

Discussion ... Staff indicate that center is sprayed regularly but if food is left out then occasional roach problem. Graham crackers were left out & roaches were found in crockpot & counter in older infant room. Center did spray on 9/21/99 when complaint brought to their attention & no roaches noted today.

Noncompliance Roaches were found in crockpot & counter as food was left out overnight on counter unwrapped. Already corrected.

The report's Discussion and Noncompliance sections are not clear as to whether the inspector saw the roaches herself or whether she was reiterating the staffs allegations. Ardmore concedes the report is unclear. However, discrepancies as to details do not demonstrate falsity for defamation purposes. *Dolcefino v. Turner,* 987 S.W.2d 100, 115 (Tex.App.-Houston [14th Dist.] 1998) (discussing discrepancy as to amount of money allegedly stolen), *aff'd sub nom., Turner v. KTRK Television, Inc.,* 38 S.W.3d 103 (Tex.2000).

KMOL quoted Jones as saying she saw roaches on her son's sippee cup and that she reported the problem to the daycare's licensing agency. When a case involves a media defendant, the defendant need only prove that third party allegations reported in a broadcast were, in fact, made and under investigation; it need not demonstrate the allegations themselves are substantially true. *Dolcefino,* 19 S.W.3d at 918.[1]

After quoting Jones, Arenas noted that Luv N Care considered Jones to be a "disgruntled former employee" who had "made a false complaint to get the center in trouble." Arenas also quoted from the letter written by Luv N Care's attorney that "a health department inspector found no roaches." After noting that roaches were found by an inspector on a follow-up visit, Arenas stated that Luv N Care was "changing for the better" and a later inspection "found no problems."

The "gist" of KMOL's broadcast was that Luv N Care and another daycare center had experienced problems or alleged problems that subjected them to inspections by the DPRS; Luv

N Care had shown improvement; and parents should take a more active role in ensuring that their child's daycare facility provides adequate care. The "gist" of the broadcast was substantially true.

Furthermore, this court must construe the broadcast as a whole in light of the surrounding circumstances, based upon how a person of ordinary intelligence would perceive the entire statement. *Musser,* 723 S.W.2d at 655; *Dracos,* 922 S.W.2d at 248. We conclude that for purposes of KMOL's substantial truth defense, the broadcast's statement that an inspector had found roaches on a follow-up inspection was not more damaging in the mind of the average listener than a more accurate statement that the inspector merely noted allegations by staff members of roaches on a sippee cup, crockpot, and counter and a Health Department report found no roaches on the day of a specific inspection. Because the gist of the broadcast

was substantially true, KMOL conclusively established its entitlement to summary judgment on Ardmore's libel *per se* claim as a matter of law.

FALSE IMPRESSION

In a cross-issue, Ardmore relies on *Turner* for its complaint that KMOL's broadcast placed it in a false light and/or created a false impression of it in the public's eye. We do not address Ardmore's "false light" claim because the Texas Supreme Court has held that there is no separate cause of action in Texas for "false light defamation." *See Turner,* 38 S.W.3d at 115; *Cain v. Hearst Corp.,* 878 S.W.2d 577, 579 (Tex.1994).

In *Turner,* the Supreme Court held that a plaintiff may bring a libel claim when discrete facts, literally or substantially true, are published in such a way that they create a substantially false and defamatory impression. *Turner,* 38 S.W.3d at 115. The *Turner* court noted that such a claim represents the converse of the substantial truth doctrine. *Id.* Therefore, under *Turner,* a plaintiff may bring a "false impression" defamation claim if the publication conveys a substantially false and defamatory impression by omitting material facts or suggestively juxtaposing true facts, even if the statements in the publication are true when read in isolation. *Id.*

Ardmore argues that, even if certain statements in the broadcast were true, others were not true and the broadcast created a substantially false and defamatory impression because KMOL omitted a variety of facts favorable to Luv N Care. Ardmore complains the broadcast omitted the following: the findings of the Health Department's inspection; three Health Department inspections in 1999 on which Luv N Care received ratings of 99% to 100%; Luv N Care is a family-owned business, at which a serious child injury has never occurred; and the DPRS inspection noted that any noncompliances were "already corrected." We do not agree that the broadcast created a false impression of Luv N Care, and the broadcast did not "cast more suspicion on [Luv N Care's] conduct than a substantially true account would have done." *Id.* at 118.

CONCLUSION

We reverse the trial court's denial of KMOL's motion for summary judgment on Ardmore's libel *per se* claim. Because Ardmore's libel *per se* claim fails as a matter of law, Ardmore is not entitled to exemplary damages on this claim. *Provencio v. Paradigm Media, Inc.,* 44 S.W.3d 677, 683 (Tex.App.-El Paso 2001, no pet.); *Musser v. Smith,* 690 S.W.2d 56, 58 (Tex. App.-Houston

[14th Dist.] 1985), *aff'd sub nom.*, *Musser v. Smith Protective Serv., Inc.*, 723 S.W.2d 653 (Tex.1987). Accordingly, we reverse the trial court's judgment and render judgment that Ardmore take nothing on its libel *per se* claim or its claim for exemplary damages.

Notes:

1. Ardmore complains that KMOL never raised "investigation" as a defense. KMOL was not required to raise this as an affirmative defense because reporting Jones' accusations against Luv N Care and whether those accusations were under investigation applies to KMOL's substantial truth defense.

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491 U.S. 397
109 S.Ct. 2533
105 L.Ed.2d 342
TEXAS, Petitioner

v.

Gregory Lee JOHNSON.

No. 88-155.
Argued March 21, 1989.
Decided June 21, 1989.
Syllabus

During the 1984 Republican National Convention in Dallas, Texas, respondent Johnson participated in a political demonstration to protest the policies of the Reagan administration and some Dallas-based corporations. After a march through the city streets, Johnson burned an American flag while protesters chanted. No one was physically injured or threatened with injury, although several witnesses were seriously offended by the flag burning. Johnson was convicted of desecration of a venerated object in violation of a Texas statute, and a State Court of Appeals affirmed. However, the Texas Court of Criminal Appeals reversed, holding that the State, consistent with the First Amendment, could not punish Johnson for burning the flag in these circumstances. The court first found that Johnson's burning of the flag was expressive conduct protected by the First Amendment. The court concluded that the State could not criminally sanction flag desecration in order to preserve the flag as a symbol of national unity. It also held that the statute did not meet the State's goal of preventing breaches of the peace, since it was not drawn narrowly enough to encompass only those flag burnings that would likely result in a serious disturbance, and since the flag burning in this case did not threaten such a reaction. Further, it stressed that another Texas statute prohibited breaches of the peace and could be used to prevent disturbances without punishing this flag desecration.

Held: Johnson's conviction for flag desecration is inconsistent with the First Amendment. Pp. 402-420.

(a) Under the circumstances, Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment. The State conceded that the conduct was expressive. Occurring as it did at the end of a demonstration coinciding with the Republican National Convention, the expressive, overtly political nature of the conduct was both intentional and overwhelmingly apparent. Pp. 402-406.

(b) Texas has not asserted an interest in support of Johnson's conviction that is unrelated to the suppression of expression and would therefore permit application of the test set forth in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672, whereby an important governmental interest in regulating nonspeech can justify incidental limitations on First Amendment freedoms when speech and nonspeech elements are combined in the same course of conduct. An interest in preventing breaches of the peace is not implicated on this record. Expression may not be prohib-

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ited on the basis that an audience that takes serious offense to the expression may disturb the peace, since the government cannot assume that every expression of a provocative idea will incite a riot but must look to the actual circumstances surrounding the expression. Johnson's expression of dissatisfaction with the Federal Government's policies also does not fall within the class of "fighting words" likely to be seen as a direct personal insult or an invitation to exchange fisticuffs. This Court's holding does not forbid a State to prevent "imminent lawless action" and, in fact, Texas has a law specifically prohibiting breaches of the peace. Texas' interest in preserving the flag as a symbol of nationhood and national unity is related to expression in this case and, thus, falls outside the *O'Brien* test. Pp. 406-410.

(c) The latter interest does not justify Johnson's conviction. The restriction on Johnson's political expression is content based, since the Texas statute is not aimed at protecting the physical integrity of the flag in all circumstances, but is designed to protect it from intentional and knowing abuse that causes serious offense to others. It is therefore subject to "the most exacting scrutiny." *Boos v. Barry*, 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed.2d 333. The government may not prohibit the verbal or nonverbal expression of an idea merely because society finds the idea offensive or disagreeable, even where our flag is involved. Nor may a State foster its own view of the flag by prohibiting expressive conduct relating to it, since the government may not permit designated symbols to be used to communicate a limited set of messages. Moreover, this Court will not create an exception to these principles protected by the First Amendment for the American flag alone. Pp. 410-422.

755 S.W.2d 92, (Tex.Cr.App.1988), affirmed.

BRENNAN, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, SCALIA, and KENNEDY, JJ., joined. KENNEDY, J., filed a concurring opinion, *post,* p. 420. REHNQUIST, C.J., filed a dissenting opinion, in which WHITE and O'CONNOR, JJ., joined, *post,* p. 421. STEVENS, J., filed a dissenting opinion, *post,* p. 436.

Kathi Alyce Drew, Dallas, Tex., for petitioner.

William M. Kunstler, New York City, for respondent.

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Justice BRENNAN delivered the opinion of the Court.

After publicly burning an American flag as a means of political protest, Gregory Lee Johnson was convicted of desecrating a flag in violation of Texas law. This case presents the question whether his conviction is consistent with the First Amendment. We hold that it is not.

I

While the Republican National Convention was taking place in Dallas in 1984, respondent Johnson participated in a political demonstration dubbed the "Republican War Chest Tour." As explained in literature distributed by the demonstrators a d in speeches made by them, the purpose of this event was to protest the policies of the Reagan administration and of certain Dallas-based corporations. The demonstrators marched through the Dallas streets, chanting political slogans and stopping at several corporate locations to stage "die-ins" intended to dramatize the consequences of nuclear war. On several occasions they spray-painted the walls of buildings and

overturned potted plants, but Johnson himself took no part in such activities. He did, however, accept an American flag handed to him by a fellow protestor who had taken it from a flagpole outside one of the targeted buildings.

The demonstration ended in front of Dallas City Hall, where Johnson unfurled the American flag, doused it with kerosene, and set it on fire. While the flag burned, the protestors chanted: "America, the red, white, and blue, we spit on you." After the demonstrators dispersed, a witness to the flag burning collected the flag's remains and buried them in his backyard. No one was physically injured or threatened with injury, though several witnesses testified that they had been seriously offended by the flag burning.

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Of the approximately 100 demonstrators, Johnson alone was charged with a crime. The only criminal offense with which he was charged was the desecration of a venerated object in violation of Tex.Penal Code Ann. § 42.09(a)(3) (1989).[1] After a trial, he was convicted, sentenced to one year in prison, and fined $2,000. The Court of Appeals for the Fifth District of Texas at Dallas affirmed Johnson's conviction, 706 S.W.2d 120 (1986), but the Texas Court of Criminal Appeals reversed, 755 S.W.2d 92 (1988), holding that the State could not, consistent with the First Amendment, punish Johnson for burning the flag in these circumstances.

The Court of Criminal Appeals began by recognizing that Johnson's conduct was symbolic speech protected by the First Amendment: "Given the context of an organized demonstration, speeches, slogans, and the distribution of literature, anyone who observed appellant's act would have understood the message that appellant intended to convey. The act for which appellant was convicted was clearly 'speech' contemplated by the First Amendment." *Id.,* at 95. To justify Johnson's conviction for engaging in symbolic speech, the State asserted two interests: preserving the flag as a symbol of national unity and preventing breaches of the peace. The Court of Criminal Appeals held that neither interest supported his conviction.

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Acknowledging that this Court had not yet decided whether the Government may criminally sanction flag desecration in order to preserve the flag's symbolic value, the Texas court nevertheless concluded that our decision in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), suggested that furthering this interest by curtailing speech was impermissible. "Recognizing that the right to differ is the centerpiece of our First Amendment freedoms," the court explained, "a government cannot mandate by fiat a feeling of unity in its citizens. Therefore, that very same government cannot carve out a symbol of unity and prescribe a set of approved messages to be associated with that symbol when it cannot mandate the status or feeling the symbol purports to represent." 755 S.W.2d, at 97. Noting that th State had not shown that the flag was in "grave and immediate danger," *Barnette, supra,* at 639, 63 S.Ct., at 1186, of being stripped of its symbolic value, the Texas court also decided that the flag's special status was not endangered by Johnson's conduct. 755 S.W.2d, at 97.

As to the State's goal of preventing breaches of the peace, the court concluded that the flag-desecration statute was not drawn narrowly enough to encompass only those flag burnings that were likely to result in a serious disturbance of the peace. And in fact, the court emphasized, the flag burning in this particular case did not threaten such a reaction. " 'Serious offense' occurred," the court admitted, "but there was no breach of peace nor does the record reflect that the situation

was potentially explosive. One cannot equate 'serious offense' with incitement to breach the peace." *Id.,* at 96. The court also stressed that another Texas statute, Tex.Penal Code Ann. § 42.01 (1989), prohibited breaches of the peace. Citing *Boos v. Barry,* 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988), the court decided that § 42.01 demonstrated Texas' ability to prevent disturbances of the peace without punishing this flag desecration. 755 S.W.2d, at 96.

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Because it reversed Johnson's conviction on the ground that § 42.09 was unconstitutional as applied to him, the state court did not address Johnson's argument that the statute was, on its face, unconstitutionally vague and overbroad. We granted certiorari, 488 U.S. 907, 109 S.Ct. 257, 102 L.Ed.2d 245 (1988), and now affirm.

II

Johnson was convicted of flag desecration for burning the flag rather than for uttering insulting words.[2] This fact

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somewhat complicates our consideration of his conviction under the First Amendment. We must first determine whether Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction. See, *e.g.*, *Spence v. Washington,* 418 U.S. 405, 409-411, 94 S.Ct. 2727, 2729-31, 41 L.Ed.2d 842 (1974). If his conduct was expressive, we next decide whether the State's regulation is related to the suppression of free expression. See, *e.g.*, *United States v. O'Brien,* 391 U.S. 367, 377, 88 S.Ct. 1673 1679, 20 L.Ed.2d 672 (1968); *Spence, supra,* at 414, n. 8, 94 S.Ct., at 2732, n. 8. If the State's regulation is not related to expression, then the less stringent standard we announced in *United States v. O'Brien* for regulations of noncommunicative conduct controls. See *O'Brien, supra,* at 377, 88 S.Ct., at 1679. If it is, then we are outside of *O'Brien*'s test, and we must ask whether this interest justifies Johnson's conviction under a more demanding standard.[3] See *Spence, supra,* at 411, 94 S.Ct., at 2730. A

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third possibility is that the State's asserted interest is simply not implicated on these facts, and in that event the interest drops out of the picture. See 418 U.S., at 414, n. 8, 94 S.Ct., at 2732, n. 8.

The First Amendment literally forbids the abridgment only of "speech," but we have long recognized that its protection does not end at the spoken or written word. While we have rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea," *United States v. O'Brien, supra,* at 376, 88 S.Ct., at 1678, we have acknowledged that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments," *Spence, supra,* at 409, 94 S.Ct., at 2730.

In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." 418 U.S., at 410-411, 94 S.Ct., at 2730. Hence, we

have recognized the expressive natu e of students' wearing of black armbands to protest American military involvement in Vietnam, *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 505, 89 S.Ct. 733, 735, 21 L.Ed.2d 731 (1969); of a sit-in by blacks in a "whites only" area to protest segregation, *Brown v. Louisiana*, 383 U.S. 131, 141-142, 86 S.Ct. 719, 723-24, 15 L.Ed.2d 637 (1966); of the wearing of American military uniforms in a dramatic presentation criticizing American involvement in Vietnam, *Schacht v. United States*, 398 U.S. 58, 90 S.Ct. 1555, 26 L.Ed.2d 44 (1970); and of picketing about a wide variety of causes, see, *e.g.*, *Food Employees v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 313-314, 88 S.Ct. 1601, 1605-06, 20 L.Ed.2d 603 (1968); *United States v. Grace*, 461 U.S. 171, 176, 103 S.Ct. 1702 1706, 75 L.Ed.2d 736 (1983).

Especially pertinent to this case are our decisions recognizing the communicative nature of conduct relating to flags. Attaching a peace sign to the flag, *Spence, supra,* at 409-410, 94 S.Ct., at 2729-30; refusing to salute the flag, *Barnette,* 319 U.S., at 632, 63 S.Ct., at 1182; and displaying a red flag, *Stromberg v. California*, 283 U.S. 359,

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368-369, 51 S.Ct. 532, 535-36, 75 L.Ed. 1117 (1931), we have held, all may find shelter under the First Amendment. See also *Smith v. Goguen*, 415 U.S. 566, 588, 94 S.Ct. 1242 1254, 39 L.Ed.2d 605 (1974) (WHITE, J., concurring in judgment) (treating flag "contemptuously" by wearing pants with small flag sewn into their seat is expressive conduct). That we have had little difficulty identifying an expressive element in conduct relating to flags should not be surprising. The very purpose of a national flag is to serve as a symbol of our country; it is, one might say, "the one visible manifestation of two hundred years of nationhood." *Id.,* at 603, 94 S.Ct., at 1262 (REHNQUIST, J., dissenting). Thus, we have observed:

"[T]he flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design." *Barnette, supra,* at 632, 63 S.Ct., at 1182.

Pregnant with expressive content, the flag as readily signifies this Nation as does the combination of letters found in "America."

We have not automatically concluded, however, that any action taken with respect to our flag is expressive. Instead, in characterizing such action for First Amendment purposes, we have considered the context in which it occurred. In *Spence,* for example, we emphasized that Spence's taping of a peace sign to his flag was "roughly simultaneous with and concededly triggered by the Cambodian incursion and the Kent State tragedy." 418 U.S., at 410, 94 S.Ct., at 2730. The State of Washington had conceded, in fact, that Spence's conduct was a form of communication, and we stated that "the State's concession is inevitable on this record." *Id.,* at 409, 94 S.Ct., at 2730.

The State of Texas conceded for purposes of its oral argument in this case that Johnson's conduct was expressive conduct, Tr. of Oral Arg. 4, and this concession seems to us as

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prudent as was Washington's in *Spence.* Johnson burned an American flag as part—indeed, as the culmination—of a political demonstration that coincided with the convening of the Republican Party and its renomination of Ronald Reagan for President. The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent. At his trial, Johnson explained his reasons for burning the flag as follows: "The American Flag was burned as Ronald Reagan was being renominated as President. And a more powerful statement of symbolic speech, whether you agree with it or not, couldn't have been made at that time. It's quite a just position [juxtaposition]. We had new patriotism and no patriotism." 5 Record 656. In these circumstances, Johnson's burning of the flag was conduct "sufficiently imbued with elements of communication," *Spence,* 418 U.S., at 409, 94 S.Ct., at 2730, to implicate the First Amendment.

III

The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. See *O'Brien,* 391 U.S. at 376-377, 88 S.Ct., at 1678-1679; *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293, 104 S.Ct. 3065 3068, 82 L.Ed.2d 221 (1984); *Dallas v. Stanglin,* 490 U.S. 19, 25, 109 S.Ct. 1591 1594, 104 L.Ed.2d 18 (1989). It may not, however, proscribe particular conduct *because* it has expressive elements. "[W]hat might be termed the more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate *basis* for singling out that conduct for proscription. A law *directed at* the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires." *Community for Creative Non-Violence v. Watt,* 227 U.S.App.D.C. 19, 55-56, 703 F.2d 586, 622-623 (1983) (Scalia, J., dissenting) (emphasis in original), rev'd *sub nom. Clark v. Community for Creative Non-Violence, supra.* It is, in short, not simply the verbal or nonverbal nature of the expression, but the govern-

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mental interest at stake, that helps to determine whether a restriction on that expression is valid.

Thus, although we have recognized that where " 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms," *O'Brien, supra,* at 376, 88 S.Ct., at 1678, we have limited the applicability of *O'Brien*'s relatively lenient standard to those cases in which "the governmental interest is unrelated to the suppression of free expression." *Id.,* at 377, 88 S.Ct., at 1679; see also *Spence, supra,* at 414, n. 8, 94 S.Ct., at 2732, n. 8. In stating, moreover, that *O'Brien*'s test "in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions," *Clark, supra,* at 298, 104 S.Ct., at 3071, we have highlighted the requirement that the governmental interest in question be unconnected to expression in order to come under *O'Brien*'s less demanding rule.

In order to decide whether *O'Brien*'s test applies here, therefore, we must decide whether Texas has asserted an interest in support of Johnson's conviction that is unrelated to the suppression of expression. If we find that an interest asserted by the State is simply not implicated on the facts before us, we need not ask whether *O'Brien*'s test applies. See *Spence, supra,* at 414, n. 8, 94 S.Ct., at 2732, n. 8. The State offers two separate interests to justify this conviction: preventing breaches of the peace and preserving the flag as a symbol of nationhood and national

unity. We hold that the first interest is not implicated on this record and that the second is related to the suppression of expression.

A.

Texas claims that its interest in preventing breaches of the peace justifies Johnson's conviction for flag desecration.[4]

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However, no disturbance of the peace actually occurred or threatened to occur because of Johnson's burning of the flag. Although the State stresses the disruptive behavior of the protestors during their march toward City Hall, Brief for Petitioner 34-36, it admits that "no actual breach of the peace occurred at the time of the flagburning or in response to the flagburning." *Id.,* at 34. The State's emphasis on the protestors' disorderly actions prior to arriving at City Hall is not only somewhat surprising given th t no charges were brought on the basis of this conduct, but it also fails to show that a disturbance of the peace was a likely reaction to *Johnson's* conduct. The only evidence offered by the State at trial to show the reaction to Johnson's actions was the testimony of several persons who had been seriously offended by the flag burning. *Id.,* at 6-7.

The State's position, therefore, amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis.[5] Our precedents do not countenance such a presumption. On the contrary, they recognize that a principal "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or

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even stirs people to anger." *Terminiello v. Chicago,* 337 U.S. 1, 4, 69 S.Ct. 894, 896, 93 L.Ed. 1131 (1949). See also *Cox v. Louisiana,* 379 U.S. 536, 551, 85 S.Ct. 453, 462, 13 L.Ed.2d 471 (1965); *Tinker v. Des Moines Independent Community School Dist.* 393 U.S., at 508-509, 89 S.Ct., at 737-38; *Coates v. Cincinnati,* 402 U.S. 611, 615, 91 S.Ct. 1686 1689, 29 L.Ed.2d 214 (1971); *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 55-56, 108 S.Ct. 876, 881-882, 99 L.Ed.2d 41 (1988). It would be odd indeed to conclude *both* that "if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection," *FCC v. Pacifica Foundation,* 438 U.S. 726, 745, 98 S.Ct. 3026 3038, 57 L.Ed.2d 1073 (1978) (opinion of STEVENS, J.), *and* that the government may ban the expression of certain disagreeable ideas on the unsupported presumption that their very disagreeableness will provoke violence.

Thus, we have not permitted the government to assume that every expression of a provocative idea will incite a riot, but have instead required careful consideration of the actual circumstances surrounding such expression, asking whether the expression "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio,* 395 U.S. 444, 447, 89 S.Ct. 1827 1829, 23 L.Ed.2d 430 (1969) (reviewing circumstances surrounding rally and speeches by Ku Klux Klan). To accept Texas' arguments that it need only demonstrate "the potential for a breach of the peace," Brief for Petitioner 37, and that every flag burning necessarily possesses that potential, would be to eviscerate our holding in *Brandenburg.* This we decline to do.

Nor does Johnson's expressive conduct fall within that small class of "fighting words" that are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574, 62 S.Ct. 766, 770, 86 L.Ed. 1031 (1942). No reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs. See *id.,* at 572-573, 62 S.Ct., at 769-770; *Cantwell v. Connecticut*, 310 U.S. 296, 309, 60 S.Ct. 900, 905-06, 84 L.Ed. 1213 (1940); *FCC v. Pacifica Foundation, supra,* at 745, 98 S.Ct., at 3038 (opinion of STEVENS, J.).

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We thus conclude that the State's interest in maintaining order is not implicated on these facts. The State need not worry that our holding will disable it from preserving the peace. We do not suggest that the First Amendment forbids a State to prevent "imminent lawless action." *Brandenburg, supra,* at 447, 89 S.Ct., at 1829. And, in fact, Texas already has a statute specifically prohibiting breaches of the peace, Tex.Penal Code Ann. § 42.01 (1989), which tends to confirm that Texas need not punish this flag desecration in order to keep the peace. See *Boos v. Barry,* 485 U.S., at 327-329, 108 S.Ct., at 1167-1168.

B

The State also asserts an interest in preserving the flag as a symbol of nationhood and national unity. In *Spence,* we acknowledged that the government's interest in preserving the flag's special symbolic value "is directly related to expression in the context of activity" such as affixing a peace symbol to a flag. 418 U.S., at 414, n. 8, 94 S.Ct., at 2732, n. 8. We are equally persuaded that this interest is related to expression in the case of Johnson's burning of the flag. The State, apparently, is concerned that such conduct will lead people to believe either that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts, or that the concepts reflected in the flag do not in fact exist, that is, that we do not enjoy unity as a Nation. These concerns blossom only when a person's treatment of the flag communicates some message, and thus are related "to the suppression of free expression" within the meaning of *O'Brien.* We are thus outside of *O'Brien*'s test altogether.

IV

It remains to consider whether the State's interest in preserving the flag as a symbol of nationhood and national unity justifies Johnson's conviction.

As in *Spence,* "[w]e are confronted with a case of prosecution for the expression of an idea through activity," and "[a]ccordingly, we must examine with particular care the inter-

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ests advanced by [petitioner] to support its prosecution." 418 U.S., at 411, 94 S.Ct., at 2730. Johnson was not, we add, prosecuted for the expression of just any idea; he was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values. See, *e.g., Boos v. Barry, supra,* at 318, 108 S.Ct., at 1162; *Frisby v. Schultz*, 487 U.S. 474, 479, 108 S.Ct. 2495, 2499-2500, 101 L.Ed.2d 420 (1988).

Moreover, Johnson was prosecuted because he knew that his politically charged expression would cause "serious offense." If he had burned the flag as a means of disposing of it because it was dirty or torn, he would not have been convicted of flag desecration under this Texas law: federal law designates burning as the preferred means of disposing of a flag "when it is in such condition that it is no longer a fitting emblem for display," 36 U.S.C. § 176(k), and Texas has no quarrel with this means of disposal. Brief for Petitioner 45. The Texas law is thus not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impairments that would cause serious offense to others.[6] Texas concedes as much: "Section 42.09(b) reaches only those severe acts of physical abuse of the flag carried out i a way likely to be offensive. The statute mandates intentional or knowing abuse, that is, the kind of mistreatment that is not innocent, but rather is intentionally designed to seriously offend other individuals." *Id.,* at 44.

Whether Johnson's treatment of the flag violated Texas law thus depended on the likely communicative impact of his expressive conduct.[7] Our decision in *Boos v. Barry, supra,*

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tells us that this restriction on Johnson's expression is content based. In *Boos,* we considered the constitutionality of a law prohibiting "the display of any sign within 500 feet of a foreign embassy if that sign tends to bring that foreign government into 'public odium' or 'public disrepute.' " *Id.,* at 315, 108 S.Ct., at 1160. Rejecting the argument that the law was content neutral because it was justified by "our international law obligation to shield diplomats from speech that offends their dignity," *id.,* at 320, 108 S.Ct., at 1163, we held that "[t]he emotive impact of speech on its audience is not a 'secondary effect' " unrelated to the content of the expression itself. *Id.,* at 321, 108 S.Ct., at 1164 (plurality opinion); see also *id.,* at 334, 108 S.Ct., at 1171 (BRENNAN, J., concurring in part and concurring in judgment).

According to the principles announced in *Boos,* Johnson's political expression was restricted because of the content of the message he conveyed. We must therefore subject the State's asserted interest in preserving the special symbolic character of the flag to "the most exacting scrutiny." *Boos v. Barry, supra,* 485 U.S., at 321, 108 S.Ct., at 1164.[8]

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Texas argues that its interest in preserving the flag as a symbol of nationhood and national unity survives this close analysis. Quoting extensively from the writings of this Court chronicling the flag's historic and symbolic role in our society, the State emphasizes the " 'special place' " reserved for the flag in our Nation. Brief for Petitioner 22, quoting *Smith v. Goguen,* 415 U.S., at 601, 94 S.Ct., at 1261 (REHNQUIST, J., dissenting). The State's argument is not that it has an interest simply in maintaining the flag as a symbol of *something,* no matter what it symbolizes; indeed, if that were the State's position, it would be difficult to see how that interest is endangered by highly symbolic conduct such as Johnson's. Rather, the State's claim is that it has an interest in preserving the flag as a symbol of *nationhood* and *national unity,* a symbol with a determinate range of meanings. Brief for Petitioner 20-24. According to Texas, if one physically treats the flag in a way that would tend to cast doubt on either the idea that nationhood and national unity are the flag's referents or that national unity actually exists, the message conveyed thereby is a harmful one and therefore may be prohibited.[9]

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If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. See, *e.g., Hustler Magazine, Inc. v. Falwell,* 485 U.S., at 55-56, 108 S.Ct., at 881-882; *City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 804, 104 S.Ct. 2118 2128, 80 L.Ed.2d 772 (1984); *Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60, 65, 72, 103 S.Ct. 2875, 2879 2883, 77 L.Ed.2d 469 (1983); *Carey v. Brown,* 447 U.S. 455, 462-463, 100 S.Ct. 2286 2291, 65 L.Ed.2d 263 (1980); *FCC v. Pacifica Foundation,* 438 U.S., at 745-746, 98 S.Ct., at 3038; *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 63-65, 67-68, 96 S.Ct. 2440, 2448-2450, 2450-2451, 49 L.Ed.2d 310 (1976) (plurality opinion); *Buckley v. Valeo,* 424 U.S. 1, 16-17, 96 S.Ct. 612, 633-634, 46 L.Ed.2d 659 (1976); *Grayned v. Rockford,* 408 U.S. 104, 115, 92 S.Ct. 2294, 2302-2303, 33 L.Ed.2d 222 (1972); *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 95, 92 S.Ct. 2286 2289, 33 L.Ed.2d 212 (1972); *Bachellar v. Maryland,* 397 U.S. 564, 567, 90 S.Ct. 1312 1314, 25 L.Ed.2d 570 (1970); *O'Brien,* 391 U.S., at 382, 88 S.Ct., at 1681; *Brown v. Louisiana,* 383 U.S., at 142-143, 86 S.Ct., at 724-725; *Stromberg v. California,* 283 U.S., at 368-369, 51 S.Ct., at 535-536.

We have not recognized an exception to this principle even where our flag has been involved. In *Street v. New York,* 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969), we held that a State may not criminally punish a person for uttering words critical of the flag. Rejecting the argument that the conviction could be sustained on the ground that Street had "failed to show the respect for our national symbol which may properly be demanded of every citizen," we concluded that "the constitutionally guaranteed 'freedom to be intellectually . . . diverse or even contrary,' and the 'right to differ as to things that touch the heart of the existing order,' encompass the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous." *Id.,* at 593, 89 S.Ct., at 1366, quoting *Barnette,* 319 U.S., at 642, 63 S.Ct., at 1187. Nor may the government, we have held, compel conduct that would evince respect for the flag. "To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind." *Id.,* at 634, 63 S.Ct., at 1183.

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In holding in *Barnette* that the Constitution did not leave this course open to the government, Justice Jackson described one of our society's defining principles in words deserving of their frequent repetition: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.,* at 642, 63 S.Ct., at 1187. In *Spence,* we held that the same interest asserted by Texas here was insufficient to support a criminal conviction under a flag-misuse statute for the taping of a peace sign to an American flag. "Given the protected character of [Spence's] expression and in light of the fact that no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired on these facts," we held, "the conviction must be invalidated." 418 U.S., at 415, 94 S.Ct., at 2732. See also *Goguen, supra,* 415 U.S., at 588, 94 S.Ct., at 1254 (WHITE, J., concurring in judgment) (to convict person who had sewn a flag onto the seat of his pants for "contemptuous" treatment of the flag would be "[t]o convict not to protect the physical integrity or to protect against acts interfering with the proper use of the flag, but to punish for communicating ideas unacceptable to the controlling majority in the legislature").

In short, nothing in our precedents suggests that a State may foster its own view of the flag by prohibiting expressive conduct relating to it.[10] To bring its argument outside our

precedents, Texas attempts to convince us that even if its interest in preserving the flag's symbolic role does not allow it to prohibit words or some expressive conduct critical of the flag, it does permit it to forbid the outright destruction of the flag. The State's argument cannot depend here on the distinction between written or spoken words and nonverbal conduct. That distinction, we have shown, is of no moment where the nonverbal conduct is expressive, as it is here, and where the regulation of that conduct is related to expression, as it is here. See *supra,* at 402-403. In addition, both *Barnette* and *Spence* involved expressive conduct, not only verbal communication, and both found that conduct protected.

Texas' focus on the precise nature of Johnson's expression, moreover, misses the point of our prior decisions: their enduring lesson, that the government may not prohibit expression simply because it disagrees with its message, is not dependent on the particular mode in which one chooses to express an idea.[11] If we were to hold that a State may forbid flag burning wherever it is likely to endanger the flag's symbolic role, but allow it wherever burning a flag promotes that role—as where, for example, a person ceremoniously burns a dirty flag—we would be saying that when it comes to impairing the flag's physical integrity, the flag itself may be used as

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a symbol—as a substitute for the written or spoken word or a "short cut from mind to mind"—only in one direction. We would be permitting a State to "prescribe what shall be orthodox" by saying that one may burn the flag to convey one's attitude toward it and its referents only if one does not endanger the flag's representation of nationhood and national unity.

We never before have held that the Government may ensure that a symbol be used to express only one view of that symbol or its referents. Indeed, in *Schacht v. United States,* we invalidated a federal statute permitting an actor portraying a member of one of our Armed Forces to " 'wear the uniform of that armed force if the portrayal does not tend to discredit that armed force.' " 398 U.S., at 60, 90 S.Ct., at 1557, quoting 10 U.S.C. § 772(f). This proviso, we held, "which leaves Americans free to praise the war in Vietnam but can send persons like Schacht to prison for opposing it, cannot survive in a country which has the First Amendment." *Id.,* at 63, 90 S.Ct., at 1559.

We perceive no basis on which to hold that the principle underlying our decision in *Schacht* does not apply to this case. To conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries. Could the government, on this theory, prohibit the burning of state flags? Of copies of the Presidential seal? Of the Constitution? In evaluating these choices under the First Amendment, how would we decide which symbols were sufficiently special to warrant this unique status? To do so, we would be forced to consult our own political preferences, and impose them on the citizenry, in the very way that the First Amendment forbids us to do. See *Carey v. Brown,* 447 U.S., at 466-467, 100 S.Ct., at 2293-2294.

There is, moreover, no indication—either in the text of the Constitution or in our cases interpreting it—that a separate juridical category exists for the American flag alone. Indeed, we would not be surprised to learn that the persons

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who framed our Constitution and wrote the Amendment that we now construe were not known for their reverence for the Union Jack. The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole—such as the principle that discrimination on the basis of race is odious and estructive will go unquestioned in the marketplace of ideas. See *Brandenburg v. Ohio,* 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969). We decline, therefore, to create for the flag an exception to the joust of principles protected by the First Amendment.

It is not the State's ends, but its means, to which we object. It cannot be gainsaid that there is a special place reserved for the flag in this Nation, and thus we do not doubt that the government has a legitimate interest in making efforts to "preserv[e] the national flag as an unalloyed symbol of our country." *Spence,* 418 U.S., at 412, 94 S.Ct., at 2731. We reject the suggestion, urged at oral argument by counsel for Johnson, that the government lacks "any state interest whatsoever" in regulating the manner in which the flag may be displayed. Tr. of Oral Arg. 38. Congress has, for example, enacted precatory regulations describing the proper treatment of the flag, see 36 U.S.C. §§ 173-177, and we cast no doubt on the legitimacy of its interest in making such recommendations. To say that the government has an interest in encouraging proper treatment of the flag, however, is not to say that it may criminally punish a person for burning a flag as a means of political protest. "National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement." *Barnette,* 319 U.S., at 640, 63 S.Ct., at 1186.

We are fortified in today's conclusion by our conviction that forbidding criminal punishment for conduct such as Johnson's will not endanger the special role played by our flag or the feelings it inspires. To paraphrase Justice Holmes, we submit that nobody can suppose that this one gesture of an un-

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known man will change our Nation's attitude towards its flag. See *Abrams v. United States,* 250 U.S. 616, 628, 40 S.Ct. 17, 21, 63 L.Ed. 1173 (1919) (Holmes, J., dissenting). Indeed, Texas' argument that the burning of an American flag " 'is an act having a high likelihood to cause a breach of the peace,' " Brief for Petitioner 31, quoting *Sutherland v. DeWulf,* 323 F.Supp. 740, 745 (SD Ill.1971) (citation omitted), and its statute's implicit assumption that physical mistreatment of the flag will lead to "serious offense," tend to confirm that the flag's special role is not in danger; if it were, no one would riot or take offense because a flag had been burned.

We are tempted to say, in fact, that the flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today. Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson's is a sign and source of our strength. Indeed, one of the proudest images of our flag, the one immortalized in our own national anthem, is of the bombardment it survived at Fort McHenry. It is the Nation's resilience, not its rigidity, that Texas sees reflected in the flag—and it is that resilience that we reassert today.

The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong. "To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the

incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377, 47 S.Ct. 641, 649, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring). And, precisely because it is our flag that is involved, one' response to the flag

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burner may exploit the uniquely persuasive power of the flag itself. We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag burner's message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by—as one witness here did—according its remains a respectful burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.

V

Johnson was convicted for engaging in expressive conduct. The State's interest in preventing breaches of the peace does not support his conviction because Johnson's conduct did not threaten to disturb the peace. Nor does the State's interest in preserving the flag as a symbol of nationhood and national unity justify his criminal conviction for engaging in political expression. The judgment of the Texas Court of Criminal Appeals is therefore

Affirmed.

Justice KENNEDY, concurring.

I write not to qualify the words Justice BRENNAN chooses so well, for he says with power all that is necessary to explain our ruling. I join his opinion without reservation, but with a keen sense that this case, like others before us from time to time, exacts its personal toll. This prompts me to add to our pages these few remarks.

The case before us illustrates better than most that the judicial power is often difficult in its exercise. We cannot here ask another Branch to share responsibility, as when the argument is made that a statute is flawed or incomplete. For we are presented with a clear and simple statute to be judged against a pure command of the Constitution. The outcome can be laid at no door but ours.

The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right

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in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases.

Our colleagues in dissent advance powerful arguments why respondent may be convicted for his expression, reminding us that among those who will be dismayed by our holding will be some who have had the singular honor of carrying the flag in battle. And I agree that the flag holds a lonely place of honor in an age when absolutes are distrusted and simple truths are burdened by unneeded apologetics.

With all respect to those views, I do not believe the Constitution gives us the right to rule as the dissenting Members of the Court urge, however painful this judgment is to announce. Though symbols often are what we ourselves make of them, the flag is constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit. The case here today forces recognition of the costs to which those beliefs commit us. It is poignant but fundamental that the flag protects those who hold it in contempt.

For all the record shows, this respondent was not a philosopher and perhaps did not even possess the ability to comprehend how repellent his statements must be to the Republic itself. But whether or not he could appreciate the enormity of the offense he gave, the fact remains that his acts were speech, in both the technical and the fundamental meaning of the Constitution. So I agree with the Court that he must go free.

Chief Justice REHNQUIST, with whom Justice WHITE and Justice O'CONNOR join, dissenting.

In holding this Texas statute unconstitutional, the Court ignores Justice Holmes' familiar aphorism that "a page of history is worth a volume of logic." *New York Trust Co. v.*

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Eisner, 256 U.S. 345, 349, 41 S.Ct. 506, 507, 65 L.Ed. 963 (1921). For more than 200 years, the American flag has occupied a uniqu position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning in the way respondent Johnson did here.

At the time of the American Revolution, the flag served to unify the Thirteen Colonies at home, while obtaining recognition of national sovereignty abroad. Ralph Waldo Emerson's "Concord Hymn" describes the first skirmishes of the Revolutionary War in these lines:

"By the rude bridge that arched the flood

Their flag to April's breeze unfurled,

Here once the embattled farmers stood

And fired the shot heard round the world."

During that time, there were many colonial and regimental flags, adorned with such symbols as pine trees, beavers, anchors, and rattlesnakes, bearing slogans such as "Liberty or Death," "Hope," "An Appeal to Heaven," and "Don't Tread on Me." The first distinctive flag of the Colonies was the "Grand Union Flag"—with 13 stripes and a British flag in the left corner—which was flown for the first time on January 2, 1776, by troops of the Continental Army around

Boston. By June 14, 1777, after we declared our independence from England, the Continental Congress resolved:

"That the flag of the thirteen United States be thirteen stripes, alternate red and white: that the union be thirteen stars, white in a blue field, representing a new constellation." 8 Journal of the Continental Congress 1774-1789, p. 464 (W. Ford ed. 1907).

One immediate result of the flag's adoption was that American vessels harassing British shipping sailed under an authorized national flag. Without such a flag, the British could treat captured seamen as pirates and hang them summarily; with a national flag, such seamen were treated as prisoners of war.

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During the War of 1812, British naval forces sailed up Chesapeake Bay and marched overland to sack and burn the city of Washington. They then sailed up the Patapsco River to invest the city of Baltimore, but to do so it was first necessary to reduce Fort McHenry in Baltimore Harbor. Francis Scott Key, a Washington lawyer, had been granted permission by the British to board one of their warships to negotiate the release of an American who had been taken prisoner. That night, waiting anxiously on the British ship, Key watched the British fleet firing on Fort McHenry. Finally, at daybreak, he saw the fort's American flag still flying; the British attack had failed. Intensely moved, he began to scribble on the back of an envelope the poem that became our national anthem:

"O say can you see by the dawn's early light,

What so proudly we hail'd at the twilight's last gleaming,

Whose broad stripes & bright stars, thro' the perilous fight

O'er the ramparts we watch'd were so gallantly streaming?

And the rocket's red glare, the bomb bursting in air,

Gave proof through the night that our flag was still there,

O say does that star-spangled banner yet wave

O'er the land of the free & the home of the brave?"

The American flag played a central role in our Nation's most tragic conflict, when the North fought against the South. The lowering of the American flag at Fort Sumter was viewed as the start of the war. G. Preble, History of the Flag of the United States of America 453 (1880). The Southern States, to formalize their separation from the Union, adopted the "Stars and Bars" of the Confederacy. The Union troops marched to the sound of "Yes We'll Rally Round The Flag Boys, We'll Rally Once Again." President Abraham Lincoln refused proposals to remove from the

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American flag the stars representing the rebel States, because he considered the conflict not a war between two nations but an attack by 11 States against the National Government. *Id.,* at 411. By war's end, the American flag again flew over "an indestructible union, composed of indestructible states." *Texas v. White,* 74 U.S. (7 Wall.) 700, 725, 19 L.Ed. 227 (1869).

One of the great stories of the Civil War is told in John Greenleaf Whittier's poem, Barbara Frietchie:

"Up from the meadows rich with corn,

Clear in the cool September morn,

The clustered spires of Frederick stand

Green-walled by the hills of Maryland.

Round about them orchards sweep,

Apple- and peach-tree fruited deep,

Fair as a garden of the Lord

To the eyes of the famished rebel horde,

On that pleasant morn of the early fall

When Lee marched over the mountain wall,—

Over the mountains winding down,

Horse and foot, into Frederick town.

Forty flags with their silver stars,

Forty flags with their crimson bars,

Flapped in the morning wind: the sun

Of noon looked down, and saw not one.

Up rose old Barbara Frietchie then,

Bowed with her fourscore years and ten;

Bravest of all in Frederick town,

She took up the flag the men hauled down;

In her attic-window the staff she set,

To show that one heart was loyal yet.

Up the street came the rebel tread,

Stonewall Jackson riding ahead.

Under his slouched hat left and right

He glanced: the old flag met his sight.

'Halt!'—the dust-brown ranks stood fast.

'Fire!'—out blazed the rifle-blast.

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It shivered the window, pane and sash;

It rent the banner with seam and gash.

Quick, as it fell, from the broken staff

Dame Barbara snatched the silken scarf;

She leaned far out on the window-sill,

And shook it forth with a royal will.

'Shoot, if you must, this old gray head,

But spare your country's flag,' she said.

A shade of sadness, a blush of shame,

Over the face of the leader came;

The nobler nature within him stirred

To life at that woman's deed and word;

'Who touches a hair of yon gray head

Dies like a dog! March on!' he said.

All day long through Frederick street

Sounded the tread of marching feet:

All day long that free flag tost

Over the heads of the rebel host.

Ever its torn folds rose and fell

On the loyal winds that loved it well;

"And through the hill-gaps sunset light

Shone over it with a warm good-night.

"Barbara Frietchie's work is o'er,

And the Rebel rides on his raids no more.

"Honor to her! and let a tear

Fall, for her sake, on Stonewall's bier.

Over Barbara Frietchie's grave,

Flag of Freedom and Union, wave!

"Peace and order and beauty draw

Round thy symbol of light and law;

And ever the stars above look down

On thy stars below in Frederick town!"

In the First and Second World Wars, thousands of our countrymen died on foreign soil fighting for the American cause. At Iwo Jima in the Second World War, United States Marines fought hand to hand against thousands of

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Japanese. By the time the Marines reached the top of Mount Suribachi, they raised a piece of pipe upright and from one end fluttered a flag. That ascent had cost nearly 6,000 American lives. The Iwo Jima Memorial in Arlington National Cemetery memorializes that event. President Franklin Roosevelt authorized the use of the flag on labels, packages, cartons, and containers intended for export as lend-lease aid, in order to inform people in other countries of the United States' assistance. Presidential Proclamation No. 2605, 58 Stat. 1126.

During the Korean war, the successful amphibious landing of American troops at Inchon was marked by the raising of an American flag within an hour of the event. Impetus for the

enactment of the Federal Flag Desecration Statute in 1967 came from the impact of flag burnings in the United States on troop morale in Vietnam. Representative L. Mendel Rivers, then Chairman of the House Armed Services Committee, testified that "[t]he burning of the flag . . . has caused my mail to increase 100 percent from the boys in Vietnam, writing me and asking me what is going on in America." Desecration of the Flag, Hearings on H.R. 271 before Subcommittee No. 4 of he House Committee on the Judiciary, 90th Cong., 1st Sess., 189 (1967). Representative Charles Wiggins stated: "The public act of desecration of our flag tends to undermine the morale of American troops. That this finding is true can be attested by many Members who have received correspondence from servicemen expressing their shock and disgust of such conduct." 113 Cong.Rec. 16459 (1967).

The flag symbolizes the Nation in peace as well as in war. It signifies our national presence on battleships, airplanes, military installations, and public buildings from the United States Capitol to the thousands of county courthouses and city halls throughout the country. Two flags are prominently placed in our courtroom. Countless flags are placed by the graves of loved ones each year on what was first called

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Decoration Day, and is now called Memorial Day. The flag is traditionally placed on the casket of deceased members of the Armed Forces, and it is later given to the deceased's family. 10 U.S.C. §§ 1481, 1482. Congress has provided that the flag be flown at half-staff upon the death of the President, Vice President, and other government officials "as a mark of respect to their memory." 36 U.S.C. § 175(m). The flag identifies United States merchant ships, 22 U.S.C. § 454, and "[t]he laws of the Union protect our commerce wherever the flag of the country may float." *United States v. Guthrie,* 58 U.S. (17 How.) 284, 309, 15 L.Ed. 102 (1855).

No other American symbol has been as universally honored as the flag. In 1931, Congress declared "The Star-Spangled Banner" to be our national anthem. 36 U.S.C. § 170. In 1949, Congress declared June 14th to be Flag Day. § 157. In 1987, John Philip Sousa's "The Stars and Stripes Forever" was designated as the national march. Pub.L. 101-186, 101 Stat. 1286. Congress has also established "The Pledge of Allegiance to the Flag" and the manner of its deliverance. 36 U.S.C. § 172. The flag has appeared as the principal symbol on approximately 33 United States postal stamps and in the design of at least 43 more, more times than any other symbol. United States Postal Service, Definitive Mint Set 15 (1988).

Both Congress and the States have enacted numerous laws regulating misuse of the American flag. Until 1967, Congress left the regulation of misuse of the flag up to the States. Now, however, 18 U.S.C. § 700(a) provides that:

"Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it shall be fined not more than $1,000 or imprisoned for not more than one year, or both."

Congress has also prescribed, *inter alia,* detailed rules for the design of the flag, 4 U.S.C. § 1, the time and occasion of flag's display, 36 U.S.C. § 174, the position and manner of

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its display, § 175, respect for the flag, § 176, and conduct during hoisting, lowering, and passing of the flag, § 177. With the exception of Alaska and Wyoming, all of the States now have statutes prohibiting the burning of the flag.[1] Most of the state statutes are patterned after the Uniform Flag Act of 1917, which in § 3 provides: "No person shall publicly mutilate, deface, defile, defy, trample upon, or by word or act cast contempt upon any such flag, standard, color, ensign or shield." Proceedings of National Conference of Commissioners on Uniform State Laws 323-324 (1917). Most were passed by the States at about the time of World War I. Rosenblatt, Flag Desecration Statutes: History and Analysis, 1972 Wash.U.L.Q. 193, 197.

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The American flag, then, throughout more than 200 years of our history, has come to be the visible symbol embodying our Nation. It does not represent the views of any particular political party, and it does not represent any particular political philosophy. The flag is not simply another "idea" or "point of view" competing for recognition in the marketplace of ideas. Millions and millions of Americans regard it with an almost mystical reverence regardless of what sort of social, political, or philosophical beliefs they may have. I cannot agree that the First Amendment invalidates the Act of Congress, and the laws of 48 of the 50 States, which make criminal the public burning of the flag.

More than 80 years ago in *Halter v. Nebraska,* 205 U.S. 34, 27 S.Ct. 419, 51 L.Ed. 696 (1907), this Court upheld the constitutionality of a Nebraska statute that forbade the use of representations of the American flag for advertising purposes upon articles of merchandise. The Court there said:

"For that flag every true American has not simply an appreciation but a deep affection. . . . Hence, it has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot." *Id.,* at 41, 27 S.Ct., at 421.

Only two Terms ago, in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee,* 483 U.S. 522, 107 S.Ct. 2971, 97 L.Ed.2d 427 (1987), the Court held that Congress could grant exclusive use of the word "Olympic" to the United States Olympic Committee. The Court thought that this "restrictio[n] on expressive speech properly [was] characterized as incidental to the primary congressional purpose of encouraging and rewarding the USOC's activities." *Id.,* at 536, 107 S.Ct., at 2981. As the Court stated, "when a word [or symbol] acquires value 'as the result of organization and the expenditure of labor, skill, and money' by an entity, that entity constitutionally may obtain a limited property right in the word [or symbol]." *Id.,* at 532, 107 S.Ct., at 2974, quoting *International News Service v. Associated Press,* 248

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U.S. 215, 239, 39 S.Ct. 68, 72, 63 L.Ed. 211 (1918). Surely Congress or the States may recognize a similar interest in the flag.

But the Court insists that the Texas statute prohibiting the public burning of the American flag infringes on respondent Johnson's freedom of expression. Such freedom, of course, is not absolute. See *Schenck v. United States,* 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470 (1919). In *Chaplinsky v. New Hampshire,* 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942), unanimous Court said:

"Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances 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." *Id.,* at 571-572, 62 S.Ct., at 769 (footnotes omitted).

The Court upheld Chaplinsky's conviction under a state statute that made it unlawful to "address any offensive, derisive or annoying word to any person who is lawfully in any street or other public place." *Id.,* at 569, 62 S.Ct., at 768. Chaplinsky had told a local marshal, " ' "You are a God damned racketeer" and a "damned Fascist and the whole government of Rochester are Fascists or agents of Fascists." ' " *Ibid.*

Here it may equally well be said that the public burning of the American flag by Johnson was no essential part of any exposition of ideas, and at the same time it had a tendency to incite a breach of the peace. Johnson was free to make any verbal denunciation of the flag that he wished; indeed, he was

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free to burn the flag in private. He could publicly burn other symbols of the Government or effigies of political leaders. He did lead a march through the streets of Dallas, and conducted a rally in front of the Dallas City Hall. He engaged in a "die-in" to protest nuclear weapons. He shouted out various slogans during the march, including: "Reagan, Mondale which will it be? Either one means World War III"; "Ronald Reagan, killer of the hour, Perfect example of U.S. power"; and "red, white and blue, we spit on you, you stand for plunder, you will go under." Brief for Respondent 3. For none of these acts was he arrested or prosecuted; it was only when he proceeded to burn publicly an American flag stolen from its rightful owner that he violated the Texas statute.

The Court could not, and did not, say that Chaplinsky's utterances were not expressive phrases—they clearly and succinctly conveyed an extremely low opinion of the addressee. The same may be said of Johnson's public burning of the flag in this case; it obviously did convey Johnson's bitter dislike of his country. But his act, like Chaplinsky's provocative words, conveyed nothing that could not have been conveyed and was not conveyed just as forcefully in a dozen different ways. As with "fighting words," so with flag burning, for purposes of the First Amendment: It is "no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed" by the public interest in avoiding a probable breach of the peace. The highest courts of several States have upheld state statutes prohibiting the public burning of the flag on the grounds that it is so inherently inflammatory that it may cause a breach of public order. See, *e.g., State v. Royal,* 113 N.H. 224, 229, 305 A.2d 676, 680 (1973); *State v. Waterman,* 190 N.W.2d 809, 811-812 (Iowa 1971); see also *State v. Mitchell,* 32 Ohio App.2d 16, 30, 288 N.E.2d 216, 226 (1972).

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The result of the Texas statute is obviously to deny one in Johnson's frame of mind one of many means of "symbolic speech." Far from being a case of "one picture being worth a thousand words," flag burning is the equivalent of an inarticulate grunt or roar that, it seems fair to say, is most likely to be indul ed in not to express any particular idea, but to antagonize others. Only five years ago we said in *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812, 104 S.Ct. 2118 2132, 80 L.Ed.2d 772 (1984), that "the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places." The Texas statute deprived Johnson of only one rather inarticulate symbolic form of protest—a form of protest that was profoundly offensive to many—and left him with a full panoply of other symbols and every conceivable form of verbal expression to express his deep disapproval of national policy. Thus, in no way can it be said that Texas is punishing him because his hearers—or any other group of people—were profoundly opposed to the message that he sought to convey. Such opposition is no proper basis for restricting speech or expression under the First Amendment. It was Johnson's use of this particular symbol, and not the idea that he sought to convey by it or by his many other expressions, for which he was punished.

Our prior cases dealing with flag desecration statutes have left open the question that the Court resolves today. In *Street v. New York*, 394 U.S. 576, 579, 89 S.Ct. 1354 1359, 22 L.Ed.2d 572 (1969), the defendant burned a flag in the street, shouting "We don't need no damned flag" and "[i]f they let that happen to Meredith we don't need an American flag." The Court ruled that since the defendant might have been convicted solely on the basis of his words, the conviction could not stand, but it expressly reserved the question whether a defendant could constitutionally be convicted for burning the flag. *Id.,* at 581, 89 S.Ct., at 1360.

Chief Justice Warren, in dissent, stated: "I believe that the States and Federal Government do have the power to protect the flag from acts of desecration and disgrace. . . . [I]t is dif-

ficult for me to imagine that, had the Court faced this issue, it would have concluded otherwise." *Id.,* at 605, 89 S.Ct., at 1372. Justices Black and Fortas also expressed their personal view that a prohibition on flag burning did not violate the Constitution. See *id.,* at 610, 89 S.Ct., at 1374 (Black, J., dissenting) ("It passes my belief that anything in the Federal Constitution bars a State from making the deliberate burning of the American Flag an offense"); *id.,* at 615-617, 89 S.Ct., at 1377-1378 (Fortas, J., dissenting) ("[T]he States and the Federal Government have the power to protect the flag from acts of desecration committed in public. . . . [T]he flag is a special kind of personality. Its use is traditionally and universally subject to special rules and regulation. . . . A person may 'own' a flag, but ownership is subject to special burdens and responsibilities. A flag may be property, in a sense; but it is property burdened with peculiar obligations and restrictions. Certainly . . . these special conditions are not *per se* arbitrary or beyond governmental power under our Constitution").

In *Spence v. Washington*, 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974), the Court reversed the conviction of a college student who displayed the flag with a peace symbol affixed to it by means of removable black tape from the window of his apartment. Unlike the instant case, there was no risk of a breach of the peace, no one other than the arresting officers saw the flag, and the defendant owned the flag in question. The Court concluded that the student's conduct was protected under the First Amendment, because "no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired on these facts." *Id.,* at 415, 94 S.Ct., at 2732-2733. The Court was careful to note, however, that the defendant "was not

charged under the desecration statute, nor did he permanently disfigure the flag or destroy it." *Ibid.*

In another related case, *Smith v. Goguen,* 415 U.S. 566, 94 § Ct. 1242, 39 L.Ed.2d 605 (1974), the appellee, who wore a small flag on the seat of his trousers, was convicted under a Massachusetts flag-misuse statute that subjected to criminal liability anyone who

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"publicly . . . treats contemptuously the flag of the United States." *Id.,* at 568-569, 94 S.Ct., at 1244-1245. The Court affirmed the lower court's reversal of appellee's conviction, because the phrase "treats contemptuously" was unconstitutionally broad and vague. *Id.,* at 576, 94 S.Ct., at 1248. The Court was again careful to point out that "[c]ertainly nothing prevents a legislature from defining with substantial specificity what constitutes forbidden treatment of United States flags." *Id.,* at 581-582, 94 S.Ct., at 1251. See also *id.,* at 587, 94 S.Ct., at 1254 (WHITE, J., concurring in judgment) ("The flag is a national property, and the Nation may regulate those who would make, imitate, sell, possess, or use it. I would not question those statutes which proscribe mutilation, defacement, or burning of the flag or which otherwise protect its physical integrity, without regard to whether such conduct might provoke violence. . . . There would seem to be little question about the power of Congress to forbid the mutilation of the Lincoln Memorial. . . . The flag is itself a monument, subject to similar protection"); *id.,* at 591, 94 S.Ct., at 1256 (BLACKMUN, J., dissenting) ("Goguen's punishment was constitutionally permissible for harming the physical integrity of the flag by wearing it affixed to the seat of his pants").

But the Court today will have none of this. The uniquely deep awe and respect for our flag felt by virtually all of us are bundled off under the rubric of "designated symbols," *ante,* at 417, that the First Amendment prohibits the government from "establishing." But the government has not "established" this feeling; 200 years of history have done that. The government is simply recognizing as a fact the profound regard for the American flag created by that history when it enacts statutes prohibiting the disrespectful public burning of the flag.

The Court concludes its opinion with a regrettably patronizing civics lecture, presumably addressed to the Members of both Houses of Congress, the members of the 48 state legislatures that enacted prohibitions against flag burning, and the troops fighting under that flag in Vietnam who objected to its

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being burned: "The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong." *Ante,* at 419. The Court's role as the final expositor of the Constitution is well established, but its role as a Platonic guardian admonishing those responsible to public opinion as if they were truant school-children has no similar place in our system of government. The cry of "no taxation without representation" animated those who revolted against the English Crown to found our Nation—the idea that those who submitted to government should have some say as to what kind of laws would be passed. Surely one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people—whether it be murder, embezzlement, pollution, or flag burning.

Our Constitution wisely places limits on powers of legislative majorities to act, but the declaration of such limits by this Court "is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case." *Fletcher v. Peck,* 10 U.S. (6 Cranch) 87, 128, 3 L.Ed. 162 (1810) (Marshall, C.J.). Uncritical extension of constitutional protection to the burning of the flag risks the frustration of the very purpose for which organized governments are instituted. The Court decides that the American flag is just another symbol, about which not only must opinions pro and con be tolerated, but for which the most inimal public respect may not be enjoined. The government may conscript men into the Armed Forces where they must fight and perhaps die for the flag, but the government may not prohibit the public burning of the banner under which they fight. I would uphold the Texas statute as applied in this case.[2]

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Justice STEVENS, dissenting.

As the Court analyzes this case, it presents the question whether the State of Texas, or indeed the Federal Government, has the power to prohibit the public desecration of the American flag. The question is unique. In my judgment rules that apply to a host of other symbols, such as state flags, armbands, or various privately promoted emblems of political or commercial identity, are not necessarily controlling. Even if flag burning could be considered just another species of symbolic speech under the logical application of the rules that the Court has developed in its interpretation of the First Amendment in other contexts, this case has an intangible dimension that makes those rules inapplicable.

A country's flag is a symbol of more than "nationhood and national unity." *Ante,* at 407, 410, 413, and n. 9, 417, 420. It also signifies the ideas that characterize the society that has chosen that emblem as well as the special history that has animated the growth and power of those ideas. The fleurs-de-lis and the tricolor both symbolized "nationhood and national unity," but they had vastly different meanings. The message conveyed by some flags—the swastika, for example—may survive long after it has outlived its usefulness as a symbol of regimented unity in a particular nation.

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So it is with the American flag. It is more than a proud symbol of the courage, the determination, and the gifts of nature that transformed 13 fledgling Colonies into a world power. It is a symbol of freedom, of equal opportunity, of religious tolerance, and of good will for other peoples who share our aspirations. The symbol carries its message to dissidents both at home and abroad who may have no interest at all in our national unity or survival.

The value of the flag as a symbol cannot be measured. Even so, I have no doubt that the interest in preserving that value for the future is both significant and legitimate. Conceivably that value will be enhanced by the Court's conclusion that our national commitment to free expression is so strong that even the United States as ultimate guarantor of that freedom is without power to prohibit the desecration of its unique symbol. But I am unpersuaded. The creation of a federal right to post bulletin boards and graffiti on the Washington Monument might enlarge the market for free expression, but at a cost I would not pay. Similarly, in my considered judgment, sanctioning the public desecration of the flag will tarnish its value—both for those who cherish the ideas for which it waves and for those who desire to don the robes of martyrdom by burning

it. That tarnish is not justified by the trivial burden on free expression occasioned by requiring that an available, alternative mode of expression including uttering words critical of the flag, see *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969)—be employed.

It is appropriate to emphasize certain propositions that are not implicated by this case. The statutory prohibition of flag desecration does not "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178 1187, 87 L.Ed. 1628 (1943). The statute does not compel any conduct or any profession of respect for any idea or any symbol.

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Nor does the statute violate "the government's paramount obligation of neutrality in its regulation of protected communication." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70, 96 S.Ct. 2440 2452, 49 L.Ed.2d 310 (1976) (plurality opinion). The content of respondent's message has no relevance whatsoever to the case. The concept of "desecration" does not turn on the substance of the message the actor intends to convey, but rather on whether those who view the *act* will take serious offense. Accordingly, one intending to convey a message of respect for the flag by burning it in a public square might nonetheless be guilty of desecration if he knows that others perhaps simply because they misperceive the intended message—will be seriously offended. Indeed, even if the actor knows that all possible witnesses will understand that he intends to send a message of respect, he might still be guilty of desecration if he also knows that this understanding does not lessen the offense taken by some of those witnesses. Thus, this is not a case in which the fact that "it is the speaker's opinion that gives offense" provides a special "reason for according it constitutional protection," *FCC v. Pacifica Foundation*, 438 U.S. 726, 745, 98 S.Ct. 3026 3038, 57 L.Ed.2d 1073 (1978) (plurality opinion). The case has nothing to do with "disagreeable ideas," see *ante,* at 409. It involves disagreeable conduct that, in my opinion, diminishes the value of an important national asset.

The Court is therefore quite wrong in blandly asserting that respondent "was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values." *Ante,* at 411. Respondent was prosecuted because of the method he chose to express his dissatisfaction with those policies. Had he chosen to spray-paint or perhaps convey with a motion picture projector—his message of dissatisfaction on the facade of the Lincoln Memorial, there would be no question about the power of the Government to prohibit his means of expression. The prohibition would be supported by the legitimate interest in preserving the quality of an important

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national asset. Though the asset at stake in this case is intangible, given its unique value, the same interest supports a prohibition on the desecration of the American flag.*

The ideas of liberty and equality have been an irresistible force in motivating leaders like Patrick Henry, Susan B. Anthony, and Abraham Lincoln, schoolteachers like Nathan Hale and Booker T. Washington, the Philippine Scouts who fought at Bataan, and the soldiers who scaled the bluff at Omaha Beach. If those ideas are worth fighting for—and our history demonstrates that they are—it cannot be true that the flag that uniquely symbolizes their power is not itself worthy of protection from unnecessary desecration.

I respectfully dissent.

1. Texas Penal Code Ann. § 42.09 (1989) provides in full:

"§ 42.09. Desecration of Venerated Object

"(a) A person commits an offense if he intentionally or knowingly desecrates:

"(1) a public monument;

"(2) a place of worship or burial; or

"(3) a state or national flag.

"(b) For purposes of this section, 'desecrate' means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.

"(c) An offense under this section is a Class A misdemeanor."

2. Because the prosecutor's closing argument observed that Johnson had led the protestors in chants denouncing the flag while it burned, Johnson suggests that he may have been convicted for uttering critical words rather than for burning the flag. Brief for Respondent 33-34. He relies on *Street v. New York,* 394 U.S. 576, 578, 89 S.Ct. 1354 1358, 22 L.Ed.2d 572 (1969), in which we reversed a conviction obtained under a New York statute that prohibited publicly defying or casting contempt on the flag "either by words or act" because we were persuaded that the defendant may have been convicted for his words alone. Unlike the law we faced in *Street,* however, the Texas flag-desecration statute does not on its face permit conviction for remarks critical of the flag, as Johnson himself admits. See Brief for Respondent 34. Nor was the jury in this case told that it could convict Johnson of flag desecration if it found only that he had uttered words critical of the fl g and its referents.

Johnson emphasizes, though, that the jury was instructed according to Texas' law of parties—that " 'a person is criminally responsible for an offense committed by the conduct of another if acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense.' " *Id.,* at 2, n. 2, quoting 1 Record 49. The State offered this instruction because Johnson's defense was that he was not the person who had burned the flag. Johnson did not object to this instruction at trial, and although he challenged it on direct appeal, he did so only on the ground that there was insufficient evidence to support it. 706 S.W.2d 120, 124 (Tex.App.1986). It is only in this Court that Johnson has argued that the law-of-parties instruction might have led the jury to convict him for his words alone. Even if we were to find that this argument is properly raised here, however, we would conclude that it has no merit in these circumstances. The instruction would not have permitted a conviction merely for the pejorative nature of Johnson's words, and those words themselves did not encourage the burning of the flag as the instruction seems to require. Given the additional fact that "the bulk of the State's argument was premised on Johnson's culpability as a sole actor," *ibid.,* we find it too unlikely that the jury convicted Johnson on the basis of this alternative theory to consider reversing his conviction on this ground.

3. Although Johnson has raised a facial challenge to Texas' flag-desecration statute, we choose to resolve this case on the basis of his claim that the statute as applied to him violates the First Amendment. Section 42.09 regulates only physical conduct with respect to the flag, not the written or spoken word, and although one violates the statute only if one "knows" that one's physical treatment of the flag "will seriously offend one or more persons likely to observe or discover his action," Tex.Penal Code Ann. § 42.09(b) (1989), this fact does not necessarily mean that the statute applies only to *expressive* conduct protected by the First Amendment. *Cf. Smith v. Goguen,* 415 U.S. 566, 588, 94 S.Ct. 1242 1254, 39 L.Ed.2d 605 (1974) (WHITE, J., concurring in judgment) (statute prohibiting "contemptuous" treatment of flag encompasses only expressive conduct). A tired person might, for example, drag a flag through the mud, knowing that this conduct is likely to offend others, and yet have no thought of expressing any idea; neither the language nor the Texas courts' interpretations of the statute precludes the possibility that such a person would be prosecuted for flag desecration. Because the prosecution of a person who had not engaged in expressive conduct would pose a different case, and because this case may be disposed of on narrower grounds, we address only Johnson's claim that § 42.09 as applied to political expression like his violates the First Amendment.

4. Relying on our decision in *Boos v. Barry,* 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988), Johnson argues that this state interest is related to the suppression of free expression within the meaning of *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). He reasons that the violent reaction to flag burnings feared by Texas would be the result of the message conveyed by them, and that this fact connects the State's interest to the suppression of expression. Brief for Respondent 12, n. 11. This view has found some favor in the lower courts. See *Monroe v. State Court of Fulton County,* 739 F.2d 568, 574-575 (CA11 1984). Johnson's theory may overread *Boos* insofar as it suggests that a desire to prevent a violent audience reaction is "related to expression" in the same way that a desire to prevent an audience from being offended is "related to expression." Because we find that the State's interest in preventing breaches of the peace is not implicated on these facts, however, we need not venture further into this area.

5. There is, of course, a tension between this argument and the State's claim that one need not actually cause serious offense in order to violate § 42.09. See Brief for Petitioner 44.

6. Cf. *Smith v. Goguen,* 415 U.S., at 590-591, 94 S.Ct., at 1255-1256 (BLACKMUN, J., dissenting) (emphasizing that lower court appeared to have construed state statute so as to protect physical integrity of the flag in all circumstances); *id.,* at 597-598, 94 S.Ct., at 1259 (REHNQUIST, J., dissenting) (same).

7. Texas suggests that Johnson's conviction did not depend on the onlookers' reaction to the flag burning because § 42.09 is violated only when a person physically mistreats the flag in a way that he "*knows* will seriously offend one or more persons likely to observe or discover his action." Tex.Penal Code Ann. § 42.09(b) (1989) (emphasis added). "The 'serious offense' language of the statute," Texas argues, "refers to an individual's intent and to the manner in which the conduct is effectuated, not to the reaction of the crowd." Brief for Petitioner 44. If the statute were aimed only at the actor's intent and not at the communicative impact of his actions, however, there would be little reason for the law to be triggered only when an audience is "likely" to be present. At Johnson's trial, indeed, the State itself seems not to have seen the distinction between knowledge and actual communicative impact that it now stresses; it proved the element of knowledge by offering the testimony of persons who had in fact been seriously offended by Johnson's conduct. *Id.,* at 6-7. In any event, we find the distinction between Texas' statute and one dependent on actual audience reaction too precious to be of constitutional significance. Both kinds of statutes clearly are aimed at protecting onlookers from being offended by the ideas expressed by the prohibited activity.

8. Our inquiry is, of course, bounded by the particular facts of this case and by the statute under which Johnson was convicted. There was no evidence that Johnson himself stole the flag he burned, Tr. of Oral Arg. 17, nor did the prosecution or the arguments urged in support of it depend on the theory that the flag was stolen. *Ibid.* Thus, our analysis does not rely on the way in which the flag was acquired, and nothing in our opinion should be taken to suggest that one is free to steal a flag so long as one later uses it to communicate an idea. We also emphasize that Johnson was prosecuted *only* for flag desecration not for trespass, disorderly onduct, or arson.

9. Texas claims that "Texas is not endorsing, protecting, avowing or prohibiting any particular philosophy." Brief for Petitioner 29. If Texas means to suggest that its asserted interest does not prefer Democrats over Socialists, or Republicans over Democrats, for example, then it is beside the point, for Johnson does not rely on such an argument. He argues instead that the State's desire to maintain the flag as a symbol of nationhood and national unity assumes that there is only one proper view of the flag. Thus, if Texas means to argue that its interest does not prefer *any* viewpoint over another, it is mistaken; surely one's attitude toward the flag and its referents is a viewpoint.

10. Our decision in *Halter v. Nebraska,* 205 U.S. 34, 27 S.Ct. 419, 51 L.Ed. 696 (1907), addressing the validity of a state law prohibiting certain commercial uses of the flag, is not to the contrary. That case was decided "nearly 20 years before the Court concluded that the First Amendment applies to the States by virtue of the Fourteenth Amendment." *Spence v. Washington,* 418 U.S. 405, 413, n. 7, 94 S.Ct. 2727, 2731, n. 7, 41 L.Ed.2d 842 (1974). More important, as we continually emphasized in *Halter* itself, that case involved purely commercial rather than political speech. 205 U.S., at 38, 41, 42, 45, 27 S.Ct., at 420, 421, 422, 423.

Nor does *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee,* 483 U.S. 522, 524, 107 S.Ct. 2971 2975, 97 L.Ed.2d 427 (1987), addressing the validity of Congress' decision to "authoriz[e] the United States Olympic Committee to prohibit certain commercial and promotional uses of the word 'Olympic,' " relied upon by THE CHIEF JUSTICE's dissent, *post,* at 429, even begin to tell us whether the government may criminally punish physical conduct towards the flag engaged in as a means of political protest.

11. THE CHIEF JUSTICE's dissent appears to believe that Johnson's conduct may be prohibited and, indeed, criminally sanctioned, because "his act . . . conveyed nothing that could not have been conveyed and was not conveyed just as forcefully in a dozen different ways." *Post,* at 431. Not only does this

assertion sit uneasily next to the dissent's quite correct reminder that the flag occupies a unique position in our society—which demonstrates that messages conveyed without use of the flag are not "just as forcefu[l]" as those conveyed with it—but it also ignores the fact that, in *Spence, supra,* we "rejected summarily" this very claim. See 418 U.S., at 411, n. 4, 94 S.Ct., at 2731.

1. See Ala.Code § 13A-11-12 (1982); Ariz.Rev.Stat.Ann. § 13-3703 (1978); Ark.Code Ann. § 5-51-207 (1987); Cal.Mil. & Vet.Code Ann. § 614 (West 1988); Colo.Rev.Stat. § 18-11-204 (1986); Conn.Gen.Stat. § 53-258a (1985); Del.Code Ann., Tit. 11, § 1331 (1987); Fla.Stat. §§ 256.05-256.051, 876.52 (1987); Ga.Code Ann. § 50-3-9 (1986); Haw.Rev.Stat. § 711-1107 (1988); Idaho Code § 18-3401 (1987); Ill.Rev.Stat., ch. 1 &Par; 3307, 3351 (1980); Ind.Code § 35-45-1-4 (1986); Iowa Code § 32.1 (1978 and Supp.1989); Kan.Stat.Ann. § 21-4114 (1988); Ky.Rev.Stat.Ann. § 525.110 (Michie Supp.1988); La.Rev.Stat.Ann. § 14:116 (West 1986); Me.Rev.Stat.Ann., Tit. 1, § 254 (1979); Md.Ann.Code, Art. 27, § 83 (1988); Mass.Gen.Laws §§ 264, 265 (1987); Mich.Comp.Laws § 750.246 (1968); Minn.Stat. § 609.40 (1987); Miss.Code Ann. § 97-7-39 (1973); Mo.Rev.Stat. § 578.095 (Supp.1989); Mont.Code Ann. § 45-8-215 (1987); Neb.Rev.Stat. § 28-928 (1985); Nev.Rev.Stat. § 201.290 (1986); N.H.Rev.Stat.Ann. § 646.1 (1986); N.J.Stat.Ann. § 2C:33-9 (West 1982); N.M.Stat.Ann. § 30-21-4 (1984); N.Y.Gen.Bus.Law § 136 (McKinney 1988); N.C.Gen.Stat. § 14-381 (1986); N.D.Cent.Code § 12.1-07-02 (1985); Ohio Rev.Code Ann. § 2927.11 (1987); Okla.Stat., Tit. 21, § 372 (1983); Ore.Rev.Stat. § 166.075 (1987); 18 Pa.Cons.Stat. § 2102 (1983); R.I.Gen.Laws § 11-15-2 (1981); S.C.Code §§ 16-17-220, 16-17-230 (1985 and Supp.1988); S.D.Codified Laws § 22-9-1 (1988); Tenn.Code Ann. §§ 39-5-843, 39-5-847 (1982); Tex.Penal Code Ann. § 42.09 (1974); Utah Code Ann. § 76-9-601 (1978); Vt.Stat.Ann., Tit. 13, § 1903 (1974); Va.Code § 18.2-488 (1988); Wash.Rev.Code § 9.86.030 (1988); W.Va.Code § 61-1-8 (1989); Wis.Stat. § 946.05 (1985-1986).

2. In holding that the Texas statute as applied to Johnson violates the First Amendment, the Court does not consider Johnson's claims that the statute is unconstitutionally vague or overbroad. Brief for Respondent 24-30. I think those claims are without merit. In *New York State Club Assn. v. City of New York,* 487 U.S. 1, 11, 108 S.Ct. 2225 2233, 101 L.Ed.2d 1 (1988), we stated that a facial challenge is only proper under the First Amendment when a statute can never be applied in a permissible manner or when, even if it may be validly applied to a particular defendant, it is so broad as to reach the protected speech of third parties. While Tex.Penal Code Ann. § 42.09 (1989) "may not satisfy those intent on finding fault at any cost, [it is] set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with." *CSC v. Letter Carriers,* 413 U.S. 548, 579, 93 S.Ct. 2880 2897, 37 L.Ed.2d 796 (1973). By defining "desecrate" as "deface," "damage" or otherwise "physically mistreat" in a manner that the actor knows will "seriously offend" others, § 42.09 only prohibits flagrant acts of physical abuse and destruction of the flag of the sort at issue here—soaking a flag with lighter fluid and igniting it in public—and not any of the examples of improper flag etiquette cited in respondent's brief.

* The Court suggests that a prohibition against flag desecration is not content neutral because this form of symbolic speech is only used by persons who are critical of the flag or the ideas it represents. In making this suggestion the Court does not pause to consider the far-reaching consequences of its introduction of disparate-impact analysis into our First Amendment jurisprudence. It seems obvious that a prohibition against the desecration of a gravesite is content n utral even if it denies some protesters the right to make a symbolic statement by extinguishing the flame in Arlington Cemetery where John F. Kennedy is buried while permitting others to salute the flame by bowing their heads. Few would doubt that a protester who extinguishes the flame has desecrated the gravesite, regardless of whether he prefaces that act with a speech explaining that his purpose is to express deep admiration or unmitigated scorn for the late President. Likewise, few would claim that the protester who bows his head has desecrated the gravesite, even if he makes clear that his purpose is to show disrespect. In such a case, as in a flag burning case, the prohibition against desecration has absolutely nothing to do with the content of the message that the symbolic speech is intended to convey.

920 S.W.2d 438
Grady SIMMONS, Appellant,
v.
Travis WARE, Individually and as District Attorney, and
David Mullin, Appellees.
No. 07-95-0296-CV.
Court of Appeals of Texas,
Amarillo.
March 26, 1996.

David L. Holder and Floyd D. Holder, Jr., Lubbock, for appellant.

Shelton & Jones, Travis D. Shelton, Dale Jones, Lubbock, Sprouse, Mozola, Smith & Rowley, Mark D. White, Lee Ann Reno, Amarillo, for appellees.

Before REYNOLDS, C.J., and DODSON and BOYD, JJ.

BOYD, Justice.

In three points, appellant Grady Simmons contends the trial court erred in entering a take-nothing summary judgment in favor of appellees Travis Ware and David Mullin. In those three points, he contends material fact questions exist which prevent the granting of summary judgment. The underlying suit is one alleging libel and slander and arises out of a complicated set of facts which we will detail as necessary to discuss and dispose of the points of error. In the course of that discussion, we will explain why we affirm the judgment of the trial court.

In October 1992, an attorney was indicted in Randall County for witness tampering in a capital murder case. Two Lubbock County police officers, William Hubbard and Patrick Kelly, were called to testify on behalf of the defendant in that case. In the course of their testimony, the officers made allegations of misconduct by State pathologist Dr. Ralph Erdmann, Randall Sherrod, who was Randall County District Attorney at the time, and Travis Ware, who was Lubbock County District Attorney at the time.

On October 21, 1992, Hubbard was indicted in Lubbock County for an offense unrelated to the Randall County capital murder proceedings. On November 18, 1992, Kelly was indicted in Randall County for allegedly committing perjury in the Randall County trial. Contending the indictments against them were obtained in retaliation for the exercise of their constitutional right and obligation to testify truthfully, Hubbard and Kelly then sought an injunction in an Amarillo federal court seeking to enjoin the prosecutions against them. Finding the officers' allegations were correct, the federal court granted a preliminary injunction enjoining the further pursuit of the State court prosecutions. The case was eventually settled.

Simmons was a newspaper reporter employed by the Lubbock Avalanche Journal. Mullin was Ware's attorney in the suit in Amarillo federal district court in which the officers obtained the preliminary injunction. In the instant suit, Simmons alleged that on or about July 27, 1993, Mullin wrote a letter to the editor of the Avalanche Journal in which Mullin "blamed everyone but his client for the lawsuit and its outcome. He never acknowledged that it is an abuse of power to use

that power to retaliate against people for the exercise of their constitutional rights." Simmons also alleged the letter, inter alia, contained defamatory material about him such as:

A. ... It states that Assistant District Attorney Trey Hill testified by affidavit that he saw "AJ reporter Grady Simmons drinking a toast to the castration of Travis Ware." This statement is untrue--the affidavit of Trey Hill did not state nor suggest that Grady Simmons joined in the said toast. Furthermore, Grady Simmons did not drink a toast to the castration of Travis Ware.

B. The statement imputes bias to Grady Simmons and colors his prior reporting of the Amarillo hearings with dishonesty and a hidden agenda to injure Travis Ware.

C. Furthermore, the letter imputes bias to Grady Simmons by placing the term "unbiased" in quotation marks.

Simmons also alleged Ware passed out copies of the letter to individuals and groups, including

a meeting of the West Texas Home Builders Association. He also asserted a claim under 42 U.S.C. § 1983 (§ 1983 claim) against Ware, relevant to which was an allegation that on or about February 7, 1994, at a "Candidates Forum" held at Texas Tech University:

TRAVIS WARE told the audience that Plaintiff had reported certain specifc [sic] things about him. Then, as if in answer to the unasked question of whether or not the reports were valid, TRAVIS WARE stated, "Grady Simmons is no longer employed at the Avalanche Journal."

While the United States Constitution contains no explicit guarantee of the right to sue for defamation, the Texas Constitution expressly authorizes the bringing of reputational torts. [1] Casso v. Brand, 776 S.W.2d 551, 557-58 (Tex.1989). Indeed, the Brand court, citing Dairy Stores Inc. v. Sentinel Publishing Co., 104 N.J. 125, 157, 516 A.2d 220, 236 (1986), noted its recognition "that summary judgment practice is particularly well-suited for the determination of libel actions, the fear of which can inhibit comment on matters of public concern." Casso v. Brand, 776 S.W.2d at 558.

Even though courts must give careful judicial attention to summary judgment motions in the context of the First Amendment, the well established standards for reviewing a summary judgment are just as applicable in defamation cases as in other types of cases. Id. at 556. Thus, the movant has the burden of showing there is no genuine issue of material fact and he is entitled to judgment as a matter of law, and, in determining whether there is a disputed material fact issue that precludes summary judgment, evidence favorable to the non-movant will be taken as true, every reasonable inference must be indulged in favor of the non-movant, and any doubts must be resolved in his favor. Nixon v. Mr. Property Management, 690 S.W.2d 546, 548-49 (Tex.1985).

Where, as here, the judgment is in favor of a defendant, the standard of review is whether the summary judgment proof establishes as a matter of law that there is no genuine issue of fact about one or more essential elements of the plaintiff's cause of action. McDole v. San Jacinto Methodist Hosp., 886 S.W.2d 357 (Tex.App.--Houston [1st Dist.] 1994, no writ), citing Gibbs v. General Motors Corp., 450 S.W.2d 827, 828 (Tex.1970). Parenthetically, our summary judgment

procedure permits the granting of a summary judgment on the basis of uncontroverted testimonial evidence of an interested witness if the evidence is "clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted." Tex.R.Civ.P. 166a(c). Additionally, one last consideration in our review is that when a trial court does not specify the ground upon which it based its ruling, the summary judgment will be affirmed on appeal if any of the theories advanced are meritorious. Carr v. Brasher, 776 S.W.2d 567, 569 (Tex.1989). It is in the light of these explications that we proceed with our review.

Our supreme court has expressly adopted the "defamation" standard set out in New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Casso v. Brand, 776 S.W.2d at 557. Thus, to prevail at trial, a plaintiff must show the defendant made a false and defamatory statement of fact without knowledge that it was false or with reckless disregard of whether it was false. Id. at 558, citing New York Times, 376 U.S. at 279-80, 84 S.Ct. at 726. Whether words are capable of the defamatory meaning the plaintiff attributes to them is a question of law for the court. Carr v. Brasher, 776 S.W.2d at 569.

In the Texas Civil Practice and Remedies Code [2] (the Code), the elements of libel are described as:

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A libel is a defamation expressed in written or other graphic form that tends to blacken the memory of the dead or that 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, integrity, virtue, or reputation or to publish the natural defects of anyone and thereby expose the person to public hatred, ridicule, or financial injury.

By provision of § 73.006 of the Code, it does not affect the existence of common law, statutory, or other defenses to libel. This court has defined slander as an orally communicated or published defamatory statement made to a third person, without legal excuse, which is either defamatory in itself or defamatory because it results in actual damages. Glenn v. Gidel, 496 S.W.2d 692, 697 (Tex.Civ.App.--Amarillo 1973, no writ).

To prevail at trial in either a libel or slander action, the plaintiff must have offered clear and convincing affirmative proof of the asserted libel or slander. Casso, 776 S.W.2d at 558. While it is conceivable that a defendant's trial testimony could provide the requisite proof under the rigors of cross-examination, it is more likely that a plaintiff will have to secure such evidence elsewhere, and if he cannot secure it during the discovery process, he is unlikely to stumble on to it at trial. Id. at 558-59.

LIBEL CLAIM AGAINST MULLIN AND WARE

In his summary judgment motion, Mullin posited that as a matter of law, the two statements complained of were not defamatory and were substantially true. He also argues that because Simmons was a limited purpose public figure and thereby must prove actual malice, the summary judgment evidence conclusively proved that he, Mullin, did not act with malice.

In his summary judgment motion, Ware claimed that because Simmons was not subjected to public hatred, contempt, ridicule or financial injury, any statements attributed to him were not

actionable. As did Mullin, Ware claimed any such statements were substantially true and that Simmons was a limited purpose public figure because his byline identified him to "tens of thousands of readers" and he voluntarily injected himself into this controversy by seeking out criminal defense attorneys, i.e., attending their party where the toast was made. Additionally, Ware claimed Simmons failed to plead and prove Ware published the letter.

To sustain his defamation claim, Simmons must show that Mullin or Ware "published" defamatory matters about him which injured or impeached his reputation. Schauer v. Memorial Care Systems, 856 S.W.2d 437 (Tex.App.--Houston [1st Dist.] 1993, no writ). The "publication" of an allegedly libelous letter requires a showing that the letter was received, read, and understood by a third person. Putter v. Anderson, 601 S.W.2d 73, 78 (Tex.Civ.App.--Dallas 1980, writ ref'd n.r.e.), citing 50 Am.Jur.2d, Libel and Slander § 154 (1970). Because such "publication" need only be a negligent or intentional act that communicates defamatory matter to a person other than the person defamed, Baubles & Beads v. Louis Vuitton, S.A., 766 S.W.2d 377, 380 (Tex.App.--Texarkana 1989, no writ), the failure of the Avalanche Journal to actually print Mullin's letter does not preclude a determination that the statements in the letter were "published" within that definition. Mullin's letter was addressed to Jay Harris, the editor of the Lubbock newspaper, and Mullin does not dispute that employees of the newspaper received and read the letter. Additionally, Ware admitted in his deposition that he distributed copies of the letter at the West Texas Home Builders' meeting. Thus, the letter was "published" within the context of a libel proceeding.

We must next determine whether the statements in the letter were actually defamatory as pled by Simmons. In order to do so, we must examine the letter in its entirety rather than examine separate sentences or excerpts from it. Schauer, 856 S.W.2d at 446, citing Musser v. Smith Protective Serv., Inc., 723 S.W.2d 653 (Tex.1987). This is true because statements may be made defamatory by taking them out of context, and although they may be false, abusive,

unpleasant and objectionable to the plaintiff, they may not be "defamatory" in an actionable sense. Schauer, 856 S.W.2d at 446.

Simmons first argues the statements are per se defamatory because they are aimed at him in his occupation, business, or profession. In doing so, he places primary reliance upon the decisions in Bradbury v. Scott, 788 S.W.2d 31 (Tex.App.--Houston [1st Dist.] 1989, writ denied), and Shearson Lehman Hutton, Inc. v. Tucker, 806 S.W.2d 914, 920 (Tex.App.--Corpus Christi 1991, writ dism'd w.o.j.). We must then determine whether he is correct in that contention.

In Bradbury, corporate majority interest owner Bradbury wrote two letters about Scott, his co-investor, after Scott had resigned her employment with the corporation. In both letters, he accused Scott of lacking fidelity and honesty while she was an employee of their corporation. The first letter was written to the bank that held the corporation's checking account, and the second was addressed to a booster club which was a charitable organization benefiting Friendswood public school activities. In both letters, Bradbury expressly stated that Scott's actions "could be construed as 'illegal and not in the best interest of the corporation,' " and specifically detailed alleged wrongdoing. Id. at 34. En route to affirming the jury's verdict in favor of Scott, the appellate court noted that both letters "were libelous per se because they accused her [Scott] of conduct that affects a person injuriously in his or her office, profession, or occupation." Id. at 38. The court also noted that Bradbury wrote the letter to the bank "knowing that the allegations were

not true, but with the apparent intention to recover money from the bank on a banking technicality." Id.

In the Shearson Lehman Hutton case, the defendant made statements that Tucker, the plaintiff, was going to lose his stockbroker's license, was in big trouble with the Securities and Exchange Commission, and would never work again as a stockbroker. 806 S.W.2d at 921. The court commented that the recipients of the comments regarded the statements as definite, factual and serious and believed Tucker would not work as a stockbroker for another firm. Id.

The statements with which we are concerned do not rise to the defamatory level of the statements in Bradbury, or Shearson Lehman Hutton, or cases of like ilk. They are not sufficient to be defamatory per se.

In his deposition, Simmons admitted that criticism of a reporter from both sides of controversial subjects is natural. He described other accusations of being biased or unfair made at or near the time of this event as "... generally a comment a reporter hears from sources and the readers." Although the letter was addressed to the editor of the Avalanche Journal, we note it was not an all out attempt to seek termination of Simmons's employment similar to the posted memo in Houston Printing Co. v. Jones, 282 S.W. 854 (Tex.Civ.App.--Galveston 1925, writ dism'd w.o.j.).

In the Houston Printing Co. case, the court held it is actionable to falsely charge that a newspaper reporter is inaccurate and a worthless person on a newspaper. An interoffice memo signed by the plaintiff's managing editor was posted on the editorial bulletin board. The memo read:

Subject: Inaccuracy

Mr. Hunter: The most worthless thing on a news staff is an inaccurate reporter. This is aptly illustrated in Monday morning's issue of the Post in connection with the death of Lee C. Ayars. The misspelling of Mr. Ayars' name not only made the Post look foolish, but offended the family and friends of the deceased. As an example and a warning, I want the man who handled the story, Mr. Jones, dismissed. I want every member of your staff to know that he was dismissed, and that other dismissals will follow for similar cause.

The court held the evidence was sufficient to raise a fact question for resolution by the jury and in doing so, noted there was needless severity of language used in the memo, it was posted on a semipublic bulletin board to which the general public had access, other employees who had committed similar instances both before and after Jones's story were neither discharged nor posted, there appeared to be a personal motive for the posting, and the managing editor knew that

the plaintiff was not inaccurate. Id. at 857-58. In this instant case, Simmons was mentioned by name only once in the letter and the alleged defamatory statements were not sufficient to be defamatory per se.

In determining whether the evidence in this case sufficiently disproves the existence of a fact question as to the defamatory effect of the letter, we must bear in mind the established rule that an

expression of opinion is protected free speech. Schauer, 856 S.W.2d at 447, citing Yiamouyiannis v. Thompson, 764 S.W.2d 338, 340 (Tex.App.--San Antonio 1988, writ denied), cert. denied, 493 U.S. 1021, 110 S.Ct. 722, 107 L.Ed.2d 742 (1990). Thus, the next question for our determination is whether the statements in question were merely expressions of opinion or were actionable assertions of fact by Mullin. Schauer, 856 S.W.2d at 447; El Paso Times, Inc. v. Kerr, 706 S.W.2d 797, 798-800 (Tex.App.--El Paso 1986, writ ref'd n.r.e.), cert. denied, 480 U.S. 932, 107 S.Ct. 1570, 94 L.Ed.2d 761 (1987). That is a question of law to be determined by the court. Carr v. Brasher, 776 S.W.2d 567, 570 (Tex.1989).

In his brief, Mullin admits that his statement about Hill's affidavit is an assertion of fact, but argues it is merely "an assertion of fact about what someone else said about Simmons, putting the ordinary reader on notice that Mullin is relying on his recollection of what a third party said." The part of the letter giving rise to this lawsuit reads as follows:

The hearing on the plaintiff's motion for temporary injunction was held after the suit had been on file only a few weeks. The evidence certainly revealed a long running feud between the Lubbock DA's office and Kelly and Hubbard, but several points did not receive notice in your paper. One, Hubbard did not take the stand. Two, Kelly testified that he knew of no evidence that Ware had retaliated against him. Three, the Lubbock police department's internal files provided extensive evidence against Hubbard and Kelly. I strongly suggest that your newspaper review the files on the investigation of Hubbard and Kelly, which are now public records in their lawsuit, to make its own determination if those records exculpate or incriminate Hubbard and Kelly. Fourth, assistant DA Trey Hill testified by affidavit that he had been at a party and seen several of the plaintiffs' lawyers and AJ reporter Grady Simmons drinking a toast to the castration of Travis Ware.

Simmons was the "unbiased" reporter that your paper sent to cover the hearing, and the pro-plaintiff bias of this paper's coverage of the hearing as compared with the coverage in the Amarillo papers was very noticeable. For example, the Lubbock paper did not report the testimony of a Lubbock minister that one of the plaintiff's lawyers had told him that: "We know Hubbard and Kelly are bad cops and they have done a lot of bad things, but that doesn't mean Travis Ware can do whatever he wants to them." This testimony was reported in the Amarillo paper.

The rest of the letter is an attempt by Mullin to elaborate on the capital murder trial and Hubbard, Kelly, Ware, Sherrod, Erdmann, and other attorneys' involvement in the legal proceedings. He also attempted to explain the meaning and ramifications of the preliminary injunction granted by the federal judge in the Amarillo federal district court.

It is well settled that the core value of the First Amendment reflects a recognition of the fundamental importance of the free flow of ideas and opinions and about matters of public interest and concern. Carr v. Brasher, 776 S.W.2d at 570, citing Hustler Magazine v. Falwell, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988). However, in Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), the Supreme Court cautioned that:

Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open debate" on public issues.

Id., 418 U.S. at 339-40, 94 S.Ct. at 3006-07, citing New York Times v. Sullivan, 376 U.S. 254, 270, 84 S.Ct. 710, 720, 11 L.Ed.2d 686 (1964).

Section 73.005 of the Code provides that the truth of the statement in the publication on which an action for libel is based is a defense to the action. [3] In this state, we have adopted the "substantial truth" test by which we measure the truth or falsity of an allegedly libelous statement. Rogers v. Dallas Morning News, Inc., 889 S.W.2d 467, 472 (Tex.App.--Dallas 1994), Citing MCILVAIN V. JACOBS, 794 S.W.2D 14, 15-16 (TEX.1990)[4]. In applying that test, we must examine Mullin's letter in its entirety and decide whether the summary judgment evidence conclusively shows the "gist" of the statements contained in the letter is substantially true. Id. at 472. This requires us to determine whether, in the mind of the average reader, the alleged defamatory statements were more damaging to appellant's reputation than truthful statements would have been. Id. If the underlying facts as to the gist of the defamatory charge are undisputed, we can disregard any variance with respect to items of secondary importance and determine substantial truth as a matter of law. McIlvain, 794 S.W.2d at 16.

The summary judgment evidence shows that in his affidavit, Trey Hill averred he was at a party in Lubbock at which Simmons was also present. There was a keg of beer in the garage at the premises for the use of those in attendance. In the course of the evening, as he made several trips to the garage for more beer, Hill exchanged "polite greetings" with Simmons and others at the party. He then stated:

At one point, as I entered, a toast was proposed and made by Rod Hobson. He raised his glass and toasted the removal of the genitalia of Travis Ware. I believe that Pat Kelly was included in the people who raised their glasses and joined in the toast, however, I cannot say that I could recall the identity of each person toasting with Rod Hobson. I was somewhat surprised that such a toast would be made, or continued in my presence and I was a little embarrassed, so I did not look directly at the group of people toasting. I filled my cup with beer and returned to the living room of the house. Except for going to the garage, I did not see the above-named individuals much.

It is my opinion that the toast I overheard is indicative of the fact that all the public criticism and the suit filed against Travis Ware is the result of personal animosity between certain defense attorneys in Lubbock and Mr. Ware. Pat Kelly & Bill Hubbard are merely being used as pawns in the personal quest of a few defense attorneys to unseat Travis Ware.

Reiterated, the exact language in Mullin's letter included in Simmons's complaint is: "Fourth Assistant DA Trey Hill testified by affidavit that he had been at a party and seen several of the plaintiff's lawyers and AJ reporter Grady Simmons drinking a toast to the castration of Travis Ware."

Simmons's summary judgment evidence in this regard consisted of excerpts from depositions of Ware and Simmons, and affidavits from three people who were at the party where the toast was made. Each averred that while they could not recall the identity of every person in the group who toasted the castration of Travis Ware, they were sure Simmons was not "standing in the group and did not join in the toast." One affiant averred he could not recall whether Trey Hill was in the garage when the toast was made, while the other two were sure he was not in the garage. Included in the evidence was an affidavit of the editor of the Avalanche Journal stating Simmons resigned in good standing and was not fired for any disciplinary reason.

Mullin's summary judgment evidence included excerpts from Simmons's deposition,

affidavits of Hill, Ware, Mullin, and Mullin's legal assistant, a copy of the actual letter, copies of several newspaper articles, and statistics. In his affidavit, Mullin swore he had never been introduced to Simmons, he felt his statements about Hill's affidavit were true and accurate according to his recollection, that putting quotation marks around "unbiased" represented his personal opinion, and that he had others proofread the letter to check its accuracy before he sent it. He also stated he sent the letter to the newspaper's editor and Ware only.

Ware averred he asked Mullin to write a letter to the newspaper to put the federal court's grant of the preliminary injunction in proper perspective. He also claimed he had no knowledge that the statement in Mullin's letter was incorrect in any way, and that he had talked on the telephone with Hill about the toasting incident itself.

Viewed in its context, as we must view it, we find the summary judgment record sufficiently demonstrates the "gist" of the statement in question. In arriving at that conclusion, we note that in his deposition, Simmons admitted attending the party at which the toast was made, that the people in attendance were predominantly from the criminal defense side of the bar, and that he was there to "pick lawyers' brains." He also said that a toast was made in the garage and at the time of the toast, he was drinking a glass of beer; but he merely saw and heard the toast to "... castration of Travis Ware. I don't remember the exact words." He did state that he did not raise his glass, and "wasn't a party to the toast, and I wouldn't have been inclined to do so in the first place." When queried why he would not be so inclined, he replied, "It would have shown bias." Simmons also admitted he had been accused of being biased by at least two other people. We have previously noted Simmons's admissions that criticism of stories a reporter writes is natural for a reporter and "you just have to put up with it." When queried, he admitted this observation "holds true in these matters, as well, when ... writing these stories."

Simmons argues "... the difference of the damage to Simmons' reputation in the mind of the reader between the letter's statements and the actual occurrence is great." We disagree. In the mind of the average reader, the statements in question, if defamatory, were not more defamatory than the fact that he was present and participating in a party where such a toast was admittedly made, in the sense that his presence could have indicated an alliance with one side of the controversy, whether he "joined" in the toast or raised his glass in the toast. Additionally, in his affidavit, Mullin expressly stated he was relying upon another person's affidavit, which would diminish the credibility of his affirmation to the average reader.

In sum, even considering the secondary variance of whether Simmons raised his glass, when considered as a whole, the statements made in the letter concerning Hill's averments are substantially true. McIlvain, 794 S.W.2d at 16. Indeed, although Simmons argues that Hill averred he joined in the toast, he does not challenge the fact that Hill was present at the party, that he, Simmons, was also present, and that the toast took place in his presence.

We also note that Simmons showed no "special" damages. By his own admission, criticism that a reporter was biased or unfair in his stories was "natural for any reporter" and was an every day risk. The only job restriction his summary judgment evidence showed was a directive not to read stories about Ware before they were published. This directive was not made until after he filed this suit. His deposition testimony showed that his salary did not change after he was

directed not to read stories about Ware, yet he voluntarily quit his job with the Avalanche Journal with the explanation that "[i]t had to do with the working conditions. If I were going to be prohibited from reading about certain subjects and sources, it is an intolerable situation for a reporter and editor." Since leaving the newspaper, Simmons has not sought any kind of employment as a reporter or editor. His deposition testimony revealed that after leaving the newspaper, he moved to Kemah, Texas, where he lived on and "fixed up" a boat he owned before this controversy. After a few months, he began working at a marina for $6.00 per hour. The

only other job for which he applied was as a substitute teacher in Galveston. Simmons also admitted he had never heard of anyone saying or indicating Mullin's letter made them think he was any less of a reporter.

Because we find the statement about the toast was not defamatory, we need not determine whether Simmons was a limited purpose public figure which would require him to establish Mullin and Ware acted with malice. [5] See Einhorn v. LaChance, 823 S.W.2d 405, 413 (Tex.App.--Houston [1st Dist.] 1992, writ dism'd w.o.j.). A limited purpose public figure is one who may not be a celebrity or household name sufficient to be an all purpose public figure, but who has "thrust [himself] to the forefront of a particular public controvers[y]...." Gertz v. Welch, 418 U.S. 323, 345, 94 S.Ct. 2997 3009, 41 L.Ed.2d 789 (1974). The determination whether one is such a public figure is a matter of law to be decided by the court. Einhorn, 823 S.W.2d at 413. We do note, however, that the outcome of the suit in federal court and the ramifications of the preliminary injunction were matters of public interest, that Simmons played a significant part in presenting facts about the matter to the public, and Mullin's letter was germane to Simmons's participation in the controversy, i.e., whether he was accurately reporting the facts. In his deposition, Simmons admitted he was the "primary reporter" covering the Amarillo hearings. Of the 87 articles about the controversy published in the Lubbock and Amarillo papers, Simmons authored at least 24. His name appeared in the by-line in each of the articles he wrote. His work on Ware's federal case was a result of his coverage of the publicized controversy about Dr. Erdmann's work as a pathologist and testimony he had given in connection with criminal prosecutions. Simmons admitted there was an ongoing controversy about these matters.

We must next determine whether Mullin's act of placing quotation marks around his description of Simmons as an "unbiased" reporter was defamatory. There is no separate articulated privilege for opinion under the First Amendment because opinions may be actionable if they imply false statements of objective fact. Shearson Lehman Hutton, 806 S.W.2d at 920, citing Milkovich v. Lorain Journal Co., 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990). Whether a statement crosses the line between a protected expression of opinion and an actionable statement or implied false statement of objective fact, again, is a question of law. Carr v. Brasher, 776 S.W.2d at 570.

As Simmons's attorney stated at the summary judgment hearing, albeit with the suggestion it crossed the line of accountability, Mullin's description of Simmons as "unbiased" was an expression of an opinion. Whether Simmons's reports were biased, considered in context and in the light of the entire controversy, was in the eye of the beholder and incapable of definitive proof one way or the other. Thus, the implication arising from the placement of the quotation marks was an expression of Mullin's opinion protected by article I, section 8 of the Texas Constitution and the First Amendment to the Federal Constitution. Simmons's first point of error is overruled.

CLAIM AGAINST WARE

Included in Simmons's second point of error is a contention that Ware failed to conclusively establish there were no issues of material fact as to Simmons's 42 U.S.C. § 1983 claim. In his suit, Simmons alleged that Ware's publication of Mullin's allegedly libelous letter was made "under color of state law by the chief law enforcement officer of the State of Texas in Lubbock County" and was made in an effort to deprive him of "a liberty interest, the freedom of speech and the freedom of press, in violation of the Constitution of the United States." Therefore, he concluded, he was entitled to compensation for emotional distress, mental anguish, injury to reputation, and punitive damages.

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Simmons's § 1983 claim was derivative of his alleged defamation claim. As we have discussed in some detail, Mullin's statements in the letter which were "republished" when Ware distributed copies of the letter at the homebuilders' meeting were substantially true and thus, were not actionable. That holding precludes any claim that Ware, acting under color of any state statute, ordinance, regulation, custom or usage, deprived Simmons of any right, privilege or immunity to which he was constitutionally or statutorily entitled and the deprivation of which is a prerequisite to a § 1983 action. 42 U.S.C. § 1983 (1994); see Hammond v. Katy Independent School Dist., 821 S.W.2d 174, 178 (Tex.App.--Houston [14th Dist.] 1991, no writ).

Although Simmons also alleges Ware failed to "properly address [Simmons's] allegation that [Ware] has used his office to intimidate and manipulate [Simmons] and the Press," he has failed to point out in what respect this is true or to support this argument with citation of case law or statutes in his summary judgment response or his appellate brief. By failing to present authority to support that contention, it has been waived. Tobias v. University of Texas, 824 S.W.2d 201, 207 (Tex.App.--Fort Worth 1991, writ denied), cert. denied, 506 U.S. 1049, 113 S.Ct. 966, 122 L.Ed.2d 122 (1993); Tex.R.App.P. 74(f).

SLANDER

Included in his third point challenge is Simmons's contention that the trial court erred in granting Ware's summary judgment because there were material fact questions concerning his slander claim. Simmons alleged Ware stated at a Texas Tech candidates' rally that "Grady Simmons is no longer employed at the Avalanche Journal [sic]" and argues the clear implication of the statement was that the newspaper reports were false or biased and that he was fired because of these shortcomings. Thus, he reasons, the statement was defamatory, tends to injure him in his profession, and is slanderous per se. He also alleged malice and sought punitive damages.

We have viewed the videotape of the "Candidate's Forum" which was received in evidence at the summary judgment hearing. From our perusal of the tape, we learn the actual alleged slanderous statement is:

... The newspaper about which Mr. Sowder complains of, and for once I am not complaining of, the newspaper has relied upon the writings of a reporter who is no longer even working at that newspaper; and when they composed the editorials he is talking about when they asked me to

resign; they were relying on that news reporter's stories. Come to find out the reporter's stories were not quite the way things happened. He no longer works there.

Simmons's initial attack upon this part of Ware's summary judgment is that Ware's assertion in his motion that Simmons's claim is "false" does not comply with Rule 166a of the Texas Rules of Civil Procedure which requires the motion for summary judgment to "state the specific grounds therefor." Tex.R.Civ.P. 166a(c). However, this type of failure does not in itself require reversal unless the party complaining of the defect files an exception pointing out that the lack of specificity leaves him without adequate information and the exception is overruled. Jones v. McSpedden, 560 S.W.2d 177, 179 (Tex.Civ.App.--Dallas 1977, no writ). Simmons filed no such exception and by failing to do so waived this complaint. In further considering Simmons's challenge, we bear in mind the rule that while a summary judgment may not be affirmed upon a ground not specified in the motion for summary judgment, when the order granting the summary judgment does not specify the ground upon which it is based, the judgment will be affirmed if any of the grounds stated in the motion are meritorious. Carr v. Brasher, 776 S.W.2d at 569.

Slander is a defamatory statement orally published to a third person without justification or excuse. Shearson Lehman Hutton, 806 S.W.2d at 921. The general rule is that oral words, though false and opprobrious, are not actionable without pleading and proof of special damages. Einhorn, 823 S.W.2d at 411, citing Buck v.

Savage, 323 S.W.2d 363, 368 (Tex.Civ.App.--Houston 1959, writ ref'd n.r.e.). Statements are slanderous per se if they are so obviously harmful to the person harmed that no proof of their injurious effect is necessary to make them actionable. Shearson Lehman Hutton, 806 S.W.2d at 921. Matters characterized as slanderous per se are statements that affect a person injuriously in his office, profession, or occupation. Id. In arguing there is a material fact issue whether he suffered harm, Simmons posits Ware's statements at the candidate's forum were slanderous per se. We disagree.

As we have before discussed, in determining whether a statement is actionable, the statements in their entirety must be examined. They must be construed as a whole in light of the surrounding circumstances and judged as a person of ordinary intelligence would perceive them. It is only if the statements are ambiguous or of doubtful import that a jury is called upon to determine their meaning and effect upon an ordinary person. Einhorn, 823 S.W.2d at 411.

Publication of a defamatory statement does not require the plaintiff be named if those who know and are acquainted with the plaintiff understand the statement refers to him or her. Galveston Co. Fair & Rodeo v. Glover, 880 S.W.2d 112, 119 (Tex.App.--Texarkana 1994, no writ). In other words, the fact that Simmons was not specifically named would not, in and of itself, prevent recovery.

Apparently recognizing this, although he does not specifically articulate an "innuendo" claim, Simmons makes such an argument in claiming that the "clear implication" of Ware's statement was that Simmons's reports were false or biased and that he was fired because of those reports. An innuendo may be used to explain but not to extend the effect and meaning of the language asserted to be actionable. The test for actionable "innuendo" is not what construction a plaintiff might place upon the statements, but rather, how the statement would be construed by the average reasonable person or the general public, Schauer, 856 S.W.2d at 448, citing Arant v.

Jaffe, 436 S.W.2d 169, 176 (Tex.Civ.App.--Dallas 1968, no writ). Again, it is the court's duty to determine if the statements in question are capable of the meaning ascribed to them by the innuendo, and, if in the natural meaning of the statements, they are not capable of a defamatory interpretation, the case must be withheld from the jury. Id.

Ware's summary judgment evidence on this point consisted of the videotape and his affidavit averring "I did not mention Grady Simmons by name." In his response, Simmons included and placed primary reliance upon the affidavit of Texas Tech journalism professor Freda McVay. McVay swore that "From my understanding of the events leading up to the editorial in question, and from my familiarity with and interest in local press coverage, I knew Travis Ware was referring to Grady Simmons as the unnamed 'reporter.' " However, because of her background and expertise, McVay's interpretation of Ware's statement is not that of the average reasonable or ordinary person.

While Ware's statements might be considered to be aimed at Simmons by those who were involved in and thoroughly cognizant of the events we have mentioned, lacking that sort of specialized interest and background, the average person would not recognize the remarks as being directed at a specific reporter, as contrasted to reporters in general. That being true, the ordinary person would not conclude that Simmons in particular was unfair or biased and was fired because of reports reflecting that bias or untruths; therefore, the remarks were not slanderous per se.

Parenthetically, we note the remarks were at least substantially true. Simmons admitted in his deposition testimony that he was the "primary" reporter covering the federal proceeding in Amarillo as well as the Ware, Erdmann, Hubbard and Kelly controversies. The newspaper did print several of his stories, and Simmons no longer worked at the Avalanche Journal at the time of the remarks. Under the authorities we have cited, if the truth of the facts underlying the gist of the alleged defamatory remarks is undisputed, we may disregard variances of secondary importance and determine substantial truth

as a matter of law. Under this record, Ware's remarks did not rise to the standard required to support a slander recovery. That showing would also negate an essential element of Simmons's slander action against Ware. We hold the trial court did not reversibly err in granting summary judgment on Simmons's slander claim.

In summary, all of Simmons's points of error are overruled and the judgment of the trial court affirmed.

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1 Every person shall be at liberty to speak, write, or publish his opinions on any subject, being responsible for the abuse of that privilege....

Tex. Const. art. I, § 8 (emphasis added).

All 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.

Tex. Const. art. I, § 13 (emphasis added).

2 Tex.Civ.Prac. & Rem.Code § 73.001 (Vernon 1986).

3 Tex.Civ.Prac. & Rem.Code Ann. § 73.005 (Vernon 1986).

4 McIlvain involved a private figure plaintiff and a media defendant. The Texas Supreme Court cited Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986) for the proposition that a private figure plaintiff must show that the speech at issue is false before recovering damages for defamation from a media defendant. 794 S.W.2d at 15.

5 With respect to defamatory statements, malice is the making of statements with knowledge they are false, or with reckless disregard whether they are false. Galveston County Fair & Rodeo v. Glover, 880 S.W.2d 112, 120 (Tex.App.--Texarkana 1994, no writ), citing Dun and Bradstreet, Inc. v. O'Neil, 456 S.W.2d 896 (Tex.1970).

922 S.W.2d 242
The SAN ANTONIO EXPRESS NEWS, A Division of Hearst Corporation, and Jeanne Jakle, Appellants,
v.
Ted DRACOS, Appellee.
No. 04-95-00755-CV.
Court of Appeals of Texas,
San Antonio.
April 17, 1996.

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Mark J. Cannan, Lang, Ladon, Green, Coghlan & Fisher, P.C., San Antonio, for appellants.

Judith R. Blakeway, Matthews & Branscomb, San Antonio, Ricardo G. Cedillo, Susan G. Lozano, Davis, Adami & Cedillo, Inc., San Antonio, for appellee.

Before CHAPA, C.J., and LPEZ and HARDBERGER, JJ.

OPINION

HARDBERGER, Justice.

This appeal arises from a defamation case brought by Ted Dracos against the San Antonio Express-News, Jeanne Jakle, Hart-Hanks Communications, Inc. and Hart-Hanks Television, Inc. The trial court denied a motion for summary judgment filed by the Express-News and Jakle; both parties then brought this accelerated, interlocutory appeal. See TEX.CIV.PRAC. & REM.CODE ANN. § 51.014(6) (Vernon 1995); TEX.R.APP.P. 42(a). For the following reasons, we sustain the appellants' points of error and reverse the trial court's judgment.

BACKGROUND

Appellee Ted Dracos was a television reporter and news commentator for KENS-TV. Appellant San Antonio Express-News, a Division of the Hearst Corporation, publishes a daily newspaper of general circulation in San Antonio and South Texas. Appellant Jeanne Jakle is a columnist and television editor with the Express-News. She writes a column published five days a week covering matters of general interest including television, radio, motion pictures, and personalities related to those industries. Hart-Hanks Television, Inc., owns and operates KENS-TV, which broadcasts in San Antonio.

On September 22, 1993, Dracos sent the following letter to Mike Conly, the general manager of KENS-TV, complaining of his treatment at the hands of Bob Rogers, the station's news director:

Dear Mike,

I'm in a box and I'd like your help. I feel that I can no longer work for Bob Rogers. His behavior towards me--and many other employees--has been consistently abusive and demeaning. I can no longer tolerate it.

You know that I have worked hard and long for KENS. Without tooting my own horn too diligently, the number of awards and/or level of professional recognition that I have received is, I believe, equal to

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any other present or past KENS employee. As a good team ballplayer, I want you to know it would be a privilege to continue working for KENS in another department or in another capacity outside of the newsroom. I feel like I have a great deal to offer, but I understand if this isn't in the cards. The radio show is something that I can do well, and I believe sincerely that it will not only be an excellent public service but will make you and KENS look very good. I'm more than willing to wait for it to evolve unless other opportunities become more attractive.

Finally, regarding any severance procedures--if it comes to that--I'm sorry but I will not deal with Bob. His word is not good. I will be happy to work with who ever else you designate.

I'm sorry for causing you any consternation. In a way, neither of us is responsible for the current situation. We both know it's not co-incidence that severe personnel problems continually emanate from the News Department. And I hope that you perceive that I have tried continually to work with Bob. Of course, I fully appreciate the tough position you are put in by these circumstances. I would like to talk with you about my feelings, but I will understand if you don't think it would be worthwhile.

KENS interpreted Dracos' letter as a letter of resignation, and quickly informed him--on September 23--that it accepted his resignation. KENS's letter reads in part as follows:

Dear Ted:

We received your letter today (September 23rd) regarding the reasons why you will be unable to continue your employment with KENS-TV. Thank you for providing us this perspective and we hereby accept your notice of resignation. As you have not been in the building this week we assume this resignation is effective immediately.

On the morning of September 25, the Express-News published the following story, which was written by Jakle and appeared as part of her column:

'Eyewitness Wants to Know' reporter Ted Dracos no longer works at KENS-TV.

That, according to Assistant News Director Araceli DeLeon, who said Dracos departed Thursday. 'Just like that,' she said.

DeLeon said she has no idea why Dracos quit, 'except that I understand he's done that kind of thing before.'

Reached at home Friday, News Director Bob Rogers said he, too, is in the dark about the departure. According to Rogers, 'there was no communication whatsoever' between him and Dracos about the latter leaving KENS.

The consumer feature, 'Eyewitness Wants to Know,' a staple of KENS since late-great Express-News columnist Paul Thompson turned it into a hit in the '70s and '80s, will continue, said DeLeon, though she doesn't know yet who'll be handling it.

Dracos, however, took exception to his letter being treated as a letter of resignation, and so informed KENS management--Bob Rogers, Mike Conly and Araceli DeLeon, the assistant news director at KENS--by memorandum on September 25, 1993:

I must assume that comments published by the Express-News, made by Ms. DeLeon and Mr. Rogers, to Jeanne Jakle may not be accurate. In any case, I would like an immediate public clarification if they are inaccurate and a public clarification and retraction if they are accurate.

I did not quit KENS and I have never quit KENS in the past. Further I attempted in good faith, in writing and by telephone to negotiate or at least talk about the terms of my employment with management.

I feel very strongly that the quotes given to the Express-News are highly damaging to me for many and obvious reasons. So I'm respectfully requesting that you broadcast on today's newscasts and on Monday's newscasts the truth. I would request that I be mailed the scripts for my review before broadcast. I hope that you understand and take seriously that I am asking for nothing more than fairness from KENS.

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Dracos' defamation lawsuit against the Express-News, Jakle, and Hart-Hanks, was filed on January 12, 1995. His original petition claims that Jakle's article, with the exception of the statement that Dracos no longer works at KENS, was entirely false. He is particularly concerned about the statements that he "no longer works at KENS," that he quit "just like that," and that he has "done that kind of thing before." He claims these statements "by Ms. Jakle and the KENS-TV employees left the impression that Mr. Dracos acted in a highly irresponsible fashion," i.e., "simply walked off the job, leaving KENS-TV without any excuse for such departure, or even knowing the reason for Mr. Dracos' leaving." Dracos also claims the Express-News and Jakle "have engaged in a pattern of relentless written assaults" on his character and reputation.

The case was abated as to Hart-Hanks Communications, Inc., and after initial discovery, motions for summary judgment were filed by the Express-News, Jakle, and Hart Hanks Television, Inc. [1] The motion filed by Hart Hanks Television was granted and the cause severed; the motions filed by the Express-News and Jakle were denied. The parties then brought this accelerated, interlocutory appeal, raising three points of error.

DISCUSSION

Standard of review

The same standard of review which governs the granting of a summary judgment applies to the denial of a summary judgment. See, e.g., Ervin v. James, 874 S.W.2d 713, 715 (Tex.App.--Houston [14th Dist.] 1994, writ denied). The movant for summary judgment must show there are no genuine issues of material fact and that he is entitled to judgment as a matter of law. Nixon v. Mr. Property Management, Co., 690 S.W.2d 546, 548-49 (Tex.1985); Ervin, 874 S.W.2d at 713. In deciding whether there is a disputed material fact issue precluding summary judgment, we take evidence favorable to the non-movant as true. Nixon, 690 S.W.2d at 548-49. We also indulge every reasonable inference in favor of the non-movant and resolve any doubts in his favor. Id. If the movant's motion and summary judgment proof facially establishes his right to judgment as a matter of law, then the burden shifts to the non-movant to raise fact issues precluding summary judgment. See City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 (Tex.1979). A defendant, to be entitled to summary judgment, must disprove at least one essential element of each pleaded cause of action or otherwise show the plaintiff could not succeed on any theory pleaded. Rosas v. Buddies Food Store, 518 S.W.2d 534, 537 (Tex.1975); Ervin, 874 S.W.2d at 713.

The Express-News and Jakle based their motion for summary judgment on three grounds: (1) that each statement in Jakle's column was not defamatory; (2) that it was either true or substantially true; and (3) that the article was published without "actual malice," that is, without knowledge of its falsity or serious doubt as to its truth. See New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Truth is an affirmative defense in a defamation case, and the appellants have the burden of proving it by a preponderance of the evidence. See, e.g., Frank B. Hall & Co., Inc. v. Buck, 678 S.W.2d 612, 623 (Tex.App.--Houston [14th Dist.] 1984, writ ref'd n.r.e.). A defendant is entitled to summary judgment on the basis of an affirmative defense if he expressly presents and conclusively proves each essential element of the affirmative defense. Swilley v. Hughes, 488 S.W.2d 64, 67 (Tex.1972); Ervin, 874 S.W.2d at 713. We will examine each of the appellants' arguments.

Are the words defamatory?

Appellants' first point claims the trial court erred in denying their motion for summary judgment because, as a matter of law, the language in the publication is not defamatory. We agree.

A statement is defamatory if the words tend to injure a person's reputation.

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See TEX.CIV.PRAC. & REM.CODE ANN. 73.001 (Vernon 1986). Whether the words are capable of a defamatory meaning is a question of law for the court. Musser v. Smith Protective Services, Inc., 723 S.W.2d 653, 654-55 (Tex.1987); Einhorn v. LaChance, 823 S.W.2d 405, 411 (Tex.App.--Houston [1st Dist.] 1992, writ dism'd w.o.j.). We must construe the statement as a whole in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive the entire statement. Einhorn, 823 S.W.2d at 411 (citing Musser, 723 S.W.2d at 655); see also Villasenor v. Villasenor, 911 S.W.2d 411, 418 (Tex.App.--San Antonio 1995, n.w.h.); Diaz v. Rankin, 777 S.W.2d 496, 498-99 (Tex.App.--Corpus Christi 1989, no writ). Only when the court determines the language is ambiguous or of doubtful import should a jury then decide the statement's meaning and the effect the statement's publication would have on an ordinary reader. Id.

Reference to dictionary definitions is appropriate for evaluating libelous content. See, e.g., El Paso Times, Inc. v. Kerr, 706 S.W.2d 797, 798 (Tex.App.--El Paso 1986, writ ref'd n.r.e.), cert. denied, 480 U.S. 932, 107 S.Ct. 1570, 94 L.Ed.2d 761 (1987). In the present case, a review of Webster's Dictionary reveals that the dictionary definition of the word "quit"--a word to which Dracos seems to take particular exception--means "to give up employment," "stop working," or to "leave." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1867 (1981). Dracos maintains that the word "quit" may not, by itself, be libelous. However, he argues, the entire Jakle article can be interpreted as defamatory because it leaves the impression he acted in a "highly irresponsible fashion, by simply walking off the job."

In our opinion, however, Dracos' complaint that Jakle's article leaves the impression he "simply walked off the job, leaving KENS-TV without any excuse for such departure, or even knowing the reason for Mr. Dracos' leaving" is not actionable. As in Musser, the statement

does not charge plaintiff with the commission of a crime or the violation of any law. It does not accuse him of violating any kind of contract, such as a covenant against competition. In our opinion by no stretch of the imagination does it charge him with any unethical acts and business dealings. It accuses him of absolutely nothing except what he had a right to do....

Musser, 723 S.W.2d at 655 (quoting 690 S.W.2d at 58). Statements must be viewed in their context and may even be false, abusive, unpleasant, or objectionable to the plaintiff without being defamatory. Musser, 723 S.W.2d at 654; Schauer v. Memorial Care Systems, 856 S.W.2d 437, 446 (Tex.App.--Houston [1st Dist.] 1993, no writ). We must also look at the entire communication and not just isolated sentences or portions. See Musser, 723 S.W.2d at 655; Schauer, 856 S.W.2d at 446. It is also important to remember that our task here is not to determine what the statement meant to the plaintiff, but whether it would be considered defamatory to the average reader. See Herald-Post Publishing Co. v. Hervey, 282 S.W.2d 410, 415 (Tex.Civ.App.--El Paso, writ ref'd n.r.e.).

Given the record in this case, we are persuaded a person of ordinary intelligence would not perceive the Jakle article as defamatory. The statements that Rogers was "in the dark" concerning Dracos' departure, that the two had not communicated on the subject prior to Dracos' departure, and that Dracos left "just like that" do not charge Dracos with doing anything illegal or unethical. Nor do they accuse him of breaching contractual obligations. If anything, the Jakle article "charges" Dracos with doing only that which he had a clear right to do: terminate his employment at will. To suggest such "accusations" are defamatory requires a strained interpretation. In the words of the Texas Supreme Court, "[a]ny other construction tortures the ordinary meaning." Musser, 723 S.W.2d at 655; see also Hervey, 282 S.W.2d at 415. When viewed in light of the surrounding circumstances, we find the Jakle article was neither ambiguous nor of doubtful import. As a matter of law, then, it cannot be libelous or defamatory. For this reason, the trial court's judgment must be reversed.

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Is the content true or substantially true?

Appellants' second point claims the trial court erred in denying their motion for summary judgment because, as a matter of law, the content of the newspaper article was true or substantially true. Again, we agree.

Section 73.005 of the civil practice and remedies code provides that "[t]he 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 ANN. § 73.005 (Vernon 1986). In a summary judgment proceeding involving a media defendant in which First Amendment protections are applicable, a showing by the defendant-movant of the publication's substantial truth will defeat the non-movant's causes of action. See McIlvain v. Jacobs, 794 S.W.2d 14, 15 (Tex.1990); Lewis v. A.H. Belo Corp., 818 S.W.2d 856, 858 (Tex.App.--Fort Worth 1991, writ denied); Wavell v. Caller-Times Publishing Co., 809 S.W.2d 633, 636 (Tex.App.--Corpus Christi 1991, writ denied); see also Villasenor, 911 S.W.2d at 418; Tatum v. Liner, 749 S.W.2d 251, 256 (Tex.App.--San Antonio 1988, no writ) (affirmative defense to a charge of defamation is that the statement is true). The test used in determining whether a publication is substantially true involves considering whether the alleged defamatory statement was more damaging to the plaintiff's reputation, in the mind of the average reader or listener, than a truthful statement would have been. McIlvain, 794 S.W.2d at 16. As noted by the Texas Supreme Court, this evaluation necessarily involves looking to the "gist" of the publication. Id. If the underlying facts as to the gist of the defamatory charge are undisputed, then we can disregard any variance regarding items of secondary importance and determine substantial truth as a matter of law. Id. "It is not the function of the court to serve as a senior editor to determine if the reporting is absolutely, literally true; substantial truth is sufficient." Wavell, 809 S.W.2d at 636.

Dracos argues in his brief that with the exception of the statement he no longer works at KENS-TV, the entire article is false. More specifically, Dracos' Original Petition claims that the statement he departed KENS "just like that" is untrue because it implies he quit, resigned or left KENS without notice. Dracos claims he "had discussions with Bob Rogers, the News Director and his immediate supervisor, about his job." Further, Dracos claims that he "tried repeatedly to reach the general manager, Mike Conly, in an attempt to avoid having to leave his position." He also argues that the statement that Ms. DeLeon understood Dracos had "done that kind of thing before" is untrue because he "has always honored his contracts and agreements with all his employers," and has never been fired. Finally, Dracos maintains that statements by Bob Rogers, i.e., he was "in the dark about the departure" and there was "no communication whatsoever" between him and Dracos regarding the departure, are also untrue.

Dracos also calls our attention to deposition testimony from Bob Rogers, the station's news director, and Araceli DeLeon, the assistant news director, to the effect that Dracos was a good employee, did a good job, and maintained good work habits. He claims this summary judgment evidence refutes any allegations of irresponsible behavior.

A review of the summary judgment record, however, reveals that prior to his tenure with KENS which began in October 1991 and ended in September of 1993, Dracos had twice before been employed by KENS-TV, and had twice before left that position. During his entire tenure at KENS, Dracos reported directly to Bob Rogers, the KENS-TV news director. Dracos worked very closely with Rogers, his supervisor, regarding preparation of the "Eyewitness-Wants-to-Know" news segment, which appeared on the air two-to-three times a week. Dracos said that on September 22, 1993, the day he sent the letter to Mike Conly, he had been away from the office for a week, taking either vacation or compensation time. Dracos did not remember ever talking to Rogers--whom he saw on almost a daily basis--regarding job dissatisfaction, leaving the employment of KENS, or the feelings he conveyed in the letter to Conly. Dracos' position is that Rogers was "very well-informed that I was unhappy" because of Dracos' conversations with Conly, the general manager. Dracos remembered

complaining to Conly about Rogers "three times, four times" in the year prior to September of 1993. The complaints included topics such as salary, Rogers' editorial control over the "Eyewitness-Wants-to-Know" program, how the program would be promoted or advertised, who would answer the viewer mail, and whether Dracos would have business cards that "reflected my position" as a "commentator" with a "special segment." Although he could not recall anything specific, Dracos characterized Conly's reaction as a "verbal shoulder shrug." Dracos said he assumed his remarks were passed on to Rogers, Conly's subordinate. Dracos also remembered trying to call Conly before writing a letter, but that he was not available.

As for Bob Rogers, the summary judgment record establishes that he was "in the dark" about Dracos' departure. Rogers remembered receiving a telephone call from Jakle on the Thursday or Friday evening before the Saturday publication of Jakle's article. He recalled telling Jakle that he was "in the dark" about Dracos' departure and that there had been no communication between Rogers and Dracos prior to the departure. Rogers also testified that Dracos' letter to Conly came without warning and caught him completely by surprise. Rogers said he was at the time, and remains, "in the dark" as to why Dracos would suddenly write that he could "no longer work for Bob Rogers." Nor, according to Rogers, was there any communication between Rogers and Dracos prior to Dracos' letter to Conly. Rogers recalled that Dracos had not been in the KENS-TV building for at least a week prior to his written ultimatum to Conly. We also note that Dracos' letter itself states unequivocally that he "will not deal with Bob." The letter is directed to Conly, without a copy to Rogers.

Jakle also placed a telephone call to Araceli DeLeon on Friday, September 24 to inquire about Dracos' departure. DeLeon was the assistant news director at KENS-TV, a position she had held for only several weeks prior to Jakle's article, and a position which required her to schedule the work of on-air personalities, including Dracos. As an assistant news director, DeLeon worked closely with her supervisor, Bob Rogers, regarding the operation of the news department. She was not authorized to furnish information or recommendations regarding KENS employees or former employees. She also did not have any authority to hire or fire Dracos, or to supervise him. She did not remember telling Jakle that Dracos had quit, that he had departed "just like that," or that "I understand he's done that kind of thing before." Regarding the latter quotation, however, DeLeon's denial was more equivocal, because she recalled telling Jakle that Dracos worked at KENS before and then left for another job.

Even if DeLeon was somewhat misquoted, it does not change the substance of Jakle's article. Dracos no longer worked at KENS on September 25, 1993. In Masson v. New Yorker Magazine, 501 U.S. 496, 518, 111 S.Ct. 2419, 2432-33, 115 L.Ed.2d 447 (1991), the United States Supreme Court noted that there is no "special test" when one claims falsity in quotations. Rather, "[t]he common law of libel takes but one approach to the question of falsity, regardless of the form of the communication. [citations omitted] It overlooks minor inaccuracies and concentrates upon substantial truth." Id. See also Gertz v. Robert Welch, Inc., 418 U.S. 323, 341, 94 S.Ct. 2997 3007, 41 L.Ed.2d 789 (1974) ("Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties.").

In the present case, there is no question that Dracos wrote a letter to Mike Conly stating that he felt he could no longer work for Bob Rogers. Conly interpreted and accepted this letter as a letter of resignation. When Jakle's article was published Dracos was no longer employed by

KENS-TV. His departure was sudden and unexpected. The suddenness of the departure--"just like that"--is evidenced both by the quick exchange of correspondence and the fact that Dracos was obviously offended by the quick "acceptance" of his letter. As for the statement that Dracos had "done that kind of thing before," the statement says nothing, explicit or implicit, about whether Dracos was fired, or whether he gave any notice

before leaving KENS. It is undisputed that before his tenure of October, 1991 to September, 1993, Dracos was twice before employed by KENS-TV, and had twice before left that position.

Dracos also complains of Rogers' statements that he was "in the dark about the departure" and there was "no communication whatsoever" between Rogers and Dracos regarding his departure. But there is summary judgment evidence that this is true. Dracos, by his own admission, did not communicate with Rogers regarding the contents of his letter to Conly. Jakle's article, therefore, is true or substantially true.

Is Dracos a public figure?

Appellants' third point claims Dracos is a public figure for purposes of New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). This case held that a public official may not recover for defamation unless he shows "that the statement was made with 'actual malice'--that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Id. at 279-80, 84 S.Ct. at 726. Later, the Court applied this standard to public figures. See Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967).

In defining "public figures," courts have used the phrases "have assumed roles of especial prominence in the affairs of society"; "occupy positions of such persuasive power and influence"; "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved"; and "they invite attention and comment." Gertz v. Robert Welch, Inc., 418 U.S. 323, 345, 94 S.Ct. 2997 3009, 41 L.Ed.2d 789 (1974). Gertz created two classes of public figures in addition to government officials: general-purpose and limited-purpose public figures. Einhorn, 823 S.W.2d at 413. General-purpose public figures are those individuals who "achieve such pervasive fame or notoriety that [they] become a public figure for all purposes and in all contexts." Id. at 323, 94 S.Ct. at 3012. Such persons have assumed so prominent a role in the affairs of society that they have become celebrities. Tavoulareas v. Piro, 817 F.2d 762, 772 (D.C.Cir.), cert. denied, 484 U.S. 870, 108 S.Ct. 200, 98 L.Ed.2d 151 (1987). "Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life." Gertz, 418 U.S. at 352, 94 S.Ct. at 3013. Limited-purpose public figures achieve their status by "thrust[ing] themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved," Gertz, 418 U.S. at 345, 94 S.Ct. at 3009, or because they "voluntarily inject [themselves] or [are] drawn into a particular public controversy." Id. at 351, 94 S.Ct. at 3012. "In either case such persons assume special prominence in the resolution of public questions." Id. at 353, 94 S.Ct. at 3014. The relevant inquiry turns on "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." Id. at 352, 94 S.Ct. at 3013.

Whether an individual is a public figure is a matter of law for the court to decide, Rosenblatt v. Baer, 383 U.S. 75, 88, 86 S.Ct. 669, 677, 15 L.Ed.2d 597 (1966), but the examination is hardly governed by mechanical rules. Indeed, one frustrated jurist has compared defining a public figure to trying to nail a jellyfish to the wall. Rosanova v. Playboy Enterprises, Inc., 580 F.2d 859, 861 n. 2 (5th Cir.1978). One also is reminded of Justice Potter Stewart's often-quoted test for obscenity: "I know it when I see it." Jacobellis v. Ohio, 378 U.S. 184, 197, 84 S.Ct. 1676 1683, 12 L.Ed.2d 793 (1964).

In the present case, a defamation lawsuit involving a media defendant, we must try to "balance the competing interests of the public, the press, and the individual." Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1291 (1980).

From its earliest days, the law of defamation made the individual's interest in his reputation supreme. Beginning with New York Times, however, the Court recognized the hard reality that society must afford a certain amount of "strategic protection" to defamatory statements to avoid chilling the dissemination of truth and

opinions. Thus, these decisions do not insulate the defamer because of the value of his message as such. Rather, they give the media "breathing space" to ensure "that debate on public issues [is] uninhibited, robust, and wideopen," while accommodating the conflicting need of the individual to redress wrongful injury to his reputation.

Id. (Citations omitted). The need to avoid self-censorship by the news media is an important societal interest. In the words of Justice Lewis Powell, "a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship." Gertz, 418 U.S. at 341, 94 S.Ct. at 3007. And the prospect of an unfavorable jury award may further chill free expression.

The unlimited discretion exercised by juries in awarding punitive and presumed damages compounds the problem of self-censorship that necessarily results from the awarding of huge judgments. This discretion allows juries to penalize heavily the unorthodox and the unpopular and exact little from others. Such free wheeling discretion presents obvious and basic threats to society's interest in freedom of the press.

Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971) (Marshall, J., dissenting). It is for these reasons that courts must try to strike a balance between "the need for a vigorous and uninhibited free press and the legitimate interest in redressing wrongful injury." Gertz, 418 U.S. at 341, 94 S.Ct. at 3008. To again quote Justice Powell,

We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues. New York Times Co. v. Sullivan, 376 U.S. at 270, 84 S.Ct. at 721. They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight societal 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." Chaplinsky v. New Hampshire, 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031 (1942).

Id.

Bearing these principles in mind, we note that journalists and television reporters like Dracos, as well as other individuals who regularly comment on public affairs, have often been considered public figures for purposes of the New York Times standard. See, e.g., Falls v. Sporting News Publishing Co., 714 F.Supp. 843, 847 (E.D.Mich.1989), affirmed without opinion, 899 F.2d 1221 (6th Cir.1990) (Sports columnist who made radio, television, and speaking appearances was a public figure "with regard to his sports writing activities"); Loeb v. Globe Newspaper Co., 489 F.Supp. 481, 485-86 (D.Mass.1980) (Newspaper publisher's description of himself as " 'a publisher who regularly takes strong stands on controversial issues ... [and who] invites expression of contrary opinion' " "neatly fits the Supreme Court's recent definition of public figures: '[those who] have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved ... [and who] invite attention and comment' "); Loeb v. New Times Communications Corp., 497 F.Supp. 85, 88 (S.D.N.Y.1980) (Same newspaper publisher's "outspoken criticism of prominent politicians and celebrities in diverse fields has frequently made him the target of national and regional media coverage"); Adler v. Conde Nast Publications, Inc., 643 F.Supp. 1558, 1564 (S.D.N.Y.1986) ("We find that Adler's general fame or notoriety in the literary and journalistic community and her pervasive involvement in the affairs of society render her a public figure with regard to her activities relating to literature, journalism and criticism"); O'Donnell v. CBS, Inc., 782 F.2d 1414, 1417 (7th Cir.1986) (Vice president and general manager of radio station who used his editorial position to advocate a particular

point of view regarding an EPA controversy became a limited purpose public figure with respect to that controversy, including comment upon his being fired from the position through which he sought to influence that controversy); Lerman v. Flynt Distributing Co., Inc., 745 F.2d 123, 137 (2d Cir.1984), cert. denied, 471 U.S. 1054, 105 S.Ct. 2114, 85 L.Ed.2d 479 (1985) (Author of nine novels who waged "organized and ongoing effort to maintain media access in order to call attention to her writings and disseminate her views" was limited purpose public figure with respect to statements about her involvement in writing books and plays); Stolz v. KSFM 102 FM, 30 Cal.App.4th 195, 35 Cal.Rptr.2d 740, 745-46 (1994), cert. denied, --- U.S. ----, 116 S.Ct. 79, 133 L.Ed.2d 37 (1995) (Owner, operator and general manager of Sacramento radio station was general purpose public figure "by virtue of occupying a position of general fame and pervasive power and influence in the community," ability "to reach a wide audience," selection and presentation of public affairs programs, and voluntary exposure to public scrutiny); Knudsen v. Kansas Gas And Electric Co., 248 Kan. 469, 807 P.2d 71, 78 (1991) (Free-lance journalist's story on local utility, published in Kansas City Star, written in an "investigatory tone to create a public controversy," transformed him into a public figure because he "voluntarily injected himself into the public's attention"); Rybachek v. Sutton, 761 P.2d 1013, 1014 (Alaska 1988) (Biweekly columnist who used her column to express her views on mining and natural resources issues was a public figure with respect to her columns); Warner v. Kansas City Star Co., 726 S.W.2d 384, 385 (Mo.Ct.App.1987) (Outdoor editor of Kansas City newspaper who had "regularly written prominently featured articles for the outdoor section of the newspaper, of which he was identified, by name and title, as the author," and who received numerous journalistic awards and

"invited public attention to himself and to his views," was a public figure for purposes of an article concerning his discharge for alleged conflict of interest violations); Maule v. NYM Corp., 76 A.D.2d 58, 429 N.Y.S.2d 891, 892-93 (N.Y.1980) (Writer for Sports Illustrated, who had made numerous television appearances, wrote 28 books on sports, received awards for his writing, and sought to "project his name and personality before millions," was a public figure, precluding his recovery for statement that he was "quite possibly the worst writer on the magazine").

Like other journalists, reporters and media personalities, Dracos has vigorously sought and achieved publicity for his journalistic efforts. His "Eyewitness-Wants-to-Know" series, for example, was a highly rated news segment and made Dracos a household name in the area reached by the Express-News. As a television journalist, he has enjoyed regular and continuing access to the news media. In Dracos' own words, he "developed highly popular and innovative news segments, both nationally and locally." His "Eyewitness-Wants-to-Know" segment on KENS-TV became "one of the highest rated news segments in San Antonio" and "received more viewer response than any other news segment in the South Texas market." The "Eyewitness-Wants-to-Know" format was also highly accusatory in nature. To be the subject of one of these programs was not good news to the individual involved. There were no compliments, and the criticisms were harsh. Both private and public figures were put on the rack by Dracos, who did not hesitate to lay on the verbal whip. In short, it was a fine example of the power and freedom of a vigorous free press. It is somewhat ironic that Dracos is so offended by this rather innocuous, and substantively true, article by Jakle. As a successful and well-known journalist, he enjoyed access to the media--and the self-remedy of rebuttal--which is not available to the ordinary citizen. See Gertz, 418 U.S. at 345, 94 S.Ct. at 3009 ("Public officials and public figures enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements then private individuals normally enjoy.")

Dracos has been frequently featured in San Antonio newspapers. For example, he was the topic of Jakle's column in November of 1988, when he publicly charged the San Antonio Police Department (SAPD) "brass" of playing golf during working hours. According

to Jakle's article, the SAPD conducted a "top-to-bottom probe" but found no evidence of such "departmental goofing off." Also according to the article, Dracos declined the department's invitation to submit facts to support his allegations. Dracos also made Jakle's column in October of 1988 with an "Eyewitness-Wants-to-Know" report on a wheelchair-bound woman who wanted to serve on a jury but was excused anyway by the judge because of her handicap. According again to Jakle's article, Dracos did not merely report the events or interview the participants; he met with the woman "and took her to confront the judge." The summary judgment record also contains a photocopy of a Jakle column discussing an "Eyewitness-Wants-to-Know" report on landfills on the east side of San Antonio. Jakle's column--the date is unclear--questions the accuracy of Dracos' reporting, concluding that while the audience was "given a sequence of aerial photos of landfills," "presumably garbage dump sites," "there was apparently no effort made to determine what was dumped there." The article noted that while Dracos was unavailable for comment, he had previously argued that his segments "are supposed to be editorials."

This is not the first time Dracos has been before our courts. After his second tenure with KENS ended in November of 1988, Dracos sued Jakle and the Express-News concerning the following article by Jakle, which was published on January 5, 1989:

"Eyewitness Wants to Know" reporter Ted Dracos is history.

Four weeks ago, a 40-ish Ted reportedly stormed out of KENS after a disagreement with News Director Bob Rogers. He's been off the air ever since. After two weeks of explaining his absence as "vacation," PR Director Susan Korbel finally confirmed Wednesday that Dracos is gone for good.

The inside report is that Rogers was unhappy with some of the stuff Dracos had been putting on the air.

Their confrontation took place soon after a piece I did that asked why Dracos didn't retract his charge that police were playing golf on taxpayer time when he had no facts to back it up.

Criticism appeared elsewhere about a Dracos landfill piece; there, Rogers was even dumped on.

Meantime, stop calling 554-4435--Ted Dracos' "Eyewitness Wants to Know" line--with your news tips.

During this prior litigation, Dracos' attorney signed an agreed order, on May 10, 1990, which was entered in response to a motion for a protective order filed by KENS-TV and certain KENS employees, and a motion filed by the Express-News and Jakle to compel KENS to produce testimony and documents. At the bottom of the order, which denies KENS's request for a protective order and grants the motion to compel, there is the following handwritten notation:

The parties to this lawsuit have stipulated as evidenced by the signature of their counsel to this order that for the purposes of this lawsuit the Plaintiff was a public figure as that term is defined by the United States Supreme Court in the cases of New York Times v. Sullivan and Gertz v. Welch. Based on that stipulation the Defendants have withdrawn their request for the KENS-TV documents relating to the popularity of the Eyewitness Wants to Know program prepared by Plaintiff. Defendants also agree that their request for all documents relating to Ted Dracos not previously produced by KENS-TV will be satisfied by the production of any further documents discovered after a reasonable and diligent search and an affidavit from an appropriate officer of KENS stating under oath that such reasonable and diligent search has been made.

The order is signed by Dracos' counsel and counsel for KENS-TV. During the hearing Dracos' counsel also stated:

We wish that Mr. Dracos would not be a public figure, but unfortunately, I think that we are left with the fact that he was a public figure at the time of the publications by Ms. Jakle. So yes, I think we would agree and could stipulate to the fact that he is a public figure.

(Emphasis added).

While Dracos' judicial admission in that case may not control the outcome of this

case, it is a fact that he has conceded on one occasion he was a public figure "as that term is defined by the United States Supreme Court," at a time when he was performing the same job (investigative reporter and commentator), and doing the same work ("Eyewitness-Wants-To-Know"), for the same employer (KENS-TV). It is at least evidentiary support for appellants' argument that Dracos was a public figure at the time the Express-News published Jakle's September, 1993 article.

Dracos' own pleadings and testimony also support the idea that he is a public figure. By his own admission, he was more than a television journalist--he was a "commentator" with a "special" news segment. According to Dracos' Original Petition, he "has received many awards, and developed highly popular and innovative news segments, both nationally and locally." Moreover, "[h]is 'Eyewitness-Wants-To-Know' segment on KENS-TV became one of the highly rated news segments in San Antonio within the first six months of its airing." As a journalist and self-described public commentator, Dracos cannot hold himself out as a popular television personality and yet deny he is a public figure for purposes of the New York Times standard and the First Amendment. He cannot, in other words, have it both ways--stepping into the limelight as a public commentator, yet avoiding it for purposes of defamation law and the First Amendment. Given the summary judgment record in this case, we therefore hold that Dracos was a public figure at the time the Express-News published Jakle's September, 1993 article.

Having determined that Dracos was a public figure for purposes of the New York Times standard, we must now determine whether the Express-News and Jakle acted with actual malice as a matter of law. "Actual malice, as used in defamation cases, is a term of art which is separate and distinct from traditional common law malice." Casso v. Brand, 776 S.W.2d 551, 558 (Tex.1989). A public official or public figure cannot recover damages for defamation unless he proves by clear and convincing evidence that the defendant published false and defamatory statements about him with actual malice. See Casso, 776 S.W.2d at 554; see also Brady v. Cox Enter., Inc., 782 S.W.2d 272, 275 (Tex.App.--Austin 1989, writ denied); Freedom Communications, Inc. v. Brand, 907 S.W.2d 614, 615 (Tex.App.--Corpus Christi 1995, no writ). Actual malice does not include ill will, spite or evil motive. Casso, 776 S.W.2d at 558; Freedom Communications, 907 S.W.2d at 620. Rather, it is the making of a statement with knowledge that it is false or with reckless disregard of whether it is true. Carr v. Brasher, 776 S.W.2d 567, 571 (Tex.1989). The complainant in a defamation case must show that the declarant knew the statements were false or that the declarant acted with reckless disregard of whether they were false or not. Casso, 776 S.W.2d at 559 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 279-80, 84 S.Ct. 710, 725-26, 11 L.Ed.2d 686 (1964)); see also Freedom Communications, 907 S.W.2d at 619; Martin v. Southwestern Elec. Power Co., 860 S.W.2d 197, 199 (Tex.App.--Texarkana 1993, writ denied); Johnson v. Southwestern Newspapers Corp., 855 S.W.2d 182, 187 (Tex.App.--Amarillo 1993, writ denied).

Courts have defined "reckless disregard" as a high degree of awareness of probable falsity, for proof of which the plaintiff must present "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731, 88 S.Ct. 1323 1325, 20 L.Ed.2d 262 (1968); Freedom Communications, 907 S.W.2d at 620; see also Carr, 776 S.W.2d at 571; Casso, 776 S.W.2d at 558; Brady, 782 S.W.2d at 276. A statement could also be defamatory by implication. Mitre v. Brooks Fashion Stores, Inc., 840 S.W.2d 612, 620 (Tex.App.--Corpus Christi 1992, writ denied).

But "actual malice can neither be 'inferred from falsity' of the challenged statement alone, see Martin, 860 S.W.2d at 200, nor from the frequency of a publisher's criticism of a public official's performance." Freedom Communications, 907 S.W.2d at 620.

Jeanne Jakle's affidavit, in addition to the other summary judgment evidence--Bob Rogers' post-publication testimony and the exchange of correspondence between

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Dracos and the management of KENS-TV--establishes that she either believed the statements in her article were true or did not have a high degree of awareness as to their falsity. A defendant's affidavit setting forth the absence of actual malice is sufficient to carry the movant's summary judgment burden of proof. Casso, 776 S.W.2d at 558; Carr v. Brasher, 776 S.W.2d at 571; Channel 4, KGBT v. Briggs, 759 S.W.2d 939, 941-42 (Tex.1988).

Even if Araceli DeLeon was misquoted, this fact is of no consequence. In Masson, for example, the Supreme Court recognized that alteration of words does not equate with knowledge of their falsity unless there is "a material change in the meaning conveyed by the statement." 501 U.S. at 517, 111 S.Ct. at 2433. In this case, the thrust of the Express-News story was that Dracos was no longer employed by KENS-TV, that he had left of his own will, i.e. "quit," and that the departure was sudden, i.e. "just like that." The summary judgment evidence confirms this to be true or substantially true; and Jakle's affidavit, when considered alongside the other summary judgment evidence, confirms that she thought the information was true when she reported it.

To overcome Jakle's affidavit and the other summary judgment evidence, Dracos had to offer specific, affirmative proof to show that the Express-News and Jakle either knew the publication was false or entertained serious doubts as to its truth. Howell v. Hecht, 821 S.W.2d 627, 631 (Tex.App.--Dallas 1991, writ denied). This, Dracos has clearly failed to do. Indeed, there is no competent summary judgment evidence that rebuts the defendants' proof. For this reason alone, appellants are entitled to judgment as a matter of law.

The judgment of the trial court is reversed. The cause is remanded to the trial court for further proceedings consistent with this opinion.

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1 Hart-Hanks Communications, Inc. is the parent company of Hart-Hanks Television, Inc., which owns and operates KENS-TV.

889 S.W.2d 467
Marcy T. ROGERS, Appellant,
v.
The DALLAS MORNING NEWS, INC., A.H. Belo Corp., Olive Talley, and Dolores A. Hutcheson, Appellees.
No. 05-93-00689-CV.
Court of Appeals of Texas,
Dallas.
Sept. 30, 1994.

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Frank Gilstrap, James V. Cornehls, Dallas, for Appellant.

William D. Sims, Jr., Steven T. Baron, Paul C. Watler, Dallas, for Dallas Morning News, A.H. Belo Corp. and Olive Talley.

Lewis R. Sifford, Robert L. Harris, Dallas, for Dolores A. Hutcheson.

Before McGARRY, EVANS [1] and NYE [2], C.JJ.

OPINION

EVANS, Chief Justice (Assigned).

This is an appeal from a summary judgment entered against Marcy Rogers on her claims against the Dallas Morning News (the "News"); a News reporter, Olive Talley; A.H. Belo Corporation; and Dolores A. Hutcheson. In her petition, Rogers alleged, among other causes of action, a claim for libel based on twelve newspaper articles written by Talley and published by the News in 1991. The trial court granted summary judgment in favor of all defendants. In her first four points of error, Rogers contends that the trial court erred in granting summary judgment on her libel claim because: (1) the published statements were false; (2) the published statements were defamatory; (3) a fact issue existed regarding whether she acted with malice; and (4) the published statements were not privileged. In her fifth point of error, Rogers contends that the trial court erred in denying her motion for continuance. In her final two points of error, Rogers complains of the summary judgment granted on her non-libel claims. For the reasons set forth below, we overrule Rogers' points of error and affirm the judgment of the trial court.

FACTS

In 1972, when Rogers was 20 years old, she worked for a Virginia surgeon who specialized in surgically correcting head and facial deformities in children. Because those children often experienced psychological problems, Rogers decided to earn a masters degree in counseling. In 1976, Rogers moved to Dallas and began working for Dr. Kenneth Salyer, the first physician to perform craniofacial surgery in the Southwest. She also began working on her studies for a Ph.D. degree. In 1981, she and Salyer formed the Foundation for Craniofacial Deformities to facilitate the treatment, education, and research of craniofacial deformities in children. In 1983, Rogers and

Salyer married, and in 1985, she was named president of the foundation. Because of the Salyers' prominence in Dallas' social and philanthropic circles, they were able to raise substantial contributions for the foundation and their efforts gained national attention. In 1988, the foundation was renamed the National Craniofacial Foundation ("NCF"). The Salyers were divorced the same year, and soon afterward, Rogers resigned as president of the NCF.

In 1989, Rogers formed the International Craniofacial Foundation ("ICF") to sponsor information and research programs and to assist children who were unable to afford reconstructive surgery. Rogers financed this new organization with her own funds, totaling some $250,000, which included some of the money she received in her divorce settlement. ICF often accomplished its goals by arranging for others to donate services. Thus, if a child was not insured or not fully insured, ICF would ask the hospital or surgeon to donate the uninsured portion of their services. Among others helped by ICF's sponsorship were twelve Soviet children who were provided craniofacial surgery. ICF

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also negotiated an agreement with the Soviet Children's Fund to "help the Soviets create and equip craniofacial centers and to help the fellowship train Soviet doctors in the U.S." In April 1990, a team of Soviet health officials came to Dallas to visit hospitals treating people with facial deformities. The News reported this tour to be a joint effort between the ICF and the Soviet Children's Fund.

Rogers recruited a number of celebrities to serve as ICF honorary officers and board members. Among those appointed to the Board were Cher, Senator Robert Dole, Dallas Mayor Annette Strauss, and Dallas businessmen G. Ray Miller (who served as board president) and Henry S. Miller, III.

Rogers also staged a series of public events to raise ICF's profile. Although these events did not generally generate significant financial returns, Rogers believed they were necessary to create a community awareness, recruit contributors, and demonstrate the need for private funding. In early 1990, Rogers arranged for Dick Clark to host a fund-raiser in Dallas. She recruited a local fund-raiser, the defendant Dolores ("Dee") Hutcheson, to serve as chairperson of the event. In March 1990, the Dick Clark "Rock Around the Clock" fund-raiser was publicly announced, and a local newspaper ran a picture of Rogers, Dick Clark, Dee Hutcheson, and G. Ray Miller.

During the months that followed, a rift developed between Rogers and Hutcheson over the management of the Dick Clark Rock Ball. Hutcheson wanted the affair to be a black-tie, sit-down dinner but that idea was at odds with the Dick Clark format. As the conflict escalated, Hutcheson complained that the Rock Ball contributions were not being deposited into a separate bank account. Hutcheson resigned as chairperson in August 1990, later expressing concerns that Rogers had been using ICF funds for personal purposes. She said that she had heard similar rumors from a former News gossip columnist, John Hawkins, and that she had suggested to Hawkins that he contact the News and the Dallas Times Herald about her resignation. Hutcheson apparently wanted the Dallas newspapers to publish "some article" showing that she was no longer associated with the Dick Clark Ball.

A reporter from the Dallas Times Herald interviewed Hutcheson and Salyer and concluded the dispute was personal and not newsworthy. The News, according to Hutcheson, said they

could not do an article unless the story came through the District Attorney's office or "had been investigated." In 1990, Hutcheson filed a formal complaint with the District Attorney suggesting the "suspected misuse of charitable funds."

The News assigned the story to one of its reporters, the defendant, Olive Talley. [3] Talley first interviewed Hutcheson, and a month or so later, started interviewing members of the board of Salyer's new organization, Child Works. In mid-December 1990, Talley called Rogers and said she wanted to do an article comparing ICF with Child Works and asked to see ICF's financial records. She assured Rogers she was not "trying to do a negative piece." The next day, Talley interviewed Rogers for about two hours. During the interview, Rogers was cooperative but apparently reluctant to discuss her divorce with Salyer or his new organization. In February 1991, Talley conducted a longer interview with Rogers and was given an ICF internal document entitled "Patient Assistance In-Kind and Cash Donations 1989-1990." Rogers explained that this document and other ICF internal financial records were unaudited and that their data should not be considered the "final truth" because they were the subject of a pending audit. Rogers promised to make the audit available to Talley as soon as it was released.

In March 1991, Rogers staged a fund-raising tea at the Mansion on Turtle Creek, which had as its focus the surgery of a craniofacially deformed child, Maree Matejic. Cher had paid for Maree's surgery through the ICF and had come to Dallas for the

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surgery and to attend the event at the Mansion. During the course of the tea, Talley approached one of the mothers of a child being assisted by ICF. She told the mother that she did not want Rogers to know she was being investigated because it would give her an opportunity to cover her tracks. She then told her that she had evidence that Rogers was misusing ICF funds for personal expenses. She asked the mother how she felt about having her son "paraded in front of all these rich people, while knowing he had not been helped by ICF." The mother responded by telling Talley about the help ICF had given her child. She then admonished Talley to examine things more closely before making such accusations.

In April 1991, Rogers received the audit report and immediately called Talley. When Talley saw the report, she became agitated because the figures were different from those she had seen earlier. She said that her story was to be published two days later on April 14, 1991, and she demanded to know why she had not been provided the information earlier. [4]

On Sunday, April 14, 1991, Talley's copyrighted eight-page article entitled "Image vs. Reality" appeared in the News. It was the first of twelve articles written by Talley about Rogers and the ICF. Because this article is the primary focus of Rogers' libel claims, we have copied it verbatim despite its considerable length. The highlighted statements are those that Rogers contends are false. [See Appendix.]

LIBEL CLAIM

Rogers' Contentions

In her first point of error, Rogers discusses each of the highlighted portions of the News article and explains why she considers those statements to be false:

1. News' Statement: "Contrary to the perception left among some in the crowd, none of ICF's funds underwrote any of the surgeries for the children Ms. Rogers presented at the Mansion."

Alleged Falsity: Rogers contends this statement is false because Maree Matejic's surgery was arranged through ICF and she was presented at the event in absentia. Rogers also points to summary judgment evidence showing that ICF was responsible for the surgery of several other children presented at the affair, and argues that the News failed to offer conclusive proof that no ICF funds were used to underwrite any of the surgeries.

2. News' Statement: "In June 1989, for example, the foundation spent $6,000 to produce a song and record about ICF. The music was recorded, but only two records--both of them gold like the kind commemorating top-selling albums--were made 'for show,' Ms. Rogers said. One was given to a donor. The other hangs in the front office of ICF."

Alleged Falsity: Rogers contends the News failed to produce any evidence showing this statement to be true, and argues that there is in fact summary judgment evidence showing the statement to be false. According to Rogers, when she was interviewed by Talley, on February 14, 1991, she advised her that $6,000 had been used to produce a music video, which ICF used repeatedly in fund-raising. She points out that Talley's interview notes confirm this conversation.

3. News' Statement: "The March 14 tea for Cher is the most recent event in which the charity has spent more on promotions than on medical care or support for its clients." [5]

Alleged Falsity: Rogers contends that when in-kind contributions are taken into consideration, the amount spent on patient assistance far exceeds the amount spent on fund-raising, and that this discrepancy in reporting is reflected in the summary judgment evidence. Thus, she submits, a jury could reasonably conclude from the evidence that the reporter's statement was false.

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4. News' Statement: "The Dick Clark Rock Ball, the organization's largest gala ever, left the charity with many unpaid bills, including a $36,000 debt to the Grand Kempinski Hotel."

Alleged Falsity: Rogers contends there is summary judgment evidence showing that ICF did not owe $36,000 to the Grand Kempinski Hotel and that ICF disputed this claim. Thus, she argues, a jury could reasonably find that $36,000 was not owed as stated in the News article.

5. News' Statement: "Ms. Rogers said her expenses in 1988 totaled about $18,000, which 'in my mind, you know, didn't really amount to a lot' in comparison to the nearly $700,000 she said she raised for the foundation that year."

Alleged Falsity: Rogers denies making this statement and contends a jury could reasonably find the reporter's statement to be false.

6. News' Statement: "But the public wouldn't suspect that the charity was so debt-ridden, based upon the image carefully cultivated by its dynamic 39-year-old founder, who describes herself as 'flashy'."

Alleged Falsity: Rogers refers us to her deposition testimony to support her contention that the News statement was untrue. She points out that her use of the term "flashy" during her deposition referred to the perception that other people had of her, not of how she viewed herself. [6] Thus, she argues, a jury could reasonably find the reporter's statement to be false.

With respect to the second News article, published April 16, 1990, Rogers complains of the following statement by Talley:

The charity said it has provided $427,319 in cash and services toward care for patients in 1989 and 1990. Of that amount, ICF spent only $30,000 in cash, or about 10% of the charity's cash revenues for the same period.

Rogers claims that this statement was false because the preliminary audit shows the total spent on patient assistance to be $113,445, not $30,000 as alleged by the News. According to Rogers, this represents 43% of total cash revenue, not 10% as the News reported. Thus, she contends, this is some evidence that the News statement was false.

In support of her contention that the statements were defamatory, Rogers points to the statutory definition of libel set forth in TEX.CIV.PRAC. & REM.CODE ANN. § 73.001 (Vernon 1986). Section 73.001 reads as follows:

A libel is a defamation expressed in written or other graphic form that 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, integrity, virtue, or reputation ... and thereby expose the person to public hatred, ridicule, or financial injury.

Id. (emphasis added).

Rogers argues that the allegations in Talley's articles injured her reputation because they suggested that Rogers had used the plight of deformed children to raise money which was later squandered on glitzy fund-raising galas. She claims that the News articles (1) led her readers to a conclusion of chicanery, if not outright fraud; and (2) caused the State Attorney General's office to begin its investigation of ICF. Further, Rogers asserts that Talley used false information to enhance her misleading portrait of Rogers, suggesting: (1) that ICF used only 10% of its funds to aid children; (2) that the Rock Ball had incurred a deficit; and (3) that Rogers had spent money on publicity stunts, such as $6,000 for a pair of gold records. Finally, Rogers complains of Talley's description of ICF's false image as being "based on the image carefully cultivated by its dynamic 39-year-old founder who describes herself as 'flashy'." To emphasize this point, Rogers refers to Talley's last article which described

the ICF's Third Annual Kid's Christmas Party as low-key and "in stark contrast to the past when ICF's glitzy, high-dollar events placed Ms. Rogers squarely in the spotlight."

The eleven News articles succeeding the April 14, 1991 article are of a similar vein to the lead article, but those reports concentrate on the attorney general's investigation of ICF. Suffice it to say that all twelve articles tend to contrast ICF's "image," as depicted by Rogers, with the "reality" of its charitable achievements.

Because we conclude that the summary judgment record conclusively shows that the News articles, considered in their entirety, are substantially true, we find it unnecessary to consider the factual accuracy of each of the highlighted statements. Thus, although the defendants have responded to each of Rogers' arguments in lengthy detail, we need not repeat their arguments here.

Standard of Review

The standard for reviewing summary judgments is well-established. The movant for summary judgment has the burden of showing there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. See Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 548-49 (Tex.1985). In deciding whether there is a disputed material fact issue preluding summary judgment, we must take evidence favorable to the non-movant as true. Id. We must indulge every reasonable inference in favor of the non-movant and resolve any doubts in its favor. Id.

The purpose of the summary judgment rule is to eliminate patently unmeritorious claims or untenable defenses. See Gulbenkian v. Penn, 151 Tex. 412, 252 S.W.2d 929, 931 (1952). The summary judgment rule does not provide for a trial by deposition or affidavit. The rule provides a method of summarily ending a case that involves only a question of law or no genuine issue of fact. See Gaines v. Hamman, 163 Tex. 618, 358 S.W.2d 557, 563 (1962). The rule is not intended to deprive litigants of their right to a full hearing on the merits of any real fact issue. See Gulbenkian, 151 Tex. 412, 252 S.W.2d at 931.

Applicable Law

To recover on her claim for libel, Rogers was required to prove that the defendants published a false, defamatory statement about her. See McIlvain v. Jacobs, 794 S.W.2d 14, 15 (Tex.1990); Carr v. Brasher, 776 S.W.2d 567, 569 (Tex.1989); A.H. Belo Corp. v. Rayzor, 644 S.W.2d 71, 79 (Tex.App.--Fort Worth 1982, writ ref'd n.r.e.). [7] In Texas, the truth or falsity of a libel defendant's statement is determined by using the "substantial truth" test. McIlvain, 794 S.W.2d at 15-16. Under that test, we must examine the twelve articles, in their entirety, and decide whether the summary judgment record conclusively shows that the "gist" of the articles is substantially true. Id at 16. This evaluation requires us to determine whether, in the mind of the average reader, the alleged defamatory statements were more damaging to Rogers' reputation than truthful statements would have been. Id. If we conclude that the underlying facts as to the gist of the defamatory charges are undisputed, then we may disregard "any variances with respect to items of secondary importance," and decide, as a matter of law, that the articles are substantially true. Id. If we decide, as a matter of law, that the News articles are substantially true, our inquiry ends and we must affirm the trial court's summary judgment. Lewis v. A.H. Belo Corp., 818 S.W.2d 856, 858-861 (Tex.App.--Fort Worth 1991, writ denied).

Application of Law to Facts

The summary judgment record in this case consists of nine volumes of transcript and contains more than 2600 pages of evidence.

After examining the News articles in light of this extensive record, we conclude that the underlying facts as to the gist of the articles are undisputed and, disregarding any variances with respect to items of secondary importance, we determine as a matter of law that the articles are substantially true. See McIlvain, 794 S.W.2d at 16. Although Rogers may disagree with the accuracy of isolated passages, she has not challenged the underlying facts constituting the gist of the defamatory charges, and those undisputed facts are conclusively established by the summary judgment evidence.

The April 14, 1991 News article, and all those that followed it, focus on the "image" (as distinguished from "reality") of ICF and its founder as a legitimate charitable enterprise.

The News articles described Rogers' history as president of NCF, her ex-husband's foundation, and reported her eventual resignation from that post in the wake of rumors regarding her alleged misuse of NCF funds and her penchant for lavish entertaining. The articles also reported allegations of similar misuse of ICF funds and quoted ICF board members and former employees regarding Rogers' extravagant and wasteful spending of ICF funds.

A former ICF board member (who was also ICF's largest single contributor) was reported in the News article as saying it was a "valid complaint" for people to criticize the foundation's chaotic finances. He reportedly told Rogers that they "had to become a little more professional in [their] operation." A former employee was reported as saying that Rogers' penchant for poorly planned promotions and fund-raisers kept the charity in the red. She said Rogers always wanted the biggest and the best, despite the fact she was representing a non-profit organization. The criminal complaint filed by Hutcheson with the District Attorney's office gave the following explanation for filing the complaint:

Numerous people have indicated that [Rogers] should be investigated, but no one has come forth. Therefore, I take it upon myself to request an investigation because I am concerned that the money given in good faith, not only by Dallasites, but by people throughout the U.S., may not go for the purpose given, which is for corrective surgery for facially deformed children.

The April 14 article concludes with a reported interview with ICF's new financial officer, who admitted that ICF's reputation in Dallas' social circles was "somewhat negative," but said he was committed to getting the charity back on track financially. According to the News article, Rogers had the same objective: "My goal for '91 is to get my hands around every dollar, where it goes and what it's for and to be able to be a better hands-on kind of person ... I would challenge anyone to do what we've done in two years against adversity." On this note, the News article ends.

In essence, the News articles raised questions about Rogers' financial competency as ICF's chief executive officer and about whether she had misled the public about ICF's charitable achievements. The summary judgment record shows the News articles to be founded on facts that, except for isolated discrepancies in matters of secondary importance, are undisputed. We conclude, therefore, that the defendants conclusively established the substantial truth of the News articles, and that the trial court properly entered a take-nothing summary judgment as to Rogers' libel claim. See McIlvain, 794 S.W.2d at 15-16. Consequently, we overrule Rogers' first point of error.

Our holding with respect to the first point of error makes it unnecessary for us to consider Rogers' second (statements defamatory), third (fact issue on malice), and fourth (statements not privileged) points of error. TEX.R.APP.P. 90(a).

CONTINUANCE

In her fifth point of error, Rogers claims the trial court erred in overruling her motion for continuance, asserting that this prevented her from investigating the authenticity of audio cassette tapes produced by the News defendants. In the court below, Rogers argued that discrepancies between the tape recordings raised questions of evidence tampering, and she therefore sought to postpone

the summary judgment hearing so that experts could examine the tapes.

We need not address the propriety of the trial court's decision to deny the requested continuance. Our decision regarding the substantial truth of the articles is dispositive of the appeal; thus, the authenticity of the tapes is not an issue that we need decide. TEX.R.APP.P. 90(a). We note, however, that by the time Rogers moved for this continuance, the trial court had already granted four continuances, albeit three by the parties' agreement. The decision whether to grant yet another continuance was a matter peculiarly within the court's discretion. See State v. Wood Oil Distrib., Inc., 751 S.W.2d 863, 865 (Tex.1988). Rogers has not shown the court's decision to be an abuse of discretion. Rogers' fifth point of error is overruled.

NON-LIBEL CLAIMS

In her final two points of error, Rogers contends the trial court erred in granting summary judgment on her "non-libel" claims of civil conspiracy, intentional infliction of emotional distress, and tortious interference with contract. Rogers first argues that the News defendants failed to move for summary judgment on her non-libel claims, and that the summary judgment granted in their favor should therefore not have disposed of those claims. We overrule this contention.

In their supplemental motion for summary judgment, the News defendants asserted that the summary judgment proof conclusively established the truth of the News articles and showed that "the News accurately reported the questionable financial dealings with ICF under the stewardship of Ms. Rogers." In their supplemental motion, the News defendants prayed that the court grant a summary judgment on all claims asserted by the plaintiff. We conclude that the News defendants' supplemental motion sufficiently presented the non-libel claims and that the trial court was therefore justified in disposing of Rogers' non-libel claims. See McConnell v. Southside I.S.D., 858 S.W.2d 337, 341 (Tex.1993).

Next, Rogers argues that the trial court erred in granting summary judgment on any of her non-libel claims. Again, we disagree. Rogers' non-libel claims were all grounded on her libel cause of action. Thus, in order to recover on the non-libel claims, Rogers had to prove the falsity of the alleged defamatory articles. See Hustler Magazine v. Falwell, 485 U.S. 46, 56, 108 S.Ct. 876, 882, 99 L.Ed.2d 41 (1988); Eimann v. Soldier of Fortune Magazine, Inc., 680 F.Supp. 863, 866 n. 3 (S.D.Tex.1988). Because we have previously found the News articles to be substantially

true, we conclude that Rogers failed to meet the condition precedent to recovery on her non-libel claims. Thus, we conclude that the court properly granted summary judgment as to Rogers' non-libel claims. Rogers' sixth and seventh points of error are overruled.

The judgment of the trial court is affirmed.

APPENDIX

EXHIBIT 1

The Dallas Morning News

Sunday, April 14, 1991

IMAGE VS. REALITY

High-profile charity awash in debt; founder defends expenses, operations

By Olive Talley

Staff Writer of The Dallas Morning News

When Cher finally arrived, almost two hours late at The Mansion on Turtle Creek, Marcy Rogers unabashedly stole one of her lines.

Ms. Rogers, charting her own "rise and fall, and rise again" in Dallas philanthropy, told the $100-a-seat crowd: "Whatever you've heard about me, you haven't heard enough."

With Cher, the glitziest of her volunteers seated beside her at the head table, Marcy Rogers was about to embark on one of the grander moments in the frenetic history of her International Craniofacial Foundations Inc.

One by one, Ms. Rogers introduced six children, each of whom has lived with badly

deformed faces. She asked the children how many operations they had undergone; each time, the audience gasped. "Seven," said Katie. "Fourteen," said Jeannelle.

"To think that the only thing that keeps these kids from being able to be helped to live a normal life is money," Cher told the crowd moments later.

"They don't need a cure, they just need the money. Their parents can't possible afford this kind of money for an operation."

Nor could Ms. Rogers' International Craniofacial Foundations Inc.

Contrary to the perception left among some in the crowd, none of ICF's funds underwrote any of the surgeries for the children Ms. Rogers presented at The Mansion.

In each of the six cases, the families and their insurance companies paid for the operations. In most cases, the surgeries were performed even before Ms. Rogers created ICF in February 1989.

Ms. Rogers said later that the children were introduced only so that "people could see them as people"--not necessarily as examples of her charity's work.

"We've done incredible things," Ms. Rogers said of the organization's two-year existence. "It's easy to sit back and criticize, but we're creating a first here. I hope to learn from our mistakes and grow from them.

"Someone once said, 'They only shoot arrows at pioneers.' "

Carolyn Shamis, a prominent real estate broker, was in the audience that afternoon last month.

"It was powerful to see the children and to understand exactly what you're giving money for," said Ms. Shamis, who at the time was moved to tears.

But when the socialite real estate broker later learned that the Dallas charity had not paid for the surgeries, Ms. Shamis said: "I took it that those were the children that got fixed. ... That would have been misleading."

The March 14 tea for Cher is the most recent event in which the charity has spent more on promotions than on medical care or support for its clients. As of March, according to organization records examined by The Dallas Morning News, fewer than 40 patients have received direct monetary support for surgery to correct facial deformities. And in some cases, that financial assistance amounted to less than $100 per patient.

The image of International Craniofacial Foundations Inc. belies a four-person operation that today is awash in red ink. At last count and using the foundation's own figures, it was at least $78,000 in the hole, nine months late in filing its federal tax returns and still not complying with a Dallas ordinance that requires it to document its revenues and expenses.

But the public wouldn't suspect that the charity was so debt-ridden, based on the image carefully cultivated by its dynamic 39-year-old founder, who describes herself as "flashy."

Ms. Rogers not only has brought Cher to Dallas for tea. She also imported rock n' roll legend Dick Clark last September for a '50s ball, hosted an auction at the Soviet Embassy in Washington and was a special guest at a White House reception with first lady Barbara Bush. Locally, Dallas Mayor Annette Strauss has used her social and political contacts to open doors for the charity promoter.

The result, Ms. Rogers says, is a non-profit organization that has benefited thousands of families. And it has raised nearly $1 million in cash and contributions to support its primary goals

of surgical care for the poor and educating doctors, parents and the public about craniofacial treatment.

Ms. Rogers has called the foundation's work "very successful" and said the public charity simply lacked the money to do more.

Some former employees, board members and volunteers, however, in interviews with The News, portray Ms. Rogers and her chaotic organization as longer on form than substance.

"Marcy is flighty, and you've got to understand that," said G. Ray Miller, a Dallas businessman and former board chairman for the organization.

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"She is that type of person that jumps from pillar to post," he said. "She'll throw out a figure one day, and it will be a different figure the next day. She's not a financially competent person. She's a promoter, and she's promoting as best she can her foundation."

Even as Ms. Rogers paraded the six children at The Mansion, a staff writer and photographer for People milled through the crowd preparing a magazine piece. Cher played the mother of a child with a craniofacial disease in the movie Mask which, her publicist said, created her dedication to the craniofacial cause.

'Trouble with details'

Ms. Rogers' advocacy for "the kids," as she calls them, far outweighs any negatives on a ledger sheet, said Carolyn Johnson of Midland. Like others, Mrs. Johnson and her 10-year-old daughter, Jennifer, who suffered a facial deformity, have drawn emotional support from Ms. Rogers and the parental support groups she's helped organize.

"Marcy is very charismatic," said Mrs. Johnson, who with her daughter have met Cher and traveled to Washington at ICF expense to promote the charity. "To see her with the kids, it's incredible.

"She has trouble with details but, boy, she's got a dream like you wouldn't believe," said Mrs. Johnson, also a member of ICF's parental advisory board. "She goes for the brass ring every time, and she wants these kids to have first-class privileges."

Cathie Walsh, mother of one of the children introduced at Cher's tea, said Ms. Rogers' "sincerity is so tremendous."

"I don't think you can possibly overestimate the determination that she's had in ... doing for these children," Mrs. Walsh said.

An examination of ICF, its mission and its records, showed:

ICF, according to a national charity watchdog group, is "not in very good financial shape" and appears to have "overstated" the amount it has spent on programs vs. administrative costs. In

December, the organization provided promotional material that said 80 cents of every dollar in cash and contributions was spent on programs for the deformed. On Friday, an ICF official said the figure is closer to 60 cents.

ICF says it has provided $427,319 in support of medical care for patients in 1989 and 1990. Of that amount, ICF spent only $30,000 in cash, or about 10 percent of the charity's cash revenues for the same period, according to foundation documents. The remainder was air fares, lodging, food, hospitalization and doctors' fees, all of which were donated by corporations and individuals.

Ms. Rogers left as the head of a similar charity in 1989 after its badly splintered board accused her of spending charity funds on gifts and entertainment expenses, diverting restricted patient funds to meet pay-roll and other overhead costs, hiring her boyfriend as a bookkeeper, and other allegations.

ICF's board never has reached full strength--the organization's bylaws require 15 members. The board has been racked by departures, with nine members resigning in less than two years. Although most praise Ms. Rogers, who also sits on the board, for her promotional skills, several said she has failed to maintain proper recordkeeping and often makes key administrative decisions herself. One member listed on the organization's honorary board, advice columnist Abigail Van Buren, said ICF is using her name without permission.

Last fall, a volunteer with ICF asked the Dallas County district attorney's office to examine the group's finances for possible fraud and misuse of funds.

"The matter is still pending, and we're waiting for additional information and documentation to be supplied before determining whether to initiate a criminal investigation," said Ted Steinke, head of the district attorney's specialized crimes division.

Other craniofacial charities openly have criticized ICF, refusing to refer clients because of what they say is the organization's lack of performance.

Let's Face It, a Massachusetts-based support group for people with facial disfigurement,

declines to include ICF in its 16-page resource list.

"I couldn't figure out that she's (Ms. Rogers) done anything," said Betsy Wilson, executive director of Let's Face It. "And I don't believe in referring people to someone unless they can give them help."

Priscilla Caine, executive director of FACES, a 20-year-old, Tennessee-based craniofacial charity, said three of her clients within the last six months sought financial help from ICF for surgery in Dallas.

"One was told that the request for funds was on too short a notice, and two were told that ICF had no funds available," Ms. Caine said.

FACES, with an annual budget of $132,000, is helping pay travel costs for all three, and about 69 other patients across the nation.

Dr. Phyllis Casavant, former executive director of FACES, said Ms. Rogers makes lots of promises, but "there's nothing there that I ever saw."

"The thing that hurts the other craniofacial organizations is that Marcy seems to have a lot of access to publicity and seems to speak for all of us--and doesn't," Dr. Casavant said.

Ms. Rogers concedes that she may not be the best manager, but she believes she makes up for it in motivation.

"I think I can be criticized for not being a good money manager, because I have big dreams and I'm always trying to support the dreams," Ms. Rogers said.

"People look at me and say, 'She's flashy; she's dressed well,' " Ms. Rogers said. "But this is the style I'm comfortable with, because it can help me get to a Dick Clark. It helped me get the money I've raised. It's me."

"But," she said, "I also recognize the limitations and that it raises questions about me, and I'm trying to work on that."

Husband-wife team

Ms. Rogers began what she calls her "love affair" with craniofacial patients in 1972, while working in the office of a plastic surgeon in Charlottesville, Va.

"I went to this clinic ... and saw people and children I never knew existed," she said. "There were all these kids and parents, and it was so emotional."

An estimated 15,000 children are born each year with craniofacial deformities ranging from a cleft, or split lip or palate (sometimes called a harelip), to an extended forehead, retruding chin or misshapen nose.

More severe cases occur when babies are born without the soft spot in their skull that allows for growth. Without surgery, pressure from the brain will cause bulging eyes and eventually death.

It was these sights that brought focus to Ms. Rogers' life nearly two decades ago.

"My whole life I wanted to feel connected to somebody and feel like I was doing something worthwhile," she recalled. "For the first time, I felt like somebody needed me and whatever I did, I could see a difference."

Motivated by a desire to provide psychological counseling to these patients and their families, Ms. Rogers went to night school and earned a master's degree in education from the University of Virginia.

A move to Dallas in 1976 meant new jobs for Ms. Rogers and her husband, an architect. It also meant divorce. Ms. Rogers joined the staff of Dr. Kenneth Salyer, who performed the first craniofacial surgery in the Southwest.

In 1983, Dr. Salyer and Ms. Rogers were married. She became executive director of the Foundation for Craniofacial Deformities, a charity formed by Dr. Salyer in 1981.

"We watched the enthusiasm that Marcy brought, and we all felt this was a nurturing mother taking care of her infant, because it was, indeed, the child of Ken and Marcy Salyer," said Rosie Moncrief, who with her husband, state Sen. Mike Moncrief, were original board members of the non-profit corporation.

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Dr. Salyer gave countless hours of free surgery to underprivileged children; his wife promoted his work.

The foundation was designed to support those who couldn't pay. Supporters said it was an irresistible charity because they saw virtually overnight, life-changing surgeries on poor children from Mexico, Guatemala and Korea, not to mention the 4-year-old blind piano prodigy from Baltimore, Germaine Gardner.

Ken and Marcy Salyer were featured in national magazines and newspapers and on network television shows, including The Donahue Show.

General Electric Foundation donated $300,000 to help underwrite surgeries; Dallas philanthropist Bill Barrett donated a van to haul children and their families to and from treatments; other donations came from the William Randolph Hearst Foundation, American Airlines and the Xerox Foundation.

And as the money rolled in, so did the political clout.

Mrs. Strauss hosted a luncheon for the foundation. "It kind of gave Marcy some instant credibility in the social fund-raising world, since Annette had done this," said one former publicist.

The mayor said she has heard criticisms of Ms. Rogers, but, "I look at the positives of it."

"Marcy Rogers has always been up-front and honest about everything that she's ever done that I know of," Mrs. Strauss said.

Other social heavyweights such as Cynthia Melnick, Pam Pappas and Linda Bomar kicked in support through a women's guild.

There were black-tie galas, country-Western concerts and parties in Washington to further the foundation's work.

To broaden its scope, the charity was re-named National Craniofacial Foundation in 1988.

The Salyers and their foundation were hot properties in Dallas' social circles--until their marriage hit the rocks.

As it crumbled, so did the charity.

'Misled and deceived'

When Ms. Rogers sued Dr. Salyer for divorce in June 1987, bitterness spilled into charity.

"If you would pick a time when things started coming unraveled, it would be the time when Ken and Marcy became estranged," said Mr. Miller, then a member of the board of the National Craniofacial Foundation and one of its largest donors.

"There was a lot of animosity on both sides, and words passed from mouth to mouth that were not conducive for good business operations," he said.

A year after the divorce was filed, the 7-year-old foundation was in a financial tailspin, but members of the foundation's board said they had no idea.

In December 1988, only after frustrated foundation employees complained to board members that the foundation was failing its mission because of a lack of funds, the board reacted with an internal examination.

Employees signed statements alleging financial abuses by Ms. Rogers. C.W. Moore, a van driver, for example, said in his statement that he spent about three hours each day on foundation time doing "personal chores," such as walking dogs, picking up laundry and grocery shopping for Ms. Rogers.

Another former employee, in an interview with The News, said that Ms. Rogers hid administrative costs in program costs, thus exaggerating the accomplishments of the charity.

Ms. Rogers' supporters said she was hard at work and had single-handedly built the foundation's revenues up to $468,000 in 1988. But critics said she also began using foundation money to supplement a $8,000-a-month lifestyle, to which she had grown accustomed as Dr. Salyer's wife, according to divorce records.

On Dec. 19, 1988, three days before a judge signed her divorce decree, board members of National Craniofacial Foundation confronted Ms. Rogers with allegations of fiscal irresponsibility.

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An investigation by the board determined that she had diverted restricted funds for medical care to meet payroll and other overhead costs; hired a boyfriend as a bookkeeper; used the foundation's van as collateral on a loan to meet payroll; spent foundation funds on gifts and personal expenses; and rolled up thousands of dollars of bills for dining and entertainment at The Mansion, the Crescent Club, Sfuzzi's and Sam's Cafe records showed.

"Some of the board members strongly defended Marcy and said she simply was not a good manager," said Mrs. Moncrief. "Well, a lot of people are not good managers, but do they use foundation money to buy dresses, flowers, wine and crystal that was totally inappropriate for the foundation?

"There were alot of excuses about bookkeepers and why we didn't have anything in writing," Mrs. Moncrief said. "We'd hear grandiose reports, names of celebrities dropped and grants, and they sounded wonderful.

"We were misled and deceived."

But other members of the board, including Mr. Miller, viewed Ms. Rogers as the underdog in a bitter divorce and fought attempts to remove her from a foundation they credited her with building.

"I never saw anything that would give me rise to suspect anyone of any major wrongdoing," he said. He characterized the board's investigation as a "kangaroo court."

In her defense, Ms. Rogers said she told members of the executive committee in July 1988 that the foundation was in a financial crunch. She now acknowledges that she "painted a rosy (financial) picture" because she was "in a state of sheer panic."

"I was afraid that because of the divorce, that they were going to get rid of me," Mr. Rogers said. "I should have stood up, but I didn't know how to handle the situation. I never let people know what's going on when things are hard. ... I thought I could pull a rabbit out of a hat and that if we just got through this, everything would be OK."

Ms. Rogers said her expenses in 1988 totaled about $18,000, which "in my mind, you know, didn't really amount to a lot" in comparison to the nearly $700,000 she said she raised for the foundation that year. Tax returns, however, list the foundation's revenues at $468,000.

That type of conflicting information made the job of unraveling the foundation's problems difficult, according to former board president Bill E. Carter.

"I don't know that I got a straight answer from anybody," he said.

By late 1988 and early 1989, angry creditors, including Humana Hospital-Medical City Dallas, where Dr. Salyer had established his dream for a craniofacial surgical center, were stalking Ms. Rogers and the foundation's Oak Lawn office, demanding payment.

Several board members, fearful of financial liability, abruptly resigned.

All the while, callers who had heard about the foundation through national news stories and television shows, were ringing its toll-free number, begging for financial help.

Finally, many of the employees had enough.

"We were told ... to just tell people we were waiting on funds to come in," said one former employee. "I would a lot of times turn the calls over to her (Ms. Rogers) because she could lie better than I could. She always had some kind of story."

Employees said that the foundation misled the public to believe "that we paid for everything" relating to patients' medical treatment. "We put them up in hotels and drove them to and from the hospitals.... We helped, but we were just kind of an aid. We were not the healers."

After surviving the board's attempt to remove her, Ms. Rogers finally quit the foundation in early 1989. The foundation was dissolved months later, and its debts negotiated or written off.

Ms. Rogers said a vindictive ex-husband orchestrated her demise.

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"Marcy brought about her own demise," said Dr. Salyer, whose communication with her for two years has been only through lawyers. "I have not taken any steps or activities or anything to try and deal with Marcy in any way."

Those who know her--both supporters and detractors--believe she fell victim to her own thirst for social acclaim.

Originally, she had good intentions, and then she got caught up in the social life and lost sight of where and why it all started," said one former friend.

Starting over

Ms. Rogers refused defeat.

"When I left the foundation, I'll never forget," she said. "I woke up the day after I left, and I didn't know who I was anymore because from 1972, this had occupied my whole life."

Within days, Ms. Rogers resurrected her dream, this time in the form of International Craniofacial Foundations Inc., which she patterned after its predecessor. Only ICF's goals would be even grander.

"I felt there was so much that could be done for these children, so I decided to start ICF and to create something as I wanted and as I envisioned it to be," she said.

Besides, her reputation was at stake.

"I wasn't going to leave Dallas until I proved to myself that I could rebuild it, resurrect it and ... (show) all those people who were pointing fingers at me," she said.

Today the lines between the old and new foundations have become so blurred that even Ms. Rogers' biggest supporters and volunteers frequently are confused.

The blurred lines are no accident, according to Ms. Rogers' former husband, Dr. Salyer.

"She really took every single thing that she thought was good from the (NCF) foundation and tried to take it with her (to ICF) and claim it as part of her situation and tried to leave everything that was bad or negative.

"She is a very convincing person," Dr. Salyer said. "And the perception is that she does have a lot of influence and power and certainly is capable and expert at marketing."

At the Cher party last month, Jesse Jackson Jr., chairman of an upcoming June fund-raiser in Dallas for ICF, credited the group with the corrective surgeries of child piano prodigy Germaine Gardner, who has become a poster child of sorts. In fact, the 7-year-old boy's surgeries were performed by Dr. Salyer and arranged through the now-defunct NCF, but paid by the family's insurance.

When the new foundation opened, it did so with the same toll-free number that had belonged to NCF.

'The biggest and best'

When Ms. Rogers was faced with questions about International Craniofacial Foundations Inc., she referred The News to a charity watchdog group called National Charities Information Bureau which, she said, "knows about ICF."

The bureau's records indicate that Ms. Rogers queried the New York-based organization once in 1988 when she then represented National Craniofacial Foundation--four months before International Craniofacial Foundations Inc. was formed.

According to the charity monitoring group, Ms. Rogers again contacted them in November 1990, requesting disclosure forms that are a prerequisite for obtaining the group's endorsement.

"We haven't heard a word since," said Daniel Langan, spokesman for the charities bureau.

The News provided the charities bureau with copies of all financial records, patient assistance lists and promotional materials it obtained from ICF.

Milton White, a research associate with the charities bureau, said ICF would probably fail most of the nine standards it uses to gauge accountability of national charity groups.

Mr. White said ICF's increasing debt violates the group's policy against non-profits' having a persistent deficit in their unrestricted fund balances. Combined with a deficit of $27,138 from its first few months of operation, ICF's deficit totaled about $180,000 as of June 1990, according to a preliminary audit.

Douglas McKinnon, a certified public accountant who joined the board in January and was elected treasurer, said he had taken control of the books and reduced the debt to $150,000 by late February. And by Friday, according to ICF's figures, the debt had been reduced to about $78,000, not including money owed Ms. Rogers.

One of the charities bureau's standards requires charities to spend at least 60 percent of their annual expenses on programs. Mr. White said ICF might have trouble meeting that goal if the value of donated goods and services were removed from its calculations.

"They seem to be relying on a lot of donated materials, and that's fine," Mr. White said. "But in our analysis, we generally don't include donated materials. And when that's taken out, their program expenses are a lot lower, and support revenue is a lot lower."

As an example, the organization's cumulative patient list for 1989-1990 lists $427,319 worth of cash and contributions for 28 patients.

Of that amount, only $30,387 was ICF's own cash, the record shows. That underwriting ranged from $46.81 in one case to $9,226.62--which paid hotel and some hospitalization for a child from Zaire.

And although Ms. Rogers said ICF has assisted many more than the 28 patients cited on its list, she could not provide an exact number. According to other documents provided by the organization, The News estimated that the total number of patients who have received support toward medical care was fewer than 40.

ICF's preliminary audit for fiscal year 1990 lists total program expenses as $226,160. That amount paid for educational mailings, a program to train Soviet doctors, public awareness and social events designed to allow children with craniofacial diseases and their families to share their experiences.

During the four-month period ending in October 1990, which covered the Dick Clark Rock Ball, ICF spent $128,948 in cash on special events, according to unaudited figures. The report showed that the charity netted $44,775 during that same period.

The charity spent more in four months on fund-raising events than it had in two years for patient assistance, the records indicate.

The Dick Clark Rock Ball, the organization's largest gala ever, left the charity with many unpaid bills, including a $36,000 debt to the Grand Kempinski Hotel.

Mr. Clark and Cher did not respond to News requests for comments.

It was the issue of fiscal responsibility that prompted an employee of ICF to quit the charity after six months. The woman spoke on condition that she not be named.

She said much of the spending was simply extravagant or wasteful. But when she began to see what she believed to be wrongdoing, the former employee said she would not tolerate it and quit. Ms. Rogers said the woman was fired.

"She would incur debt without thinking," the former foundation official said. "I tried to get her to follow a budget, but she'd say, "We've got to spend money to make money and we'll worry about paying bills later."

"I did at one point carry the checkbook with me in my car so she wouldn't write checks to herself," said the former employee.

"She would put money in the foundation to make monthly expenditures, but then she'd say, 'I spent $7,500 on this, so I need that money back now because I can't pay my rent or make my car payment,' " the former employee said.

Ms. Rogers admits she has written checks to herself, but she said she was simply reimbursing herself for legitimate expenses she incurred, in most cases for funds she put into the charity.

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As of last month, Ms. Rogers said she had put in well over $100,000 of her own funds. $90,000 to be paid back by the charity. Another $51,000 is owed her in accrued salary, she said.

The figures are an indication, said former board president Miller, of her commitment to the charity: "That's putting the point where the heart is."

Ms. Rogers explained it as simply keeping the charity alive.

"Whatever it took to do that, that's what I had to do," she said. "I cashed in my pension plan so that I could help fund bills and keep Dick Clark going.

"I felt like we had to hit the ground running and by doing lots of good works, we would vindicate the past and that once I got past the first two years, then it could get on a financial footing," Ms. Rogers said.

Mr. Miller, the organization's single largest contributor at more than $45,000 in cash and donations, said he believed ICF was in relatively good shape when he resigned in November to devote more time to his business. But he had not involved himself with the day-to-day operations of the charity, he said.

He said it was a "valid complaint" for people to criticize the foundation's chaotic finances and that he told Ms. Rogers that "we had to become a little more professional in our operation."

The former employee said it was Ms. Rogers' penchant for poorly planned promotions and fund-raisers that kept the charity in the red. "She always wanted the biggest and the best," the woman said. "If you had to pay for it, it was OK. That's not the attitude in non-profits."

In June 1989, for example, the foundation spent $6,000 to produce a song and record about ICF. The music was recorded, but only two records--both of them gold like the kind commemorating top-selling albums--were made "for show," Ms. Rogers said. One was given to a donor. The other hangs in the front office of ICF.

Angry fund-raiser

Dee Hutcheson, a prominent Dallas interior designer, was no stranger to charity balls, having worked on events benefiting the American Heart Association, the USA Film Festival, the Dallas Civic Opera and TACA (The Auction for the Cultural Arts).

So Ms. Hutcheson agreed last year when Marcy Rogers asked her to be the honorary chairwoman for the Dick Clark Rock Ball.

"When she first asked me to chair this, she said the money raised would be used for reconstructive surgery for these children," Ms. Hutcheson said. "Your heart goes out to children with deformed faces, so I felt it was a worthwhile cause."

Ms. Hutcheson, however, resigned after five months because, she said, Ms. Rogers would not take steps she believed necessary to ensure the proceeds were spent on the kids. Ms. Hutcheson demanded a separate account for Rock Ball donations and demanded that they be controlled by a "budget and finance man"--not Ms. Rogers.

"She (Ms. Rogers) would call me and say she had some payments to make and needed the checks immediately," Ms. Hutcheson said.

Ms. Rogers wrote Ms. Hutcheson a letter on July 29, 1990, saying that ICF had entered into a "contractual arrangement" with an accountant at McCall McBride to serve as "ICF's interim chief financial officer."

Rick McCall, a partner at McCall McBride, recently told The News that his company "never looked at the books" for ICF because Ms. Rogers withdrew from contract negotiations.

"Numerous people have indicated that she should be investigated, but no one has come forth," Ms. Hutcheson stated in the complaint she filed in September with the district attorney's office.

"Therefore, I take it upon myself to request an investigation because I am concerned that the money given in good faith, not only by Dallasites, but by people throughout the U.S., may not go for the purpose given, which is for corrective surgery for facially deformed children."

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Mr. Miller, ICF's board chairman until November, said he was unaware of the pending complaint and had seen no evidence of wrongdoing at the charity.

In January, Daner Wood, an insurance sales executive, was installed as president of the board, and Doug McKinnon, a certified public accountant and restaurant owner, as treasurer.

It was the first ICF board meeting either had attended. Mr. Wood said he met Ms. Rogers while trying to sell her insurance. Mr. McKinnon said he met Ms. Rogers at his Addison restaurant, where he hosted the charity's Christmas party.

Several board members, including Mr. Wood, said they lacked the information to discuss ICF's finances and operations in any detail.

Mr. McKinnon, who took control of ICF's checkbook and finances upon joining the board in January, said ICF needed a lot of financial overhauling.

He said the organization's methods of bookkeeping are "confusing," but he said he had seen worse.

And while he has heard questions about the charity's past problems and admits that ICF's reputation in Dallas social circles is "somewhat negative," Mr. McKinnon said he's committed to getting the charity back on track financially.

"My job is to make sure from this day forward things are better," he said.

That too, Ms. Rogers said, is her goal.

"With all the things that were being said about me, I have constantly been defending myself and trying to buy credibility," Ms. Rogers said.

"My goal for '91 is to get my hands around every dollar, where it goes and what it's for and to be able to be a better hands-on kind of person," she said.

"I would challenge anyone to do what we've done in two years against adversity."

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1 The Honorable Frank G. Evans, Chief Justice, Court of Appeals, First District of Texas at Houston, Retired, sitting by assignment.

2 The Honorable Paul W. Nye, Chief Justice, Court of Appeals, Thirteenth District of Texas at Corpus Christi, Retired, sitting by assignment.

3 Several years earlier, Talley had worked for the Houston Post, and had written a series of articles dealing with investigations of foundations and charities. According to the summary judgment affidavit of Dr. John Black, Rogers' "journalism expert," each of those articles was cast as a "morality play," with a standardized formula of "villains and victims."

4 In her deposition, Talley admitted that April 14th was not a firm deadline and that she made changes in her article after she received a copy of the audit.

5 We note that this particular statement was repeated in each of Talley's subsequent articles.

6 Ms. Rogers' deposition testimony went as follows:

Q: You Told--you told Ms. Talley in the interview that you were flashy?

A: I told Ms. Talley at the interview that people described me as flashy.

Q: And you said, that's me?

A: I said people describe me as flashy, she's dressed well, how can she do that, and I said, that's me.

7 Regardless of whether Rogers is considered a private person or a public figure, she would still be required to prove that the News defendants' objectionable statements were false. See McIlvain, 794 S.W.2d at 15 (private-figure plaintiff must show speech at issue is false to recover damages for defamation from media defendant); Carr, 776 S.W.2d at 569 (to recover for defamation, public figure must prove that defendant published defamatory statement and that false statement was made with actual malice).

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REHAK CREATIVE SERVICES, INC. and Robert Rehak, Appellants
v.
Ann L. WITT, Ellen Witt, Raymond Witt and Ann Witt Campaign, Appellees.

No. 14–12–00658–CV.

Court of Appeals of Texas,
Houston (14th Dist.).

May 21, 2013.

[404 S.W.3d 719]

Charles Clayton Conrad, Edward S. Hubbard, Patrick E. Gaas, Houston, TX, for Appellants.

Judith A. Meyer, William W. Ogden, Houston, TX, for Appellees.

Panel consists of Chief Justice HEDGES and Justices BOYCE and DONOVAN.

OPINION

WILLIAM J. BOYCE, Justice.

Rehak Creative Services, Inc. and Robert Rehak (collectively, "Rehak") appeal from a final judgment granting a motion to dismiss in favor of appellees Ann L. Witt, Ellen Witt, Raymond Witt, and the Ann Witt Campaign (collectively, "Witt"). We affirm.

Overview

This appeal focuses on a recently enacted statute called the "Texas Citizens Participation Act," which is codified in Chapter 27 of the Civil Practices and Remedies Code under the heading "Actions Involving the Exercise of Certain Constitutional Rights." *See* Tex. Civ. Prac. & Rem.Code Ann. §§ 27.001–.011 (Vernon Supp.2012). This statute is an anti-SLAPP law, which is an acronym for "Strategic Lawsuits Against Public Participation." *See generally In re Lipsky*, – — S.W.3d ——, 2013 WL 1715459, at *1 n. 1 (Tex.App.-Fort Worth 2013, orig. proceeding).

Chapter 27 seeks 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. It does so by establishing a mechanism for early dismissal of lawsuits that threaten the right of free speech, the right to petition, or the right of association. The statute is to be "construed liberally to effectuate its purpose and intent fully." *Id.* § 27.011(a).

We must apply this statute to a libel claim and other causes of action asserted in connection with a political campaign for a seat in the Texas Legislature.

Factual Background

Ann L. Witt ran unsuccessfully in the 2012 Republican primary for House District 133. The Ann Witt Campaign was

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designated as Witt's campaign committee under the Texas Election Code. *See*Tex. Elec.Code Ann. § 251.001(13) (Vernon 2010). Raymond Witt served as campaign treasurer. Ellen Witt maintained campaign websites.

Ann Witt's opponent, incumbent Representative Jim Murphy, first was elected to represent House District 133 in 2006 for a term to begin on January 1, 2007. [1] Murphy served from 1997 through 2006 as president of a "municipal management district" on Houston's west side called the Westchase District. This entity seeks to "promote, develop, encourage, and maintain employment, commerce, economic development, and the public welfare in the commercial areas of municipalities and metropolitan areas of this state." Tex. Local Gov't Code Ann. § 375.001(b) (Vernon 2005). The Westchase District is a political subdivision of the state. *Id.* § 375.004(a). Murphy received a state salary as president of the Westchase District.

Members of the Texas Legislature cannot hold "any other office or position of profit under this State." Tex. Const. art. XVI, § 40(d). Before running for the legislature, Murphy sought an opinion from the Texas Attorney General addressing whether he could serve simultaneously as president of the Westchase District and in the legislature.

Texas Attorney General Greg Abbott issued an opinion concluding that the Texas Constitution prohibits an individual from serving simultaneously as a municipal management district employee and a legislator. *See* Tex. Att'y Gen. Op. No. GA–386 (2005). The attorney general also opined that a person working as an "independent contractor" for a governmental entity does not hold a "position of profit under this State" *Id.* The opinion stated: "We conclude that article XVI, section 40(d) of the Texas Constitution does not prohibit a member of the Texas Legislature from also working for compensation as an independent contractor for a municipal management district." *Id.* The opinion further stated: "The determination that a person actually works as an independent contractor and not as an employee involves questions of fact and contract interpretation, which cannot be resolved in the opinion process." *Id.*

Murphy created a limited liability company called District Management Services, LLC in December 2006. Murphy is the LLC's sole member. Murphy resigned his position with the Westchase District as of December 31, 2006.

Effective January 1, 2007, the Westchase District entered an Administrative and Management Services Agreement with District Management Services, LLC. Each year since 2007, the district and the LLC have entered a similar one-year contract with a January 1 effective date. The LLC performs consulting services under these annual agreements to act as the district's general manager in return for compensation including a fixed monthly fee. Each annual

agreement identifies the LLC as an "independent contractor." The agreements prohibit Murphy from awarding work to, supervising, or approving the work of other contractors.

During the 2012 Republican primary for House District 133, Witt accused Murphy of acting to "sidestep" the Texas Constitution by serving in the legislature while receiving payment as a consultant to the Westchase District via contracts with District Management Services, LLC. Witt

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leveled this and many other accusations against Murphy on a Witt campaign website called "How to Succeed in Government Without Really Trying."

The Witt campaign's main website was http:// voteannwitt. com. The main campaign website provided a link to the separate "How to Succeed" website at http:// howto succeed in government. com. The Witt campaign also placed radio advertisements and distributed mailers directing potential voters to the "How to Succeed" website. Versions of the "How to Succeed" website were accessible from mid-April 2012 until June 7, 2012.

The website explains that " *How to Succeed in Business Without Really Trying* is a book, broadway musical, and movie about climbing the corporate ladder." It continues: "The main character, J. Pierrepont Finch, outwardly appears to be a very likeable chap, but really he is using every trick in the book to get ahead at the expense of others." The website then casts Murphy in the role of Finch: "In Texas government, J. Pierrepont Finch is Jim Murphy: likeable guy, but he's using every trick in the book—really, he could write the book—to make money off of government and further his own political ambition."

The following statement appears below the website's "How to Succeed" heading and next to a large picture of Murphy: "How Jim Murphy is ripping off taxpayers." The website states, "For professional politician Jim Murphy, it takes just 6 sleazy steps."

The website's content changed over time. In one version of the "How to Succeed" website, the six steps are identified as follows.

- "STEP 1: Oversee a Government Body."
- "STEP 2: Hire yourself as General Manager."
- "STEP 3: Make $290,000 a year off taxpayers."
- "STEP 4: Sidestep the Texas Constitution."
- "STEP 5: Get a second government job."
- "STEP 6: Reward your supporters."

In another version, the six steps are identified with somewhat different wording.

- "STEP 1: Help create a new taxing entity."
- "STEP 2: Hire yourself as its top bureaucrat."
- "STEP 3: Make $290,000 a year off taxpayers."
- "STEP 4: Sidestep that pesky Texas Constitution."
- "STEP 5: Get a second government job."
- "STEP 6: Reward your supporters with government contracts."

In these iterations of the "How to Succeed" website, each "step" contains additional text and a link to click on for "MORE INFO." The following words appear at the bottom of the screen: "Double Dipping. Skirting the Law. Bilking Taxpayers. Rewarding Cronies. It's time to end Jim's run."

The dispute here focuses primarily on Step 6 and its accompanying text.

One version of the "How to Succeed" website contains this statement under Step 6: "Westchase District has awarded government contracts to the following companies, and the CEOs of these companies have contributed more than $48,000 in cash and services to Jim's campaigns for State Representative. (Copies of these contracts have been requested of the Westchase District.)" The website lists six companies under this text.

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The second company listed under Step 6 is an advertising agency named "Rehak Creative Services." The agency's chief executive officer and sole owner is Robert Rehak. He contributed $3,250 to Murphy's campaign for House District 133 in 2005–2006 and another $3,750 to Murphy's subsequent campaigns through 2011. Rehak's contributions to Murphy's campaigns for four election cycles totaled $7,000.

The website's entry for Rehak Creative Services, Inc. reads as follows: "$9,750 from Robert Rehak, CEO of Rehak Creative Services. Rehak Creative Services received a government contract from the Westchase District to design its Long Range Plan (see p. 55). And the company lists Westchase District as a client." Three links appear under the second entry: " *Click here for contributions," "Click here for Westchase Long Range Plan* " and " *Click here for Rehak client list.*" According to Rehak's appellate brief, "Readers who followed the links under the statements about Rehak and RCS were directed to a list of Rehak's contributions to Murphy's campaigns since 2005, a copy of a 55–page long-range planning report for the Westchase District produced by RCS, and the trademarked logos of some of RCS' clients from RCS' website."

A later version of the "How to Succeed" website revised the text referencing Rehak Creative Services, Inc. under Step 6 to state as follows:

Jim Murphy has awarded $1.3 million in Westchase District government contracts to his State Representative campaign contributors.

Westchase District has awarded $1.3 million worth of government contracts to the companies below, and the CEOs of those companies have contributed more than $45,000 in cash and services to Jim's campaigns for State Representative. (Copies of these contracts were obtained by Public Information Act request to Westchase District.)

* * *

Rehak Creative Services has received government contracts from Westchase District totaling more than $50,000. The company's CEO, Robert Rehak, has contributed $7,000 to Jim's campaigns.

Click here for contributions>>

Click here for contract # 1>>

Click here for contract # 2>>

Click here for contract # 3>>

Click here for contract # 4>>

According to Rehak, "[T]he documents that the Witts represented as supporting their accusations that Rehak and RCS received 'rewards' and participated in a scheme to 'bilk taxpayers,' in fact, showed the exact opposite." Rehak contends: "People, who knew and worked with Rehak and RCS, and who read the core website from being directed to it by the main campaign website, the radio ads or the mailers, believed the campaign literature, including the Defamatory Post, was accusing Rehak and RCS of wrongdoing, and of possible criminal behavior."

The Witt campaign refused repeated requests for a retraction, and for removal of all references to Rehak and Rehak Creative Services, Inc. from the "How to Succeed" website.

Procedural Background

Rehak sued Witt on April 30, 2012 and asserted claims for libel; business disparagement; tortious interference with business relationships and prospective business opportunities; intentional infliction of emotional distress; civil conspiracy; conversion; and misappropriation. Rehak based these claims on Witt's actions in connection with the "How to Succeed" website, including the alleged misuse of

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trademarked logos belonging to clients of Rehak Creative Services, Inc.

Witt timely filed a motion to dismiss all of Rehak's claims under Chapter 27. *See*Tex. Civ. Prac. & Rem.Code Ann. § 27.003(b). Witt filed a response and included supporting affidavit evidence; Rehak objected to certain portions of the affidavits. Neither side sought discovery. *See id.* § 27.006(b).

The trial court conducted two hearings. In accordance with the parties' agreement, the trial court decided the motion based upon the pleadings; motion; response; arguments of counsel; and affidavits. *See id.* §§ 27.004, 27.006(a). The trial court signed an order denying Witt's objections to affidavits Rehak proffered as part of his response to the motion to dismiss. It also signed a "Final Judgment of Dismissal" that dismissed all claims asserted by Rehak and awarded attorney's fees to Witt. *See id.* § 27.009(a)(1). Rehak timely appealed. *See id.* § 27.008(c).

Analysis

I. Chapter 27 Dismissal Mechanism

We begin with a summary of Chapter 27's dismissal mechanism.

This statute allows a litigant to seek dismissal of a "legal action" that is "based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association...." *Id.* § 27.003(a).

A " 'legal action' means a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief." *Id.*§ 27.001(6). The " '[e]xercise of the right of free speech' means a communication made in connection with a matter of public concern." *Id.*§ 27.001(3).

A " '[c]ommunication' includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic." *Id.*§ 27.001(1). Among other things, a " '[m]atter of public concern' includes an issue related to ... environmental, economic, or community well-being .... the government ... [or] ... a public official or public figure...." *Id.*§ 27.001(7)(B), (C), (D).

The motion seeking dismissal "must be filed not later than the 60th day after the date of service of the legal action." *Id.* § 27.003(b). The trial court can extend this deadline for good cause. *Id.* The filing suspends all discovery pending a ruling on the motion unless the trial court allows "specified and limited discovery relevant to the motion" upon "a showing of good cause." *Id.* § 27.006(b).

The trial court must set a hearing on the motion "not later than the 30th day after the date of service of the motion unless the docket conditions of the court require a later hearing." *Id.* § 27.004. The trial court must rule on the motion "not later than the 30th day following the date of the hearing on the motion." *Id.*§ 27.005(a). "If a court does not rule on the 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." *Id.* § 27.008(a).

Chapter 27 employs a burden-shifting mechanism. With one exception quoted below, the trial court "shall dismiss a legal action against the moving party if the moving party shows by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the

party's exercise of ... the right of free speech....” *Id.*§ 27.005(b)(1). The exception: “The court may not dismiss a legal action under this section if the party

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bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question.” *Id.*§ 27.005(c). Chapter 27 does not define the phrases “clear and specific evidence” or “prima facie case.” [2]

II. Issues on Appeal

Rehak does not dispute that the claims for libel, business disparagement, tortious interference with business relationships and prospective business opportunities, intentional infliction of emotional distress, and civil conspiracy are based on, related to, and asserted in response to Witt's exercise of the “right of free speech” under sections 27.003(a) and 27.005(b)(1).[3] With respect to these claims, the appellate battle focuses on whether Rehak met his section 27.005(c) burden to establish “by clear and specific evidence a prima facie case for each essential element of the claim in question.”

In his first five issues, Rehak contends he satisfied section 27.005(c) because the record establishes that Witt's statements on the “How to Succeed” website (1) were “of and concerning” Rehak and Rehak Creative Services, Inc.; (2) were defamatory; (3) created a substantially false and defamatory impression by omitting material facts or juxtaposing facts in a misleading way; (4) were statements of fact rather than opinion; and (5) resulted in damages.

Rehak's last two issues focus on the remaining claims for conversion and misappropriation in connection with copyrighted materials and trademarked logos appearing on the “How to Succeed” website.

In his sixth issue, Rehak contends that Witt did not satisfy her initial burden under section 27.005(b) to establish by a preponderance of the evidence that the conversion and misappropriation claims were based on, related to, or asserted in response to Witt's exercise of the right of free speech.

In his seventh issue, Rehak contends he satisfied his section 27.005(c) burden to establish a “prima facie case” by “clear and specific evidence” with respect to his conversion and misappropriation claims.

III. Standard of Review

Chapter 27's recent vintage means that the case law has not yet coalesced around a single, widely accepted formulation of the standard of review for section 27.005 dismissal orders.

At least one case addressing Chapter 27 has invoked the *de novo* standard of review applicable to issues of statutory construction.

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Avila v. Larrea, 394 S.W.3d 646, 652–53 (Tex.App.-Dallas 2012, pet. filed) (citing *Tex.* Lottery Comm'n v. First State Bank of DeQueen, 325 S.W.3d 628, 635 (Tex.2010)). *De novo* review governs a question-of-law inquiry concerning the meaning of specific words used in the statute. But invoking the *de novo* standard alone does not fully explain the dismissal standard to be applied when an appellate court determines *de novo* whether (1) the movant satisfied section 27.005(b)'s initial burden; and (2) the non-movant satisfied section 27.005(c)'s shifted burden.

Another case has applied an abuse of discretion standard. *In re Lipsky*, 2013 WL 1715459, at *3, *10–13.*Lipsky's* use of this standard arises from a unique procedural posture; that case reached the court of appeals on a petition for writ of mandamus based on an earlier determination by the Second Court of Appeals that Chapter 27 does not authorize an interlocutory appeal from an express order denying dismissal. *Id.*[4] Because Rehak's case does not come to this court via mandamus, we do not apply an abuse of discretion standard to gauge the propriety of dismissal under section 27.005.

We agree with the First Court of Appeals that the first step of this inquiry under section 27.005(b) is a legal question reviewed *de novo* on appeal. *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.,* No. 01–12–00581–CV, 2013 WL 1867104, at *6 (Tex.App.-Houston [1st Dist.] May 2, 2013, no pet. h.) (citing City of Rockwall v. Hughes, 246 S.W.3d 621, 625 (Tex.2008)).

With respect to the second step, Rehak invites us to apply *de novo* review under section 27.005(c) "[b]ecause the motion to dismiss procedure provided in Chapter 27 is the functional equivalent of a no-evidence summary judgment motion...." *See*Tex.R. Civ. P. 166a(i). Rehak further contends that a non-movant seeking to satisfy section 27.005(c)'s burden "must come forward with pleadings and affidavits that contain direct evidence that would provide more than a scintilla of evidence to support each essential element of respondent's claim...." *Cf. Ramsey v. Lynch,* No. 10–12–00198–CV, 2013 WL 1846886 (Tex.App.-Waco May 2, 2013, no pet. h.) (applying legal sufficiency standard from City of Keller v. Wilson, 168 S.W.3d 802, 827 (Tex.2005), and factual sufficiency standard from Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex.1986) (op. on reh'g), to trial court's findings of fact under Chapter 27).

We hesitate to embrace the Rule 166a(i) analogy or import into Chapter 27 the "scintilla of evidence" concept applicable in

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the context of a no-evidence motion for summary judgment. *See, e.g.,* King Ranch, Inc. v. Chapman, 118 S.W.3d 742, 751 (Tex.2003).

This reluctance stems from Chapter 27's distinct terminology. It is doubtful whether Rule 166a(i)'s no-evidence standard meshes with a Chapter 27 mechanism that demands a showing of "clear and specific" evidence—not just "some" evidence—to avoid dismissal. *Compare*Tex. Civ. Prac. & Rem.Code Ann. § 27.005(c) (non-movant must establish "by ***clear and specific evidence*** a prima facie case for each essential element of the claim in question" (emphasis added) *with* Romo v. Tex. Dept. of Transp., 48 S.W.3d 265, 269 (Tex.App.-San Antonio 2001, no pet.) ("When a party moves for a no-evidence summary judgment, the nonmovant must produce some evidence raising a genuine issue of material fact."). The purposeful inclusion of a "clear and specific evidence" requirement indicates that the non-movant must satisfy an elevated evidentiary

standard under section 27.005(c). We will follow section 27.005(c)'s express (albeit undefined) terminology and leave the "scintilla" to other contexts.

"Clear and specific evidence" has been described as evidence that is "unaided by presumptions, inferences, or intendments." *McDonald v. Clemens,* 464 S.W.2d 450, 456 (Tex.Civ.App.-Tyler 1971, no writ); *see also S. Cantu & Son v. Ramirez,* 101 S.W.2d 820, 822 (Tex.Civ.App.-San Antonio 1936, no writ).

"Prima facie evidence is evidence that, until its effect is overcome by other evidence, will suffice as proof of a fact in issue." *Duncan v. Butterowe, Inc.,* 474 S.W.2d 619, 621 (Tex.Civ.App.-Houston [14th Dist.] 1971, no writ). "In other words, a prima facie case is one that will entitle a party to recover if no evidence to the contrary is offered by the opposite party." *Id.* (citing *Simonds v. Stanolind Oil & Gas Co.,* 134 Tex. 332, 136 S.W.2d 207, 209 (1940)); *see also In re Lipsky,* 2013 WL 1715459, at *4 ("In cases unrelated to motions to dismiss under chapter 27, Texas courts have defined 'prima facie' evidence as the 'minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true.' ") (quoting *In re E.I. DuPont de Nemours & Co.,* 136 S.W.3d 218, 223 (Tex.2004) (orig. proceeding)).

Other circumstances requiring a "prima facie" showing provide apt analogies for section 27.005(c)'s dismissal standard. *Cf. Baker v. Goldsmith,* 582 S.W.2d 404, 408–09 (Tex.1979) (In bill of review context, "a prima facie meritorious defense is made out when it is determined that the complainant's defense is not barred as a matter of law and that he will be entitled to judgment on retrial if no evidence to the contrary is offered. This is a question of law for the court."). "Because a determination of whether a party has presented prima facie proof of a meritorious claim is a question of law, we review the trial court's decision of this issue de novo." *In re C.E.,* 391 S.W.3d 200, 203 (Tex.App.-Houston [1st Dist.] 2012, no pet.) (citing *Baker,* 582 S.W.2d at 406, and *Nichols v. Jack Eckerd Corp.,* 908 S.W.2d 5, 7–8 (Tex.App.-Houston [1st Dist.] 1995, no writ)); *see also Elliott v. Elliott,* 21 S.W.3d 913, 917 (Tex.App.-Fort Worth 2000, pet. denied).

A *de novo* standard likewise governs review of the trial court's determination regarding the propriety of dismissal under section 27.005. By the term " *de novo* " we mean that the appellate court makes an independent determination and applies the same standard used by the trial court in the first instance. *See, e.g., Duerr v. Brown,* 262 S.W.3d 63, 68 (Tex.App.-Houston [14th Dist.] 2008, no pet.).

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To sum up: On appeal from an order decided under section 27.005(c), we determine *de novo* whether the record contains a minimum quantum of clear and specific evidence that, unaided by inferences, would establish each essential element of the claim in question if no contrary evidence is offered. *See*Tex. Civ. Prac. & Rem.Code Ann. § 27.005(c); *Duncan,* 474 S.W.2d at 621;*McDonald,* 464 S.W.2d at 456;*see also Newspaper Holdings, Inc.,* 2013 WL 1867104, at *6.

We now turn to the application of these standards.

IV. Application of Chapter 27A. Libel and Business Disparagement

Rehak's briefing focuses primarily on his libel and business disparagement claims. He emphasizes that Witt's "How to Succeed" website "used the terms 'reward,' 'rip-off,' and 'bilk,'

to describe the conduct in which Rehak and RCS were alleged to have participated." Rehak contends: "The statements that RCS received contracts from the Westchase District, and that Rehak made contributions to Murphy's campaigns as part of a scheme to 'reward' 'cronies' by 'bilking' and 'ripping-off' taxpayers were false and defamatory." He further contends: "The false gist of the Witts' statements about the Appellants is that they participated in a scheme to 'rip off and 'bilk' taxpayers, and to help Jim Murphy to break state law." According to Rehak, the "How to Succeed" website conveyed a false gist "by juxtaposing true facts, while ignoring, misrepresenting and omitting other material facts."

We address Rehak's contentions in light of the extensive body of law that has developed around claims for libel and business disparagement.

Libel is "a defamation expressed in written or other graphic form...." Tex. Civ. Prac. & Rem.Code Ann. § 73.001 (Vernon 2011). This formulation encompasses writing that appears as text on an internet website. *See* *Kaufman v. Islamic Soc'y of Arlington*, 291 S.W.3d 130, 144–45 (Tex.App.-Fort Worth 2009, pet. denied). A libel plaintiff must prove that the defendant "(1) published a statement; (2) that was defamatory concerning the plaintiff; (3) while acting with either actual malice, if the plaintiff was a public official or public figure, or negligence, if the plaintiff was a private individual, regarding the truth of the statement." *WFAA–TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex.1998).[5]

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Corporations and individual persons alike can sue for defamation. *See* *Gen. Motors Acceptance Corp. v. Howard*, 487 S.W.2d 708, 712–13 (Tex.1972).

Although claims for libel and business disparagement bear some similarity to one another, they are distinct causes of action that protect different interests. A libel action protects "the personal reputation of the injured party, whereas the action for ... business disparagement is to protect the economic interests of the injured party against pecuniary loss." *Hurlbut v. Gulf Atlantic Life Ins. Co.*, 749 S.W.2d 762, 766 (Tex.1987). Business disparagement requires proof of "publication by the defendant of the disparaging words, falsity, malice, lack of privilege, and special damages." *Prudential Ins. Co. of Am. v. Fin. Review Servs., Inc.*, 29 S.W.3d 74, 82 (Tex.2000); *see also Hurlbut,* 749 S.W.2d at 766. The words at issue must be defamatory to be actionable as business disparagement. *Delta Air Lines, Inc. v. Norris*, 949 S.W.2d 422, 427 (Tex.App.-Waco 1997, writ denied) (citing *Hurlbut,* 749 S.W.2d at 766).

The threshold inquiry focuses on the requirement of a defamatory statement because this element is common to both causes of action.

A statement is defamatory when a person of ordinary intelligence would interpret it in a way that tends to injure the subject's reputation and thereby expose the subject to public hatred, contempt, or ridicule, or financial injury, or to impeach the subject's honesty, integrity virtue, or reputation. Tex. Civ. Prac. & Rem Code. Ann. § 73.001; *see also* *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 114–15 (Tex.2000). This is an objective test. *Miranda v. Byles*, 390 S.W.3d 543, 550 (Tex.App.-Houston [1st Dist.] 2012, pet. filed) (citing *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 157 (Tex.2004)); *see also Kaufman,* 291 S.W.3d at 145. A statement may be "false, abusive, unpleasant, or objectionable to the plaintiff without being defamatory." *San Antonio Express News v. Dracos*, 922 S.W.2d 242, 248 (Tex.App.-San Antonio 1996, no writ).[6]

"The person of 'ordinary intelligence' described in *Turner* is a prototype of a person who exercises care and prudence, but not omniscience, when evaluating allegedly defamatory communications." *New Times, Inc.,* 146 S.W.3d at 154–55. This person " 'is no dullard' " and represents " 'reasonable intelligence and learning,' " not " 'the lowest common denominator.' " *Id.* (quoting *Patrick v. Superior Court,* 27 Cal.Rptr.2d 883, 887 (Cal.Ct.App.1994)).

Whether the statement at issue is capable of defamatory meaning initially

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is a question of law for the court. *Turner,* 38 S.W.3d at 114;*Musser v. Smith Protective Servs.,* 723 S.W.2d 653, 654–55 (Tex.1987). "The court construes the statement as a whole in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive the entire statement." *Musser,* 723 S.W.2d at 655. "Only when the court determines the language is ambiguous or of doubtful import should the jury then determine the statement's meaning and the effect the statement's publication has on an ordinary reader." *Id.; see also New Times, Inc.,* 146 S.W.3d at 154–55.

This inquiry does not examine individual words in isolation. *Turner,* 38 S.W.3d at 115. Context is important. *See id.; see also New Times, Inc.,* 146 S.W.3d at 154–55. "[P]ublications alleged to be defamatory must be viewed as a whole—including accompanying statements, headlines, pictures, and the general tenor and reputation of the source itself." *City of Keller v. Wilson,* 168 S.W.3d 802, 811 (Tex.2005) (citing *New Times, Inc.,* 146 S.W.3d at 158–59;*Turner,* 38 S.W.3d at 114;*Guisti v. Galveston Tribune,* 105 Tex. 497, 150 S.W. 874, 877–78 (1912)).

Rehak's argument based on the website's asserted "false gist" invokes a related, context-based concept involving the manner in which particular words are presented. "Because a publication's meaning depends on its effect on an ordinary person's perception, courts have held that under Texas law a publication can convey a false and defamatory meaning by omitting or juxtaposing facts, even though all the story's individual statements considered in isolation were literally true or non-defamatory." *Turner,* 38 S.W.3d at 114 (citing *Golden Bear Dist. Sys. v. Chase Revel, Inc.,* 708 F.2d 944, 948–49 (5th Cir.1983) (applying Texas law); *Huckabee v. Time Warner Entm't. Co.,* 19 S.W.3d 413, 425 (Tex.2000); *Express Publ'g Co. v. Gonzalez,* 350 S.W.2d 589, 592 (Tex.Civ.App.-Eastland 1961, writ ref'd n.r.e.)). "[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." *Turner,* 38 S.W.3d at 115.

The analysis now applies these precepts to specific statements from Witt's "How to Succeed" website.

Rehak argues that the words "[r]ewarding," "ripping off," and "[b]ilking" as used in the context of Witt's "How to Succeed" campaign website have "specific meanings that include 'theft,' 'cheating,' 'swindling,' and 'defrauding.' " He contends: "The basis for those accusations cited by the Witts juxtaposed the history of RCS' Westchase District contracts with the history of Rehak's campaign contribution to Candidate Witt's primary opponent, misconstrued and misrepresented the contents of documents, and omitted key information concerning when her opponent first ran for office...." He further contends that these words "accuse the Appellants of gaining influence over an elected official to obtain work, to steal and cheat taxpayers, and to help

the elected official break the law." Thus, Rehak contends that these words are actionable as defamatory statements of fact.

Viewing the challenged statements as a whole and in context, we conclude that a person of ordinary intelligence would perceive these words as nothing more than rhetorical hyperbole. *See Am. Broad. Cos. v. Gill*, 6 S.W.3d 19, 30 (Tex.App.-San Antonio 1999, pet. denied) (" 'Rhetorical hyperbole' is 'extravagant exaggeration' [that is] 'employed for rhetorical effect.' ") (quoting

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Webster's Ninth New Collegiate Dictionary 592, 1011 (1988 ed.)).[7] A person of ordinary intelligence would not perceive these words to be defamatory statements of fact regarding Rehak or Rehak Creative Services, Inc. *See Gill,* 6 S.W.3d at 30 (statement by Resolution Trust Corporation investigator, who said that "[a]s a taxpayer" he "got screwed" by conduct resulting in losses absorbed by the federal government, constituted rhetorical hyperbole and was not a defamatory statement of fact as to former officers and directors of savings and loan association); *El Paso Times, Inc. v. Kerr*, 706 S.W.2d 797, 800 (Tex.App.-El Paso 1986, writ ref'd n.r.e.) (assertion that assistant United States attorney engaged in "cheating" during a criminal trial constituted rhetorical hyperbole and was not a defamatory statement of fact); *see also Church of Scientology of Cal. v. Cazares*, 638 F.2d 1272, 1288–89 (5th Cir.1981) ("uncomplimentary" reference to Church of Scientology as a "rip-off, money motivated operation" was not defamatory under Florida law); *Raczkowski v. Peters,* No. 302606, 2012 WL 5853842, at *4 (Mich.Ct.App. Nov. 13, 2012) (per curiam) (unpublished) (terms "bilked" and "ripped off" used in television commercial criticizing political candidate were not defamatory under Michigan law; terms "amounted to 'rhetorical hyperbole' or a 'vigorous epithet' " and represented " 'the language of the rough-and-tumble world of politics' ") (citations omitted).

The website's tone and the campaign context of these statements reinforce our conclusion regarding the ordinarily intelligent person's perceptions, and the non-dullard's understanding that political advertising cannot necessarily be taken at face value. This tone includes references to "that pesky Texas Constitution," and to Murphy as a "professional politician" and "bureaucrat." The website's analogy between an elected legislator and a character in a famous musical demonstrates an attempt to deliver a political message about the use of public money in an exaggerated, provocative and amusing way.

Regardless of whether the attempt actually succeeded, this type of communication lies "[a]t the heart of the First Amendment" and its "recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988). "The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical about those who hold public office...." *Id.* at 51, 108 S.Ct. 876. The First Amendment's protection for "statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual" provides "assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990) (citing *Hustler Magazine, Inc.* 485 U.S. at 50, 53–55, 108 S.Ct. 876);*see also Bentley v. Bunton*, 94 S.W.3d 561, 580 (Tex.2002) (referencing constitutional protection of rhetorical hyperbole arising "in debate over public matters").

Rehak acknowledges the political context but stresses that the plaintiff here is ***not*** Jim Murphy, the elected public official running for re-election in 2012 who was

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targeted by a primary opponent. Rehak argues that this lawsuit is being pursued by a non-elected individual and his private company because Witt's campaign website accused them of "participating in an alleged scheme by her primary opponent to improperly control and profit from a state agency." In essence, Rehak complains that candidate Witt opened her rhetorical fire hose on Representative Murphy but indiscriminately hit Rehak with the spray.

Rehak's understandable chagrin at his presence on the "How to Succeed" website does not change our conclusion or diminish the importance of the political campaign context in which the challenged statements arose. The ordinary reader would understand that Witt's vigorous criticism targeted the incumbent elected official she hoped to unseat in the primary—not Rehak. *See* *Wheeler v. New Times, Inc.*, 49 S.W.3d 471, 474–75 (Tex.App.-Dallas 2001, no pet.).

The circumstances here parallel *Wheeler,* in which a landlord sued for libel contending that a newspaper article falsely portrayed him as a slumlord. The appellate court affirmed summary judgment in favor of the newspaper because the article was not reasonably capable of a defamatory meaning. *Id.* In so doing, the court stressed that "the article in this case does not expressly criticize Wheeler." *Id.* at 474. "Rather, the article is critical of Dallas's urban rehabilitation efforts." *Id.* at 475. "[W]e cannot conclude that a person of ordinary intelligence would perceive the article as implying that Wheeler manipulated or exploited the [Urban Rehabilitation Standards Board] ... for his own benefit." *Id.* "Rather, we conclude the article suggests that it is the URSB and the City of Dallas, *not Wheeler,* who are ultimately responsible for the alleged improprieties that are the focus of the article." *Id.* (original emphasis). *Wheeler's* conclusion applies with equal force to a campaign website that mentions a contributor in the course of a wide-ranging political attack on its main target—the opposing candidate pictured prominently at the top of the website, whose "run" it is "time to end."

Rehak's invocation of a "false gist" theory likewise fails to change the outcome here. Rehak acknowledges that some statements on the website are true. Rehak Creative Services, Inc. received and was paid for work it performed for the Westchase District starting in 2003. Murphy signed some of the documentation relating to this work. Rehak contributed to Murphy's campaigns. He contends that material facts nonetheless were omitted because "... Rehak and Murphy had not known each other before RCS bid for work with the Westchase District in 2003; RCS received the work from the Westchase District as a result of winning the competitive proposal process; Murphy did not assign or supervise RCS's work for the Westchase District...." He emphasizes that "Murphy did not run for the office in question, and Rehak did not contribute to his campaign, until 2005—two years after RCS[ ] had won approval to do work for the Westchase District."

Rehak's "false gist" argument focuses on linked documents that were accessible on the "How to Succeed" website. Rehak contends: "To continue to make their misrepresentation ... the Witts had to ignore the material true facts contained in those documents, and juxtaposed others, while continuing to include the references to Rehak and RCS under 'Step 6' of the core website." Rehak contends that documents linked to the "How to Succeed" website established the following facts.

• Rehak Creative Services, Inc. obtained contracts # 1, # 2, and # 3 in 2003, before Rehak made his first

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campaign contribution to Murphy in 2005.

• Rehak reported to Westchase District employee Sherry Fox rather than Murphy.

• Contract # 4 was approved by Westchase District employee Dave Gilkeson, not Murphy, after Murphy was elected.

• Rehak Creative Services, Inc. worked at market or below-market rates for Westchase District.

According to Rehak, these facts demonstrate the website's "false gist" arising from its suggestion that "Rehak obtained influence over Murphy with campaign contributions and, then, RCS received work from Murphy through the Westchase District."

Rehak's "false gist" argument founders for two related reasons.

First, the linked documents are part of the context that must be taken into consideration when assessing what the website actually conveyed about Rehak. *See Kaufman,* 291 S.W.3d at 146;*see also* *Nicosia v. De Rooy*, 72 F.Supp.2d 1093, 1103 (N.D.Cal.1999); *Sandals Resorts Int'l, Ltd. v. Google, Inc.*, 86 A.D.3d 32, 925 N.Y.S.2d 407, 416 (N.Y.2011); *Franklin v. Dynamic Details, Inc.*, 116 Cal.App.4th 375, 10 Cal.Rptr.3d 429, 438–39 (2004). Website access to linked documents distinguishes this case from *Bentley,* in which the host of a public access cable television program referenced documents that supposedly supported allegations of corrupt conduct by a local judge but did not make those documents accessible. *See Bentley,* 94 S.W.3d at 584 ("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."). Rehak argues that here, as in *Bentley,* "the Witts asserted that they had obtained factual information that corroborated their allegations in the Defamatory Post concerning Rehak and RCS, but the actual information they obtained and posted clearly did not support their accusation...." In contrast to *Bentley,* this case does not involve "an implication of undisclosed facts." *Id.* Rather, the disclosed facts are part of the context we must consider in addressing how a person of ordinary intelligence would perceive the website's message.

Second, the context created by these linked documents confirms that a person of ordinary intelligence would perceive the website's statements to be politically flavored hyperbole rather than defamatory assertions of fact. If, as Rehak contends, the supporting linked documents unmistakably show "the exact opposite" of the gist he perceives in the website's text, then the person of ordinary intelligence could be expected to pick up on this clue and conclude that rhetorical hyperbole is being employed as part of a political campaign during a contested primary.

Because this record does not contain a minimum quantum of clear and specific evidence demonstrating that the Witt campaign's "How to Succeed" website made defamatory statements

of fact about Rehak and Rehak Creative Services, Inc., dismissal of the libel and business disparagement claims was appropriate under section 27.005(c).

B. Remaining Claims1. Tortious interference, emotional distress, and conspiracy

Rehak does not separately discuss the elements of his claims for tortious interference, intentional infliction of emotional distress, or conspiracy. He identifies no evidence—clear and specific or otherwise—addressing these elements.

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Additionally, Rehak states as follows in his opening brief: "The underlying tortious activity that gives rise to each of the Plaintiffs' causes of action is defamation—and more specifically libel." Because the underlying activity at issue in this case is not tortious given the absence of defamatory statements of fact about Rehak, the tag-along tort claims predicated on the same website content also fail. "The same protections which the First Amendment affords defendants from libel claims also protect them from non-libel claims" based on the same publication. *Provencio v. Paradigm Media, Inc.*, 44 S.W.3d 677, 682–83 (Tex.App.-El Paso 2001, no pet.). The scope of free speech protection "do[es] not depend on the legal theory asserted by an inventive plaintiff." *Wavell v. Caller–Times Pub. Co.*, 809 S.W.2d 633, 635 (Tex.App.-Corpus Christi 1991, writ denied), *abrogated on other grounds by Cain v. Hearst Corp.*, 878 S.W.2d 577 (Tex.1994); *see also MKC Energy Invs. v. Sheldon*, 182 S.W.3d 372, 378 (Tex.App.-Beaumont 2005, no pet.); *KTRK Television v. Felder*, 950 S.W.2d 100, 107–08 (Tex.App.-Houston [14th Dist.] 1997, no pet.).

For these reasons, dismissal under section 27.005(c) was proper with respect to Rehak's claims for tortious interference with business relationships and prospective business opportunities, intentional infliction of emotional distress, and civil conspiracy.

2. Conversion and misappropriation

Rehak contends that the burden never shifted to him to make a prima facie case under section 27.005(c) because Witt did not satisfy section 27.005(b)'s threshold requirement to show by a preponderance of the evidence that these two claims are based on, relate to, or asserted in response to Witt's exercise of the right of free speech.

Rehak argues: "The conversion and misappropriation claims do not arise from the libelous nature of the statements made on the Defamatory Post, but from a link on that post to a copyrighted page on RCS' website ... that contains the logos of all of RCS' customers, many of which are registered trademarks that were used by the Witts without permission." He continues: "Other than the Westchase District, none of the other customers whose trademarks were shown on the linked page were implicated in the Witts' accusations. Therefore, there was no 'public concern' ... served or implicated by linking those trademarks to the Defamatory Post."

We reject this contention because section 27.005(b)'s inquiry does not focus on whether the conversion and misappropriation claims arise from the assertedly libelous nature of the website's statements. The correct analysis focuses on Chapter 27's unambiguous words. The statute broadly encompasses a "cause of action" that "relates to" the movant's "exercise of ... the right of free speech." Tex. Civ. Prac. & Rem.Code Ann. §§ 27.001(6), 27.005(b)(1). The "[e]xercise of the

right of free speech" encompasses "a communication made in connection with a matter of public concern," which includes "an issue related to ... the government ... [or] a public official...." *Id.* § 27.001(3), (7)(C), (D). "In ordinary use, 'relates to' means to have a connection with, to refer to, or to concern." *Tex. Dept. of Pub. Safety v. Abbott*, 310 S.W.3d 670, 674–75 (Tex.App.-Austin 2010, no pet.).

On this record, we have no difficulty in concluding that section 27.005(b)' s initial burden is satisfied because Rehak's causes of action for conversion and misappropriation have a connection with a "communication" in the form of a political campaign website that "relates to" the Texas Legislature

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and an elected member of that body. Rehak therefore bore the burden to satisfy section 27.005(c)'s requirement of establishing "by clear and specific evidence a prima facie case for each essential element" of his claims for conversion and misappropriation.

Rehak cannot satisfy this burden with respect to conversion because intangible property cannot be converted unless the underlying intangible right has been merged into a document that has been converted. *Express One Int'l v. Steinbeck*, 53 S.W.3d 895, 901 (Tex.App.-Dallas 2001, no pet.); *see also Real Estate Innovations, Inc. v. Houston Ass'n of Realtors, Inc.*, 422 Fed.Appx. 344, 350 (5th Cir.2011), *cert. denied*,—— U.S. ——, 132 S.Ct. 249, 181 L.Ed.2d 143 (2011). He likewise cannot satisfy this burden with respect to damages in connection with his claim for misappropriation. Rehak contends on appeal that "RCS lost a lucrative business project after one of its clients complained about the misuse of its logo by the Witts." In his affidavit, Rehak states: "Recently, Halliburton chose another agency to handle a project that RCS would normally have handled. The lost fee was $100,000." This conclusory assertion does not rise to the level of "clear and specific" evidence sufficient to make out a prima facie case of damages caused by and attributable to the alleged misappropriation.

Conclusion

We overrule Rehak's issues and affirm the trial court's judgment.

Notes:

[1.] Murphy lost the seat in 2008. He was elected again to represent House District 133 in 2010, and re-elected in 2012.

[2.] Other provisions in Chapter 27 address additional findings; damages and costs; and exemptions. *Id.* §§ 27.007, 27.009, 27.010. Discussion of these provisions is not necessary to resolve this appeal.

[3.] Rehak's opening brief contains two different formulations of his sixth issue. One formulation at the brief's beginning says Witt failed "to prove by a preponderance of the evidence that each of the Appellants' claims other than libel and business disparagement were based on,

related to, or were in response to the Appellees' exercise of their 'right to free speech' as defined by the statute." As restated in the brief's argument section, Rehak's sixth issue says Witt failed "to prove by a preponderance of the evidence that the Appellants' claims for misuse of RCS'[s] copyrighted materials, and of RCS's clients['] trademarked logos were based on, related to, or were in response to the Appellees' exercise of their 'right to free speech' as defined by the statute." The argument following this restatement of Issue 6 addresses only conversion and misappropriation. Accordingly, we construe Rehak's Issue 6 to contend that only the conversion and misappropriation claims are not based on, related to, or asserted in response to Witt's exercise of the right of free speech as required under section 27.005(b)(1).

[4.] The Fourteenth Court of Appeals has concluded that Chapter 27 allows an interlocutory appeal regardless of whether the motion to dismiss is determined by an express order or by operation of law. *See Direct Commercial Funding, Inc. v. Beacon Hill Estates, LLC,* No. 14–12–00896–CV, 2013 WL 407029 (Tex.App.-Houston [14th Dist.] Jan. 24, 2013, Order); *see also San Jacinto Title Servs. of Corpus Christi, LLC. v. Kingsley Props., LP.,* No. 13–12–00352–CV, 2013 WL 1786632 (Tex.App.-Corpus Christi April 25, 2013, no pet. h.); Tex. Civ. Prac. & Rem.Code Ann. § 27.008(a), (b), (c). The Second Court of Appeals has reached a contrary conclusion. *See Jennings v. WallBuilder Presentations, Inc.*, 378 S.W.3d 519, 524–29 (Tex.App.-Fort Worth 2012, pet. filed) (interlocutory appeal is permitted under section 27.008 when trial court fails to rule on motion to dismiss, but not when trial court signs express order on dismissal); *see also Lipsky v. Range Prod. Co.,* No. 02–12–00098–CV, 2012 WL 3600014, at *1 (Tex.App.-Fort Worth Aug. 23, 2012, no pet.). This appeal does not require consideration of section 27.008's application to an interlocutory order because the order at issue here operated as a final judgment dismissing all causes of action asserted by Rehak. *See Lehmann v. Har–Con Corp.,* 39 S.W.3d 191, 205 (Tex.2001).

[5.] The burden of demonstrating a challenged statement's truth or falsity depends on the litigants' status and the statement's subject matter. In a case brought by a private plaintiff against a nonmedia defendant in connection with a matter that is not of public concern, "[t]he 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 Ann. § 73.005; *see also Randall's Food Mkts., Inc. v. Johnson,* 891 S.W.2d 640, 646 (Tex.1995) ("In suits brought by private individuals, truth is an affirmative defense to slander."). In contrast, "[A] public official ... must prove that defamatory statements made about him were false." *Bentley v. Bunton,* 94 S.W.3d 561, 586 (Tex.2002); *see also id.* at 586 n. 62;*Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 777, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986) (plaintiff bears burden of proving falsity when defamatory speech is of public concern and defendant is a member of the media; reserving question of who bears the burden when defendant is not a member of the media); *New York Times Co. v. Sullivan,* 376 U.S. 254, 279–80, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (public figure or public official must prove falsity). Because we resolve this appeal on other grounds, we do not address (1) whether Rehak was a public figure; (2) whether Witt was a media defendant; (3) whether the challenged statements were false; (4) who bore the burden with respect to establishing truth or falsity; or (5) the requisite level of fault necessary to establish liability. We also do not address the nature of any asserted damages attributed to libel or disparagement. *See generally Hancock v. Variyam,* 400 S.W.3d 59 (Tex.2013).

[6.] Rehak submitted affidavits in the trial court from himself and from "members of the community" who, according to Rehak, "meet the test of being 'ordinary readers' or the 'man on the street.' " Rehak asserts that "[t]hese individuals all perceived the Defamatory Post in its entirety as conveying the false gist that Rehak was being accused of participating in a scheme of

theft and bribery involving a public official and a public entity." Because the defamatory meaning inquiry is objective rather than subjective, affidavits containing assertions from Rehak and others regarding their individual subjective perceptions of the validity of his claims are not competent evidence and do not affect the analysis. *See, e.g., Tex. Div.-Tranter, Inc. v. Carrozza*, 876 S.W.2d 312, 314 (Tex.1994); *see also Vice v. Kasprzak*, 318 S.W.3d 1, 21 (Tex.App.-Houston [1st Dist.] 2009, pet. denied) (plaintiff's own characterization of allegedly defamatory statement cannot form the basis for a viable defamation claim).

[7] The Texas Supreme Court subsequently disapproved a separate portion of *Gill* addressing the viability of a "false gist" claim under Texas law. *See Turner,* 38 S.W.3d at 115 (citing *Gill,* 6 S.W.3d at 43). The disapproved portion of *Gill* has no bearing on the opinion's separate discussion of specific phrases that constituted rhetorical hyperbole.

327 S.W.2d 633
Wiley H. RAWLINS, Appellant,
v.
John McKEE et al., Appellees.
No. 7143.
Court of Civil Appeals of Texas, Texarkana.
Aug. 11, 1959.
Rehearing Denied Sept. 8, 1959.

Arthur N. Bishop, Jr., Dallas, for appellant.

J. C. Muse, Jr., Dallas, for appellee A. H. Belo Corp.

Leachman, Gardere, Akin & Porter, Dallas, for appellee John McKee.

Jackson, Walker, Winstead, Cantwell & Miller and Donald C. Fitch, Jr., Dallas, for appellee Times Herald Printing Co.

PER CURIAM.

Plaintiff-appellant, Wiley H. Rawlins, sued defendant-appellee, John McKee, A. H. Belo Corporation, and the Times Herald Printing Company, for $1,000,000 in damages, which he claims to have sustained as a result of a political advertisement published by appellees at the height of appellant's campaign for the Texas Legislature in the year 1958. He contends that the ad was libelous because, in effect, it referred to him (without using his name) as 'radical' and 'left-winger' who was 'backed and financed by D.O.T left-wingers and the big shot labor bosses.' The ad was alleged to have been printed on August 18, 1958, and reads as follows:

'VOTE

For Conservatives

Saturday, Aug. 23

Defeat the left-wingers in the

Democratic run-off primary

These are the Conservative

Democratic Candidates

Robert W. Hamilton

Associate Justice Supreme Court

Tom James

Place 4-Legislature

Ben Lewis

Place 5-Legislature

The above candidates, who personally ask your vote and support, are state

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rights conservative democrats. Their radical opponents are being backed and financed by D.O.T. Left-wingers and the Big Shot Labor Bosses.

Your Vote is Urgently needed Saturday.'

Appellees moved to dismiss the case on the ground that the petition failed to state a cause of action, because, as a matter of law, the ad was not libelous, and in any event was privileged. The motions were granted, the action was dismissed, and the appellant has appealed.

The only portion of the ad which appellant contends is libelous are the references to him as 'radical' and as 'backed and financed by the big shot labor bosses.' He brings forward seven points of error and each point is challenged by appellees. It can readily be seen that appellant was not named in the newspaper ad. However, it is assumed for the purpose of this appeal that the appellations complained of referred to appellant and that they were untrue. In his brief, appellant contends only that the ad was libelous per se. The true meaning of 'libelous per se' is, 'Written or printed words if they are so obviously hurtful to the person aggrieved by them that they require no proof of their injurious character to make them actionable.' Balentine, College Law Dictionary p. 492. He does not claim there was any malice or special circumstances which might give rise to libel per quod.

The reference to appellant, a candidate for public office, as 'radical' and as 'being backed and financed by the big shot labor bosses,' even if untrue, as a matter of law is not libelous under Art. 5430, R.C.S., since (a) the language complained of is not defamatory, and (b) such language does not expose the appellant to 'public hatred, contempt or ridicule' or 'impeach the honesty, integrity, or virtue, or reputation.'

Article 1, Sec. 8 of the Texas Constitution, Vernon's Ann.St., contains the following:

'Sec. 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; and no law shall ever be passed curtailing the liberty of speech or of the press. * * *'

'Libel' is defined in Art. 5430 as follows:

'A libel is a defamation expressed in printing or writing * * * tending to injure the reputation of one who is alive, and thereby expose him to public hatred, contempt or ridicule, or financial

injury, or to impeach the honesty, integrity, or virtue, or reputation of anyone, * * * and thereby expose such person to public hatred, ridicule, or financial injury.'

It is universally recognized that an appellation may be quite false, abusive, unpleasant and objectionable to the person designated without being defamatory. In 37 A.L.R. 885, we find the following:

'The law is well settled that mere words of general abuse, however opprobrious, ill-natured, or vexatious, whether written or spoken, do not constitute a basis for an action for defamation, in the absence of an allegation of special damages.' (Emphasis added.)

In Texas, of course, not all defamations necessarily come within the definition of a 'libel' under Art. 5430. It must also have the drastic results described therein. Snider v. Leatherwood, Tex.Civ.App., 49 S.W.2d 1107, wr. dis. The term 'radical' is a commonly used word. It is defined in Webster's New International Dictionary (unabridged, 2d Ed.1955) as follows:

'Radical: * * * In politics, one who advocates radical and sweeping

changes in laws and methods of government with the least delay, esp. changes that it is believed will equalize social conditions, or remedy evils arising from them.'

Under the dictionary definition there is nothing at all abusive, much less defamatory, about the term. It certainly does not have a violent and revolutionary impact as asserted by appellant.

Applying the term complained of to appellant, no matter how incorrectly, does not 'expose him to public hatred, contempt or ridicule or impeach his honesty, integrity or virtue or reputation' as is required for defamation to become a libel under the law. The conclusion must be the same with regard to the statement that appellant was supported by 'labor bosses.' Wabash Railroad Co. v. Young, 1904, 162 Ind. 102, 69 N.E. 1003, 4 L.R.A.,N.S., 1091; Chicago, R. I. & P. Ry. Co. v. Medley, 1916, 55 Okl. 145, 155 P. 211, L.R.A.1916D, 587; 33 A.L.R.2d 1223.

Appellant seems to contend that if the language he dislikes is not on its face libelous, it is so by innuendo or by reverse logic. In Snider v. Leatherwood, supra [49 S.W.2d 1109], it was said that: 'It is the true function of an innuendo to explain but not extend the effect and meaning of the language used, and charged to be libelous * * * So, the innuendo cannot enlarge or restrict the natural meaning of words, introduce new matter, or make certain that which was uncertain * * *.'

The Texas case most squarely in point, Brown v. Houston Printing Co., Tex.Civ.App., 255 S.W. 254, arose out of the political struggle between Governor Hobby and former Governor Ferguson near the end of World War I. There the newspaper in an editorial repeatedly naming Brown, a candidate for the Texas Legislature, charged that he was a 'Ferguson man on the Ferguson ticket' was 'opposed to the Hobby win-the-war legislation' would 'discharge the President and the war administration by voting to put saloons around the (Army) camps again,' and '[found] no fault with Ferguson's conduct, and that the voters should strike out his name on the ballot if they wished to vote for 'the protection of the military camps against drunkenness, debauchery, disease, demoralization and weakness.'

The court held that a general demurrer to the petition had been correctly sustained, because the objectional language (much stronger than here) simply was not libelous. It did not even mention statutory privilege. The court said that it could never be libelous to state, erroneously or otherwise, openly or by innuendo, that a person supported political views, measures or personages (there an impeached former governor) which were great public issues of the day and on which large groups of citizens differed.

That a candidate for county commissioner was a party to a 'scheme' to change the planned route of a highway so as to by-pass certain towns was not libelous. Snider v. Leatherwood, supra.

That a sheriff's absence from his office resulted in the escape of a murderer and necessitated a three-year search for him was not libelous. Houston Chronicle Publishing Co. v. Thomas, Tex.Civ.App., 262 S.W. 243, wr. ref.

That a mayor had admitted he had put a forced retirement plan in effect for city employees to get rid of one particular employee, was not libelous. Herald-Post Pub. Co. v. Hervey, Tex.Civ.App., 282 S.W.2d 410, wr. ref., n. r. e. In that case the court assumed that the statement was both false and made with malice, but held that the statement was not defamatory.

In the case of Houston Printing Co. v. Hunter, Tex.Civ.App., 105 S.W.2d 312, 316, affirmed 129 Tex. 652, 106 S.W.2d 1043, the court said:

'As we understand the law as laid down by our courts in such cases, if

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the alleged libelous matter is such that its language is obvious, unambiguous, and evident, and not capable of defamatory meaning, it would be the duty of the court to so declare it (and) to sustain a general demurrer thereto.'

When the libel statutes were enacted all the common-law defenses were preserved. Art. 5433, R.C.A. provides in part as follows:

'Nothing in the title shall be construed * * * to take away any now or at any time heretofore existing defense to a civil action for libel, either at common law or otherwise, but all such defenses are hereby expressly preserved.'

It is the common law of Texas, as well as the English-speaking world generally, that criticism of the official acts or conduct of public officials and candidates for public office, or of their fitness and qualifications for office, is privileged and not libelous, unless the charge is of such nature as to be grounds for removal from office. 27 Tex.Jur. 604; A. H. Belo & Co. v. Wren, 63 Tex. 686; Express Printing Co. v. Copeland, 64 Tex. 354; Cotulla v. Kerr, 74 Tex. 89, 11 S.W. 1058; Nunn v. Webster, Tex.Com.App., 260 S.W. 157; Houston Press Co. v. Smith, Tex.Civ.App., 3 S.W.2d 900, wr. dis.; Fitzjarrald v. Panhandle Pub. Co., 149 Tex. 87, 228 S.W.2d 499; Herald-Post Pub. Co. v. Hervey, Tex.Civ.App., 282 S.W.2d 410, wr. ref., n. r. e.

In one decision, Jenkins v. Taylor, Tex.Civ.App., 4 S.W.2d 656, 658, wr. dis., the test in the case of a legislator or candidate for the Legislature was said to be whether the statement charged him with 'such conduct as would impair his fitness for the office of legislator' or would 'subject

him to censure or reprimand before the bar of the House' if he were a member. Such is not the case here.

The libel statutes contain articles dealing with privilege. Art. 5432 R.C.S. contains in part the following:

'The publication of the following matters by any newspaper or periodical shall be deemed privileged and shall not be made the basis for any action for libel.

* * *

* * *

'4. A reasonable and fair comment or criticism of the official acts of public officials and of other matters of public concern published for general information.

'5. The privilege provided under * * * this article shall extend to any first publication of such privileged matter * * * and to subsequent publication thereof * * * when * * * a matter of public concern * * * (but) may be made the basis of an action for libel upon proof that such matter has ceased to be of such public concern and that same was published with actual malice.'

Clause (4) applies to candidates for public office as well as public officials. Fitzjarrald v. Panhandle Pub. Co., supar.

That a district attorney was an 'incompetent', a member of the Ku Klux Klan, who was 'dominated by a little clique of men in secret halls' and had 'made a corpse out of the district attorney's office,' was not libelous. Houston Press Co. v. Smith, supra. In this case the court said:

'When a man becomes a candidate for office his character for honesty, integrity, and matters which surround him which are calculated to affect his qualification and fitness for office are put before the public and are proper subjects for fair and reasonable comment.' [3 S.W.2d 900.]

That a mayor seeking nomination as county judge had squandered $80,000 of the taxpayers' money on a useless drainage

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basin while he was mayor, was not libelous. Fort Worth Press Co. v. Davis, Tex.Civ.App., 96 S.W.2d 416, wr. ref.

That a legislator had made statements on the floor of the Texas House of Representatives which were 'violent and irresponsible' and which if they had been made elsewhere would subject him 'to prosecution for libel,' was not libelous. Westbrook v. Houston Chronicle Pub. Co., Tex.Com.App., 129 Tex. 95, 102 S.W.2d 197, 199.

We have carefully examined the plaintiff's petition and the defendants' motions to dismiss the case, and find that the order of dismissal was proper.

The judgment of the trial court is affirmed.

475 U.S. 767
106 S.Ct. 1558
89 L.Ed.2d 783
PHILADELPHIA NEWSPAPERS, INC., et al., Appellants

v.

Maurice S. HEPPS et al.

No. 84-1491.
Argued Dec. 3, 1985.
Decided April 21, 1986.
Syllabus

Appellee Hepps is the principal stockholder of appellee corporation that franchises a chain of stores selling beer, soft drinks, and snacks. Appellant owner published a series of articles in its Philadelphia newspaper whose general theme was that Hepps, the franchisor corporation, and its franchisees (also appellees) had links to organized crime and used some of those links to influence the State's governmental processes. Appellees then brought a defamation suit in a Pennsylvania state court against the newspaper owner and the authors (also appellants) of the articles in question. Concluding that the Pennsylvania statute giving the defendant the burden of proving the truth of allegedly defamatory statements violated the Federal Constitution, the trial court instructed the jury that the plaintiff bore the burden of proving falsity. The jury ruled for appellants and therefore awarded no damages to appellees. The Pennsylvania Supreme Court, concluding that a showing of fault did not require a showing of falsity, held that to place the burden of showing truth on the defendant did not unconstitutionally inhibit free debate, and remanded the case for a new trial.

Held: In a case such as this one, where a newspaper publishes speech of public concern about a private figure, the private-figure plaintiff cannot recover damages without also showing that the statements at issue are false. Because in such a case the scales are in an uncertain balance as to whether the statements are true or false, the Constitution requires that the scales be tipped in favor of protecting true speech. To ensure that true speech on matters of public concern is not deterred, the common-law presumption that defamatory speech is false cannot stand. While Pennsylvania's "shield law," which allows employees of the media to refuse to divulge their sources, places a heavier burden on appellees, the precise scope of that law is unclear and, under these circumstances, it does not appear that such law requires a different constitutional standard than would prevail in the absence of such law. Pp. 771-779.

506 Pa. 304, 485 A.2d 374, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and POWELL, JJ., joined. BRENNAN, J., filed a concurring opinion, in which BLACKMUN, J., joined, *post,* p. 779. STE-

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VENS, J., filed a dissenting opinion, in which BURGER, C.J., and WHITE and REHNQUIST, JJ., joined, *post,* p. 780.

David H. Marion, Philadelphia, Pa., for appellants.

Ronald H. Surkin, Philadelphia, Pa., for appellees.

Justice O'CONNOR delivered the opinion of the Court.

This case requires us once more to "struggl[e] . . . to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 325, 94 S.Ct. 2997 3000, 41 L.Ed.2d 789 (1974). In *Gertz,* the Court held that a private figure who brings a suit for defamation cannot recover without some showing that the media defendant was at fault in publishing the statements at issue. *Id.,* at 347, 94 S.Ct., at 3010. Here, we hold that, at least where a newspaper publishes speech of public

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concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false.

I

Maurice S. Hepps is the principal stockholder of General Programming, Inc. (GPI), a corporation that franchises a chain of stores—known at the relevant time as "Thrifty" stores—selling beer, soft drinks, and snacks. Mr. Hepps, GPI, and a number of its franchisees are the appellees here.[1] Appellant Philadelphia Newspapers, Inc., owns the Philadelphia Inquirer (Inquirer). The Inquirer published a series of articles, authored by appellants William Ecenbarger and William Lambert, containing the statements at issue here. The general theme of the five articles, which appeared in the Inquirer between May 1975 and May 1976, was that appellees had links to organized crime and used some of those links to influence the State's governmental processes, both legislative and administrative. The articles discussed a state legislator, described as "a Pittsburgh Democrat and convicted felon," App. A60, whose actions displayed "a clear pattern of interference in state government by [the legislator] on behalf of Hepps and Thrifty," *id.,* at A62-A63. The stories reported that federal "investigators have found connections between Thrifty and underworld figures," *id.,* at A65; that "the Thrifty Beverage beer chain . . . had connections . . . with organized crime," *id.,* at A80; and that Thrifty had "won a series of competitive advantages through rulings by the State Liquor Control Board," *id.,* at A65. A grand jury was said to be investigating the "alleged relationship between the Thrifty chain and known Mafia figures," and "[w]hether the chain received special treatment from the [state Governor's] administration and the Liquor Control Board." *Id.,* at A68.

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Appellees brought suit for defamation against appellants in a Pennsylvania state court. Consistent with *Gertz, supra,* Pennsylvania requires a private figure who brings a suit for defamation to bear the burden of proving negligence or malice by the defendant in publishing the statements at issue. 42 Pa.Cons.Stat. § 8344 (1982). As to falsity, Pennsylvania follows the common law's presumption that an individual's reputation is a good one. Statements defaming that person are therefore presumptively false, although a publisher who bears the burden of proving the truth of the statements has an absolute defense. See 506 Pa. 304, 313-314, 485 A.2d

374, 379 (1984). See also 42 Pa.Cons.Stat. § 8343(b)(1) (1982) (defendant has the burden of proving the truth of a defamatory statement). Cf. *Gertz, supra,* 418 U.S., at 349, 94 S.Ct., at 3011 (common law presumes injury to reputation from publication of defamatory statements). See generally Eaton, The American Law of Defamation Through *Gertz v. Robert Welch, Inc.,* and Beyond: An Analytical Primer, 61 Va.L.Rev. 1349, 1352-1357 (1975) (describing common-law scheme of defamation law).

The parties first raised the issue of burden of proof as to falsity before trial, but the trial court reserved its ruling on the matter. Appellee Hepps testified at length that the statements at issue were false, Tr. 2221-2290, and he extensively cross-examined the author of the stories as to the veracity of the statements at issue. After all the evidence had been presented by both sides, the trial court concluded that Pennsylvania's statute giving the defendant the burden of proving the truth of the statements violated the Federal Constitution. *Id.,* at 3589. The trial court therefore instructed the jury that the plaintiffs bore the burden of proving falsity. *Id.,* at 3848.

During the trial, appellants took advantage of Pennsylvania's "shield law" on a number of occasions. That law allows employees of the media to refuse to divulge their sources. See 42 Pa.Cons.Stat. § 5942(a) (1982) ("No person . . . employed by any newspaper of general circulation . . . or any

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radio or television station, or any magazine of general circulation, . . . shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit"). See also 506 Pa., at 327, 485 A.2d, at 387 ("This statute has been interpreted broadly"). Appellees requested an instruction stating that the jury could draw a negative inference from appellants' assertions of the shield law; appellants requested an instruction that the jury could not draw any inferences from those exercises of the shield law's privilege. The trial judge declined to give either instruction. Tr. 3806-3808. The jury ruled for appellants and therefore awarded no damages to appellees.

Pursuant to Pennsylvania statute, 42 Pa.Cons.Stat. § 722(7) (1982), the appellees here brought an appeal directly to the Pennsylvania Supreme Court. That court viewed *Gertz* as simply requiring the plaintiff to show fault in actions for defamation. It concluded that a showing of fault did not require a showing of falsity, held that to place the burden of showing truth on the defendant did not unconstitutionally inhibit free debate, and remanded the case for a new trial.[2] 506 Pa., at 318-329, 485 A.2d, at 382-387. We noted probable jurisdiction, 472 U.S. 1025, 105 S.Ct. 3496, 87 L.Ed.2d 628 (1985), and now reverse.

II

In *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), the Court "determin[ed] for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a

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public official against critics of his official conduct." *Id.,* at 256, 84 S.Ct., at 713. The State's trial court in that case believed the statements tended to injure the plaintiff's reputation or bring him

into public contempt, *id.,* at 267, 84 S.Ct., at 719, and were therefore libelous *per se, id.,* at 262, 84 S.Ct., at 716. The trial court therefore instructed the jury that it could presume falsity, malice, and some damage to reputation, as long as it found that the defendant had published the statements and that the statements concerned the plaintiff. *Ibid.* The trial court also instructed the jury that an award of punitive damages required "malice" or "actual malice." *Id.,* at 262, 267, 84 S.Ct., at 716, 719. The jury found for the plaintiff and made an award of damages that did not distinguish between compensatory and punitive damages. *Id.,* at 262, 84 S.Ct., at 716. The Alabama Supreme Court upheld the judgment of the trial court in all respects. *Id.,* at 263, 84 S.Ct., at 716.

This Court reversed, holding that "libel can claim no talismanic immunity from constitutional limitations." *Id.,* at 269, 84 S.Ct., at 720. Against the "background of a 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," the Court noted that "[a]uthoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker." *Id.,* at 270-271, 84 S.Ct., at 720-721. Freedoms of expression require " 'breathing space,' " *id.,* at 272, 84 S.Ct., at 721 (quoting *NAACP v. Button,* 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963)):

"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 . . . 'self-censorship.' . . . 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." 376 U.S., at 279, 84 S.Ct., at 725.

The Court therefore held that the Constitution

"prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.,* at 279-280, 84 S.Ct., at 725-726.

That showing must be made with "convincing clarity," *id.,* at 285-286, 84 S.Ct., at 728-729, or, in a later formulation, by "clear and convincing proof," *Gertz,* 418 U.S., at 342, 94 S.Ct., at 3008. The standards of *New York Times* apply not only when a public official sues a newspaper, but also when a "public figure" sues a magazine or news service. See *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 162-165, 87 S.Ct. 1975, 1995-1997, 18 L.Ed.2d 1094 (1967) (Warren, C.J., concurring in result); *id.,* at 170, 87 S.Ct., at 1999 (opinion of Black, J.); *id.,* at 172, 87 S.Ct., at 2000 (opinion of BRENNAN, J.). See also *Wolston v. Reader's Digest Assn., Inc.,* 443 U.S. 157, 163-169, 99 S.Ct. 2701, 2705-2708, 61 L.Ed.2d 450 (1979).

A decade after *New York Times,* the Court examined the constitutional limits on defamation suits by private-figure plaintiffs against media defendants. *Gertz, supra.* The Court concluded that the danger of self-censorship was a valid, but not the exclusive, concern in suits for defamation: "The need to avoid self-censorship by the news media is . . ., not the only societal value at issue . . . [or] this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation." *Gertz, supra,* 418 U.S., at 341, 94 S.Ct., at 3007. See also *Rosenblatt v. Baer,* 383 U.S. 75, 92, 86 S.Ct. 669, 679, 15 L.Ed.2d 597 (1966) (Stewart, J., concurring). Any analysis must also take into account the "legitimate state interest underlying the law of libel [in] the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Gertz, supra,* 418 U.S., at 341, 94 S.Ct., at 3008. See also *Time, Inc. v. Firestone,* 424 U.S. 448, 456, 96 S.Ct. 958, 966, 47 L.Ed.2d 154 (1976) (dis-

cussing the "appropriate accommodation between the public's interest in an uninhibited press and its equally compelling need for judicial redress of libelous utterances"). In light of that interest, and in light of the fact that private figures have lesser access to media channels useful for counteracting false statements and have not voluntarily placed themselves in the public eye, *Gertz, supra,* 418 U.S., at 344-345, 94 S.Ct., at 3009-3010, the Court held that the Constitution "allows the States to impose liability on the publisher or broadcaster of defamatory falsehood on a less demanding showing than that required by *New York Times,*" 418 U.S., at 348, 94 S.Ct., at 3011: "[S]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Id.,* at 347, 94 S.Ct., at 3010. Nonetheless, even when private figures are involved, the constitutional requirement of fault supersedes the common law's presumptions as to fault and damages. In addition, the Court in *Gertz* expressly held that, although a showing of simple fault sufficed to allow recovery for actual damages, even a private-figure plaintiff was required to show actual malice in order to recover presumed or punitive damages. *Id.,* at 348-350, 94 S.Ct., at 3011-3012.

The Court most recently considered the constitutional limits on suits for defamation in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985). In sharp contrast to *New York Times, Dun & Bradstreet* involved not only a private-figure plaintiff, but also speech of purely private concern. 472 U.S., at 751-752, 105 S.Ct., at 2941. A plurality of the Court in *Dun & Bradstreet* was convinced that, in a case with such a configuration of speech and plaintiff, the showing of actual malice needed to recover punitive damages under either *New York Times* or *Gertz* was unnecessary:

"In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest [in preserving private reputation] adequately supports awards of presumed and punitive

damages—even absent a showing of 'actual malice.' " 472 U.S., at 761, 105 S.Ct., at 2946 (opinion of POWELL, J.) (footnote omitted).

See also *id.,* at ----, 105 S.Ct., at 2948 (BURGER, C.J., concurring in judgment); *id.,* at 764, 105 S.Ct., at 2948 (WHITE, J., concurring in judgment).

One can discern in these decisions two forces that may reshape the common-law landscape to conform to the First Amendment. The first is whether the plaintiff is a public official or figure, or is instead a private figure. The second is whether the speech at issue is of public concern. When the speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law. When the speech is of public concern but the plaintiff is a private figure, as in *Gertz,* the Constitution still supplants the standards of the common law, but the constitutional requirements are, in at least some of their range, less forbidding than when the plaintiff is a public figure and the speech is of public concern. When the speech is of exclusively private concern and the plaintiff is a private figure, as in *Dun & Bradstreet,* the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape.

Our opinions to date have chiefly treated the necessary showings of fault rather than of falsity. Nonetheless, as one might expect given the language of the Court in *New York Times,* see *supra,* at 772-773, a public-figure plaintiff must show the falsity of the statements at issue in order to prevail in a suit for defamation. See *Garrison v. Louisiana,* 379 U.S. 64, 74, 85 S.Ct. 209, 215, 13 L.Ed.2d 125 (1964) (reading *New York Times* for the proposition that "a public official [is] allowed the civil [defamation] remedy only if he establishes that the utterance was false"). See also *Herbert v. Lando,* 441 U.S. 153, 176, 99 S.Ct. 1635 1648, 60 L.Ed.2d 115 (1979) ("[T]he plaintiff must focus on the editorial process and prove a false publication attended by some degree of culpability").

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Here, as in *Gertz,* the plaintiff is a private figure and the newspaper articles are of public concern. In *Gertz,* as in *New York Times,* the common-law rule was superseded by a constitutional rule. We believe that the common law's rule on falsity—that the defendant must bear the burden of proving truth—must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages.

There will always be instances when the factfinding process will be unable to resolve conclusively whether the speech is true or false; it is in those cases that the burden of proof is dispositive. Under a rule forcing the plaintiff to bear the burden of showing falsity, there will be some cases in which plaintiffs cannot meet their burden despite the fact that the speech is in fact false. The plaintiff's suit will fail despite the fact that, in some abstract sense, the suit is meritorious. Similarly, under an alternative rule placing the burden of showing truth on defendants, there would be some cases in which defendants could not bear their burden despite the fact that the speech is in fact true. Those suits would succeed despite the fact that, in some abstract sense, those suits are unmeritorious. Under either rule, then, the outcome of the suit will sometimes be at variance with the outcome that we would desire if all speech were either demonstrably true or demonstrably false.

This dilemma stems from the fact that the allocation of the burden of proof will determine liability for some speech that is true and some that is false, but *all* of such speech is *unknowably* true or false. Because the burden of proof is the deciding factor only when the evidence is ambiguous, we cannot know how much of the speech affected by the allocation of the burden of proof is true and how much is false. In a case presenting a configuration of speech and plaintiff like the one we face here, and where the scales are in such an uncertain balance, we believe that

the Constitution requires us to tip them in favor of protecting true speech. To ensure that true speech on matters of public concern is not deterred,

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we hold that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern.

In the context of governmental restriction of speech, it has long been established that the government cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified. See *Consolidated Edison Co. v. Public Service Comm'n of N.Y.,* 447 U.S. 530, 540, 100 S.Ct. 2326 2334, 65 L.Ed.2d 319 (1980) (content-based restriction); *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 786, 98 S.Ct. 1407 1421, 55 L.Ed.2d 707 (1978) (speaker-based restriction); *Renton v. Playtime Theaters, Inc.,* 475 U.S. 41, 47-54, 106 S.Ct. 925, 928-932, 89 L.Ed.2d 29 (1986) (secondary-effects restriction). See also *Speiser v. Randall,* 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958) (striking down the precondition that a taxpayer sign a loyalty oath before receiving certain tax benefits). It is not immediately apparent from the text of the First Amendment, which by its terms applies only to governmental action, that a similar result should obtain here: a suit by a private party is obviously quite different from the government's direct enforcement of its own laws. Nonetheless, the need to encourage debate on public issues that concerned the Court in the governmental-restriction cases is of concern in a similar manner in this case involving a private suit for damages: placement by state law of the burden of proving truth upon media defendants who publish speech of public concern deters such speech because of the fear that liability will unjustifiably result. See *New York Times,* 376 U.S., at 279, 84 S.Ct., at 725; *Garrison, supra,* 379 U.S., at 74, 85 S.Ct., at 215 ("Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned"). Because such a "chilling" effect would be antithetical to the First Amendment's protection of true speech on matters of public concern, we believe that a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant. To do otherwise could "only result in a deterrence of speech which the Constitution makes free." *Speiser, supra,* 357 U.S., at 526, 78 S.Ct., at 1342.

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We recognize that requiring the plaintiff to show falsity will insulate from liability some speech that is false, but unprovably so. Nonetheless, the Court's previous decisions on the restrictions that the First Amendment places upon the common law of defamation firmly support our conclusion here with respect to the allocation of the burden of proof. In attempting to resolve related issues in the defamation context, the Court has affirmed that "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters." *Gertz,* 418 U.S., at 341, 94 S.Ct., at 3007. Here the speech concerns the legitimacy of the political process, and therefore clearly "matters." See *Dun & Bradstreet,* 472 U.S., at 758-759, 105 S.Ct., at 2945 (speech of public concern is at the core of the First Amendment's protections). To provide " 'breathing space,' " *New York Times, supra,* 376 U.S., at 272, 84 S.Ct., at 721 (quoting *NAACP v. Button,* 371 U.S., at 433, 83 S.Ct., at 338), for true speech on matters of public concern, the Court has been willing to insulate even *demonstrably* false speech from liability, and has imposed additional requirements of fault upon the plaintiff in a suit for defamation. See, *e.g., Garrison,* 379 U.S., at 75, 85 S.Ct., at 216; *Gertz, supra,* 418 U.S., at 347, 94 S.Ct., at 3010. We therefore do not break new ground here in insulating speech that is not even demonstrably false.

We note that our decision adds only marginally to the burdens that the plaintiff must already bear as a result of our earlier decisions in the law of defamation. The plaintiff must show fault. A jury is obviously more likely to accept a plaintiff's contention that the defendant was at fault in publishing the statements at issue if convinced that the relevant statements were false. As a practical matter, then, evidence offered by plaintiffs on the publisher's fault in adequately investigating the truth of the published statements will generally encompass evidence of the falsity of the matters asserted. See Keeton, Defamation and Freedom of the Press, 54 Texas L.Rev. 1221, 1236 (1976). See also Franklin & Bussel, The Plaintiff's Burden in Defamation: Awareness and Falsity, 25 Wm. & Mary L.Rev. 825, 856-857 (1984).

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We recognize that the plaintiff's burden in this case is weightier because of Pennsylvania's "shield" law, which allows employees of the media to refuse to divulge their sources. See *supra,* at 770-771.[3] But we do not have before us the question of the permissible reach of such laws. Indeed, we do not even know the precise reach of Pennsylvania's statute. The trial judge refused to give any instructions to the jury as to whether it could, or should, draw an inference adverse to the defendant from the defendant's decision to use the shield law rather than to present affirmative evidence of the truthfulness of some of the sources. See *supra,* at 771. That decision of the trial judge was not addressed by Pennsylvania's highest court, nor was it appealed to this Court.[4] In the situation before us, we are unconvinced that the State's shield law requires a different constitutional standard than would prevail in the absence of such a law.

For the reasons stated above, the judgment of the Pennsylvania Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice BRENNAN, with whom Justice BLACKMUN joins, concurring.

I believe that where allegedly defamatory speech is of public concern, the First Amendment requires that the plaintiff,

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whether public official, public figure, or private individual, prove the statements at issue to be false, and thus join the Court's opinion. Cf. *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971). I write separately only to note that, while the Court reserves the question whether the rule it announces applies to nonmedia defendants, *ante,* at 779, n. 4, I adhere to my view that such a distinction is "irreconcilable with the fundamental First Amendment principle that '[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of the source, whether corporation, association, union, or individual.' " *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 781, 105 S.Ct. 2939 2957, 86 L.Ed.2d 593 (1985) (BRENNAN, J., dissenting) (quoting *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 777, 98 S.Ct. 1407 1416, 55 L.Ed.2d 707 (1978)).

Justice STEVENS, with whom THE CHIEF JUSTICE, Justice WHITE, and Justice REHNQUIST join, dissenting.

The issue the Court resolves today will make a difference in only one category of cases—those in which a private individual can prove that he was libeled by a defendant who was at least negligent. For unless such a plaintiff can overcome the burden imposed by *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347, 94 S.Ct. 2997 3010, 41 L.Ed.2d 789 (1974), he cannot recover regardless of how the burden of proof on the issue of truth or falsity is allocated. By definition, therefore, the only litigants—and the only publishers—who will benefit from today's decision are those who act negligently or maliciously.

The Court, after acknowledging the need to " 'accommodat[e] . . . the law of defamation and the freedoms of speech and press protected by the First Amendment,' " *ante,* at 768 (quoting *Gertz v. Robert Welch, Inc.,* 418 U.S., at 325, 94 S.Ct., at 3000), decides to override "the common-law presumption" retained by several States [1] that "defamatory speech is false" because of

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the need "[t]o ensure that true speech on matters of public concern is not deterred." *Ante,* at 776-777. I do not agree that our precedents require a private individual to bear the risk that a defamatory statement—uttered either with a mind toward assassinating his good name or with careless indifference to that possibility—cannot be proven false. By attaching no weight to the State's interest in protecting the private individual's good name, the Court has reached a pernicious result.

The state interest in preventing and redressing injuries to reputation is obviously important. As Justice Stewart eloquently reminded us in his concurrence in *Rosenblatt v. Baer,* 383 U.S. 75, 92-94, 86 S.Ct. 669, 679-680, 15 L.Ed.2d 597 (1966):

"The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.

* * * * *

". . . The First and Fourteenth Amendments have not stripped private citizens of all means of redress for inju-

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ries inflicted upon them by careless liars. The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored.

"Moreover, the preventive effect of liability for defamation serves an important public purpose. For the rights and values of private personality far transcend mere personal

interests. Surely if the 1950's taught us anything, they taught us that the poisonous atmosphere of the easy lie can infect and degrade a whole society." [2]

While deliberate or inadvertent libels vilify private personages, they contribute little to the marketplace of ideas. In assaying the First Amendment side of the balance, it helps to remember that the perpetrator of the libel suffers from its failure to demonstrate the truth of its accusation only if the "private-figure" plaintiff first establishes that the publisher is at "fault," 418 U.S., at 347, 94 S.Ct., at 3010—*i.e.,* either that it published its libel with "actual malice" in the *New York Times* sense ("with knowledge that it was false or with reckless disregard of whether it was false or not," *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280, 84 S.Ct. 710, 725-726, 11 L.Ed.2d 686 (1964)), or that it published with that degree of careless indifference characteristic of negligence. Far from being totally in the dark about "how much

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of the speech affected by the allocation of the burden of proof is true and how much is false," *ante,* at 776, the antecedent fault determination makes irresistible the inference that a significant portion of this speech is beyond the constitutional pale.[3] This observation is almost tautologically true with regard to libels published with "actual malice." For that standard to be met, the publisher must come close to willfully blinding itself to the falsity of its utterance.[4] The observation is also valid, albeit to a lesser extent, with respect to

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defamations uttered with "fault." [5] Thus, while the public's interest in an uninhibited press is at its nadir when the publisher is at fault or worse, society's "equally compelling" need

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for judicial redress of libelous utterances is at its zenith. *Time, Inc. v. Firestone,* 424 U.S. 448, 456, 96 S.Ct. 958, 966, 47 L.Ed.2d 154 (1976).

To appreciate the thrust of the Court's holding, we must assume that a private-figure libel plaintiff can prove that a story about him was published with "actual malice"—that is, without the publisher caring in the slightest whether it was false or not. Indeed, in order to comprehend the full ramifications of today's decision, we should assume that the publisher knew that it would be impossible for a court to verify or discredit the story and that it was published for no other purpose than to destroy the reputation of the plaintiff. Even if the plaintiff has overwhelming proof of malice—in both the common-law sense and as the term was used in *New York Times Co. v. Sullivan*—the Court today seems to believe that the character assassin has a constitutional license to defame.[6]

In my opinion deliberate, malicious character assassination is not protected by the First Amendment to the United States Constitution. That Amendment does require the target of a defamatory statement to prove that his assailant was at fault, and I agree that it provides a constitutional shield for truthful statements. I simply do not understand, however, why a character assassin should be given an absolute license to defame by means of statements that can be neither verified nor disproved. The danger of deliberate defamation by reference to unprovable facts is not a merely speculative or hypothetical concern. Lack of knowledge about third parties, the loss

of critical records, an uncertain recollection about events that occurred long ago, perhaps during a period of special stress, the absence of eyewitnesses—a host of fac-

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tors may make it impossible for an honorable person to disprove malicious gossip about his past conduct, his relatives, his friends, or his business associates.

The danger of which I speak can be illustrated within the confines of this very case. Appellants published a series of five articles proclaiming that "Federal authorities . . . have found connections between Thrifty and underworld figures," App. A65; that "Federal agents have evidence of direct financial involvement in Thrifty by [Joseph] Scalleat," a "leader of organized crime in northeastern Pennsylvania," *id.,* at A72; and that "the Thrifty Beverage beer chain . . . had connections itself with organized crime," *id.,* at A80.[7] The defamatory character of these statements is undisputed. Yet the factual basis for the one specific allegation contained in them is based on an admitted relationship between appellees and a third party. The truth or falsity of that statement depends on the character and conduct of that third party—a matter which the jury may well have resolved against the plaintiffs on the ground that they could not disprove the allegation on which they bore the burden of proof.[8]

Despite the obvious blueprint for character assassination provided by the decision today, the Court's analytical approach—by attaching little or no weight to the strong state interest in redressing injury to private reputation—provides a wholly unwarranted protection for malicious gossip. As I understand the Court's opinion, its counterintuitive result is derived from a straightforward syllogism. The major premise seems to be that "the First Amendment's protection of true speech on matters of public concern," *ante,* at 777, is

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tantamount to a command that no rule of law can stand if it will exclude any true speech from the public domain. The minor premise is that although "we cannot know how much of the speech affected by the allocation of the burden of proof is true and how much is false," *ante,* at 776, at least some unverifiable gossip is true. From these premises it necessarily follows that a rule burdening the dissemination of such speech would contravene the First Amendment. Accordingly, "a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant." *Ante,* at 777.

The Court's result is plausible however, only because it grossly undervalues the strong state interest in redressing injuries to private reputations. The error lies in its initial premise, with its mistaken belief that doubt regarding the veracity of a defamatory statement must invariably be resolved in favor of constitutional protection of the statement and against vindication of the reputation of the private individual. To support its premise, the Court relies exclusively on our precedents requiring the government to bear the burden of proving that a restriction of speech is justified. See *ante,* at 777-778. Whether such restrictions appear in the form of legislation burdening the speech of particular speakers or of particular points of view, or of common-law actions punishing seditious libel, the Court is doubtlessly correct that the government or its agents must at a minimum shoulder the burden of proving that the speech is false and must do so with sufficient reliability that we can be confident that true speech is not suppressed. It was to achieve this reliability that the Court, in *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), incorporated into the First Amendment the then-emergent common-law

"privilege for [good-faith] criticism of official conduct." *Id.,* at 282, 84 S.Ct., at 727. See *id.,* at 282, n. 21, 84 S.Ct., at 727, n. 21. Because "erroneous statement is inevitable in free debate, and [because] it must be protected if the freedoms of expres-

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sion are to have the 'breathing space' that they 'need . . . to survive,' *N.A.A.C.P. v. Button,* 371 U.S. 415, 433 [83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963)],' " *id.,* 376 U.S., at 271-272, 84 S.Ct., at 721-722, this privilege is defeasible only if the defamatory statement "was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not," *id.,* at 279-280, 84 S.Ct., at 725-726. "Allowance of the defense of truth, with the burden of proving it on the defendant," was found wanting because it did not "mean that only false speech [would] be deterred"—doubts regarding whether truth "can be proved in court or fear of the expense of having to do so" would force good-faith critics of official conduct to " 'steer far wider of the unlawful zone,' " *id.,* at 279, 84 S.Ct., at 725 (quoting *Speiser v. Randall,* 357 U.S. 513, 526, 78 S.Ct. 1332 1342, 2 L.Ed.2d 1460 (1958)).[9]

Even assuming that attacks on the reputation of a public figure should be presumed to be true, however, a different calculus is appropriate when a defamatory statement disparages the reputation of a private individual.[10] In that case, the overriding concern for reliable protection of truthful statements must make room for "[t]he legitimate state interest underlying the law of libel"—"the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Gertz v. Robert Welch, Inc.,* 418 U.S., at 341, 94 S.Ct., at 3008. A public official, of course, has no "less interest in protecting his reputation than an individual in private life." *Rosenbloom v. Metromedia,* 403 U.S. 29, 46, 91 S.Ct. 1811 1821, 29 L.Ed.2d 296 (1971) (opinion of

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BRENNAN, J.). But private persons are "more vulnerable to injury" and "more deserving of recovery"—more vulnerable because they lack "access to the channels of effective communication . . . to counteract false statements"; more deserving because they have "relinquished no part of [their] good name[s]" by "thrust[ing] themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Gertz v. Robert Welch, Inc.,* 418 U.S., at 344-345, 94 S.Ct., at 3009-3010.

Recognition of the "strong and legitimate [state] interest in compensating private individuals for injury to reputation," *id.,* at 348-349, 94 S.Ct., at 3011-3012, exposes the untenability of the Court's methodology: the burden of proof in "private-figure" libel suits simply cannot be determined by reference to our precedents having the reputations of "public figures" in mind. In libel cases brought by the latter category of plaintiffs,

"we view an erroneous verdict for the plaintiff as most serious. Not only does it mulct the defendant for an innocent misstatement . . . but the possibility of such error . . . would create a strong impetus toward self-censorship, which the First Amendment cannot tolerate." *Rosenbloom v. Metromedia,* 403 U.S., at 50, 91 S.Ct., at 1823 (opinion of BRENNAN, J.).

In libel suits brought by private individuals, in contrast, "the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain." *Gertz v.*

Robert Welch, Inc., 418 U.S., at 343, 94 S.Ct., at 3008. To be sure, both categories of cases involve "speech that matters." *Id.,* at 341, 94 S.Ct., at 3007. But "[t]he extension of the *New York Times* test" to every item of public interest "would abridge this legitimate state interest to a degree that we find unacceptable." *Id.,* at 346, 94 S.Ct., at 3010.[11] Accordingly, in *Gertz v. Robert Welch, Inc.,* this

Court rejected the *Rosenbloom* plurality's assumption that the risk of error must invariably be borne by the libel plaintiff, regardless of his or her status, as long as the defamatory statement touches "matters of public or general concern." *Rosenbloom v. Metromedia,* 403 U.S., at 44, 91 S.Ct., at 1820. *Gertz* thus forecloses the Court's unacknowledged reliance on the discredited analysis of the *Rosenbloom* plurality; where private-figure libel plaintiffs are involved, the First Amendment does *not* "requir[e] us to tip [the scales] in favor of protecting true speech" merely because that speech addresses "matters of public concern." *Ante,* at 776. See 418 U.S., at 345-346, 94 S.Ct., at 3009-3010. See also *Time, Inc. v. Firestone,* 424 U.S., at 454-456, 96 S.Ct., at 965-966 (refusing to "reinstate the doctrine advanced in the plurality opinion in *Rosenbloom* " in the guise of protection for inaccurate reporting on "public controversies" or on judicial proceedings).

In my view, as long as publishers are protected by the requirement that the plaintiff has the burden of proving fault, there can be little, if any, basis for a concern that a significant amount of true speech will be deterred unless the private person victimized by a malicious libel can also carry the burden of proving falsity. The Court's decision trades on the good names of private individuals with little First Amendment coin to show for it.

I respectfully dissent.

1. Appellants list nine entities as appellees in the proceedings in this Court: Maurice S. Hepps; General Programming, Inc.; A. David Fried, Inc.; Brookhaven Beverage Distributors, Inc.; Busy Bee Beverage Co.; ALMIK, Inc.; Lackawanna Beverage Distributors; N.F.O., Inc.; and Elemar, Inc. Brief for Appellants ii.

2. The state courts that have considered this issue since *Gertz* have reached differing conclusions. Compare, *e.g., Denny v. Mertz,* 106 Wis.2d 636, 654-658, 318 N.W.2d 141, 150-151 (defendant must bear burden of showing truth), cert. denied, 459 U.S. 883, 103 S.Ct. 179, 74 L.Ed.2d 147 (1982), and *Memphis Publishing Co. v. Nichols,* 569 S.W.2d 412 (Tenn.1978) (same), with *Gazette, Inc. v. Harris,* 229 Va. 1, 15-16, 325 S.E.2d 713, 725 (plaintiff must bear burden of showing falsity), cert. denied, 473 U.S. 905, 105 S.Ct. 3513, 87 L.Ed.2d 643 (1985), and *Madison v. Yunker,* 180 Mont. 54, 67, 589 P.2d 126, 133 (1978) (same).

3. Pennsylvania is not alone in this choice. See, *e.g.,* Ala.Code § 12-21-142 (1977); Cal.Const., Art. I, § 2(b); N.Y.Civ.Rights Law § 79-h (McKinney 1976).

4. We also have no occasion to consider the quantity of proof of falsity that a private-figure plaintiff must present to recover damages. Nor need we consider what standards would apply if the plaintiff sues a nonmedia defendant, see *Hutchinson v. Proxmire,* 443 U.S. 111, 133, n. 16, 99 S.Ct. 2675, 2687, n. 16, 61 L.Ed.2d 411 (1979), or if a State were to provide a plaintiff with the opportunity to obtain a judgment that declared the speech at issue to be false but did not give rise to liability for damages.

1. See, *e.g., Elliott v. Roach,* 409 N.E.2d 661, 681 (Ind.App.1980); *Trahan v. Ritterman,* 368 So.2d 181, 184 (La.App.1979); *Parsons v. Gulf & South American S.S. Co.,* 194 So.2d 456, 460 (La.App.), cert. denied, 389 U.S. 896, 88 S.Ct. 215, 19 L.Ed.2d 213 (1967); *Madison v. Yunker,* 180 Mont. 54, 61, 589 P.2d 126, 129-130 (1978); *Rogozinski v. Airstream by Angell,* 152 N.J.Super. 133, 146-147, 377 A.2d 807, 814 (1977), modified, 164 N.J.Super. 465,

397 A.2d 334 (1979); *Martin v. Griffin Television, Inc.*, 549 P.2d 85, 87, 94 (Okla.1976); *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 447-451, 468, 273 A.2d 899, 907-909, 917 (1971); *Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412, 420 (Tenn.1978); *Frank B. Hall & Co., Inc. v. Buck*, 678 S.W.2d 612, 623-625 (Tex.App.1984), cert. denied, 472 U.S. 1009, 105 S.Ct. 2704, 86 L.Ed.2d 720 (1985); *Denny v. Mertz*, 106 Wis.2d 636, 654-655, 318 N.W.2d 141, 150, cert. denied, 459 U.S. 883, 103 S.Ct. 179, 74 L.Ed.2d 147 (1982).

2. "There is no doubt about the historical fact that the interest in one's good name was considered an important interest requiring legal protection more than a thousand years ago; and that so far as Anglo-Saxon history is concerned this interest became a legally protected interest comparatively soon after the interest in bodily integrity was given legal protection." L. Eldridge, The Law of Defamation § 53, pp. 293-294 (1978).

See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757-758, 105 S.Ct. 2939 2944, 86 L.Ed.2d 593 (1985) (opinion of POWELL, J.); *id.*, at 767-769, 105 S.Ct., at 2949-2950 (WHITE, J., concurring in judgment); *id.*, at 793, n. 16, 105 S.Ct., at 2963, n. 16 (BRENNAN, J., dissenting) ("[T]he individual's interest in reputation is certainly at the core of notions of human dignity"); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341, 94 S.Ct. 2997 3007, 41 L.Ed.2d 789 (1974).

3. "But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues. *New York Times Co. v. Sullivan*, 376 U.S. [254,] 270 [84 S.Ct. 710, 720, 11 L.Ed.2d 686 (1964)]. They belong to that category 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.' *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031 (1942)." *Gertz v. Robert Welch, Inc.*, 418 U.S., at 340, 94 S.Ct., at 3007.

But cf. *New York Times Co. v. Sullivan*, 376 U.S., at 279, n. 19, 84 S.Ct., at 725, n. 19.

4. "Our cases, however, have furnished meaningful guidance for the further definition of a reckless publication. In *New York Times, supra*, the plaintiff did not satisfy his burden because the record failed to show that the publisher was aware of the likelihood that he was circulating false information. In *Garrison v. State of Louisiana*, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964), . . . the opinion emphasized the necessity for a showing that a false publication was made with a 'high degree of awareness of . . . probable falsity.' 379 U.S., at 74, 85 S.Ct., at 216. Mr. Justice Harlan's opinion in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 153, 87 S.Ct. 1975 1990, 18 L.Ed.2d 1094 (1967), stated that evidence of either deliberate falsification or reckless publication 'despite the publisher's awareness of probable falsity' was essential to recovery by public officials in defamation actions. These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323 1325, 20 L.Ed.2d 262 (1968).

See *Rosenblatt v. Baer*, 383 U.S. 75, 92, 86 S.Ct. 669, 679, 15 L.Ed.2d 597 (1966) (Stewart, J., concurring) ("What the *New York Times* rule ultimately protects is defamatory falsehood").

5. It is presumably for this reason that the Court believes that its "decision adds only marginally to the burdens that the plaintiff must already bear as a result of our earlier decisions in the law of defamation." *Ante*, at 778. See *ibid.* ("As a practical matter, then, evidence offered by plaintiffs on the publisher's fault in adequately investigating the truth of the published statements will generally encompass evidence of the falsity of the matters asserted." (citations omitted)).

Although I am inclined to agree with the preceding observation, I do not agree that it supports the result reached by the Court today. That allocation of the burden of proof is inconsequential in many cases provides no answer to cases in which it is determinative. See *infra*, at 785-787. Moreover, the Court's belief, however sincere, that its decision will not significantly impair the state interest in redressing injury to reputation is not itself sufficient to justify overriding state law. See *Gertz v. Robert Welch, Inc.*, 418 U.S., at 349, 94 S.Ct., at 3011.

I note that the Court makes no claim that its decision to impose on private-figure libel plaintiffs the burden of proving falsity is necessary to prevent jury confusion. See W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 116, pp. 839-840 (5th ed. 1984) ("[T]here is no inconsistency in assuming falsity until defendant publisher proves otherwise and requiring the plaintiff to prove negligence or recklessness with respect to

the truth or falsity of the imputation"). See also 506 Pa. 304, 325, n. 13, 485 A.2d 374, 385, n. 13 (1984) ("In a rather circuitous argument, [appellants] contend that falsity is inextricably bound up with proof of fault. [Appellants] assert that to prove fault the plaintiff in fact must demonstrate the falsity of the matter. While in some instances the plaintiff may elect to establish the patent error in the material to demonstrate the lack of due care in ascertaining its truth, it does not necessarily follow that negligence of the defendant can only be shown by proving that the material is false. A plaintiff can demonstrate negligence in the manner in which the material was gathered, regardless of its truth or falsity. In such instance the presumption of falsity will prevail unless the defendant elects to establish the truth of the material and thereby insulate itself from liability. Where it is necessary to prove falsity to establish the negligence of the defendant, it is then the burden of the plaintiff to do so. . . . That proposition will not, of course, hold true in all cases. Where negligence can be established without a demonstration of the falsity of the material, there is no additional obligation upon the plaintiff to prove the falsity of the material").

6. This license would gain immeasurable strength if courts take up the suggestion of commentators in the Court's camp that the nonfalsifiable nature of a libel should entitle the defendant to summary judgment. See Franklin & Bussel, The Plaintiff's Burden in Defamation: Awareness and Falsity, 25 Wm. & Mary L.Rev. 825, 865 (1984) ("If the plaintiff's suit is based upon a statement that is not susceptible to being proved false, for example, the court should deny any discovery and dismiss the complaint").

7. The parties agree that "the thrust of the challenged publications was that the Thrifty chain was connected with underworld figures and organized crime. It was that proposition that was required to be proven false." Brief for Appellants 36.

8. At trial, the individual plaintiff simply denied knowledge of Joseph Scalleat's employment with Beer Sales Consultants and of BSC's employment by three Thrifty stores. See Testimony of Maurice Hepps, Tr. 2185-2186, 2200.

9. The *New York Times Co. v. Sullivan* privilege was subsequently extended to "public figures." See *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 164, 87 S.Ct. 1975 1996, 18 L.Ed.2d 1094 (1967) (Warren, C.J., concurring in result).

10. If the issue were properly before us, I would be inclined to the view that public figures should not bear the burden of disproving the veracity of accusations made against them with "actual malice," as the *New York Times* Court used that term. The contrary remarks in cases such as *Garrison v. Louisiana,* 379 U.S. 64, 74, 85 S.Ct. 209, 215, 13 L.Ed.2d 125 (1964), were not necessary to the decisions in those cases, and they do not persuade me that the constitutional value in truthful statements requires any more protection of defamatory utterances whose truth may not be ascertained than is provided by the *New York Times* test.

11. See 418 U.S., at 342, 94 S.Ct., at 3008 ("Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test").

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In re PHILADELPHIA NEWSPAPERS, LLC, et al., Debtors. Vahan H. Gureghian, Danielle Gureghian, and Charter School Management, Inc., Appellants.

No. 11–3257.

United States Court of Appeals,
Third Circuit.

Argued May 23, 2012.
Filed July 26, 2012.
As Amended Oct. 25, 2012.

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Before: AMBRO, FUENTES, and HARDIMAN, Circuit Judges.

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OPINION OF THE COURT

AMBRO, Circuit Judge.

Vahan H. Gureghian, Danielle Gureghian, and Charter School Management, Inc. (collectively, the "CSMI Parties") appeal from the judgment of the District Court affirming the Bankruptcy Court's decision to deny the CSMI Parties' requests for the allowance of administrative expense claims under 11 U.S.C. § 503(b) in the Chapter 11 bankruptcy proceedings of Philadelphia Newspapers, LLC and certain of its affiliates (collectively, the

"Debtors"). [1] In affirming the Bankruptcy Court's decision, the District Court held that the appeal was equitably moot, and alternatively that the CSMI Parties failed to establish their entitlement to administrative expense claims. Though we hold that the appeal is not equitably moot, we affirm the District Court's judgment based on its conclusions regarding the administrative expense requests.

I. Background

Bankruptcy Court Proceedings

This appeal relates to a defamation action filed by the CSMI Parties against Philadelphia Media Holdings, LLC (one of the Debtors), The Philadelphia Inquirer, and several Inquirer employees in the Court of Common Pleas of Delaware County, Pennsylvania. The action concerns certain articles published in print and online by the Inquirer discussing the CSMI Parties' contract management of the Chester Community Charter School (the "Articles"). After the filing of the action, the Debtors filed for relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101 *et seq.* The CSMI Parties assert that post-petition the Debtors published an article that links to and endorses the Articles. On August 2, 2010, they timely filed the administrative expense requests based on these allegations.[2]

Specifically, the CSMI Parties alleged that pre-petition the Debtors published a charter school webpage (the "Charter Page") that contained links to various items published by the Inquirer about charter schools, including the Articles. [3] They claimed that these links endorsed the Articles as accurate reporting and misled the public into believing that the CSMI Parties engaged in wrongdoing similar to the improper or illegal conduct alleged in other linked news items. They also highlighted that the Articles were displayed beneath the Charter Page's title bar as a "marquee" enclosed in a separate box containing photographs, thereby drawing attention to the Articles.

They further alleged that post-petition the Debtors published an editorial article titled "Not the Lessons Charters Were Supposed to Teach" by Inquirer columnist Monica Yant Kinney (the "Kinney Article"). It contained a link to and a statement endorsing the Charter Page. The Kinney Article read: "Some city charter schools—think Mastery, KIPP, Independence,

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Young Scholars—are soaring. But if you follow the remarkable reporting of my colleague Martha Woodall (http:// go. philly. com/ charter), you'll see greedy grown-ups pilfering public gold under the guise of enriching children's lives." The CSMI Parties argue that this link and statement "republished" the Articles.[4]

Each administrative expense request asserted an estimated claim of $1,800,000 for the Debtors' alleged post-petition act of defamation. Each also sought $147,140 in alleged damages for the Debtors' post-petition conduct and prosecution of claims against the CSMI Parties.[5]

Three weeks after the CSMI Parties made the administrative expense requests, the Debtors filed on August 23 an objection to the requests along with a motion for an expedited hearing. The next day, the CSMI Parties objected to the Debtors' motion to expedite. The Bankruptcy Court held a hearing on the motion to expedite on August 26. At that hearing, the Debtors stated that they requested an expedited hearing because the closing under the then-current version of the

Debtors' confirmed plan of reorganization [6] was scheduled to take place on August 31, and reserving $1.8 million for the requests would affect adversely their post-closing working capital.[7] The Bankruptcy Court granted the motion to expedite and scheduled an evidentiary hearing for August 30.

Bankruptcy Judge Stephen Raslavich also made preliminary statements regarding the administrative expense requests. He noted that he could

detect virtually no merit to this assertion of an administrative expense claim.... I didn't want to mislead you as to what my preliminary sense of this is.... [I]t's going to take an enormous amount of persuading to convince me that the allegations of damage ... [provide] some kind of [ongoing] recoverable damage in the nature of a bankruptcy estate administrative claim.

Nonetheless, the Judge worked with the CSMI Parties to establish an acceptable hearing date and time.

At the hearing on the Debtors' objection to the administrative expense requests, Judge Raslavich, after hearing testimony and oral argument, denied the requests. He held that the CSMI Parties had not sustained their burden of proof in establishing entitlement to an administrative expense claim. The CSMI Parties timely appealed to the District Court on September 10.

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The closing did not take place as anticipated because of failed negotiations with the Debtors' labor unions, the acceptable completion of which was a condition to closing. The Debtors conducted another auction of substantially all of their assets on September 23, and the sale was consummated under the terms of the Fifth Amended Joint Chapter 11 Plan (the “Fifth Amended Plan” or “Plan”) for a purchase price of $105 million in cash.[8]

District Court Decision

Before the District Court, the CSMI Parties argued that the Bankruptcy Court erred in denying the administrative claims requests because the Kinney Article's link and reference to the Charter Page provided a post-petition tort claim. They also asserted that the Bankruptcy Court prejudged the merits of the requests and infringed on their due process rights by forcing them to proceed on an expedited basis. The Debtors argued that the appeal should be dismissed as equitably moot.[9]

The District Court held that the appeal was equitably moot, “as the plan has been substantially consummated and no stay was sought,” but nonetheless considered the merits. After noting that courts often provide their preliminary impressions on matters to narrow issues and that expedited hearings are “commonplace and often necessary” in bankruptcy proceedings, it considered the claims underlying the administrative expense requests. It affirmed the Bankruptcy Court's denial of the requests based on its holding that “merely post[ing] a link to the charter school webpage that contained the original articles as the courts that have had occasion to consider this issue have uniformly held, is not distinct tortious conduct upon which a defamation claim can be grounded.”

In addition to advancing the same arguments regarding the Bankruptcy Court's actions and decisions as they did before the District Court, the CSMI Parties argue to us that the District Court erred in holding that the appeal is equitably moot.

II. Jurisdiction and Standard of Review

The Bankruptcy Court had jurisdiction under 28 U.S.C. § 157(b). The District Court had jurisdiction under 28 U.S.C. §§ 158(a) and 1334. We have jurisdiction under 28 U.S.C. §§ 158(d) and 1291.

Our precedent requires us to review for abuse of discretion a district court's decision that an appeal is equitably moot. *In re Cont'l Airlines,* 91 F.3d 553, 560 (3d Cir.1996) (en banc) ("*Continental I* "). [10] Because a district court sits as an

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appellate court to review a bankruptcy court, we review a bankruptcy court's "legal determinations *de novo,* its factual findings for clear error, and its exercises of discretion for abuse thereof." *In re Goody's Family Clothing Inc.,* 610 F.3d 812, 816 (3d Cir.2010).

III. Equitable Mootness

Equitable mootness is a way for an appellate court to avoid deciding the merits of an appeal. In this uncommon act, a court dismisses an appeal even if it has jurisdiction and can grant relief if "implementation of that relief would be inequitable." *Continental I,* 91 F.3d at 559 (quoting *In re Chateaugay Corp.,* 988 F.2d 322, 325 (2d Cir.1993)). The term "mootness" is a misnomer. Unlike mootness in the constitutional sense, where it is impossible for a court to grant any relief, "mootness" here is used "as a shortcut for a court's decision that *the fait accompli* of a plan confirmation should preclude further judicial proceedings." *Id.*

A court arrives at this decision through the application of "prudential" considerations that address "concerns unique to bankruptcy proceedings." *Id.* These concerns relate to the adverse effects of the unraveling of a confirmed plan that could result from allowing the appeal to proceed. The equitable mootness doctrine recognizes that if a successful appeal would be fatal to a plan, prudence may require the appeal be dismissed because granting relief to the appellant "would lead to a perverse outcome." *United States Tr. v. Official Comm. of Equity Sec. Holders (In re Zenith Elecs. Corp.),* 329 F.3d 338, 343 (3d Cir.2003). A "perverse outcome" often involves injury to third parties, particularly investors, who have relied on the confirmed plan, *see Nordhoff Invs. Inc. v. Zenith Elecs. Corp.,* 258 F.3d 180, 184 (3d Cir.2001) ("One inequity, in particular, that is often at issue is the effect upon innocent third parties. When transactions following court orders are unraveled, third parties not before us who [took actions] in reliance on those orders will likely suffer adverse effects."), or the potential for chaos in the bankruptcy court, *see Continental I,* 91 F.3d at 560–61 (citing *In re Roberts Farms,* 652 F.2d 793 (9th Cir.1981)) (reversal of the plan's confirmation would "create an unmanageable, uncontrollable situation for the Bankruptcy Court").

The "prudential" factors we consider in evaluating equitable mootness are the following:

(1) whether the reorganization plan has been substantially consummated, (2) whether a stay has been obtained, (3) whether the relief requested would affect the rights of parties not before the court, (4) whether the relief requested would affect the success of the plan, and (5) the public policy of affording finality to bankruptcy judgments.

Continental I, 91 F.3d at 560. "These factors are given varying weight, depending on the particular circumstances." *In re PWS Holding Corp.,* 228 F.3d 224, 236 (3d Cir.2000).

The first factor, typically "the foremost consideration," *id.,* requires that a court consider whether allowing an appeal to go forward will undermine the plan, and not merely whether the plan has been substantially consummated under the

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Bankruptcy Code's definition.[11] *See, e.g., Zenith Elecs.,* 329 F.3d at 343–44 (holding that the district court abused its discretion in finding the appeal equitably moot because it merely determined that the plan had been substantially consummated in a definitional sense and did not provide a complete analysis of the first factor); *United Artists Theatre Co. v. Walton (In re United Artists Theatre Co.),* 315 F.3d 217, 228 (3d Cir.2003) (holding that the substantial consummation factor weighed against equitable mootness, despite the plan satisfying the Bankruptcy Code's definition, because the relief sought "does not undermine the Plan's foundation"); *PWS Holding,* 228 F.3d at 236 (declining to dismiss an appeal seeking alterations to a confirmed plan as equitably moot because a successful appeal would not "knock the props out from under the authorization for every transaction that has taken place" (quoting *In re Chateaugay Corp.,* 167 B.R. 776, 780 (S.D.N.Y.1994))).

The second factor principally duplicates the first "in the sense that a plan cannot be substantially consummated if the appellant has successfully sought a stay." *Zenith Elecs.,* 329 F.3d at 346 n. 4. Thus this factor "should only weigh heavily against the appellant if, by a failure to secure a stay, a reorganization plan was confirmed, the existence of which is later threatened by the appellant's appeal." *Id. See also United Artists,* 315 F.3d at 228 (noting that failure to seek a stay weighed against appellant, but "because the remedy [appellant] seeks does not undermine the Plan's foundation, this omission is not fatal"); *Nordhoff Invs. Inc. v. Zenith Elecs. Corp.,* 258 F.3d 180, 186–87 (3d Cir.2001) ("[I]t 'is obligatory upon appellant ... to pursue with diligence all available remedies to obtain a stay of execution of the objectionable order ... *if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from.*' " (emphasis added) (quoting *In re Highway Truck Drivers & Helpers Local Union No. 107,* 888 F.2d 293, 297 (3d Cir.1989))).

The third factor asks to what extent the relief sought would adversely affect parties not before the court. Stated differently, "[h]igh on the list of prudential considerations ... is the reliance of third parties, in particular investors, on the finality of the transaction." *Continental I,* 91 F.3d at 562. The fourth factor largely replicates the analysis of the first in that it considers whether granting the appellant the requested relief would unravel the plan. *See Nordhoff Invs.,* 258 F.3d at 189. Finally, the fifth factor supports the other four by encouraging investors and others to rely on confirmation orders, thereby facilitating successful reorganizations by fostering confidence in the finality of confirmed plans. *See id.* at 190;*Continental I,* 91 F.3d at 565 ("[T]he

importance of allowing approved reorganizations to go forward in reliance on bankruptcy court confirmation orders may be the central animating force behind the equitable mootness doctrine").

Taken together, these factors recognize that a court only should apply the equitable mootness doctrine if doing so will "[unscramble] complex bankruptcy reorganizations when the appealing party should have acted before the plan became extremely difficult to retract."

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Nordhoff Invs., 258 F.3d at 185. The doctrine is quite rightly "limited in scope" and "cautiously applied." [12]*Continental I,* 91 F.3d at 559.

In holding that the appeal is equitably moot, the District Court seemingly relied on the Plan's substantial consummation under the Bankruptcy Code's definition. We discern no analysis of whether a ruling favorable to the CSMI Parties would upset the Plan. The Court also faulted the CSMI Parties for not seeking a stay without explaining whether a stay was critical given the progression of the Debtors' bankruptcy proceedings. Moreover, it did not include any analysis of the final three factors.

In our view, a balancing of the equitable mootness factors calls for allowing this appeal to proceed. Though the Plan was substantially consummated in a definitional sense after the Bankruptcy Court denied the administrative expense requests, a ruling in favor of the CSMI Parties will not upset the Plan. It provides that administrative expense claims will be paid on the later of the Plan's effective date or the date on which the claims become allowed. It also establishes an account from which a designated entity is to distribute funds to holders of allowed administrative expense claims as provided by the Plan. If the CSMI Parties' administrative expense requests are allowed, they may be paid under the Plan without upsetting it.

Indeed, on appeal the Debtors do not argue that allowance of the requests will undermine the Plan. Also, under the agreement for the purchase of substantially all of the Debtors' assets and the Plan, the Debtors are responsible for paying the requests if they are allowed. These facts make this appeal unlike *Continental I,* in which the debtor entered into an agreement with investors premised on the limitation of the amount of administrative expense claims that the investors would assume. That agreement was incorporated explicitly into the confirmed plan. 91 F.3d at 556. A holding in favor of the appellant would have provided for an additional (and sizable) administrative expense claim that the investor would be required to assume, and thus arguably would have upset the plan. Here, the administrative expense requests were not part of the purchaser's calculus at the time of the sale and their allowance, only 1.7% of the monies ($105 million) coming into the Debtors' estates from the purchase of their assets consummated under the terms of the Fifth Amended Plan, will not unravel the sale or the Plan.

In addition, at the time of the Bankruptcy Court's ruling on the administrative expense requests, the then-current plan (the Fourth Amended Plan) already had been confirmed. The closing on that plan, scheduled for a day after the hearing on the requests, did not occur. Instead the Fourth Amended Plan became moot (pun

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intended) when the Fifth Amended Plan was confirmed a month later.

Though perhaps the CSMI Parties should have sought a stay of the order confirming the Fifth Amended Plan, given the timing of their appeal during the progression of Debtors' bankruptcy proceedings, they need not be faulted unduly for failing to do so. Moreover, the CSMI Parties' appeal of the Bankruptcy Court's disallowance of its requests categorized the requests as disputed administrative expense claims. Under the Plan, the Debtors should have set aside sufficient funds in the distribution account to fulfill the requests if the CSMI Parties prevailed on appeal and the requests later became allowed claims. As such, the CSMI Parties' posting of a bond was not critical to the Debtors or the entities designated to administer the Plan.

As concerns the rights of parties not before us (the third factor), the Bankruptcy Code and the Plan establish priority of payment among the Debtors' creditors. The latter provides a mechanism for payment of disputed administrative expense claims if they are deemed allowed claims. *See* Plan §§ 5.04, 7.09, 7.11, 7.13 (establishing the distribution account, and detailing powers and duties of the liquidating trustee and distribution agent). No doubt the appeal can proceed without causing substantial harm to other creditors. In this context, it is hard to say that the Plan's success, the fourth factor, will be affected.

Accordingly, the first four factors weigh in favor of allowing the appeal to proceed. Though the finality of the Bankruptcy Court's decision necessarily will be disturbed, because a holding in favor of the CSMI Parties on appeal will not unscramble the Plan or upset the rights of other parties, we honor the CSMI Parties' statutory right to review of the Court's decision. We thus hold that the appeal is not equitably moot.

IV. The Bankruptcy Court's Handling of the Administrative Expense Requests

Expedited Hearing

The CSMI Parties argue that the expedited hearing on August 30, 2010, violated their due process rights and that the Bankruptcy Court abused its discretion in holding the hearing on such an expedited basis. We review due process claims *de novo*. *Fadiga v. Att'y Gen.*, 488 F.3d 142, 154 (3d Cir.2007).

Due process generally requires notice and an opportunity to be heard. *See United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993). The CSMI Parties received notice of the hearing on the Debtors' objection to the administrative expense requests a week before the hearing took place. They also were given the opportunity to be heard at the hearing on the motion to expedite. At that hearing, the Bankruptcy Court asked them to propose a schedule (taking into account the scheduled closing).

Under Fed. R. Bankr.P. 9006(c), "for cause shown" a bankruptcy court has the discretion to set an expedited schedule for the hearing of a substantive motion. In exercising that discretion, it should consider the prejudice to parties entitled to notice and weigh this against the reasons for hearing the motion on an expedited basis. *See In re Grant Broad. of Phila., Inc.*, 71 B.R. 390, 397 (Bankr.E.D.Pa.1987). The Debtors stated that they needed to resolve the administrative expense requests before the closing under the then-current Fourth Amended Plan. The CSMI Parties' requests were for $1.8 million, small relative to the proposed purchase

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price under the agreement accompanying the Fourth Amended Plan. However, the CSMI Parties had a week to prepare for the expedited hearing. This was sufficient time for them to ready witness testimony and draft a detailed twelve-page brief in opposition to the Debtors' objection to the requests. At the hearing, they presented this testimony and expounded on their written arguments regarding the requests.

Given the accelerated time frame of bankruptcy proceedings and the facts before us, we conclude that the CSMI Parties were given more than adequate time to prepare for the expedited hearing. *See Hester v. NCNB Nat'l Bank (In re Hester),* 899 F.2d 361, 364 n. 3 (5th Cir.1990) ("[M]otions for material reductions in the notice period are routinely granted by bankruptcy courts."). The Bankruptcy Court did not abuse its discretion in hearing the Debtors' objection to the requests on an expedited basis and the expedited hearing did not violate the CSMI Parties' due process rights.

Preliminary Statements At Hearing On Motion to Expedite

The CSMI Parties argue that Judge Raslavich made improper premature conclusions at the August 26, 2010, hearing on the Debtors' motion to expedite. As the District Court noted, judges often inform parties of their preliminary impressions to narrow issues and assist the parties in focusing both themselves and the court. *See, e.g., Official Comm. of Asbestos Pers. Injury Claimants v. Sealed Air Corp. (In re W.R. Grace & Co.),* 285 B.R. 148, 158 (Bankr.D.Del.2002) (giving preliminary views as to the appointment of a Chapter 11 trustee before denying the motion to appoint a trustee "at this time"). The CSMI Parties elected to proceed, and Judge Raslavich held an evidentiary hearing during which they had an opportunity to present their full case. This included arguments regarding the Kinney Article that they raised for the first time in response to the Debtors' objection, which was filed after the hearing on the motion to expedite. Indeed, the CSMI Parties focused on the Kinney Article during the August 30 hearing and their arguments regarding the Kinney Article served as the primary basis of their appeal to the District Court and to us. Thus Judge Raslavich's comments at the August 26 hearing on the motion to expedite served their purpose. In giving the CSMI Parties a preview of what they needed to do to counteract his pre-hearing impressions, which certainly were not irrevocable, he encouraged the CSMI Parties to develop additional arguments. Most counsel would prize such insights.

Moreover, at the end of the August 30 hearing, Judge Raslavich articulated his reasoning for sustaining the Debtors' objection, specifically noting case law cited in the CSMI Parties' written response to the Debtors' objection. With this background, we can hardly conclude that his candid preliminary comments at the August 26 hearing on the motion to expedite prejudiced the CSMI Parties.

V. Administrative Expense Requests

Administrative Expense Claims Under the Bankruptcy Code

Section 503 of the Bankruptcy Code provides that, "[a]fter notice and a hearing, there shall be allowed administrative expenses, ... including—(1)(A) the actual, necessary costs and expenses of preserving the estate...." 11 U.S.C. § 503(b). For a claim to be entitled to administrative expense status, it must "arise from a [post-petition] transaction with the debtor-in-possession," and "be beneficial to the debtor-in-possession in the operation of the business."

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Calpine Corp. v. O'Brien Envtl. Energy, Inc. (In re O'Brien Envtl. Energy, Inc.), 181 F.3d 527, 532–33 (3d Cir.1999). The party asserting an administrative expense claim bears the burden of demonstrating that it deserves administrative expense status. *Id.* at 533.

The Supreme Court has held that fairness may call for the allowance of post-petition tort claims as administrative expenses if those claims arise from actions related to the preservation of a debtor's estate despite having no discernable benefit to the estate. *Reading Co. v. Brown,* 391 U.S. 471, 477, 88 S.Ct. 1759, 20 L.Ed.2d 751 (1968) (deeming costs from fire damage resulting from the negligent actions of the bankruptcy receiver acting in the scope of his authority an "actual and necessary" expense of reorganization). Based on *Reading,* courts in our Circuit have granted requests for administrative expense claims arising from a variety of tort actions. *See, e.g., In re B. Cohen & Sons Caterers, Inc.,* 143 B.R. 27 (E.D.Pa.1992) (granting an administrative expense claim for injuries resulting from a slip and fall while on the debtor's premises); *In re Hayes Lemmerz Int'l, Inc.,* 340 B.R. 461 (Bankr.D.Del.2006) (granting an administrative expense claim to the lessor of machines that the debtor-lessee returned damaged where the damage occurred post-petition); *In re Women First Healthcare, Inc.,* 332 B.R. 115 (Bankr.D.Del.2005) (granting the stalking horse bidder an administrative expense claim as compensation for its reliance on the debtor's negligent misrepresentations regarding the sale). Also based on *Reading,* courts in other jurisdictions have denied administrative expense requests where the alleged tort claims were speculative or too strained to be considered related to the preservation of a debtor's estate. *See, e.g., In re Aspen Limousine Serv., Inc.,* 193 B.R. 325 (D.Colo.1996) (holding that asserted antitrust damages were too speculative as to their amount and unrelated to the preservation of the debtor's estate); *In re Pacesetter Designs, Inc.,* 114 B.R. 731 (Bankr.D.Colo.1990) (granting administrative expense status to certain medical expenses resulting from an injury to an employee of the debtor-in-possession, but disallowing other expenses as "too strained" and "too disparate with the language and intent of the Bankruptcy Code" to be considered costs of administration).

In *Pa. Dep't of Envtl. Res. v. Tri–State Clinical Labs., Inc.,* 178 F.3d 685 (3d Cir.1999), we discussed *Reading* in the context of whether a criminal fine for post-petition waste management violations was an administrative expense under Chapter 7. We observed that the Supreme Court's concept of "necessary costs" as including expenses incident to the preservation of a debtor's estate advances the language of § 503(b). "[R]ead as a whole, [it] suggests a quid pro quo pursuant to which the estate accrues a debt in exchange for some consideration necessary to the operation or rehabilitation of the estate." *Id.* at 690–91. With this case law context, we turn to the CSMI Parties' alleged tort, and whether it is eligible for administrative expense status.

Alleged Tort

For the CSMI Parties to be entitled to administrative expense claims, they must demonstrate that their allegations regarding the "republishing" of the Articles support a cause of action. To state a cause of action for defamation under Pennsylvania law, a plaintiff must establish: "(1) the defamatory character of the communication; (2) its publication by the defendant; (3) a reference to the plaintiff; (4) a recipient's understanding of the communication's defamatory character and its application to plaintiff; (5) special harm resulting from the publication; and (6)

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abuse of any conditional privilege." *Iafrate v. Hadesty,* 423 Pa.Super. 619, 621 A.2d 1005, 1006 (1993) (quoting *Smith v. Wagner,* 403 Pa.Super. 316, 588 A.2d 1308, 1311 (1991)). The statute of

limitations for defamation claims is one year from the date of publication. 42 Pa. Cons.Stat. § 5523. To avoid the potential for endless re-triggering of the statute of limitations, Pennsylvania has adopted the "single publication rule," which holds that for purposes of the statute of limitations "any one edition of a book or newspaper, or any one radio, television broadcast, exhibition of a motion picture or similar aggregate communication is a single publication." *Graham v. Today's Spirit*, 503 Pa. 52, 468 A.2d 454, 457 (1983) (quoting *Restatement (Second) of Torts* § 577(A)(3)); *see also*42 Pa. Cons.Stat. § 8341(b). Under this rule, "it is the original printing of the defamatory material and not the circulation of it which results in a cause of action." *Graham,* 468 A.2d at 457.

Pennsylvania courts have not considered whether the single publication rule applies to Internet publication. Other courts addressing Internet-based defamation have found the rule applicable to information widely available on the Internet. Noting that "[c]oncerns regarding the rapid pace of changes in the way information is disseminated, the desire to avoid multiplicity of suits and the need to give effect to relevant Statutes of Limitation ... gave rise to the single publication rule," those courts reason that there is "no rational basis upon which to distinguish publication of a book or report through traditional printed media and publication through electronic means...." *Firth v. State*, 184 Misc.2d 105, 706 N.Y.S.2d 835, 843 (N.Y.Ct.Cl.2000), *aff'd*98 N.Y.2d 365, 747 N.Y.S.2d 69, 775 N.E.2d 463 (App.2002); *see also Nationwide Bi–Weekly Admin., Inc. v. Belo Corp.*, 512 F.3d 137, 144 (5th Cir.2007) ("Every court to consider the issue after *Firth* has followed suit in holding that the single publication rule applies to information widely available on the Internet."); *Oja v. U.S. Army Corps of Eng'rs*, 440 F.3d 1122, 1131 (9th Cir.2006). We believe that Pennsylvania courts would extend the single publication rule to publicly accessible material on the Internet based on similar reasoning.

An exception to the single publication rule is the doctrine of republication. Republishing material (for example, the second edition of a book), editing and reissuing material, or placing it in a new form that includes the allegedly defamatory material, resets the statute of limitations. *Restatement (Second) of Torts* § 577(A); *Davis v. Mitan (In re Davis)*, 347 B.R. 607, 611 (W.D.Ky.2006). Traditional principles of republication thus require the retransmission of the allegedly defamatory material itself for the doctrine to apply. However, courts addressing the doctrine in the context of Internet publications generally distinguish between linking, adding unrelated content, or making technical changes to an already published website (which they hold is not republication), and adding substantive material related to the allegedly defamatory material to an already published website (which they hold is republication). *See Davis,* 347 B.R. at 611–12.

Several courts specifically have considered whether linking to previously published material is republication. To date, they all hold that it is not based on a determination that a link is akin to the release of an additional copy of the same edition of a publication because it does not alter the substance of the original publication. *See, e.g., Sundance Image Tech., Inc. v. Cone Editions Press, Ltd.,* No. 02–02258, 2007 WL 935703 (S.D.Cal. Mar. 7, 2007); *Churchill v. State of N.J.,* 378 N.J.Super. 471, 876 A.2d 311 (2005).

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Moreover, in a case with facts similar to this appeal, the Court held that a link and reference to an allegedly defamatory article did not amount to a republication of the article. In *Salyer v. Southern Poverty Law Center, Inc.*, 701 F.Supp.2d 912 (W.D.Ky.2009) (Heyburn II, J.), the defendant posted an allegedly defamatory article to his website. Between the time of the initial

posting and the defendant's removal of the article from the website, the defendant linked to the article while referencing it several times in other articles posted on the website. None of the references mentioned the plaintiff by name or restated the allegedly defamatory comments. The Court analyzed the link and reference separately, holding that neither amounted to republication. As to the link, it cautioned that "to find that a new link to an unchanged article posted long ago on a website republishes that article would result in a continual retriggering of the limitations period," and thus held that a link "is simply a new means for accessing the referenced article," not a republication. *Id.* at 916–18. As to the reference, it noted that "[w]hile [a reference] may call the *existence* of the article to the attention of a new audience, it does not present the *defamatory contents* of the article to the audience. Therefore, a reference, without more, is not properly a republication." *Id.* at 916 (emphases in original).

We agree with the distinction in these cases. The single publication rule advances the statute of limitations' policy of ensuring that defamation suits are brought within a specific time after the initial publication. Websites are constantly linked and updated. If each link or technical change were an act of republication, the statute of limitations would be retriggered endlessly and its effectiveness essentially eliminated. A publisher would remain subject to suit for statements made many years prior, and ultimately could be sued repeatedly for a single tortious act the prohibition of which was the genesis of the single publication rule. *See Graham,* 468 A.2d at 458. Additionally, under traditional principles of republication, a mere reference to an article, regardless how favorable it is as long as it does not restate the defamatory material, does not republish the material. *See Salyer,* 701 F.Supp.2d at 916. These traditional principles are as applicable to Internet publication as traditional publication, if not more so. Publishing a favorable reference with a link on the Internet is significantly easier. Taken together, though a link and reference may bring readers' attention to the existence of an article, they do not republish the article.

Though the Kinney Article's link may allow for easy access to the Charter Page, and the reference may speak favorably of the items collected by the Charter Page, including the Articles regarding the CSMI Parties, here they do not amount to the restatement or alteration of the allegedly defamatory material in the Articles necessary for a republication. The Bankruptcy and District Courts were correct in sustaining the Debtors' objection to the administrative expense requests on the basis that the CSMI Parties cannot advance a sustainable cause of action to support the requests. Though the publication of the Kinney Article occurred during the post-petition operation of the Debtors' newspaper, the claim is so speculative that we can discern no benefit conferred on the Debtors' estates even under *Reading's* view of what is a "necessary" expense.

* * * * * *

For the reasons stated above, we affirm the District Court's judgment, but hold that the appeal is not equitably moot.

Notes:

[1.] The Debtors are PMH Acquisition, LLC, Broad Street Video, LLC, Philadelphia Newspapers, LLC, Philadelphia Direct, LLC, Philly Online, LLC, PMH Holdings, LLC, Broad Street Publishing, LLC, Philadelphia Media, LLC, and Philadelphia Media Holdings, LLC.

[2.] The CSMI Parties filed one request in each of the Debtors' proceedings.

[3.] The CSMI Parties' statements in the materials supporting the administrative expense requests implied that the Charter Page was published for the first time post-petition. At the hearing before the Bankruptcy Court on the requests, the Debtors introduced evidence that the Charter Page was created pre-petition and had not been modified post-petition. Before the District Court and us, the CSMI Parties abandoned their assertion about the initial publication date of the Charter Page.

[4.] The CSMI Parties did not include this argument in the materials supporting the administrative expense requests. Rather, they first mentioned the Kinney Article in their response to the Debtors' objection to the requests. The parties agree that the Bankruptcy Court properly considered this argument.

[5.] The $147,140 is for legal costs related to adversary proceedings before the Bankruptcy Court seeking to stay the prosecution of the Pennsylvania state court action regarding the Articles. The CSMI Parties do not present any arguments on appeal regarding these fees, nor did they do so in the District Court.

[6.] The Bankruptcy Court confirmed the Fourth Amended Joint Chapter 11 Plan (the “Fourth Amended Plan”) at the end of June 2010. It contemplated a sale of substantially all of the Debtors' assets for a “base purchase price” of $105 million in cash. Under the asset purchase agreement, this cash was to be delivered to the entity designated to distribute funds to holders of claims under the Fourth Amended Plan.

[7.] The agreement for the purchase of substantially all of the Debtors' assets provided that the purchaser would assume certain administrative expense claims, the definition of which did not include the claims arising from the CSMI Parties' administrative expense requests.

[8.] The Bankruptcy Court confirmed the Fifth Amended Plan at the end of September 2010. Similar to the agreement accompanying the Fourth Amended Plan, the final agreement for the purchase of substantially all of the Debtors' assets provided that the purchaser would assume certain administrative expense claims, whose definition did not include the claims arising from the CSMI Parties' administrative expense requests. It also similarly provided that the “base purchase price” of $105 million in cash would be delivered to the entity designated to distribute funds to holders of claims under the Fifth Amended Plan.

[9.] Before the District Court (per Judge Eduardo Robreno), the Appellee was Philadelphia Media Network Inc., which under the Plan, as purchaser of substantially all of the Debtors' assets, possesses the rights of a party in interest for all matters related to the Debtors' Chapter 11 cases. Before us, Philadelphia Media Network Inc. remains the Appellee. For convenience, we refer to the Debtors when discussing the Appellee.

[10.] Then Circuit Judge Alito criticized this standard of review as contradicting our precedent that where the district court sits as an appellate court, we exercise plenary review. *Continental I,*

91 F.3d at 568 n. 4 (Alito, J., dissenting) ("We are essentially called on to review whether the district court properly decided not to reach the merits of the ... appeal. We are in just as good a position to make this determination as was the district court, which sat as an appellate court in this case.... [P]lenary review would better serve these ends.")

[11.] The Bankruptcy Code defines "substantial consummation" as: "(A) transfer of all or substantially all of the property proposed by the plan to be transferred; (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and (C) commencement of distribution under the plan." 11 U.S.C. § 1101(2).

[12.] In *Continental I,* our court sitting *en banc* invoked the equitable mootness doctrine by a narrow 7–6 margin. As referenced above, then Judge Alito dissented, and was joined by five judges. For the dissenters, the extraordinary nature of the equitable mootness doctrine required, at the very least, a more limited application than the majority provided in weighing the five factors it set out. *Continental I,* 91 F.3d at 567 (Alito, J., dissenting). Indeed, the majority did not "undertake an independent analysis of the origin or scope of the doctrine," but simply assumed its existence and adopted it as our own. *Id.* at 568. This resulted in an unjustifiably expansive doctrine that "can easily be used as a weapon to prevent any appellate review of bankruptcy court orders confirming reorganization plans. It thus places far too much power in the hands of bankruptcy judges." *Nordhoff Invs.,* 258 F.3d at 191 (Alito, J., concurring); *see also Continental I,* 91 F.3d at 568–71 (Alito, J., dissenting).

693 S.W.2d 621
The OUTLET COMPANY and Baxter Gentry, Appellants,
v.
International Sec. Group., Inc.
No. 04-83-00602-CV.
Court of Appeals of Texas,
San Antonio.
April 24, 1985.
Rehearing Denied June 12, 1985.

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

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

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

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OPINION

STOREY, Justice (Assigned).

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

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

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

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

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

BROADCASTS

PRE-BROADCAST

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

JULY 2nd

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

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

This is the International Security Group, a San Antonio based firm in a warehouse district on the city's northeast side. ISG provides protection for businessmen and high government officials

against terrorism attacks. Most of the clients are from Latin America. Building highly sophisticated bullet proof cars and training bodyguards are two aspects of this business that has grossed 6 million dollars so far this year. One former employee of ISG is afraid of appearing on camera, but he talked with us about how the company was allegedly involved in smuggling weapons.

QUESTION: How were you involved?

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

QUESTION: Where were they going?

ANSWER: To Guatemala I think.

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

ANSWER: I asked, but never got an answer.

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

We were allowed inside the plant to talk with ISG President Richard Medlin. Medlin says the charges are unfounded and that the man in our report is simply a disgruntled employee trying to make his company look bad. Medlin, who refused to appear on camera for security reasons, says that neither he or [sic] his company have ever been involved in smuggling guns.

JULY 3rd

MICHELLE MARSH: Last night we stated during this newscast that authorities were investigating a multi-million dollar gun smuggling scheme. We'd like to clarify that statement. The possibility that the people at the International Security Group based here in San Antonio are or have been involved in gun smuggling is under investigation. The extent of such an operation or the amount of money involved is not known. The management at International Security Group denies any knowledge of such a gun smuggling operation and today asked that all employees with knowledge of such an operation to take that information to proper authorities.

It has been held that, with respect to identity, the asserted libel must refer to some ascertained or ascertainable person. The individual need not be named if those who knew him understand from the publication that it referred to him. Newspapers, Inc. v. Matthews, 161 Tex. 284, 339 S.W.2d 890, 894 (1960). We believe the

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rule in Texas with respect to identity to be that set forth in W. PROSSER, HANDBOOK OF THE LAW OF TORTS 583 (2d ed. 1955):

A publication may clearly be defamatory as to somebody, and yet on its face make no reference to the individual plaintiff ... He need not, of course, be named and the reference may be an

indirect one; and it is not necessary that every listener understand it, so long as there are some who reasonably do.

Id. at 543, cited with approval in Poe v. San Antonio Express News Corp., 590 S.W.2d 537, 542 (Tex.Civ.App.--San Antonio 1979, writ ref'd n.r.e.) and Gibler v. Houston Post Co., 310 S.W.2d 377, 385 (Tex.Civ.App.--Houston 1958, writ ref'd n.r.e.). Here, Medlin was known to be the president of International Security Group, Inc. and its sole stockholder. Hence, he was identified by name as well as by the phrase "the management." There was no evidence offered tending to prove the broadcast was not directed to Medlin. We are persuaded that the texts themselves point directly to Medlin and taken with the testimony of witnesses who so understood the broadcast, the jury finding in this respect is amply supported.

Nor can we agree with the broadcaster's contention that Medlin was shown to be a public figure. There is no evidence that he assumed any role of special prominence in society or that he had thrust himself to the forefront of any particular public controversy in order to influence its resolution, the tests laid down in Gertz v. Robert Welch, Inc., 418 U.S. 323, 345, 94 S.Ct. 2997 3009, 41 L.Ed.2d 789, 808 (1974). Of course, the broadcasts themselves could not serve to make Medlin a public figure. Hutchinson v. Proxmire, 443 U.S. 111, 135, 99 S.Ct. 2675 2688, 61 L.Ed.2d 411, 431 (1979). While it is generally conceded that the question of whether a defamation plaintiff is a public figure is one for decision by the court, we conclude that no harm resulted in submitting the question to the jury in this case.

The broadcaster next complains that there was no evidence or, alternatively, insufficient evidence to support certain of the jury findings. The jury found that the broadcast taken as a whole had the effect of causing ordinary persons to believe that Medlin was involved in the criminal activity of gun smuggling. It found further that the published statement was false, that the broadcasters knew or should have known the statement was false, that the subject matter would warn a prudent broadcaster of its defamatory potential, that the broadcasters failed to use ordinary care, that "from clear and convincing evidence" the broadcasters were motivated by malice, and that the broadcasts were made with gross indifference or reckless disregard amounting to willful conduct. The jury also found the broadcasts were not fair, true and impartial accounts of a matter of public concern. Specifically, the broadcaster questions the evidentiary support for the findings of falsity, malice and willful conduct.

Consistent with the Supreme Court's holding in Gertz, the Texas Supreme Court in Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809 (Tex.1976), adopted the simple negligence standard for determining liability in the case of libel against a private individual. However, as required by Gertz, if this lesser standard is employed the individual may recover only actual damages, and the negligence finding may not be predicated upon a factual misstatement whose content would not warn a reasonably prudent editor of its defamatory potential. Foster, 541 S.W.2d at 819-20. Here, therefore, if the finding of falsity is supported in the evidence Medlin is entitled to recover his actual damages because of the finding of fault, that is, negligence, and the further finding that the broadcaster should have been warned of the statement's defamatory potential--two findings whose evidentiary support are not questioned. Thus, the only remaining evidentiary attacks on appeal are to the findings of falsity, malice and willful conduct. We will review at one time the evidence as it relates to these findings.

In discharging his burden of proving the falsity of the broadcaster's assertions, Medlin testified that neither he nor International Security Group were ever involved in gun smuggling. Four other witnesses who were closely related to the affairs of International Security Group confirmed this testimony. Additionally, Ron Wolters, the agent in charge of the local Bureau of Alcohol, Tobacco & Firearms, testified that his earlier investigations of International Security Group had uncovered no evidence of gun smuggling. Wolters also testified that there was no investigation under way at the time of the broadcast.

On the other hand, the broadcaster presented no direct evidence at trial tending to connect Medlin with a gun smuggling scheme. Its only evidence was the text of the broadcast which quoted an anonymous source as stating "I loaded shotguns and ammo into secret compartments in the cars." And in response to the question "Where were they going?" the source stated, "To Guatemala I think." The anonymous source remains anonymous and, of course, did not testify at trial. This exchange, is at best equivocal, but even if taken to mean that both cars and guns were going to Guatemala, it was hearsay and, consequently, without probative effect to demonstrate in fact that gun smuggling was in progress. Additionally, Baxter Gentry, the news reporter, testified at trial that his source never told him there were secret compartments in the vehicles or that any weapons ever left the gates of International Security Group.

While the burden is on Medlin to prove the falsity of the broadcaster's assertions rather than on the broadcaster to prove their truth, see A.H. Belo Corp. v. Rayzor, 644 S.W.2d 71, 80 (Tex.App.--Fort Worth 1982, writ ref'd n.r.e.), we are persuaded that Medlin has sustained his burden and that the jury finding of falsity is supported in the evidence. We conclude, therefore, that having proved the defamatory statement, fault, knowledge of defamatory potential and falsity, the tests set forth in Foster v. Laredo Newspapers, Inc. have been met, and, because the statement was libelous per se, Medlin is entitled to recover his actual damages for mental anguish without proof of other injury. Additionally, upon the same proof an award of special damages is authorized if such damages are shown to exist.

We now consider the propriety of the award of exemplary damages. It is clear that exemplary damages are recoverable only upon a finding from "clear and convincing evidence" that the defamatory statement was made from malice. Malice may be established by proving knowledge of falsity, the constitutional standard, or by proving reckless disregard amounting to willful conduct,--the so called "ill will" standard. See Gertz, 418 U.S. at 342, 94 S.Ct. at 3008, 41 L.Ed.2d at 807. A finding with respect to either standard which is supported by the requisite proof is sufficient. Furthermore, this court must independently decide whether the evidence in the record affords "clear and convincing" proof. Bose v. Consumers Union of United States, Inc., 466 U.S. ----, ----, 104 S.Ct. 1949 1965, 80 L.Ed.2d 502, 523 (1984), see also, New York Times v. Sullivan, 376 U.S. 254, 285, 84 S.Ct. 710, 729, 11 L.Ed.2d 686, 709 (1964).

Here, the jury found malice which was defined in New York Times v. Sullivan as "made ... with knowledge that it was false or with reckless disregard of whether it was false or not." Sullivan, 376 U.S. at 279-80, 84 S.Ct. at 726, 11 L.Ed.2d at 706. In a separate issue the jury found the statement was "made with gross indifference to or reckless disregard of the rights of Mr. Medlin so as to amount to a willful or wanton act." The broadcaster urges that there is no evidence and, alternatively, insufficient evidence to support these findings. We cannot agree.

The reporter, Gentry, virtually conceded that he made no effort to verify the assertions of his unnamed source or the statements contained in the broadcast. The failure to investigate without more cannot establish reckless disregard for truth. Gertz, 418 U.S. at 332, 94 S.Ct. at

3003, 41 L.Ed.2d at 801. In connection with the failure to investigate, however, we deem it important to observe that the subject matter of this broadcast was found by the jury to be such that a prudent broadcaster should be aware of its defamatory potential. The jury finding to this effect is not attacked on appeal. With knowledge of this potential it would seem appropriate that the failure to investigate should take on greater significance. In this context we review the additional evidence which goes to support the jury finding of actual malice.

The reporter, Gentry, videotaped and recorded the interview with his anonymous source before interviewing Medlin. The Medlin interview resulted in a categorical denial of any wrongdoing, yet the source interview was aired as originally taped. Indeed, Gentry testified that his purpose in interviewing Medlin was "to get a reaction or response" rather than to ascertain the accuracy of the "source" information. For example, there was uncontroverted testimony at trial that the vehicles in question were not equipped with secret compartments capable of storing weapons, yet no effort was made at the plant-site interview with Medlin to inspect any vehicle for secret compartments. These circumstances would tend to demonstrate that the broadcast was in the making without concern for what further investigation might disclose.

Furthermore, it is apparent that the broadcast was "staged" so as to depict a "cloak and dagger" episode. The video showed the anonymous source in shadows so as to conceal his identity with a voice-over by Gentry narrating the interview. The video included background graphics of weapons, and scenes of armed men in dark glasses riding in black Cadillacs. These circumstances tended to demonstrate an effort to dramatize and sensationalize rather than to report essential facts.

The video broadcast included footage of the Bureau of Alcohol, Tobacco & Firearms agent, with voice-over by Gentry. This created the illusion of a live interview in which Wolters was affirming that gun smuggling was illegal, and that an investigation into gun smuggling activities was presently underway. Yet at trial Wolters testified that he had not appeared on camera during the interview with Gentry. Wolters' testimony in this regard was uncontroverted and the only reasonable inference to be drawn is that file footage of Wolters was used in an attempt to lend authenticity to the narration. Wolters testified that he could not have stated to Gentry that an investigation was underway because, in fact, there was none. While in the broadcast, Gentry quoted his source as saying "I loaded shotguns and ammo into secret compartments in the cars," he, Gentry, testified at trial that he was never told of secret compartments. He testified further that he had never heard that any cars carrying weapons had left the gates of the International Security Group plant.

Finally, considerable testimony by media experts was presented at trial which criticized adversely the investigative reporting resulting in this broadcast. We find it unnecessary to evaluate this testimony. We are persuaded that the foregoing facts taken with the failure to verify--with knowledge of defamatory potential--and a lack of any competent evidence that a gun smuggling scheme was in fact underway, are sufficient to support the jury finding of actual malice.

The broadcaster urges that the actual damages awarded by the jury bear no relationship to those proved at trial--it suggests a remittitur but suggests no amount. We agree that the award is so excessive as to compel the conclusion that the jury acted from passion, prejudice or some other improper motive and that remittitur should be ordered.

"Actual damage" was defined by the trial court to "include mental anguish and suffering, humiliation and embarrassment." The proof of this injury was supplied wholly by the testimony of Medlin and his wife. Medlin testified that he experienced "anger and hurt." A meeting with his employees to discuss the allegations made by the broadcasts resulted in "one of probably the hardest times in my life."

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Mrs. Medlin characterized Medlin as being "shocked and embarrassed" and "I know it was hard for him to deal with all the phone calls and having to explain ... it was very frustrating." Yet, Mrs. Medlin acknowledged that none of the friends and relatives who called believed that Medlin was engaged in illegal activity. No further evidence of injury was offered.

There is no certain standard by which personal injury damages may be ascertained. Each case must stand on its own facts and review of other cases offer little help. The uncertainty is compounded where, as here, the injury is mental anguish not associated with bodily injury. Mental anguish has been characterized as " 'intense pain of body or mind' " and as a " 'high degree of mental suffering.' ... It must be something more than worry and vexation...." McAllen Coca Cola Bottling Co., Inc. v. Alvarez, 581 S.W.2d 201, 205 (Tex.Civ.App.--Corpus Christi 1979, no writ). It must be more than mere disappointment, anger, resentment or embarrassment. Gill v. Snow, 644 S.W.2d 222, 224 (Tex.App.--Fort Worth 1982, no writ).

We view the injury proved here as transitory in nature--little more than anger, embarrassment and frustration. A different conclusion might be reached had not Medlin waived injury to reputation as an element of his damages. A different question would then be presented because of the "presumed" injury, its severity and continuing nature. Here, the jury could not presume damages but was bound by the proof offered on the issue of mental anguish. For these reasons, we are compelled to the conclusion that the jury acted from passion, prejudice or some other improper motive in arriving at actual damages. The result is so excessive as to "shock the sense of justice and conscience of this court," and dictates that we order a remittitur of one-half the jury award.

For yet another reason we are persuaded that remittitur is appropriate in this case. The U.S. Supreme Court has consistently cautioned state courts with respect to the delicate line to be observed in considering the impact of defamation law upon the first amendment freedoms of speech and press. An example is found in Gertz v. Robert Welch, Inc.:

The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms.... More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.

* * *

* * *

[A]nd all awards must be supported by competent evidence concerning the injury....

418 U.S. 323, 349-50, 94 S.Ct. 2997, 3011-12, 41 L.Ed.2d 789, 811 (1974).

We consider this court no less bound to observe the fine line existing between these first amendment rights.

For like reasons we consider the jury award of $1,000,000.00 as punitive damages to be excessive. In this regard we reject the broadcaster's contention that the award of punitive damages against a media defendant is unconstitutional as a prior restraint upon the exercise of a constitutional right. See id. at 349, 94 S.Ct. at 3011-12, 41 L.Ed.2d at 811. However, it is clear that the courts consider the punishment of error as running the risk of "inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press.... [which] may lead to intolerable self-censorship." Id. at 340, 94 S.Ct. at 3007, 41 L.Ed.2d at 805-06.

Here, Medlin has recovered his actual as well as his special damages. Consequently, little is left to be served by the award of punitive damages except to punish and to set an example for others--both inviting a cautious and restrictive exercise of free speech and press. This consideration together with the circumstances which we have considered with respect to the actual damage award lead us to conclude that the

punitive damage award is excessive. We will therefore order that one-half of the punitive damages awarded be remitted.

The broadcaster also complains of the admission of certain testimony offered to prove special damages, that is, Medlin's economic loss arising out of loss in value of his stock in International Security Group. Specifically, complaint is made of expert testimony projecting profits and expert opinion evidence based on assumptions not supported by the evidence. We do not understand the broadcaster to dispute the fact that economic loss was suffered, or to complain that the amount of the loss as found by the jury was excessive.

The record shows that International Security Group commenced the manufacture and sale of security vehicles in January 1977. At the time of the broadcast in July 1979, it was selling in about 28 foreign countries and employed about 198 workers. Individual sales of vehicles in 1977 numbered 50, in 1978 about 120, and the first six months of 1979 about 190. Gross sales in 1977 and 1978 totaled about $2 million and $4.3 million dollars yielding profits of $8,000.00 and $132,000.00 respectively. Gross sales for the first six months of 1979 were $6 million, and after the broadcast no sales were made. International Security Group soon after became bankrupt.

The testimony is conflicting regarding the reasons for International Security Group's failure--whether because its suppliers and credit sources withdrew their support because of the broadcast, or because of other reasons not directly related to the broadcast. The jury obviously believed the broadcasts to be a significant reason because it awarded Medlin $100,000.00 as special damages arising out of loss of value in his stock. This was a small fraction of the value to which Medlin's experts testified.

The broadcaster complains that the court erred in allowing Medlin's expert to project profits because the business did not have a history of profits. It also complains that the expert, in calculating the value of the business, assumed as an intangible asset certain patents which Medlin

had never assigned to the International Security Group. We conclude that if admission of this testimony was error, it was harmless. We are thus persuaded, first, because the jury awarded only a fraction of the value asserted. Second, and more importantly, the uncontroverted evidence shows that in 1978 Medlin paid $120,000.00 for 10% of the stock of International Security Group. There is no claim that this sale and purchase was not an arm's length transaction, and we believe it to be the most reliable evidence of the value of Medlin's stock before the broadcast. Here also, the jury's award is a small fraction of the value demonstrated by this evidence. We find no reason in the record to disturb the jury's finding with respect to special damages.

The broadcaster next urges that the court erred in submitting three special issues which it claims to be duplicitous of other issues thus "highlighting plaintiff's case." We are not persuaded that the issues are duplicitous or immaterial. Rather, it appears that out of an abundance of caution the court submitted issues which were shades of others submitted. For example, in Issue No. 3 the court applied the ordinary negligence standard to knowledge of falsity. Issue No. 5 applied the same standard to the act of making the broadcast and Issue No. 8 inquired of the New York Times standard of malice. Under the holdings of Gertz and Foster none of these issues are immaterial because ordinary negligence is necessary to show a right to actual damages and a finding of malice is necessary for punitive damages.

Similarly, Issue No. 8, the New York Times standard for malice, and Issue No. 9, the Texas common law standard for malice, are shades of one another. While Foster seemed to adopt the New York Times standard, the common law standard has never been disapproved. Although an affirmative answer to either issue is sufficient to support an award for punitive damages,

we cannot agree that the court erred in submitting both.

We do not consider Special Issue No. 5 to be duplicitous of any other issue. This issue inquired whether the content of the broadcast would warn a prudent broadcaster of its defamatory potential. Both Gertz and Foster teach that a defamation may not be predicated upon a factual misstatement unless the content of the statement would warn a prudent broadcaster of its defamatory potential. Finally, we observe that there is nothing inherently prejudicial in submitting an immaterial issue. Our standard of review is to determine if the unnecessary issues amounted to such a denial of rights as was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Fisher v. Leach, 221 S.W.2d 384, 390 (Tex.Civ.App.--San Antonio 1949, writ ref'd n.r.e.); TEX.R.CIV.P. 434. We conclude that such is not shown in this case.

The broadcaster next complains that the court erred in admitting into evidence certain "stilled" portions of the video broadcast. It argues that separate scenes and sentences of a defamatory statement may not be isolated from the whole and independently examined. Here it appears that the stills were offered in connection with the examination of the reporter, Gentry, for the purpose of demonstrating the editing process by which the entire broadcast was prepared. These circumstances are distinguished from those in Houston v. Interstate Circuit, Inc. 132 S.W.2d 903 (Tex.Civ.App.--Galveston 1939, no writ), relied upon by the broadcaster. There the question was whether the motion picture as a whole was libelous. Here the entire text of the broadcast was before the jury as was the entire video portion. The same effect could be accomplished by stopping the video at selected intervals and the broadcaster makes no effort to show how the continuous showing of the entire broadcast might have persuaded the jury that the

statement was not false. In short, the broadcaster has not attempted to demonstrate that it was prejudiced in any way. We conclude that if error existed, it was harmless.

Finally, the broadcaster complains that Medlin was allowed to impeach the testimony of an earlier witness without having established a predicate for the impeaching testimony. We cannot agree that a predicate was not established. The next to last witness to testify was John Yoggerst, a bank loan officer, who testified that the broadcasts did not affect his loan committee's decision to turn down a loan to International Security Group. When Yoggerst had left the courtroom, Medlin, the final witness, was allowed to take the stand and controvert his testimony. We view Medlin's testimony as merely cumulative of other testimony before the jury, because early in the trial there was considerable testimony that International Security Group's failure was partially caused by the refusal of suppliers and lenders to extend further credit. The admission of this cumulative testimony does not demonstrate such an abuse of discretion by the trial court as to warrant reversal.

We conclude, therefore, that the points of error presented for review contain no grounds for reversal; however, we are persuaded that the amounts awarded as actual and punitive damages are excessive. Consequently, the case must be reversed unless a remittitur is filed for the excess. We grant the appellee fifteen (15) days from the date of our judgment to remit one-half of the actual damages and one-half of the punitive damages found--a total remittitur of $750,000.00; otherwise, the case will be reversed and remanded for a new trial.

Affirmed on condition of remittitur.

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* Assigned to this case by the Chief Justice of the Supreme Court of Texas as authorized pursuant to Paragraph (d) of Article 1812, Texas Revised Civil Statutes as amended by H.B. 2244 (Acts 1983, 68th Leg., p. 1912, Ch. 354, Sec. 1, effective June 16, 1983).

146 S.W.3d 144
NEW TIMES, INC. d/b/a Dallas Observer, Dallas Observer, L.P., Rose Farley, Julie Lyons, and Patrick Williams, Petitioners,
v.
Bruce ISAACKS and Darlene A. Whitten, Respondents.
No. 03-0019.
Supreme Court of Texas.
Argued December 3, 2003.
Decided September 3, 2004.
Rehearing Denied November 5, 2004.

Appeal from the 158th District Court, Denton County, Bob McCoy, J.,

[146 S.W.3d 147]

Steven P. Suskin, Law Office of Steven P. Suskin, Phoenix, AZ, R. James George Jr., James Alan Hemphill, George & Donaldson, L.L.P., Peter D. Kennedy, Graves, Dougherty, Hearon & Moody, P.C., Austin, for Petitioner.

James Scott Reib, Law Group of Rocky Haire and Scott Reib, and Michael J. Whitten, The Whitten Law Firm, Mike Griffin and Michelle Jones, Griffin, Whitten, Jones & Reib, Denton, TX, for Respondent.

Gregory S. Coleman, Weil Gotshal & Manges LLP, Austin, TX, for Amicus Curiae Association of American Publishers, Inc.

Justice JEFFERSON delivered the opinion of the Court.

This is a libel suit brought by a judge and a district attorney against a newspaper and its staff for publishing a satirical article the respondents contend was defamatory. The trial court denied the petitioners' motions for summary judgment, and the court of appeals affirmed. 91 S.W.3d 844. We reverse the court of appeals' judgment and render judgment that plaintiffs take nothing.

I
Factual Background

In November 1999, thirteen-year-old Christopher Beamon, a Ponder, Texas seventh grader, was arrested and detained for five days in a juvenile detention facility after the Halloween story he wrote as a school assignment was deemed to contain "terroristic threats." According to Beamon, his teacher assigned students the task of writing a scary story about being home alone in the dark and hearing noises.

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Beamon penned a tale that described shooting a teacher and two classmates. He received a grade of 100, plus extra credit for reading it aloud in class. The school principal read the story and called juvenile authorities, who sent sheriff's deputies to remove Christopher from school. Denton County Juvenile Court Judge Darlene Whitten ordered Christopher detained at the Denton County Juvenile Detention Facility for ten days. She later approved an early release after five days, and

Denton County District Attorney Bruce Isaacks declined to prosecute the case. He commented, "It looks like to me the child was doing what the teacher told him to do, which was to write a scary story. But this child does appear to be a persistent discipline problem for this school, and the administrators there were legitimately concerned." Brenda Rodriguez & Annette Reynolds, *Boy Freed After Story Lands Him in Cell; Ponder Seventh-Grader Wrote of Shooting Teacher, Students When Told to Pen Horror Tale,* DALLAS MORNING NEWS, Nov. 3, 1999, at 1A.

The widely-reported Beamon incident received national and international attention. *See, e.g., id.;* John Kass, *Fear of School Violence Getting Best of Common Sense,* CHICAGO TRIBUNE, Nov. 4, 1999, at 3; Josh Romonek, *Scary Halloween Essay Puts Student, 13, in Jail,* CHATTANOOGA TIMES/CHATTANOOGA FREE PRESS, Nov. 4, 1999, at A2; Vin Suprynowicz, *So Simple, Even a Child Could Figure it Out,* LAS VEGAS REVIEW JOURNAL, Nov. 7, 1999, at 2D; Greg Torode, *Boy Jailed 6 Days for Essay on Massacre,* SOUTH CHINA MORNING POST, Nov. 4, 1999, at 1.

The *Dallas Observer,* a self-described "alternative newsweekl[y]" that focuses on reporting "in context and with perspective and sometimes with an individual's voice," published a satirical article lampooning the officials involved in the Beamon incident. The satire, written by Observer staff writer Rose Farley, ran in the *Observer's* November 11, 1999 print and online editions.[1]

Entitled "Stop the madness," the fictitious article described the arrest and detention of "diminutive 6 year-old" Cindy Bradley, who was purportedly jailed for writing a book report about "cannibalism, fanaticism, and disorderly conduct" in Maurice Sendak's classic children's book, *Where the Wild Things Are.*[2] Adjacent to the article was a picture of a smiling child holding a stuffed animal and bearing the caption, "Do they make handcuffs this small? Be afraid of this little girl." The article states that Bradley was arrested "without incident during `story time'" at Ponder Elementary School and attributes fabricated words and conduct to Judge Darlene Whitten, District Attorney Bruce Issacks, and others.

Other false quotes and bogus factual assertions were strewn throughout the piece. Judge Whitten was said to have ordered Bradley detained for ten days at the Denton County Juvenile Detention Center while prosecutors contemplated whether to file charges. Whitten purportedly said: "Any implication of violence in a school situation, even if it was just contained in a first grader's book report, is reason enough for panic and overreaction.... It's time for you to grow up, young lady, and it's time for us to stop treating kids like children." Cindy was placed in ankle shackles "after [authorities] reviewed her disciplinary record, which included reprimands for spraying a boy with pineapple juice and sitting on her feet." The article noted that Isaacks had

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not yet decided whether to prosecute Cindy and quoted him as saying, "We've considered having her certified to stand trial as an adult, but even in Texas there are some limits." Yet another fictional quote was attributed to Dr. Bruce Welch, the Ponder ISD Superintendent: "Frankly, these kids scare the crap out of me." The article claimed that school representatives would soon join several local faith-based organizations, including "the God Fearing Opponents of Freedom (GOOF)," in asking publishers to review content guidelines for children's books.

In describing Sendak's 1964 Caldecott Medal winning book, the article offered the only true quote in the entire piece:

The most controversial aspect of the book is contained in an early exchange between Max and his mother. It reads:

His mother called him `WILD THING!' and Max said `I'LL EAT YOU UP!'

so he was sent to bed without eating anything.

The article asserts that although he had not read the book, then-governor George W. Bush purportedly "was appalled that such material could find its way into the hands of a Texas schoolchild. This book clearly has deviant, violent sexual overtones. Parents must understand that zero tolerance means just that. We won't tolerate anything." The article concludes with Cindy "scoff[ing] at the suggestion that *Where the Wild Things Are* can corrupt young minds. `Like, I'm *sure,*' she said. `It's bad enough people think like Salinger and Twain are dangerous, but Sendak? Give me a break, for Christ's sake. Excuse my French.'"

Isaacks and Whitten demanded an apology, requested a retraction, and threatened to sue. In response, the *Buzz* column in the *Observer*'s next edition (published November 18, 1999, one week after "Stop the madness") explained that the piece was a satire:

Buzz hates being one of those guys— commonly known as "losers" or "dateless" — who laboriously explains jokes. Unfortunately, some people — commonly known as "clueless" or "Judge Darlene Whitten" — did not get, or did not appreciate, the joke behind the news story "Stop the madness," which appeared in last week's *Dallas Observer*.

. . . .

Here's a clue for our cerebrally challenged readers who thought the story was real: It wasn't. It was a joke. We made it up. Not even Judge Whitten, we hope, would throw a 6-year-old girl in the slammer for writing a book report. Not yet, anyway.

Patrick Williams, *Buzz,* DALLAS OBSERVER, November 18-24, 1999, at 9.

II
Procedural Background

Isaacks and Whitten filed suit, claiming they were libeled by the "Stop the madness" article.[3] Isaacks and Whitten named as defendants New Times, Inc. (partial owner of the *Dallas Observer*), Dallas Observer, L.P. (publisher of the *Dallas Observer*), and Rose Farley, Julie Lyons, and Patrick Williams (the *Observer's* staff writer, editor-in-chief, and managing editor, respectively) (collectively, "New Times"). New Times moved for summary judgment, contending that, as a

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matter of law: (1) an average or reasonable reader would understand the article at issue as a satire or parody rather than actual statements of fact about the plaintiffs; and (2) New Times negated actual malice. On December 30, 2000, the trial court denied New Times's motion on the first point, holding that there was a fact question as to how the reasonable reader would understand the article. On the actual malice issue, the trial court held that "to establish actual malice, the

Plaintiffs must prove that the Defendants intended the reasonable reader to interpret as actual, literal statements of fact those portions of the November 11, 1999 article that Defendants contend are parody or satire, taking into account the article as a whole." The court then denied summary judgment on the actual malice issue, finding that the plaintiffs required additional discovery.

New Times filed an interlocutory appeal, pursuant to section 51.014(b), Texas Civil Practice and Remedies Code. That appeal was stayed pending further summary judgment proceedings in the trial court. New Times filed its second motion for summary judgment on February 15, 2001, which was denied by order dated May 29, 2001. New Times filed a second notice of appeal, and the two appeals were consolidated.

In what New Times contends is "the first [decision] in the nation finding a triable fact issue in a libel case brought by elected public officials over a political satire," the court of appeals affirmed, holding that fact issues precluded summary judgment. 91 S.W.3d 844, 864. The court held that "satire or parody that conveys a substantially false and defamatory impression is not protected under the First Amendment as mere opinion or rhetorical hyperbole, but instead is subject to scrutiny as to whether it makes a statement of fact under defamation case law." *Id.* at 856. The court concluded that "[a]fter examining the evidence in the light most favorable to the non-movants, we hold there is evidence raising a genuine issue of material fact that the `Stop the madness' article fails to provide any notice to a reasonable reader that it was a satire or parody and that a reasonable reader could conclude that the article made statements of fact." *Id.* at 859. On the actual malice issue, the court of appeals applied "the traditional test for actual malice, as articulated in *Turner* [*v. KTRK Television, Inc.*, 38 S.W.3d 103 (Tex.2000)]," and held that "there [was] evidence that the *Dallas Observer* knew or strongly suspected that when they published the article it was false and defamatory." *Id.* at 864. The court ordered New Times to pay attorney's fees and costs of the appeal and remanded to the trial court for a determination of those amounts. *Id.; see* TEX. CIV. PRAC, & REM. CODE § 51.015.

We granted the petition for review to address the important constitutional issues raised by defamation claims involving satire. 46 Tex. Sup.Ct. J. 1204 (Sept. 25, 2003).

III
Satire

New Times asserts that its statements are protected under the First Amendment to the United States Constitution and Article I, Section 8 of the Texas Constitution. "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." *Bentley v. Bunton*, 94 S.W.3d 561, 579 (Tex.2002).

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As the court of appeals noted, "[s]atire, particularly realistic satire, is ... a distortion of the familiar with the pretense of reality in order to convey an underlying critical message." 91 S.W.3d at 854. According to one commentator, satire "deals with actual cases, mentions real people by name or describes them unmistakably (and often unflatteringly), talks of this moment and this city, and this special, very recent, very fresh deposit of corruption whose stench is still in the satirist's curling nostrils." GILBERT HIGHET, THE ANATOMY OF SATIRE 16 (1962). "Satire is particularly relevant to political debate because it tears down facades, deflates stuffed

shirts, and unmasks hypocrisy. By cutting through the constraints imposed by pomp and ceremony, it is a form of irreverence as welcome as fresh air." *Falwell v. Flynt*, 805 F.2d 484, 487 (4th Cir.1986) (Wilkinson, J., dissenting), *rev'd sub nom. Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988). Perhaps the most famous example of satire is Jonathan Swift's 1729 essay, "A Modest Proposal,"[4] in which he advocated that the children of the Irish poor be sold and slaughtered for meat. The article was intended to criticize English landlords and political economists, but Swift was widely criticized by those who misunderstood the satire.

In this country too, there has been a long and storied "tradition of satiric comment." *Falwell,* 805 F.2d at 487.

Much of the comment went overboard, and much would be considered libelous today. For all its clatter and hubbub, however, it has not undermined this country's profound respect for presidents and priests. But it has enhanced political debate. Nothing is more thoroughly democratic than to have the high-and-mighty lampooned and spoofed. An observant electorate may also gain by watching the reactions of objects of satiric comment, noting those who take themselves seriously and those whose self-perspective is somewhat more relaxed.

Id. at 487. Public figures generally bear the brunt of satire, and "[f]rom the Pickwick Papers of the 1830's to Colorado of the 1890's to Monty Python of the early 1970's, judges and the judiciary have been fair game for satirists." *Patrick v. Superior Court*, 27 Cal.Rptr.2d 883, 885 (Cal.Ct. App.1994).

Thus, defamation claims involving humor in general, and satire in particular, raise important issues pertaining to free speech. "Humor is an important medium of legitimate expression and central to the well-being of individuals, society, and their government. Despite its typical literal `falsity,' any effort to control it runs severe risks to free expression as dangerous as those addressed to more `serious forms of communication.'" ROBERT D. SACK, SACK ON DEFAMATION § 5.5.2.7.1 (3d ed.2004) (hereafter "SACK ON DEFAMATION").[5]

Is there a recognized exception from the laws of libel when words otherwise defamatory are uttered in a humorous context? Of course, common sense tells us there must be. Humor takes many forms—sheer nonsense, biting satire, practical jokes, puns (clever and otherwise), one-liners, ethnic jokes, incongruities, and rollicking parodies, among others. Laughter can soften the blows dealt by a cruel world, or can sharpen the cutting edge of truth. Without humor

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— the ability to recognize the ridiculous in any situation—there can be no perspective. Humor is a protected form of free speech, just as much to be given full scope, under appropriate circumstances, as the political speech, the journalistic expose, or the religious tract.

Salomone v. MacMillan Publ'g Co., 97 Misc.2d 346, 411 N.Y.S.2d 105, 108 (Sup. Ct.1978), *rev'd on other grounds*, 77 A.D.2d 501, 429 N.Y.S.2d 441 (N.Y.App. Div.1980).

We must consider, then, how best to balance potential defamation liability with constitutional concerns when a satirical communication is at issue. One commentator suggests

that "[a]dequate protection for most humor can be found in ordinary common-law defamation principles." SACK ON DEFAMATION § 5.5.2.7.1.

Much humor is a form of opinion or criticism, protected under the common-law defense of "fair comment" or the doctrines suggested by the Supreme Court cases: that there are "constitutional limits on the type of speech which may be the subject of state defamation actions," such as "rhetorical hyperbole" and "vigorous epithets," and the requirement that the statements at issue be reasonably interpreted as alleging facts. Humor is usually understood to be humor and to convey no serious, objective factual allegations about its target. Although perhaps annoying or embarrassing, humorous statements will have no substantial impact on reputation and therefore ought not to be held to be defamatory. Incidental jibes and barbs may be humorous forms of epithets or "mere name-calling" and are not actionable under settled law governing such communications. And it is on these bases that most humor cases are decided.

Id. (citations omitted).

The United States Supreme Court, sensitive to the constitutional issues involved in imposing liability for speech, has applied the *New York Times v. Sullivan* standard to a case involving parody. *See Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988). In that case, evangelist Jerry Falwell sued Hustler Magazine over an ad parody published in Hustler's November 1983 issue. The inside front cover of that issue featured a parody of an advertisement for Campari Liqueur that contained Falwell's name and photograph and was entitled "Jerry Falwell talks about his first time." Hustler modeled the parody after actual Campari ads that included interviews with various celebrities who discussed their "first times." Although it was apparent by the end of the interviews that the ads referred to the celebrities' first experience sampling Campari, "the ads clearly played on the sexual double entendre of the general subject of `first times.'" *Id.* at 48, 108 S.Ct. 876. The Hustler parody's form and layout mimicked the Campari ads. Hustler's editors selected Falwell as the featured celebrity and drafted an alleged "interview" with him in which he stated that his "first time" was during a drunken incestuous rendezvous with his mother in an outhouse. *Id.* The parody depicted Falwell and his mother as drunk and immoral and suggested that Falwell was a hypocrite who preached only when drunk. *Id.* At the bottom of the page, the ad bore the disclaimer, "ad parody—not to be taken seriously." *Id.* at 49, 108 S.Ct. 876. The magazine's table of contents also identified the ad as "Fiction; Ad and Personality Parody." *Id.*

The jury found that the Hustler ad parody could not "`reasonably be understood as describing actual facts about [Falwell] or actual events in which [he] participated'" and returned a verdict in Hustler's favor on Falwell's defamation claim. *Id.* at

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57, 108 S.Ct. 876 (quoting appendix to petition for certiorari). Nonetheless, the jury awarded Falwell damages for intentional infliction of emotional distress, and the Fourth Circuit Court of Appeals affirmed. *Falwell v. Flynt*, 797 F.2d 1270, 1278 (4th Cir.1986). The Supreme Court granted certiorari to "consider whether [the intentional infliction of emotion distress] award [was] consistent with the First and Fourteenth Amendments of the United States Constitution." *Falwell,* 485 U.S. at 48, 108 S.Ct. 876. Chief Justice Rehnquist, writing for the Court, concluded that "public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with `actual

malice,' *i.e.,* with knowledge that the statement was false or with reckless disregard as to whether or not it was true." *Id.* at 56, 108 S.Ct. 876.

The Court noted that the *New York Times Co. v. Sullivan* actual malice standard protected the parody from an intentional infliction of emotional distress claim:

Since *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), we have consistently ruled that a public figure may hold a speaker liable for the damage to reputation caused by publication of a defamatory falsehood, but only if the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.,* at 279-280, 84 S.Ct. 710. False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective. *See Gertz,* 418 U.S., at 340, 344, n. 9, 94 S.Ct. 2997. But even though falsehoods have little value in and of themselves, they are "nevertheless inevitable in free debate," *id.,* at 340, 94 S.Ct. 2997 and a rule that would impose strict liability on a publisher for false factual assertions would have an undoubted "chilling" effect on speech relating to public figures that does have constitutional value. "Freedoms of expression require `breathing space.'" *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 772, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986) (quoting *New York Times, supra,* at 272, 84 S.Ct. 710). This breathing space is provided by a constitutional rule that allows public figures to recover for libel or defamation only when they can prove *both* that the statement was false and that the statement was made with the requisite level of culpability.

485 U.S. at 52, 108 S.Ct. 876.

The Court rejected the notion that, because the *Hustler* parody was particularly outrageous, it could be distinguished from traditional political cartoons:

There is no doubt that the caricature of respondent and his mother published in Hustler is at best a distant cousin of the political cartoons described above, and a rather poor relation at that. If it were possible by laying down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm. But we doubt that there is any such standard, and we are quite sure that the pejorative description "outrageous" does not supply one. "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike

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of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience. *See NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 910, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982) ("Speech does not lose its protected character ... simply because it may embarrass others or coerce them into action"). And, as we stated in *FCC v. Pacifica Foundation,* 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978): "The fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." *Id.,* at 745-746, 98 S.Ct. 3026. *See also Street v. New York,* 394 U.S. 576, 592, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969)("It is firmly settled that ... the public expression of

ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.").

Id. at 55-56, 108 S.Ct. 876. The Court concluded that Falwell's intentional infliction of emotional distress claim could not, "consistently with the First Amendment, form a basis for the award of damages when the conduct in question is the publication of a caricature such as the ad parody involved here." *Id.* at 57, 108 S.Ct. 876. Accordingly, the Supreme Court reversed the court of appeals' judgment.[6] *Id.*

A. The Reasonable Reader and "Stop the madness"

Thus, we must "consider this case against the background of a 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." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). We are guided in our analysis by the United States Supreme Court's handling of the constitutional issues presented by the ad parody in *Falwell.* Additionally, we agree with Judge Sack's observation that common-law defamation principles—with some adjustments—provide adequate protection for satire. SACK ON DEFAMATION § 5.5.2.7.1. We turn, then, to our standards for evaluating allegedly defamatory communications.

"We have long held that an allegedly defamatory publication should be construed as a whole in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive it." *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 114 (Tex.2000) (citing *Musser v. Smith Protective Servs.*, 723 S.W.2d 653, 655 (Tex.1987), *Guisti v. Galveston Tribune Co.*, 105 Tex. 497, 150 S.W. 874, 878 (1912), and *Kapellas v. Kofman*, 1 Cal.3d 20, 81 Cal.Rptr. 360, 459 P.2d 912 (1969)(en banc)). Falsity for constitutional purposes depends upon the meaning a reasonable person would attribute to a publication, and not to a technical analysis of each statement. *Id.* at 116, 81 Cal.Rptr.

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360, 459 P.2d 912. Whether a publication is capable of a defamatory meaning is initially a question for the court. *Id.* at 114, 81 Cal.Rptr. 360, 459 P.2d 912. But when a publication is of ambiguous or doubtful import, the jury must determine its meaning. *Id.*

We have never before applied these principles to a satirical article, however. New Times asserts that "Stop the madness" is rhetorical hyperbole, protected under the First Amendment. *See, e.g., Letter Carriers v. Austin*, 418 U.S. 264, 282-83, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974); *Greenbelt Co-op. Pub. Ass'n v. Bresler*, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970). In *Greenbelt,* the Supreme Court considered whether a newspaper story that referred to a position the plaintiff had taken at city council meetings as "blackmail" was actionable. 398 U.S. at 7, 90 S.Ct. 1537. The trial court and the court of appeals viewed the use of the word as charging the crime of blackmail, and because the paper knew the plaintiff had committed no such crime, it was liable for the "knowing use of falsehood." *Id.* at 6, 90 S.Ct. 1537. The Supreme Court rejected this holding:

We hold that the imposition of liability on such a basis was constitutionally impermissible—that as a matter of constitutional law, the word `blackmail' in these circumstances was ... not

libel.... No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who consider Bresler's negotiating position extremely unreasonable.

Greenbelt, 398 U.S. at 13-14, 90 S.Ct. 1537. Similarly, in *Letter Carriers,* the Supreme Court held that a publication's description of non-union individuals as "scabs" was not actionable. Relying on *Greenbelt,* the Court noted that it was "similarly impossible to believe that any reader ... would have understood the newsletter to be charging the appellees with committing the criminal offense of treason. As in [*Greenbelt*], Jack London's `definition of a scab' is merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members towards those who refuse to join." *Letter Carriers,* 418 U.S. at 285-86, 94 S.Ct. 2770.

Most recently, in *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990), the Supreme Court noted that the "[*Greenbelt*]-*Letter Carriers*-*Falwell* line of cases provide protection for statements that cannot `reasonably [be] interpreted as stating actual facts' about an individual." *Id.* at 20, 90 S.Ct. 1537 (quoting *Falwell,* 485 U.S. at 50, 108 S.Ct. 876); *see also* Eric Scott Fulcher, *Rhetorical Hyperbole and the Reasonable Person Standard: Drawing the Line Between Figurative Expression and Factual Defamation,* 38 GA. L.REV. 717, 735 (2004). "This provides assurance that public debate will not suffer for lack of `imaginative expression' or the `rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." *Milkovich,* 497 U.S. at 20, 110 S.Ct. 2695.

Other courts have applied these holdings to create a workable standard for cases involving satire or parody. *See, e.g.,* SACK ON DEFAMATION § 5.5.2.7.1; *see also* Jan Kipp Kreutzer, *Defamation: Problems with Applying Traditional Standards to Non-Traditional Cases—Satire, Fiction and "Fictionalization,"* 11 N. KY. L.REV. 131, 134 (1984) (noting that "[t]he *Greenbelt* `rhetorical hyperbole' principle has ... been helpful to defendants in cases involving humor, satire and new

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types of literary expression"). For example, in *Pring v. Penthouse Int'l, Ltd.,* 695 F.2d 438 (10th Cir.1982), *cert. denied,* 462 U.S. 1132, 103 S.Ct. 3112, 77 L.Ed.2d 1367 (1983), the court considered the appropriate test for determining whether Penthouse could be liable for publishing a spoof of the Miss America contest. In that case, Penthouse published an article about "Charlene," a Miss Wyoming at the Miss America pageant. The article described Miss Wyoming during the talent portion of the competition and depicted her performing sexual acts with her coach and others. The real Miss Wyoming sued Penthouse for defamation. The jury found that the plaintiff Pring was the Miss Wyoming about whom the article was written. Nonetheless, the Tenth Circuit Court of Appeals reversed the district court's judgment and directed the trial court to set aside the verdict and dismiss the action. Relying on *Letter Carriers* and *Greenbelt,* the court held:

The test is not whether the story is or is not characterized as "fiction," "humor," or anything else in the publication, but *whether the charged portions in context could be reasonably understood as describing actual facts about the plaintiff or actual events in which she participated.* If it could not be so understood, the charged portions could not be taken literally. This is clearly the message in *Greenbelt* and *Letter Carriers.*

695 F.2d at 442 (emphasis added). The court concluded that, because the story described something physically impossible in an impossible setting, it was "simply impossible to believe that a reader would not have understood that the charged portions were pure fantasy and nothing else." *Id.* at 443.

In *Hustler Magazine v. Falwell,* the district court incorporated the *Pring* test into the jury instructions on Falwell's libel claim. 485 U.S. at 57, 108 S.Ct. 876 (jury found that "the Hustler ad parody could not `reasonably be understood as describing actual facts about [respondent] or actual events in which [he] participated.'" (quoting appendix to petition for certiorari)); Brief for the Petitioners at 21, *Hustler Magazine v. Falwell,* (No. 86-1278); *see also Milkovich,* 497 U.S. at 20, 110 S.Ct. 2695. Other courts have adopted variations of this test. *See, e.g., Dworkin v. Hustler Magazine, Inc.,* 867 F.2d 1188, 1193-94 (9th Cir.1989) (Hustler features mentioning Dworkin's name in a derogatory fashion were "privileged opinion" because they could not be "reasonably understood as statements of fact."); *San Francisco Bay Guardian, Inc. v. Superior Court,* 17 Cal.App.4th 655, 21 Cal.Rptr.2d 464, 467 (1993) (average reader would recognize phony letter to the editor as "a fake and a joke"); *Walko v. Kean College,* 235 N.J.Super. 139, 561 A.2d 680, 683 (Ct. Law Div.1988) ("A parody or spoof that no reasonable person would read as a factual statement, or as anything other than a joke—albeit a bad joke—cannot be actionable as a defamation.") (citing *Pring*); *Myers v. Boston Magazine Co., Inc.,* 380 Mass. 336, 403 N.E.2d 376, 379 (1980) (reasonable reader would not understand satire to state actual fact); *Garvelink v. Detroit News,* 206 Mich.App. 604, 522 N.W.2d 883, 886 (1994) (As a matter of law, satirical article could not "reasonably be interpreted as stating actual facts about the plaintiff and ... is, therefore, protected speech."); *Hoppe v. Hearst Corp.,* 53 Wash.App. 668, 770 P.2d 203, 206 (1989) (adopting *Pring* test and holding that parody was non-actionable as a matter of law).

We believe *Pring* appropriately sets the standard for liability in cases of satire or parody, while providing freedom of expression its necessary "breathing

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space." *Falwell,* 485 U.S. at 52, 108 S.Ct. 876. Thus, in such cases, the test is whether the publication could be reasonably understood as describing actual facts. *Pring,* 695 F.2d at 442. Although the court of appeals' articulation of this standard was largely correct, *see* 91 S.W.3d at 855 (holding that statements are protected "if a reasonable reader would understand that they do not state an actual fact" and "the meaning of a publication, and thus whether it is false and defamatory, depends upon how a person of ordinary intelligence would perceive the publication") (citing *Turner,* 38 S.W.3d at 114), we disagree with the conclusion that "[t]he *Dallas Observer* provided *no obvious clues* to the average reader that the article was not conveying statements of actual fact" and "the `Stop the madness' article fails to provide *any notice* to a reasonable reader that it was a satire or parody." 91 S.W.3d at 857, 859 (emphasis added).

The court of appeals has underestimated the "reasonable reader."

As the relevant cases show, the hypothetical reasonable person—the mythic Cheshire cat who darts about the pages of the tort law—is no dullard. 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.

Patrick v. Superior Court, 27 Cal.Rptr.2d 883, 887 (Cal.Ct.App.1994). The person of "ordinary intelligence" described in *Turner* is a prototype of a person who exercises care and

prudence, but not omniscience, when evaluating allegedly defamatory communications. *See Turner,* 38 S.W.3d at 114; *see also Patrick,* 27 Cal.Rptr.2d at 887-88.

The appropriate inquiry is objective, not subjective. Thus, the question is not whether some actual readers were mislead, as they inevitably will be,[7] but whether the hypothetical reasonable reader could be. *See San Francisco Bay Guardian v. Superior Court,* 17 Cal.App.4th 655, 21 Cal.Rptr.2d 464, 467(1993) ("The fact that real party furnished declarations of a few people who stated that they did not recognize the letter as a joke does not raise a question of fact as to the view of the average reader. The question is not one that is to be answered by taking a poll of readers but is to be answered by considering the entire context in which the offending material appears."); *see also* BRUCE W. SANFORD, LIBEL & PRIVACY 193-94

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(2d ed. 1991) ("Dry irony ... creates a greater risk of being misunderstood as an assertion of fact than slapstick, but nonetheless it is entitled to protection. We should hardly encourage the development of libel law that rewards low humor."). Thus, we focus on a single objective inquiry: whether the satire can be reasonably understood as stating actual fact.

This is not the same as asking whether all readers actually understood the satire, or "got the joke." Intelligent, well-read people act unreasonably from time to time, whereas the hypothetical reasonable reader, for purposes of defamation law, does not. In a case of parody or satire, courts must analyze the words at issue with detachment and dispassion, considering them in context and as a whole, as the reasonable reader would consider them.

In this case, the court of appeals distinguished other cases finding satire to be protected under the First Amendment, holding that, in those cases, "the reader was given obvious clues that the piece was not conveying statements of actual facts." 91 S.W.3d at 858. But, to a careful reader, the clues here are no less suggestive. They include:

• the unorthodox headline ("Stop the madness") and photo of a smiling child holding a stuffed animal, captioned "Do they make handcuffs this small? Be afraid of this little girl."

• the article's assertion that the six-year-old child was placed in ankle shackles due to her school disciplinary record, "which included reprimands for spraying a boy with pineapple juice and sitting on her feet."

• the fabricated quote attributed to then-Governor George W. Bush, stating that *Where the Wild Things Are* "clearly has deviant, violent, sexual overtones" and that "zero tolerance means just that. We won't tolerate anything."

• reference to Isaacks's "quote" that "[w]e've considered having her certified to stand trial as an adult, but even in Texas there are some limits."

• Judge Whitten's alleged statement that "[a]ny implication of violence in a school setting ... is reason enough for panic and overreaction."

• The article's reference to a freedom-opposing religious group that bears a ridiculous acronym: God Fearing Opponents of Freedom ("GOOF").

• Six-year-old Cindy Bradley's scoffing at the reaction to her book report and saying, "Like, I'm sure. It's bad enough people think like Salinger and Twain are dangerous, but Sendak? Give me a break, for Christ's sake. Excuse my French."

These clues (among others) involve "exaggeration or distortion," the means by which "the satirist clearly indicates to his audience that the piece does not purport to be a statement of fact but is rather an expression of criticism or opinion, a means of reaching an abstract truth or idea." Jan Kipp Kreutzer, *Defamation: Problems with Applying Traditional Standards to Non-Traditional Cases—Satire, Fiction and "Fictionalization,"* 11 N. KY. L.REV. 131, 144 (1984). And their combined effect provides a signal to the reasonable reader that the piece is satirical. Would a six-year-old be able to comment intelligently on the works of Salinger and Twain, while using expressions like "[e]xcuse my French"? Would a faith-based organization label itself "GOOF"? Would a judge say that it is time to panic and overreact? *See Patrick,* 27 Cal.Rptr.2d at 887 ("[T]he reasonable person has some feel for the nuances of law and language."). The reasonable reader would not consider

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each of these clues in isolation, but would synthesize each signal as part of the larger determination of whether "Stop the madness" can reasonably be interpreted as stating actual facts.

Some satire, like the article at issue here,

relies for its force and effect on the idea of attribution of ideas and words to someone who never uttered them. The satiric effect emerges only as the reader concludes by the very outrageousness of the words that the whole thing is a put-on. The comic effect is achieved because the reader sees the words as the absurd expression of positions or ideas associated with the purported author.

Patrick, 27 Cal.Rptr.2d at 886. It is not surprising, therefore, that respondents complain that only readers who read the entire article would "get" the joke. As they argue, "many readers will read the first few paragraphs of an article and form an opinion." But we cannot impose civil liability based on the subjective interpretation of a reader who has formed an opinion about the article's veracity after reading a sentence or two out of context; that person is not an objectively reasonable reader. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 583, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994) ("First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed.").

The court of appeals found it persuasive that the article was "indexed and published as the lead story under the heading of `News' in a section ordinarily devoted to hard-hitting investigative news." 91 S.W.3d at 859. The article's inclusion in the *Observer's* "News" section must be examined in the context of the *Observer's* nature, however, because the reasonable reader must consider the type of publication in which the offending material appears. *See, e.g.,* BRUCE W. SANFORD, LIBEL AND PRIVACY 193 n. 187 (2d ed. 1999) ("The context that a humorous article appears in may determine the outcome in a close case."); *Myers v. Boston Magazine Co., Inc.*, 380 Mass. 336, 403 N.E.2d 376, 379 (1980) (courts must "examine the statement in its totality in the context in which it was uttered," including the medium in which it was published and the audience to whom it was disseminated); *Walko v. Kean College*, 235 N.J.Super. 139, 561 A.2d 680, 684 (Ct. Law Div.1988) ("Our case law has made it abundantly clear that a challenged publication must be viewed in context to determine whether or not it is subject to a defamatory

meaning."); *see also* Musser v. Smith Protective Servs., Inc., 723 S.W.2d 653, 655 (Tex.1987) ("The court construes the statement as a whole in light of surrounding circumstances based upon how a person of ordinary intelligence would perceive the entire statement.").

Here, the record establishes that the *Dallas Observer* is an alternative weekly newspaper that "report[s] the news in context and with perspective and sometimes with an individual's voice." Julie Lyons, the *Observer's* editor, described the newspaper as follows:

at a daily newspaper when you're reporting a news story, you might write the mayor said so-and-so and the counsel [sic] member said so-and-so. We call that a he said she said kind of story. Whereas at the *Dallas Observer* we might say the mayor said so-and-so. The counsel [sic] member said so-and-so, but the counsel [sic] member's lying.

The "News" heading was used to delineate a section of the newspaper and not to indicate that articles contained in that section were "traditional news" — in fact the record establishes that opinion, commentary, and satire had previously been published

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in the "News" section, as the *Observer* did not have a separate opinion section. Additionally, the court of appeals' statement that "Stop the madness" was "both indexed and published as the lead story under the heading of `News,'" 91 S.W.3d at 859, appears to be erroneous — the article was not the lead story and was not indexed at all; it was not even mentioned in the table of contents. The nearby article describing awards won by *Observer* staff could suggest that "Stop the madness" was a news article, but it is just one of many factors to be considered. *Cf.* Walko v. Kean College, 235 N.J.Super. 139, 561 A.2d 680, 684 (Ct. Law Div.1988) (fact that parody was surrounded by other, humorous articles supported interpretation that reasonable reader would not have taken it seriously).

Moreover, "Stop the madness" was not the first satire the *Observer* published. In earlier issues, the *Observer* had spoofed the music industry's issuance of "[b]oring and exhaustive box sets of irrelevant material"; the Dallas Area Rapid Transit light rail system (providing tips for safer rides, including "never lend your handgun to a stranger," "share your ammo," and "carry tissues, Lysol, and an extra drool cup for your seatmate"); and the Belo Corporation's part ownership of the Dallas Mavericks (in an article entitled "Belo's Sure Got Balls"). Perhaps the *Observer's* general tenor can best be gleaned by examining the November 18, 1999 *Buzz* column, in which Patrick Williams explained the *Observer's* decision to lampoon Isaacks and Whitten. Williams wrote:

The reaction [to the Christopher Beamon incident] at the *Observer* was that this was an outrageous, idiotic abuse of power. OK, we didn't express it quite that way. "Whoa, dude, that's f[* *]ked up," is closer to what was said. Luckily for us, we work for a newspaper that lets us ridicule the ridiculous. Farley, grinning like a rottweiler about to bite a baby, drew the writer's sharpest weapon, satire, and set about to make a few points.

Patrick Williams, *Buzz,* DALLAS OBSERVER, November 18-24, 1999, at 9 (expletive deleted).

The reference in "Stop the madness" to the actual Beamon incident provides yet another signal to the reasonable reader, who would have understood the satire to be commentary on that controversy. *See, e.g.,* *Lane v. Ark. Valley Publ'g Co.*, 675 P.2d 747, 750-51 (Colo.Ct.App.1983) (noting that context in which satirical articles were published was significant: "comments made in the context of a hotly contested political campaign should not be judged by the same standard as those made in other contexts" and topics at issue "had been the subject of extensive reporting and controversy"); *Garvelink,* 522 N.W.2d at 887 (column was "obviously satire intended to criticize the school budget cuts, which was a controversial issue at the time"); *Hoppe,* 770 P.2d at 207 (satirical column critical of plaintiffs' use of public funds was published during a political campaign and in the context of "a well publicized debate" over the plaintiff's use of public funds to hire detectives); *see also Patrick,* 27 Cal.Rptr.2d at 889-90 (when viewed in the context of the "running feud" between the judge and the newspaper, it was unreasonable to believe that judge himself had written phony, satirical memo). It does not, as the court of appeals held, support a finding that a reasonable reader would have misunderstood the satire. 91 S.W.3d at 859.

Finally, while a disclaimer would have aided the reasonable reader in determining the article was a satire, such a disclaimer is not necessarily dispositive. *See, e.g., Falwell v. Flynt,* 805 F.2d at 486-87.

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87 (Wilkinson, J., dissenting) (noting that, despite label proclaiming "Ad Parody— Not to be Taken Seriously," Flynt could have been subject to a libel judgment if the publication were found to be defamatory); *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438 (10th Cir.1982) ("The test is not whether the story is or is not characterized as `fiction,' `humor,' or anything else in the publication" but whether story could reasonably be interpreted as stating actual fact). Rather, the presence of a disclaimer is one of many signals the reasonable reader may consider in evaluating a publication. *See, e.g.,* *San Francisco Bay Guardian v. Superior Court*, 17 Cal.App.4th 655, 21 Cal.Rptr.2d 464, 466 (1993) (noting that "[t]he question of whether the average reader would have recognized the issue as a parody and the letter as a part of the joke depends upon a view of the entire issue, i.e., the `totality of circumstances'"; fact that phony letter to the editor was in a section of the newspaper labeled "special parody section" was significant).

"Stop the madness" does have a superficial degree of plausibility, but such is the hallmark of satire. *See, e.g.,* Jon M. Garon, *Media & Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas,* 17 CARDOZO ARTS & ENT. L.J. 491, 557 (1999) ("Satire works precisely because it evokes other materials."); *cf.* *San Francisco Bay Guardian v. Superior Court*, 17 Cal.App.4th 655, 21 Cal.Rptr.2d 464, 466 (1993) ("[T]he very nature of parody... is to catch the reader off guard at first glance, after which the `victim' recognizes that the joke is on him to the extent that it caught him unaware."). That does not necessarily make it actionable, however. While a reader may initially approach the article as providing straight news, "Stop the madness" contains such a procession of improbable quotes and unlikely events that a reasonable reader could only conclude that the article was satirical. On balance, the obvious clues in the article itself, the *Observer's* general and intentionally irreverent tone, its semi-regular publication of satire, as well as the satire's timing and commentary on a then-existing controversy, lead us to conclude that "Stop the madness" could not reasonably be understood as stating actual facts about Isaacks and Whitten. The court of appeals erred in holding otherwise.

B. Actual Malice

Even if the article were reasonably understood as stating actual facts about the respondents, however, respondents could proceed with their claim only if they raised a fact issue on actual malice. Public figures cannot recover for defamatory statements made about them absent proof of actual malice. *Forbes, Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 170-71 (Tex.2003) (citing *N.Y. Times,* 376 U.S. at 279-80, 84 S.Ct. 710 and *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex.1998)). But "[t]he phrase actual malice is unfortunately confusing in that it has nothing to do with bad motive or ill will," but rather is "a shorthand to describe the First Amendment protections for speech injurious to reputation." *Bentley v. Bunton*, 94 S.W.3d 561, 590 (Tex. 2002) (quoting *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 666 n. 7, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989) and *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 511, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991)); *Letter Carriers,* 418 U.S. at 281, 94 S.Ct. 2770 ("[I]mpos[ing] liability on the basis of the defendant's hatred, spite, ill will, or desire to injure [is] `clearly impermissible.'"); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82, 88 S.Ct. 197, 19 L.Ed.2d 248 (1967) (noting actual malice cannot be based merely on defendant's "`bad or corrupt motive,'" "`personal spite, ill will or a

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desire to injure plaintiff'"). As the Supreme Court noted:

> [I]n the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment. In *Garrison v. Louisiana*, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964), we held that even when a speaker or writer is motivated by hatred or ill will his expression was protected by the First Amendment:
>
> "Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth." *Id.,* at 73, 88 S.Ct. 197.
>
> Thus while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures.
>
> *Falwell,* 485 U.S. at 53, 108 S.Ct. 876.

Instead, "actual malice" requires proof that the defendant made a statement "`with knowledge that it was false or with reckless disregard of whether it was true or not.'" *Huckabee v. Time Warner Entm't Co.*, 19 S.W.3d 413, 420 (Tex.2000) (quoting *N.Y. Times,* 376 U.S. at 279-80, 84 S.Ct. 710). Reckless disregard is a subjective standard, focusing on the defendant's state of mind. *Bentley,* 94 S.W.3d at 591. Mere negligence is not enough. *Id.* Rather, the plaintiff must establish "`that the defendant in fact entertained serious doubts as to the truth of his publication,'" or had a "`high degree of awareness of ... [the] probable falsity'" of the published information. *Id.* (quoting *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989)). Constitutional malice generally consists of "`[c]alculated falsehood.'" *Bunton,* 94 S.W.3d at 591 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 75, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964)). When the defendant's words lend themselves to more than one interpretation, the plaintiff must establish either that the defendant knew that the words would convey a defamatory message, or had reckless disregard for their effect. *See Bunton,* 94 S.W.3d at 603.

Applying the actual malice standard to a satirical work may "become[ ] confused because the author is usually well aware of any `falsity' contained in the comment and indeed intends no `truth.' That sounds like `actual malice.'" SACK ON DEFAMATION § 5.5.2.7.1. Respondents advocate this very sort of "automatic actual malice" standard in satire cases, because the author always knows the publication contains false statements of fact. They assert that "[i]n the parody context, the reporter's subjective belief is irrelevant, because he always knows that what he is publishing is not true." But we cannot square such a blanket rule with the protections of the First Amendment. In a pre-*Hustler Magazine v. Falwell* text, one commentator warned against a literal application of the *New York Times* rule in the satire/parody context:

> [I]f someone wishes to convey the notion that a particular American president is ineffective, he should not be limited to expressing that view by saying it in so many words. He should be permitted to convey the view more dramatically through the use of admittedly invented verbal images.
>
> The problem ... may be that courts will follow too literally the fact/opinion dichotomy suggested in *Gertz,* find that knowingly false assertions *of fact* have been made, and conclude that such assertions are unprotected both under
>
> [146 S.W.3d 163]
>
> common law and constitutional principles. It may be difficult, depending on the particular work and the particular forum, to persuade a judge that statements of fact are, under certain circumstances, not statements of fact at all, but of opinion.
>
> ROBERT D. SACK, LIBEL, SLANDER AND RELATED PROBLEMS § V.6.5.7, at 246-47 (1980).

In *Hustler Magazine v. Falwell,* the United States Supreme Court implicitly rejected a literal application of the actual malice rule to works involving satire or parody. If the Supreme Court had literally applied the actual malice test as set forth in *Falwell,* it would have found liability because neither party contested the fictional nature of the parody, and Hustler knew the statements were fictional when it published the article. While the Supreme Court does not detail how to apply this standard to cases of satire or parody, its rejection of liability means that it could not have applied the standard literally.

New Times asserts that the court of appeals' articulation of the actual malice test was "largely appropriate," and we agree. The court of appeals, citing *Turner,* articulated the issue as: "Did the publisher either know or strongly suspect that the article was misleading or presented a substantially false impression?" 91 S.W.3d at 862. As this is not a case of libel by impression (as *Turner* was), however, we believe the inquiry is more properly stated as: did the publisher either know or have reckless disregard for whether the article could reasonably be interpreted as stating actual facts?[8] *Bentley,* 94 S.W.3d at 603; *see also Pring,* 695 F.2d at 442.

In conducting the actual malice inquiry, the court of appeals dismissed the individual defendants' affidavits as "conclusory and ... therefore not competent summary judgment evidence." 91 S.W.3d at 863. Additionally, the court concluded that the affidavits of Farley, Williams, and Lyons were controverted by their deposition testimony. *Id.* We disagree with both propositions.

In *Casso v. Brand*, 776 S.W.2d 551, 558 (Tex.1989), we held that a reporter's summary judgment affidavit could conclusively establish a lack of actual malice so long as it was "clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted." As we later noted:

Although we chose in *Casso* not to carve out a special exception to our summary judgment practice for public figure and public official defamation cases, the court, in overruling *Bessent* [*v. Times-Herald*, 709 S.W.2d 635 (Tex. 1986)] and *Beaumont Enterprise* [& *Journal v. Smith*, 687 S.W.2d 729 (Tex. 1985)] made it possible for defendants to obtain a summary judgment in such cases. In *Casso,* the defendant (Casso) submitted an affidavit and supporting evidence establishing that he did not believe that certain allegations he made were false and that he did not act with reckless disregard as to their truth or falsity in

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repeating those allegations in his campaign advertising. As evidence supporting his motion for summary judgment, Casso submitted his affidavit and certain testimony from a pending federal trial. He asserted in his affidavit that this testimony formed the basis of his allegedly defamatory statements. The court in *Casso* held that because the plaintiff, Brand, "presented no controverting proof, summary judgment as to these statements was proper."

Carr v. Brasher, 776 S.W.2d 567, 571 (Tex. 1989) (holding that defendants' affidavits and deposition testimony negated actual malice where plaintiff "presented no controverting proof that [the defendants] believed that the statements in question were false or published with reckless disregard for the truth"); *see also Huckabee v. Time Warner Entm't Co.*, 19 S.W.3d 413, 417 (Tex.2000); *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 574 (Tex.1998). Thus, under our framework, because these affidavits are from interested witnesses, they will negate actual malice as a matter of law only if they are "clear, positive, and direct, otherwise credible and free from contradictions and inconsistencies, and [able to be] readily controverted." Tex.R. Civ. P. 166a(c); *see also Huckabee,* 19 S.W.3d at 424; *Casso,* 776 S.W.2d at 558.

In support of its summary judgment motion on actual malice, New Times presented affidavits from Farley, Williams, and Lyons. The affidavits detailed the writing, editing, and publication of "Stop the madness." In her affidavit, Farley explained that she "had the idea to write something for the Dallas Observer that would be a takeoff or satire of the Beamon incident." She described a conversation with Williams in which they discussed whether they wanted the story to be a "prank intended to fool readers or whether the story should be outrageous enough that the readers would be let in on the joke.... We agreed that [the story] should be constructed so that readers would be attracted to it and then would clearly be signaled that the article was a satire or parody." Farley testified that she never intended that the article be taken as an account of actual events and that she neither knew nor believed that it would be understood that way. She detailed "very specific steps to make sure that this was obviously a satire," including using a very young child as protagonist, placing her in ankle shackles, inventing the religious group "GOOF," and adding fictional quotes.

Williams testified in a similar vein. He explained that their "goal was to make [the story] clearly satirical while not so overbroad as to be sophomoric. We intended the article to poke fun at those involved in the Christopher Beamon matter, as well as the dry `daily news' type of journalism that often overlooks the broader issues." Williams testified that he did not intend the

article to be taken as an account of an actual event and did not know or believe that the article's readers would mistake it for one.

Like Farley and Williams, Julie Lyons, the Observer's editor-in-chief, also gave a detailed affidavit. She testified that there was no intent that "Stop the madness" be taken as stating actual historical fact. She described reviewing a draft and suggesting that the article be edited to make it funnier and more obviously satire. She described the choice to use a six-year-old: "We knew that a child that young would clearly signal to the reader that it was fictitious because a child that young can't be detained."

These affidavits are "clear, positive, and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted."

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Tex.R. Civ. P. 166a(c). They are not, as the court of appeals held, "conclusory." 91 S.W.3d at 863. The affidavits do not merely deny actual malice, they provide detailed explanation of the affiants' state of mind and descriptions of steps taken to ensure that the article was understood to be fiction. The affidavits establish New Times's lack of actual malice; none of the witnesses knew or had reckless disregard for whether the satire would be taken as stating actual facts, nor is there any evidence that they intended such a result.[9] Unless Isaacks and Whitten raised a fact issue, therefore, New Times has negated actual malice as a matter of law.

Isaacks and Whitten — and the court of appeals—relied on the respondents' deposition testimony. In fact, the court's actual malice finding appears to have been based largely on evidence that the Dallas Observer intended to ridicule those officials. *See* 91 S.W.3d at 863-64 (noting that Farley "admitted the article was intended to hold Isaacks and Whitten up to public ridicule"; that Williams "agreed the article was meant as satire or scathing commentary"; and that Lyons "agreed that the story would hold these public officials up to public ridicule"). But, while the statutory definition of libel under Texas law includes a statement that exposes a person to ridicule, *see* TEX. CIV. PRAC. & REM.CODE § 73.001, evidence of intent to ridicule is not evidence of actual malice. Rather, actual malice concerns the defendant's attitude toward the truth, not toward the plaintiff. *See Prozeralik v. Capital Cities Communications, Inc.*, 82 N.Y.2d 466, 605 N.Y.S.2d 218, 626 N.E.2d 34, 42 (N.Y.1993) (distinguishing between actual malice, which "focuses on the defendant's state of mind in relation to the truth or falsity of the published information," and common-law malice, which "focuses on the defendant's mental state in relation to the plaintiff"); *Hoppe v. Hearst Corp.*, 53 Wash.App. 668, 770 P.2d 203, 208 (1989) ("The standard for finding actual malice is subjective, and focuses on the declarant's belief in, or attitude toward, the truth of the communication at issue.").

Equating intent to ridicule with actual malice would curtail the "uninhibited, robust, and wide-open" public debate that the actual malice standard was intended to foster, particularly if that debate was expressed in the form of satire or parody. *Sullivan,* 376 U.S. at 270, 84 S.Ct. 710; *cf. id.* at 273, 84 S.Ct. 710 ("Criticism of [government officials'] official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations."). Moreover, relying on such evidence ignores the Supreme Court's repeated admonitions that ill will, spite, and bad motive are not the same as actual malice. Indeed, the very purpose of satire is ridicule, but this does not make it a sort of second-class speech under the First Amendment. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2017(1961) (defining "satire" as "a usu. topical literary composition holding up human or individual vices,

folly, abuses, or shortcomings to censure by means of ridicule, derision, burlesque, irony, or other method sometimes with an intent to bring about improvement").

In fact, reliance on intent to ridicule as evidence of actual malice contravenes *Falwell* itself. In that case, Falwell's evidence that Flynt intended to cause him distress rested on Flynt's deposition testimony that he had intended to "upset" Falwell, that he had wanted "[t]o settle a score" because Falwell had labeled Flynt's personal life "abominable," and that Flynt wanted to

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"assassinate" Falwell's integrity. Deposition Testimony of Larry Flynt, *reprinted in* Joint Appendix at 113, 136, 141, *Hustler Magazine v. Falwell,* 485 U.S. at 56, 108 S.Ct. 876). Despite this evidence, the Supreme Court held that Falwell could not recover for intentional infliction of emotional distress without proof of actual malice, and the Court reversed the Fourth Circuit's judgment. As one commentator has noted, "the regulation of improper intentions, although important for the civil law of torts, is constitutionally inappropriate `in the area of public debate about public figures.'" Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell,* 103 HARV. L.REV. 603, 613 (1990)(quoting *Falwell,* 485 U.S. at 53, 108 S.Ct. 876).

As further evidence of the *Observer's* purported malice, the court of appeals pointed to editor-in-chief Julie Lyons's actions: "She never considered labeling the article as parody or satire. She later realized that some readers thought that the article was real and she changed the heading of the on-line version to satire." 91 S.W.3d at 864. Lyons also responded to each reader query she received about the story and explained that it was a satire. Additionally, the court gave weight to Patrick Williams's testimony that he wrote a response in his "Buzz" column, calling readers who believed the report "cerebrally challenged" and "clueless," and that "he never considered the possibility that some-one might not be able to tell that the article was fictional satire." *Id.* at 863.

But contrary to the court of appeals' opinion, New Times's prompt labeling and clarification in the next edition's *Buzz* column, as well as its explanatory responses to readers, evidence a lack of actual malice. *See, e.g., Washington Nat'l Ins. Co. v. Adm'rs,* 2 F.3d 192, 196 (7th Cir.1993) (holding that "subsequent statements negating any defamatory implications may show the absence of malice by demonstrating that the speaker did not contemplate the defamatory reading in the first place"); *Zerangue v. TSP Newspapers, Inc.,* 814 F.2d 1066, 1071 (5th Cir.1987) (noting that "[r]efusal to retract an exposed error tends to support a finding of actual malice [and][c]onversely, a readiness to retract tends to negate `actual malice'") (citations omitted); *Hoffman v. Washington Post Co.,* 433 F.Supp. 600, 605 (D.D.C.1977) ("[I]t is significant and tends to negate any inference of actual malice on the part of the [publisher] that it published a retraction... in the next day's edition . . . ."), *aff'd,* 578 F.2d 442 (D.C.Cir.1978); *see also* SACK ON DEFAMATION § 11.1; John C. Martin, *The Role of Retraction in Defamation Suits,* 1993 U. OF CHI. LEGAL F. 293, 296 (1993) (noting that some courts "regard retraction as sufficiently probative of an absence of malice to warrant summary judgment in suits involving public figures").

The *Buzz* column was certainly crude and provocative, but the First Amendment does not police bad taste.[10]

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Cohen v. California, 403 U.S. 15, 25, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971); *see also Sullivan,* 376 U.S. at 270, 84 S.Ct. 710 ("[D]ebate on public issues should be uninhibited, robust, and wide-open, and ... may well include vehement, caustic, and sometimes unpleasantly sharp attacks" on public figures.); *Univ. of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp.*, 22 A.D.2d 452, 256 N.Y.S.2d 301, 307 (N.Y.App.Div.1965) ("[W]e may not import the role of literary or dramatic critic into our functioning as judges in this case; and so for purposes of the law we may not reach a conclusion that the works of fiction involved in this litigation are not artistic or literary works.... Whether [the work] is good burlesque or bad, penetrating satire or blundering buffoonery, is not for us to decide. It is fundamental that courts may not muffle expression by passing judgment on its skill or clumsiness, its sensitivity or coarseness; nor on whether it pains or pleases.").

Elected public officials, like Isaacks and Whitten, must become enured to the slings and arrows of public life. *See Sullivan,* 376 U.S. at 272-73, 84 S.Ct. 710 ("[J]udges are to be treated as men of fortitude, able to thrive in a hardy climate."); *Patrick,* 27 Cal.Rptr.2d at 889 ("As judges we are public figures, and part of our job, to paraphrase Harry Truman, is to stand the heat in the kitchen."); *Polygram Records, Inc. v. Superior Court*, 170 Cal.App.3d 543, 216 Cal.Rptr. 252, 258 (1985) ("[I]f judges assumed the responsibility to decide what is amusing and made the protections of the First Amendment turn upon their views, perhaps less putative humor would be safeguarded than our restrained approach permits."). We should not "deny to the press the right to use hyperbole, under the threat of removing the protective mantle of *New York Times,* [thereby] condemn[ing] the press to an arid, desiccated recital of bare facts." *Time, Inc. v. Johnston*, 448 F.2d 378, 384 (4th Cir.1971); *see also Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir.1964)(noting, with respect to an alleged copyright infringement, "... as a general proposition, we believe that parody and satire *are* deserving of substantial freedom—both as entertainment and as a form of social and literary criticism"), *cert. denied,* 379 U.S. 822, 85 S.Ct. 46, 13 L.Ed.2d 33 (1964).

Moreover, the court of appeals noted— correctly—that Farley "never intended a straight news story. She never interviewed Isaacks and Whitten and admitted quotes attributed to them were untrue. She denied the story was false, but admitted it was `fictional.'" 91 S.W.3d at 863. If indeed these undisputed facts are treated as evidence of actual malice, however, there would be automatic actual malice in all cases of satire. As set forth above, this cannot be reconciled with the First Amendment as interpreted by *Falwell.*

The court of appeals' reliance on New Times's failure to conduct an independent investigation of the Beamon case is particularly misguided. *See* 91 S.W.3d at 863, 864 (noting that Farley "did no investigation into the handling of the Beamon case" and that "Lyons, who was responsible for the Dallas Observer's overall editorial policy, agreed that no one investigated the Beamon incident"). New Times's portrayal of the Beamon incident is not at issue in this case and, even if it were, failure to investigate, by itself, is no evidence of actual malice. *Bentley,* 94 S.W.3d at 595.

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Finally, in finding a fact issue on actual malice, the court of appeals relied "[m]ost significantly" on Julie Lyons's testimony that, after the article was published, she agreed that even intelligent, well-read people could have been misled by the story. 91 S.W.3d at 864. The actual malice inquiry focuses on the defendant's state of mind at the time of publication, however. *See Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 173 (Tex.2003) (citing *Bose Corp. v.*

Consumers Union of United States, Inc., 466 U.S. 485, 512, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984)). When asked what she thought at the time of publication, Lyons answered that she did not know or suspect *at that time* that the satire would be misinterpreted. Her hindsight acknowledgment that some people could have been fooled is not evidence that the reasonable reader could have understood the satire to state actual facts, nor is it evidence of actual malice at the time of publication.

We hold that New Times negated actual malice as a matter of law. In light of our disposition of this issue, we do not reach the *Observer's* request that we revisit our holding in *Huckabee* to require clear and convincing evidence of actual malice at the summary judgment stage.

IV
Attorney's Fees and Costs

Section 51.015, Tex. Civ. Prac. & Rem. Code provides:

Costs of Appeal

In the case of an appeal brought pursuant to Section 51.014(6), if the order appealed from is affirmed, the court of appeals shall order the appellant to pay all costs and reasonable attorney fees of the appeal; otherwise each party shall be liable for and taxed its own costs of the appeal.

TEX. CIV. PRAC. & REM.CODE § 15.015. Because it affirmed the trial court's order, the court of appeals ordered New Times to pay all costs and reasonable attorney's fees for the appeal. 91 S.W.3d at 864. Because we reverse that part of the court of appeal's judgment affirming the trial court order, we also reverse the court of appeals' judgment requiring New Times to pay attorney's fees and costs. Instead, pursuant to the statute, each party shall be liable for and taxed its own costs.

V
Conclusion

"However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 504, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) (quoting *Gertz*, 418 U.S. at 339-40, 94 S.Ct. 2997). As Judge Learned Hand noted, the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States v. Associated Press*, 52 F.Supp. 362, 372 (S.D.N.Y.1943), quoted in *N.Y. Times*, 376 U.S. at 270, 84 S.Ct. 710.

We reverse the court of appeals' judgment and render judgment that Isaacks and Whitten take nothing.

Justice SCHNEIDER did not participate in the decision.

APPENDIX

[146 S.W.3d 169]

NOTE: OPINION CONTAINING TABLE OR OTHER DATA THAT IS NOT VIEWABLE

Notes:

1. The article and accompanying photograph are attached as an Appendix to this opinion.

2. MAURICE SENDAK, WHERE THE WILD THINGS ARE (Harper Collins 1963).

3. Neither President Bush nor Dr. Welch sued the *Dallas Observer*. Dr. Welch did remark that, although he "like[s] satire like the best of them, [i]t's not as much fun when you [bear] the brunt of it." Angela Ward, *Denton Judge, DA Plan Libel Suit,* TEXAS LAWYER, November 22, 1999, at 1.

4. The full title is "A Modest Proposal for preventing the children of poor people in Ireland, from being a burden on their parents or country, and for making them beneficial to the public."

5. Judge Robert Sack sits on the United States Court of Appeals for the Second Circuit.

6. In a two sentence concurrence, Justice White wrote, "As I see it, the decision in *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), has little to do with this case, for here the jury found that the ad contained no assertion of fact. But I agree with the Court that the judgment below, which penalized the publication of the parody, cannot be squared with the First Amendment." *Falwell,* 485 U.S. at 57, 108 S.Ct. 876 (White, J., concurring).

7. For example, earlier this year, the *Beijing Evening News,* in a story written by Huang Ke, reported that Congress was threatening to bolt Washington, D.C. unless it got a new, modern Capitol building, complete with retractable roof. Daniel Terdiman, *Onion Taken Seriously, Film at 11,* WIRED, April 14, 2004, at http://www.wired.com/news/culture/0,1284,63048,00.html (last visited Sept. 1, 2004 and available in Clerk of Court's file). Unfortunately, Ke's source for this information was *The Onion,* the satirical publication that bills itself as "America's Finest News Source." *Id.* The *Evening News* later apologized but blamed *The Onion,* writing that "[s]ome small American newspapers frequently fabricate offbeat news to trick people into noticing them with the aim of making money." *Id.* (quoting *Beijing Evening News*). According to Carol Kolb, *Onion* editor, "People every single day think *The Onion* stories are real." *Id.* One piece, called "Al-Qaida Allegedly Engaging in Telemarketing," prompted the Branch County, Michigan sheriff's department to issue an urgent press release warning of the purported practice. *Id.* In a similar vein, an article entitled "Chinese Woman Gives Birth to Septuplets: Has One Week to Choose" provoked prayer vigils on behalf of the six babies who would be rejected. *Id.* Additionally, Deborah Norville reported on MSNBC that more than half of all exercise done in the United States happens in TV infomercials for workout machines, a "statistic" obtained from an *Onion* article. *Id.*

8. New Times proposes that the Court adopt Chief Justice Phillips's concurrence in *Bentley,* which advocated an "intent" standard for actual malice. *Bentley,* 94 S.W.3d at 616 (Phillips, C.J., concurring and dissenting) (actual malice requires proof "that the defendants intended or knew of the implications that the plaintiff is attempting to draw from the allegedly defamatory material") (quoting *Saenz v. Playboy Enters., Inc.*, 841 F.2d 1309, 1318 (7th Cir.1988)) (emphasis added). In fact, the trial court applied this standard but found a fact issue on actual malice. Under either an intent standard or a knowledge standard, however (as more fully explained below), Isaacks and Whitten have failed to raise a fact issue on actual malice.

9. *See* footnote 8, *supra.*

10. As one commentator has aptly noted:

To ask a satirist to be in good taste is like asking a love poet to be less personal. Is THE SATYRICON in good taste? Is A MODEST PROPOSAL? Swift recommends the stewing, roasting and fricaseeing of one-year-old children.... How nasty and vulgar that must have seemed.... Imagine how this went down in polite society: `A child will make two dishes at an Entertainment for Friends; and when the Family dines alone, the fore or hind quarter will make a reasonable Dish, and seasoned with a little Pepper or Salt will be very good Boiled on the fourth Day, especially in Winter....' Now that's considered Literature. It's called Swiftian. Back in 1729 it probably seemed, to a lot of Smith's contemporaries, bad taste and worse.

PHILIP ROTH, READING MYSELF AND OTHERS 47 (1975) (Quoting JONATHAN SWIFT, A MODEST PROPOSAL (1729)).

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723 S.W.2d 653
Bob H. MUSSER, Individually and d/b/a Musser & Associates, Petitioner,
v.
SMITH PROTECTIVE SERVICES, INC., et al., Respondents.
No. C-4216.
Supreme Court of Texas.
Jan. 14, 1987.
Rehearing Denied Feb. 25, 1987.

Michael C. Neel and Candace Sturdivant, Michael C. Neel & Associates, Houston, for petitioner.

Thomas P. Sartwelle and Roger Townsent, Fulbright & Jaworski, Houston, for respondents.

SPEARS, Justice.

This is a libel action concerning a written statement by Smith about Musser's business practices. The jury found the statement was libelous and was made with malice and awarded Musser compensatory damages of $15,000 and exemplary damages of $35,000. The trial court rendered judgment for Musser that the statement was libelous, but granted judgment notwithstanding the verdict for Smith on the malice and exemplary damages findings. The court of appeals reversed the trial court's judgment that the statement was libelous. 690 S.W.2d 56. We affirm the judgment of the court of appeals.

In an attempt to attract a client whom his security and polygraph testing firm previously served, Andrew Smith wrote the following letter to Charles Yust in July of 1976:

Dear Mr. Yust:

Thank you for the time you spent with me over the telephone this morning allowing me the opportunity to explain the services of our guard division, investigative division and our polygraph division, Truth Verification. Under the name Truth Verification, Inc. which was in the years past a separate corporation, we started commercial polygraph in the

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State of Texas in the early 1950s. We opened up the first commercial polygraph office in Houston in the late 1950s. With offices in Dallas, Fort Worth, San Antonio and Houston, we have pioneered commercial polygraph here in the State of Texas for the last 25 years.

I was certainly glad to hear that you are the security director of Sterling Electronics. In years past, our good competitor, Mr. Bob Musser, acted as the Sterling Electronics security director and although he did ocassionally refer us undercover and investigative business, we were, for all practical purposes, "wired-out" when it came to any polygraph services.

As I mentioned over the telephone, because of the fine job we did in training Mr. Bob Musser, we can vouch for his competence. He is a fine polygraph examiner and a very strong competitor.

Originally, Sterling Electronics was a Truth Verification client. When Mr. Musser left us, he was able, as so many of our ex-employees have in the past, to relieve us of certain of our polygraph accounts. The two major accounts that he took were Sterling Electronics and Finger Furniture Company. When I originally spoke to Mr. Allen Finger, he was very pessimistic about the prospects of making a change. Two years ago, he told me that he would give me ten minutes of his time to explain our polygraph services after months of relentless attempts on my part to secure an appointment.

Today, we handle their polygraph requirements, their investigation requirements and they have [a] proposal from us under consideration to handle all of their security guard requirements. At this time, all I would ask is some of your time to make a presentation of our polygraph services. In terms of quality, special service, convenience and economy, I am confident that I can demonstrate our unequivocal superiority. I will be back in touch with you on Monday September 6, 1976. I would ask that you please give me a few minutes of your time. Until then, I will remain,

Very truly yours,

Andrew L. Smith

At the time of the letter's publication, Yust was personnel director for Sterling Electronics. Smith was vice-president of Smith Protective Services, Inc., which was formerly Truth Verification, Inc. Truth Verification, Inc., had employed Musser from March to December in 1962. In May of 1964, Musser formed his own investigating company named Musser & Associates. Sterling Electronics was under contract with Musser for polygraph testing of Sterling's employees and potential employees when Smith wrote the letter to Yust.

On the basis of the statements Smith made in the letter addressed to Yust, Musser sued Smith and Smith Protective Services, Inc. The trial court determined Smith's letter was capable of a defamatory meaning and submitted special issues to the jury. The jury answered that the statement "[w]hen Mr. Musser left us, he was able, as so many of our ex-employees have in the past, to relieve us of certain of our polygraph accounts" was libelous and made with malice. The trial court disregarded the malice findings. Smith and Musser both appealed. The court of appeals reversed the trial court's judgment, holding as a matter of law the statement was not reasonably capable of a defamatory meaning in the mind of an ordinary reader. On appeal to this court, Musser argues that Smith's remark was reasonably capable of a defamatory meaning and that the jury's findings of libel and malice should be upheld.

The law in the area of libel is well settled. In trying a libel action, the initial question for determination is a question of law to be decided by the trial court: were the words used reasonably capable of a defamatory meaning. [1] Beaumont Enterprise

& Journal v. Smith, 687 S.W.2d 729, 730 (Tex.1985); Taylor v. Houston Chronicle Publishing Co., 473 S.W.2d 550, 554 (Tex.Civ.App.--Houston [1st Dist.] 1971, writ ref'd n.r.e.). The court construes the statement as a whole in light of surrounding circumstances based upon how a person of ordinary intelligence would perceive the entire statement. Fitzjarrald v. Panhandle Publishing Co., 149 Tex. 87, 228 S.W.2d 499, 504 (1950). Only when the court determines the language is ambiguous or of doubtful import should the jury then determine the statement's

meaning and the effect the statement's publication has on an ordinary reader. Smith, 687 S.W.2d at 730; Gartman v. Hedgpeth, 138 Tex. 73, 157 S.W.2d 139, 141 (1941). The threshold question then, which is a question of law, is whether Smith's statements are reasonably capable of a defamatory meaning.

Smith's letter praises Musser's qualifications and competence. Smith also writes that Musser was "able, as so many of our ex-employees have in the past, to relieve us of certain polygraph accounts." This language, when read with the letter as a whole, is not ambiguous or of doubtful import. While "relieve us of certain accounts" is sarcastic and may perhaps be twisted or stretched to imply that Musser was unethical in his departing relationship with Smith, the language is not ambiguous to an ordinary reader. Mr. Yust, to whom the letter was addressed, and Mr. Robert Yuna, a vice-president of Sterling Electronics, testified that Smith's statement seemed to cause doubts regarding Musser's integrity and implied that Musser would steal customer lists. The reactions of Yust and Yuna, however, are not typical of the meaning an ordinary reader would impute to the statement. As the court of appeals said:

We fail to see how the statement complained of is defamatory. It calls plaintiff a strong and successful competitor. In our free enterprise system competition is expected, not unethical. The statement does not charge plaintiff with the commission of a crime or the violation of any law. It does not accuse him of violating any kind of contract, such as a covenant against competition. In our opinion by no stretch of the imagination does it charge him with any unethical acts and business dealings. It accuses him of absolutely nothing except what he had a right to do, that is, to compete with Smith for business including business from customers of Smith.

690 S.W.2d at 58.

Based upon a review of the letter as a whole in light of the circumstances in which it was written, Smith's words are not reasonably capable of a defamatory meaning. As a matter of law, then, the statement was not libelous or defamatory. It was improper, therefore, for the trial court to submit any issue to the jury regarding the alleged libelous character of the letter.

It is noteworthy that Smith's statements are basically true. While Sterling Electronics was not a client of Truth Verification during Musser's employment, testimony at trial indicated Truth Verification did train Musser; Musser was a good examiner; Truth Verification had provided service to Sterling in the past; and Sterling and Finger both retained Musser's new firm for their security business. In order for Smith's statement to be actionable, the statement must be false. TEX.CIV.PRAC. & REM. CODE ANN. § 73.005 (Vernon 1986). Finger and Sterling did retain Musser's services after Musser left Truth Verification. But even had Smith's remark been false, it certainly was not defamatory.

Although couched in a sarcastic tone, Smith's letter portrays Musser as a successful competitor. Any other construction tortures the ordinary meaning. To impute a defamatory character to Smith's letter would adversely affect spirited commercial representations regarding the relative merits of any products, services, and business dealings and opportunities.

Accordingly, we affirm the judgment of the court of appeals that Musser take nothing.

Dissenting opinion by ROBERTSON, J., joined by RAY and MAUZY, JJ.

ROBERTSON, Justice, dissenting.

I respectfully dissent. After first acknowledging that it is for the trial court to decide whether the words used are reasonably capable of a defamatory meaning, the majority substitutes its opinion for that of the trial judge and holds that as a matter of law they are not.

The words "took" and "relieved" are perhaps the two most important words used in the statement. Common synonyms for "take," the present tense of "took," are "cheat, bilk, ... defraud, ... flimflam, gyp." Webster's Collegiate Thesaurus 815 (1976). Synonyms of "relieve" include "rob, knock off, knock over, loot, plunder, ransack, rifle, stick up." Id. at 666. Whether the jury interpreted these words in this way is irrelevant, but it clearly establishes the ambiguous nature of the statement without considering the surrounding circumstances.

Having determined the statement to be ambiguous or of doubtful import "it is the duty of the court to give the jury a definition of what is a libel, and leave it for the jury to say whether the offense has been proved." Cotulla v. Kerr, 74 Tex. 89, 11 S.W. 1058, 1059 (1889). That is exactly what was done by the trial court and it is noteworthy that a unanimous jury found the statement to be libelous. Additionally, Yust and Yuna interpreted the statement as defamatory. Yet, the majority dismisses Yust and Yuna's reactions as "not typical of the meaning an ordinary reader would impute to the statement." Apparently, the majority feels that Yust, Yuna, the trial judge, twelve jurors, one court of appeals justice and three supreme court justices do not represent the "ordinary reader" while two court of appeals justices and six supreme court justices are "ordinary readers."

By mere insertion of the words "as a matter of law," the majority of this Court has substituted its judgment, regarding the threshold determination concerning the ambiguity of the statement, for that of the trial court judge. Moreover, the majority has substituted its finding for that of the jury simply because it would have reached a different conclusion. I find no authority for either of these actions by the majority. The record contains evidence to support the trial judge's finding and the jury findings. Accordingly, I would affirm the judgment of the trial court.

RAY and MAUZY, JJ., join in this dissenting opinion.

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1 While recognizing the correct rule in its first paragraph, the dissenting opinion proceeds to disregard the rule. Whether the words used are reasonably capable of a defamatory meaning is a question of law.

166 S.W.3d 380
David E. MOORE, Appellant,
v.
Billy WALDROP, Appellee.
No. 10-04-00205-CV.
Court of Appeals of Texas, Waco.
May 25, 2005.

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Richard T. Miller, San Saba, for appellant.

Alfred Mackenzie, Haley & Davis PC, Waco, for appellee.

Before Chief Justice GRAY, Justice VANCE, and Justice REYNA.

OPINION

FELIPE REYNA, Justice.

David E. Moore brought suit against Billy Waldrop claiming slander *per se* and intentional infliction of emotional distress. The trial court granted Waldrop's motion for summary judgment. Because we find that Waldrop conclusively established his entitlement to judgment on both of Moore's claims, we affirm.

Background

In 1997, Moore was an employee of the Limestone County Sheriff's Department. A dispute arose between Moore and some members of the Limestone County Commissioner's Court, including Commissioner Waldrop. At a restaurant after a Commissioner's Court meeting, Waldrop and other commissioners asked Moore if he would like to sit at their table. Moore replied, "No, I don't want to sit at a table with a bunch of liars." After that incident,

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Moore was called into his supervisor's office on two separate occasions to discuss how Waldrop was upset about Moore's comment at the restaurant. At one time, Moore's supervisor told Moore that Waldrop wanted Moore fired.

Subsequently, Moore and other Limestone County employees were involved in a suit against Limestone County for violations of the Fair Labor Standards Act. Most of the employees settled, but Moore refused to sign the settlement because he believed he was entitled to be paid for overtime hours worked in caring for the department's drug dog. Moore signed a separate

settlement agreement for his care and maintenance of the dog. Shortly thereafter, Moore left to attend law school.

After Moore completed law school, Roy DeFriend, district attorney for Limestone County, hired Moore as an assistant district attorney despite DeFriend's expressed concerns that hiring Moore would anger Waldrop. Shortly thereafter, while in the presence of numerous colleagues and other county officials, Waldrop asked DeFriend if he was considering hiring Moore. DeFriend stated that he had already done so. Waldrop replied, "You don't want to hire him, he's a crook." Waldrop acknowledges that he made this statement, but states that it was made to DeFriend only.

During a budget session, DeFriend and Moore received notice that the Commissioner's Court was considering cutting the funding for Moore's position. At this time, Commissioner Don Ford approached Moore and asked him what he had done to Waldrop. Ford told Moore that Waldrop "is still mouthing and hates your guts," and that Waldrop was still angry over Moore's 1997 comment.

Subsequently, Moore filed suit against Waldrop claiming slander *per se* and intentional infliction of emotional distress. Waldrop filed a traditional motion for summary judgment. The trial court granted the motion.

Moore argues on appeal that the trial court erred in granting Waldrop's motion for summary judgment because fact issues exist as to whether (1) Waldrop's comment was slanderous *per se;* (2) Waldrop's conduct was extreme and outrageous or caused Moore to suffer severe emotional distress; (3) Waldrop is entitled to sovereign immunity; and (4) Moore was a public official.

Standard of Review

The standard of review for a traditional summary judgment is well established. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex.1985). The movant has the burden of showing that no genuine issue of material fact exists and that he is entitled to summary judgment as a matter of law. *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex.1997); *Ash v. Hack Branch Distributing Co., Inc.*, 54 S.W.3d 401, 413 (Tex.App.-Waco 2001, pet. denied). The reviewing court must accept all evidence favorable to the non-movant as true. *Nixon,* 690 S.W.2d at 549; *Ash,* 54 S.W.3d at 413. Every reasonable inference must be indulged in favor of the non-movant and all doubts resolved in its favor. *Grinnell,* 951 S.W.2d at 425; *Ash,* 54 S.W.3d at 413. The non-movant need not respond to the motion for summary judgment unless the movant meets its burden of proof. *Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 222-23 (Tex.1999). But if the movant meets its burden of proof, the non-movant must present evidence to raise a fact issue. *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex.1995); *Rosas v. Hatz*, 147 S.W.3d 560, 564 (Tex.App.-Waco 2004, no pet.). When the trial court does not specify the basis for its summary judgment, as

here, the appealing party must show it is error to base it on any ground asserted in the motion. *Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473 (Tex.1995); *Rosas,* 147 S.W.3d at 564.

Slander *Per Se*

Moore argues in his first issue that fact issues exist as to whether Waldrop's comment is slanderous *per se*.

Defamation is a false statement about a plaintiff published to a third person without legal excuse which damages the plaintiff's reputation. *Doe v. Mobile Video Tapes, Inc.*, 43 S.W.3d 40, 48 (Tex.App.-Corpus Christi 2001, no pet.). Libel is defamation in written or other graphic form. TEX. CIV. PRAC. & REM.CODE ANN. § 73.001 (Vernon 1997); *Doe,* 43 S.W.3d at 48. Slander is orally communicated defamation. *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex.1995); *Doe,* 43 S.W.3d at 48.

A defamatory oral statement may be slander *per se* or slander *per quod*.[1] *Minyard Food Stores, Inc. v. Goodman*, 50 S.W.3d 131, 140 (Tex.App.-Fort Worth 2001), *rev'd on other grounds*, 80 S.W.3d 573 (Tex.2002). If a statement is slander *per quod,* the plaintiff must present proof of actual damages. *Id.* If the statement is slander *per se,* no independent proof of damage to the plaintiff's reputation or of mental anguish is required, as the slander itself gives rise to a presumption of these damages. *Mustang Athletic Corp. v. Monroe*, 137 S.W.3d 336, 339 (Tex.App.-Beaumont 2004, no pet.) (citing *Leyendecker & Assocs., Inc. v. Wechter*, 683 S.W.2d 369, 374 (Tex.1984) (op. on reh'g)).

To be considered slander *per se,* the statement must (1) impute the commission of a crime; (2) impute contraction of a loathsome disease; (3) cause injury to a person's office, business, profession, or calling; or (4) impute sexual misconduct. *Goodman,* 50 S.W.3d at 140. Whether words are capable of the defamatory meaning the plaintiff attributes to them is a question of law for the court. *Musser v. Smith Protective Serv., Inc.*, 723 S.W.2d 653, 654-55 (Tex.1987).

In his pleadings, Moore alleges that Waldrop's statement calling Moore a crook is slanderous *per se* because it imputes the commission of a crime and caused injury to his profession.

However, taken by itself, Waldrop's statement is not slanderous *per se. See Billington v. Houston Fire & Cas. Ins. Co.*, 226 S.W.2d 494, 496 (Tex.Civ.App., Fort Worth-1950, no writ) (holding words such as `liar' and `crook' are not actionable *per se*); *Arant v. Jaffe*, 436 S.W.2d 169, 176 (Tex.Civ.App.-Dallas 1968, no writ) (`phony', `cheat', and `crook', in the absence of innuendo are not actionable *per se*). The parties disagree upon whether innuendo may be used to clarify the meaning of Waldrop's statement. Once applied, Moore argues the innuendo will turn Waldrop's otherwise inactionable statement into an actionable one.

Waldrop argues that a trial court should not use innuendo to expound upon the meaning of a statement when the plaintiff is arguing that the statement is slanderous *per se.* He argues that if innuendo must be used to interpret the meaning of the statement, then the statement cannot be *per se* slanderous. Waldrop cites *Montgomery*

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Ward & Co. v. Peaster which states:

If particular language alleged to be defamatory may, or may not, be so, according to other facts or circumstances, then an innuendo is required in order to tender as an issue the fact that the words conveyed to hearers the defamatory meaning. In a slander suit, not involving an imputation of unchastity in a female, if an innuendo is required, then the allegation and proof of special damages is also required in order to authorize a recovery.

178 S.W.2d 302, 305 (Tex.Civ.App.-Eastland 1944, no writ) (citations omitted).

Waldrop also argues that the courts in *Billington* and *Arant* refused to use innuendo to interpret the meaning of the word "crook." However, Moore distinguishes these cases. In *Billington,* the court found that "crook" was not actionable *per se,* but stated that it would not use innuendo to clarify the meaning of "crook" because the plaintiff did not plead innuendo. 226 S.W.2d at 497 ("[the statements] were practically meaningless in the absence of a pleading of innuendo."). Moore argues that because he pleaded innuendo in his first amended petition, innuendo should be used. Also, in *Arant* the court found that the defendant's statement was not actionable *per se* because the plaintiff failed to substantiate her allegations of innuendo with proof. 436 S.W.2d at 176-78. Again, Moore argues, innuendo was or could have been used.

Moore also points to well known language in defamation cases as proof that a trial court is allowed to consider innuendo. This language states that an allegedly defamatory 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." *New Times, Inc. v. Isaacks,* 146 S.W.3d 144, 154 (Tex.2004); *Carr v. Brasher,* 776 S.W.2d 567, 571 (Tex.1989); *Cram Roofing Co. v. Parker,* 131 S.W.3d 84, 90 (Tex.App.-San Antonio 2003, no pet.).

Moore states that the circumstances surrounding Waldrop's statement concern his settlement agreement with Limestone County. By calling him a crook, Moore states that Waldrop insinuated that Moore had committed a crime by falsifying government records concerning his overtime hours in the settlement agreement. In his deposition, Waldrop admits that this is the reason that he called Moore a crook, and that he still believes that Moore was not truthful in his accounting of the overtime hours he spent taking care of the drug dog. Moore argues that those who heard Waldrop's statement knew of the circumstances surrounding the settlement with Limestone County, and thus knew what Waldrop meant when he called Moore a crook.

However there is a difference between the language quoted by Moore, the consideration of surrounding circumstances, and the definition of innuendo at common law. Innuendo is extrinsic evidence used to prove a statement's defamatory nature. 50 Am.Jur.2d *Libel and Slander* § 137 (1995). It includes the aid of inducements, colloquialisms, and explanatory circumstances. *Id.*

Considering the surrounding circumstances does not necessarily require the use of extrinsic evidence. The surrounding circumstances are the setting in which the alleged slanderous statement is spoken, consisting of the context of the statement and the common meaning attached to the statement. Common sense requires courts to understand the statement as ordinary men and women would, considering the temper of the times, and

the current of contemporary public opinions. "The test is what construction would be placed upon such language by the average reasonable person or the general public, not by the plaintiff." *Schauer v. Memorial Care Syst.,* 856 S.W.2d 437, 448 (Tex.App.-Houston [1st Dist.] 1993, no writ). If the statement seen in this light has but one clear and obvious meaning, then no further inquiry is necessary. *Gray v. HEB Food Store No. 4.,* 941 S.W.2d 327, 329 (Tex.App.-Corpus Christi 1997, writ denied) ("If a statement unambiguously and falsely imputes criminal conduct to plaintiff, it is defamatory *per se*"). However, if the statement is ambiguous, or if the full effect of the statement cannot be understood without the use of extrinsic evidence, then the trial court must go beyond the snapshot of time in which the statement was published and admit into

consideration inducements and explanatory circumstances. *See Peaster,* 178 S.W.2d at 305; *Billington,* 226 S.W.2d at 496.

Accordingly, when dealing with the initial question of whether a statement is slanderous, a trial court should look to innuendo and explanatory circumstances in order to interpret the meaning of the statement. Consideration of innuendo and extrinsic evidence is sometimes the only way to know whether the statement is slanderous or not. Yet, once innuendo is being considered, the statement has moved beyond the analysis of slander *per se* and into that of slander *per quod,* because innuendo not only reflects the meaning of the statement but also illuminates the amount of harm the plaintiff may have suffered. For if innuendo is used to prove slander, then innuendo must also be used to prove damage to the plaintiff. In order to prove harm, the plaintiff must prove that those to whom the statement was published understood the meaning that the plaintiff attaches to the statement. *See Diaz v. Rankin,* 777 S.W.2d 496, 499 (Tex.App.-Corpus Christi 1989, no writ); *Bergman v. Oshman's Sporting Goods, Inc.,* 594 S.W.2d 814, 816 (Tex.Civ.App.-Tyler 1980, no writ) ("third party must understand the words in a defamatory sense"). Therefore, when innuendo is required, it follows that proof of damages must be required as well.

Consequently, innuendo should never be considered when interpreting slander *per se.* The very definition of "*per se,*" "in and of itself," precludes the use of innuendo. If the statement, taken by itself and as a whole, is slanderous, it will require no extrinsic evidence to clarify its meaning. It will stand alone. *Burnaman v. J.C. Penney Co.,* 181 F.Supp. 633, 636-37 (S.D.Tex.1960) ("Statements were not slanderous *per se* and could only become so by innuendo added by plaintiffs."). And by its very nature of being *per se* slanderous, damages are presumed, because contained in the statement itself is a single meaning so obviously harmful that all proof of damages may be dispensed with.

Standing alone, the word "crook" is a general disparagement. *See Billington,* 226 S.W.2d at 496. A specific crime or moral turpitude is not imputed, nor does it injure Moore's profession.

The threat to ruin appellant and to hurt him, and to put him out of business, and to send a letter to Austin to accomplish that purpose, did not impute the commission of a crime. Nor were the words ["crook" and "liar"], taken by themselves and without explanation, such as would tend to affect appellant injuriously in his office, profession, or occupation.

Id. On its face, Waldrop's statement is but mere "name calling." Waldrop's words may indeed be slander *per quod* when innuendo and extrinsic evidence are considered, but it is not *per se* slanderous so

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as to absolve Moore from proving special damages.

Therefore, the trial court did not err in finding that as a matter of law Waldrop's statement was not slanderous *per se. See Grinnell,* 951 S.W.2d at 425; *Ash,* 54 S.W.3d at 413. As Moore did not plead a cause of action for slander *per quod* or special damages, the trial court did not err in granting Waldrop's motion for summary judgment on Moore's slander claim. Accordingly, we overrule Moore's first issue.

Intentional Infliction of Emotional Distress

Moore argues in his second issue that the trial court erred in granting Waldrop's motion for summary judgment because fact issues exist as to whether Waldrop's conduct was extreme and outrageous or whether Moore suffered severe emotional distress.

To recover damages for intentional infliction of emotional distress, a plaintiff must prove that (1) the defendant acted intentionally or recklessly; (2) the conduct was extreme and outrageous; (3) the defendant's actions caused the plaintiff emotional distress; and (4) the resulting emotional distress was severe. *Standard Fruit & Vegetable Co. v. Johnson*, 985 S.W.2d 62, 65 (Tex.1998); *Durckel v. St. Joseph Hosp.*, 78 S.W.3d 576, 586 (Tex.App.-Houston [14th Dist.] 2002, no pet.).

Waldrop argues that his conduct is not extreme or outrageous. We agree. Waldrop's statement while rude, and certainly not inconsequential, does not rise to the level of outrageous behavior. Even if we consider Moore's assertions that Waldrop was actively attempting to thwart his employment as an assistant district attorney, these actions are not so extreme as to come within the definitions of outrageous behavior. Insensitive and rude behavior, "mere insults, indignities, threats, annoyances, *petty oppressions,* or other trivialities," are not considered outrageous conduct. *Porterfield v. Galen Hosp. Corp.*, 948 S.W.2d 916, 920 (Tex.App.-San Antonio 1997, writ denied) (emphasis added); *Creditwatch, Inc. v. Jackson*, 157 S.W.3d 814, 817-18 (Tex.2005).

Therefore, the trial court did not err in finding as a matter of law that Waldrop's conduct was not extreme or outrageous. *See Grinnell,* 951 S.W.2d at 425; *Ash,* 54 S.W.3d at 413. Accordingly, we overrule Moore's second issue.

Conclusion

Because issues one and two are dispositive of this appeal, we need not address Moore's other issues. Accordingly, we affirm the judgment of the trial court.

Notes:

1. *Per se* is defined as "of, in, or by itself; standing alone." Black's Law Dictionary 1178 (Bryan A. Garner ed., 8th ed., West 2004). *Per quod* is Latin for "whereby," and is defined as "requiring reference to additional facts." Black's Law Dictionary 1177 (Bryan A. Garner ed., 8th ed., West 2004).

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486 U.S. 414
108 S.Ct. 1886
100 L.Ed.2d 425
Natalie MEYER, Colorado Secretary of State, and Duane Woodard, Colorado Attorney General, Appellants,
v.
Paul K. GRANT et al. No. 87-920.

486 U.S. 414
108 S.Ct. 1886
100 L.Ed.2d 425

Natalie MEYER, Colorado Secretary of State, and Duane Woodard, Colorado Attorney General, Appellants,

v.

Paul K. GRANT et al.

No. 87-920.

Argued April 25, 1988.
Decided June 6, 1988.

Syllabus

A Colorado statute allows a proposed state constitutional amendment to be placed on a general election ballot if its proponents can obtain the signatures of at least five percent of the total number of qualified voters on an "initiative petition" within a 6-month period, but makes it a felony to pay petition circulators. Concluding that they would need the assistance of paid personnel to obtain the required signatures within the allotted time, appellee proponents of a constitutional amendment that would remove motor carriers from the Colorado Public Utilities Commission's jurisdiction brought suit under 42 U.S.C. § 1983 against appellant state officials seeking a declaration that the statutory payment prohibition violated their First Amendment rights. The District Court upheld the statute, but the Court of Appeals ultimately reversed, holding that the statute violates the First Amendment, as made applicable to the States by the Fourteenth Amendment.

Held: The statutory prohibition against the use of paid circulators abridges appellees' right to engage in political speech in violation of the First and Fourteenth Amendments. Pp. 420-428.

(a) The statute is subject to exacting scrutiny, since the circulation of an initiative petition seeking to deregulate the Colorado trucking industry necessarily constitutes "core political speech," for which First Amendment protection is at its zenith. The statute burdens such speech in two ways: First, it limits the number of voices that will convey appellees' message and the hours they can speak and, therefore, limits the size of the audience they can reach. Second, it makes it less likely that appellees will garner the number of necessary signatures, thus limiting their ability to make the matter the focus of statewide discussion. The statute's burden on speech is not relieved by the fact that other avenues of expression remain open to appellees, since the use of paid circulators is the most effective, fundamental, and perhaps economical means of achieving direct, one-on-one communication, and appellees' right to utilize that means is itself protected by the First Amendment. Nor is the statutory burden rendered acceptable by the State's claimed authority to impose limitations on the scope of the state-created right to legislate by initiative; the power to ban initiatives entirely does not include

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the power to limit discussion of political issues raised in initiative petitions. *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed.2d 266, distinguished. Pp. 420-425.

(b) The State has failed to sustain its burden of justifying the statutory prohibition. The argument that justification is found in the State's interest in assuring that an initiative has sufficient grass roots support to be placed on the ballot is not persuasive, since that interest is adequately protected by the requirement that the specified number of signatures be obtained. Nor does the State's claimed interest in protecting the integrity of the initiative process justify the prohibition, because the State has failed to demonstrate the necessity of burdening appellees' ability to communicate in order to meet its concerns. It cannot be assumed that a professional circulator—whose qualifications for similar future assignments may well depend on a reputation for competence and integrity—is any more likely to accept false signatures than a volunteer motivated entirely by an interest in having the proposition placed on the ballot. Moreover, other statutory provisions dealing expressly with the potential danger of false signatures are adequate to minimize the risk of improper circulation conduct. Pp. 425-428.

828 F.2d 1446 (CA10 1987), affirmed.

STEVENS, J., delivered the opinion for a unanimous Court.

Maurice G. Knaizer, Denver, Colo., for appellants.

William C. Danks, Denver, Colo., for appellees.

Justice STEVENS delivered the opinion of the Court.

In Colorado the proponents of a new law, or an amendment to the State Constitution, may have their proposal placed on the ballot at a general election if they can obtain enough signatures of qualified voters on an "initiative petition" within

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a 6-month period. One section of the state law regulating the initiative process makes it a felony to pay petition circulators.[1] The question in this case is whether that provision is unconstitutional. The Court of Appeals for the Tenth Circuit, sitting en banc, held that the statute abridged appellees' right to engage in political speech and therefore violated the First and Fourteenth Amendments to the Federal Constitution. We agree.

I

Colorado is one of several States that permits its citizens to place propositions on the ballot through an initiative process. Colo. Const., Art. V, § 1; Colo.Rev.Stat. §§ 1-40-101 to 1-40-119 (1980 and Supp.1987). Under Colorado law, proponents of an initiative measure must submit the measure to the State Legislative Council and the Legislative Drafting Office for review and comment. The draft is then submitted to a three-member title board, which prepares a title, submission clause, and summary. After approval of the title, submission clause, and summary, the proponents of the measure then have six months to obtain the necessary signatures, which must

be in an amount equal to at least five percent of the total number of voters who cast votes for all candidates for the Office of Secretary of State at the last preceding general election. If the signature requirements are met, the petitions may be filed with the Secretary of State, and the measure will appear on the ballot at the next general election. Colo.Rev.Stat. §§ 1-40-101 to 1-40-105 (1980 and Supp.1987).

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State law requires that the persons who circulate the approved drafts of the petitions for signature be registered voters. Colo. Const., Art. V, § 1(6). Before the signed petitions are filed with the Secretary of State, the circulators must sign affidavits attesting that each signature is the signature of the person whose name it purports to be and that, to the best of their knowledge and belief, each person signing the petition is a registered voter. Colo.Rev.Stat. § 1-40-109 (Supp.1987). The payment of petition circulators is punished as a felony. Colo.Rev.Stat. § 1-40-110 (1980), n. 1, *supra.*

Appellees are proponents of an amendment to the Colorado Constitution that would remove motor carriers from the jurisdiction of the Colorado Public Utilities Commission. In early 1984 they obtained approval of a title, submission clause, and summary for a measure proposing the amendment and began the process of obtaining the 46,737 signatures necessary to have the proposal appear on the November 1984 ballot. Based on their own experience as petition circulators, as well as that of other unpaid circulators, appellees concluded that they would need the assistance of paid personnel to obtain the required number of signatures within the allotted time. They then brought this action under 42 U.S.C. § 1983 against the Secretary of State and the Attorney General of Colorado seeking a declaration that the statutory prohibition against the use of paid circulators violates their rights under the First Amendment.[2]

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After a brief trial, the District Judge entered judgment upholding the statute on alternative grounds. First, he concluded that the prohibition against the use of paid circulators did not burden appellees' First Amendment rights because it did not place any restraint on their own expression or measurably impair efforts to place initiatives on the ballot.[3] The restriction on their ability to hire paid circulators to speak for them was not significant because they remained free to use their money to employ other spokesmen who could advertise their cause. Second, even assuming, *arguendo,* that the statute burdened appellees' right to engage in political speech, the District Judge concluded that the burden was justified by the State's interests in (a) making sure that an

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initiative measure has a sufficiently broad base to warrant its placement on the ballot, and (b) protecting the integrity of the initiative process by eliminating a temptation to pad petitions.

A divided panel of the Court of Appeals affirmed for the reasons stated by the District Court. After granting rehearing en banc, however, the court reversed. The en banc majority concluded that the record demonstrated that petition circulators engage in the communication of ideas while they are obtaining signatures and that the available pool of circulators is necessarily smaller if only volunteers can be used.

"Thus, the effect of the statute's absolute ban on compensation of solicitors is clear. It impedes the sponsors' opportunity to disseminate their views to the public. It curtails the discussion of issues that normally accompanies the circulation of initiative petitions. And it shrinks the size of the audience that can be reached. . . . In short, like the campaign expenditure limitations struck down in *Buckley,* the Colorado statute imposes a direct restriction which 'necessarily reduces the quantity of expression. . . .' *Buckley* [*v. Valeo*], 424 U.S. [1,] 19 [96 S.Ct. 612, 634, 46 L.Ed.2d 659 (1976)]." 828 F.2d 1446, 1453-1454 (CA10 1987)(citations omitted).

The Court of Appeals then rejected the State's asserted justifications for the ban. It first rejected the suggestion that the ban was necessary either to prevent fraud or to protect the public from circulators that might be too persuasive:

"The First Amendment is a value-free provision whose protection is not dependent on 'the truth, popularity, or social utility of the ideas and beliefs which are offered.' *NAACP v. Button,* [371 U.S. 415, 445, 83 S.Ct. 328, 344, 9 L.Ed.2d 405 (1963)]. 'The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind. . . . In this field every person must be his

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own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.' *Thomas v. Collins,* [323 U.S. 516, 545 [65 S.Ct. 315, 329, 89 L.Ed. 430], (1945)] (Jackson, J., concurring)." *Id.,* at 1455.

The court then rejected the suggestion that the ban was needed to assure that the initiative had a broad base of public support because, in the court's view, that interest was adequately protected by the requirement that the petition be signed by five percent of the State's eligible voters. Finally, the Court of Appeals rejected an argument advanced by a dissenting judge that since Colorado had no obligation to afford its citizens an initiative procedure, it could impose this condition on its use. Having decided to confer the right, the State was obligated to do so in a manner consistent with the Constitution because, unlike *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico,* 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986), which involved only commercial speech, this case involves "core political speech."

II

We fully agree with the Court of Appeals' conclusion that this case involves a limitation on political expression subject to exacting scrutiny. *Buckley v. Valeo,* 424 U.S. 1, 45, 96 S.Ct. 612, 647, 46 L.Ed.2d 659 (1976). The First Amendment provides that Congress "shall make no law . . . abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances." The Fourteenth Amendment makes that prohibition applicable to the State of Colorado. As we explained in *Thornhill v. Alabama,* 310 U.S. 88, 95, 60 S.Ct. 736, 740, 84 L.Ed. 1093 (1940), "[t]he freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a State."

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Unquestionably, whether the trucking industry should be deregulated in Colorado is a matter of societal concern that appellees have a right to discuss publicly without risking criminal sanctions. "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Id.,* at 101-102, 60 S.Ct., at 744. The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States,* 354 U.S. 476, 484, 77 S.Ct. 1304 1308, 1 L.Ed.2d 1498 (1957). Appellees seek by petition to achieve political change in Colorado; their right freely to engage in discussions concerning the need for that change is guarded by the First Amendment.

The circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change. Although a petition circulator may not have to persuade potential signatories that a particular proposal should prevail to capture their signatures, he or she will at least have to persuade them that the matter is one deserving of the public scrutiny and debate that would attend its consideration by the whole electorate. This will in almost every case involve an explanation of the nature of the proposal and why its advocates support it.[4] Thus, the circulation of a petition involves the type of

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interactive communication concerning political change that is appropriately described as "core political speech." [5]

The refusal to permit appellees to pay petition circulators restricts political expression in two ways: First, it limits the number of voices who will convey appellees' message and the

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hours they can speak and, therefore, limits the size of the audience they can reach.[6] Second, it makes it less likely that appellees will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion. The Colorado Supreme Court has itself recognized that the prohibition against the use of paid circulators has the inevitable effect of reducing the total quantum of speech on a public issue. When called upon to consider the constitutionality of the statute at issue here in another context in *Urevich v. Woodard,* 667 P.2d 760, 763 (1983), that court described the burden the statute imposes on First Amendment expression:

"As mentioned previously, statutes that limit the power of the people to initiate legislation are to be closely scrutinized and narrowly construed. That the statute in question acts as a limitation on ACORN's ability to circulate petitions cannot be doubted. We can take judicial notice of the fact that it is often more difficult to get people to work without compensation than it is to get them to work for pay. As the dissent in *State v. Conifer Enterprises, Inc.,* 82 Wash.2d 94, [104,] 508 P.2d 149 [,155] (1973) (Rosellini, J., dissenting), observed:

" 'The securing of sufficient signatures to place an initiative measure on the ballot is no small undertaking. Unless the proponents of a measure can find a large number of volunteers, they must hire persons to solicit signatures or abandon the project. I think we can take judicial

notice of the fact that the solicitation of signatures on petitions is work. It is time-consuming and it is tire-

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some so much so that it seems that few but the young have the strength, the ardor and the stamina to engage in it, unless, of course, there is some remuneration.' "

Appellants argue that even if the statute imposes some limitation on First Amendment expression, the burden is permissible because other avenues of expression remain open to appellees and because the State has the authority to impose limitations on the scope of the state-created right to legislate by initiative. Neither of these arguments persuades us that the burden imposed on appellees' First Amendment rights is acceptable.

That appellees remain free to employ other means to disseminate their ideas does not take their speech through petition circulators outside the bounds of First Amendment protection. Colorado's prohibition of paid petition circulators restricts access to the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication. That it leaves open "more burdensome" avenues of communication, does not relieve its burden on First Amendment expression. *FEC v. Massachusetts Citizens For Life, Inc.*, 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986). Cf. *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 296, 299, 102 S.Ct. 434, 437, 439, 70 L.Ed.2d 492 (1981). The First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.

Relying on *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986), Colorado contends that because the power of the initiative is a state-created right, it is free to impose limitations on the exercise of that right. That reliance is misplaced. In *Posadas* the Court concluded that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." *Id.*, at 345-346, 106 S.Ct., at 2979. The Court of Appeals quite properly pointed out the logical flaw in Colorado's attempt to draw an analogy between the present case and *Posadas*. The decision in *Posadas* does not suggest that "the power to

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ban casino gambling entirely would include the power to ban public discussion of legislative proposals regarding the legalization and advertising of casino gambling." 828 F.2d, at 1456. Thus it does not support the position that the power to ban initiatives entirely includes the power to limit discussion of political issues raised in initiative petitions. And, as the Court of Appeals further observed:

"*Posadas* is inapplicable to the present case for a more fundamental reason—the speech restricted in *Posadas* was merely 'commercial speech which does "no more than propose a commercial transaction. . . ." ' *Posadas,* [478 U.S., at 340, 106 S.Ct., at 2976] (quoting *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762, 96 S.Ct. 1817 1825, 48 L.Ed.2d 346 (1976)). . . . Here, by contrast, the speech at issue is 'at the core of our electoral process and of the First Amendment freedoms,' *Buckley,* 424 U.S., at 39, 96 S.Ct., at 644

(quoting *Williams v. Rhodes*, 393 U.S. 23, 32, 89 S.Ct. 5, 11, 21 L.Ed.2d 24 (1968))—an area of public policy where protection of robust discussion is at its zenith." *Id.,* at 1456-1457.

We agree with the Court of Appeals' conclusion that the statute trenches upon an area in which the importance of First Amendment protections is "at its zenith." For that reason the burden that Colorado must overcome to justify this criminal law is well-nigh insurmountable.

III

We are not persuaded by the State's arguments that the prohibition is justified by its interest in making sure that an initiative has sufficient grass roots support to be placed on the ballot, or by its interest in protecting the integrity of the initiative process. As the Court of Appeals correctly held, the former interest is adequately protected by the requirement that no initiative proposal may be placed on the ballot

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unless the required number of signatures has been obtained. *Id.,* at 1455.[7]

The State's interest in protecting the integrity of the initiative process does not justify the prohibition because the State has failed to demonstrate that it is necessary to burden appellees' ability to communicate their message in order to meet its concerns. The Attorney General has argued that the petition circulator has the duty to verify the authenticity of signatures on the petition and that compensation might provide the circulator with a temptation to disregard that duty. No evidence has been offered to support that speculation, however, and we are not prepared to assume that a professional circulator—whose qualifications for similar future assignments may well depend on a reputation for competence and integrity—is any more likely to accept false signatures than a volunteer who is motivated entirely by an interest in having the proposition placed on the ballot.

Other provisions of the Colorado statute deal expressly with the potential danger that circulators might be tempted

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to pad their petitions with false signatures. It is a crime to forge a signature on a petition, Colo.Rev.Stat. § 1-13-106 (1980), to make false or misleading statements relating to a petition, Colo.Rev.Stat. § 1-40-119 (Supp.1987), or to pay someone to sign a petition, Colo.Rev.Stat. § 1-40-110 (1980). Further, the top of each page of the petition must bear a statement printed in red ink warning potential signatories that it is a felony to forge a signature on a petition or to sign the petition when not qualified to vote and admonishing signatories not to sign the petition unless they have read and understand the proposed initiative.[8] These provisions seem adequate to the task of minimizing the risk of improper conduct in the circulation of a petition, especially since the risk of fraud or corruption, or the appearance thereof, is more remote at the petition stage of an initiative than at the time of balloting. Cf. *First National Bank of Boston v. Bellotti,* 435

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U.S. 765, 790, 98 S.Ct. 1407 1423, 55 L.Ed.2d 707 (1978) ("The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue").

"[L]egislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment." *Buckley v. Valeo,* 424 U.S., at 50, 96 S.Ct., at 650. That principle applies equally to "the discussion of political policy generally or advocacy of the passage or defeat of legislation." *Id.,* at 48, 96 S.Ct., at 648. The Colorado statute prohibiting the payment of petition circulators imposes a burden on political expression that the State has failed to justify. The Court of Appeals correctly held that the statute violates the First and Fourteenth Amendments. Its judgment is therefore affirmed.

It is so ordered.

1. Colorado Rev.Stat. § 1-40-110 (1980) provides:

"Any person, corporation, or association of persons who directly or indirectly pays to or receives from or agrees to pay to or receive from any other person, corporation, or association of persons any money or other thing of value in consideration of or as an inducement to the circulation of an initiative or referendum petition or in consideration of or as an inducement to the signing of any such petition commits a class 5 felony and shall be punished as provided in section 18-1-105, C.R.S. (1973)."

2. Although the November 1984 election in which appellees had first hoped to present their proposal to the citizens of Colorado is long past, we note that this action is not moot. Neither party suggests that the action is moot. Rather, both assert that the controversy between them is one capable of repetition, yet evading review.

We may exercise jurisdiction over this action if " '(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.' " *Murphy v. Hunt,* 455 U.S. 478, 482, 102 S.Ct. 1181 1183, 71 L.Ed.2d 353 (1982) (*per curiam*), quoting *Weinstein v. Bradford,* 423 U.S. 147, 149, 96 S.Ct. 347, 349, 46 L.Ed.2d 350 (1975) (*per curiam*). We are satisfied that both elements are present in this case. Colorado grants the proponents of an initiative only six months in which to obtain the necessary signatures. The likelihood that a proponent could obtain a favorable ruling within that time, much less act upon such a ruling in time to obtain the needed signatures, is slim at best. Further, the initiative sought by appellees has not been enacted. Appellees, however, continue to advocate its adoption and plan future attempts to obtain the signatures necessary to place the issue on the ballot. Tr. of Oral Arg. 37. Consequently, it is reasonable to expect that the same controversy will recur between these two parties, yet evade meaningful judicial review. See *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 774-775, 98 S.Ct. 1407, 1414-1415, 55 L.Ed.2d 707 (1978); *Moore v. Ogilvie,* 394 U.S. 814, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969).

3. In support of its conclusion that the prohibition against the use of paid circulators did not inhibit the placement of initiative measures on the general ballot, the District Court compared Colorado's experience with that of 20 States which have an initiative process but do not prohibit paid circulators. It noted that since 1910, Colorado has ranked fourth in the total number of initiatives placed on the ballot. This statistic, however, does not reject the possibility that even more petitions would have been successful if paid circulators had been available, or, more narrowly, that these appellees would have had greater success if they had been able to hire extra help. As the District Court itself noted, "the evidence indicates [appellees'] purposes would be enhanced if the corps of volunteers could be augmented by a cadre of paid workers." 741 F.2d 1210, 1212 (CA10 1984) (Appendix).

4. The record in this case demonstrates that the circulation of appellees' petition involved political speech. Paul Grant, one of the appellees, testified about the nature of his conversations with voters in an effort to get them to sign the petition:

"[T]he way we go about soliciting signatures is that you ask the person—first of all, you interrupt the person in their walk or whatever they are doing. You intrude upon them and ask them, "Are you a registered voter?

* * * * *

"If you get a yes, then you tell the person your purpose, that you are circulating a petition to qualify the issue on the ballot in November, and tell them what about, and they say, 'Please let me know a little bit more.' Typically, that takes maybe a minute or two, the process of explaining to the persons that you are trying to put the initiative on the ballot to exempt Colorado transportation from [State Public Utilities Commission] regulations.

"Then you ask the person if they will sign your petition. If they hesitate, you try to come up with additional arguments to get them to sign.

* * * * *

"[We try] to explain the not just deregulation in this industry, that it would free up to industry from being cartelized, allowing freedom from moral choices, price competition for the first time, lowering price costs, which we estimate prices in Colorado to be $150 million a year in monopoly benefits. We have tried to convey the unfairness and injustice of the existing system, where some businesses are denied to go into business simply to protect the profits of existing companies.

"We tried to convey the unfairness of the existing system, which has denied individuals the right to start their own businesses. In many cases, individuals have asked for an authority and been turned down because huge corporate organizations have opposed them." 2 Record 10-11.

This testimony provides an example of advocacy of political reform that falls squarely within the protections of the First Amendment.

5. Our recognition that the solicitation of signatures for a petition involves protected speech follows from our recognition in *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980), that the solicitation of charitable contributions often involves speech protected by the First Amendment and that any attempt to regulate solicitation would necessarily infringe that speech:

"Prior authorities, therefore, clearly establish that charitable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment. Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease." *Id.,* at 632, 100 S.Ct., at 833.

6. Paul Grant testified that compensation resulted in more people being "able and willing" to circulate petitions. 2 Record 19-20. As he succinctly concluded: "[M]oney either enables people to forego leaving a job, or enables them to have a job." *Ibid.*

7. Colorado also seems to suggest that it is permissible to mute the voices of those who can afford to pay petition circulators. See Brief for Appellants 17. "But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-49, 96 S.Ct. 612, 648-649, 46 L.Ed.2d 659 (1976). The concern that persons who can pay petition circulators may succeed in getting measures on the ballot when they might otherwise have failed cannot defeat First Amendment rights. As we said in *First National Bank of Boston v. Bellotti,* 435 U.S., at 790-791, 98 S.Ct., at 1423-1424, paid advocacy "may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it. . . . '[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . .' *Buckley,* 424 U.S., at 48-49, 96 S.Ct., at 648-649. . . . [T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments." Cf. *Brown v. Hartlage*, 456 U.S. 45, 60, 102 S.Ct. 1523 1532, 71 L.Ed.2d 732 (1982) ("The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech").

8. Section 1-40-106 provides in part:

"(1) At the top of each page of every initiative or referendum petition shall be printed, in plain red letters no smaller than the impression of ten-point, boldface type, the following:

"**WARNING**

"**IT IS A FELONY:**

"For anyone to sign any initiative or referendum petition with any name other than his or her own or to knowingly sign his or her name more than once for the same measure or to sign such petition when not a qualified elector.

"**DO NOT SIGN THIS PETITION UNLESS YOU ARE A QUALIFIED ELECTOR**

"**TO BE A QUALIFIED ELECTOR, YOU MUST BE:**

"(a) At least eighteen years of age.

"(b) A citizen of the United States.

"(c) A resident of the state of Colorado and have resided in the state at least thirty-two days.

"(d) A resident of the precinct in which you live for at least thirty-two days.

"Do not sign this petition unless you have read or had read to you the proposed initiative or referred measure or the summary of an initiated measure in its entirety and understand its meaning."

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Bertha MEANS and Harlem Cab Company d/b/a Austin Cab, Appellants,
v.
ABCABCO, INC. d/b/a Lone Star Cab Co., and Solomon Kassa, Appellees.

No. 03-08-00426-CV.

Court of Appeals of Texas, Austin.

June 3, 2010.

[315 S.W.3d 210]

William T. Peckham, Austin, TX, for appellants.

Malcolm Greenstein, Greenstein & Kolker, Austin, TX, for appellees.

[315 S.W.3d 211]

Before Chief Justice JONES, Justices PURYEAR and HENSON.

OPINION

DAVID PURYEAR, Justice.

Bertha Means and Harlem Cab Company d/b/a Austin Cab (collectively, "Austin Cab") sued ABCABCO, Inc. d/b/a Lone Star Cab Co. and Solomon Kassa (collectively, "Kassa") for slander and several other claims based on allegedly defamatory comments Kassa made regarding Austin Cab. The trial court granted Kassa's no-evidence motion for summary judgment on Austin Cab's claims on the ground that Kassa's statements were not defamatory. Austin Cab's single point of error on appeal is that the trial court erred in granting summary judgment as to Austin Cab's claim for slander. Because we hold that the statements are not defamatory as a matter of law, we affirm the trial court's order.

FACTUAL AND PROCEDURAL BACKGROUND

Kassa worked as a taxicab driver for Austin Cab as an independent contractor between 1998 and 2003. While he was driving for Austin Cab, Kassa formed his own cab company, Lone Star Cab, and began efforts to gain a taxicab franchise from the City of Austin. At the time, only three cab companies held franchises, but the City was considering granting an additional franchise. As part of his efforts, Kassa appeared at City of Austin committee and council meetings to advocate on behalf of his cab company. Meanwhile, Kassa's relationship with Austin Cab ended in May 2003 when Austin Cab terminated his contract because of Kassa's repeated failure to comply with certain contractual terms. Kassa told others, however, that Austin Cab had terminated his contract

because he had started his own cab company and was trying to gain a franchise to compete with Austin Cab.[1] Specifically, at an April 5, 2007 Austin City Council meeting at which the award of a new taxicab franchise was under consideration, Doug Young, Kassa's attorney and agent, made the following comments:

I do want to point out . . . that you are not going to see a lot of the drivers from Lone Star and here's why, you will hear from Solomon Kassa, one of the officers of Lone Star. He has been the public face since 2003. The first time he talked at an Urban Transportation Committee in 2003, his contract with one of the three existing cab companies was summarily terminated within days of his appearance at that meeting. . . . The point was made to the drivers, if you are currently a driver for one of the existing companies and it's no secret that the existing companies have all been on the record and the Urban Transportation Commission and I think they will be before you today, that they favor Mr. Fodo, their subcontractor for the award of this franchise. It's not safe for Lone Star's drivers to come and advocate for Lone Star today.

Six days after these comments, Austin Cab sued Kassa for declaratory judgment, tortious interference, libel, slander and defamation, and business disparagement. Austin Cab's claims were based on the statements made by Kassa or his agent regarding the reasons Austin Cab terminated its contract with Kassa, including

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the agent's April 5, 2007 statement to the Austin City Council. After a short time for discovery, Kassa filed a no-evidence motion for summary judgment as to each of Austin Cab's claims, arguing that Austin Cab had no evidence that: (1) the statements were defamatory, (2) the statements were false, (3) the statements were directed at Austin Cab, (4) Austin Cab suffered actual damages, (5) the statements constitute defamation per se, (6) the statements constitute slander per se, (7) the statements were published within one year of the date suit was filed, and (8) the statements were published maliciously. Austin Cab filed a response to Kassa's motion, attaching both documentary and testimonial evidence, and amended its pleadings to add claims for reckless infliction of emotional distress and negligence. After a hearing on Kassa's motion, the trial court rendered partial summary judgment as to Austin Cab's claims for declaratory judgment, tortious interference, libel, slander and defamation, and business disparagement on the ground that the April 5, 2007 statement to the Austin City Council was not defamatory.

Austin Cab next filed a motion to modify or vacate the trial court's partial summary judgment, and Kassa filed a motion for no-evidence summary judgment as to Austin Cab's remaining claims. After examining the pleadings and hearing argument from counsel on Austin Cab's motion to modify or vacate and Kassa's second motion for summary judgment, the trial court modified the previous partial summary judgment "to reflect that Kassa's Motion for Summary Judgment is granted solely as to the statements made by Kassa's agent but further finds that said statements are not defamatory and that the Motion to Vacate Summary Judgment is denied." The trial court then addressed Kassa's second motion for summary judgment and granted it "as to any and all other allegedly defamatory statements that were made by or attributed to" Kassa and dismissed all of Austin Cab's remaining claims without specifying the grounds relied on for its ruling. Austin Cab's single point of error on appeal is that the district court erred in granting Kassa's motion for summary judgment on the slander claim stemming from Kassa's

April 5, 2007 statement to the Austin City Council. Austin Cab does not appeal the trial court's dismissal of its other claims.

STANDARD OF REVIEW

We review summary judgments de novo. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 156 (Tex.2004). Under the "no-evidence" rule 166a(i) standard, a defendant may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim on which the plaintiff would have the burden of proof at trial. *See* Tex.R. Civ. P. 166a(i). A no-evidence summary judgment is essentially a pre-trial directed verdict and we apply the same legal-sufficiency standard. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750 (Tex.2003). We review the evidence in the light most favorable to the non-movant, disregarding all contrary evidence and inferences. *Id.* at 751. We will affirm a no-evidence summary judgment if the non-movant fails to produce more than a scintilla of probative evidence raising a genuine issue of fact as to an essential element of a claim on which the non-movant would have the burden of proof at trial. *Holmstrom v. Lee*, 26 S.W.3d 526, 530 (Tex.App.-Austin 2000, no pet.). More than a scintilla of evidence exists when reasonable and fair-minded people could differ in their conclusions based on that evidence. *Forbes Inc. v. Granada Biosciences*, 124 S.W.3d 167, 172 (Tex.2003).

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DISCUSSION

Austin Cab contends that Kassa's statement to the Austin City Council is slander because it accuses Austin Cab of firing Kassa for trying to compete with Austin Cab. To prove a cause of action for slander, a plaintiff must prove that the defendant orally communicated a defamatory statement to a third person without justification or excuse. *Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex.1995). The issue for our determination is whether the words used by Kassa's agent are "reasonably capable of a defamatory meaning." *Musser v. Smith Protective Serv., Inc.*, 723 S.W.2d 653, 655 (Tex. 1987). Because Kassa's words are unambiguous, this determination is a question of law for the court. *Id.*

Proper Use of No-Evidence Summary Judgment

Before we reach the issue of whether the statement is defamatory, we address *sua sponte* whether it was proper for the trial court to grant a no-evidence summary judgment on a question of law. Questions of law are proper subjects of traditional motions for summary judgment, *see, e.g., Johnson v. City of Fort Worth*, 774 S.W.2d 653, 655-56 (Tex.1989), but Kassa raised the issue in a no-evidence motion for summary judgment and the trial court granted summary judgment on that ground. The Dallas Court of Appeals has held that purely legal issues can never be the subject of a no-evidence motion for summary judgment. *Harrill v. A.J.'s Wrecker Serv., Inc.*, 27 S.W.3d 191, 194 (Tex.App.-Dallas 2000, pet. dism'd w.o.j); *but see Cone v. Fagadau Energy Corp.*, 68 S.W.3d 147, 156 (Tex.App.-Eastland 2001, no pet.) (holding that purely legal issue may be addressed as part of no-evidence summary judgment). *Harrill,* however, cites no authority for its bright-line proposition, nor does the court offer reasoning to support its

conclusion. *Harrill,* 27 S.W.3d at 194. Furthermore, *Harrill* is distinguishable because the motion for summary judgment there involved a movant who had the burden of proof on the legal issue. *Id.; see also* Tex.R. Civ. P. 166a(i) (movant cannot have burden of proof on subject of no-evidence summary judgment).

The purpose of summary judgment is to permit the trial court to promptly dispose of cases that involve unmeritorious claims or untenable defenses. *City of Houston v. Clear Creek Basin Auth.,* 589 S.W.2d 671, 678 n. 5 (Tex.1979); *see also Gaines v. Hamman,* 163 Tex. 618, 358 S.W.2d 557, 563 (1962) (summary judgment "provides a method of summarily terminating a case when it clearly appears that only a question of law is involved and that there is no genuine issue of fact"). Likewise, the no-evidence summary judgment allows a court to "pierce the pleadings" and evaluate the evidence to see if there is a genuine need for trial. *Benitz v. Gould Group,* 27 S.W.3d 109, 112 (Tex. App.-San Antonio 2000, no pet.). In the absence of an articulated reason or further support, we decline to follow *Harrill*'s lead and instead review the legal issue on appeal to determine if it was properly presented to the trial court and is susceptible to review under no-evidence summary-judgment standards.

Kassa's no-evidence motion asserted that Austin Cab could not produce any evidence of a defamatory statement, which is an element of Austin Cab's slander claim. *See Randall's Food Markets, Inc.,* 891 S.W.2d at 646. Kassa's motion meets the requirements of Rule 166a(i). *See* Tex.R. Civ. P. 166a(i). To defeat Kassa's motion, Austin Cab had to present evidence raising a genuine issue of material fact regarding the existence of a defamatory statement. *Id.* Austin Cab produced a transcript of the statement and witness

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affidavits regarding the effect of the statement on those who heard it. After reviewing the evidence, the trial court found that the statement was not defamatory. If the statement produced by Austin Cab as evidence of a defamatory statement is not capable of defamatory meaning as a matter of law, then, logically, Austin Cab failed to produce evidence of a defamatory statement. Thus, summary judgment was proper. *See King Ranch,* 118 S.W.3d at 751 (no-evidence summary judgment should be sustained when there is complete absence of evidence of vital fact). Because the question of defamatory meaning was presented to the trial court within the framework of rule 166a(i) and because it is subject to a proper analysis under the no-evidence summary-judgment standards, we hold that it was not improper for the trial court to consider this legal issue under a no-evidence motion for summary judgment.

Analysis of Statement

Next we address de novo whether the words used by Kassa's agent were reasonably capable of a defamatory meaning. *See Musser,* 723 S.W.2d at 654. We construe as a matter of law language that is unambiguous on its face and find it not actionable if it lacks defamatory meaning. *See Carr v. Brasher,* 776 S.W.2d 567, 570 (Tex.1989); *Musser,* 723 S.W.2d at 655 (if ambiguous, trier-of-fact must determine statement's meaning and effect on listener). When considering whether a statement is defamatory, we construe the statement as a whole, in light of the surrounding circumstances, based on how a person of ordinary intelligence would perceive the entire statement. *Id.*

A statement is defamatory if it tends to injure the person's reputation, exposing the person to public hatred, contempt, ridicule, or financial injury, or if it tends to impeach that person's

honesty, integrity, or virtue. *See* Tex. Civ. Prac. & Rem.Code Ann. § 73.001 (West 2005) (libel); Restatement (Second) of Torts § 559 (1977) (defamation). A communication that is merely unflattering, abusive, annoying, irksome, or embarrassing, or that hurts only the plaintiff's feelings, however, is not actionable. *H.O. Merren & Co., Ltd. v. A.H. Belo Corp.*, 228 F.Supp. 515, 517 (N.D.Tex.1964), *aff'd*, 346 F.2d 568 (5th Cir.1965); *Rawlins v. McKee*, 327 S.W.2d 633, 635 (Tex.Civ.App.-Texarkana 1959, writ ref'd n.r.e.); *see also* 1 Robert D. Sack, *Sack on Defamation* 2-12 (3d ed.2009). To be defamatory, a statement should be derogatory, degrading, and somewhat shocking, and contain "elements of personal disgrace." Sack, *supra* at 2-17 (quoting W. Page Keeton, *et al., Prosser & Keeton on the Law of Torts* § 111 (5th ed.1984)). Thus, it is not defamatory to accuse a person of doing that which he has a legal right to do. *Associated Press v. Cook*, 17 S.W.3d 447, 456 n. 8 (Tex.App.-Houston 1st Dist. 2000, no pet.) ("Exercising a legal right is not defamatory as a matter of law."); *see also Musser,* 723 S.W.2d at 655 (accusing someone of doing that which they had right to do is not defamatory).

The statement in this case was made at an Austin City Council meeting during public comments regarding the award of a new taxicab franchise by the City. The speaker was advocating on behalf of Kassa to encourage the Austin City Council to award the franchise to Kassa's cab company. The unambiguous meaning of Kassa's statement and, in fact, the meaning ascribed to it by Austin Cab, is that Austin Cab terminated Kassa's contract as soon as it found out that Kassa was seeking the award of a taxicab franchise that would

[315 S.W.3d 215]

compete with Austin Cab.[2] The statement does not suggest some wrongful or unethical conduct by Austin Cab. It does not suggest that Austin Cab violated a law or the term of a contract or that Austin Cab breached its contractual obligations. What it does state is that Austin Cab terminated its contract with Kassa because he was supporting a competitor.

The ability to terminate a contract is a legal and ethical option often available to parties to a contract. *See, e.g.*, Tex. Bus. & Com.Code Ann. § 2.106(c) (West 2009)("`Termination' occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach."). It is similar to the right of an employer or an employee to terminate the employment relationship at any time, with or without cause, absent agreement to the contrary. *See County of Dallas v. Wiland*, 216 S.W.3d 344, 347 (Tex.2007). For the same reasons, the suggestion that the action was retaliation for Kassa's support of a competitor does not make the statement defamatory. The decision to terminate a contract or to fire an employee because the contractor or employee actively supports a competitor is an option available to a business absent agreement to the contrary. Businesses in a free-enterprise system are expected to protect and promote their best interests. *See Wilkow v. Forbes, Inc.*, 241 F.3d 552, 557 (7th Cir. 2001) ("Sedulous pursuit of self-interest is the engine that propels a market economy."). These are business decisions, and, like other business decisions, they are made in the context of the free enterprise system where competition is expected. *Musser,* 723 S.W.2d at 655.

Although Austin Cab finds Kassa's statement insulting and offensive, the statement lacks the element of disgrace or wrongdoing necessary for slander. Kassa's agent did nothing more than accuse Austin Cab of doing that which it had a legal right to do; thus, Kassa's statement is not defamatory. *Cf. Musser,* 723 S.W.2d at 655 (statement that former employee "relieved" his former employer of some of its accounts is not defamatory because it does not accuse employee of anything other than competitiveness); *Cook,* 17 S.W.3d at 456 n. 8 (statement that person invoked Fifth Amendment right is not defamatory as matter of law); *San Antonio Express News v.*

Dracos, 922 S.W.2d 242, 248 (Tex.App.-San Antonio 1996, no writ) (statement that employee "walked off the job . . . without any excuse" is not defamatory because it does not suggest he did anything illegal or unethical); *Einhorn v. LaChance*, 823 S.W.2d 405, 411 (Tex.App.-Houston 1st Dist. 1992, writ dism'd w.o.j.) (statement that someone was "attempting to form a union" is not defamatory despite prejudice against unions); *Taylor v. Houston Chronicle Publ'g Co.*, 473 S.W.2d 550, 554 (Tex. Civ.App.-Houston 1st Dist. 1971, writ ref'd n.r.e.) (statement that coach refused to do his job unless player was traded is not defamatory because he had right to do so); *Herald-Post Publ'g Co. v. Hervey*, 282 S.W.2d 410, 415 (Tex.Civ.App.-El Paso 1955, writ ref'd n.r.e.) (statement that mayor changed city's retirement plan to get rid of one employee is not defamatory because mayor and council had right to formulate retirement plan as they saw fit).

Based on our review of the statement in light of the circumstances in which it was made, we hold that it is not defamatory as

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a matter of law. Because the statement is not defamatory as a matter of law, Austin Cab produced no evidence of a defamatory statement and the trial court properly granted Kassa's no-evidence motion for summary judgment as to Austin Cab's claim for slander. We therefore overrule Austin Cab's sole issue on appeal.

CONCLUSION

Having overruled Austin Cab's sole issue, we affirm the trial court's order.

Notes:

1 Austin Cab maintains that Kassa's efforts to gain a competing taxicab franchise were not a factor in the termination of the contract and that the sole reason for termination was his failure to pay a deposit required by the contract. Kassa does not dispute the basis for his termination.

2 Although we do not necessarily agree that "one of the existing companies" refers to either appellant as Austin Cab asserts, we assume it does for purposes of review because our finding that the statement is not defamatory is dispositive of the appeal.

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794 S.W.2d 14
17 Media L. Rep. 2207
Judd McILVAIN, et al., Petitioners,
v.
Emerick JACOBS, Jr. and Joyce Moore, Respondents.
No. C-8149.
Supreme Court of Texas.
June 20, 1990.
Rehearing Overruled Sept. 6, 1990.

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William W. Ogden, Andy Taylor, and Rob L. Wiley, Houston, for petitioners.

Randall D. Wilkins, Houston and David W. Showalter, Bellaire, for respondents.

OPINION

COOK, Justice.

This is a defamation suit filed by respondents Emerick Jacobs, Jr. and Joyce Moore against petitioners Judd McIlvain, Gulf Television Corporation and Corinthian Broadcasting Corporation. The trial court granted summary judgment in favor of petitioners, but the court of appeals reversed the judgment and remanded the cause to the trial court. 759 S.W.2d 467. We reverse the judgment of the court of appeals and affirm the judgment of the trial court.

Jacobs and Moore work for the City of Houston Water Maintenance Division. In December 1982, Judd McIlvain broadcast a news report stating that the Public Integrity Review Group ("PIRG") was conducting an investigation of the water maintenance division. The report as broadcast is set out below:

The city's public integrity section is investigating the use of city employees for private work in the home of the city water maintenance manager.

The employees of the city water maintenance division say four payroll employees were used, on city time, to care for the elderly father of Emerick Jacobs, the manager of water department maintenance division.

The employees say they were sent by a supervisor each day to the manager's home to care for his father and do other tasks around the house.

On top of this, these same employees are putting in for overtime so they could get their city jobs done later on.

Police investigators who are conducting the investigation were looking for a gun, but they didn't find the gun at the Dalton Street Water Facility. They found liquor bottles. One city employee says drinking on the job there is not so unusual.

The information about the alleged theft of City time may be turned over to a grand jury. Judd McIlvain. News Center 11.

In Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986), the United States Supreme Court held that "[A] private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant." Id. at 787, 106 S.Ct. at 1569. Since McIlvain is clearly a media defendant, this requirement is imposed on Jacobs by constitutional considerations of free speech and free press.

A showing of the substantial truth of McIlvain's broadcast at the summary judgment hearing will defeat Jacobs' cause of action. Crites v. Mullins, 697

S.W.2d 715, 717 (Tex.App.--Corpus Christi 1985, writ ref'd n.r.e.); Fort Worth Press Co. v. Davis, 96 S.W.2d 416, 419 (Tex.Civ.App.--Fort Worth 1936, writ ref'd); see also Bell Publishing Co. v. Garrett Engineering Co., 141 Tex. 51, 60, 170 S.W.2d 197, 203 (1943); W. Prosser & P. Keeton, Prosser and Keeton on Torts § 116 (1984). The test used in deciding whether the broadcast is substantially true involves consideration of whether the alleged defamatory statement was more damaging to Jacobs' reputation, in the mind of the average listener, than a truthful statement would have been. 53 C.J.S. Libel and Slander § 109(a) (1987); see Gannett Co. v. Re, 496 A.2d 553, 557 (Del.1985). This evaluation involves looking to the "gist" of the broadcast. Prosser & Keeton § 116. If the underlying facts as to the gist of the defamatory charge are undisputed, then we can disregard any variance with respect to items of secondary importance and determine substantial truth as a matter of law. Crites, 697 S.W.2d at 717-18.

McIlvain's broadcast statements are factually consistent with PIRG's investigation and its findings. A comparison of the contents of the broadcast and the PIRG report demonstrates that the broadcast was substantially correct, accurate and not misleading.

The broadcast stated that an investigation into the use of city employees for private work was underway. The affidavits of assistant city attorney Brenda Loudermilk and city legal department investigator V.H. Shultea, Jr. confirm the existence of the investigation. The broadcast further stated that employees of the city water maintenance division allege four employees were used on city time to care for the elderly father of Emerick Jacobs. According to the City of Houston's legal department report, employees of the water maintenance division had gone on separate occasions with Joyce Moore to St. Joseph's Hospital or to the home of Jacobs' father and sat with him while he was ill. Sworn statements by a division employee indicate that on three occasions, Moore and other water division employees would visit Jacobs' father in the hospital during work hours, staying there for a half day or longer. While on these visits, the employees were paid their regular city wages. According to the broadcast, these employees put in overtime so they could get their jobs done. The PIRG investigation found from the payroll division office records that on several occasions, when these employees were absent from the office for as long as four hours caring for the elder Mr. Jacobs, they requested and received overtime.

The broadcast further stated that police investigators were looking for a gun at the water facility but instead found liquor bottles and that one city employee claimed drinking on the job was not unusual. The report stated that the search of Joyce Moore's desk produced a liquor bottle

but no gun. The PIRG report also contained statements by employees that Moore and Jacobs were seen in Moore's office drinking alcohol.

Finally, the evidence conclusively shows that this information was being gathered for possible prosecution. McIlvain's report states that the information may be turned over to the grand jury.

Based on these facts, McIlvain has established the substantial truth [1] of the broadcast as a matter of law, thus negating an essential element of Jacobs' cause of action. Accordingly, we reverse the judgment of the court of appeals and affirm the judgment of the trial court.

RAY and MAUZY, JJ., note their dissent.

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1 Other states have also recognized the "substantial truth" standard in defamation cases involving a media defendant. See, e.g., Herron v. King Broadcasting Co., 112 Wash.2d 762, 776 P.2d 98 (1989); Jones v. Palmer Communications, Inc., 440 N.W.2d 884 (Iowa 1989); Chicarella v. Passant, 343 Pa.Super. 330, 494 A.2d 1109 (1985); Pritchard v. Times Southwest Broadcasting, Inc., 277 Ark. 458, 642 S.W.2d 877 (1982); Hein v. Lacy, 228 Kan. 249, 616 P.2d 277 (1980); Fecteau v. George J. Foster & Co., 120 N.H. 406, 418 A.2d 1265 (1980); Baker v. Burlington Northern, Inc., 99 Idaho 688, 587 P.2d 829 (1978).

501 U.S. 496
111 S.Ct. 2419
115 L.Ed.2d 447
Jeffrey M. MASSON, Petitioner
v.
NEW YORKER MAGAZINE, INC., Alfred A. Knopf, Inc. and Janet Malcolm. No. 89-1799.

501 U.S. 496
111 S.Ct. 2419
115 L.Ed.2d 447
Jeffrey M. MASSON, Petitioner

v.

NEW YORKER MAGAZINE, INC., Alfred A. Knopf, Inc. and Janet Malcolm.

No. 89-1799.
Argued Jan. 14, 1991.
Decided June 20, 1991.
Syllabus

Petitioner Masson, a psychoanalyst, became disillusioned with Freudian psychology while serving as Projects Director of the Sigmund Freud Archives, and was fired after advancing his own theories. Thereafter, respondent Malcolm, an author and contributor to respondent The New Yorker, a magazine, taped several interviews with Masson and wrote a lengthy article on his relationship with the Archives. One of Malcolm's narrative devices consists of enclosing lengthy passages attributed to Masson in quotation marks. Masson allegedly expressed alarm about several errors in those passages before the article was published. After its publication, and with knowledge of Masson's allegations that it contained defamatory material, respondent Alfred A. Knopf, Inc., published the work as a book, which portrayed Masson in a most unflattering light. He brought an action for libel under California law in the Federal District Court, concentrating on passages alleged to be defamatory, six of which are before this Court. In each instance, the quoted statement does not appear in the taped interviews. The parties dispute whether there were additional untaped interviews, the notes from which Malcolm allegedly transcribed. The court granted respondents' motion for summary judgment. It concluded that the alleged inaccuracies were substantially true or were rational interpretations of ambiguous conversations, and therefore did not raise a jury question of actual malice, which is required when libel is alleged by a public figure. The Court of Appeals affirmed. The court found, among other things, that one passage—in which Masson was quoted as saying that Archive officials had considered him an "intellectual gigolo" while the tape showed that he said he "was much too junior within the hierarchy of analysis for these important . . . analysts to be caught dead with [him]"—was not defamatory and would not be actionable under the "incremental harm" doctrine.

Held:

1. The evidence presents a jury question whether Malcolm acted with requisite knowledge of falsity or reckless disregard as to the truth or falsity of five of the passages. Pp. 509-525.

(a) As relevant here, the First Amendment limits California's libel law by requiring that a public figure prove by clear and convincing evidence that the defendant published the defamatory statement with

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actual malice. However, in place of the term actual malice, it is better practice that jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity. Pp. 509-511.

(b) A trier of fact in this case could find that the reasonable reader would understand the quotations attributed to Masson to be nearly verbatim reports of his statements. In general, quotation marks indicate a verbatim reproduction, and quotations add authority to a statement and credibility to an author's work. A fabricated quotation may injure reputation by attributing an untrue factual assertion to the speaker, or by indicating a negative personal trait or an attitude the speaker does not hold. While some quotations do not convey that the speaker actually said or wrote the quoted material, such is not the case here. Malcolm's work gives the reader no clue that the quotations are anything but the reproductions of actual conversations, and the work was published in a magazine that enjoyed a reputation for scrupulous factual inquiry. These factors could lead a reader to take the quotations at face value. Pp. 511-513.

(c) The common law of libel overlooks minor inaccuracies and concentrates upon substantial truth. Thus, a deliberate alteration of a plaintiff's words does not equate with knowledge of falsity for purposes of *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280, 84 S.Ct. 710, 725-726, 11 L.Ed.2d 686, and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342, 94 S.Ct. 2997 3008, 41 L.Ed.2d 789, unless it results in a material change in the statement's meaning. While the use of quotations to attribute words not in fact spoken is important to that inquiry, the idea that any alteration beyond correction of grammar or syntax by itself proves falsity is rejected. Even if a statement has been recorded, the existence of both a speaker and a reporter, the translation between two media, the addition of punctuation, and the practical necessity to edit and make intelligible a speakers' perhaps rambling comments, make it misleading to suggest that a quotation will be reconstructed with complete accuracy. However, if alterations give a different meaning to a speaker's statements, bearing upon their defamatory character, then the device of quotations might well be critical in finding the words actionable. Pp. 513-518.

(d) Although the Court of Appeals applied a test of substantial truth, it erred in going one step further and concluding that an altered quotation is protected so long as it is a "rational interpretation" of the actual statement. The protection for rational interpretation serves First Amendment principle by allowing an author the interpretive license that is necessary when relying upon ambiguous sources; but where a writer uses a quotation that a reasonable reader would conclude purports to be a verbatim repetition of the speaker's statement, the quota-

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tion marks indicate that the author is not interpreting the speaker's ambiguous statement, but is attempting to convey what the speaker said. *Time, Inc. v. Pape*, 401 U.S. 279, 91 S.Ct. 633, 28 L.Ed.2d 45; *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502, distinguished. Pp. 2433-2435.

(e) In determining whether Masson has shown sufficient falsification to survive summary judgment, it must be assumed, except where otherwise evidenced by the tape recordings' transcripts, that he is correct in denying that he made the statements Malcolm attributed to him, and that Malcolm reported with knowledge or reckless disregard of the differences between what he said and what was quoted. Malcolm's typewritten notes should not be considered, since Masson denied making the statements, and since the record contains substantial additional evidence to support a jury determination under a clear and convincing evidence standard that

Malcolm deliberately or recklessly altered the quotations. While she contests Masson's allegations, only a trial on the merits will resolve the factual dispute. Pp. 2434-2435.

(f) Five of the six published passages differ materially in meaning from the tape recorded statements so as to create an issue of fact for a jury as to falsity. Whether the "intellectual gigolo" passage is defamatory is a question of California law, and to the extent that the Court of Appeals based its conclusion on the First Amendment, it was mistaken. Moreover, an "incremental harm" doctrine—which measures the incremental reputational harm inflicted by the challenged statements beyond the harm imposed by the nonactionable remainder of the publication—is not compelled as a matter of First Amendment protection for speech, since it does not bear on whether a defendant has published a statement with knowledge of falsity or reckless disregard of whether it was false or not. Pp. 2435-2437.

2. On remand, the Court of Appeals should consider Masson's argument that the District Court erred in granting summary judgment to the New Yorker Magazine, Inc., and Alfred A. Knopf, Inc., on the basis of their respective relations with Malcolm or the lack of any independent actual malice, since the court failed to reach his argument because of its disposition with respect to Malcolm. P. 2437.

895 F.2d 1535, (CA9 1989), reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and MARSHALL, BLACKMUN, STEVENS, O'CONNOR, and SOUTER, JJ., joined, and in Parts I, II-A, II-D, and III-A of which WHITE and SCALIA, JJ., joined. WHITE, J., filed an opinion concurring in part and dissenting in part, in which SCALIA, J., joined.

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Charles O. Morgan, Jr., San Francisco, Cal., for petitioner.

H. Bartow Farr, III, Washington, D.C., for respondents.

Justice KENNEDY delivered the opinion of the Court.

In this libel case, a public figure claims he was defamed by an author who, with full knowledge of the inaccuracy, used quotation marks to attribute to him comments he had not made. The First Amendment protects authors and journalists who write about public figures by requiring a plaintiff to prove that the defamatory statements were made with what we have called "actual malice," a term of art denoting deliberate or reckless falsification. We consider in this opinion whether the attributed quotations had the degree of falsity required to prove this state of mind, so that the public figure can defeat a motion for summary judgment and proceed to a trial on the merits of the defamation claim.

I

Petitioner Jeffrey Masson trained at Harvard University as a Sanskrit scholar, and in 1970 became a professor of Sanskrit & Indian Studies at the University of Toronto. He spent eight years in psychoanalytic training, and qualified as

an analyst in 1978. Through his professional activities, he came to know Dr. Kurt Eissler, head of the Sigmund Freud Archives, and Dr. Anna Freud, daughter of Sigmund Freud and a major psychoanalyst in her own right. The Sigmund Freud Archives, located at Maresfield Gardens outside of London, serves as a repository for materials about Freud, including his own writings, letters, and personal library. The materials, and the right of access to them, are of immense value to those who study Freud, his theories, life and work.

In 1980, Eissler and Anna Freud hired petitioner as Projects Director of the Archives. After assuming his post, petitioner became disillusioned with Freudian psychology. In a 1981 lecture before the Western New England Psychoanalytical Society in New Haven, Connecticut, he advanced his theories of Freud. Soon after, the Board of the Archives terminated petitioner as Projects Director.

Respondent Janet Malcolm is an author and a contributor to respondent The New Yorker, a weekly magazine. She contacted petitioner in 1982 regarding the possibility of an article on his relationship with the Archives. He agreed, and the two met in person and spoke by telephone in a series of interviews. Based on the interviews and other sources, Malcolm wrote a lengthy article. One of Malcolm's narrative devices consists of enclosing lengthy passages in quotation marks, reporting statements of Masson, Eissler, and her other subjects.

During the editorial process, Nancy Franklin, a member of the fact-checking department at The New Yorker, called petitioner to confirm some of the facts underlying the article. According to petitioner, he expressed alarm at the number of errors in the few passages Franklin discussed with him. Petitioner contends that he asked permission to review those portions of the article which attributed quotations or information to him, but was brushed off with a never-fulfilled prom-

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ise to "get back to [him]." App. 67. Franklin disputes petitioner's version of their conversation. App. 246-247.

The New Yorker published Malcolm's piece in December 1983, as a two-part series. In 1984, with knowledge of at least petitioner's general allegation that the article contained defamatory material, respondent Alfred A. Knopf, Inc., published the entire work as a book, entitled In the Freud Archives.

Malcolm's work received complimentary reviews. But this gave little joy to Masson, for the book portrays him in a most unflattering light. According to one reviewer,

"Masson the promising psychoanalytic scholar emerges gradually, as a grandiose egotist—mean-spirited, self-serving, full of braggadocio, impossibly arrogant and, in the end, a self-destructive fool. But it is not Janet Malcolm who calls him such: his own words reveal this psychological profile—a self-portrait offered to us through the efforts of an observer and listener who is, surely, as wise as any in the psychoanalytic profession." Coles, Freudianism Confronts Its Malcontents, Boston Globe, May 27, 1984, pp. 58, 60.

Petitioner wrote a letter to the New York Times Book Review calling the book "distorted." In response, Malcolm stated:

"Many of [the] things Mr. Masson told me (on tape) were discreditable to him, and I felt it best not to include them. Everything I do quote Mr. Masson as saying was said by him, almost word for word. (The 'almost' refers to changes made for the sake of correct syntax.) I would be glad to play the tapes of my conversation with Mr. Masson to the editors of The Book Review whenever they have 40 or 50 short hours to spare." App. 222-223.

Petitioner brought an action for libel under California law in the United States District Court for the Northern District of California. During extensive discovery and repeated

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amendments to the complaint, petitioner concentrated on various passages alleged to be defamatory, dropping some and adding others. The tape recordings of the interviews demonstrated that petitioner had, in fact, made statements substantially identical to a number of the passages, and those passages are no longer in the case. We discuss only the passages relied on by petitioner in his briefs to this Court.

Each passage before us purports to quote a statement made by petitioner during the interviews. Yet in each instance no identical statement appears in the more than 40 hours of taped interviews. Petitioner complains that Malcolm fabricated all but one passage; with respect to that passage, he claims Malcolm omitted a crucial portion, rendering the remainder misleading.

(a) "*Intellectual Gigolo.*" Malcolm quoted a description by petitioner of his relationship with Eissler and Anna Freud as follows:

" 'Then I met a rather attractive older graduate student and I had an affair with her. One day, she took me to some art event, and she was sorry afterward. She said, "Well, it is very nice sleeping with you in your room, but you're the kind of person who should never leave the room—you're just a social embarrassment anywhere else, though you do fine in your own room." And you know, in their way, if not in so many words, Eissler and Anna Freud told me the same thing. They like me well enough "in my own room." They loved to hear from me what creeps and dolts analysts are. I was like an intellectual gigolo—you get your pleasure from him, but you don't take him out in public. . . .' " In the Freud Archives 38.

The tape recordings contain the substance of petitioner's reference to his graduate student friend, App. 95, but no suggestion that Eissler or Anna Freud considered him, or that he considered himself, an " 'intellectual gigolo.' " Instead, petitioner said:

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"They felt, in a sense, I was a private asset but a public liability. . . . They liked me when I was alone in their living room, and I could talk and chat and tell them the truth about things and they would tell me. But that I was, in a sense, much too junior within the hierarchy of analysis, for these important training analysts to be caught dead with me." *Id.,* at 104.

(b) "*Sex, Women, Fun.*" Malcolm quoted petitioner as describing his plans for Maresfield Gardens, which he had hoped to occupy after Anna Freud's death:

" 'It was a beautiful house, but it was dark and sombre and dead. Nothing ever went on there. I was the only person who ever came. I would have renovated it, opened it up, brought it to life. Maresfield Gardens would have been a center of scholarship, but it would also have been a place of sex, women, fun. It would have been like the change in *The Wizard of Oz,* from black-and-white into color.' " In the Freud Archives 33.

The tape recordings contain a similar statement, but in place of the reference to "sex, women, fun," and The Wizard of Oz, petitioner commented:

"[I]t is an incredible storehouse. I mean, the library, Freud's library alone is priceless in terms of what it contains: all his books with his annotations in them; the Schreber case annotated, that kind of thing. It's fascinating." App. 127.

Petitioner did talk, earlier in the interview, of his meeting with a London analyst:

"I like him. So, and we got on very well. That was the first time we ever met and you know, it was buddy-buddy, and we were to stay with each other and [laughs] we were going to pass women on to each other, and we were going to have a great time together when I lived in the Freud house. We'd have great parties there and we were [laughs]—

. . . . .

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" . . . going to really, we were going to live it up." *Id.,* at 129.

(c) "*It Sounded Better*." Petitioner spoke with Malcolm about the history of his family, including the reasons his grandfather changed the family name from Moussaieff to Masson, and why petitioner adopted the abandoned family name as his middle name. The article contains the passage:

" 'My father is a gem merchant who doesn't like to stay in any one place too long. His father was a gem merchant, too—a Bessarabian gem merchant, named Moussaieff, who went to Paris in the twenties and adopted the name Masson. My parents named me Jeffrey Lloyd Masson, but in 1975 I decided to change my middle name to Moussaieff—it sounded better.' " In the Freud Archives 36.

In the most similar tape recorded statement, Masson explained at considerable length that his grandfather had changed the family name from Moussaieff to Masson when living in France, "[j]ust to hide his Jewishness." Petitioner had changed his last name back to Moussaieff, but his then-wife Terry objected that "nobody could pronounce it and nobody knew how to spell it, and it wasn't the name that she knew me by." Petitioner had changed his name to Moussaieff because he "just liked it." "[I]t was sort of part of analysis: a return to the roots, and your family tradition and so on." In the end, he had agreed with Terry that "it wasn't her name after all," and used Moussaieff as a middle instead of a last name. App. 87-89.

(d) "*I Don't Know Why I Put It In.*" The article recounts part of a conversation between Malcolm and petitioner about the paper petitioner presented at his 1981 New Haven lecture:

"[I] asked him what had happened between the time of the lecture and the present to change him from a Freud-

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ian psychoanalyst with somewhat outre views into the bitter and belligerent anti-Freudian he had become.

"Masson sidestepped my question. 'You're right, there was nothing disrespectful of analysis in that paper,' he said. 'That remark about the sterility of psychoanalysis was something I tacked on at the last minute, and it was totally gratuitous. I don't know why I put it in.' " In the Freud Archives 53.

The tape recordings instead contain the following discussion of the New Haven lecture:

Masson: "So they really couldn't judge the material. And, in fact, until the last sentence I think they were quite fascinated. I think the last sentence was an in, [sic] possibly, gratuitously offensive way to end a paper to a group of analysts. Uh,—"

Malcolm: "What were the circumstances under which you put it [in]? . . ."

Masson: "That it was, was true.

. . . . .

" . . . I really believe it. I didn't believe anybody would agree with me.

. . . . .

" . . . But I felt I should say something because the paper's still well within the analytic tradition in a sense. . . .

. . . . .

" . . . It's really not a deep criticism of Freud. It contains all the material that would allow one to criticize Freud but I didn't really do it. And then I thought, I really must say one thing that I really believe, that's not going to appeal to anybody and that was the very last sentence. Because I really do believe psychoanalysis is entirely sterile. . . ." App. 176.

(e) "*Greatest Analyst Who Ever Lived.*" The article contains the following self-explanatory passage:

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"A few days after my return to New York, Masson, in

a state of elation, telephoned me to say that Farrar, Straus & Giroux has taken *The Assault on Truth* [Masson's book]. 'Wait till it reaches the best-seller list, and watch how the analysts will crawl,' he crowed. 'They move whichever way the wind blows. They will want me back, they will say that Masson is a great scholar, a major analyst—after Freud, he's the greatest analyst who ever lived. Suddenly they'll be calling, begging, cajoling: "Please take back what you've said about our profession; our patients are quitting." They'll try a short smear campaign, then they'll try to buy me, and ultimately they'll have to shut up. Judgment will be passed by history. There is no possible refutation of this book. It's going to cause a revolution in psychoanalysis. Analysis stands or falls with me now.' " In the Freud Archives 162.

This material does not appear in the tape recordings. Petitioner did make the following statements on related topics in one of the taped interviews with Malcolm:

" . . . I assure you when that book comes out, which I honestly believe is an honest book, there is nothing, you know, mean-minded about it. It's the honest fruit of research and intellectual toil. And there is not an analyst in the country who will say a single word in favor of it." App. 136.

"Talk to enough analysts and get them right down to these concrete issues and you watch how different it is from my position. It's utterly the opposite and that's finally what I realized, that I hold a position that no other analyst holds, including, alas, Freud. At first I thought: Okay, it's me and Freud against the rest of the analytic world, or me and Freud and Anna Freud and Kur[t] Eissler and Vic Calef and Brian Bird and Sam

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Lipton against the rest of the world. Not so, it's me. It's me alone." *Id.,* at 139.

The tape of this interview also contains the following exchange between petitioner and Malcolm:

Masson: " . . . analysis stands or falls with me now."

Malcolm: "Well that's a very grandiose thing to say."

Masson: "Yeah, but it's got nothing to do with me. It's got to do with the things I discovered." *Id.,* at 137.

(f) "*He Had The Wrong Man.*" In discussing the Archives' board meeting at which petitioner's employment was terminated, Malcolm quotes petitioner as giving the following explanation of Eissler's attempt to extract a promise of confidentiality:

" '[Eissler] was always putting moral pressure on me. "Do you want to poison Anna Freud's last days? Have you no heart? You're going to kill the poor old woman." I said to him, "What have I done? *You're* doing it. *You're* firing me. What am I supposed to do—be grateful to you?" "You could be silent about it. You could swallow it. I know it is painful for you. But you could just live with it in silence." "Why should I do that?" "Because it is the honorable thing to do." Well, he had the wrong man.' " In the Freud Archives 67.

From the tape recordings, on the other hand, it appears that Malcolm deleted part of petitioner's explanation (italicized below), and petitioner argues that the "wrong man" sentence relates to something quite different from Eissler's entreaty that silence was "the honorable thing." In the tape recording, petitioner states:

"But it was wrong of Eissler to do that, you know. He was constantly putting various kinds of moral pressure on me and, 'Do you want to poison Anna Freud's last days? Have you no heart?' He called me: 'Have you no heart? You're going to kill the poor old woman.

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Have you no heart? Think of what she's done for you and you are now willing to do this to her.' I said, 'What have I, what have I done? *You* did it. You fired me. What am I supposed to do: thank you? be grateful to you?' He said, 'Well you could never talk about it. You could be silent about it. You could swallow it. I know it's painful for you but just live with it in silence.' 'Fuck you,' I said, 'Why should I do that? Why? You know, why should one do that?' 'Because it's the honorable thing to do *and you will save face. And who knows? If you never speak about it and you quietly and humbly accept our judgment, who knows that in a few years if we don't bring you back?*' Well, he had the wrong man." App. 215-216.

Malcolm submitted to the District Court that not all of her discussions with petitioner were recorded on tape, in particular conversations that occurred while the two of them walked together or traveled by car, while petitioner stayed at Malcolm's home in New York, or while her tape recorder was inoperable. She claimed to have taken notes of these unrecorded sessions, which she later typed, then discarding the handwritten originals. Petitioner denied that any discussion relating to the substance of the article occurred during his stay at Malcolm's home in New York, that Malcolm took notes during any of their conversations, or that Malcolm gave any indication that her tape recorder was broken.

Respondents moved for summary judgment. The parties agreed that petitioner was a public figure and so could escape summary judgment only if the evidence in the record would permit a reasonable finder of fact, by clear and convincing evidence, to conclude that respondents published a defamatory statement with actual malice as defined by our cases. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-256, 106 S.Ct. 2505, 2513-2514, 91 L.Ed.2d 202 (1986). The District Court analyzed each of the passages and held that the alleged inaccuracies did not raise a jury question. The court found that the allegedly fabricated quotations were either substantially true, or were " 'one of a number of possi-

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ble rational interpretations' of a conversation or event that 'bristled with ambiguities,' " and thus were entitled to constitutional protection. 686 F.Supp. 1396, 1399 (1987) (quoting *Bose Corp. v. Consumer's Union of the United States, Inc.*, 466 U.S. 485, 512, 104 S.Ct. 1949 1965, 80 L.Ed.2d 502 (1984)). The court also ruled that the "he had the wrong man" passage involved an exercise of editorial judgment upon which the courts could not intrude. 686 F.Supp., at 1403-1404.

The Court of Appeals affirmed, with one judge dissenting. 895 F.2d 1535 (CA9 1989). The court assumed for much of its opinion that Malcolm had deliberately altered each quotation not found on the tape recordings, but nevertheless held that petitioner failed to raise a jury question of

actual malice, in large part for the reasons stated by the District Court. In its examination of the "intellectual gigolo" passage, the court agreed with the District Court that petitioner could not demonstrate actual malice because Malcolm had not altered the substantive content of petitioner's self-description, but went on to note that it did not consider the "intellectual gigolo" passage defamatory, as the quotation merely reported Kurt Eissler's and Anna Freud's opinions about petitioner. In any event, concluded the court, the statement would not be actionable under the " 'incremental harm branch' of the 'libel-proof' doctrine," *id.,* at 1541 (quoting *Herbert v. Lando,* 781 F.2d 298, 310-311 (CA2 1986)).

The dissent argued that any intentional or reckless alteration would prove actual malice, so long as a passage within quotation marks purports to be a verbatim rendition of what was said, contains material inaccuracies, and is defamatory. 895 F.2d, at 1562-1570. We granted certiorari, 498 U.S. ----, 111 S.Ct. 39, 112 L.Ed.2d 16 (1990), and now reverse.

II

A.

Under California law, "[l]ibel is a false and unprivileged publication by writing . . . which exposes any person to ha-

tred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." Cal.Civ.Code Ann. § 45 (West 1982). False attribution of statements to a person may constitute libel, if the falsity exposes that person to an injury comprehended by the statute. See *Selleck v. Globe International, Inc.,* 166 Cal.App.3d 1123 1132, 212 Cal.Rptr. 838, 844 (1985); *Cameron v. Wernick,* 251 Cal.App.2d 890, 60 Cal.Rptr. 102 (1967); *Kerby v. Hal Roach Studios, Inc.,* 53 Cal.App.2d 207, 213, 127 P.2d 577, 581 (1942); cf. *Baker v. Los Angeles Herald Examiner,* 42 Cal.3d 254, 260-261, 228 Cal.Rptr. 206, 208-210, 721 P.2d 87, 90-91 (1986). It matters not under California law that petitioner alleges only part of the work at issue to be false. "[T]he test of libel is not quantitative; a single sentence may be the basis for an action in libel even though buried in a much longer text," though the California courts recognize that "[w]hile a drop of poison may be lethal, weaker poisons are sometimes diluted to the point of impotency." *Washburn v. Wright,* 261 Cal.App.2d 789, 795, 68 Cal.Rptr. 224, 228 (1968).

The First Amendment limits California's libel law in various respects. When, as here, the plaintiff is a public figure, he cannot recover unless he proves by clear and convincing evidence that the defendant published the defamatory statement with actual malice, *i.e.,* with "knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan,* 376 U.S. 254, 279-280, 84 S.Ct. 710, 726, 11 L.Ed.2d 686 (1964). Mere negligence does not suffice. Rather, the plaintiff must demonstrate that the author "in fact entertained serious doubts as to the truth of his publication," *St. Amant v. Thompson,* 390 U.S. 727, 731, 88 S.Ct. 1323 1325, 20 L.Ed.2d 262 (1968), or acted with a "high degree of awareness of . . . probable falsity," *Garrison v. Louisiana,* 379 U.S. 64, 74, 85 S.Ct. 209, 215, 13 L.Ed.2d 125 (1964).

Actual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will. See *Greenbelt Cooper-*

ative Publishing Assn., Inc. v. Bresler, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970). We have used the term actual malice as a shorthand to describe the First Amendment protections for speech injurious to reputation and we continue to do so here. But the term can confuse as well as enlighten. In this respect, the phrase may be an unfortunate one. See *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 666, n. 7, 109 S.Ct. 2678, 2685, n. 7, 105 L.Ed.2d 562 (1989). In place of the term actual malice, it is better practice that jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity. This definitional principle must be remembered in the case before us.

B

In general, quotation marks around a passage indicate to the reader that the passage reproduces the speaker's words verbatim. They inform the reader that he or she is reading the statement of the speaker, not a paraphrase or other indirect interpretation by an author. By providing this information, quotations add authority to the statement and credibility to the author's work. Quotations allow the reader to form his or her own conclusions, and to assess the conclusions of the author, instead of relying entirely upon the author's characterization of her subject.

A fabricated quotation may injure reputation in at least two senses, either giving rise to a conceivable claim of defamation. First, the quotation might injure because it attributes an untrue factual assertion to the speaker. An example would be a fabricated quotation of a public official admitting he had been convicted of a serious crime when in fact he had not.

Second, regardless of the truth or falsity of the factual matters asserted within the quoted statement, the attribution may result in injury to reputation because the manner of expression or even the fact that the statement was made indicates a negative personal trait or an attitude the speaker does not hold. John Lennon once was quoted as saying of

the Beatles, "We're more popular than Jesus Christ now." Time, Aug. 12, 1966, p. 38. Supposing the quotation had been a fabrication, it appears California law could permit recovery for defamation because, even without regard to the truth of the underlying assertion, false attribution of the statement could have injured his reputation. Here, in like manner, one need not determine whether petitioner is or is not the greatest analyst who ever lived in order to determine that it might have injured his reputation to be reported as having so proclaimed.

A self-condemnatory quotation may carry more force than criticism by another. It is against self-interest to admit one's own criminal liability, arrogance, or lack of integrity, and so all the more easy to credit when it happens. This principle underlies the elemental rule of evidence which permits the introduction of admissions, despite their hearsay character, because we assume "that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true." Advisory Committee's Notes on Fed.Rule Evid. 804(b)(3), 28 U.S.C.App., p. 789 (citing *Hileman v. Northwest Engineering Co.*, 346 F.2d 668 (CA6 1965)).

Of course, quotations do not always convey that the speaker actually said or wrote the quoted material. "Punctuation marks, like words, have many uses. Writers often use quotation marks, yet no reasonable reader would assume that such punctuation automatically implies the truth of the quoted material." *Baker v. Los Angeles Examiner,* 42 Cal.3d, at 263, 228 Cal.Rptr., at 211, 721 P.2d, at 92. In *Baker,* a television reviewer printed a hypothetical conversation between a station vice president and writer/producer, and the court found that no reasonable reader would conclude the plaintiff in fact had made the statement attributed to him. *Id.,* at 267, 228 Cal.Rptr., at 213, 721 P.2d, at 95. Writers often use quotations as in *Baker,* and a reader will not reasonably understand the quotations to indicate reproduction of a conversation that took place. In other

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instances, an acknowledgement that the work is so-called docudrama or historical fiction, or that it recreates conversations from memory, not from recordings, might indicate that the quotations should not be interpreted as the actual statements of the speaker to whom they are attributed.

The work at issue here, however, as with much journalistic writing, provides the reader no clue that the quotations are being used as a rhetorical device or to paraphrase the speaker's actual statements. To the contrary, the work purports to be nonfiction, the result of numerous interviews. At least a trier of fact could so conclude. The work contains lengthy quotations attributed to petitioner, and neither Malcolm nor her publishers indicate to the reader that the quotations are anything but the reproduction of actual conversations. Further, the work was published in The New Yorker, a magazine which at the relevant time seemed to enjoy a reputation for scrupulous factual accuracy. These factors would, or at least could, lead a reader to take the quotations at face value. A defendant may be able to argue to the jury that quotations should be viewed by the reader as nonliteral or reconstructions, but we conclude that a trier of fact in this case could find that the reasonable reader would understand the quotations to be nearly verbatim reports of statements made by the subject.

C

The constitutional question we must consider here is whether, in the framework of a summary judgment motion, the evidence suffices to show that respondents acted with the requisite knowledge of falsity or reckless disregard as to truth or falsity. This inquiry in turn requires us to consider the concept of falsity; for we cannot discuss the standards for knowledge or reckless disregard without some understanding of the acts required for liability. We must consider whether the requisite falsity inheres in the attribution of words to the petitioner which he did not speak.

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In some sense, any alteration of a verbatim quotation is false. But writers and reporters by necessity alter what people say, at the very least to eliminate grammatical and syntactical infelicities. If every alteration constituted the falsity required to prove actual malice, the practice of journalism, which the First Amendment standard is designed to protect, would require a radical change, one inconsistent with our precedents and First Amendment principles. Petitioner concedes this absolute definition of falsity in the quotation context is too stringent, and acknowledges that "minor changes to correct for grammar or syntax" do not amount to falsity for purposes of proving actual malice. Brief for Petitioner 18, 36-37. We agree, and must determine what, in addition to this technical falsity, proves falsity for purposes of the actual malice inquiry.

Petitioner argues that, excepting correction of grammar or syntax, publication of a quotation with knowledge that it does not contain the words the public figure used demonstrates actual malice. The author will have published the quotation with knowledge of falsity, and no more need be shown. Petitioner suggests that by invoking more forgiving standards the Court of Appeals would permit and encourage the publication of falsehoods. Petitioner believes that the intentional manufacture of quotations does not "represen[t] the sort of inaccuracy that is commonplace in the forum of robust debate to which the *New York Times* rule applies," *Bose Corp.*, 466 U.S., at 513, 104 S.Ct., at 1966, and that protection of deliberate falsehoods would hinder the First Amendment values of robust and well-informed public debate by reducing the reliability of information available to the public.

We reject the idea that any alteration beyond correction of grammar or syntax by itself proves falsity in the sense relevant to determining actual malice under the First Amendment. An interviewer who writes from notes often will engage in the task of attempting a reconstruction of the speaker's statement. That author would, we may assume,

act with knowledge that at times she has attributed to her subject words other than those actually used. Under petitioner's proposed standard, an author in this situation would lack First Amendment protection if she reported as quotations the substance of a subject's derogatory statements about himself.

Even if a journalist has tape recorded the spoken statement of a public figure, the full and exact statement will be reported in only rare circumstances. The existence of both a speaker and a reporter; the translation between two media, speech and the printed word; the addition of punctuation; and the practical necessity to edit and make intelligible a speaker's perhaps rambling comments, all make it misleading to suggest that a quotation will be reconstructed with complete accuracy. The use or absence of punctuation may distort a speaker's meaning, for example, where that meaning turns upon a speaker's emphasis of a particular word. In other cases, if a speaker makes an obvious misstatement, for example by unconscious substitution of one name for another, a journalist might alter the speaker's words but preserve his intended meaning. And conversely, an exact quotation out of context can distort meaning, although the speaker did use each reported word.

In all events, technical distinctions between correcting grammar and syntax and some greater level of alteration do not appear workable, for we can think of no method by which courts or juries would draw the line between cleaning up and other changes, except by reference to the meaning a statement conveys to a reasonable reader. To attempt narrow distinctions of this type would be an unnecessary departure from First Amendment principles of general applicability, and, just as important, a departure from the underlying purposes of the tort of libel as understood since the latter half of the 16th century. From then until now, the tort action for defamation has existed to redress injury to the plaintiff's reputation by a statement that is defamatory and false. See [516]

Milkovich v. Lorain Journal Co., 497 U.S. 1, ----, 110 S.Ct. 2695, ----, 111 L.Ed.2d 1 (1990). As we have recognized, "[t]he legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). If an author alters a speaker's words but effects no material change in meaning, including any meaning conveyed by

the manner or fact of expression, the speaker suffers no injury to reputation that is compensable as a defamation.

These essential principles of defamation law accommodate the special case of inaccurate quotations without the necessity for a discrete body of jurisprudence directed to this subject alone. Last Term, in *Milkovich v. Lorain Journal Co.,* we refused "to create a wholesale defamation exemption for anything that might be labeled 'opinion.' " 497 U.S., at ----, 110 S.Ct., at 2705 (citation omitted). We recognized that "expressions of 'opinion' may often imply an assertion of objective fact." *Ibid.* We allowed the defamation action to go forward in that case, holding that a reasonable trier of fact could find that the so-called expressions of opinion could be interpreted as including false assertions as to factual matters. So too in the case before us, we reject any special test of falsity for quotations, including one which would draw the line at correction of grammar or syntax. We conclude, rather, that the exceptions suggested by petitioner for grammatical or syntactical corrections serve to illuminate a broader principle.

The common law of libel takes but one approach to the question of falsity, regardless of the form of the communication. See Restatement (Second) of Torts § 563, Comment *c* (1977); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 776 (5th ed. 1984). It overlooks minor inaccuracies and concentrates upon substantial truth. As in other jurisdictions, California law permits the defense of substantial truth, and would absolve a defendant even if she cannot "justify every word of the alleged defamatory matter; it is sufficient if the substance of the

charge be proved true, irrespective of slight inaccuracy in the details." B. Witkin, Summary of California Law, § 495 (9th ed. 1988) (citing cases). In this case, of course, the burden is upon petitioner to prove falsity. See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775, 106 S.Ct. 1558 1563, 89 L.Ed.2d 783 (1986). The essence of that inquiry, however, remains the same whether the burden rests upon plaintiff or defendant. Minor inaccuracies do not amount to falsity so long as "the substance, the gist, the sting, of the libelous charge be justified." *Heuer v. Kee*, 15 Cal.App.2d 710, 714, 59 P.2d 1063, 1064 (1936); see also *Alioto v. Cowles Communications, Inc.*, 623 F.2d 616, 619 (CA9 1980); *Maheu v. Hughes Tool Co.*, 569 F.2d 459, 465-466 (CA9 1978). Put another way, the statement is not considered false unless it "would have a different effect on the mind of the reader from that which the pleaded truth would have produced." R. Sack, Libel, Slander, and Related Problems 138 (1980); see, *e.g., Wheling v. Columbia Broadcasting System, Inc.*, 721 F.2d 506, 509 (CA5 1983); see generally R. Smolla, Law of Defamation § 5.08 (1991). Our definition of actual malice relies upon this historical understanding.

We conclude that a deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity for purposes of *New York Times Co. v. Sullivan,* 376 U.S., at 279-280, 84 S.Ct., at 725-726 and *Gertz v. Robert Welch, Inc., supra,* 418 U.S., at 342, 94 S.Ct., at 3008, unless the alteration results in a material change in the meaning conveyed by the statement. The use of quotations to attribute words not in fact spoken bears in a most important way on that inquiry, but it is not dispositive in every case.

Deliberate or reckless falsification that comprises actual malice turns upon words and punctuation only because words and punctuation express meaning. Meaning is the life of language. And, for the reasons we have given, quotations may be a devastating instrument for

conveying false meaning. In the case under consideration, readers of In the Freud Archives may have found Malcolm's portrait of petitioner especially

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damning because so much of it appeared to be a self-portrait, told by petitioner in his own words. And if the alterations of petitioner's words gave a different meaning to the statements, bearing upon their defamatory character, then the device of quotations might well be critical in finding the words actionable.

D

The Court of Appeals applied a test of substantial truth which, in exposition if not in application, comports with much of the above discussion. The Court of Appeals, however, went one step beyond protection of quotations that convey the meaning of a speaker's statement with substantial accuracy and concluded that an altered quotation is protected so long as it is a "rational interpretation" of an actual statement, drawing this standard from our decisions in *Time, Inc. v. Pape,* 401 U.S. 279, 91 S.Ct. 633, 28 L.Ed.2d 45 (1971), and *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984). Application of our protection for rational interpretation in this context finds no support in general principles of defamation law or in our First Amendment jurisprudence. Neither *Time, Inc. v. Pape,* nor *Bose Corp.,* involved the fabrication of quotations, or any analogous claim, and because many of the quotations at issue might reasonably be construed to state or imply factual assertions that are both false and defamatory, we cannot accept the reasoning of the Court of Appeals on this point.

In *Time, Inc. v. Pape,* we reversed a libel judgment which arose out of a magazine article summarizing a report by the United States Commission on Civil Rights discussing police civil rights abuses. The article quoted the Commission's summary of the facts surrounding an incident of police brutality, but failed to include the Commission's qualification that these were allegations taken from a civil complaint. The Court noted that "the attitude of the Commission toward the factual verity of the episodes recounted was anything but straightforward," and distinguished between a "direct ac-

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count of events that speak for themselves," 401 U.S., at 285, 286, 91 S.Ct., at 637, 637, and an article descriptive of what the Commission had reported. *Time, Inc. v. Pape* took into account the difficult choices that confront an author who departs from direct quotation and offers his own interpretation of an ambiguous source. A fair reading of our opinion is that the defendant did not publish a falsification sufficient to sustain a finding of actual malice.

In *Bose Corp.,* a Consumer Reports reviewer had attempted to describe in words the experience of listening to music through a pair of loudspeakers, and we concluded that the result was not an assessment of events that speak for themselves, but " 'one of a number of possible rational interpretations' of an event 'that bristled with ambiguities' and descriptive challenges for the writer." 466 U.S., at 512, 104 S.Ct., at 1966 (quoting *Time, Inc. v. Pape, supra,* 401 U.S., at 290, 91 S.Ct., at 639). We refused to permit recovery for choice of language which, though perhaps reflecting a misconception, represented "the sort of inaccuracy that is commonplace in

the forum of robust debate to which the *New York Times* rule applies." 466 U.S., at 513, 104 S.Ct., at 1966.

The protection for rational interpretation serves First Amendment principles by allowing an author the interpretive license that is necessary when relying upon ambiguous sources. Where, however, a writer uses a quotation, and where a reasonable reader would conclude that the quotation purports to be a verbatim repetition of a statement by the speaker, the quotation marks indicate that the author is not involved in an interpretation of the speaker's ambiguous statement, but attempting to convey what the speaker said. This orthodox use of a quotation is the quintessential "direct account of events that speak for themselves." *Time, Inc. v. Pape, supra,* 401 U.S., at 285, 91 S.Ct., at 637. More accurately, the quotation allows the subject to speak for himself.

The significance of the quotations at issue, absent any qualification, is to inform us that we are reading the state-

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ment of petitioner, not Malcolm's rational interpretation of what petitioner has said or thought. Were we to assess quotations under a rational interpretation standard, we would give journalists the freedom to place statements in their subjects' mouths without fear of liability. By eliminating any method of distinguishing between the statements of the subject and the interpretation of the author, we would diminish to a great degree the trustworthiness of the printed word, and eliminate the real meaning of quotations. Not only public figures but the press doubtless would suffer under such a rule. Newsworthy figures might become more wary of journalists, knowing that any comment could be transmuted and attributed to the subject, so long as some bounds of rational interpretation were not exceeded. We would ill serve the values of the First Amendment if we were to grant near absolute, constitutional protection for such a practice. We doubt the suggestion that as a general rule readers will assume that direct quotations are but a rational interpretation of the speaker's words, and we decline to adopt any such presumption in determining the permissible interpretations of the quotations in question here.

III
A.

We apply these principles to the case before us. On summary judgment, we must draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence. *Anderson v. Liberty Lobby, Inc.,* 477 U.S., at 255, 106 S.Ct., at 2513. So we must assume, except where otherwise evidenced by the transcripts of the tape recordings, that petitioner is correct in denying that he made the statements attributed to him by Malcolm, and that Malcolm reported with knowledge or reckless disregard of the differences between what petitioner said and what was quoted.

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Respondents argue that, in determining whether petitioner has shown sufficient falsification to survive summary judgment, we should consider not only the tape-recorded statements but also Malcolm's typewritten notes. We must decline that suggestion. To begin with, petitioner affirms in an affidavit that he did not make the complained of statements. The record contains substantial

additional evidence, moreover, evidence which, in a light most favorable to petitioner, would support a jury determination under a clear and convincing standard that Malcolm deliberately or recklessly altered the quotations.

First, many of the challenged passages resemble quotations that appear on the tapes, except for the addition or alteration of certain phrases, giving rise to a reasonable inference that the statements have been altered. Second, Malcolm had the tapes in her possession and was not working under a tight deadline. Unlike a case involving hot news, Malcolm cannot complain that she lacked the practical ability to compare the tapes with her work in progress. Third, Malcolm represented to the editor-in-chief of The New Yorker that all the quotations were from the tape recordings. Fourth, Malcolm's explanations of the time and place of unrecorded conversations during which petitioner allegedly made some of the quoted statements have not been consistent in all respects. Fifth, petitioner suggests that the progression from typewritten notes, to manuscript, then to galleys provides further evidence of intentional alteration. Malcolm contests petitioner's allegations, and only a trial on the merits will resolve the factual dispute. But at this stage, the evidence creates a jury question whether Malcolm published the statements with knowledge or reckless disregard of the alterations.

B

We must determine whether the published passages differ materially in meaning from the tape recorded statements so as to create an issue of fact for a jury as to falsity.

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(a) "*Intellectual Gigolo.*" We agree with the dissenting opinion in the Court of Appeals that "[f]airly read, intellectual gigolo suggests someone who forsakes intellectual integrity in exchange for pecuniary or other gain." 895 F.2d, at 1551. A reasonable jury could find a material difference between the meaning of this passage and petitioner's tape-recorded statement that he was considered "much too junior within the hierarchy of analysis, for these important training analysts to be caught dead with [him]."

The Court of Appeals majority found it difficult to perceive how the "intellectual gigolo" quotation was defamatory, a determination supported not by any citation to California law, but only by the argument that the passage appears to be a report of Eissler's and Anna Freud's opinions of petitioner. *Id.,* at 1541. We agree with the Court of Appeals that the most natural interpretation of this quotation is not an admission that petitioner considers himself an intellectual gigolo but a statement that Eissler and Anna Freud considered him so. It does not follow, though, that the statement is harmless. Petitioner is entitled to argue that the passage should be analyzed as if Malcolm had reported falsely that *Eissler* had given this assessment (with the added level of complexity that the quotation purports to represent petitioner's understanding of Eissler's view). An admission that two well-respected senior colleagues considered one an "intellectual gigolo" could be as or more damaging than a similar self-appraisal. In all events, whether the "intellectual gigolo" quotation is defamatory is a question of California law. To the extent that the Court of Appeals based its conclusion in the First Amendment, it was mistaken.

The Court of Appeals relied upon the "incremental harm" doctrine as an alternative basis for its decision. As the court explained it, "[t]his doctrine measures the incremental reputational harm inflicted by the challenged statements beyond the harm imposed by the nonactionable remainder of the publication." *Ibid.;* see generally Note, 98 Harv.L.

Rev. 1909 (1985); R. Smolla, Law of Defamation § 9.10[4][d] (1991). The court ruled, as a matter of law, that "[g]iven the . . . many provocative, bombastic statements indisputably made by Masson and quoted by Malcolm, the additional harm caused by the 'intellectual gigolo' quote was nominal or nonexistent, rendering the defamation claim as to this quote non-actionable." 895 F.2d, at 1541.

This reasoning requires a court to conclude that, in fact, a plaintiff made the other quoted statements, cf. *Liberty Lobby, Inc. v. Anderson*, 241 U.S.App.D.C. 246, 251, 746 F.2d 1563, 1568 (1984), vacated and remanded on other grounds, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), and then to undertake a factual inquiry into the reputational damage caused by the remainder of the publication. As noted by the dissent in the Court of Appeals, the most "provocative, bombastic statements" quoted by Malcolm are those complained of by petitioner, and so this would not seem an appropriate application of the incremental harm doctrine. 895 F.2d, at 1566.

Furthermore, the Court of Appeals provided no indication whether it considered the incremental harm doctrine to be grounded in California law or the First Amendment. Here, we reject any suggestion that the incremental harm doctrine is compelled as a matter of First Amendment protection for speech. The question of incremental harm does not bear upon whether a defendant has published a statement with knowledge of falsity or reckless disregard of whether it was false or not. As a question of state law, on the other hand, we are given no indication that California accepts this doctrine, though it remains free to do so. Of course, state tort law doctrines of injury, causation, and damages calculation might allow a defendant to press the argument that the statements did not result in any incremental harm to a plaintiff's reputation.

(b) "*Sex, Women, Fun.*" This passage presents a closer question. The "sex, women, fun" quotation offers a very different picture of petitioner's plans for Maresfield Gardens

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than his remark that "Freud's library alone is priceless." See *supra,* at 503. Petitioner's other tape-recorded remarks did indicate that he and another analyst planned to have great parties at the Freud house and, in a context that may not even refer to Freud house activities, to "pass women on to each other." We cannot conclude as a matter of law that these remarks bear the same substantial meaning as the quoted passage's suggestion that petitioner would make the Freud house a place of "sex, women, fun."

(c) "*It Sounded Better.*" We agree with the District Court and the Court of Appeals that any difference between petitioner's tape-recorded statement that he "just liked" the name Moussaieff, and the quotation that "it sounded better" is, in context, immaterial. Although Malcolm did not include all of petitioner's lengthy explanation of his name change, she did convey the gist of that explanation: Petitioner took his abandoned family name as his middle name. We agree with the Court of Appeals that the words attributed to petitioner did not materially alter the meaning of his statement.

(d) "*I Don't Know Why I Put It In.*" Malcolm quotes petitioner as saying that he "tacked on at the last minute" a "totally gratuitous" remark about the "sterility of psychoanalysis" in an

academic paper, and that he did so for no particular reason. In the tape recordings, petitioner does admit that the remark was "possibly [a] gratuitously offensive way to end a paper to a group of analysts," but when asked why he included the remark, he answered "[because] it was true . . . I really believe it." Malcolm's version contains material differences from petitioner's statement, and it is conceivable that the alteration results in a statement that could injure a scholar's reputation.

(e) "*Greatest Analyst Who Ever Lived.*" While petitioner did, on numerous occasions, predict that his theories would do irreparable damage to the practice of psychoanalysis, and did suggest that no other analyst shared his views, no tape-recorded statement appears to contain the substance or the

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arrogant and unprofessional tone apparent in this quotation. A material difference exists between the quotation and the tape-recorded statements, and a jury could find that the difference exposed petitioner to contempt, ridicule or obloquy.

(f) "*He Had The Wrong Man.*" The quoted version makes it appear as if petitioner rejected a plea to remain in stoic silence and do "the honorable thing." The tape-recorded version indicates that petitioner rejected a plea supported by far more varied motives: Eissler told petitioner that not only would silence be "the honorable thing," but petitioner would "save face," and might be rewarded for that silence with eventual reinstatement. Petitioner described himself as willing to undergo a scandal in order to shine the light of publicity upon the actions of the Freud Archives, while Malcolm would have petitioner describe himself as a person who was "the wrong man" to do "the honorable thing." This difference is material, a jury might find it defamatory, and, for the reasons we have given, there is evidence to support a finding of deliberate or reckless falsification.

C

Because of the Court of Appeals' disposition with respect to Malcolm, it did not have occasion to address petitioner's argument that the District Court erred in granting summary judgment to The New Yorker Magazine, Inc., and Alfred A. Knopf, Inc. on the basis of their respective relations with Malcolm or the lack of any independent actual malice. These questions are best addressed in the first instance on remand.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice WHITE, with whom Justice SCALIA joins, concurring in part and dissenting in part.

I join Parts I, II-A, II-D, and III-A, but cannot wholly agree with the remainder of the opinion. My principal dis-

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agreement is with the holding, *ante,* at 517, that "a deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity . . . unless the alteration results in a material change in the meaning conveyed by the statement."

New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), "malice" means deliberate falsehood or reckless disregard for whether the fact asserted is true or false. *Id.,* at 279-280, 84 S.Ct., at 725-726. As the Court recognizes, the use of quotation marks in reporting what a person said asserts that the person spoke the words as quoted. As this case comes to us, it is to be judged on the basis that in the instances identified by the Court, the reporter, Malcolm, wrote that Masson said certain things that she knew Masson did not say. By any definition of the term, this was "knowing falsehood": Malcolm asserts that Masson said these very words, knowing that he did not. The issue, as the Court recognizes, is whether Masson spoke the words attributed to him, not whether the fact, if any, asserted by the attributed words is true or false. In my view, we need to go no further to conclude that the defendants in this case were not entitled to summary judgment on the issue of malice with respect to any of the six erroneous quotations.

That there was at least an issue for the jury to decide on the question of deliberate or reckless falsehood, does not mean that plaintiffs were necessarily entitled to go to trial. If, as a matter of law, reasonable jurors could not conclude that attributing to Masson certain words that he did not say amounted to libel under California law, *i.e.,* "expose[d] [Masson] to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation," Cal.Civ.Code Ann. § 45 (West 1982), a motion for summary judgment on this ground would be justified.* I would suppose, for example

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that if Malcolm wrote that Masson said that he wore contact lenses, when he said nothing about his eyes or his vision, the trial judge would grant summary judgment for the defendants and dismiss the case. The same would be true if Masson had said "I was spoiled as a child by my Mother," whereas, Malcolm reports that he said "I was spoiled as a child by my parents." But if reasonable jurors could conclude that the deliberate misquotation was libelous, the case should go to the jury.

This seems to me to be the straightforward, traditional approach to deal with this case. Instead, the Court states that deliberate misquotation does not amount to *New York Times* malice unless it results in a material change in the meaning conveyed by the statement. This ignores the fact that under *New York Times,* reporting a known falsehood—here the knowingly false attribution is sufficient proof of malice. The falsehood, apparently, must be substantial; the reporter may lie a little, but not too much.

This standard is not only a less manageable one than the traditional approach, but it also assigns to the courts issues that are for the jury to decide. For a court to ask whether a misquotation substantially alters the meaning of spoken words in a defamatory manner is a far different inquiry than whether reasonable jurors could find that the misquotation was different enough to be libelous. In the one case, the court is measuring the difference from its own point of view; in the other it is asking how the jury would or could view the erroneous attribution.

The Court attempts to justify its holding in several ways, none of which is persuasive. First, it observes that an interviewer who takes notes of any interview will attempt to reconstruct what

the speaker said and will often knowingly attribute to the subject words that were not used by the speaker. *Ante,* at 514-515. But this is nothing more than an assertion that authors may misrepresent because they cannot remember what the speaker actually said. This

should be no dilemma for such authors, or they could report their story without purporting to quote when they are not sure, thereby leaving the reader to trust or doubt the author rather than believing that the subject actually said what he is claimed to have said. Moreover, this basis for the Court's rule has no application where there is a tape of the interview and the author is in no way at a loss to know what the speaker actually said. Second, the Court speculates that even with the benefit of a recording, the author will find it necessary at times to reconstruct, *ante,* at 515, but again, in those cases why should the author be free to put his or her reconstruction in quotation marks, rather than report without them? Third, the Court suggests that misquotations that do not materially alter the meaning inflict no injury to reputation that is compensable as defamation. *Ante,* at 517. This may be true, but this is a question of defamation or not, and has nothing to do with whether the author deliberately put within quotation marks and attributed to the speaker words that the author knew the speaker did not utter.

As I see it, the defendants' motion for summary judgment based on lack of malice should not have been granted on any of the six quotations considered by the Court in Part III-B of its opinion. I therefore dissent from the result reached with respect to the "It Sounded Better" quotation dealt with in paragraph (c) of Part III-B, but agree with the Court's judgment on the other five misquotations.

* In dealing with the intellectual gigolo passage, the Court of Appeals ruled that there was no malice but in the alternative went on to say that as a matter of law the erroneous attribution was not actionable defamation. 895 F.2d 1535, 1540-1541 (CA9 1989).

411 S.W.3d 530
In re Steven and Shyla LIPSKY and Alisa Rich, Relators.
No. 02–12–00348–CV.
Court of Appeals of Texas,
Fort Worth. April 22, 2013.
Rehearing and En Banc Reconsideration Overruled Oct. 10, 2013.

411 S.W.3d 530

In re Steven and Shyla LIPSKY and Alisa Rich, Relators.

No. 02–12–00348–CV.

**Court of Appeals of Texas,
Fort Worth.**

**April 22, 2013.
Rehearing and En Banc Reconsideration Overruled Oct. 10, 2013.**

[411 S.W.3d 535]

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[411 S.W.3d 536]

PANEL: LIVINGSTON, C.J.; DAUPHINOT and GARDNER, JJ.

OPINION

TERRIE LIVINGSTON, Chief Justice.

Relators Steven and Shyla Lipsky (the Lipskys) and Alisa Rich seek a writ of mandamus that directs the trial court to dismiss the claims asserted against them by real parties in interest Range Production Company and Range Resources Corporation (Range). Relators contend that provisions contained within chapter 27 of the civil practice and remedies code (chapter 27) require the dismissal of Range's claims.[1] We conditionally grant relief in part and deny relief in part.[2]

Background Facts

The Lipskys own a home in the Silverado on the Brazos development in Weatherford. In 2005, they drilled a well to a depth of about two hundred feet to provide water to their home and property, and they also constructed a large holding tank to meet the anticipated water needs at the property. Range drilled two natural gas wells in 2009 near the Lipskys' property. According to the Lipskys, in the latter part of 2009, they began noticing problems with their water, and by the middle of 2010, their water pump began experiencing "gas locking," meaning that the pump could not efficiently move water. The Lipskys contacted public health officials, who referred them to Rich. After the Lipskys contracted in August 2010 with Rich and her company, Wolf

Eagle Environmental, to conduct testing, she confirmed the presence of various gases in the Lipskys' water well.

In December 2010, after being notified by Rich and the Lipskys about the circumstances at the Lipskys' property and after conducting its own investigation, the Environmental Protection Agency (EPA) issued an emergency order stating that Range's production activities had caused or contributed to the gas in the Lipskys' water well and that the gas could be hazardous to the Lipskys' health. In the order, the EPA required Range to, among other actions, provide potable water to the Lipskys and install explosivity meters at the Lipskys' property. The federal government, acting at the request of the EPA, later filed a lawsuit in a federal district court against Range, alleging that Range had not complied with requirements of the emergency order.

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The Railroad Commission of Texas (the Railroad Commission) also investigated the contamination of the Lipskys' well. After calling a hearing and listening to testimony from several witnesses in January 2011, the Railroad Commission issued a unanimous decision in March 2011 that Range had not contaminated the Lipskys' water.[3] Thus, the Railroad Commission allowed production from Range's wells to continue.

In June 2011, the Lipskys sued several defendants, including Range, for claims related to the contamination of their water well that, according to the Lipskys, resulted from Range's "oil and gas drilling activities." In their original petition, the Lipskys claimed that the contamination had caused a water pump to malfunction and had caused the water "to be flammable." Against Range, the Lipskys sought compensatory and punitive damages while asserting causes of action for negligence, gross negligence, and private nuisance. The Lipskys alleged that Range's drilling, including hydraulic fracture stimulation operations (fracking), affected their water source, and they contended that they could no longer use their home as a residence.[4]

A month after the Lipskys sued Range, Range answered the suit and brought counterclaims (against the Lipskys) and third-party claims (against Rich) for civil conspiracy, aiding and abetting, defamation, and business disparagement. Range contended, among other arguments, that Range's fracking of a deep shale formation could not have contaminated the Lipskys' much shallower water well; that Range's two gas wells near the Lipskys' residence had "mechanical integrity"; that other factors occurring before Range's drilling contributed to gas in the Lipskys' well; that the Railroad Commission had already found that Range's drilling did not contaminate the Lipskys' well; that the contrary conclusion that had been reached by the EPA was based on incomplete and overlooked data; [5] that the Lipskys had ignored the Railroad Commission's findings by continuing to blame Range for the contamination; that Rich, along with the Lipskys, had, with malice against Range, made false, misleading, and disparaging statements; and that Range's business reputation had therefore suffered.

The Lipskys and Rich each answered Range's claims against them, and they later each filed motions to dismiss the claims under chapter 27. In their motions, relators argued, among other contentions, that

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through bringing its affirmative claims, Range intended to suppress relators' right of free speech and their right to petition (including petitioning the EPA to act on the Lipskys' water contamination) and that Range had not provided clear and specific evidence establishing prima facie proof of each element of its claims. Documents attached to the Lipskys' motion to dismiss established, among other facts, that the possible contamination of water by drilling and fracking has been a matter of public concern in recent years; that the Lipskys began noticing problems with their drinking water in 2009, which was after Range began drilling; that in 2005, before Range began production in Silverado on the Brazos, Steven Lipsky saw another water well that contained gas fumes; that the Lipskys cooperated with Rich (and her company, Wolf Eagle Environmental) to obtain water and air samples (which showed the presence of benzene, toluene, ethane, and methane) and to get the EPA involved in investigating the contamination of the Lipskys' well; that the Lipskys complained to the Railroad Commission about their water well containing natural gas; that Steven Lipsky created a video of igniting gas from his well and shared the video with "friends and family"; [6] that as of his deposition in January 2011, Steven Lipsky still was not sure how natural gas entered his well water; that Rich testified in a deposition that the test results from the Lipskys' water were "not ... high enough to cause an imminent ... danger"; and that Rich told the EPA that Steven Lipsky had "demonstrated in her presence that he could light his water hose which was attached to his well vent and that a '10–foot flare' was the result."

Range opposed the motions to dismiss, detailing the evidence that Range offered in support of the claims. The trial court denied the motions. Relators filed an interlocutory appeal, and we dismissed the appeal for want of jurisdiction.[7] However, we allowed relators to challenge the propriety of the trial court's order denying the dismissal motions through this original proceeding.[8]

Mandamus Standards

Mandamus relief is proper only to correct a clear abuse of discretion when there is no adequate remedy by appeal. *In re Columbia Med. Ctr. of Las Colinas*, 290 S.W.3d 204, 207 (Tex.2009) (orig. proceeding); *In re Aslam*, 348 S.W.3d 299, 301 (Tex.App.-Fort Worth 2011, orig. proceeding). A trial court clearly abuses its discretion when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law or if it clearly fails to correctly analyze or apply the law. *In re Olshan Found. Repair Co.*, 328 S.W.3d 883, 888 (Tex.2010) (orig. proceeding); *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex.1992) (orig. proceeding).

With respect to the resolution of factual issues or matters committed to the trial court's discretion, we may not substitute our judgment for that of the trial court unless a relator establishes that the trial court could reasonably have reached only one decision and that the trial court's decision is arbitrary and unreasonable. *In re Sanders*, 153 S.W.3d 54, 56 (Tex.2004)

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(orig. proceeding); *Walker*, 827 S.W.2d at 839–40; *In re Tex. Collegiate Baseball League, Ltd.*, 367 S.W.3d 462, 468–69 (Tex.App.-Fort Worth 2012, orig. proceeding). This burden is a heavy one. *Aslam*, 348 S.W.3d at 302 (citing *In re CSX Corp.*, 124 S.W.3d 149, 151 (Tex.2003) (orig. proceeding)).

While we give deference to a trial court's factual determinations that are supported by evidence, we review the trial court's legal determinations de novo. *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 643 (Tex.2009) (orig. proceeding). A trial court abuses its discretion if it fails to analyze the law correctly or misapplies the law to established facts. *Iliff v. Iliff*, 339 S.W.3d 74, 78 (Tex.2011); *State v. Sw. Bell Tel. Co.*, 526 S.W.2d 526, 528 (Tex.1975). Also, a trial court's erroneous legal conclusion, even in an unsettled area of law, is an abuse of discretion. *In re United Scaffolding, Inc.*, 301 S.W.3d 661, 663 (Tex.2010) (orig. proceeding).

Standards for Motions to Dismiss Under Chapter 27

When the legislature enacted chapter 27 in 2011, it expressed that the purposes of doing so were 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. To promote these purposes, chapter 27 creates an avenue at the early stage of litigation for dismissing unmeritorious suits that are based on the defendant's exercise of the rights of free speech, petition, or association as those rights are defined within the chapter. *Id.*§ 27.003; *see also id.*§ 27.001(2)-(4) (defining the exercise of the right of association, the exercise of the right of free speech, and the exercise of the right to petition).

To prevail on a motion to dismiss under chapter 27, a defendant has the burden to show by a preponderance of the evidence that the plaintiff's legal action is "based on, relates to, or is in response to" one of the rights discussed above. *Id.*§ 27.005(b). If the defendant meets its burden, the plaintiff, to avoid dismissal, must then establish "by clear and specific evidence a prima facie case for each essential element of the claim in question." *Id.*§ 27.005(c). Chapter 27 does not define what sort of evidence satisfies the "clear and specific" qualitative standard, but it expresses that in determining the propriety of dismissal, courts may consider "the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based." *Id.* § 27.006(a); *see also Jennings,* 378 S.W.3d at 526 ("[T]he overall structure of [chapter 27] requires judicial review ... of limited evidence ... concerning the elements ... of a legal action involving a party's exercise of the right of free speech, right to petition, or right of association...."). In cases unrelated to motions to dismiss under chapter 27, Texas courts have defined "prima facie" evidence as the "minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true." *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 223 (Tex.2004) (orig. proceeding) (citing *Tex. Tech Univ. Health Scis. Ctr. v. Apodaca*, 876 S.W.2d 402, 407 (Tex.App.-El Paso 1994, writ denied)); *see also Elliott v. Elliott*, 21 S.W.3d 913, 917 (Tex.App.-Fort Worth 2000, pet. denied) (stating that whether a prima facie case has been presented is a question of law for the court).

Relators' Procedural Compliance with Chapter 27

In its briefing, Range argues, in part, that relators cannot show that the trial

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court clearly abused its discretion by denying relators' motions to dismiss because relators "refused to comply with the mandatory deadline for a timely hearing" under section 27.004 of the civil practice and remedies code. Section 27.004 provides that a hearing on a motion to dismiss under chapter 27 "must be set not later than the 30th day after the date of service of the motion

unless the docket conditions of the court require a later hearing." Tex. Civ. Prac. & Rem.Code Ann. § 27.004. Range contends that relators "forfeited their rights to seek dismissal of Range's claims ... by refusing to comply with the mandatory time requirement of Section 27.004."

The Lipskys filed their motion to dismiss Range's claims on September 12, 2011, and Rich filed her motion to dismiss the claims two days later. Range concedes that "[d]ue, at least in part, to intervening docket conditions" of the trial court, the hearing on relators' motions to dismiss was first set for December 19, 2011.[9] Range filed its response to relators' motions to dismiss on the afternoon of December 16, 2011, which was a Friday. The response included an appendix containing more than 1,600 pages of documents. On December 19, relators sought a continuance of the dismissal hearing on the ground that they needed more time to digest Range's response, and over Range's objection, the trial court granted a continuance and reset the hearing on relators' motions for January 31, 2012. The trial court conducted the hearing on January 31 and denied relators' motions on February 16, 2012.

Range does not contend that the trial court's initial hearing date of December 19, 2011 was improper, but Range argues that the continuance of the hearing until January 31, 2012 violated section 27.004. In the trial court, the Lipskys contended that they complied with section 27.004 because that section requires a hearing on a motion to dismiss to be "set," not heard, within thirty days (or later if required by the docket conditions of the court) of the service of the motion.

As we explained in *Jennings,*

In construing statutes, our primary objective is to give effect to the legislature's intent. We rely on the plain meaning of the text as expressing legislative intent unless a different meaning is supplied by legislative definition or is apparent from the context, or the plain meaning leads to absurd results. Even when it appears that the legislature may have made a mistake, courts are not empowered to "fix" the mistake by disregarding direct and clear statutory language that does not create an absurdity.

378 S.W.3d at 523 (citations omitted); *see Tex. Real Estate Comm'n v. Bayless,* 366 S.W.3d 808, 811 (Tex.App.-Fort Worth 2012, pet. denied) (explaining that ordinary citizens should be able to rely on the plain language of a statute to mean what it says and that straying from the plain language of a statute risks encroaching on the legislature's function to decide what the law should be).

We agree with relators that the plain language of section 27.004 applies to the setting, not the hearing or consideration, of a chapter 27 motion to dismiss; if the legislature had meant to require the holding of a hearing within thirty days (or as soon as the trial court's docket allows) rather than the setting of a hearing within that time period, it knew how to say so.

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*See, e.g.,*Tex. Fam.Code Ann. § 8.258(b) (West 2006) (stating that when a spousal maintenance obligor files a motion to stay the issuance of a writ of withholding, the trial court "shall *hold a hearing* on the motion to stay not later than the 30th day after the date the motion was filed unless the obligor and obligee agree and waive the right to have the motion heard within 30 days")

(emphasis added); *id.* § 158.309(b) (West 2008) (stating similarly with respect to a motion to stay in a child support case); Tex. Fin.Code Ann. § 92.254(a) (West 2013) ("A hearing [for the conversion of a savings bank to another financial institution] *must be held not later than the 25th day* after the date the application is filed ....") (emphasis added). We decline Range's invitation for us to interpret section 27.004 in a way that adds language to its setting requirement. *See* *Harris Cnty. Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 846 (Tex.2009) (stating that a court usurps its powers when it adds language to a law where the legislature has refrained). Moreover, we conclude that applying the statute's plain meaning does not lead to an absurd result because that meaning encourages trial courts to resolve a chapter 27 motion to dismiss quickly while allowing flexibility for extending the time for hearing the motion under circumstances similar to those that relators faced in this case.[10] We therefore reject Range's argument that relators waived their motions to dismiss by seeking a continuance of the setting of the hearing from December 19, 2011 until January 31, 2012.

The Bases of Range's Claims

To trigger the mechanism for the dismissal of Range's claims against them under chapter 27, relators had the initial burden to establish by a preponderance of the evidence that Range's claims are based on, relate to, or are in response to relators' exercise of the right of free speech, right to petition, or right of association. Tex. Civ. Prac. & Rem.Code Ann. §§ 27.003(a), .005(b). In denying relators' motions to dismiss, the trial court did not expressly determine whether relators had met this burden.

In chapter 27, the exercise of the right to petition includes "a communication in or pertaining to," among other venues, a judicial proceeding, an "official proceeding ... to administer the law," a "proceeding before a department of the state or federal government or a subdivision of the state or federal government," or a "public meeting dealing with a public purpose." *Id.*§ 27.001(4)(A)(i)-(iii), (ix). Also, the exercise of the right to petition includes "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." *Id.*§ 27.001(4)(C).

In Range's original pleading that asserted counterclaims against the Lipskys and a third-party claim against Rich, Range expressed that its affirmative claims were based on relators' strategy to involve the EPA in the gas issue at the Lipskys' home; [11] on Rich's communications with EPA personnel, which according

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to Range, the EPA "used ... in issuing the draconian ex parte order against Range"; [12] on the Lipskys' statements about their drinking water; and on the Lipskys' communications with news media. When Range filed its response to relators' motions to dismiss, Range alleged that its claims could be supported by, among other allegations, multiple contacts with the EPA made by Rich, Steven Lipsky, and one of the Lipskys' attorneys; by the Lipskys' alleged statements that blamed Range for contaminating the well; by statements made by the Lipskys' agents and by Steven Lipsky in official hearings about the appraisal of the value of the Lipskys' home; by statements reported in newspaper articles; and by Steven Lipsky's communication with Parker County officials.

We conclude, based on these facts alleged by Range in its pleading and in its response to relators' motions to dismiss, that Range's claims are based on or relate to relators' exercise of their "right to petition" as chapter 27 defines that term.[13] Taking all of Range's allegations as true, many of the statements at issue were made to encourage the "review of an issue" (the contamination of the Lipskys' well) by a "governmental body" (the EPA). *See id.*[14] Moreover, other statements upon which Range expressly bases its defamation and business disparagement claims were indisputably made in official proceedings or public meetings, such as appraisal proceedings, and those statements therefore also qualify as the exercise of the right to petition. *See id.*§ 27.001(4)(A)(ii), (ix).

Moreover, under chapter 27, the exercise of the right of free speech occurs when a communication is "made in connection with a matter of public concern." *Id.*§ 27.001(3). The environmental effects of fracking in general, the specific cause of the contamination of the Lipskys' well, and the safety of Range's operation methods are matters of public concern under chapter 27. *See id.*§ 27.001(7)(A)-(B), (E) (defining "[m]atter of public concern" as an issue related to, among other topics, health, safety, environmental well-being, or a "service in the marketplace"); *see also Avila v. Larrea*, 394 S.W.3d 646, 656 (Tex.App.-Dallas 2012, pet. denied) (holding that a communication about the legal services offered by an attorney was a matter of public concern under chapter 27 because it concerned a service in the marketplace).[15] The EPA determined in its emergency administrative order that the chemicals found in the Lipskys' well "pose a variety of risks to health of persons."

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Many of relators' statements upon which Range bases its claims were made in "connection with" fracking, the contamination of the Lipskys' well, and aspects of Range's business. Furthermore, in its defamation and business disparagement claims, Range relies on statements made by Steven Lipsky and his counsel concerning Range's alleged political power and the Railroad Commission's alleged corrupt system. Under chapter 27, these communications, relating to the operation of the government, were also made on matters of public concern. *See*Tex. Civ. Prac. & Rem.Code Ann. § 27.001(7)(C).

Range argues that the statements underlying its claims against relators do not relate to the "right of free speech" or the "right to petition" because the statements were defamatory and were therefore not constitutionally protected. *See Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 116–17 (Tex.2000) (explaining that federal and state constitutional protections do not outweigh a plaintiff's constitutional right of redress for reputational torts). But chapter 27 dictates that we should review evidence concerning whether relators' statements were defamatory and thus actionable in the second part of our review, in which Range has the burden of establishing "by clear and specific evidence a prima facie case for each essential element of the claim in question." Tex. Civ. Prac. & Rem.Code Ann. § 27.005(c). The statutory definitions for the exercise of the right of free speech and the exercise of the right to petition do not include language requiring us to determine the truth or falsity of communications when deciding whether a movant for dismissal has met its preliminary preponderance of the evidence burden under section 27.005(b). *See id.* §§ 27.001(3)-(4), 27.005(b); *see also Harris Cnty. Hosp. Dist.*, 283 S.W.3d at 846 (expressing that courts should not add language to a statute while implementing it).

For these reasons, we conclude that relators met their initial burden of showing by a preponderance of the evidence that Range's claims are based on or relate to relators' exercise of

their rights of free speech or of their rights to petition as defined by chapter 27. *See*Tex. Civ. Prac. & Rem.Code Ann. § 27.005(b)(1)-(2).

The Evidence of Range's Claims

We have concluded that relators met their burden of showing by a preponderance of the evidence that Range's claims against them were based on, were related to, or were in response to the exercise of relators' protected rights under chapter 27. Range, however, could avoid dismissal of its claims by providing "clear and specific evidence" that satisfied a prima facie case for each essential element of the claims. *Id.* § 27.005(c).

Defamation and business disparagement

To prevail on a defamation claim, the plaintiff must prove that the defendant (1) published a statement, (2) that was defamatory concerning the plaintiff, (3) while acting with either actual malice, if the plaintiff is a public official or a public figure, or negligence, if the plaintiff is a private individual, regarding the truth of the statement. *See WFAA–TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex.1998), *cert. denied*,526 U.S. 1051, 119 S.Ct. 1358, 143 L.Ed.2d 519 (1999). A statement is defamatory "if it tends to injure a person's reputation and thereby expose the person to public hatred, contempt, ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation." *Tex. Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.*, 219 S.W.3d 563, 580 (Tex.App.-Austin 2007, pets. denied) (op. on reh'g) (citing

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Tex. Civ. Prac. & Rem.Code Ann. § 73.001 (West 2011)). When actual malice is required, it may be established by proof that the defendant knew a statement was false or made the statement with reckless disregard about whether it was false, meaning that the defendant had serious doubts about the statement's truth. *McLemore,* 978 S.W.2d at 573–74;*see also Hearst Corp. v. Skeen*, 159 S.W.3d 633, 637–38 (Tex.2005) (explaining that actual malice occurs when a party purposefully avoids the truth or bases a statement on obviously dubious information). When only negligence is required for the defendant's fault, the plaintiff must prove that the defendant should have known that the published statement was false. *See McLemore,* 978 S.W.2d at 571;*Klentzman v. Brady*, 312 S.W.3d 886, 898 (Tex.App.-Houston [1st Dist.] 2009, no pet.).

Under either fault standard, the statement must be "of and concerning" the plaintiff. *See Kaufman v. Islamic Soc'y of Arlington*, 291 S.W.3d 130, 144 (Tex.App.-Fort Worth 2009, pet. denied); *Cox Tex. Newspapers, L.P. v. Penick*, 219 S.W.3d 425, 433 (Tex.App.-Austin 2007, pet. denied). A publication is "of and concerning" the plaintiff if persons who knew and were acquainted with the plaintiff "understood from viewing the publication that the allegedly defamatory matter referred to the plaintiff." *Allied Mktg. Grp., Inc. v. Paramount Pictures Corp.*, 111 S.W.3d 168, 173 (Tex.App.-Eastland 2003, pet. denied). The statement must refer to the plaintiff and "no one else." *Kaufman,* 291 S.W.3d at 147–48 (quoting *Newspapers, Inc. v. Matthews*, 161 Tex. 284, 290, 339 S.W.2d 890, 894 (1960)).

A statement may be defamatory, although literally true, if the omission of material facts allows a reasonable person to perceive a false impression. *Turner,* 38 S.W.3d at 114–15;*Klentzman,* 312 S.W.3d at 898–99. Also, a defendant may be liable for defamation if a reasonable person would recognize that an act creates an unreasonable risk that defamatory

matter will be communicated to a third party. *See George v. Deardorff*, 360 S.W.3d 683, 690 (Tex.App.-Fort Worth 2012, no pet.).

In most defamation claims, the plaintiff must prove the existence and amount of damages caused by the defamatory statement. *Exxon Mobil Corp. v. Hines*, 252 S.W.3d 496, 501 (Tex.App.-Houston [14th Dist.] 2008, pet. denied); *Tex. Disposal Sys. Landfill, Inc.*, 219 S.W.3d at 580. Some statements, however, are defamatory per se, meaning that the law presumes the defendant's injury. *See Leyendecker & Assocs., Inc. v. Wechter*, 683 S.W.2d 369, 374 (Tex.1984) (op. on reh'g) (explaining that a false statement charging someone with the commission of a crime is defamatory per se); *Tex. Disposal Sys. Landfill, Inc.*, 219 S.W.3d at 580–81;*see also Morrill v. Cisek*, 226 S.W.3d 545, 549 (Tex.App.-Houston [1st Dist.] 2006, no pet.) ("Defamation is actionable per se if it injures a person in his office, business, profession, or occupation.").

The supreme court has explained that to

prevail on a business disparagement claim, a plaintiff must establish that (1) the defendant published false and disparaging information about it, (2) with malice, (3) without privilege, (4) that resulted in special damages to the plaintiff. A business disparagement claim is similar in many respects to a defamation action. The two torts differ in that defamation actions chiefly serve to protect the personal reputation of an injured party, while a business disparagement claim protects economic interests.... [A] business disparagement defendant may be held liable "only if he knew of

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the falsity or acted with reckless disregard concerning it, or if he acted with ill will or intended to interfere in the economic interest of the plaintiff in an unprivileged fashion."

Forbes Inc. v. Granada Biosciences, Inc., 124 S.W.3d 167, 170 (Tex.2003) (citations and emphasis omitted) (quoting *Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762, 766 (Tex.1987)). Proof of special damages is an "essential part of [a plaintiff's] cause of action for business disparagement.... [T]he communication must play a substantial part in inducing others not to deal with the plaintiff with the result that special damage, in the form of the loss of trade or other dealings, is established." *Hurlbut*, 749 S.W.2d at 767;*see Astoria Indus. of Iowa, Inc. v. SNF, Inc.*, 223 S.W.3d 616, 628 (Tex.App.-Fort Worth 2007, pet. denied) (op. on reh'g).

Evidence concerning the Lipskys

In the trial court, through responding to relators' motions to dismiss, Range presented evidence that, according to Range, proves that the Lipskys, or their agents, made false, misleading, and disparaging communications. The alleged false and misleading communications include disseminating "misleading videos ... that show [Steven Lipsky] lighting the end of a garden hose on fire" when the hose was actually connected to the well's gas vent, and stating or implying that

• Range's drilling went under the Lipskys house while omitting that Range's wellbore was over a mile below the surface;

• the Lipskys' well no longer pumped water (when it actually could);

• the Lipskys had found unnatural detergents in the water;

• the Lipskys could not live in their home (although they continued to do so);

• Range would eventually "own" the Lipskys' home (which implied that Range was responsible for contaminating the Lipskys' water source and would be liable for doing so); [16]

• Range was politically powerful and had prevailed with the Railroad Commission through corruption,[17] even though the Railroad Commission had considered extensive evidence to support its decision and the Lipskys had not participated in the Railroad Commission's hearing;

• the Lipskys could literally light their water on fire, and the water was unsafe to drink; [18]

• Range's drilling operations contaminated the water (even though the Railroad Commission had found that the operations had not); [19] and

• Range treated the Lipskys like "criminals."

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Range also contended that the evidence showed that the Lipskys acted with actual malice because, among other reasons, they blamed Range before and after the Railroad Commission had concluded its investigation and had found that Range had *not* contaminated the Lipskys' well; Steven Lipsky failed to disclose, when blaming Range, that the Railroad Commission had ruled in Range's favor; Steven Lipsky stated under oath in January 2011 that he did not know the cause of the contamination but made statements at other times blaming Range (including, prior to January 2011, implying that Range would be liable for contaminating his well); and Steven Lipsky said that he could light his water on fire when he knew that the hose was attached to the well's gas vent.

We conclude that the trial court did not clearly abuse its discretion by determining that Range had presented clear and specific evidence to establish a prima facie case for each essential element of its defamation and business disparagement claims against Steven Lipsky; the trial court could have reasonably concluded that the facts established by Range, which we have summarized above, provide at least a "minimum quantum of evidence necessary to support a rational inference" that Range has met its burden with regard to those elements. *See E.I. DuPont de Nemours & Co.*, 136 S.W.3d at 223;*see also*Tex. Civ. Prac. & Rem.Code Ann. § 27.005(c). Specifically, for example,[20] the trial court could have reasonably concluded that a rational inference of a false, defamatory, and disparaging statement arose from Steven Lipsky's communication that Range prevailed in the Railroad Commission through corruption.[21] The trial court could have also concluded that there was a rational inference that this statement was made with actual malice, as defined above, in light of the evidence that the Lipskys did not participate in the Railroad Commission's proceedings and that the Railroad Commission made its decision after listening to several expert witnesses, including witnesses with advanced degrees and significant experience in the gas industry. And concerning the requirement for Range's defamation and business disparagement claims that Steven Lipsky's statements caused damage, David Poole, a senior vice president for Range, stated in an affidavit,

As a direct and proximate result and consequence of the ... false, disparaging, and defamatory public statements made by Steven Lipsky ... regarding Range and its operations, Range's business and reputation have been harmed.... The numerous false, disparaging, and defamatory public statements made by Mr. Lipsky ... have caused Range to be associated in the public as a polluter of water and the environment, and nothing could be further from the truth.

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... As a direct and proximate result and consequence of the false, disparaging, and defamatory statements made by Mr. Lipsky ..., *Range has suffered direct pecuniary and economic losses and costs, lost profits,* loss of its reputation, and loss of goodwill in the communities in which it operates. To date, the damages suffered by Range as a direct and proximate result and consequence of the conspiracy and ... defamatory public statements made by Lipsky and Rich are in excess of three million dollars. [Emphasis added.]

Although Poole's affidavit is concise, we conclude that by stating that Range had suffered direct economic losses and "lost profits," it provided the trial court with minimum but sufficient facts, at this stage in the litigation, to raise a rational inference, and therefore serve as prima facie proof, that Range lost "trade or other dealings" as a result of statements made by Steven Lipsky. *See Hurlbut,* 749 S.W.2d at 767;*see also Hines,* 252 S.W.3d at 501 (explaining that ordinarily, defamation claims require proof of damages). [22] Poole's affidavit is clear and specific about the facts included within it, even if it is not elaborate. *See*Tex. Civ. Prac. & Rem.Code Ann. § 27.005(c). For all of these reasons, we conclude that the trial court did not abuse its discretion by denying Steven Lipsky's motion to dismiss Range's defamation and business disparagement claims against him.

Range has not directed us to any evidence, however, establishing that Shyla Lipsky published statements, defamatory or otherwise, concerning Range, and we have located none. In Range's briefing, it argues, concerning Shyla specifically, only that she "wanted to provide information to the media" and that she participated in a conspiracy with her husband and Rich to "defame and disparage" Range. As explained below, we conclude that Range did not present sufficient evidence of such a conspiracy. And although Range argued in the trial court's hearing on the dismissal motions that Shyla was liable for statements made by her agents, Range has not cited authority or provided analysis establishing that Shyla should be liable for statements that her agents made. To hold a defendant liable for defamation based on an agency relationship, a plaintiff must show that the defendant's agent made a statement in the general authority of the agency and for the accomplishment of the objective of the agency. *See Minyard Food Stores, Inc. v. Goodman,* 80 S.W.3d 573, 576, 578–79 (Tex.2002); *Louis v. Mobil Chem. Co.,* 254 S.W.3d 602, 610 (Tex.App.-Beaumont 2008, pet. denied). Range has not provided analysis of these requirements of its defamation and business disparagement claims against Shyla or directed us to where we can locate evidence about the Lipskys' agents that satisfies the requirements. Also, Shyla cannot be personally liable for Steven's acts merely because of their marriage relationship; he was not her agent solely because they were married. *See*Tex. Fam.Code Ann. § 3.201(a)(1), (c) (West 2006). Thus, we conclude that Range did not provide clear and specific

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evidence of a prima facie case for each essential element of its defamation and business disparagement claims against Shyla, and we conclude the trial court clearly abused its discretion

by denying Shyla's motion to dismiss Range's defamation and business disparagement claims against her. *See* Tex. Civ. Prac. & Rem.Code Ann. § 27.005(c).

Evidence concerning Rich

In the trial court, while responding to Rich's motion to dismiss, Range contended that Rich was liable for defamation and business disparagement particularly because

• "[Steven] Lipsky ha[d] said that scientists who tested his well ha[d] said that his well could only have been contaminated by nearby gas drilling"; and

• Rich falsely or misleadingly told EPA officials that she was concerned about a risk to the Lipskys; that one of her sampling technicians had suffered respiratory distress after breathing what she believed to be harmful fumes; and that she had detected methane, ethane, propane, and butane in the Lipskys' water.

Steven Lipsky's March 2011 statement, which appeared in various media publications, about communications from "scientists" who had tested his well and had said that the contamination of an established water well could be caused "only" by natural gas drilling, does not identify Rich as one of the scientists who made that statement. The record establishes that along with Rich, officials from the EPA and the Railroad Commission conducted tests at the Lipskys' home before Lipsky made the statement about the conclusion of scientists who had tested his well. Before March 2011, the EPA officials determined that Range could have caused or contributed to the contamination of the Lipskys' water. During Rich's deposition, which was taken in January 2011 in the course of the Railroad Commission's proceeding, she said that after completing testing at the Lipskys' residence, she told the Lipskys that it was her opinion that a natural gas well had compromised their water well but that she could not ascertain which well had done so. Rich explained in the deposition that she had "no way of knowing" which gas well had affected the Lipskys' water well, and she indicated that she had advised the Lipskys to contact the Railroad Commission to "get some pressure testing done ... to find out if the wells were actually compromised." At the time of the deposition, Rich opined that the "probable" cause of gas in the Lipskys' water well was natural gas drilling.[23] Range has not directed us to any part of the record, however, establishing that Rich was the person who made the particular statement expressly relied upon by Range to support its defamation and business disparagement claims that an established water "well could *only* have been contaminated by nearby gas drilling." [Emphasis added.] Thus, we conclude that Steven Lipsky's March 2011 statement to the media about the conclusion of "scientists" who conducted tests at his home cannot support

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Range's defamation or business disparagement claims against Rich. *See Forbes Inc.,* 124 S.W.3d at 170 (requiring proof, in a business disparagement claim, that the defendant published the statement at issue); *McLemore,* 978 S.W.2d at 571 (requiring the same evidence in a defamation claim).

Rich's other statements to the EPA, summarized above, even if proven false, relate to the environmental conditions at the Lipskys' home but do not name or blame Range for causing those conditions. Because these statements are not "of and concerning" Range, they likewise cannot serve as clear and specific proof of Range's defamation and business disparagement claims

against Rich. *See*Tex. Civ. Prac. & Rem.Code Ann. § 27.005(c); *Kaufman,* 291 S.W.3d at 144–48;*Penick,* 219 S.W.3d at 433 (explaining that to be "of and concerning" the plaintiff, the defendant's publication must "refer to some ascertained or ascertainable person and that person must be the plaintiff").

In an oral argument handout, Range alleged, concerning Rich, only that in her initial communication with the EPA, she "blamed Range and [fracking] for contamination of the Lipskys' well." We have not located such evidence from the record references that Range provided. Beyond the statement in the handout, Range has not expressed in this court that it is basing its defamation or business disparagement claims against Rich on any other statements made by Rich to the EPA, or to anyone else, that specifically concerned Range rather than only generally concerning the contamination of the Lipskys' well and the environmental effects of the contamination.

Because Rich's statements that Range relies on to support its defamation and business disparagement claims did not "concern" Range, we conclude that there is no clear and specific evidence to prove a prima facie case for an essential element of those claims and that the trial court clearly abused its discretion by denying Rich's motion to dismiss those claims. *See*Tex. Civ. Prac. & Rem.Code Ann. § 27.005(c); *Kaufman,* 291 S.W.3d at 144–48;*Penick,* 219 S.W.3d at 433.

Civil conspiracy and aiding and abetting

An actionable civil conspiracy is a combination by "two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means." *Cotten v. Weatherford Bancshares, Inc.,* 187 S.W.3d 687, 701 (Tex.App.-Fort Worth 2006, pet. denied). The essential elements of a civil conspiracy are "(1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result." *Id.* 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.; see also Carroll v. Timmers Chevrolet, Inc.,* 592 S.W.2d 922, 925 (Tex.1979) ("It is not the agreement itself, but an injury to the plaintiff resulting from an act done pursuant to the common purpose that gives rise to the cause of action."). Recovery for civil conspiracy is not based on the conspiracy but on the underlying tort. *Tilton v. Marshall,* 925 S.W.2d 672, 681 (Tex.1996) (orig. proceeding) (op. on reh'g). Once a civil conspiracy is proven, each coconspirator "is responsible for all acts done by any of the conspirators in furtherance of the unlawful combination." *Carroll,* 592 S.W.2d at 926. A civil conspiracy claim may be proved by circumstantial evidence and reasonable inferences from parties' actions. *Int'l Bankers Life Ins. Co. v. Holloway,* 368 S.W.2d 567, 581 (Tex.1963).

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In the trial court, Range initially pled that the object of a conspiracy between the Lipskys and Rich was "to make false and damaging accusations that Range's operations had contaminated [the] Lipskys' water well." Range also alleged that Rich had participated in the scheme so that she could "circulate false accusations against Range to further her business and her anti-natural gas agenda." When Range responded to relators' motions to dismiss, it contended that the "object of the conspiracy was to make false and defamatory statements that Range's operations caused the alleged contamination"; that Rich and the Lipskys decided to blame Range for the contamination before receiving any evidence that Range was at fault; that Rich and the Lipskys agreed on a

strategy of creating a "false sense of 'damage' " associated with the Lipskys' air quality to obtain the EPA's involvement; and that Rich made misleading statements to the EPA, including providing copies of "misleading videos."

In this court, Range asserts that it presented evidence in the trial court "showing that the Lipskys and Rich agreed and conspired to defame and disparage Range by making false and misleading statements that Range caused the alleged contamination of the Lipskys' water well," including that they provided misleading information to the EPA and manufactured, through an air test five feet away from the gas vent on the water well, a non-existent imminent danger to get the EPA to prosecute Range as a wrongdoer. Range argues that the central part of the conspiracy "was Rich's 'strategy' to stage a deceptive air test designed to create a non-existent imminent danger."

A letter sent by Rich to Steven Lipsky on August 9, 2010 recites that the purpose of Rich's testing was to "characterize the water and ambient air conditions present" on the property. While the letter referenced "recent gas well development" near the Lipskys' property, the letter did not accuse Range of contaminating the Lipskys' well or express that the goal of Rich's testing would be to prove that Range did so. Similarly, although Rich's bid proposal that accompanied her August 9 letter described the tests planned by Rich, explained that the tests could determine the presence of various compounds, and stated generally that natural gas development may cause water and soil contamination, the proposal did not blame Range for contaminating the Lipskys' well.

On August 12, 2010, Rich sent an e-mail to Steven Lipsky stating in part,

Steve,

I left a message for you earlier today regarding an air test at the [well head]. Yes, I know it is expensive—but after serious consideration I am strongly recommending we take an air sample 5 feet away from the hose that is hooked up to the well head.... [24]

TCEQ does not have any jurisdiction over water, only the [Railroad Commission]—and you saw how helpful they were. Just wait, it gets better. However, TCEQ has total jurisdiction over air emissions. Once the natural gas leaves the water it is an airborne issue; and therefore falls into their laps to get involved

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—which they will jump because they are in the middle of SunSet Review (oversight by EPA).

Also, I can then contact the EPA and discuss the fact that we have a multi-issue environmental concern, including potential for explosion AND impact to human health (especially children)[, and] they will be very receptive.

It is worth every penny if we can get jurisdiction to EPA who oversees TCEQ. I would like to get my [technician] out there tomorrow if you approve of this strategy. Please advise.

Range contends that this e-mail proves that the object to be accomplished in the conspiracy was defamation, but the language of the e-mail focuses on the contamination of the Lipksys' well

and on executing a plan to trigger an investigation into the contamination rather than on blaming Range or pursuing an action against Range for the contamination. Two days after Rich sent the e-mail, she conducted tests at the Lipskys' residence. Eight days after Rich sent the e-mail, after she had collected preliminary data, she contacted the EPA. An e-mail sent by an EPA official following Rich's call to him referenced Rich's concern about the environmental conditions on the Lipskys' property, but the e-mail did not express that Rich had blamed Range for those conditions or had asked the EPA to take action against Range. Rich swore in an affidavit that when she called the EPA official, she "did not mention any Range entity by name or offer any opinion as to where the contaminants were coming from."

Range contends that Rich is "predisposed to blame oil and gas drilling anytime there is alleged contamination." Despite this alleged predisposition, however, Range did not present clear and specific evidence establishing that Rich had conspired with the Lipskys to blame Range on this occasion. Also, Range asserts that in furtherance of the conspiracy to defame and disparage Range, "videos of Mr. Lipsky lighting the end of the green garden hose were distributed to the media and others for the false and misleading proposition that the Lipskys' water is flammable." While the EPA official's August 20, 2010 e-mail states that Rich had told the official about the video, the e-mail also reflects that Rich had correctly disclosed to the official that the hose "was attached to [the Lipskys'] well vent." Range has not directed us to any evidence showing that Rich participated in distributing the video to the media, which reported that the video showed water being lit on fire, and the television reports about the video do not mention Rich.[25]

For these reasons, we conclude that Range did not establish through clear and specific evidence a prima facie case that relators agreed on the objective to defame Range, which is an essential element of Range's civil conspiracy claim as Range pled it. *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex.1983); *Cotten,* 187 S.W.3d at 701. Specifically, we have located no evidence showing that Rich agreed with the Lipskys to publicly blame Range for the contamination or that she ever in fact did so. Thus, we hold that the trial court clearly abused its discretion by denying relators' motions to dismiss Range's civil conspiracy claim under chapter 27.

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*See*Tex. Civ. Prac. & Rem.Code Ann. § 27.005(b)-(c).

In its pleading, on the same facts as it based its civil conspiracy claim, Range also brought a claim against relators for "aiding and abetting." [26] Relators sought dismissal of this claim. In responding to relators' motions to dismiss in the trial court, Range did not particularly discuss the elements or facts of its aiding and abetting claim or argue that the claim could survive independently from the civil conspiracy claim. Similarly, in this court, Range has not briefed its aiding and abetting claim separately from its civil conspiracy claim. Thus, for the same reasons that we have concluded that the trial court abused its discretion by denying relators' motions to dismiss Range's civil conspiracy claim, we likewise hold that the trial court abused its discretion by denying relators' motions to dismiss Range's aiding and abetting claim.

The Adequacy of Relators' Remedy by Appeal

Although we have determined that the trial court clearly abused its discretion, in part, by denying relators' motions to dismiss Range's claims under chapter 27, we cannot grant relief unless we determine that relators' remedy by appeal is inadequate. *Columbia Med. Ctr. of Las*

Colinas, 290 S.W.3d at 207;*Aslam,* 348 S.W.3d at 301. Because we have interpreted chapter 27 as not providing an interlocutory appeal when the dismissal of a plaintiff's claims is expressly and timely denied by a trial court, an immediate appellate remedy is not available to relators. *Lipsky,* 2012 WL 3600014, at *1 (citing *Jennings,* 378 S.W.3d at 529).

In this court, citing section 27.008(b) of the civil practice and remedies code, Range has recognized that when a trial court timely rules on a motion to dismiss, as the trial court did here, the trial court's decision may be reviewed by a petition for a writ of mandamus. *See*Tex. Civ. Prac. & Rem.Code Ann. § 27.008(b) (stating that an "appellate court shall expedite an appeal *or other writ* ... from a trial court order on a motion to dismiss a legal action" under chapter 27) (emphasis added). Nonetheless, Range contends that relators have not presented sufficiently extraordinary circumstances to justify relief.

An "adequate" remedy by appeal has "no comprehensive definition" and should not be decided based on "simple rules that treat cases as categories"; rather, in determining whether a relator has an adequate remedy by appeal, we must carefully analyze the costs and benefits of granting mandamus relief. *In re W.L.W.,* 370 S.W.3d 799, 807 (Tex.App.-Fort Worth 2012, orig. proceeding [mand. denied]). An appellate remedy is adequate "when any benefits to mandamus review are outweighed by the detriments." *Id.* (citing *In re Prudential Ins. Co. of Am.,* 148 S.W.3d 124, 136 (Tex.2004) (orig. proceeding)). In our consideration of whether an appellate remedy is adequate, we should consider whether mandamus review will spare litigants and the public the time and money wasted "enduring eventual reversal of improperly conducted proceedings." *Id.* (quoting *In re Team Rocket, L.P.,* 256 S.W.3d 257, 262 (Tex.2008) (orig. proceeding)). The "most frequent use ... of mandamus

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relief involves cases in which the very act of proceeding to trial ... would defeat the substantive right involved." *In re McAllen Med. Ctr., Inc.,* 275 S.W.3d 458, 465 (Tex.2008) (orig. proceeding); *see also In re Kings Ridge Homeowners Ass'n, Inc.,* 303 S.W.3d 773, 785 (Tex.App.-Fort Worth 2009, orig. proceeding) (expressing that we will not typically intervene to control incidental trial court rulings).

The legislature has determined that unmeritorious lawsuits subject to chapter 27 should be dismissed early in litigation, generally before parties must engage in discovery. *See*Tex. Civ. Prac. & Rem.Code Ann. §§ 27.003(b)-(c), .005(a)-(b); *Jennings,* 378 S.W.3d at 526. The supporters of the bill leading to the enactment of chapter 27 noted that the bill's purposes were to allow a prevailing movant of a motion to dismiss to achieve dismissal "earlier than would otherwise be possible" and to avoid costly legal expenses, including discovery expenses, even before the summary judgment stage of litigation. House Research Org., Bill Analysis, Tex. H.B. 2973, 82nd Leg, R.S. (2011); Senate Research Ctr., Bill Analysis, Tex. H.B. 2973, 82nd Leg., R.S. (2011).[27] Requiring a proper movant for dismissal under chapter 27 to engage fully in litigation, including a possible trial, would eviscerate these purposes and would ignore the legislature's determination that customary procedures are inadequate in some respects to protect defendants in cases falling within chapter 27's guidelines. Likewise, requiring proper chapter 27 movants generally to proceed through litigation when they should be entitled to dismissal harms a broader purpose of chapter 27 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." Tex. Civ. Prac. & Rem.Code Ann. § 27.002; *see also* House Research Org., Bill Analysis, Tex. H.B. 2973, 82nd Leg, R.S. (2011) (stating that the types of lawsuits that

are subject to dismissal under chapter 27 "chill public debate" and are "particularly problematic for independent voices that are not part of a news or media company").

The statute underlying this mandamus action is similar to the health care statute that the supreme court considered in *McAllen Med. Ctr., Inc.,* 275 S.W.3d at 464–69. In that case, while considering whether mandamus relief should be granted from a trial court's abuse of discretion in denying a hospital's motion to dismiss a health care liability claim because of the plaintiffs' failure to comply with a statute requiring sufficient expert reports, the court stated,

Here, the Legislature has already balanced most of the relevant costs and benefits for us. After extensive study, research, and hearings, the Legislature found that the cost of conducting plenary trials of claims as to which no supporting expert could be found was affecting the availability and affordability of health care—driving physicians from Texas and patients from medical care they need. Given our role among the coordinate branches of Texas government, we are in no position to contradict this statutory finding.... [D]enying mandamus review would defeat everything the Legislature was trying to accomplish.

[411 S.W.3d 554]

Id. at 466 (footnote omitted). Similarly, we conclude that denying mandamus relief in this case would defeat what the legislature was trying to accomplish, which was the early dismissal of unmeritorious claims that come within chapter 27's purview.

Finally, along with a movant's entitlement to early dismissal that will be lost if we refuse to grant mandamus relief in appropriate chapter 27 cases, the movant may also lose, by proceeding to trial, a statutory entitlement to attorney's fees and costs when dismissal is warranted under the chapter. *See*Tex. Civ. Prac. & Rem.Code Ann. § 27.009(a)(1).

For all of these reasons, we hold that relators have no adequate remedy by appeal to the extent, as explained above, that the trial court clearly abused its discretion by denying their motions to dismiss Range's claims under chapter 27. *See Columbia Med. Ctr. of Las Colinas,* 290 S.W.3d at 207;*Aslam,* 348 S.W.3d at 301.

Conclusion

Having held that the trial court clearly abused its discretion by denying Rich's and Shyla Lipsky's motions to dismiss all of Range's claims against them and that Rich and Shyla Lipsky have no adequate remedy by appeal, we conditionally grant their petitions for a writ of mandamus, order the trial court to set aside its February 16, 2012 order denying their motions to dismiss, and order the trial court to enter an order dismissing Range's claims against them. *See*Tex. Civ. Prac. & Rem.Code Ann. § 27.005(b)-(c). Having concluded that the trial court clearly abused its discretion by denying Steven Lipsky's motion to dismiss Range's civil conspiracy and aiding and abetting claims against him and that he has no adequate remedy by appeal, we conditionally grant, in part, his petition for a writ of mandamus, order the trial court to set aside its February 16, 2012 order denying his motion to dismiss to the extent that the motion concerned Range's civil conspiracy and aiding and abetting claims, and order the trial court to enter an order dismissing those claims against him. *See id.* We deny the remainder of the relief

sought by Steven Lipsky, thereby leaving pending Range's claims for defamation and business disparagement against him. A writ of mandamus will issue only in the event the trial court fails to comply with our instructions within thirty days of the date of this opinion.

Notes:

[1.] *See* Tex. Civ. Prac. & Rem.Code Ann. §§ 27.001–.011 (West Supp.2012). Chapter 27, also known as the Texas Citizens' Participation Act, is "considered to be anti-SLAPP legislation. SLAPP stands for Strategic Lawsuit Against Public Participation, and approximately twenty-seven states have enacted anti-SLAPP legislation." *Jennings v. WallBuilder Presentations, Inc.*, 378 S.W.3d 519, 521 & n.1 (Tex.App.-Fort Worth 2012, pet. denied).

[2.] In February 2012, the Honorable Trey Loftin, who at that time was the presiding judge of the 43rd District Court of Parker County, signed the order denying relators' motions to dismiss. In June 2012, the presiding judge of the 8th Administrative Judicial Region of Texas, the Honorable Jeff Walker, assigned the Honorable Graham Quisenberry, who is the presiding judge of the 415th District Court of Parker County, to preside in the underlying cause between the parties to this original proceeding. Accordingly, we substitute Judge Quisenberry as the respondent of this original proceeding for Judge Loftin. All of the relators, the real parties in interest, and Judge Quisenberry filed documents with this court waiving any entitlement to abatement of this original proceeding for the purpose of Judge Quisenberry's possible reconsideration of Judge Loftin's ruling on relators' motions to dismiss. *See* Tex.R.App. P. 7.2(b); *In re Gonzales*, 391 S.W.3d 251, 251–52 (Tex.App.-Austin 2012, orig. proceeding) (abating an original proceeding when the judge who made the ruling in dispute removed herself from the proceedings and a new judge was assigned to the underlying case).

[3.] Range had presented evidence to the commission, through geochemical gas fingerprinting, that the gas in the Lipskys' well did not match gas from the depth of the Barnett Shale, where Range was drilling. Range had also presented evidence that its drilling casing near the Lipskys' home was not leaking. In its decision, the commission explained that domestic wells in the area of the Lipskys' well had contained methane gas for many years. The commission further stated, "Given that the separation between the Barnett Shale and the aquifer [providing water to the Lipskys' well] is about 5,000 feet, it is evident that hydraulic fracturing of the Barnett Shale has not caused any communication with the aquifer."

[4.] Pursuant to Range's plea to the jurisdiction, the trial court eventually dismissed the Lipskys' claims against Range on the basis that the Lipskys were required to appeal the Railroad Commission's decision in Range's favor by filing a suit in a Travis County district court. The propriety of the dismissal of the Lipskys' affirmative claims against Range is not at issue in this original proceeding.

[5.] An EPA official testified in a deposition that he was not certain that Range caused the contamination of the Lipskys' well and that the EPA did not evaluate the geology below the Lipskys' well, including a shallower gas formation in the vicinity of the Lipskys' property that might have contributed to the contamination. In March 2012, the EPA withdrew its administrative order against Range.

[6.] Two local news stations broadcast a video taken from the Lipskys' residence. The broadcasts mentioned Range and stated that a homeowner had lit water on fire.

[7.] *Lipsky v. Range Prod. Co.,* No. 02–12–00098–CV, 2012 WL 3600014, at *1 (Tex.App.-Fort Worth Aug. 23, 2012, pets. denied) (mem. op.) (citing *Jennings,* 378 S.W.3d at 529).

[8.] *Id.*

[9.] The record indicates that the trial court chose to hear Range's plea to the jurisdiction concerning the Lipskys' claims against Range before hearing relators' motions to dismiss Range's claims.

[10.] We note that we have been instructed to construe chapter 27 liberally to "effectuate its purpose and intent fully." Tex. Civ. Prac. & Rem.Code Ann. § 27.011(b).

[11.] Particularly, Range asserted that the "Lipskys conspired with Rich in a strategy to get the EPA involved by using false and misleading information to manufacture a non-existent imminent danger and to falsely blame Range's operations for the alleged contamination."

[12.] Range alleged that Rich "concocted a disingenuous plan to improperly acquire samples and develop false conclusions from allegedly objective data regarding the presence of natural gas in the [Lipskys'] water well."

[13.] Thus, we need not determine whether relators' affidavits, which Range asserts are conclusory, provide additional evidence that satisfied relators' burden under section 27.005(b). Tex. Civ. Prac. & Rem.Code Ann. § 27.005(b); *see*Tex.R.App. P. 47.1.

[14.] Rich also presented evidence that she contacted the Parker County Fire Department to express concerns about the contamination of the Lipskys' well.

[15.] We note that the public's interest in fracking and the contamination of the Lipskys' well is evidenced by, among other facts in the record, the Railroad Commission's public hearing into the contamination of the well, the reporting of the EPA's action against Range by The Wall Street Journal, local newscasts concerning the gas in the Lipskys' well, a story in the Fort Worth Star–Telegram about the Railroad Commission's proceedings, and a story in The New York Times concerning the EPA's emergency order against Range.

[16.] This statement was made to an appraisal review board and, according to Steven Lipsky's deposition, could have been repeated to friends and family.

[17.] For example, Range presented evidence that Steven Lipsky told a newspaper reporter that Range owned the Railroad Commission and "got away with" contaminating his well.

[18.] Steven Lipsky told a reporter, "You can't drink this water." In a deposition, however, Rich indicated that the gas level in the Lipskys' water was not high enough to cause an imminent danger. She also conceded that the levels of gases in the Lipskys' water were below national drinking water standards. Range funded testing of the Lipskys' water by an independent company, and that company determined that there were no gases that made the water unsafe to drink.

[19.] For example, Steven Lipsky was quoted in a newspaper article as stating that the Railroad Commission's decision that Range had not contaminated the Lipskys' well was "ridiculous."

[20.] We conclude that Range presented sufficient evidence to maintain its claims against Steven Lipsky for defamation and business disparagement at this preliminary stage in the litigation, but we do not intend to indicate an opinion about whether the claims will ultimately have merit. None of the parties to this original proceeding have requested for us, at this stage, to individually assess the merits of each of the numerous statements relied on by Range to support those claims, and we decline to do so. Thus, we express no opinion about whether the privileges asserted by Steven Lipsky bar Range's claim for relief on various statements.

[21.] The trial court could have reasonably concluded that whether Range owned the Railroad Commission and had prevailed in the Railroad Commission's proceeding through corruption were verifiable facts that may be subject to a defamation claim. *See* *Bentley v. Bunton*, 94 S.W.3d 561, 583–85 (Tex.2002).

[22.] Furthermore, the trial court could have reasonably concluded that Steven Lipsky's statements that Range owned the Railroad Commission and prevailed in the Railroad Commission's proceedings through corruption were defamatory per se because the statements implied that Range had engaged in criminal activity. *See Wechter,* 683 S.W.2d at 374;*French v. French*, 385 S.W.3d 61, 72 (Tex.App.-Waco 2012, pet. denied); *see also*Tex. Penal Code Ann. § 36.02(a)(1) (West 2011) (stating that bribery occurs when a person intentionally or knowingly offers a benefit as consideration for a public servant's decision).

[23.] To the extent that Range relies on statements made by Rich exclusively in her deposition to support its defamation and business disparagement claims, Range recognizes in its briefing that communications made in the course of a quasi-judicial proceeding are subject to an absolute privilege. *See* *James v. Brown*, 637 S.W.2d 914, 916 (Tex.1982) (expressing that the absolute privilege applies to statements made in depositions); *Reagan v. Guardian Life Ins. Co.*, 140 Tex. 105, 111, 166 S.W.2d 909, 912–13 (1942) (stating that the Railroad Commission is a quasi-judicial body and that communications to quasi-judicial bodies are absolutely privileged).

[24.] Range contends that Rich's plan to take an air sample five feet away from the well head was calculated to create a "non-existent imminent danger." As Rich contends, however, the Railroad Commission and the EPA each confirmed the presence of gas in the Lipskys' water well. According to the EPA, the Railroad Commission's test of the Lipskys' water showed higher levels of benzene and toluene than Rich's test had. The EPA's test showed higher levels of benzene, toluene, and dissolved methane than Rich's test had, and the EPA concluded that these gases posed a "variety of risks to health of persons."

[25.] Rich stated in an affidavit, "Although contacted by several media sources[,] I did not give out any information about my tests to anyone but the Lipskys and the [EPA]." Rich also swore, "At no time did I refer to any Range entity or activity to any individual or organization and did not give any opinion as to the source of the gas. I simply reported that the well contained components related to natural gas."

[26.] There is some uncertainty about whether Texas recognizes a cause of action of "aiding and abetting" separately from a civil conspiracy claim. *See Ernst & Young,* *L.L.P. v. Pac. Mut. Life Ins. Co.*, 51 S.W.3d 573, 583 n. 7 (Tex.2001); *O'Kane v. Coleman,* No. 14–06–00657–CV, 2008 WL 2579832, at *5 (Tex.App.-Houston [14th Dist.] July 1, 2008, no pet.) (mem. op.).

[27.] In the trial court, Range conceded that "Chapter 27 requires a motion to dismiss to be determined early on the litigation process in order to reduce litigation costs." Range also candidly stated that chapter 27 provides a "mandate that the motion [to dismiss] be filed and heard as soon as practicable."

IN RE STEVEN LIPSKY, RELATOR

NO. 13-0928

SUPREME COURT OF TEXAS

Argued December 4, 2014
April 24, 2015

ON PETITION FOR WRIT OF MANDAMUS

JUSTICE DEVINE delivered the opinion of the Court.

The Texas Citizens Participation Act (TCPA)[1] protects citizens who petition or speak on matters of public concern from retaliatory lawsuits that seek to intimidate or silence them. TEX. CIV. PRAC. & REM. CODE §§ 27.001-.011. The protection consists of a special motion for an expedited consideration of any suit that appears to stifle the defendant's communication on a matter of public concern. *Id*. § 27.003. In reviewing that motion, the trial court is directed to dismiss the suit unless "clear and specific evidence" establishes the plaintiffs' "prima facie case." *Id*. § 27.005(c). When applying the Act's requirement for clear and specific evidence, however, the courts of appeals disagree about the role of circumstantial evidence.

Some courts hold that only direct evidence is relevant when considering a motion to dismiss under the Act, while others have concluded that relevant circumstantial evidence must also be

considered. The court of appeals here considered circumstantial evidence, and we agree that clear and specific evidence under the Act includes relevant circumstantial evidence. 411 S.W.3d 530, 546 (Tex. App.—Fort Worth 2013). We further agree, generally, with the court of appeals's disposition of the proceedings below and accordingly deny all relief requested here.

I. Background and Procedural History

Steven and Shyla Lipsky own several acres in Weatherford, Texas. In 2005 they drilled a well on their property to a depth of about two hundred feet to provide water to a cabin and boathouse. In 2009 they finished a house on the property, connecting the well to their new home. That same year, Range Resources Corporation and Range Production Company drilled two gas wells about a half-mile from the Lipskys' property.

A few months after moving into their new home, the Lipskys experienced mechanical problems with their well. They contacted a well-servicing company, which identified the problem as "gas locking," a condition typically associated with an excess of natural gas in the ground water. A submersible pump's ability to transport water from a well can be affected when too much gas is in the water.

Concerned about the gas in their well water, the Lipskys contacted local health officials who referred them to Alisa Rich, an environmental consultant with Wolf Eagle Environmental. After tests, Rich confirmed the presence of methane and other gases in the well. About this time,

Lipsky made a video of himself lighting gas escaping from a garden hose attached to his well. To produce this effect, Lipsky connected the hose to a vent on his water well. He shared his video with the Environmental Protection Agency (EPA) and the media, which reported on the flammable nature of

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Lipsky's water well. He also complained about the gas in his well to the Texas Railroad Commission. Lipsky's own investigation led him to believe that Range, the oil and gas operator closest to his property, had some responsibility for contaminating his ground water.

Both the EPA and Railroad Commission began investigating Lipsky's complaints. The EPA initially concluded that Range's production activities had contributed to the gas in the Lipskys' well water and that the situation could be hazardous to health and safety. The federal agency ordered Range to provide the Lipskys potable water and to install explosivity meters at their property.

The Railroad Commission completed its investigation a few months later. Although invited to participate in the Commission's evidentiary hearing, the Lipskys declined. The Commission thereafter concluded that Range's operations in the area were not the source of the contamination. Lipsky immediately denounced the Railroad Commission's decision in the media and continued to blame Range, pointing to the EPA's action and his expert's opinions.

The Lipskys thereafter sued Range and others involved in developing their residential area. As to Range, they alleged that its fracking operations near their property were negligent, grossly negligent, and a nuisance. They asserted that Range's operations contaminated their water well, causing the water to become flammable and their home uninhabitable. Range answered the suit and moved to dismiss all claims as an improper collateral attack on the Railroad Commission's ruling. Range also filed a counterclaim against the Lipskys and a third-party claim against Rich (the Lipskys' environmental consultant) alleging defamation, business disparagement, and a civil conspiracy. The Lipskys and Rich responded by moving to dismiss Range's counter-attack as an

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improper attempt to suppress their First Amendment rights guaranteed under the Constitution and protected by the Texas Citizens Participation Act. TEX. CIV. PRAC. & REM. CODE § 27.005.

The trial court granted Range's motion to dismiss, agreeing that the Lipskys' claims were an improper collateral attack on the Commission's determination. The court also declined to dismiss Range's claims against the Lipskys and Rich by denying their motions to dismiss under the Texas Citizens Participation Act. The Lipskys and Rich attempted an interlocutory appeal from this latter ruling, but the court of appeals dismissed the appeal for want of jurisdiction.[2] *See Lipsky v. Range Prod. Co.*, No. 02-12-00098-CV, 2012 WL 3600014, at *1 (Tex. App.—Fort Worth Aug. 23, 2012, pet. denied) (mem. op.). The court, however, allowed the challenge to proceed as an original proceeding. 411 S.W.3d at 536. Meanwhile, the EPA withdrew its administrative order against Range without explanation. *See* Joint Stipulation of Dismissal Without Prejudice, *United States v. Range Prod. Co.*, No. 3:11-CV-00116-F (N.D. Tex. Mar. 30, 2012).

The court of appeals thereafter determined that the Texas Citizens Participation Act required the dismissal of Range's claims against Lipsky's wife, Shyla, and his environmental consultant, Rich, and that the trial court had accordingly abused its discretion in not dismissing those claims.

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411 S.W.3d at 554. The court further determined that the TCPA did not similarly require dismissal of all of Range's claims against Lipsky.[3] *Id*. at 546. The court of appeals granted mandamus relief to Lipsky's wife and consulant, while denying similar relief to Lipsky, prompting both Lipsky and Range to seek mandamus relief in this Court. In their respective petitions, Lipsky argues that the TCPA required the trial court to dismiss all claims against him also, while Range argues that the TCPA did not require the dismissal of any claims. The Lipsky petition accordingly concludes that the trial court abused its discretion in failing to grant his TCPA motion. The Range petition, on the other hand, concludes that the court of appeals abused its discretion in granting mandamus relief to Lipsky's wife, his environmental consultant, and Lipsky himself (in part) because the TCPA did not require it.

II. The Texas Citizens Participation Act

As already mentioned, the Texas Citizens Participation Act or TCPA protects citizens from retaliatory lawsuits that seek to intimidate or silence them on matters of public concern. *See* House Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. H.B. 2973, 82nd Leg., R.S. (2011). The Act provides a special procedure for the expedited dismissal of such suits. A two-step process is initiated by motion of a defendant who believes that the lawsuit responds to the defendant's valid exercise of First Amendment rights. Under the first step, the burden is initially on the defendant-movant to show "by a preponderance of the evidence" that the plaintiff's claim "is based on, relates

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to, or is in response to the [movant's] exercise of: (1) the right of free speech;[4] (2) the right to petition;[5] or (3) the right of association."[6] TEX. CIV. PRAC. & REM. CODE § 27.005(b). If the movant is able to demonstrate that the plaintiff's claim implicates one of these rights, the second step shifts the burden to the plaintiff to "establish[] by clear and specific evidence a prima facie case for each essential element of the claim in question." *Id.* § 27.005(c).

In determining whether the plaintiff's claim should be dismissed, the court is to consider the pleadings and any supporting and opposing affidavits. *Id*. § 27.006(a). Moreover, the motion to dismiss ordinarily suspends discovery, *id*. § 27.003(c), although the statute leaves the possibility for a court to order limited discovery for "good cause" as it relates to the motion itself, *id*. § 27.006(b). Within defined time limits, the court must then rule on the motion and must dismiss the plaintiff's claim if the defendant's constitutional rights are implicated and the plaintiff has not met the required showing of a prima facie case. *Id*. § 27.005. The determination is to be made promptly, ordinarily within 150 days of service of the underlying legal action. *See id*. §§ 27.003(b), .004(a), .005(a).

In this proceeding, only the second step is at issue—the question being whether the plaintiff has met its burden of "establish[ing] by clear and specific evidence a prima facie case for each essential element of the claim in question." *Id*. § 27.005(c). The parties disagree about the

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evidentiary burden this language imposes. Lipsky argues that the phrase "clear and specific evidence" elevates the evidentiary standard, requiring Range to produce direct evidence as to each element of its claim. Range, on the other hand, argues that circumstantial evidence and rational inferences may be considered by the court in determining whether clear and specific evidence exists and that the TCPA's prima-facie-case requirement does not impose a higher or unique evidentiary standard. The dispute mirrors a similar disagreement among the courts of appeals.

Some courts, focusing on the requirement of "clear and specific evidence," have interpreted the statute to require a heightened evidentiary standard, unaided by inferences. *See Shipp v. Malouf*, 439 S.W.3d 432, 439 (Tex. App.—Dallas 2014, pet. denied); *Young v. Krantz*, 434 S.W.3d 335, 342-43 (Tex. App.—Dallas 2014, no pet.); *KBMT Operating Co. v. Toledo*, 434 S.W.3d 276, 282 (Tex. App.—Beaumont 2014, pet. granted); *Farias v. Garza*, 426 S.W.3d 808, 814 (Tex. App.—San Antonio 2014, pet. filed); *Rio Grande H2O Guardian v. Robert Muller Family P'ship, Ltd.*, No. 04-13-00441-cv, 2014 WL 309776, at *2 (Tex. App.—San Antonio Jan. 29, 2014, no pet.) (mem op.); *Sierra Club v. Andrews Cnty., Tex.*, 418 S.W.3d 711, 715 (Tex. App.—El Paso 2013, pet. filed); *Alphonso v. Deshotel*, 417 S.W.3d 194, 198 (Tex. App.—El Paso 2013, no pet.); *Fitzmaurice v. Jones*, 417 S.W.3d 627, 632 (Tex. App.—Houston [14th Dist.] 2013, no pet.); *Rehak Creative Servs., Inc. v. Witt*, 404 S.W.3d 716, 726 (Tex. App.—Houston [14th Dist.] 2013, pet. denied). Implicit in these decisions is the assumption that circumstantial evidence is not sufficiently "clear and specific" to satisfy the statutory burden. Other courts, focusing on the prima-facie-case language, have concluded that the statute permits the court to draw rational inferences from circumstantial evidence when determining whether the plaintiff has met its threshold factual burden.

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See Schimmel v. McGregor, 438 S.W.3d 847, 855 (Tex. App.—Houston [1st Dist.] 2014, pet. denied); *Combined Law Enforcement Ass'ns of Tex. v. Sheffield*, No. 03-13-00105-CV, 2014 WL 411672, at *10 (Tex. App.—Austin Jan. 31, 2014, pet. filed) (mem. op.); *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 80 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); *In re Lipsky*, 411 S.W.3d at 539.

The statute does not define "clear and specific evidence," but the courts that have interpreted the phrase to impose a heightened evidentiary standard have purportedly found support in the case law. Those courts invariably rely on two cases predating the Act for the proposition that "clear and specific evidence" means "evidence unaided by presumptions, inferences or intendments." *See, e.g., Sierra Club*, 418 S.W.3d at 715 (citing *McDonald v. Clemens*, 464 S.W.2d 450, 456 (Tex. Civ. App.—Tyler 1971, no writ) and *S. Cantu & Son v. Ramirez*, 101 S.W.2d 820, 822 (Tex. Civ. App.—San Antonio 1936, no writ)); *Rehak Creative Servs.*, 404 S.W.3d at 726 (relying on same two cases).

Both cases involved fraud claims. In *McDonald*, the trial court granted summary judgment on the fraud claim, and the appellate court affirmed, concluding no material fact issue existed as to one or more of the claim's essential elements. *McDonald*, 464 S.W.2d at 456. The court noted that the summary judgment could not be reversed on the presumption of fraud but rather required the existence of a fact issue raised by more than mere conjecture:

As to appellants' claim of fraud, the burden was upon them to raise a fact issue as to its existence by competent evidence. This burden could not be discharged in the absence of a showing that all of the elements of actionable fraud were present. *Mere conjecture or evidence which does not necessarily tend to that conclusion is insufficient. Charges of fraud must be established by clear and specific evidence*

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unaided by presumptions, inferences or intendments. Until or unless fraud is proved, the presumption is in favor of the fairness of a transaction and specific acts of fraud must be both alleged and proved by appellants in response to appellee's motion for summary judgment.

Id. (emphasis added).

The context establishes that the court was not attempting to define "clear and specific evidence" to exclude circumstantial evidence or to require only direct evidence to create a fact question. Such a definition would, of course, have been erroneous "[s]ince intent to defraud is not susceptible to direct proof [and] invariably must be proven by circumstantial evidence." *Spoljaric v. Percival Tours, Inc*., 708 S.W.2d 432, 435 (Tex. 1986). Similarly, the court in *S. Cantu & Son* did not define "clear and specific evidence" to exclude circumstantial evidence but instead said that fraud could not be inferred from the "vague, indefinite, and inconclusive" testimony of interested witnesses.[7]

Circumstantial evidence can, of course, be vague, indefinite, or inconclusive, but it is not so by definition. Rather, it is simply indirect evidence that creates an inference to establish a central fact. *See Felker v. Petrolon, Inc*., 929 S.W.2d 460, 463-64 (Tex. App.—Houston [1st Dist.] 1996, writ denied). It is admissible unless the connection between the fact and the inference is too weak to be of help in deciding the case. TEX. R. EVID. 401-02. The common law has developed several

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distinct evidentiary standards, but none of these standards categorically rejects the use of circumstantial evidence.

The applicable evidentiary standard is generally determined by the nature of the case or particular claim. Criminal cases require proof beyond a reasonable doubt, a near certainty, whereas civil cases typically apply the preponderance-of-the-evidence standard, that is, a fact-finder's determination that the plaintiff's version of the events is more likely than not true. Some civil claims, including some defamation claims, elevate the evidentiary standard to require proof by clear-and-convincing evidence. *Bentley v. Bunton*, 94 S.W.3d 561, 596 (Tex. 2002). This standard requires that the strength of the plaintiff's proof produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations. *Id*. at 597.

Clear and specific evidence is not a recognized evidentiary standard. Although it sounds similar to clear and convincing evidence, the phrases are not legally synonymous. The Legislature well understands the clear-and-convincing-evidence standard and uses that standard when it so intends. *See, e.g*., TEX. CIV. PRAC. & REM. CODE §§ 18.033(c), 41.001(2), 41.003(b), (c), 134A.004(b), 147.122.[8] But even were we to assume that the Legislature intended to apply the

clear-and-convincing standard in this statute, the statute would still not exclude circumstantial evidence.

All evidentiary standards, including clear and convincing evidence, recognize the relevance of circumstantial evidence. In fact, we have acknowledged that the determination of certain facts in particular cases may exclusively depend on such evidence. *See, e.g., Bentley*, 94 S.W.3d at 596

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(noting, in a defamation case, that claims involving an element of a defendant's state of mind "must usually [] be proved by circumstantial evidence"). Circumstantial evidence may be used to prove one's case-in-chief or to defeat a motion for directed verdict, and so it would be odd to deny its use here to defeat a preliminary motion to dismiss under the TCPA. That the statute should create a greater obstacle for the plaintiff to get into the courthouse than to win its case seems nonsensical. *See Carreras v. Marroquin*, 339 S.W.3d 68, 73 (Tex. 2011) (noting that we "interpret statutes to avoid an absurd result").

The TCPA's purpose is to identify and summarily dispose of lawsuits designed only to chill First Amendment rights, not to dismiss meritorious lawsuits. *See* TEX. CIV. PRAC. & REM. CODE § 27.002 (balancing "the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law" against "the rights of a person to file meritorious lawsuits for demonstrable injury"). To accomplish its purpose, the Act endorses a summary process, requiring judicial review of the pleadings and limited evidence, typically within 150 days following service. TEX. CIV. PRAC. & REM. CODE §§ 27.003(b), .004(a), .005(a); *Jennings*, 378 S.W.3d at 526. To defeat an appropriate TCPA motion to dismiss, the opponent must establish "by clear and specific evidence a prima facie case for each essential element of the claim in question." TEX. CIV. PRAC. & REM. CODE § 27.005(c).

As discussed, neither the Act nor the common law provides a definition for "clear and specific evidence."[9] Words and phrases that are not defined by statute and that have not acquired

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a special or technical meaning are typically given their plain or common meaning. *FKM P'ship, Ltd. v. Bd. of Regents of Univ. of Hous. Sys.*, 255 S.W.3d 619, 633 (Tex. 2008). The words "clear" and "specific" in the context of this statute have been interpreted respectively to mean, for the former, "'unambiguous,' 'sure,' or 'free from doubt'" and, for the latter, "'explicit' or 'relating to a particular named thing.'" *See KTRK Television, Inc. v. Robinson*, 409 S.W.3d 682, 689 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (quoting BLACK'S LAW DICTIONARY 268, 1434 (8th ed. 2004)).

The statute, however, requires not only "clear and specific evidence" but also a "prima facie case." In contrast to "clear and specific evidence," a "prima facie case" has a traditional legal meaning. It refers to evidence sufficient as a matter of law to establish a given fact if it is not rebutted or contradicted. *Simonds v. Stanolind Oil & Gas Co.*, 136 S.W.2d 207, 209 (Tex. 1940). It is the "minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true." *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 223 (Tex. 2004) (per curiam) (quoting *Tex. Tech Univ. Health Scis. Ctr. v. Apodaca*, 876 S.W.2d 402, 407 (Tex. App.—El Paso 1994, writ denied)).

The TCPA's direction that a claim should not be dismissed "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" thus describes the clarity and detail required to avoid dismissal. TEX. CIV. PRAC. & REM. CODE § 27.005(c) (emphasis added). Courts are further directed to make that determination early in the proceedings, typically on the basis of the pleadings and affidavits. But pleadings that might suffice in a case that does not implicate the TCPA may not be sufficient to satisfy the TCPA's "clear and specific evidence" requirement.

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Our procedural rules merely require that the pleadings provide fair notice of the claim and the relief sought such that the opposing party can prepare a defense. *See* TEX. R. CIV. P. 45 & 47. Even the omission of an element is not fatal if the cause of action "may be reasonably inferred from what is specifically stated." *Boyles v. Kerr*, 855 S.W.2d 593, 601 (Tex. 1993). Moreover, under notice pleading, a plaintiff is not required to "set out in his pleadings the evidence upon which he relies to establish his asserted cause of action." *Paramount Pipe & Supply Co. v. Muhr*, 749 S.W.2d 491, 494-95 (Tex. 1988). But the TCPA requires that on motion the plaintiff present "clear and specific evidence" of "each essential element."

Fair notice of a claim under our procedural rules thus may require something less than "clear and specific evidence" of each essential element of the claim. Because the Act requires more, mere notice pleading—that is, general allegations that merely recite the elements of a cause of action—will not suffice. Instead, a plaintiff must provide enough detail to show the factual basis for its claim. In a defamation case that implicates the TCPA, pleadings and evidence that establishes the facts of when, where, and what was said, the defamatory nature of the statements, and how they damaged the plaintiff should be sufficient to resist a TCPA motion to dismiss.

Though the TCPA initially demands more information about the underlying claim, the Act does not impose an elevated evidentiary standard or categorically reject circumstantial evidence. In short, it does not impose a higher burden of proof than that required of the plaintiff at trial. We accordingly disapprove those cases that interpret the TCPA to require direct evidence of each essential element of the underlying claim to avoid dismissal. With that understanding of the Act's requirements, we turn to pleadings and evidence in this case.

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III. Steven Lipsky's Petition

Range sued Steven Lipsky, alleging defamation, business disparagement, and civil conspiracy. The court of appeals found no evidence of a civil conspiracy, but some evidence of the other claims, concluding "that the trial court did not abuse its discretion by denying Steven Lipsky's motion to dismiss Range's defamation and business disparagement claims." 411 S.W.3d at 547. Contrary to the court of appeals's opinion, Lipsky argues that no clear and specific evidence shows he defamed Range or disparaged its business. He concludes then that the trial court should have granted his motion to dismiss pursuant to the TCPA.

Business disparagement and defamation are similar in that both involve harm from the publication of false information. *Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc.*, 434 S.W.3d 142, 155 (Tex. 2014). The respective torts, however, serve different interests. Whereas "defamation actions chiefly serve to protect the personal reputation of an injured party,

[] a business disparagement claim protects economic interests." *Forbes Inc. v. Granada Biosciences, Inc*., 124 S.W.3d 167, 170 (Tex. 2003). Business disparagement or "injurious falsehood applies to derogatory publications about the plaintiff's economic or commercial interests." 3 DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 656, at 615 (2d ed. 2011). The tort does not seek to redress dignitary harms to the business owner, but rather redresses aspersions cast on the business's commercial product or activity that diminishes those interests. *Hurlbut v. Gulf Atl. Life Ins. Co*., 749 S.W.2d 762, 766-67 (Tex. 1987).

A corporation or other business entity that asserts a claim for defamation may assert an additional or alternative claim for business disparagement if it seeks to recover economic damages

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for injury to the business. *Burbage v. Burbage*, 447 S.W.3d 249, 261 n.6 (Tex. 2014). Impugning one's reputation is possible without disparaging its commercial interests and vice versa. Depending on the circumstances, then, a plaintiff may have a claim for defamation, or for business disparagement, or both.[10]

A. Business Disparagement (Injurious Falsehood)

To defend against Lipsky's dismissal motion, Range's burden under the TCPA was to "establish[] by clear and specific evidence a prima facie case for each essential element of the claim in question." TEX. CIV. PRAC. & REM. CODE § 27.005(c). "To prevail on a business disparagement claim, a plaintiff must establish that (1) the defendant published false and disparaging information about it, (2) with malice, (3) without privilege, (4) that resulted in special damages[11] to the plaintiff." *Forbes*, 124 S.W.3d at 170 (citing *Hurlbut*, 749 S.W.2d at 766). Lipsky contends that the trial court should have dismissed Range's business-disparagement claim because no evidence established that his remarks caused Range any special or economic damages.

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The court of appeals disagreed. It concluded that an affidavit from Range's senior vice president was sufficient proof of Range's damages, at this stage, to defeat Lipsky's motion to dismiss. *See* 411 S.W.3d at 547 (noting that the affidavit "provided the trial court with minimum but sufficient facts, at this stage in the litigation, to raise a rational inference, and therefore serve as prima facie proof" of Range's losses).

Range's vice president averred in general terms that Lipsky's statements caused Range to suffer "direct pecuniary and economic losses and costs, lost profits, loss of its reputation, and loss of goodwill in the communities in which it operates . . . in excess of three million dollars."[12] The court of appeals concluded that the affidavit, "by stating that Range had suffered direct economic losses and 'lost profits,'" was sufficient "to raise a rational inference . . . that Range lost 'trade or other dealings' as a result of statements made by Steven Lipsky." *Id*. (quoting *Hurlbut*, 749 S.W.2d at 767).

Lipsky argues, however, that the affidavit is conclusory and therefore insufficient to satisfy the TCPA's requirement of "clear and specific evidence," and we agree. Bare, baseless opinions do

not create fact questions, and neither are they a sufficient substitute for the clear and specific evidence required to establish a prima facie case under the TCPA. *See Elizondo v. Krist*, 415 S.W.3d 259, 264 (Tex. 2013) ("Conclusory statement[s] . . . [are] insufficient to create a question of fact to defeat summary judgment."); *City of San Antonio v. Pollock*, 284 S.W.3d 809, 816 (Tex. 2009) (holding conclusory, baseless testimony to be no evidence). Opinions must be based on demonstrable facts and a reasoned basis. *Elizondo*, 415 S.W.3d at 265. We accordingly disagree with the court of appeals that general averments of direct economic losses and lost profits, without more, satisfy the minimum requirements of the TCPA. Although the affidavit states that Range "suffered direct pecuniary and economic losses," it is devoid of any specific facts illustrating how Lipsky's alleged remarks about Range's activities actually caused such losses. *See, e.g., Burbage*, 447 S.W.3d at 262 (noting that a jury could not reasonably infer that cancellations for a funeral home business were caused by defamation when any number of reasons could have caused the cancellations).

Range, however, asserted not only business disparagement but also defamation. Corporations and other business entities have reputations that can be libeled apart from the businesses they own, and such entities can prosecute an action for defamation in their own names. *See Waste Mgmt. of Tex.*, 434 S.W.3d at 147, 150-51 & n.35 (recognizing that a corporation, as owner of a business, may sue for defamation that injures its reputation). Moreover, a corporation or other business entity asserting a claim for business disparagement may also assert additional or alternative claims for defamation to recover non-economic general damages such as injury to reputation that are not

recoverable on a business-disparagement claim. *Id.* at 155-156 & n.81. We turn then to Range's defamation claim and Lipsky's complaint that the trial court should have also dismissed it.

B. Defamation

Defamation's elements 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. *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998); *see also Waste Mgmt. of Tex.*, 434 S.W.3d at 146 n.7. The status of the person allegedly defamed determines the requisite degree of fault. A private individual need only prove negligence, whereas a public figure or official must prove actual malice. *WFAA-TV, Inc.*, 978 S.W.2d at 571. "Actual malice" in this context means that the statement was made with knowledge of its falsity or with reckless disregard for its truth. *Huckabee v. Time Warner Entm't Co.*, 19 S.W.3d 413, 420 (Tex. 2000). Finally, the plaintiff must plead and prove damages, unless the defamatory statements are defamatory per se. *Waste Mgmt. of Tex.*, 434 S.W.3d at 162 n.7.

Defamation per se refers to statements that are so obviously harmful that general damages may be presumed. *Hancock*, 400 S.W.3d at 63-64. General damages include non-economic losses, such as loss of reputation and mental anguish. *Id.* Special damages, on the other hand, are never presumed as they represent specific economic losses that must be proven. *Id.* at 65-66. And even though Texas law presumes general damages when the defamation is per se, it does not "presume any particular amount of damages beyond nominal damages." *Salinas v. Salinas*, 365 S.W.3d 318, 320 (Tex. 2012) (per curiam). Any award of general damages that exceeds a nominal

sum is thus reviewed for evidentiary support. *Burbage*, 447 S.W.3d at 259; *see also Bentley*, 94 S.W.3d at

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606-07 (criticizing award of mental anguish damages in defamation per se case because it was excessive and beyond any figure the evidence supported).

(1) *The Falsehoods*

Lipsky complains that the trial court should have dismissed the defamation claim against him because Range failed to establish the defamatory nature of his alleged statements. The court of appeals listed the following published statements as potentially defamatory to Range:

• Range's drilling went under the Lipskys house while omitting that Range' s wellbore was over a mile below the surface;

• the Lipskys' well no longer pumped water (when it actually could);

• the Lipskys had found unnatural detergents in the water;

• the Lipskys could not live in their home (although they continued to do so);

• Range would eventually "own" the Lipskys' home (which implied that Range was responsible for contaminating the Lipskys' water source and would be liable for doing so);

• Range was politically powerful and had prevailed with the Railroad Commission through corruption, even though the Railroad Commission had considered extensive evidence to support its decision and the Lipskys had not participated in the Railroad Commission's hearing;

• the Lipskys could literally light their water on fire, and the water was unsafe to drink;

• Range's drilling operations contaminated the water (even though the Railroad Commission had found that the operations had not); and

• Range treated the Lipskys like "criminals."

411 S.W.3d at 545 (footnotes omitted). Lipsky argues that these statements are not defamatory either because they are true, do not explicitly refer to Range, are unverifiable statements of opinion,

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or are statements subject to a bona fide scientific dispute. Lipsky made these statements to the media and to his family and friends, as well as to the EPA, the Parker County Appraisal Review Board, and the Texas Railroad Commission.

"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." *Bentley*, 94 S.W.3d at 579 (internal quotation marks omitted).

While some of the statements may, in isolation, not be actionable, in looking at the entirety of Lipsky's publications 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.

The Commission's investigation coincided with the EPA's, beginning in August 2010, after Lipsky complained to the Abilene District Office about gas in his water well. That month, the Commission collected water and gas samples from the Lipskys' well, asked Range to test the mechanical integrity of its wells, and further obtained a gas analysis from Range's operations for comparison with the gas in the Lipskys' well. After comparing the respective gas samples, the Abilene District Office found them to have "distinct characteristics," but the Commission nevertheless continued its investigation.

Meanwhile, the EPA decided that Range's two gas wells were an "imminent and substantial endangerment to a public drinking water aquifer," and issued an Emergency Administrative Order to that effect on December 7, 2010. The next day, the Commission issued its Notice of Hearing, inviting the EPA and the Lipskys to participate in an evidentiary hearing on the cause of the aquifer's contamination. Neither the EPA nor the Lipskys chose to participate, however.

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After hearing testimony on the groundwater investigation and Range's operations in the area, as well as expert testimony on geology, hydrogeology, microseismic analysis, hydraulic fracturing, geochemical gas fingerprinting, and petroleum engineering, the Commission's hearing examiners concluded that Range's gas wells had not contributed to the contamination of any domestic water wells. The examiners concluded instead that the Strawn formation was the most likely source of the gas in the Lipskys' well.

The Strawn is a shallow formation, lying directly beneath the Trinity aquifer at a depth of 200 to 400 feet. There had been gas production from the Strawn in the mid-1980s about a mile from Range's current wells. Range's two wells, however, did not produce from the Strawn. They were instead completed in the Barnett Shale, a formation lying more than a mile below the aquifer. And although Range used hydraulic fracturing of the Barnett Shale to extract its gas, the examiners found that this caused no communication with the aquifer, as nearly a mile of rock remained between the highest fracture point and the aquifer. The examiners further confirmed the mechanical integrity of Range's wells, finding its production casings properly cemented and in compliance with the Texas Commission on Environmental Quality's recommendations for water quality protection. The examiners noted that gas contamination in water wells throughout the county had occurred since at least 2003, several years before Range drilled the two wells in question.

Adopting the examiners' findings and conclusions, the Railroad Commission signed its final order on March 22, 2011. Afterward, Lipsky was quoted in news articles to state that the Commission's decision was "ridiculous," the product of a "corrupt system," and that "it was kind of sad." Although he had not participated in the hearing, he referenced the earlier EPA order and

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his own expert, who suspected that the contamination resulted from Range's nearby drilling. Thus, despite the Commission's conclusions to the contrary, Lipsky continued to maintain that

Range was responsible for contaminating the aquifer and his domestic water well. The court of appeals concluded that there was some evidence of a defamatory statement concerning Range sufficient to defeat Lipsky's TCPA motion to dismiss, and we agree. His statements were not presented as opinion but were "sufficiently factual to be susceptible of being proved true or false." *Milkovich v. Lorain Journal Co*., 497 U.S. 1, 21 (1990).

(2) *The Damages*

Lipsky also argues that the trial court should have dismissed Range's defamation claim because no evidence established that his remarks caused the company specific damages. The court of appeals again disagreed. It concluded that the affidavit from Range's senior vice president, which discussed Range's losses in very general terms, was sufficient to defeat Lipsky's TCPA motion to dismiss. *See* 411 S.W.3d at 547. As we have already determined, the vice president's affidavit was insufficient proof of Range's special damages for purposes of the TCPA.

Range argues, however, that it did not have to submit proof of special damages as part of its defamation claim because Lipsky's statements were defamatory per se. When an offending publication qualifies as defamation per se, a plaintiff may recover general damages without proof of any specific loss. *Hancock*, 400 S.W.3d at 63-64. Thus, if Lipsky's remarks concerning Range are actionable per se, then any failure in proof as to special damages is irrelevant. In other words, if such losses are not an essential element of Range's defamation claim, they can have no bearing on Lipsky's dismissal motion under the TCPA. *See* TEX. CIV. PRAC. & REM. CODE § 27.005(c).

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The common law distinguishes defamation claims as either per se or per quod.[13] *Hancock*, 400 S.W.3d at 63. Defamation per se refers to statements that are so obviously harmful that general damages, such as mental anguish and loss of reputation, are presumed. *Id*. at 63-64. Defamation per quod is defamation that is not actionable per se. *Id*. at 64. Defamation per se is itself broken down into separate categories of falsehoods. Accusing someone of a crime, of having a foul or loathsome disease, or of engaging in serious sexual misconduct are examples of defamation per se. *Moore v. Waldrop*, 166 S.W.3d 380, 384 (Tex. App.—Waco 2005, no pet.). Remarks that adversely reflect on a person's fitness to conduct his or her business or trade are also deemed defamatory per se. *Hancock*, 400 S.W.3d at 66. And whether a statement qualifies as defamation per se is generally a question of law. *Id*.

Range argues that Lipsky's remarks in this case were defamatory per se because they reflected on Range's fitness and abilities as a natural gas producer. To qualify as defamation per se under this category the disparaging words must affect the plaintiff in some manner that is peculiarly harmful to the plaintiff's trade, business, or profession and not merely upon the plaintiff's general characteristics. *See id*. at 66-67 (noting that a statement injures one in his profession when it would "adversely affect his fitness for the proper conduct" of the business). Range submits that by being falsely branded as a polluter and a threat to public health and safety, Lipsky has portrayed Range as incompetent, even reckless, as a gas producer, thereby injuring the company's reputation.

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Environmental responsibility is an attribute particularly important to those in the energy industry—none more so than natural gas producers, such as Range, who employ horizontal drilling and hydraulic fracturing in their business. Accusations that Range's fracking operations contaminated the aquifer thus adversely affect the perception of Range's fitness and abilities as a natural gas producer. As defamation per se, damages to its reputation are presumed, although the presumption alone will support only an award of nominal damages. *Salinas*, 365 S.W.3d at 320. Pleading and proof of particular damage is not required to prevail on a claim of defamation per se, and thus actual damage is not an essential element of the claim to which the TCPA's burden of clear and specific evidence might apply. Although Range's affidavit on damages may have been insufficient to substantiate its claim to special damages, it was not needed to defeat Lipsky's dismissal motion because Range's defamation claim was actionable per se. The trial court accordingly did not abuse its discretion in denying Lipsky's motion to dismiss.

IV. Range's Petition

The court of appeals concluded that the TCPA required the dismissal of Range's business-disparagement and defamation claims against Shyla Lipsky and Alisa Rich because no evidence showed that either party published any false statements about Range concerning contamination of the aquifer in general or the Lipsky well in particular. 411 S.W.3d at 547-49. The court also concluded that the TCPA required the dismissal of Range's civil conspiracy claim because no evidence established that the Lipskys and Rich agreed to defame Range, an essential element of Range's civil-conspiracy claim as pled. *Id*. at 551. In its petition, Range seeks reinstatement of its

defamation and business-disparagement claims against Shyla Lipsky, as well as reinstatement of its civil-conspiracy claim against all defendants.

Range complains that the court of appeals failed to give it the benefit of rational inferences drawn from the voluminous evidence it presented. It argues that Rich had a history of publicly blaming drilling, in general—and Range in particular—for contaminating the environment and that she devised a "strategy" to get the EPA to investigate the Lipsky contamination claim, which she documented in an email to the Lipskys. Range further complains that Rich played a role in the distribution of Lipsky's "misleading" garden hose video in furtherance of the conspiracy to defame and disparage Range.

The court observed, however, that Rich, although mentioning Lipsky's video to the EPA, had not used it to mislead the agency but rather explained that the hose had been attached to the well vent. 411 S.W.3d at 551. The court found no evidence that Rich participated in distributing the video to the media or contributed to media reports about "water being lit on fire." *Id*. The court of appeals considered the evidence of Rich's alleged predisposition but concluded it was not clear and specific evidence that "Rich had conspired with the Lipskys to blame Range on this occasion." *Id*. The court further considered the email documenting Rich's "strategy," but found it to be no evidence of a conspiracy to defame or disparage Range. Instead, the court observed that the email focused "on the contamination of the Lipksys' well and on executing a plan to trigger an investigation into the contamination rather than on blaming Range or pursuing an action against Range for the contamination." *Id*.

We agree that no clear and specific evidence establishes a prima facie case that Shyla Lipsky or Alisa Rich published any defamatory remarks concerning Range or conspired with Steven Lipsky "to publicly blame Range for the contamination." *Id*. The court of appeals accordingly did not abuse its discretion in holding that the TCPA required the dismissal of Range's claims against Steven Lipsky's wife and environmental consultant and Range's conspiracy claim against all parties.

* * *

The respective petitions filed in this Court by Steven Lipsky and by Range Production Co. and Range Resources Corp. are denied.

/s/_____
John P. Devine
Justice

Opinion Delivered: April 24, 2015

Footnotes:

[1.] *See* Act of May 18, 2011, 82nd Leg., R.S., ch. 341, § 1, 2011 Tex. Gen. Laws 961 (stating that "Act may be cited as the Citizens Participation Act").

[2.] At the time, the courts of appeals disagreed about whether the Texas Citizens Participation Act granted an interlocutory appeal from a signed order denying dismissal. *Compare Jennings v. WallBuilder Presentations, Inc*., 378 S.W.3d 519, 524-29 (Tex. App.—Fort Worth 2012, pet. denied) (rejecting interlocutory appeal), *with San Jacinto Title Servs. of Corpus Christi, LLC. v. Kingsley Props., LP*.,452 S.W.3d 343, 349 (Tex. App.—Corpus Christi 2013, pet. denied) (accepting interlocutory appeal); *see also* Justice Nora Longoria & Nathaniel Beal, *"What Is A SLAPP Case? " Interlocutory Appeals and the Texas Citizens' Participation Act*, 26 APP. ADVOC. 390, 395-96 (2014). The Legislature has since clarified that an interlocutory appeal is permitted from any interlocutory order denying a motion to dismiss under the TCPA. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(12); *see also Miller Weisbrod, L.L.P. v. Llamas-Soforo*, ___ S.W.3d ___, ___; 2014 WL 6679122, at *6 (Tex. App.—El Paso 2014, no pet.). Although an interlocutory appeal is clearly the appropriate remedy going forward, we nevertheless consider the issues presented here in the context of the original mandamus proceedings filed in this Court.

[3.] The court of appeals concluded that the trial court should have dismissed the civil conspiracy and aiding and abetting claims against all defendants, including Steven Lipsky. *Id*. at 551-52.

[4.] The "right of free speech" refers to communications related to "a matter of public concern" which is defined to include an issue related to: "(A) health or safety; (B) environmental, economic, or community well-being; (C) the government; (D) a public official or public figure; or (E) a good, product, or service in the marketplace." *Id*. § 27.001(3), (7)(A)-(E).

[5.] The "right to petition" refers to a wide range of communications relating to judicial, administrative, or other governmental proceedings. *Id*. § 27.001(4).

[6.] The "right of association" refers to people "collectively express[ing], promot[ing], pursu[ing], or defend[ing] common interests." *Id*. § 27.001(2) .

[7] The court wrote:

Charges of fraud must be established by clear and specific evidence, which may not be aided by presumptions or inferences, or intendment. The evidence and findings of the representations complained of in this case are vague, indefinite, and inconclusive, and, moreover, are so qualified by the testimony of appellee and her sister-in-law, upon which her case rests, as to rob them of the implications of active fraud necessary to destroy a written contract.

S. Cantu & Sons, 101 S.W.2d at 822.

[8] The phrase "clear and specific evidence" appears in only three statutes. *See* TEX. CIV. PRAC. & REM. CODE §§ 22.025, 27.005(c); TEX. CODE CRIM PROC. art. 3811, §6. "Clear and specific showing" appears in two others. *See* TEX. CIV. PRAC. & REM. CODE § 22.024; TEX. CODE CRIM. PROC. art. 3811, §§ 4(a), (c), 5(a).

[9] Before the TCPA's enactment, the phrase appeared in two reported cases. *See McDonald*, 464 S.W.2d at 456; *S. Cantu & Son*, 101 S.W.2d at 822. Since its enactment, the phrase has appeared in over thirty reported cases tied to a discussion of the statute.

[10] Professor Dobbs offers a number of examples of commercial disparagement or trade libel that are not strictly speaking defamatory in the sense of dignitary harm:

[A] publication that says the defendant's product is poisonous and contaminates the land or [] one that says the plaintiff's wood products are inferior and will not stand up. . . . A false statement that the ratings of the plaintiff's radio show are too low to justify continuing the show . . . . [A] publication falsely stating the price the plaintiff charges for his goods [or] that the plaintiff is no longer carrying on a business or has insufficient funds to continue in business.

3 DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 656, at 618-19 (2d ed. 2011) (footnotes omitted).

[11] Special damages are synonymous with economic damages and are distinguishable from general damages. General damages are recoverable under a defamation claim for non-economic losses, such as loss of reputation and mental anguish. *Hancock v. Variyam*, 400 S.W.3d 59, 65 (Tex. 2013).

[12] The court of appeals quoted from the vice president's affidavit as indicated below:

As a direct and proximate result and consequence of the . . . false, disparaging, and defamatory public statements made by Steven Lipsky . . . regarding Range and its operations, Range's business and reputation have been harmed . . . . The numerous false, disparaging, and defamatory public statements made by Mr. Lipsky . . . have caused Range to be associated in the public as a polluter of water and the environment, and nothing could be further from the truth.
. . . As a direct and proximate result and consequence of the false, disparaging, and defamatory statements made by Mr. Lipsky . . . , *Range has suffered direct pecuniary and economic losses and costs, lost profits*, loss of its reputation, and loss of goodwill in the communities in which it operates. To date, the damages suffered by Range as a direct and proximate result and consequence of the conspiracy and . . . defamatory public statements made by Lipsky and Rich are in excess of three million dollars.

411 S.W.3d at 546-47 (omissions in original).

[13] The common law distinction between defamation per se and per quod has been criticized as anachronistic and has been abandoned in some jurisdictions, but Texas has not abandoned this distinction. *See Waste Mgmt. of Tex.*, 434 S.W.3d at 146 & nn.8-9.

IN RE STEVEN LIPSKY, RELATOR
NO. 13-0928
SUPREME COURT OF TEXAS Argued December 4, 2014 April 24, 2015

LIFE DESIGNS RANCH, INC., a Washington Corporation, VINCENT BARRANCO, an individual, and BOBBIE BARRANCO, an indidivual, Appellants,

v.

MICHAEL SOMMER, Respondent.

No. 32922-4-III

COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION THREE

November 12, 2015

PUBLISHED OPINION

BROWN, A.C.J. — Life Designs Ranch (Life Designs) appeals the summary judgment dismissal of its defamation, tortious interference with a business expectancy, and invasion of privacy (false light) claims against Michael Sommer. Life Designs contends the trial court erred when it concluded Life Designs had failed to establish its legal claims as a matter of law. We disagree with Life Designs and affirm.

FACTS

Life Designs, owned by Vince and Bonnie Barranco, is a substance abuse aftercare program for young adults operating from Cusick, Washington with following optional transition housing in Spokane. Clients attend Narcotics Anonymous/Alcoholics Anonymous meetings at off-site locations three times a week as part of the program.

The six-month Cusick program costs clients $52,200 plus a $1,200 initial interview fee. The Spokane transitional program costs an additional $12,000.

Clay Garrett, formerly Life Designs' admissions director, developed relationships with educational consultants hired by the families of prospective clients to guide them in program selection. The educational consultants typically narrow the prospective client's focus to three recommended programs. Mr. Garrett updated Life Designs' website to attract more clients. He often gave educational consultants and prospective clients Life Designs' website information so they could learn more about the program.

In 2012, Mr. Sommer contracted to send his son to Life Designs. Mr. Sommer later disputed Life Designs' billings. Mr. Sommer e-mailed Mr. Barranco:

Please review your contract again. It specifically states that any partial months are billed at full and the last month is not refundable. I think you are in a highly indefensible position. The 26K was put into brackets to show that was the amount we were at THE MOST liable for, not the least. I am willing to get legal with this. Are you? I would hope that the most important thing to you is your reputation. We all know how easily reputations can be destroyed, without the legal system even getting involved. But I would go both routes if I have to. You are wrong on all fronts. Please reconsider before we find it necessary to proceed.

Clerk's Papers (CP) at 257.

Mr. Sommer contacted one of Life Designs' referral sources, Chad Balagna, who worked at a preliminary treatment program. According to Mr. Sommer, he told Mr. Balagna he should "reconsider if he was going to recommend people there so his own reputation would be protected." CP at 243. It is unclear if Mr. Balagna is considered an educational consultant. Additionally, Mr. Sommer unsuccessfully complained to the

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Better Business Bureau. He registered www.lifedesignsranchinc.com, a domain name similar to Life Designs' actual domain name, www.lifedesignsinc.com, Mr. Sommer uploaded and published allegedly defamatory content onto his website, partly including

• The problems with this organization are numerous. Life Designs Ranch claims to help you pursue your life's passions. That is only true if your life passion fits into what the other 11 prisoners and their wardens consider their life passion.
• Therapeutic environment??? Only for the staff and the owner, Vince Barranco, who finds that charging 12 young adults $8000 to $9000 a months for food and housing permits him to pursue his life passions since he really doesn't have to work and has free labor to increase the value of his property.
• **What you get** . . . A visual experience of pine trees, dead pine trees, falling down pine trees, disintegrated pine trees, and more pine trees. River, can't be seen. Mountains, can't be seen. Civilization, can't be seen. But there are pine trees!!!!!
• **What you get** . . . 2 or 3 twelve step meetings a week in a very small western Washington community where the only young adults in attendance are those from Life Designs ranch.
• **You should go to Life Designs if:** . . . You believe that it takes no education or experience with substance abuse, or compassion for the young adult who is recovering from a substance addiction to help them become the person they want to be.

CP at 248-51. The "About Us" section on Mr. Sommer's website partly specified: "We are here to try to protect people from the financial and emotional distress that comes with attending Life Designs Ranch." CP at 251. It concluded: "Healing is not done and *seems* to be very limited in it's [sic] attempt. Keep your money, go somewhere else . . . ." *Id.* (emphasis added). The website also included a link to Human Earth Animal Liberation's (HEAL) preexisting website alleging Life Designs is run like a cult, illegally exploits student labor, and employs a staff member who worked at another camp when a young boy died.

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Life Designs sued Mr. Sommer for defamation, intrusion, false light, and interference with business expectancy based on later business losses. After the trial court dismissed its claims at summary judgment, Life Designs appealed.

STANDARD OF REVIEW

We review summary judgment orders de novo, engaging in the same inquiry as the trial court. *Mohr v. Grant*, 153 Wn.2d 812, 821, 108 P.3d 768 (2005). Summary judgment is appropriate if the evidence, when viewed in a light most favorable to the nonmoving party, shows

no genuine issue of material fact remains and the moving party is entitled to judgment as a matter of law. CR 56(c). "[C]onstruing the evidence in the light most favorable to the nonmoving party, the court asks whether a reasonable jury could find in favor of that party." *Herron v. KING Broad. Co.*, 112 Wn.2d 762, 767-68, 776 P.2d 98 (1989). In defamation cases, summary judgment plays an important role: "Serious problems regarding the exercise of free speech and free press guaranteed by the First Amendment are raised if unwarranted lawsuits are allowed to proceed to trial. The chilling effect of the pendency of such litigation can itself be sufficient to curtail the exercise of these freedoms." *Mark v. Seattle Times*, 96 Wn.2d 473, 485, 635 P.2d 1081 (1981) (internal quotation marks omitted).

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ANALYSIS
A. Defamation Per Se

The issue is whether the trial court erred in failing to find, as a matter of law, Mr. Sommer's website was defamatory per se. Life Designs contends reasonable minds could solely conclude the false content on Mr. Sommer's website exposed it to hatred, contempt, ridicule, and obloquy, deprived it of public confidence, and injured its business.

"Whether a given communication constitutes defamation per se may be either a question of law or a question of fact." *Maison de France, Ltd. v. Mais Oui!, Inc.*, 126 Wn. App. 34, 43, 108 P.3d 787 (2005). A publication is defamatory per se (actionable without proof of special damages) if it "(1) exposes a living person to hatred, contempt, ridicule or obloquy, or to deprive him of the benefit of public confidence or social intercourse, or (2) injures him in his business, trade, profession or office." *Caruso v. Local Union No. 690*, 100 Wn.2d 343, 353, 670 P.2d 240 (1983). A jury normally decides what is defamatory per se:

Where the definition of what is libelous *per se* goes far beyond the specifics of a charge of crime, or of unchastity in a woman, into the more nebulous area of what exposes a person to hatred, contempt, ridicule or obloquy, or deprives him of public confidence or social intercourse, the matter of what constitutes libel *per se* becomes, in many instances, a question of fact for the jury.

Id. at 354 (quotation marks omitted).

Life Designs argues Mr. Sommer's website directly attacks its recovery program business by denigrating its therapeutic environment and the staff's education,

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experience, and compassion. But the website statements do not rise to the level of "extreme" need to constitute defamation per se as a matter of law. The criticized statements are similar to those seen in *Caruso*, dealing with "the rather vague areas of public confidence, injury to business, etc." *Id.* at 353.

In *Caruso*, an article was printed in a weekly paper mailed to union members. *Id.* at 346. The article urged readers to avoid patronizing a carpet business because the business harassed laborers who, due to construction, parked at the business to make deliveries nearby. *Id.* The article further explained despite the laborers' willingness to move the equipment, the business still impounded

the equipment. *Id*. This article was printed four times. *Id*. at 346-47. After its publication, people called the business, telling the owner they would not shop there. *Id*. at 347. Other callers used various derogatory and profane terms to refer to the owner. *Id*. Sales dropped sharply. *Id*. The court held the trial court improperly instructed the jury when it told the jury if the jury found the article was false and defamatory it was libelous per se. *Id*. at 353-54. Whether the article was defamatory per se was for the jury to decide. *Id*.

Similarly, Mr. Sommer's website warned potential clients away from Life Designs. Life Designs' business declined shortly after publication. But unlike in *Caruso*, there were no threatening phone calls nor were there calls where people said they would not send their family member/client to Life Designs. Given *Caruso*, we conclude the less severe publication here cannot be defamation per se as a matter of law.

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B. Defamation

The issue is whether the trial court erred in dismissing Life Designs' defamation claim. Life Designs contends: (1) the contents of Mr. Sommer's website are actionable statements of false fact resulting in damage to Life Designs and (2) Mr. Sommer republished allegedly defamatory material by hyperlinking the HEAL website.

Life Designs must raise a genuine issue of material fact as to the four elements of a prima facie defamation claim by establishing: (1) Mr. Sommer's statements were false, (2) the statements were unprivileged, (3) Mr. Sommer was at fault, and (4) the statements proximately caused damages. *Alpine Indus. Computers, Inc. v. Cowles Publ'g Co*., 114 Wn. App. 371, 378, 57 P.3d 1178 (2002). Here, elements (1) and (4) are contested. "The prima facie case must consist of specific, material facts, rather than conclusory statements, that would allow a jury to find that each element of defamation exists." *Id*. (internal quotation marks omitted).

The alleged defamatory statement must be a statement of fact, not a statement of opinion. *Davis v. Fred's Appliance, Inc*., 171 Wn. App. 348, 365, 287 P.3d 51 (2012). As the line between fact and opinion "is sometimes blurry," we consider the following factors to determine whether a statement is actionable: "'(1) the medium and context in which the statement was published, (2) the audience to whom it was published, and (3) whether the statement implies undisclosed facts.'" *Id*. (quoting *Dunlap v. Wayne*, 105 Wn.2d 529, 539, 716 P.2d 842 (1986)). Regarding the first factor, the *Dunlap* court

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noted statements expressing opinion are found more often in certain contexts. *Dunlap*, 105 Wn.2d at 539. "The court should consider the entire communication and note whether the speaker qualified the defamatory statement with cautionary terms of apparency." *Id*. (internal quotation marks omitted).

All allegedly defamatory statements were published on Mr. Sommer's website, the medium. In this realm, a dearth of Washington defamation law exists. While other jurisdictions have found statements on similar "spoof websites can survive a motion for summary judgment or a motion to dismiss, no case has held the existence of such a "spoof website automatically means the

statements on the website are actionable. *See Taylor Bldg. Corp. of Am. v. Benfield*, 507 F. Supp. 2d 832, 838-40 (S.D. Ohio 2007) (individually analyzing statements on a "spoof website to determine whether they are actionable); *Winer v. Senior Living Guide, Inc.*, No. 12-934, 2013 WL 1217582 (W.D. Pa. 2013) (denying motion to dismiss where the "spoof website contained untrue factual statements and falsely indicated it was the plaintiff's official website).

Mr. Sommer did not attempt to pass his website off as Life Designs' official website; the "About Us" section is clear, using "seems" as a word of apparency. *Dunlap*, 105 Wn.2d at 539; CP at 251. Thus the website suggested opinions, not facts. Furthermore, Mr. Sommer's website did provide a hyperlink to Life Designs' official website and expressly said that the link was to "the website for Life Designs Ranch." CP at 250. From a policy standpoint, allowing businesses to sue any unhappy consumer for what they posted online for defamation would stifle freedom of speech.

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The internet is a medium where statements expressing opinions in the context of reviewing businesses and services are often found. The medium and context of Mr. Sommer's website denotes it is opining about the quality of Life Designs' business, especially when looked at in relation to the other two factors discussed next.

For the second factor, courts should consider "whether the audience expected the speaker to use exaggeration, rhetoric, or hyperbole." *Dunlap*, 105 Wn.2d at 539. Here, the audience was the people researching Life Designs. Online search engines retrieved many results for Life Designs; the first result was Life Designs' official website, the fourth result was Mr. Sommer's website, and the fifth result was the HEAL website. The blurb describing Mr. Sommer's website read, "Thinking about going to or sending someone you love to Life Designs Ranch?? Read this first." CP at 60. This language signaled this was a review and not the official website of Life Designs.

The third factor is "perhaps [the] most crucial" as "[a]rguments for actionability disappear when the audience members know the facts underlying an assertion and can judge the truthfulness of the allegedly defamatory statements themselves." *Dunlap*, 105 Wn.2d at 539-40; *see Davis*, 171 Wn. App. at 366 (stating the third factor "addresses whether a listener unknown to the plaintiff can judge the truthfulness of the statement"). "Whether a statement is one of fact or opinion is a question of law unless the statement could only be characterized as either fact or opinion." *Davis*, 171 Wn. App. at 365. Life Designs discusses three statements in its briefing.

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The first criticized statement is: "**What you get** . . . . 2 or 3 twelve step meetings a week in a very small western Washington community where the only young adults in attendance are those from Life Designs ranch." CP at 248. While Mr. Sommer incorrectly described Life Designs as being located in western Washington, this statement was not based on undisclosed facts. Rather, Life Designs' official website states it is located in Cusick, Washington, which is on the eastern side of the state.

The second statement, "**What you get** . . . . A visual experience of pine trees, dead pine trees, falling down pine trees, disintegrated pine trees, and more pine trees. River, can't be seen. Mountains, can't be seen. Civilization, can't be seen. But there are pine trees!!!!!" CP at 248. On

its website, Life Designs disclosed it is located "on 30 acres overlooking the Pend O'reille River on the international Selkirk Scenic Loop" and the "area boasts a reputation for one of the most undiscovered recreational areas in the northwest." Life Designs Ranch, http://www.lifedesignsinc.com (last visited Sept. 9, 2015). The website shows pictures of clients in Life Designs' natural setting. *Id*.

The third statement is "**Who Should Go? You should go to Life Designs if:** . . . You believe that it takes no education or experience with substance abuse, or compassion for the young adult who is recovering from a substance addiction to help them become the person they want to be." CP at 249. Again, this statement is based on disclosed facts. Life Designs' website discusses the experience and education of its staff. While the compassion of the staff is not directly addressed on Life Designs' website, compassion is a subjective determination and is thus opinion.

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Each *Dunlap* factor weighs in Mr. Sommer's favor. Given all, Mr. Sommer's statements were nonactionable as defamation. Even if actionable, Life Designs fails to make a sufficient showing Mr. Sommer's statements proximately caused its damages.[1]

The sparse evidence shows (1) a decline in referrals following publication of Mr. Sommer's website despite an increase in traffic to Life Designs' official website, (2) some hearsay by Mr. Garrett about an interaction between Mr. Sommer and Mr. Balagna regarding not making referrals to Life Designs, and (3) no other apparent changes accounting for the referral decline. Mr. Garrett's declaration opining Mr. Sommer's website caused the decline in referrals is conclusory. Mr. Garrett limited his analysis to Life Designs' official website. No evidence shows anyone who visited Life Designs' website visited or was influenced by Mr. Sommer's website. Life Designs has

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not referred to or produced anyone who did not choose Life Designs because of Mr. Sommer's website. And while Life Designs can show Mr. Sommer talked to Mr. Balagna about not referring anyone to Life Designs, no evidence shows Mr. Balagna took Mr. Sommer's advice and stopped referring clients.

Mr. Sommer argues coincidence is not proof of causation. *See Anica v. Wal-Mart Stores, Inc*., 120 Wn. App. 481, 489, 84 P.3d 1231 (2004) (stating employee's argument that timing of her termination gave rise to a reasonable inference of unlawful discrimination relied on a logical fallacy-"after this, therefore because of this"). Life Designs cites to *Borden v. City of Olympia*, 113 Wn. App. 359, 53 P.3d 1020 (2002), to show coincidence in timing can give rise to an inference the result was the proximate cause of the action. There are two defects in Life Designs' analogy. First, *Borden* was not a defamation case. In defamation cases, it has been held in a summary judgment context, absent a privileged defendant, a private individual must prove negligence by a preponderance of the evidence. *Momah v. Bharti*, 144 Wn. App. 731, 742, 182 P.3d 455 (2008); *see Mohr*, 153 Wn.2d at 822. Second, the evidence used regarding coincidence in timing was quite different. In *Borden*, flooding started the first winter after the drainage project was completed and recurred each winter for several years. *Borden*, 113 Wn. App. at 372. The flooding subsided when another drainage facility channelled water out of the area. *Id*. The evidence submitted by Life Designs does not meet the preponderance of the evidence standard.

Next, Life Designs contends publishing the hyperlink to an allegedly defamatory website alone constitutes republication of that defamatory content to third persons reading Mr. Sommer's website. No Washington case addresses this contention.

Washington has adopted the single publication rule which "states that any one edition of a book or newspaper, or any one radio or television broadcast, is a single publication." *Momah*, 144 Wn. App. at 752 (internal quotation marks omitted). *Momah* is the sole Washington case exploring application of this rule to the internet. There, a newspaper published comments attributed to the defendant. *Id*. at 737. Another article was later published, again quoting the defendant. *Id*. At some point, the defendant posted the newspaper articles to his website. *Id*. In holding the defendant republished the defamatory material, the court reiterated "the general rule that each communication of the same defamatory matter by the same defamer, whether to a new person or to the same person, is a separate and distinct publication, for which a separate cause of action arises." *Id*. at 753 (internal quotation marks omitted). The court held the defendant made the statement two different times, once when he spoke to the newspaper and once when he posted the articles on his website. *Id*. The two publications were aimed at different audiences. *Id*. The court found the situation did not differ from a newscast reading the same copy at 5:30 p.m. and 11:00 p.m. *Id*.

While no Washington law is directly on point, a federal court grappling with this same issue used Washington law to hold "a mere reference or URL [Uniform Resource Locator] is not a publication of the contents of the materials referred to." *U.S. ex. rel*.

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Klein v. Omeros Corp., 897 F. Supp. 2d 1058, 1074 (W.D. Wash. 2012). The *Klein* court distinguished relevant Washington case law, including *Momah*, by stating "a finding of republication hinged on the defendant's communication of the *contents* of the original, allegedly defamatory statements." *Id*. Because the defendant in *Klein* merely provided a URL to such statements, no republication of the contents existed. *Id*.

Other courts considering the issue are in accord with *Klein*. In *Salyer v. S. Poverty Law Center, Inc*., 701 F. Supp. 2d 912, 916 (W.D. Ky. 2009), the court observed:

It appears that the common thread of traditional republication is that it presents the material, in its entirety, before a new audience. A mere reference to a previously published article does not do that. While it may call the *existence* of the article to the attention of a new audience, it does not present the *defamatory contents* of the article to that audience. Therefore, a reference, without more, is not properly a republication.

Because a hyperlink is more like a reference than a separate publication, "[m]aking access to the referenced article easier does not appear to warrant a different conclusion from the analysis of a basic reference." *Id*. at 917; *see also In re Philadelphia Newspapers*, 690 F.3d 161, 175 (3d Cir. 2012) (holding "though a link and reference may bring readers' attention to the existence of an article, they do not republish the article").

We are persuaded by *Klein* and *Salyer*. We reason a URL is not qualitatively different from a mere reference. Therefore, we hold Mr. Sommer did not republish allegedly defamatory material when he posted on his website: "For more info click or cut and paste the link below http://www.heal-online.org/lifedesigns.htm." CP at 249.

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C. Tortious Interference with a Business Expectancy

The issue is whether the trial court erred in dismissing Life Designs' claim for tortious interference with a business expectancy. The five elements of a tortious interference with a business expectancy are: "(1) the existence of a valid . . . business expectancy; (2) that defendants had knowledge of that [expectancy]; (3) an intentional interference inducing or causing a breach or termination of the . . . expectancy; (4) that defendants interfered for an improper purpose or used improper means; and (5) resultant damage." *Leingang v. Pierce County Med. Bureau*, 131 Wn.2d 133, 157, 930 P.2d 288 (1997). The first, third, fourth, and fifth elements are at issue here.

"A valid business expectancy includes any prospective contractual or business relationship that would be of pecuniary value." *Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Grp., Inc.*, 114Wn. App. 151, 158, 52 P.3d 30 (2002). A plaintiff must show future business opportunities "are a reasonable expectation and not merely wishful thinking," but certainty of proof is not needed. *Caruso v. Local Union No. 690*, 33 Wn. App. 201, 208, 653 P.2d 638 (1982), *rev'd on other grounds*, 100 Wn.2d 343 (1983). Life Designs used its historical referral and enrollment records to demonstrate it could reasonably (1) expect a certain number of referrals each quarter and (2) successfully enroll a specific percentage of those referrals as clients. Thus, Life Designs raised a prima facie business expectancy.

Next, interference with a business expectancy is intentional "if the actor desires to bring it about or if he knows that the interference is certain or substantially certain to

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occur as a result of his action." *Newton Ins. Agency & Brokerage, Inc.*, 114 Wn. App. at 158 (internal quotation marks omitted). Looking at the evidence in the light most favorable to Life Designs, Mr. Sommer intentionally interfered with a business expectancy. Mr. Sommer acquired a domain name similar to that of Life Designs' official website because he wanted people to see his website when searching for Life Designs. Mr. Sommer wanted people to research and question Life Designs' program. Mr. Sommer admitted telling Mr. Balagna he should not refer clients to Life Designs.

In evaluating the fourth element, a plaintiff must establish the intentional interference was wrongful. *Pleas v. City of Seattle*, 112 Wn.2d 794, 804, 774 P.2d 1158 (1989). Interference is wrongful if it is done for an improper purpose or by improper means. *Id.* In *Pleas*, the city of Seattle intentionally stalled development of a high-rise apartment complex. The improper motive was a desire to curry favor with the active and influential opponents of the project; the improper means was the city's arbitrary refusal to grant necessary permits. *Id.* at 804-05. The means used by Mr. Sommer, the internet website, was not improper. But looking at the evidence in the light most favorable to Life Designs, a genuine issue of material fact exists as to whether Mr. Sommer acted with an improper purpose as he threatened to destroy Life Designs' reputation in an e-mail.

Decisive is the fifth element. Life Designs fails to show resultant damage to its business expectancy. The trial court did not err in dismissing this claim because Life Designs' conclusory claim of injury to reputation lacks evidentiary support. No client,

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potential client, or referral source submitted an affidavit establishing they can no longer trust Life Designs or did not choose Life Designs because of Mr. Sommer's website.

D. False Light

The issue is whether the trial court erred in dismissing Life Designs' false light claim. Life Designs contends Mr. Sommer's website placed the Barrancos in a false light because the contents of the website created a false impression about the way in which the Barrancos operated their business.

"The protectable interest in privacy is generally held to involve four distinct types of invasion: intrusion, disclosure, false light and appropriation." *Eastwood v. Cascade Broad. Co.*, 106 Wn.2d 466, 469, 722 P.2d 1295 (1986) (internal quotation marks omitted). Actions based on invasion of privacy are separate and distinct from those based on defamation. *Id.* False light claims differ from defamation claims because false light claims focus on compensation for mental suffering rather than reputation. *Id.* at 471. Washington follows the *Restatement (Second) of Torts*. *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 135, 580 P.2d 246 (1978) (establishing the RESTATEMENT (SECOND) OF TORTS § 652D (1977) sets out the guiding principles for invasion of privacy actions).

Only a living individual whose privacy has been invaded can maintain an action for invasion of privacy. RESTATEMENT (SECOND) OF TORTS § 652I. Comment (c) to the *Restatement* states a corporation has no personal right of privacy and thus has no cause of action for invasion of privacy. Thus, Life Designs' false light claim fails. But the Barrancos individually sued for false light and do not face the corporate exclusion.

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A false light claim arises when someone publicizes a matter that places another in a false light if (a) the false light would be highly offensive to a reasonable person and (b) the actor knew of or recklessly disregarded the falsity of the publication and the false light in which the other would be placed.

Eastwood, 106 Wn.2d at 470-71 (internal quotation marks omitted). While the Barrancos' false light claim may have merit, all evidence in relation to damages is in reference to Life Designs. Ms. Barranco was not mentioned by name on Mr. Sommer's website; her claim is derivative of Mr. Barranco's claim. Mr. Barranco did not state he personally suffered damage to his reputation or any emotional suffering; rather, all his statements refer to the damages suffered by his business, Life Designs. Thus, the trial court did not err in dismissing the false light claims.

Affirmed.

/s/_____
Brown, A.C.J.

I CONCUR:

/s/_____
Korsmo, J.

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FEARING, J. (concurring in part and dissenting in part) — I conclude that plaintiff Life Designs Ranch, Inc. (Life Designs) presents sufficient facts to survive a summary judgment motion on its claims of defamation and tortious interference with business expectancy. Thus, I, in part, respectfully dissent from the majority. I concur with the majority's ruling that Life Designs may not recover against Michael Sommer because of a hyperlink on his website to another site critical of Life Designs. I also concur that Life Designs and Vincent and Bobbie Barranco cannot recover in false light.

The majority commits three fundamental errors that lead to my partial dissent. First, the majority mistakenly fabricates a new element of "extreme defamation" for defamation per se. Second, the majority mistakenly levies a higher standard of proof, not imposed in other actions, for causation in defamation and tortious interference with business expectancy actions. Third, the majority also weighs facts on the issue of damages.

The majority retells the basic facts of the dispute. The facts include quotes of the alleged defamatory statements published by defendant Michael Sommer about Life

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Designs. I will emphasize some of the basic facts when I discuss the respective claims asserted by Life Designs.

DEFAMATION PER SE

I do not know if defamation per se is a cause of action distinct from defamation, but I analyze the former separately from the latter. Life Designs does not allege defamation per se as a separate cause of action but has consistently argued defamation per se as a basis for recovery. Defamation per se loosens for the plaintiff the burden of proving damages. If a plaintiff shows defamation per se, the law presumes damages. *Maison de France, Ltd, v. Mais Oui!, Inc.*, 126 Wn. App. 34, 53-54, 108 P.3d 787 (2005). Stated differently, plaintiff need not prove loss of income or special damages to recover. Since the trial court dismissed Life Designs' defamation claim because of a failure to show damages, whether Life Designs creates an issue of fact as to defamation per se looms important. To intelligently analyze defamation per se, I must first include a discussion of the elements of defamation.

The common law distinguished between libel, written or printed defamatory words, and slander, spoken defamatory words. Washington no longer distinguishes between libel and slander, such that Washington law only recognizes a cause of action for defamation.

The law of defamation embodies the public policy that individuals should be free to enjoy their reputations unimpaired by false and defamatory attacks. *Maressa v. New*

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Jersey Monthly, 89 N.J. 176, 445 A.2d 376, 383 (1982); *Campos v. Oldsmobile Div., Gen. Motors Corp.*, 71 Mich. App. 23, 246 N.W.2d 352, 354 (1976); 50 Am. Jur. 2d *Libel and Slander* § 2 (2015). Decisions of the United States Supreme Court recognize the important societal interest in the protection of individual reputations, despite First Amendment protections for free speech. *Herbert v. Lando*, 441 U.S. 153, 169, 99 S. Ct. 1635, 60 L. Ed. 2d 115 (1979); *N.Y. Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). Defamation is an impairment of a relational interest; it denigrates the opinion which others in the community have of the plaintiff and invades the plaintiff's interest in his or her reputation and good name. *Lumbermen's Mut. Cas. Co. v. United Services Auto Ass'n*, 218 N.J. Super. 492, 528 A.2d 64, 67 (App. Div. 1987); 50 Am. Jur. 2d *Libel and Slander* § 2 (2015). One's reputation can greatly impact one's business and income. Washington courts generally deny that the state's civil law seeks to punish, but one Supreme Court decision exclaimed that the purpose of defamation law is to punish the publisher, since there is no constitutional protection for a false, damaging statement. *Due Tan v. Le*, 177 Wn.2d 649, 666, 300 P.3d 356 (2013).

Washington decisions characterize defamation as consisting of four elements: (1) a false statement, (2) publication, (3) fault, and (4) damages. *Due Tan v. Le*, 177 Wn.2d at 662 (2013); *Herron v. KING Broad. Co.*, 112 Wn.2d 762, 768, 776 P.2d 98 (1989). Some cases substitute the element of unprivileged communication for publication. *Grange Ins. Ass'n v. Roberts*, 179 Wn. App. 739, 767, 320 P.3d 77 (2013), *review*

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denied, 180 Wn. 2d 1026, 328 P.3d 903 (2014); *Demopolis v. Peoples Nat'l Bank of Wash.*, 59 Wn. App. 105, 108, 796 P.2d 426 (1990). The traditional four elements can be dissected into a lengthier list that includes:

1. a statement;

2. factual in character rather than an opinion;

3. defamatory in nature;

4. and false;

5. concerning the plaintiff;

6. communicated to a third party;

7. without an absolute or conditional privilege to so communicate;

8. with a varying degree of fault on the part of the defendant depending on the nature of the plaintiff and the statement;

9. and which causes;

10. damages.

Former Court of Appeals Judge Dean Morgan wrote an opinion in *Schmalenberg v. Tacoma News, Inc.*, 87 Wn. App. 579, 943 P.2d 350 (1997), in the nature of a law review article, that meticulously explains the history behind the defamation action and the permutations in its elements.

I return to defamation per se. Michael Sommer contends that defamation per se applies solely to statements accusing the plaintiff of unchaste or criminal conduct. Sommer cites *Davis v. Fred's Appliance, Inc.*, 171 Wn. App. 348, 367, 287 P.3d 51, 61 (2012) for this proposition. *Davis* at page 367 does read that: "defamation per se *generally* requires imputation of a crime or communicable disease." (Emphasis added). The quotation does not read that defamation per se always necessitates attribution of crime or communicable disease. *Davis* cites a Florida and an Ohio case for its

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proposition.

No Washington decision expressly limits defamation per se to crime and infectious disease. Instead, oodles of decisions extend defamation per se well beyond accusations of disease and criminal behavior. A statement is defamatory per se if it (1) exposes a living person to hatred, contempt, ridicule or obloquy, or to deprive him of the benefit of public confidence or social intercourse, or (2) injures him in his business, trade, profession or office. *Caruso v. Local Union No. 690 of Int'l Bhd. of Teamsters*, 100 Wn.2d 343, 353, 670 P.2d 240 (1983); *Amsbury v. Cowles Publ'g Co.*, 76 Wn.2d 733, 737, 458 P.2d 882 (1969); *Grayson v. Curtis Publ'g Co.*, 72 Wn.2d 999, 436 P.2d 756 (1967); *Purvis v. Bremer's, Inc.*, 54 Wn.2d 743, 751, 344 P.2d 705 (1959); *Spongier v. Glover*, 50 Wn.2d 473, 313 P.2d 354 (1957); *Wood v. Battle Ground Sch. Dist.*, 107 Wn. App. 550, 573-74, 27 P.3d 1208 (2001); *Maison de France, Ltd. v. Mais Oui!, Inc.*, 126 Wn. App. 34 (2005); *Haueter v. Cowles Publ'g Co.*, 61 Wn. App. 572, 578, 811 P.2d 231 (1991); *Vern Sims Ford, Inc. v. Hagel*, 42 Wn. App. 675, 679, 713 P.2d 736 (1986); *Corbin v. Madison*, 12 Wn. App. 318, 529 P.2d 1145 (1974). Defamatory words spoken of a person, which themselves prejudice him in his profession, trade, vocation, or office, are slanderous and actionable per se. *Ward v. Painters' Local Union No. 300*, 41 Wn.2d 859, 863, 252 P.2d 253 (1953); *Maison de France, Ltd. v. Mais Oui!, Inc.*, 126 Wn. App. at 45 n.1 (2005); *Waechter v. Carnation Co.*, 5 Wn. App. 121, 126, 485 P.2d 1000 (1971). A publication is also defamatory per se if it imputes to the plaintiff conduct

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involving moral turpitude. *Maison de France, Ltd. v. Mais Oui!, Inc.*, 126 Wn. App. 34 (2005); *Ward v. Painters' Local Union No. 300*, 41 Wn.2d at 863.

The list of categories mentioned by Washington courts as comprising defamation per se may cover all defamatory statements such that all defamatory statements could be judged defamation per se, particularly since the object behind the tort is to protect one's public confidence and the goal of the tort is to guard one's personality from contempt and ridicule. I need not explore the

limits, however, of defamation per se, since facts support a conclusion that Michael Sommer's website deprived Life Designs of the benefit of public confidence and injured the business and trade of the addiction recovery center.

The majority impliedly holds that a defamatory statement must be "extreme" in order to qualify as defamatory per se. Majority Op. at 6. No Washington decision supports this holding. The adjective "extreme" arises from our high court's decision in *Caruso v. Local Union No. 690 of Int'l Bhd. of Teamsters*. The Supreme Court wrote:

The imputation of a criminal offense involving moral turpitude has been held to be clearly libelous per se. [*Ward v. Painters' Local 300*], 41 Wn.2d 859, 252 P.2d 253 (1953). The instant case is quite different. It deals with the rather vague areas of public confidence, injury to business, etc. In such cases

Where the definition of what is libelous *per se* goes far beyond the specifics of a charge of crime, or of unchastity in a woman, into the more nebulous area of what exposes a person to hatred, contempt, ridicule or obloquy, or deprives him of public confidence or social intercourse, the matter of what constitutes libel *per se* becomes, in many instances, a question of fact for the jury.

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Purvis v. Bremer's, Inc., 54 Wn.2d 743, 752, 344 P.2d 705 (1959). In all but *extreme cases* the jury should determine whether the article was libelous per se. *Miller v. Argus Publ'g Co.*, 79 Wn.2d 816, 820 n.3, 821 n.4, 490 P.2d 101 (1971); *Amsbury v. Cowles Publ'g Co.*, *supra* [76 Wn.2d at 740].

Caruso v. Local Union, 100 Wn.2d at 353-54. (Emphasis added). Note that the quotation demands that the jury determine whether a statement is defamatory per se except in extreme cases. The excerpt does not command an extreme case before a judge or jury may declare the statement defamatory per se. Later decisions read the, *Caruso* quote as declaring that a determination of whether a statement is defamatory per se is for the court, not the jury, unless the claim involves the vague areas of public confidence or injury to business. *Wood v. Battle Ground Sch. Dist.*, 107 Wn. App. at 574 (2001). Life Designs does not seek a ruling on appeal as a matter of law that Michael Sommer's website constituted defamation per se. Life Designs settles for sending the claim of defamation per se to a jury.

The majority's holding that only "extreme" cases qualify for defamation per se will create difficulties for practitioners and lower courts. The majority gives little, if any, guidance, as to what circumstances qualify as "extreme" cases. Lawyers and trial courts may wonder if they look to principles adopted in intentional infliction of emotional distress decisions to determine when conduct of a defendant constitutes outrage. In such a setting, the plaintiff must establish "extreme" conduct. *Trujillo v. Nw. Trustee Servs., Inc.*, 183 Wn.2d 820, 840, 355 P.3d 1100 (2015).

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In *Caruso v. Local Union*, the defendant union published a "do not patronize" article in its weekly paper. The article read:

Don't [P]atronize Carpet City in Spokane

This is to notify all members of Teamsters Union, Local 690 and all other Teamsters and Laboring people in the State of Washington that when traveling to and from the Expo City—"please do not *patronize Carpet City Carpet & Linoleum Shop* at West 518 Main Avenue"—Spokane, Washington," [sic] (Expo City). The reasons for this request are: This Company is continuously harassing the Teamsters and other laboring people who may at some time use the parking facility at this place of business to make a delivery because of the congested traffic problems in Expo City since construction is going on mainly in that area. Someone from this Company removes the keys of such vehicles, have [*sic*] the equipment impounded and create [*sic*] many problems for these employees and their employers including the cost of impoundment to those effected [sic].

This company will not cooperate with these drivers when told that they will move their equipment and apologize for parking in this area—their equipment is still impounded!

We request that all Laboring people—Teamsters or otherwise—*do not [p]atronize Carpet City Carpet & Linoleum Shop*.

Thanks kindly for your *Support*.

Teamsters Union, Local 690.

Caruso, 100 Wn.2d at 346. Facts belied the allegations regarding the carpet business' lack of cooperation and impoundment of vehicles after an apology. Contrary to this court's majority's analysis, the *Caruso* court did not declare a jury instruction erroneous because it directed the jury to find the paper's article to be defamatory per se if it found the article to be false. The court found the instruction mistaken because it allowed the jury to presume damages without a finding of malice, a ruling that is no longer accepted law.

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The majority in this appeal emphasizes threatening phone calls placed to Robert Caruso after the union's publication and distinguishes the case on appeal with *Caruso v. Local Union* on the basis that Life Designs received no phone calls or threatening messages. Nevertheless, the threatening phone calls were relevant to the damages sustained by Caruso, not to the liability of the union. The reader's response to a defamatory statement has no bearing on whether the statement is defamation per se. *Caruso* does not read to the contrary.

At least three Washington decisions illustrate that Michael Sommer's website entries qualify for defamation per se. In *Wood v. Battle Ground School District*, 107 Wn. App. 550 (2001), this court reversed a summary judgment dismissal of a defamation claim brought by a former employee of the school district against the district board chair. The chairman told a local newspaper that Jennifer Wood's performance as a communications coordinator was "lacking." The court characterized the quotation as defamatory per se.

In *Vern Sims Ford, Inc. v. Hagel*, 42 Wn, App. 675 (1986), Fred Hagel claimed the Ford dealership overcharged him for the purchase of a van. Hagel sent a flyer to approximately one hundred persons in the dealership's community. The flyer read that the dealership and its salesperson were thieves. The trial court awarded damages despite no proof of actual damages since the flyer injured the dealership's business reputation. This court agreed the flyer constituted defamation per se and affirmed the award.

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In *Waechter v. Carnation Co.*, 5 Wn. App. 121 (1971), a competitor in milk delivery told customers in the community that the plaintiff's milk was not properly refrigerated and therefore contained bacteria injurious to the drinker's health. This court sustained a substantial award despite missing proof of actual damages because the nature of the defamatory statement was defamatory per se.

FALSITY, FACT, AND OPINION

I must now determine whether Life Designs presents some evidence of all of the elements of defamation, regardless of whether Michael Sommer's comments were defamatory per se. Irrespective of whether the defendant's statements affect the plaintiff's business, the plaintiff must still fulfill the elements of defamation. The majority holds that all remarks on Sommer's website were opinion, not factual, in personality. The majority also holds that Life Designs failed to provide evidence of damages. I address now whether some evidence supports a conclusion that remarks on Sommers' website were factually false. I will later address damages.

Consistent with the majority's ruling, Michael Sommer argues that the contents of his website entirely entail mockery, exaggeration, vituperation, and complaints over pricing and the quality of services received. Sommer asks that this court rule as a matter of law that written grievances from a dissatisfied customer complaining of overcharges and poor service is protected and not defamatory. When Sommer contends that his comments were not defamatory he does not contend that his statements were not negative

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or hurtful to Life Designs. In other words, he does not argue that the meaning of the words was not defamatory, but he argues instead that his comments were in the nature of opinions and thus not qualifying as defamation. Sommer mentions in passing that an element of defamation is a defamatory statement, but Sommer does not expressly adopt the position that any particular statement could not injure Life Designs' reputation. Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration. *West v. Thurston County*, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012); *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998).

At the outset, the defamation plaintiff must prove the offensive statement is "provably false." *Alpine Indus. Computers, Inc. v. Cowles Publ'g Co.*, 114 Wn. App. 371, 379, 57 P.3d 1178 (2002), 64 P.3d 49 (2003); *Schmalenberg v. Tacoma News, Inc.*, 87 Wn. App. at 590 (1997). A statement can be provably false if it falsely describes the act, condition or event that comprises its subject matter. *Schmalenberg*, 87 Wn. App. at 590. Implications, like plain statements, may give rise to a defamation claim. *Mohr v. Grant*, 153 Wn.2d 812, 823, 108 P.3d 768 (2005). In a defamation by implication case, the plaintiff must show that the statement at issue is provably false, either because it is a false statement or because it leaves a false impression. *Sisley v. Seattle Pub. Sch.*, 180 Wn. App. 83, 87-88, 321 P.3d 276 (2014).

Defamation law distinguishes between fact and opinion. While communication of a false fact may not be privileged, expressions of opinion are protected under the First

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Amendment and thus are not actionable. *Camer v. Seattle Post-Intelligencer*, 45 Wn. App. 29, 39, 723 P.2d 1195 (1986).

Certain means of expression qualify as opinion. "Rhetorical hyperbole" is not actionable as defamation and is constitutionally protected. *Haueter v. Cowles Publ'g Co.*, 61 Wn. App. 572, 586 (1991). Some statements cannot reasonably be understood to be meant literally and seriously and are obviously mere vituperation and abuse. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 55, 59 P.3d 611 (2002), (quoting RESTATEMENT (SECOND) OF TORTS § 566 cmt. e (1977)).

The law treats some ostensible opinions as facts and actionable in defamation. A defamatory communication may consist of a statement in the form of an opinion, and a statement of this nature is actionable if it implies the allegation of undisclosed defamatory facts as the basis for the opinion. *Camer*, 45 Wn. App. at 39 (quoting RESTATEMENT (SECOND) OF TORTS § 566 at 170 (1977)). A statement meets the provably false test to the extent it expresses or implies provable facts, regardless of whether the statement is, in form, a statement of fact or a statement of opinion. *Valdez-Zontak v. Eastmont Sch. Dist.*, 154 Wn. App. 147, 225 P.3d 339 (2010). If a direct statement of facts would be defamatory, then a statement of an opinion implying the existence of those false facts supports a defamation action. *Henderson v. Pennwalt Corp.*, 41 Wn. App. 547, 557, 704 P.2d 1256 (1985).

The determination of whether a communication is one of fact or opinion is a

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question of law for the court. *Benjamin v. Cowles Publ'g Co.*, 37 Wn. App. 916, 922, 684 P.2d 739 (1984). Washington courts have promulgated two complimentary tests to aid a court in making this determination. Under the first test, the court should consider: (1) the entire article and not merely a particular phrase or sentence, (2) the degree to which the truth or falsity of a statement can be objectively determined without resort to speculation, and (3) whether ordinary persons hearing or reading the matter perceive the statement as an expression of opinion rather than a statement of fact. *Benjamin*, 37 Wn. App. at 923; *Camer*, 45 Wn. App. at 39. Even apparent statements of fact may assume the character of opinions, and thus be privileged, when made in public debate, heated labor dispute, or other circumstances in which an audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole. *Camer v. Seattle Post-Intelligencer*, 45 Wn. App. at 41 (1986). In other words, both the immediate as well as broader social context in which the statements occur should be considered. *Camer*, 45 Wn. App. at 41.

Under the second test, to determine whether the words are nonactionable opinions, the court considers the totality of the circumstances surrounding the statements. *Robel v. Roundup Corp.*, 148 Wn.2d at 55 (2002). The court studies (1) the medium and context in which the statement was published, (2) the audience to whom it was published, and (3) whether the statement implies [defamatory] undisclosed facts. *Dunlap v. Wayne*, 105 Wn.2d 529, 539, 716 P.2d 842 (1986); *Robel v. Roundup Corp.*, 148 Wn.2d at 55.

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Michael Sommer argues that *Robel v. Roundup Corporation* is dispositive in his favor. Linda Robel, an employee of defendant, filed a worker compensation claim. Thereafter

imaginative coworkers called Robel pleasantries such as "bitch," "cunt," "fucking bitch," "fucking cunt," "snitch," "squealer," "liar," and "idiot." 128 Wn.2d at 55 (2002). The Supreme Court concluded that, under the circumstances in which the coemployees uttered the names, the words were plainly abusive words not intended to be taken literally as statements of fact. The court applied the *Dunlap* three-factor test. At issue were oral statements made in circumstances and places that invited exaggeration and personal opinion. Those engaging in the name-calling were Robel's coworkers and superiors who were potentially interested in discrediting her complaints to management about questionable food handling practices in the deli or who were personally interested in ostracizing Robel in the workplace. The audience of the statements was Fred Meyer's customers, workers and managers. All would have been aware of the animosity between Robel and other coworkers. Words such as "snitch," "squealer," and "liar" would have registered, if at all, as expressions of personal opinion, not as statements of fact. According to the court, customers hearing the comments would reasonably perceive that the speaker was an antagonistic or resentful coworker.

To determine whether genuine issues of material fact relating to defamatory words and falsity exist, I must necessarily examine the challenged statements against the available evidence. I later explore the context in which Sommer published his

statements. Michael Sommer's website no longer exists, so the court may not review the website as a whole, including its design and layout. We must rely on snapshots taken of some of the contents.

I divide the alleged defamatory statements of Michael Sommer into four descriptions: the pine trees, the terrain, the western Washington, and the counselor remarks. The pine trees comment declared:

What you get . . . A visual experience of pine trees, dead pine trees, falling down pine trees, disintegrated pine trees, and more pine trees.

CP at 248. Pine trees grow in the physical world and thus their existence and condition can be perceived objectively. The ordinary person would consider the statement one of fact.

Michael Sommer's comment refers to pine trees five times. On two of the references, he does not write that the pine trees are fallen, injured or ill. A sixth and later reference mentions pine trees without describing them as ill or dead. Thus, the reader could conclude that some beautiful trees lay on Life Designs' land. Sommer does not quantify the number of respiring trees or contrast the quick trees with the dead trees. Life Designs presents evidence that its trees live but does not dispute that its land includes some dismembered, decaying, or dead trees. Therefore, Life Designs presents no issue of fact as to the falsity of the pine trees statement.

Life Designs next complains about Michael Sommer's terrain remark. The website declared:

River, can't be seen. Mountains, can't be seen. Civilization, can't be seen. But there are pine trees!!!!!

CP at 248. Whether one can view a river and mountains from a section of land can be determined objectively. The ordinary person would consider the statement one of fact. Life Designs presents evidence countering Michael Sommer's statement denying the scenic view on Life Designs' land.

Michael Sommer likens his terrain remark to one expressing that she was not impressed with a view or landmark by declaring "I don't see what's so great" about the scene or landmark. If so, Sommer inadequately expressed this concept. A reasonable reader could conclude that Sommer accuses Life Designs as misrepresenting its pastoral location by untruthfully claiming a river and mountains can be seen.

Life Designs next complains about a western Washington reference. Sommers wrote:

What you get . . . 2 or 3 twelve step meetings a week in a very small western Washington community where the only young adults in attendance are those from Life Designs ranch.

CP at 248.

Life Designs only complains about Sommer's comment that Life Designs ranch lies in western Washington. Washingtonians generally divide the state into eastern and western halves by the Cascade Range. One viewing a map of the Evergreen State may question, however, whether some locations in central Washington should be considered in western or eastern Washington. Nevertheless, no one would conclude that property

lying near Cusick, Pend Oreille County, is in western Washington. Pend Oreille County borders Idaho. Michael Sommer's statement is objectively false.

Michael Sommer claims his designating Life Designs ranch as being in or near a western Washington community references the State of Washington as being a western state, not the ranch lying in a western portion of the state. He asserts that his statement meant that Cusick is a "small western community in the State of Washington." Respondent's Br. at 21. The average reader would conclude otherwise. On his website, the word "western" preceded Washington, not community. I am to invest Sommer's words with their natural and obvious meaning.

I question whether Michael Sommer's erroneous location of a dependency recovery ranch in western, rather than eastern, Washington would injure the reputation of the ranch. Perhaps some eastern Washington residents would consider a western Washington location to be intolerable because of the crazy liberals on the west side of the mountains. Nevertheless, the lack of damage to reputation was not argued by Sommer.

Finally, Life Designs complains about Michael Sommer's website statement concerning the experience of counselors at Life Designs Ranch. Sommers declared:

You should go to Life Designs if: . . . You believe that it takes no education or experience with substance abuse, or compassion for the young adult who is recovering from a substance addiction to help them become the person they want to be.

CP at 249.

Michael Sommer did not expressly declare that counselors lacked experience or

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education with substance abuse or compassion for young people. Nevertheless, reading the website as a whole leads the reader to conclude such. The strong implication is that Life Designs' staff lacks the training, sympathy, and empathy desirous in a substance recovery counselor. Life Designs presents facts refuting the truthfulness of the statement. Criticizing the qualifications of a business' staff injures the business' reputation.

Michael Sommer wrote all of his allegedly false statements on a website critical of Life Designs. Sommer used a web address similar in nature to Life Designs' address. In his deposition, Sommer conceded he used the address to communicate with potential clients of Life Designs. As noted in his June 26, 2012 e-mail message to Life Designs, he intended to destroy the reputation of the addiction recovery center. Sommer did not post his comments on a blog that allowed competing viewpoints. Reading all comments in light of the entire website does little to change the meaning or impression given or soften the sting of the remarks.

The majority discounts Michael Sommer's defamatory statements on the ground that the reader should consider the statements exaggerations of an angry customer. The majority emphasizes the site's language: "Healing is not done and seems to be very limited in it's [sic] attempt." CP at 251. The majority concludes that the word "seems" should lead a reader to consider all statements on the site to be of opinion. I disagree. The site contained some obvious exaggerations of an irate customer, but the Sommer website contained more. The website included provable statements of false fact injurious

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to Life Designs.

The majority reasons that a reader of Michael Sommer's website could also enter and read Life Designs' authentic website to obtain a countervailing view or the corrected facts. No principle of law excuses defamatory statements on the ground that the reader may find the true facts elsewhere.

In this postmodern information era of history, many consumers glean information about products and services on the Internet. For some young consumers, the web is the only source of information. One is often cautioned about believing everything read on the Internet. But no decision grants immunity for falsehoods posted on the web. Because of ready access to the Internet, such falsehoods may ruin a business' reputation quicker than older forms of communication. One's reputation can be sullied as much by the Internet as the local community grapevine in a bygone era. Because the creator of a website often remains anonymous, the reader is unable to contact the speaker of defamatory words to question the truth of the statements.

The only Washington decision addressing a claim of defamation based on a website is *Janaszak v. State*, 173 Wn. App. 703, 297 P.3d 723 (2013). This court affirmed a summary judgment dismissal of Eric Janaszak's claim based on the Washington Department of Health's posting of, on its website, a notice that the department restricted Janaszak's license for practicing

dentistry after he engaged in sex with patients. This court dismissed the suit on the basis of a privilege. Although the

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State did not argue the point, this court did not suggest that the law of defamation changes when the defendant uttered the defamatory communique on a website.

The Federal Communication Decency Act of 1996 grants immunity from defamation claims to the administrator of a website or an internet service provider. 47 U.S.C. § 230(a). The act does not shield the author of the defamatory statement, even if the author is the administrator of the site. *Ricci v. Teamsters Union Local 456*, 781 F.3d 25 (2d Cir. 2015); *Cisneros v. Sanchez*, 403 F. Supp. 2d 588, 591-92 (S.D. Tex. 2005). Other courts have held defamatory factual statements posted on the Internet, even in chat rooms, can garner liability. *Taylor Bldg. Corp. v. Benfield*, 507 F. Supp. 2d 832 (S.D. Ohio 2007); *Marczeski v. Law*, 122 F. Supp. 2d 315 (D. Conn. 2000); *SPX Corp. v. Doe*, 253 F. Supp. 2d 974 (N.D. Ohio 2003); *Bently Reserve L.P. v. Papaliolios*, 218 Cal. App. 4th 418, 160 Cal. Rptr. 3d 423 (2013); *Too Much Media, LLC v. Hale*, 206 N.J. 209, 20 A.3d 364 (2011).

In *Bently Reserve L.P. v. Papaliolios*, a tenant anonymously posted a review of his former landlord and apartment on the popular Yelp website. The posting read:

Sadly, the Building is (newly) owned and occupied by a sociopathic narcissist—who celebrates making the lives of tenants hell. Of the 16 mostly-long-term tenants who lived in the Building when the new owners moved in, the new owners' noise, intrusions, and other abhorrent behaviors (likely) contributed to the death of three tenants (Pat, Mary, & John), and the departure of eight more (units 1001, 902, 802, 801, 702, 701, 602, 502) in very short order. Notice how they cleared-out all the upper-floor units, so they could charge higher rents?
They have sought evictions of 6 of those long-term tenants, even though rent was paid-in-full, and those tenants bothered nobody. And what

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they did to evict the occupants of unit # 902, who put many of tens of thousands of dollars into their unit, was horrific and shameful.
This is my own first-hand experience with this building, and its owners. I know this situation well, as I had the misfortune of being in a relationship with one of the Building's residents at the time, have spent many days and nights over many years in the Building, and have personally witnessed the abhorrent behavior of the owners of the Building.
There is NO RENT that is low enough to make residency here worthwhile.

218 Cal. App. 4th at 423.

The *Bently Reserve* appellate court affirmed the trial court's denial of the tenant's motion to dismiss the landlord's defamation suit. The tenant claimed that Internet fora are notorious as places where readers expect to see strongly worded opinions rather than objective facts and that anonymous opinions should be discounted accordingly. The court noted that commentators have likened cyberspace to a frontier society free from the conventions and constraints that limit discourse in the real world. The court disagreed and ruled that the mere fact speech is broadcast

across the Internet by an anonymous speaker does not make it nonactionable opinion and immune from defamation law.

HYPERLINK

The organization Human Earth Animal Liberation (HEAL) operated a website critical of Life Designs and other addiction recovery businesses. The website accused Life Designs of functioning like a cult and illegally exploiting student labor. Michael Sommer did not repeat, on his website, the critical remarks made by HEAL on its site. Sommer, however, provided the reader of his site a hyperlink to the HEAL site. I agree

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with the majority that Sommer, as a matter of law, does not incur liability in defamation for the hyperlink. I need not add to the majority's analysis.

PRESUMED DAMAGES

The majority also affirms summary judgment dismissal of Life Designs' defamation action on the basis that Life Designs failed to submit facts showing Michael Sommer's website caused damages. I disagree for two reasons. First, because Life Designs presented facts supporting defamation per se, Life Designs need not show actual damages. Sommer does not argue that, assuming Life Designs prevails in defamation per se, he need not prove damages. Second, Life Designs provided facts showing damages. This section of the opinion discusses presumed damages for defamation per se.

Since the majority dismisses Life Designs' defamation per se allegation, the majority ignores the rule freeing Life Designs from proving economic loss. Defamation per se is actionable without proof of special damages. *Amsbury v. Cowles Publ'g Co.*, 76 Wn.2d at 737 (1969). Conversely, a defamation plaintiff may recover presumptive damages if he shows he has been referred to by words libelous per se. *Maison de France, Ltd. v. Mais Oui!, Inc.*, 126 Wn. App. at 53-54 (2005); *Haueter v. Cowles Publ'g. Co.*, 61 Wn. App. at 578 (1991). The defamed person is entitled to substantial damages without proving actual damages. *Waechter v. Carnation Co.*, 5 Wn. App. at 128 (1971). Statements falling within the per se categories are thought to be so obviously and

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materially harmful to a plaintiff that damage can be presumed. *Arnold v. Nat'l Union of Marine Cooks & Stewards*, 44 Wn.2d 183, 187, 265 P.2d 1051 (1954).

Michael Sommer contends that Life Designs cannot prove damages because the business cannot identify anyone who read the contents of Sommer's website. One wonders how Life Designs could locate readers of another's website. Defamation per se is designed to assist businesses like Life Designs that may encounter difficulties in proof. Proof of actual damage will be impossible in a great many cases when, from the character of the defamatory words and circumstances of publication, it is all but certain that serious harm has resulted in fact. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 u.S. 749, 760 (1985) (quoting WILLIAM PROSSER, *Law of Torts* § 112 at 765 (4th ed. 1971)).

In *Demopolis v. Peoples National Bank of Washington*, 59 Wn. App. 105, 796 p.2d 426 (1990), the trial court directed a verdict in favor of the defendant in a defamation case, in part because plaintiff had proved no damages. This court reversed on the ground that defendant accused plaintiff of a crime. Since plaintiff established an action for defamation per se, plaintiff did not need to prove any actual damages.

In *Maison de France, Ltd. v. Mais Oui!, Inc.*, 126 Wn. App. 34 (2005), the defendant falsely claimed that law enforcement agencies investigated the plaintiff for fraud. The trial court found no economic or other damages and thus denied recovery. This court reversed and directed the trial court to award presumed damages.

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Some cases refer to "actual damages" and other cases refer to "special damages" as the form of damages not needing proof in defamation per se. Some decisions use both terms. Presumably the two mean the same. *See Haueter v. Cowles Publ'g. Co.*, 61 Wn. App. at 578 (1991). Special damages, according to the *Restatement*, include any pecuniary or economic loss. RESTATEMENT (SECOND) OF TORTS § 575, cmt. b (1977).

GARRETT DECLARATION

I now address whether, assuming Life Designs did not show facts sufficient to sustain a claim for defamation per se, Life Designs otherwise defeats a summary judgment motion against an argument that it showed no damages to support a defamation suit. Before discussing the law of damages, I must first address an evidentiary question important to this issue.

In opposition to Michael Sommer's summary judgment motion, Life Designs filed an affidavit of its former admissions director, Clay Garrett. Garrett not surprisingly testified that a recovery center's reputation is a primary factor in obtaining clients. Garrett averred that, upon Michael Sommer opening his website, the Life Designs website visits remained constant, but referrals from consultants and clients decreased. Life Designs suffered an approximate fifty six percent decline in referrals during the period when Sommer published the defamatory content to the public. This equates to nine to twelve clients that Life Designs lost because of Sommer's website. Garrett insists

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that Sommer's Internet site caused a decline in clients and income. When someone searched the web for Life Designs addiction recovery center, the searcher also was given the web address for Sommer's site.

On appeal, Michael Sommer claims that the trial court struck the declaration of Clay Garrett, because the declaration contained opinions, for which Garrett is not qualified to utter. The record does not support this claim. Regardless, Sommer argues on appeal that this court should ignore the testimony of Garrett. This argument would be dispositive only if Life Designs failed to establish defamation per se. Resolution of the argument looms important in determining whether Life Designs presents an issue of fact as to actual damages.

ER 702 governs testimony by expert witnesses. The rule reads:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Michael Sommer belittles Clay Garrett's qualifications, in part, because Garrett holds a herpetology degree. Sommer fails to recognize that a witness qualifies as an expert in more ways than education. Witnesses may qualify as experts by practical experience. *State v. Ortiz*, 119 Wn.2d 294, 310, 831 P.2d 1060 (1992); *Acord v. Pettit*, 174 Wn. App. 95, 111, 302 P.3d 1265 (2013). An expert may be qualified to testify by experience alone. *In re Marriage of Katare*, 175 Wn.2d 23, 38, 283 P.3d 546 (2012); *Taylor v. Bell*, 185 Wn. App. 270, 285, 340 P.3d 951 (2014). Once the basic requisite

qualifications are established, any deficiencies in an expert's qualifications go to the weight, rather than the admissibility, of his testimony. *In re Welfare of Young*, 24 Wn. App. 392, 397, 600 P.2d 1312 (1979); *Larson v. Georgia Pac. Corp.*, 11 Wn. App. 557, 524 P.2d 251 (1974).

Clay Garrett qualifies as an expert on the business of addiction recovery, the importance of a business' reputation, factors causing damage to a business' reputation, and the business affairs of Life Designs. Garrett was Life Designs' employee. He began working for Life Designs on December 15, 2010. He became director of admissions in early 2012. As director of admissions, Garrett gained intimate knowledge of the reasons by which clients chose Life Designs and obstacles that impacted that choice.

Clay Garrett worked for ten years at the Dallas Zoological Society and was the director of a scouting program. He later worked as a mentor and field director at a wilderness treatment program for young adults in Santa Clara, Utah. At Life Designs, Garrett worked in many capacities including that of a mentor, life coach, and program and admissions director. As a program and admissions director, Garrett developed new business, helped redesign the business' website, and interfaced with educational consultants who referred clients to recovery centers.

The majority holds that Clay Garrett was qualified as an expert to testify. I readily agree. Whereas, a court may sometimes limit a qualified expert to the scope of his testimony, the majority imposes no limitations on Garrett. The majority instead, in its

hurried analysis, fails to recognize the implications of its holding. I address those repercussions later.

CAUSATION AND DAMAGES

In a defamation action, the plaintiff may recover compensation for damage to reputation, emotional distress, bodily harm, and economic or special damages. *Schmalenberg v. Tacoma News, Inc.*, 87 Wn. App. at 589 n.56 (1977); RESTATEMENT (SECOND) OF TORTS at 197, 319, 321, 322, 325. The defamation must be the proximate cause of the damages. *Schmalenberg v. Tacoma News, Inc.*, 87 Wn. App. at 599 n.56. Even if Life Designs failed to establish

defamation per se, it presents sufficient facts to defeat a motion to dismiss its defamation claim on the elements of causation and damages.

Michael Sommer emphasizes the rule of logic caged in the Latin locution: "post hoc, ergo propter hoc" or "after this, therefore because of this." The axiom should be stated in the converse: an event or condition is not necessarily caused by an occurrence or circumstance that preceded it. According to Sommer and the majority, Life Designs does not create an issue of fact by showing that its business declined after Sommer began his website.

In *Anica v. Wal-Mart Stores, Inc.*, 120 Wn. App. 481 (2004), this court relied on this logical fallacy when affirming a summary judgment dismissal of Lorena Anica's claim of wrongful termination from employment. Wal-Mart terminated Anica's

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employment after her return to work from time off to recover from her second job injury. Anica argued that the timing of her termination provided sufficient evidence of causation to survive a summary judgment motion. Evidence, however, verified that the Social Security Administration had recently contacted Wal-Mart and notified the store that Anica's social security number was false. After Anica failed to fix the number anomaly, corporate offices told the local store to fire Anica.

Anica v. Wal-Mart Stores must be contrasted with *Borden v. City of Olympia*, 113 Wn. App. 359, 53 P.3d 1020 (2002). The Bordens sued Olympia after their property flooded. In November 1995, the city completed a new stormwater drainage system near the Borden land. In February 1996, ponds formed in the Borden's yard and the basement flooded. The flooding continued thereafter. When the city redesigned the system and redirected the wastewater flow, the flooding ceased. The Bordens complained that Olympia negligently designed the 1995 system. The trial court granted the city summary judgment. On appeal, this court determined that facts supported a breach of duty and causation of damages. This court reversed the summary judgment on the negligence claim.

The *Borden* Court asked whether a trier of fact could rationally find that Olympia's project proximately caused damage to the Bordens. Taken in the light most favorable to the Bordens, the record showed that flooding to their property started the first winter after the 1995 project was completed. The flooding recurred each winter for

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the next several years. The flooding subsided when another drainage facility channeled water away from the Bordens' land and into the headwaters of a nearby creek. According to the court, this coincidence in timing gave rise to an inference that the flooding was a proximate result of the 1995 drainage project.

Based on *Anica v. Wal-Mart Stores*, timing may not be sufficient on its own to raise a question of fact of causation. Nevertheless, according to *Borden v. City of Olympia*, timing is a significant factor to consider.

The majority distinguishes *Borden v. City of Olympia* on two grounds. First, the Bordens sued the city for negligence, not defamation. The majority intimates that the rules of causation change in a defamation action. The majority cites no law for this implication. There is no law. If the majority's implied ruling is correct, the majority should avoid principles discussed in *Anica v. Wal-Mart*, since *Anica* is not a defamation suit.

The majority also distinguishes *Borden v. City of Olympia* with the important distinction that the flooding of the Bordens' property ended when Olympia redesigned its storm drainage system. Life Designs presented no testimony that its business recovered after Michael Sommer removed his website. Of course, Life Designs can argue that the damage had been done and the cessation of the website did not restore its reputation. Redesigning the city stormwater system physically changed the flow of the water, whereas defamatory statements may linger in the minds of hearers long after the

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defendant ceases publication of the statements. Defamation's stormwaters may persist even after a redirection.

Borden v. City of Olympia and the majority's ruling may be based on the principle that when damage ends after defendant's wrongful conduct ends, the plaintiff proves causation. This ruling is also logically false under the same principle. Just because the Bordens' flooding ended after the city redesigned its system does not mean that the redesign ended the flooding. Of course, *Borden* has two critical events that assist in resolving causation, the beginning of operations of the system project and cessation of the system. Logicians have yet to announce the fallacy of "after this but not after this endeth, therefore this."

Some commonsense based on experience should enter the discussion of causation. When a man bangs his head against the wall, after which his head hurts, we conclude that the banging caused the hurt. When a woman is in a rear end collision, after which her neck hurts, the law allows a physician to testify that the car accident caused a whiplash, regardless of whether imaging studies confirm the lack of soft tissue injury before the accident or presence of tissue injury after the accident. An injured party's testimony alone of pain after an accident is sufficient to permit the jury to award damages for that pain and future pain. *Bitzan v. Parisi*, 88 Wn.2d 116, 122, 558 P.2d 775 (1977). For purposes of a summary judgment motion, the law accepts the truthfulness of the accident

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victim when she states that after an accident she garnered pain and therefore the pain is related to the accident. The jury can later judge the credibility of the victim.

The law might permit Clay Garrett to testify as a lay witness that the defamation published by Michael Sommer caused Life Designs damages. The majority has gone one step further and qualified Garrett as an expert witness. He is in a similar position to a treating physician in a personal injury suit.

Clay Garrett avers that, during the time Michael Sommer operated his website, Life Designs' referral rate plummeted by fifty six percent and the business lost five to nine clients. Based on his

experience, Sommer opined that the website caused the lack of business. No case requires Life Designs to identify a lost costumer as a condition to recovering lost income. Thus, Life Designs presents a jury question of damages. A trier of fact can later decide the credibility of Garrett's testimony. Michael Sommer raises a good argument that the HEAL website could have caused all of Life Designs' damages. This good argument should be presented to the jury.

The majority criticizes the reasoning and the relevance of the data on which Clay Garrett justified his opinion. Once this court qualified Garrett as an expert, however, Garrett did not even need to disclose the facts or data on which he supported his conclusion. ER 705.

Michael Sommer should not be surprised that his website caused a loss of business to Life Designs. He threatened to harm Life Designs' reputation. Damage to Life

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Designs was Sommer's stated goal. In his June 26 message to Vince Barranco, Sommer wrote, in part:

I am willing to get legal with this. Are you? I would hope that the most important thing to you is your reputation. We all know how easily reputations can be destroyed, without the legal system even getting involved. But I would go both routes if I have to.

CP at 257.

The elements of damages and causation run together in this case. Proximate cause has two elements, cause in fact cause and legal causation. *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wn.2d 468, 478, 951 P.2d 749 (1998). Cause in fact asks whether damages would have occurred but for the wrongful conduct of the defendant. *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985). Legal causation addresses policy considerations as to how far the consequences of defendant's acts should extend. *Hartley v. State*, 103 Wn.2d at 779. A proximate cause is one that in natural and continuous sequence, unbroken by an independent cause, produces the injury complained of and without which the ultimate injury would not have occurred. *Schooley*, 134 Wn.2d at 478; *Bernethy v. Walt Failor's, Inc.*, 97 Wn.2d 929, 935, 653 P.2d 280 (1982). The plaintiff need not establish causation by direct and positive evidence, but only by a chain of circumstances from which the ultimate fact required is reasonably and naturally inferable. *Teig v. St. John's Hosp.*, 63 Wn.2d 369, 381, 387 P.2d 527 (1963); *Conrad ex rel. Conrad v. Alderwood Manor*, 119 Wn. App. 275, 281, 78 P.3d 177 (2003).

Generally, the issue of proximate causation is a question for the jury. *Bernethy v.*

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Walt Failor's, Inc., 97 Wn.2d at 935 (1982); *Attwood v, Albertson's Food Ctr., Inc., 92* Wn. App. 326, 330, 966 P.2d 351 (1998). Only when the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion may the court remove the question from the jury. *Bernethy*, 97 Wn.2d at 935. In its abbreviated analysis, the majority weighs the facts relevant to causation. By ruling as a matter of law on the issue of damages, the majority usurps the role of the jury,

A foreign decision of limited relevance is *State Farm Fire & Casualty Company v. Radcliff*, 987 N.E. 2d 121 (Ct. App. Ind. 2013). State Farm sued Joseph Radcliff and Radcliff's company for fraud and racketeering arising out of Radcliff's assistance to State Farm policyholders in recovering damages for a large hailstorm in central Indiana. Radcliff counterclaimed for defamation because of State Farm's broadcasting of Radcliff engaging in fraudulent and criminal practices. The Indiana Court of Appeals affirmed a $14.5 million verdict in favor of Radcliff. In affirming the verdict, the appellate court rejected State Farm's argument that the trial court impermissibly allowed Radcliff's economic expert to testify that articles on the Internet, prompted by State Farm's allegations, created a negative situation for Radcliff that impacted his business prospects in the future. The expert exclaimed "the challenge with the internet is that once something is on the internet, it's virtually impossible to get rid of it." *State Farm Fire & Cas. Co.* 987 N.E.2d at 154 (Ct. App. Ind. 2013).

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FALSE LIGHT

I concur with the majority that a corporation may not recover for the tort of false light. I also concur that Vincent and Bobbie Barranco did not show damages to sustain an action in false light.

TORTIOUS INTERFERENCE WITH BUSINESS EXPECTANCY

The majority writes that Life Designs created issues of fact as to each substantive element of the tort of interference with a business expectancy. I agree. Thus, I will not list the elements of the tort or analyze the evidence in relationship to all elements.

The majority affirms summary judgment dismissal of the tortious interference cause of action on the basis that Life Designs has not presented evidence of damages. Resultant damage is an element of the tort. *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 157, 930 P.2d 288 (1997). In reviewing the evidence on appeal, the majority conducts the same analysis performed when holding that Life Designs showed no damages to support its defamation claim. The majority writes that no potential client or referral source submitted an affidavit establishing that he or she did not choose Life Designs because of Michael Sommer's website. The majority cites no authority for the proposition that the plaintiff must present evidence from a customer or potential customer in order to sustain a claim for tortious interference. Washington law imposes no such requirement.

/s/_____
Fearing, J.

Footnotes:

[1] Mr. Sommer contends Mr. Garrett's declaration is inadmissible as an expert opinion because (1) Mr. Garrett was not qualified to offer the opinions contained therein, thus (2) much of the declaration was inadmissible conclusory allegations of a lay witness. We cannot consider inadmissible evidence when ruling on a motion for summary judgment. *Davis*, 171 Wn. App. at 357. We review the admissibility of evidence in summary judgment proceedings de novo. *Id*. ER 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue,

a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Under this rule, we engage in a two-part inquiry: "(1) does the witness qualify as an expert; and (2) would the witness's testimony be helpful to the trier of fact." *State v. Guillot*, 106 Wn. App. 355, 363, 22 P.3d 1266 (2001). The focus of our inquiry is on Mr. Garrett's qualifications. "[I]n the appropriate context, practical experience is sufficient to qualify a witness as an expert." *State v. McPherson*, 111 Wn. App. 747, 762, 46 P.3d 284 (2002) (internal quotation marks omitted). Once a witness is qualified as an expert, any deficiencies in that qualification go to the weight, not the admissibility of the testimony. *Keegan v. Grant County Pub. Util. Dist. No. 2*, 34 Wn. App. 274, 283, 661 P.2d 146 (1983). Mr. Garrett's experience in wilderness programs, computers (including building a website), and business development render his testimony admissible under ER 702. Any deficiencies in his testimony thus would go to the weight.

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950 S.W.2d 100
25 Media L. Rep. 2418
KTRK TELEVISION d/b/a KTRK-TV, Minerva Perez, and Shara Fryer, Appellants,
v.
Bettye FELDER and the Houston Resource Learning Center, Inc., Appellees.
No. 14-96-00310-CV.
Court of Appeals of Texas,
Houston (14th Dist.).
April 10, 1997.

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Charles L. Babcock, N. David Bleisch, Susan Weiss Davidson, for appellants.

Laurence W. Watts, Carla S. Danbury, for appellees.

Before MURPHY, C.J., and ANDERSON and O'NEILL, JJ.

OPINION

MURPHY, Chief Justice.

This is an interlocutory appeal by media defendants from the denial of a motion for summary judgment in a defamation case. See TEX. CIV. PRAC. & REM.CODE ANN. § 51.014(6) (Vernon Supp.1997). Bettye Felder sued KTRK Television, Inc. d/b/a KTRK-TV and two of its reporters, Minerva Perez and Shara Fryer (collectively referred to as "KTRK"), alleging she was defamed by a January 6, 1994, news broadcast ("the Broadcast"). The Broadcast reported allegations by parents of students that Felder, a Dowling Middle School teacher, had physically threatened and verbally abused their children.

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It also reported that Felder was going to be reassigned pending an investigation of the matter by the Houston Independent School District ("HISD"). Felder's private tutoring business, Houston Resource Reading & Learning Center, Inc. ("Houston Resource"), intervened in the suit claiming its business was damaged by the alleged defamatory broadcast. KTRK moved for summary judgment on a variety of constitutional, statutory, and common law grounds. Without stating the basis for its ruling, the trial court denied KTRK's motion and KTRK appealed. We reverse the trial court's order and render judgment that Felder and Houston Resource take nothing.

I. FACTS

A. The Incidents

There are several incidents in late 1993 that are the basis for the story aired by KTRK. At the time, Felder, a former special education teacher of elementary school students, had just transferred to Dowling Middle School. Although she was not accustomed to working with middle school children, Felder requested the transfer because of a conflict with an elementary school principal. At Dowling, Felder taught English to "resource students," who needed special attention because of behavioral problems or learning deficiencies. The first incident occurred when the parents of one of Felder's eighth-grade students complained to Joseph Drayton, then the Assistant Superintendent for the HISD South Area Office, that Felder had threatened to shoot their son with a gun, which the child claimed was in Felder's purse. After being confronted by Dowling's principal, Richard Gardner, Felder denied making such a threat or possessing a gun, but stated she had a large sum of cash in her purse which necessitated her keeping her purse nearby at all times. She opened her purse for Gardner, who did not see a gun.

The second incident occurred when a parent complained to Superintendent Drayton that Felder threatened to "body-slam" her daughter, a sixth-grader, if she did not leave the classroom. In a previous incident, that same parent had accused Felder of choking her son, but had resolved the matter with Felder. Once again, Principal Gardner investigated. As a result of that investigation, Mr. Gardner issued a written reprimand to Felder for her "negative unprofessional comments." A fourth incident involved a claim by an eighth-grade student that Felder threatened him with a pair of scissors. In a written statement, Felder later claimed she was not "conscious" of the scissors in her hand and that the student had verbally threatened her when she asked him to leave the classroom due to disruptive behavior.

As a result of this last incident, the student was suspended and a hearing on the matter was scheduled on the Dowling campus. On the scheduled date, the hearing was initially delayed for the arrival of a union representative as per Felder's request. When she subsequently learned that several of the complaining parents and students were going to be at the hearing, Felder requested another delay so that she could be represented by a union attorney. Ultimately, the hearing never took place because Gayle Fallon, the President of the Houston Federation of Teachers, arrived and received permission to remove Felder from the campus. Felder was immediately reassigned and never returned to Dowling.

B. The Story

KTRK reporter, Minerva Perez, was first notified about the allegations concerning Felder at approximately mid-morning on January 6, 1994, by Rose Ayala, a parent active in school affairs at Dowling. In the past, Ms. Ayala had called Perez on other stories about Dowling and Perez believed her to be a reliable source. Following her conversation with Ms. Ayala, Perez interviewed several parents of Dowling Middle School students, including the PTA president, Mildred Burnley. They told Perez that Felder had threatened their children with physical harm. After these interviews, Perez called the official spokesperson for HISD, Jaime De La Isla. Unable to reach Mr. De La Isla, Perez spoke to Vernell Jessie, who stated she would call Perez back. When Perez asked Ms. Jessie if she could reach Felder, she was

told Felder could not be contacted through HISD.

Later that morning, Ms. Jessie informed the KTRK news desk that Mr. De La Isla would be available to meet with Perez. Around lunchtime, Perez met with Mr. De La Isla at HISD headquarters. Mr. De La Isla stated the administration was going to temporarily reassign Felder under the supervision of the area superintendent pending the outcome of an investigation on the matter. When Perez asked for Felder's home telephone number and a photograph of Felder, Mr. De La Isla refused to provide them. At this time, Perez attempted to contact Gayle Fallon. Ms. Fallon, however, was in a meeting and unavailable. Sometime after lunch, Perez went back to Dowling Middle School to speak to Principal Gardner to obtain Felder's home telephone number. Perez asked two school officials for permission to speak to Mr. Gardner but was barred from entering the school.

C. The Broadcast

Following her investigation, Perez wrote the script for her report and submitted it to the executive producer and producer for approval. The executive producer had been kept informed of the investigation's progress throughout the day by Perez. After the script was approved, Perez tracked it on videotape and gave it to the editors. The following report headlined KTRK's January 6, 1994, broadcast:

Shara Fryer: Dowling Middle School, which has a history of discipline and personnel problems is once again in the middle of a controversy. A group of parents, including the PTA President, is charging a school teacher with physically threatening and verbally abusing their kids. As Minerva Perez reports, they want that teacher and the principal removed.

Lucille Taylor: And then she told him, asked him maybe two or three times, and the third time he got up and he started walking out the door and uh, he said she said something to him, and he turned around and when he turned around, she come up with the scissors like that and told him you better get out of this room boy.

Ester Thompson: About three days after he was in her class, she choked him. He has a problem, and if you provoke him, he will get violent. She choked him.

Minerva Perez: Those are the allegations against Dowling Middle School teacher Bettye Felder, whom we couldn't reach for comment today. These parents say they have had enough of her questionable behavior in her special ed class. Even the PTA President is siding with the parents.

Mildred Burnley: And then to go and talk to HISD, and they inform me that the same teacher had done similar, and they understood what I was going through. To say that they understand is not enough, and we're not going to sit back and take it over here.

Perez: When attempts were made to reach Principal Richard Gardner today, this reporter wasn't even given the courtesy to reach his campus office.

Unidentified Woman: He came out and told you that we would not be making comments today.

Perez: He didn't tell me.

Unidentified Woman: Here he is right here.

Man: Mr. Gardner has gone to a meeting.

Unidentified Woman: We are going to ask that you leave.

Perez: You're not Mr. Gardner?

Unidentified Woman: You are already exciting our kids.

Perez: You are very excited ma'am. All I want to do is talk to this man. Now is Mr. Gardner here?

Unidentified Woman: We have no comment.

Perez: Dowling for years has seen enough people with discipline and administration problems. These latest allegations are just another round. But school officials say they have already taken action.

Jaime De La Isla: The administration is determined to reassign this individual temporarily under the supervision of the area superintendent, certainly pending the outcome of the investigation.

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Perez: But until the problem is resolved, parents say they are prepared to file a lawsuit against the district for what they call inadequate teachers and administrators at Dowling Middle School. Minerva Perez 13 Eyewitness News.

D. The Follow-Up

The next day, Perez interviewed Gayle Fallon at Fallon's office. Perez asked Ms. Fallon for Felder's telephone number but Fallon refused, saying that she could not release personnel records. A portion of the Fallon interview headlined KTRK's January 7, 1994, news broadcast. That broadcast essentially reported Ms. Fallon's view that Felder was incapable of choking a child and it was Felder who was being threatened by the students. Neither Felder nor Houston Resource complain about this broadcast. In fact, in their pleadings, Felder and Houston Resource characterize the January 7, 1994, broadcast as a "retraction."

E. The HISD Investigation

HISD subsequently investigated the incidents concerning Felder. On March 2, 1994, the HISD Office of Professional Standards issued a Personnel Investigation Report ("the HISD report"). That report documented that Felder had an inordinate amount of discipline problems with her students. However, of the incidents giving rise to the investigation, the HISD report confirmed only the incident in which Felder threatened to body-slam a student. [1] This incident was not specifically mentioned in the Broadcast and as we described, Felder was reprimanded for her conduct.

F. This Suit

On October 3, 1994, Felder filed suit, asserting causes of action for libel and slander, false light invasion of privacy, negligence, and intentional infliction of emotional distress based on the January 6, 1994 broadcast. On March 17, 1995, Houston Resource intervened asserting causes of action for business disparagement, injurious falsehood, and tortious interference with a business relationship based on the Broadcast. In November 1995, KTRK moved for summary judgment on all claims asserted by Felder and Houston Resource. Specifically, KTRK asserted Felder's defamation claim failed as a matter of law because the Broadcast was substantially true or privileged. Alternatively, KTRK asserted Felder was a limited public figure or public official and the summary judgment proof conclusively showed the absence of actual malice by KTRK in airing the Broadcast. KTRK further asserted the other causes of action alleged by both Felder and Houston Resource were founded entirely on Felder's defamation claim and because that claim failed as a matter of law, so did these other causes of action.

After Felder and Houston Resource filed their response, KTRK filed briefs in support of its motion as well as objections to the summary judgment proof offered by Felder and Houston Resource. At a hearing on January 5, 1996, the trial court took matters under advisement and requested additional briefing by the parties concerning the Texas Supreme Court's opinion in McIlvain v. Jacobs, 794 S.W.2d 14 (Tex.1990). Pursuant to the court's request, the parties filed reply briefs. In its reply, KTRK also asked the court to rule on its summary judgment motion and motion to strike summary judgment proof. The trial court eventually denied KTRK's motion for summary judgment on February 8, 1996. It did not rule on KTRK's objections, however, until March 14, 1996, after KTRK perfected this appeal. The trial court overruled most of these objections but sustained objections to portions of Felder's deposition testimony and struck the expert report on damages submitted by Felder and Houston Resource.

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II. ANALYSIS

In fourteen points of error, KTRK contends the trial court erred in denying it summary judgment on each of the claims asserted by Felder and Houston Resource.

A. The Standard

Point of error one complains generally that the trial court erred in denying KTRK's motion for summary judgment. Even though courts must give careful judicial attention to summary judgment motions in the context of the First Amendment, the standard for reviewing summary judgment is the same in defamation cases as in other types of case. Simmons v. Ware, 920 S.W.2d 438, 443 (Tex.App.--Amarillo 1996, no writ) (citing Carr v. Brasher, 776 S.W.2d 567, 569 (Tex.1989)). That standard is well-established. A movant for summary judgment has the burden of showing there is no genuine issue of material fact and it is entitled to judgment as a matter of law. Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 548-49 (Tex.1985); Montgomery v. Kennedy, 669 S.W.2d 309, 310-11 (Tex.1984). In deciding whether there is a disputed material fact issue precluding summary judgment, proof favorable to the non-movant is taken as true and the court must indulge every reasonable inference and resolve any doubts in favor of the non-movant. Nixon 690 S.W.2d at 548-49; Montgomery, 669 S.W.2d at 310.

In other words, the issue on appeal is not whether the non-movant raised a material issue of fact precluding summary judgment; rather, the issue is whether the movant proved it was entitled to judgment as a matter of law. See TEX.R. CIV. P. 166a(c); Gibbs v. General Motors Corp., 450 S.W.2d 827, 828-29 (Tex.1970). If the appellate court finds the movant has not met its burden, it must reverse and remand the case for further proceedings. Gibbs, 450 S.W.2d at 828-29. To prevail on summary judgment, a defendant, as the movant, must establish as a matter of law all the elements of an affirmative defense or show that that at least one element of plaintiff's cause of action has been established conclusively against the plaintiff. Montgomery, 669 S.W.2d at 310-11; Gibbs, 450 S.W.2d at 828. When, as in this case, the trial court does not specify the ground upon which it based its ruling, the summary judgment will be affirmed on appeal if any of the theories advanced are meritorious. Carr, 776 S.W.2d at 569; Simmons, 920 S.W.2d at 443.

B. Felder's Defamation Claim

Generally, to recover on a claim for defamation, the plaintiff must prove the defendant published a false defamatory statement to a third-party about the plaintiff. See Clarke v. Denton Publishing Co., 793 S.W.2d 329, 331 (Tex.App.--Fort Worth 1990, writ denied). As we stated, KTRK sought to negate essential elements of Felder's claim by asserting that the Broadcast was substantially true, and alternatively, that Felder was a public figure and/or public official and the summary judgment proof conclusively showed the absence of actual malice. McIlvain, 794 S.W.2d at 15 (holding that private figure plaintiff must bear burden of showing the speech at issue is false before recovering damages for defamation from media defendant); [2] see also Carr, 776 S.W.2d at 569 (stating the elements of defamation cause of action brought by public official or public figure). KTRK also asserted the defense of privilege. TEX. CIV. PRAC. & REM.CODE ANN. §§ 73.002 (Vernon 1986). Because the truth issue raised by KTRK in point of error two is dispositive of this appeal, we address it first.

In determining the truth or falsity of an allegedly defamatory broadcast, Texas uses the "substantial truth" test. McIlvain, 794 S.W.2d at 16. That test involves consideration of whether the alleged defamatory statement was more damaging to the plaintiff's reputation in the mind of the average listener than a truthful statement would have been. McIlvain, 794 S.W.2d at 16. This evaluation involves looking to the "gist" of the broadcast. Id. If the underlying facts

as to the gist of the defamatory charge are undisputed, then we can disregard any variance with respect to items of secondary importance and determine substantial truth as a matter of law. Id. "It is not the function of the court to serve as senior editor to determine if the reporting is absolutely, literally true; substantial truth is sufficient." San Antonio Express News v. Dracos, 922 S.W.2d 242, 249 (Tex.App.--San Antonio 1996, no writ) (quoting Wavell v. Caller-Times Publishing Co., 809 S.W.2d 633, 636 (Tex.App.--Corpus Christi 1991, writ denied)).

In McIlvain, the manager of the City of Houston Water Maintenance Department brought a libel suit against several media defendants for airing a certain news broadcast. Id. at 15. That broadcast reported allegations by employees of the city water maintenance division that four employees were used on city time to care for the manager's elderly father and do other tasks around the manager's house. Id. The broadcast also reported that these employees then put in for overtime so they could get their city jobs done. Id. The broadcast further reported that the Public Integrity Review Group ("PIRG") was conducting an investigation into the matter and

information about the alleged theft of City time might be turned over to a grand jury. Id. at 15-16. The trial court granted summary judgment for the defendants. Id. at 15.

On appeal, this court, with one justice dissenting, reversed the summary judgment, holding that a question of fact existed as to whether the statements contained in the report were defamatory. Jacobs v. McIlvain, 759 S.W.2d 467, 469 (Tex.App.--Houston [14th Dist.] 1988), rev'd, 794 S.W.2d 14 (Tex.1990). Although it noted that the summary judgment proof "did not show that the underlying charges were true as a matter of law," the court expressly rejected the defendants' contention that they could publish potentially defamatory statements merely because there were charges made. Id. at 469. The court stated, "merely alleging that an investigation was in progress does not entitle a journalist to publish free-standing allegations...." According to the court, "it is no defense to say, 'it is alleged that....' " The Texas Supreme Court reversed this court, finding that "a comparison of the contents of the broadcast and the PIRG report demonstrates that the broadcast was substantially correct, accurate and not misleading." Id. at 16. The court concluded "[the defendants have] established the substantial truth of the broadcast as a matter of law, thus negating an essential element of [the plaintiff's] cause of action." Id.

Because the Supreme Court compared some of the investigation's findings with the alleged defamatory broadcast, Felder argues that McIlvain requires not only the fact of an investigation be true, but also that the allegations under investigation be proven true. We disagree. Based on our reading of both the Supreme Court and appellate court opinions, we are convinced that when, as in this case, the report is merely that allegations were made and they were under investigation, McIlvain only requires proof that allegations were in fact made and under investigation in order to prove substantial truth. Otherwise, the media would be subject to potential liability everytime it reported an investigation of alleged misconduct or wrongdoing by a private person, public official, or public figure. Such allegations would never be reported by the media for fear an investigation or other proceeding might later prove the allegations untrue, thereby subjecting the media to suit for defamation. Furthermore, when would an allegation be proven true or untrue for purposes of defamation? After an investigation? After a court trial? After an appeal? Undoubtedly, the volume of litigation and concomitant chilling effect on the media under such circumstances would be incalculable. First Amendment considerations aside, common sense does not dictate any conclusion other than the one we reach today.

Here, the gist of the alleged defamation, as taken from statements in the Broadcast itself, is as follows:

(1) Dowling Middle School, which has a history of discipline problems is once again in the middle of a controversy.

(2) A group of parents, including the PTA President, is charging a school teacher

with physically threatening and verbally abusing their kids.

(3) Those are the allegations against Dowling Middle School teacher Bettye Felder, whom we couldn't reach for comment today.

(4) The administration is determined to reassign this individual temporarily under the supervision of the area superintendent, certainly pending the outcome of the investigation.

The truth of the facts asserted in these statements is conclusively established by uncontroverted summary judgment proof. First, Felder admitted in her deposition she was aware of other discipline problems at Dowling that had attracted media attention. Similarly, Principal Gardner admitted that when he first came to Dowling, he was aware of parents' concern about problems there and that these problems had received media attention. He added he was aware of public controversy surrounding Dowling and noted the allegations against Felder were not the first time that parents expressed concern about "things going on there." Newspaper articles further document prior media attention, both positive and negative, to past discipline and personnel problems at Dowling.

Second, the HISD report unquestionably shows parents at Dowling Middle School had alleged physical threats and verbal abuse by Felder toward their children. That these allegations were made was confirmed by Superintendent Drayton and Principal Gardner in their depositions. PTA President Mildred Burnley testified by affidavit that she was contacted on January 6, 1994, by one of the parents about "allegations that Felder was threatening and verbally abusing Dowling students." Ms. Burnley confirmed the statement attributed to her in the Broadcast was in fact made by her and she believed it to be true and accurate. While the parents quoted in the Broadcast did not express their comments as allegations, those comments were explicitly characterized as such by reporter Minerva Perez in the Broadcast.

Third, Perez's uncontroverted affidavit and deposition testimony establish she tried several times to contact Felder for comment on January 6, 1994, but those efforts failed primarily because it was against HISD policy to give out information on its personnel. Perez's testimony is supported by the affidavit of HISD spokesperson Jaime De La Isla. While the name of Felder's husband is listed in the telephone directory, Perez testified she never met Felder and "did not know anything about her." This testimony was not disputed. Lastly, Mr. De La Isla confirmed he made the statement attributed to him in the Broadcast and believed it to be true and accurate. Mr. De La Isla also testified HISD's standard policy was to temporarily reassign teachers pending an investigation into allegations of physical or verbal abuse or other improprieties. Superintendent Drayton testified Felder was in fact reassigned around the time of the January 5, 1994, suspension hearing.

In summary, the Broadcast reported that Dowling Middle School, which had a history of discipline and personnel problems, was embroiled in another controversy in which parents alleged physical threats and verbal abuse by teacher Bettye Felder, who was reassigned pending the HISD investigation. This was substantially, if not literally, true. Therefore, the Broadcast could not, as a matter of law, have been any more damaging to Felder's reputation in the mind of the average listener than absolutely truthful statements. See McIlvain, 794 S.W.2d at 16. Accordingly, the trial court erred in denying summary judgment for KTRK on the basis of substantial truth. Points one and two are sustained. Hence, we need not address points of error three through seven concerning actual malice and privilege.

C. Other Claims

In addition to her defamation claim, Felder asserted causes of action for false light invasion of privacy, negligence, and intentional infliction of emotional distress. Felder claimed the

allegedly false and defamatory statements "exposed her to financial injury" as well as "public hatred and ridicule" and she "suffered irreparable harm to her reputation" and severe emotional distress. Similarly, Houston Resource asserted causes of action for business disparagement, injurious falsehood, and tortious interference with a

business relationship. [3] Houston Resource claimed it "suffered severe and extreme realized pecuniary loss" as a result of the allegedly false and disparaging statements.

While raised as KTRK's tenth point of error, the parties acknowledge the tort of false light invasion of privacy is not recognized in Texas. See Cain v. Hearst Corp., 878 S.W.2d 577, 580-81 (Tex.1994). This point is therefore sustained. In points of error eight and eleven through thirteen, KTRK essentially contends the remaining claims are indistinguishable from Felder's defamation claim and must therefore fail. We agree. Each of the those claims was based on allegedly false and defamatory or disparaging statements made about Felder in the Broadcast. In other words, those claims were grounded entirely on Felder's defamation claim. Because we have determined the Broadcast was substantially true as a matter of law and KTRK was entitled to summary judgment on Felder's defamation claim, we hold Felder and Houston Resource are also precluded from recovering on their other claims as a matter of law, and the trial court erred in not granting summary judgment in favor of KTRK on those claims. See Rogers v. Dallas Morning News, Inc., 889 S.W.2d 467, 474 (Tex.App.--Dallas 1994, writ denied) (holding that plaintiff was precluded from recovering on non-libel claims where such claims were all grounded on plaintiff's libel cause of action and where summary judgment proof conclusively showed alleged defamatory articles were substantially true).

Because we hold the Broadcast was substantially true, we sustain points of error eight and eleven through thirteen. Accordingly, we need not address KTRK's ninth point of error contending that Felder was not entitled to recovery for intentional infliction of emotional distress because KTRK's conduct was not "outrageous" as a matter of law.

D. KTRK's Objections To The Summary Judgment Proof

KTRK's fourteenth point of error complains of the court's decision to overrule only some of its objections. Felder argues KTRK cannot complain about the trial court's ruling because the court was without authority to rule on them in the first place. Accordingly, Felder and Houston Resource have filed a motion to strike certain exhibits attached to KTRK's brief. Specifically, Felder moves to strike: (1) a copy of the court's rulings on KTRK's objections, (2) a copy of an unpublished appellate court opinion granting mandamus relief where the trial court refused to rule on a media defendant's pending summary judgment motion, and (3) a transcription of a state Senate hearing on interlocutory appeals in media defamation cases.

We need not rule on the motion to strike nor address the issues raised by it because, even if we were to disregard the court's ruling on KTRK's objections and the exhibits attached to KTRK's brief, KTRK would still be entitled to summary judgment for the reasons stated above. Accordingly, we reverse the order of the trial court denying summary judgment to KTRK, and render judgment that Felder and Houston Resource take nothing.

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1 HISD investigated two other alleged incidents. One was an allegation by Felder that students verbally threatened to assault her. The other was an allegation that Felder closed a classroom door on a student's hand. In its report, HISD noted that "none of the persons interviewed had any knowledge of this [latter] incident." Indeed, in that report, HISD concluded both of these allegations, as well as the "gun" allegation, could not be confirmed "due to lack of evidence." Further, Superintendent Drayton testified that he found no evidence to support the "scissors" allegation and was not aware of any fact finding by HISD regarding this allegation.

2 Section 73.005 of the Civil Practices & Remedies Code and much of the case law declare "truth" an affirmative defense to a defamation claim. In this case, the result is the same regardless of whether "truth" is an affirmative defense or merely negates the essential element of "falsity."

3 Although alleged as separate torts, "business disparagement is actually a species of 'injurious falsehood.' " See Gulf Atlantic Life Ins. Co. v. Hurlbut, 696 S.W.2d 83, 96 (Tex.App.--Dallas 1985), rev'd on other grounds, 749 S.W.2d 762, 766 (Tex.1987). "The Restatement identifies the tort [of business disparagement] by the name 'injurious falsehood' and notes its application 'in cases of the disparagement of property in land, chattels, or intangible things or of their quality.' " 749 S.W.2d at 766 (quoting RESTATEMENT (SECOND) OF TORTS § 623A cmt.a (1977)).

409 S.W.3d 682
KTRK TELEVISION, INC., Appellant
v.
Theaola ROBINSON, Appellee.
No. 01–12–00372–CV. Court of Appeals of Texas, Houston (1st Dist.).
July 11, 2013. Rehearing Overruled Aug. 21, 2013.

409 S.W.3d 682

KTRK TELEVISION, INC., Appellant
v.
Theaola ROBINSON, Appellee.

No. 01–12–00372–CV.

Court of Appeals of Texas,
Houston (1st Dist.).

July 11, 2013.
Rehearing Overruled Aug. 21, 2013.

[409 S.W.3d 683]

Laura Lee Prather, Catherine Lewis Robb, Haynes and Boone, LLP, Austin, TX, for Appellant.

[409 S.W.3d 684]

Berry Dunbar Bowen, Houston, TX, for Appellee.

Panel consists of Justices BLAND, SHARP, and MASSENGALE.

OPINION

JIM SHARP, Justice.

Following a series of news reports by KTRK Television, Inc. alleging financial mismanagement, Benji's Special Education Academy ("BSEA"), a charter school, and Theaola Robinson sued KTRK. KTRK moved to dismiss the action pursuant to the then-recently enacted Texas Citizens Participation Act ("TCPA").[1] In a written order, the trial court denied the motion. In five issues, KTRK contends that the trial court erred in denying KTRK's motion to dismiss. In her brief, the school's former director and superintendent, Robinson, also challenges this Court's jurisdiction to consider KTRK's appeal. [2] We hold that we have jurisdiction over this appeal, that the trial court erred by denying KTRK's motion to dismiss, and we reverse.

Background

A. The Charter School

In May 1980, Robinson founded BSEA, a non-profit corporation, to provide a day care and education for special needs children ("Benji's"). In November 1998, the Texas State Board of Education ("SBOE") granted BSEA a charter to operate Benji's as an open-enrollment, publicly funded pre-K through twelfth grade charter school.[3] As such, compliance with the laws governing public schools was required.

By the mid–2000s, Benji's enrollment had increased nearly five-fold and, on behalf of BSEA, Robinson applied for a renewal of the charter to the Texas Education Agency ("TEA") in April 2003. The TEA refused action on the application, however, pending resolution of BSEA's growing list of problems. Indeed, five years later, the renewal application was still pending and, in December 2008, the TEA informed Robinson that it would remain pending until resolution of BSEA's problems in the following areas: financial management, academic performance, performance-based monitoring activities, audit requirements, and special education laws and policies.

By letter dated July 8, 2010, TEA Commissioner Robert Scott notified Robinson that in light of longstanding academic, governance, and financial concerns, and despite numerous agency investigations and interventions, the TEA intended to appoint a Board of Managers and a new Superintendent for the school. Following a hearing on August 19, 2010, Robinson and Benji's board of directors were notified on September 3, 2010, that the TEA would proceed to appoint a Board of Managers and Superintendent, which appointments effectively suspended any and all prior grants of authority to the former board of directors and Robinson.

On September 16, 2010, after the TEA had learned of the extent of the financial problems at Benji's, it issued an Order

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Suspending Charter Operations and Funds, stating, in relevant part, as follows:

[The urgent financial conditions at Benji's were not] known either to the board of managers or to the new superintendent when they met on September 6, 2010. Rather, the information leading to the conclusion that an urgent financial condition may exist at the charter school was disclosed by painstaking effort to assemble and evaluate information that had not been viewed by the former administration as indicating such a conclusion. Subsequent events have made plain that the former administration continues to maintain that there was and is no urgent financial condition presented by these facts.

The newly appointed Superintendent advised the parents by letter of the immediate suspension of the school's operations. The letter cited the school's critical cash flow problem, which included a virtually depleted bank account and numerous outstanding debts (including one to the Internal Revenue Service), as the reason that "the school cannot continue to operate as it does not have the necessary funds to pay its staff members or meet its current financial obligations."

Despite having been relieved of her duties as superintendent, Robinson directed staff to continue reporting to work as usual and asked parents to continue sending their children to school. Robinson also conducted a televised press conference at which she stated that she would not allow the new superintendent to carry out the TEA's decision and that the school would remain open despite the board's decision. Notwithstanding the State-mandated closure, on September 15, 2010, Robinson re-opened Benji's as an unaccredited private school using the same public school property and buses.

The next day, TEA Commissioner Scott ordered the immediate suspension of all of Benji's funding as well as its open-enrollment charter. Commissioner Scott subsequently sent a letter to

Robinson and BSEA's board outlining the various grounds for revoking Benji's charter, including its "failure to satisfy generally accepted accounting standards of fiscal management." The letter detailed examples of the school's fiscal mismanagement, which had resulted in significant wasting of financial resources. Examples of Benji's financial problems while under Robinson's direction included the following:

(1) BSEA was the subject of a warrant hold following its nonpayment to the Teachers Retirement System in the amount of $43,000 for retirement contributions and $13,000 in health coverage;

(2) The Department of Agriculture cancelled BSEA's participation in child nutrition programs because of BSEA's failure to demonstrate fiscal responsibility;

(3) BSEA owed a debt of $87,000 to the IRS in unpaid taxes;

(4) BSEA's board failed to oversee or adequately supervise its financial resources; and

(5) BSEA had been in poor financial condition for many years.

In his letter, the TEA Commissioner also noted the irregularities in Benji's rental arrangement and payments: BSEA leased the property from the City of Houston for $1 per year and re-leased this same property to Benji's for $9,000 per month, an arrangement for which the City had never given its permission.

B. KTRK's Statements at Issue

A public outcry ensued over the charter revocation and the school's closing. Several local media outlets—including KTRK—

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broadcast and posted numerous reports about the ongoing controversy. KTRK's reports included the following statements upon which Robinson bases her defamation claim:

(1) "According to the State[,] millions in taxpayer dollars cannot be accounted for" and "[t]he State closure is based on a lack of sufficient financial records, meaning the State doesn't know where over three million dollars of taxpayer money given last year has been spent." (4:30 p.m., September 15, 2010 broadcast) [4]

(2) "For the State, the issue is simple—where is the money? They say millions of taxpayer dollars are unaccounted for ... The State closure is based on a lack of sufficient financial records, meaning the State doesn't know where the more than $3 million of taxpayer money given last year has been spent...." (September 15, 2010 article published on KTRK's website)

(3) "Where is taxpayer money going and how is a taxpayer-owned building being used? ... The Texas Education Agency says it doesn't know how Benji's spent $3 million of taxpayer money, and a lease agreement obtained by Eyewitness News raises even new questions." (September 25, 2010 article published on KTRK's website)

(4) "The Texas Education Agency doesn't know how the academy spent $3 million of state money." (September 27, 2010 article published on KTRK's website)

(5) "The [S]tate says it had no choice, alleging Benji's did not provide proper financial records to account for over $3 million in state funding for the past year." (September 30, 2010 article published on KTRKs website)

(6) "On September 14, the TEA ordered Benji's Academy to close, citing millions of dollars in State funding that was not accounted for." (October 11, 2010 article published on KTRK's website)

C. Trial Court Proceedings

On September 14, 2011, Robinson and BSEA sued KTRK for defamation.[5] On December 21, 2011, KTRK filed a motion to dismiss under the TCPA. *See*Tex. Civ. Prac. & Rem.Code Ann. §§ 27.001–.011 (West Supp.2012). KTRK argued that it was entitled to dismissal because (1) plaintiffs' claim was based on, related to, or in response to KTRK's exercise of its right of free speech, and (2) plaintiffs could not establish by clear and specific evidence a prima facie case for each essential element of their case. Robinson filed a response.[6] Both parties attached affidavits and other evidence to their pleadings.

The trial court conducted a hearing on February 13, 2012. On February 23, 2012, the trial court entered an amended order denying KTRK's motion to dismiss. On February 29, 2012, KTRK filed its request for findings and conclusions regarding the court's denial of its motion to dismiss. On

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March 20, 2012, the trial court issued its "Findings of Fact In Connection with CPRC § 27.007." KTRK timely appealed.

Discussion

A. Appellate Jurisdiction

As a threshold matter, we address Robinson's contention that we do not have jurisdiction over this interlocutory appeal. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex.2004) ("[A] court must not proceed on the merits of a case until legitimate challenges to its jurisdiction have been decided.") Generally, courts of appeals have jurisdiction only over appeals from final judgments. *Lehmann v. Har–Con Corp.*, 39 S.W.3d 191, 195 (Tex.2001). Further, appellate courts have jurisdiction over interlocutory orders only when that authority is explicitly granted by statute. *Tex. A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex.2007). Statutes authorizing interlocutory appeals are strictly construed because they are a narrow exception to the general rule that interlocutory orders are not immediately appealable. *CMH Homes v. Perez*, 340 S.W.3d 444, 447 (Tex.2011).

Section 27.008 of the TCPA, entitled "Appeal," provides:

(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's 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) An appeal or other writ under this section must be filed on or before the 60th day after the date the trial court's order is signed or the time prescribed by Section 27.005 expires, as applicable.

Tex. Civ. Prac. & Rem.Code Ann. § 27.008.

Robinson relies on the Fort Worth Court of Appeals's decision in *Jennings v. WallBuilders Presentations, Inc.* to argue that although section 27.008(a) authorizes an interlocutory appeal when a movant's motion to dismiss is denied by operation of law, the TCPA does not authorize an interlocutory appeal of a trial court's signed order denying a motion to dismiss. *See Jennings,* 378 S.W.3d 519, 524–27 (Tex.App.-Fort Worth 2012, pet. filed). There, the court held that the language in the TCPA conferred jurisdiction to review a decision under the TCPA, but only if the motion is denied by operation of law, and not if the trial court signs an order denying the motion. *See id.* at 526–27. The *Jennings* court concluded that the legislature intended to ensure that a court would review and rule on the motion, but not that its ruling would be subject to appellate review. *See id.* at 527.

Since *Jennings,* several other courts of appeals have considered the issue. In *Direct Commercial Funding, Inc. v. Beacon Hill Estates, LLC,* the Fourteenth Court of Appeals declined to follow *Jennings. See* No. 14–12–00896–CV, 2013 WL 407029 (Tex.App.-Houston [14th Dist.] Jan. 24, 2013, order). The *Beacon Hill Estates* court noted that section 27.008(b) requires an appellate court to "expedite an appeal or other writ, whether interlocutory or not, from a trial court order on a motion to dismiss ... or from a trial court's failure to rule." *Id.* at *3. The court reasoned that "[i]f no interlocutory appeal is available when the trial court expressly rules on a motion to dismiss by signing an order, then the phrase 'from a trial court order on a motion to dismiss' appearing after the phrase 'whether interlocutory or not' is

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rendered meaningless." *Id.* The court further concluded the most natural reading of the phrase "whether interlocutory or not" is to read it as modifying both of the subsequent references to "a trial court order" and "a trial court's failure to rule." *Id.* Finally, the court noted that section 27.008(c) states an appeal "must be filed on or before the 60th day after the date the trial court's order is signed or the time prescribed by section 27.005 expires, as applicable." *Id.* at *4. The court concluded that "[i]f no signed order can be the subject of an interlocutory appeal, then the reference to the date on which 'the trial court's order is signed' also is superfluous." *Id.* The Fifth and Thirteenth Courts of Appeals have since adopted the Fourteenth Court of Appeals's interpretation of section 27.008. *See Better Bus. Bureau of Metro. Dallas, Inc. v. BH DFW, INC.,* 402 S.W.3d 299, 306–07 (Tex.App.-Dallas 2013, no pet. h.) (finding reasoning of Fourteenth

Court of Appeals persuasive and concluding that it had jurisdiction under TCPA over interlocutory appeal of trial court's order denying defendant's motion to dismiss); *San Jacinto Title Svcs., LLC v. Kingsley Props., LP.*, ——S.W.3d ——, 2013 WL 1786632, at *4 (Tex.App.-Corpus Christi 2013, no pet. h.) (agreeing with Fourteenth Court of Appeals that to conclude that no signed order can be subject of interlocutory appeal would render portions of section 27.008(b) and (c) meaningless).

We agree with the Fourteenth Court of Appeals's reasoning in *Beacon Hill Estates.* We conclude that section 27.008 permits an interlocutory appeal from the trial court's written order denying a motion to dismiss under the TCPA.

B. Application of the TCPA

In enacting the TCPA, the Legislature explained that the statute's purpose "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 statute is to "be construed liberally to effectuate its purpose and intent fully." *Id.* § 27.011(b).

In deciding whether to grant a motion under the TCPA and dismiss the lawsuit, the statute directs the trial court to "consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based." *Id.* § 27.006. The court must then determine whether (1) the moving defendant has shown "by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of the right of free speech, the right to petition, or the right of association"; and (2) the plaintiff has shown "by clear and specific evidence a prima facie case for each essential element of the claim in question." *Id.*§ 27.005(b), (c). The first step of this inquiry is a legal question we review de novo. *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.,* No. 01–12–00581–CV, 2013 WL 1867104, at *6 (Tex.App.-Houston [1st Dist.] May 2, 2013, no pet. h.).

The Legislature's use of the term "prima facie case" in the second step implies a minimal factual burden: "[a] prima facie case represents the minimum quantity of evidence necessary to support a rational inference that the allegation of fact is true." *Id.* at *6 (quoting *Rodriguez v. Printone Color Corp.*, 982 S.W.2d 69, 72 (Tex.App.-Houston [1st Dist.] 1998, pet. denied)). Nonetheless, the statute requires that the proof offered address and support each "essential element" of every claim asserted with "clear and specific evidence."

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*See*Tex. Civ. Prac. & Rem.Code Ann. § 27.005(b), (c). Because the statute does not define "clear and specific" evidence, these terms are given their ordinary meaning. *See TGS–NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex.2011). "Clear" means "unambiguous," "sure," or "free from doubt." Black's Law Dictionary 268 (8th ed. 2004). "Specific" means "explicit" or "relating to a particular named thing." *Id.* at 1167. Accordingly, we examine the pleadings and the evidence to determine whether Robinson marshaled "clear and specific" evidence to support each alleged element of her cause of action.

As a preliminary matter, we note that Robinson has never asserted, either in the trial court below or on appeal, that her claim is not covered by the TCPA. That is, she does not argue that her defamation claim is not based on, related to, or in response to KTRK's exercise of its right to "petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law." As such, we begin with the second step of the inquiry—whether Robinson has demonstrated by clear and specific evidence a prima facie case for each essential element of her claim.

C. Prima Facie Case

To maintain a defamation cause of action, a plaintiff must prove that the defendant (1) published a statement; (2) that was defamatory concerning the plaintiff; (3) while acting with either actual malice, if the plaintiff was a public official or public figure, or with negligence, if the plaintiff was a private individual, regarding the truth of the statement. *WFAA–TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex.1998). "Whether words are capable of the defamatory meaning the plaintiff attributes to them is a question of law for the court." *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex.1989). Questions of law are subject to de novo review. *In re Humphreys*, 880 S.W.2d 402, 404 (Tex.1994). Whether a publication is an actionable statement of fact depends on its verifiability and the context in which it was made. *See Bentley v. Bunton*, 94 S.W.3d 561, 581 (Tex.2002).

Defamatory Statement

Robinson argues that she has demonstrated that KTRK "made up" the complained-of statements and, in doing so, has established a prima facie case of defamation *per se*. KTRK contends that Robinson failed to establish with clear and specific evidence that the complained-of statements were defamatory *per se*.

We initially address KTRK's contention that Robinson has alleged only a claim of defamation *per se*. Defamation claims are divided into two categories—defamation *per se* and defamation *per quod*—according to the level of proof required to make them actionable. *See Texas Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.*, 219 S.W.3d 563, 580 (Tex.App.-Austin 2007, pet. denied). Statements that are defamatory *per quod* are actionable only upon allegation and proof of damages. *Id.* at 580;*Alaniz v. Hoyt*, 105 S.W.3d 330, 345 (Tex.App.-Corpus Christi 2003, no pet.). That is, before a plaintiff can recover for defamation *per quod*, she must carry her burden of proof as to both the defamatory nature of the statement and the amount of damages caused by its publication. *See Texas Disposal*, 219 S.W.3d at 580 (citing *Leyendecker & Assocs., Inc. v. Wechter*, 683 S.W.2d 369, 374 (Tex.1984)). By contrast, in cases involving defamation *per se*, damages are presumed to flow from the nature of the defamation itself and, in most situations, a plaintiff injured by a defamatory *per se* communication is entitled to recover

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general damages without specific proof of the existence of harm. *Bentley*, 94 S.W.3d at 604 ("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.").

KTRK argues that Robinson neither pleaded nor presented any proof of the amount of alleged damages, and thus, her claim is one for defamation *per se* only. In her petition, Robinson

alleged that KTRK's statements damaged her reputation. In her prayer, Robinson sought judgment "[f]or libel *per se* damages found by the trier of fact without proof of special damages [and] for actual damages and exemplary damages for malicious libel...." In her appellate brief, Robinson does not dispute KTRK's contention that her claim sounds only in defamation *per se*. Indeed, she asserts that she has "established by clear and specific evidence a prima facie case on each element of her claim that the complained of statements were defamatory *per se*." Based upon the record before us, we agree that Robinson has not alleged a claim for defamation *per quod* and, therefore, our analysis treats upon Robinson's claim as one for defamation *per se*.

The law presumes certain categories of statements are defamatory *per se*, including statements that (1) unambiguously charge a crime, dishonesty, fraud, rascality, or general depravity or (2) are falsehoods that injure one in his office, business, profession, or occupation. *Main v. Royall*, 348 S.W.3d 381, 390 (Tex.App.-Dallas 2011, no pet.). Robinson complains of the following statements made by KTRK:

(1) "According to the State[,] millions in taxpayer dollars cannot be accounted for" and "[t]he State closure is based on a lack of sufficient financial records, meaning the State doesn't know where over three million dollars of taxpayer money given last year has been spent." (4:30 p.m., September 15, 2010 broadcast)

(2) "For the State, the issue is simple—where is the money? They say millions of taxpayer dollars are unaccounted for ... The State closure is based on a lack of sufficient financial records, meaning the State doesn't know where the more than $3 million of taxpayer money given last year has been spent...." (September 15, 2010 article published on KTRK's website)

(3) "Where is taxpayer money going and how is a taxpayer-owned building being used? ... The Texas Education Agency says it doesn't know how Benji's spent $3 million of taxpayer money, and a lease agreement obtained by Eyewitness News raises even new questions." (September 25, 2010 article published on KTRK's website)

(4) "The Texas Education Agency doesn't know how the academy spent $3 million of state money." (September 27, 2010 article published on KTRK's website)

(5) "The [S]tate says it had no choice, alleging Benji's did not provide proper financial records to account for over $3 million in state funding for the past year." (September 30, 2010 article published on KTRKs website)

(6) "On September 14, the TEA ordered Benji's Academy to close, citing millions of dollars in state funding that was not accounted for." (October 11, 2010 article published on KTRK's website)

Robinson argues these statements to be defamatory *per se* because they insinuate that she embezzled over $3 million and

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thereby falsely imputed criminal behavior to her. Robinson also contends that KTRK's statements have damaged her reputation and, in support of her argument, points to the following third-party comments posted by readers on KTRK's website in response to the broadcasts and articles:

• "Call and ask where the money went. I'm sure Theola [sic] Robinson tell you."

• "Could it be in somebody's pockets?"

• "Ms. Robinson should be arrested, not because she's black, because she's a thief!"

• "I am just amazed as to why the parents are not suing Theaola Robinson and the old Board of Director[s], they are the ones who are stealing their children's future...."

• "You bet they want to keep it open, if its [sic] closed an investigation will show they were all taking money not to mention they won't be able to afford their new house, Hummer and boat payments the school and taxpayers were helping to buy."

• "The state is not to blame here. They need to sue the administrators to find out where the money is followed by prosecution of those who may have 'mis-spent' it. Put blame where blame is due!"

• "Simple! No money! Can not account for $9 million! Close the doors and take the administrators to court for mis-use of government (your) money...."

• "The only thing organized about this plan is the organized crime."

• "The parents are supporting the administrators who have a little charisma along with a talent for lining their pockets...."

• "The mgmt. of this facility will continue to steal under the guide [sic] of a school, where the kids will continue to suffer."

Robinson's reliance on third-party comments posted on KTRK's comment board to prove defamation *per se* is misplaced. To be defamatory *per se,* the defamatory nature of the challenged statement must be apparent on its face without reference to extrinsic facts or "innuendo." *Moore v. Waldrop,* 166 S.W.3d 380, 386 (Tex.App.-Waco 2005, no pet.) (noting that "the very definition of ' *per se,*' 'in and of itself,' precludes the use of innuendo"). If the court must resort to innuendo or extrinsic evidence to determine whether a statement is defamatory, then it is defamation *per quod* and requires proof of injury and damages. *Main,* 348 S.W.3d at 390. There is nothing intrinsically defamatory about KTRK's reports on the State's investigation into Benji's mismanaged funds. The reports did not say or imply that the entire $3 million in state funds had been misappropriated or embezzled. Rather, the statements speak to the insufficiency of financial records to account for spent state funds. Similarly, the September 25th broadcast questioning the lease situation neither states nor implies that state funds were misappropriated.

Further, the evidence shows that the TEA's longstanding concern about and subsequent investigation into Benji's accounting resulted in the suspension and, ultimately, the revocation of the school's charter due to the urgent financial conditions and its fiscal mismanagement. Thus, KTRK's reports that the State found Benji's financial records insufficient to fully account for the money spent, and that the State did not know how the money had been spent, were based on evidence that Robinson did not counter. Media defendants cannot be liable for varying

[409 S.W.3d 692]

subjective impressions that may have been generated from the broadcast of true statements. *See ABC, Inc. v. Gill*, 6 S.W.3d 19, 35–38 (Tex.App.-San Antonio 1999, pet. denied).

Robinson also argues that because KTRK's broadcasts on questions of financial mismanagement reported the amount of total funding, the statements falsely suggest that she failed to account for any of it, when, in fact, she did provide records to show how part of the funds were spent. KTRK's reports, however, never recited that she had failed to account for any of it, but that the TEA *had* found the records provided were insufficient to account for the full amount. Moreover, discrepancies as to details do not demonstrate material falsity for defamation purposes. *See, e.g.*, *Dolcefino v. Turner*, 987 S.W.2d 100, 115 (Tex.App.-Houston [14th Dist.] 1998), *aff'd*,38 S.W.3d 103 (Tex.2000) (showing that insurance fraud "scam" involved $1.7 million, rather than $6.5 million, did not demonstrate falsity of statement); *Rogers v. Dallas Morning News, Inc.*, 889 S.W.2d 467, 471–73 (Tex.App.-Dallas 1994, writ denied) (misstatement that charity spent 10% of its donations on actual services, rather than 43%, was immaterial to gist of articles concerning misuse of charity funds); *Finklea v. Jacksonville Daily Progress*, 742 S.W.2d 512, 514–15 (Tex.App.-Tyler 1987, writ dism'd w.o.j.) (misstatement that plaintiff had four drug convictions, rather than two, was substantially true); *Shihab v. Express–News Corp.*, 604 S.W.2d 204, 206–08 (Tex.Civ.App.-San Antonio 1980, writ ref'd n.r.e.) (inaccurate designation of which of several news stories was fabricated was insignificant where the main charge was fabrication and one story was fabricated); *Downer v. Amalgamated Meatcutters & Butcher Workmen of N. Am.*, 550 S.W.2d 744, 747 (Tex.Civ.App.-Dallas 1977, writ ref'd n.r.e.) (misstatement that plaintiff embezzled $2,187.77, rather than $840.73, was substantially true); *Fort Worth Press Co. v. Davis*, 96 S.W.2d 416, 419–20 (Tex.Civ.App.-Fort Worth 1936, writ ref'd) (article charging official with wasting $80,000 of tax money rather than only $17,500 was substantially true).

In sum, there is nothing in the complained-of statements that unambiguously charged Robinson with engaging in criminal behavior or constituted a falsehood that injured her in her profession. Because Robinson has not adduced clear and specific evidence that the challenged statements made by KTRK in its broadcasts and reports are defamatory *per se,* she has not made a prima facie case for each essential element of her defamation claim against KTRK. *See*Tex. Civ. Prac. & Rem.Code Ann. § 27.005(b), (c) (West Supp.2012).

Conclusion

Having concluded that we have jurisdiction over this interlocutory appeal and that Robinson failed to sustain her burden to show a prima facie case for each essential element of her defamation claim, we reverse the trial court's denial of KTRK's motion to dismiss, and remand the case to the trial court for further proceedings as required by the statute to order dismissal of the suit. *See*Tex. Civ. Prac. & Rem.Code Ann. § 27.009(a).

Notes:

[1.] *See*Tex. Civ. Prac. & Rem.Code Ann. §§ 27.001–.011 (West Supp.2012).

[2.] BSEA is no longer a party to this case.

[3.] The original plaintiffs in this suit were BSEA, the non-profit corporation that ran the charter school, and Robinson. Although both the school and the corporation use the name "Benji's" or "Benji's Special Education Academy," Benji's (the school) was never a plaintiff. Robinson amended her petition and dropped BSEA from the case, leaving Robinson as the sole plaintiff. As a result, Robinson is the sole appellee.

[4.] As an exhibit to its Motion to Dismiss, KTRK attached the affidavit of KTRK reporter Cynthia Cisneros. In her affidavit, Cisneros states "I was [ ] informed by the TEA that Benji's had received $3.3 million in 2009–2010."

[5.] Robinson originally filed this suit against KTRK's parent company, The Walt Disney Company, in federal court. After the suit was dismissed, Robinson attempted to add Disney and KTRK to a federal lawsuit against the TEA in which she had joined. The federal court denied leave to add Disney and KTRK as defendants in the federal action.

[6.] BSEA was no longer a plaintiff in the case.

807 S.W.2d 613
19 Media L. Rep. 1159
Billy Earl JOHNSON, Appellant,
v.
The HOUSTON POST COMPANY, Appellee.
No. B14-90-566-CV.
Court of Appeals of Texas,
Houston (14th Dist.).
Feb. 28, 1991.
Rehearing Denied March 28, 1991.

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Robert J. Binstock, Houston, for appellant.

William J. Boyce, Thomas C. Godbold, Houston, for appellee.

Before PAUL PRESSLER, JUNELL and ELLIS, JJ.

OPINION

JUNELL, Justice.

This is an appeal from a summary judgment granted in favor of appellee, The Houston Post Company (Post). Appellant brings two points of error alleging that the trial court erred in granting appellee's motion for summary judgment because: (1) appellee's claim of statutory privilege is a question of fact for the jury; and (2) the defamatory language used was ambiguous and the jury must be allowed to determine whether the language was defamatory to an ordinary reader. For the purpose of this appeal we find it necessary to address only appellant's second point of error. We affirm.

On August 19, 1986, over one hundred thousand Houston residents found that the trash placed outside for pick-up by the sanitation department was not removed. This was a result of sanitation workers calling in sick. The calls were prompted by the city's decision to lay off over one hundred and fifty sanitation workers and lengthen collection routes. The "sick" sanitation workers gathered at city hall while two chosen delegates negotiated with the mayor and union representatives. Appellant was one of these delegates.

Appellant spoke with the mayor about the strike after giving speeches to the striking workers outside city hall. Appellant admitted his role as "spokesperson" and "representative". The Post reported on the strike and on appellant's activities.

Appellant filed a libel suit against the Post approximately one year after the story appeared in the newspaper. The suit alleged that the Post libeled appellant when it stated that appellant was "among the most militant speakers ... outside City Hall". The trial court granted appellee's motion for summary judgment.

In his second point of error appellant claims that the language used by the Post was ambiguous and therefore the jury must be allowed to determine whether the language was defamatory to an ordinary reader.

The law in the area of libel is settled; in a libel action, the initial question for determination is a question of law to be decided by the trial court: were the words used reasonably capable of a defamatory meaning. Musser v. Smith Protective Services, Inc., 723 S.W.2d 653, 654 (Tex.1987); Beaumont Enterprise & Journal v. Smith, 687 S.W.2d 729, 730 (Tex.1985). The court construes the statement as a whole in light of surrounding circumstances based upon how a person of ordinary intelligence would perceive the entire statement. Fitzjarrald v. Panhandle Publishing Co., 149 Tex. 87, 228 S.W.2d 499, 504 (1950). Only when the court determines the language is ambiguous or of doubtful import is a fact issue, suitable for the jury, raised. See Musser, 723 S.W.2d at 655. The threshold question then, which is a question of law, is whether appellee's

statements are reasonably capable of a defamatory meaning.

Appellee's story described appellant as a "militant speaker". The article did not accuse appellant of violent acts or suggest unlawful behavior on his part. The story explicitly said he was a speaker. Simply placing the word militant in front of speaker does not make the statement defamatory. In fact, the Post was right on target in using the word militant in the context of the story as a whole. Webster's New Collegiate Dictionary lists, as a definition of militant: aggressively active (as in a cause). The word militant, combined with the word speaker, in the situation that was reported by the Post, is right on target. The evidence and the words of the appellant show that he was aggressively active in the sanitation workers' cause as a speaker. The Post's statement cannot be described in any sense as defamatory.

Based upon a review of the statements in light of the circumstances in which they were written, appellee's words are not capable of a defamatory meaning. As a matter of law, then, the statement was not libelous or defamatory. Therefore, the trial court properly granted the summary judgment in favor of the Post.

The overruling of appellant's second point of error disposes of the entire case. If the statement was not defamatory in the first instance, appellee cannot recover on any ground. The judgment of the trial court is affirmed.

485 U.S. 46
108 S.Ct. 876
99 L.Ed.2d 41
HUSTLER MAGAZINE and Larry C. Flynt, Petitioners

v.

Jerry FALWELL.

No. 86-1278.
Argued Dec. 2, 1987.
Decided Feb. 24, 1988.
Syllabus

Respondent, a nationally known minister and commentator on politics and public affairs, filed a diversity action in Federal District Court against petitioners, a nationally circulated magazine and its publisher, to recover damages for, *inter alia,* libel and intentional infliction of emotional distress arising from the publication of an advertisement "parody" which, among other things, portrayed respondent as having engaged in a drunken incestuous rendezvous with his mother in an outhouse. The jury found against respondent on the libel claim, specifically finding that the parody could not "reasonably be understood as describing actual facts . . . or events," but ruled in his favor on the emotional distress claim, stating that he should be awarded compensatory and punitive damages. The Court of Appeals affirmed, rejecting petitioners' contention that the "actual malice" standard of *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 must be met before respondent can recover for emotional distress. Rejecting as irrelevant the contention that, because the jury found that the parody did not describe actual facts, the ad was an opinion protected by the First Amendment to the Federal Constitution, the court ruled that the issue was whether the ad's publication was sufficiently outrageous to constitute intentional infliction of emotional distress.

Held: In order to protect the free flow of ideas and opinions on matters of public interest and concern, the First and Fourteenth Amendments prohibit public figures and public officials from recovering damages for the tort of intentional infliction of emotional distress by reason of the publication of a caricature such as the ad parody at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice," *i.e.,* with knowledge that the statement was false or with reckless disregard as to whether or not it was true. The State's interest in protecting public figures from emotional distress is not sufficient to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved. Here, respondent is clearly a "public figure" for First Amendment purposes, and the lower courts' finding that the ad parody was not reasonably believable must be accepted. "Outrageous-

ness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression, and cannot, consistently with the First Amendment, form a basis for the award of damages for conduct such as that involved here. Pp. 50-57.

797 F.2d 1270 (CA4 1986), reversed.

REHNQUIST, C.J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, STEVENS, O'CONNOR, and SCALIA, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, *post,* p. 57. KENNEDY, J., took no part in the consideration or decision of the case.

Alan L. Isaacman, Beverly Hills, Cal., for petitioners.

Norman Roy Grutman, New York City, for respondent.

Chief Justice REHNQUIST delivered the opinion of the Court.

Petitioner Hustler Magazine, Inc., is a magazine of nationwide circulation. Respondent Jerry Falwell, a nationally known minister who has been active as a commentator on politics and public affairs, sued petitioner and its publisher, petitioner Larry Flynt, to recover damages for invasion of

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privacy, libel, and intentional infliction of emotional distress. The District Court directed a verdict against respondent on the privacy claim, and submitted the other two claims to a jury. The jury found for petitioners on the defamation claim, but found for respondent on the claim for intentional infliction of emotional distress and awarded damages. We now consider whether this award is consistent with the First and Fourteenth Amendments of the United States Constitution.

The inside front cover of the November 1983 issue of Hustler Magazine featured a "parody" of an advertisement for Campari Liqueur that contained the name and picture of respondent and was entitled "Jerry Falwell talks about his first time." This parody was modeled after actual Campari ads that included interviews with various celebrities about their "first times." Although it was apparent by the end of each interview that this meant the first time they sampled Campari, the ads clearly played on the sexual double entendre of the general subject of "first times." Copying the form and layout of these Campari ads, Hustler's editors chose respondent as the featured celebrity and drafted an alleged "interview" with him in which he states that his "first time" was during a drunken incestuous rendezvous with his mother in an outhouse. The Hustler parody portrays respondent and his mother as drunk and immoral, and suggests that respondent is a hypocrite who preaches only when he is drunk. In small print at the bottom of the page, the ad contains the disclaimer, "ad parody—not to be taken seriously." The magazine's table of contents also lists the ad as "Fiction; Ad and Personality Parody."

Soon after the November issue of Hustler became available to the public, respondent brought this diversity action in the United States District Court for the Western District of Virginia against Hustler Magazine, Inc., Larry C. Flynt, and Flynt Distributing Co., Inc. Respondent stated in his complaint that publication of the ad parody in Hustler entitled

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him to recover damages for libel, invasion of privacy, and intentional infliction of emotional distress. The case proceeded to trial.[1] At the close of the evidence, the District Court granted a

directed verdict for petitioners on the invasion of privacy claim. The jury then found against respondent on the libel claim, specifically finding that the ad parody could not "reasonably be understood as describing actual facts about [respondent] or actual events in which [he] participated." App. to Pet. for Cert. C1. The jury ruled for respondent on the intentional infliction of emotional distress claim, however, and stated that he should be awarded $100,000 in compensatory damages, as well as $50,000 each in punitive damages from petitioners.[2] Petitioners' motion for judgment notwithstanding the verdict was denied.

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the judgment against petitioners. *Falwell v. Flynt*, 797 F.2d 1270 (1986). The court rejected petitioners' argument that the "actual malice" standard of *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), must be met before respondent can recover for emotional distress. The court agreed that because respondent is concededly a public figure, petitioners are "entitled to the same level of first amendment protection in the claim for intentional infliction of emotional distress that they received in [respondent's] claim for libel." 797 F.2d, at 1274. But this does not mean that a literal application of the actual malice rule is appropriate in the context of an emotional distress claim. In the court's view, the *New York Times* decision emphasized the constitutional importance not of the falsity of the statement or the defendant's disregard for the truth, but of the heightened level of culpability embodied in the requirement of "knowing . . . or reckless" conduct. Here, the *New York*

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Times standard is satisfied by the state-law requirement, and the jury's finding, that the defendants have acted intentionally or recklessly.[3] The Court of Appeals then went on to reject the contention that because the jury found that the ad parody did not describe actual facts about respondent, the ad was an opinion that is protected by the First Amendment. As the court put it, this was "irrelevant," as the issue is "whether [the ad's] publication was sufficiently outrageous to constitute intentional infliction of emotional distress." *Id.*, at 1276.[4] Petitioners then filed a petition for rehearing en banc, but this was denied by a divided court. Given the importance of the constitutional issues involved, we granted certiorari. 480 U.S. 945, 107 S.Ct. 1601, 94 L.Ed.2d 788 (1987).

This case presents us with a novel question involving First Amendment limitations upon a State's authority to protect its citizens from the intentional infliction of emotional distress. We must decide whether a public figure may recover damages for emotional harm caused by the publication of an ad parody offensive to him, and doubtless gross and repugnant in the eyes of most. Respondent would have us find that a State's interest in protecting public figures from emotional distress is sufficient to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury, even when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved. This we decline to do.

At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. "[T]he

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freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole."

Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 503-504, 104 S.Ct. 1949 1961, 80 L.Ed.2d 502 (1984). We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions. The First Amendment recognizes no such thing as a "false" idea. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339, 94 S.Ct. 2997 3007, 41 L.Ed.2d 789 (1974). As Justice Holmes wrote, "when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas that the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . ." *Abrams v. United States*, 250 U.S. 616, 630, 40 S.Ct. 17, 22, 63 L.Ed. 1173 (1919) (dissenting opinion).

The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or those public figures who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." *Associated Press v. Walker,* decided with *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164, 87 S.Ct. 1975 1996, 18 L.Ed.2d 1094 (1967) (Warren, C.J., concurring in result). Justice Frankfurter put it succinctly in *Baumgartner v. United States*, 322 U.S. 665, 673-674, 64 S.Ct. 1240 1245, 88 L.Ed. 1525 (1944), when he said that "[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures." Such criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to "vehement, caustic, and sometimes unpleasantly sharp attacks," *New York Times, supra,* 376 U.S., at 270, 84 S.Ct., at 721. "[T]he candidate who vaunts his spotless record and sterling integrity cannot convincingly cry 'Foul!' when an opponent or an industrious reporter attempts

to demonstrate the contrary." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 274, 91 S.Ct. 621, 626, 28 L.Ed.2d 35 (1971).

Of course, this does not mean that *any* speech about a public figure is immune from sanction in the form of damages. Since *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), we have consistently ruled that a public figure may hold a speaker liable for the damage to reputation caused by publication of a defamatory falsehood, but only if the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.,* 376 U.S., at 279-280, 84 S.Ct., at 726. False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective. See *Gertz,* 418 U.S., at 340, 344, n. 9, 94 S.Ct., at 3007, 3009, n. 9. But even though falsehoods have little value in and of themselves, they are "nevertheless inevitable in free debate," *id.,* at 340, 94 S.Ct., at 3007, and a rule that would impose strict liability on a publisher for false factual assertions would have an undoubted "chilling" effect on speech relating to public figures that does have constitutional value. "Freedoms of expression require 'breathing space.' " *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772, 106 S.Ct. 1558 1561, 89 L.Ed.2d 783 (1986) (quoting *New York Times, supra,* 376 U.S., at 272, 84 S.Ct., at 721). This breathing space is provided by a constitutional rule that allows public figures to recover for libel or defamation only when they can prove *both* that the statement was false and that the statement was made with the requisite level of culpability.

Respondent argues, however, that a different standard should apply in this case because here the State seeks to prevent not reputational damage, but the severe emotional distress suffered by the person who is the subject of an offensive publication. Cf. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977) (ruling that the "actual malice" standard does not apply to the tort of appropriation of a right of publicity). In respondent's view, and in the view of the

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Court of Appeals, so long as the utterance was intended to inflict emotional distress, was outrageous, and did in fact inflict serious emotional distress, it is of no constitutional import whether the statement was a fact or an opinion, or whether it was true or false. It is the intent to cause injury that is the gravamen of the tort, and the State's interest in preventing emotional harm simply outweighs whatever interest a speaker may have in speech of this type.

Generally speaking the law does not regard the intent to inflict emotional distress as one which should receive much solicitude, and it is quite understandable that most if not all jurisdictions have chosen to make it civilly culpable where the conduct in question is sufficiently "outrageous." But in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment. In *Garrison v. Louisiana*, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964), we held that even when a speaker or writer is motivated by hatred or illwill his expression was protected by the First Amendment:

"Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth." *Id.,* at 73, 85 S.Ct., at 215.

Thus while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures.

Were we to hold otherwise, there can be little doubt that political cartoonists and satirists would be subjected to damages awards without any showing that their work falsely defamed its subject. Webster's defines a caricature as "the deliberately distorted picturing or imitating of a person, literary style, etc. by exaggerating features or mannerisms for satirical effect." Webster's New Unabridged Twentieth

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Century Dictionary of the English Language 275 (2d ed. 1979). The appeal of the political cartoon or caricature is often based on exploitation of unfortunate physical traits or politically embarrassing events—an exploitation often calculated to injure the feelings of the subject of the portrayal. The art of the cartoonist is often not reasoned or evenhanded, but slashing and one-sided. One cartoonist expressed the nature of the art in these words:

"The political cartoon is a weapon of attack, of scorn and ridicule and satire; it is least effective when it tries to pat some politician on the back. It is usually as welcome as a bee

sting and is always controversial in some quarters." Long, The Political Cartoon: Journalism's Strongest Weapon, The Quill 56, 57 (Nov. 1962).

Several famous examples of this type of intentionally injurious speech were drawn by Thomas Nast, probably the greatest American cartoonist to date, who was associated for many years during the post-Civil War era with Harper's Weekly. In the pages of that publication Nast conducted a graphic vendetta against William M. "Boss" Tweed and his corrupt associates in New York City's "Tweed Ring." It has been described by one historian of the subject as "a sustained attack which in its passion and effectiveness stands alone in the history of American graphic art." M. Keller, The Art and Politics of Thomas Nast 177 (1968). Another writer explains that the success of the Nast cartoon was achieved "because of the emotional impact of its presentation. It continuously goes beyond the bounds of good taste and conventional manners." C. Press, The Political Cartoon 251 (1981).

Despite their sometimes caustic nature, from the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate. Nast's castigation of the Tweed Ring, Walt McDougall's characterization of Presidential candidate James G. Blaine's banquet with the millionaires at Delmonico's as "The Royal

Feast of Belshazzar," and numerous other efforts have undoubtedly had an effect on the course and outcome of contemporaneous debate. Lincoln's tall, gangling posture, Teddy Roosevelt's glasses and teeth, and Franklin D. Roosevelt's jutting jaw and cigarette holder have been memorialized by political cartoons with an effect that could not have been obtained by the photographer or the portrait artist. From the viewpoint of history it is clear that our political discourse would have been considerably poorer without them.

Respondent contends, however, that the caricature in question here was so "outrageous" as to distinguish it from more traditional political cartoons. There is no doubt that the caricature of respondent and his mother published in Hustler is at best a distant cousin of the political cartoons described above, and a rather poor relation at that. If it were possible by laying down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm. But we doubt that there is any such standard, and we are quite sure that the pejorative description "outrageous" does not supply one. "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910, 102 S.Ct. 3409 3424, 73 L.Ed.2d 1215 (1982) ("Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action"). And, as we stated in *FCC v. Pacifica Foundation*, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978):

"[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.

For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." *Id.,* at 745-746, 98 S.Ct., at 3038.

See also *Street v. New York,* 394 U.S. 576, 592, 89 S.Ct. 1354 1366, 22 L.Ed.2d 572 (1969) ("It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers").

Admittedly, these oft-repeated First Amendment principles, like other principles, are subject to limitations. We recognized in *Pacifica Foundation,* that speech that is " 'vulgar,' 'offensive,' and 'shocking' " is "not entitled to absolute constitutional protection under all circumstances." 438 U.S., at 747, 98 S.Ct., at 3039. In *Chaplinsky v. New Hampshire,* 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942), we held that a State could lawfully punish an individual for the use of insulting " 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.,* at 571-572, 62 S.Ct., at 769. These limitations are but recognition of the observation in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 758, 105 S.Ct. 2939 2945, 86 L.Ed.2d 593 (1985), that this Court has "long recognized that not all speech is of equal First Amendment importance." But the sort of expression involved in this case does not seem to us to be governed by any exception to the general First Amendment principles stated above.

We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice," *i.e.,* with knowledge that the statement was false or with reckless disregard as to whether or not it was true. This is not merely a "blind application" of the *New York Times* standard, see *Time, Inc. v. Hill,* 385 U.S. 374, 390, 87 S.Ct. 534, 543, 17 L.Ed.2d 456 (1967), it reflects our considered judgment that such a standard is necessary to give adequate "breathing space" to the freedoms protected by the First Amendment.

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Here it is clear that respondent Falwell is a "public figure" for purposes of First Amendment law.[5] The jury found against respondent on his libel claim when it decided that the Hustler ad parody could not "reasonably be understood as describing actual facts about [respondent] or actual events in which [he] participated." App. to Pet. for Cert. C1. The Court of Appeals interpreted the jury's finding to be that the ad parody "was not reasonably believable," 797 F.2d, at 1278, and in accordance with our custom we accept this finding. Respondent is thus relegated to his claim for damages awarded by the jury for the intentional infliction of emotional distress by "outrageous" conduct. But for reasons heretofore stated this claim cannot, consistently with the First Amendment, form a basis for the award of damages when the conduct in question is the publication of a caricature such as the ad parody involved here. The judgment of the Court of Appeals is accordingly

Reversed.

Justice KENNEDY took no part in the consideration or decision of this case.

Justice WHITE, concurring in the judgment.

As I see it, the decision in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), has little to do with this case, for here the jury found that the ad contained no assertion of fact. But I agree with the Court that the judgment below, which penalized the publication of the parody, cannot be squared with the First Amendment.

1. While the case was pending, the ad parody was published in Hustler Magazine a second time.

2. The jury found no liability on the part of Flynt Distributing Co., Inc. It is consequently not a party to this appeal.

3. Under Virginia law, in an action for intentional infliction of emotional distress a plaintiff must show that the defendant's conduct (1) is intentional or reckless; (2) offends generally accepted standards of decency or morality; (3) is causally connected with the plaintiff's emotional distress; and (4) caused emotional distress that was severe. 797 F.2d, at 1275, n. 4 (citing *Womack v. Eldridge*, 215 Va. 338, 210 S.E.2d 145 (1974)).

4. The court below also rejected several other contentions that petitioners do not raise in this appeal.

5. Neither party disputes this conclusion. Respondent is the host of a nationally syndicated television show and was the founder and president of a political organization formerly known as the Moral Majority. He is also the founder of Liberty University in Lynchburg, Virginia, and is the author of several books and publications. Who's Who in America 849 (44th ed. 1986-1987).

283 S.W.3d 8
HEARST NEWSPAPER PARTNERSHIP, L.P., d/b/a San Antonio Express-News and Ron Wilson, Appellants,
v.
Manuel MACIAS, Jr., Appellee.
No. 04-08-00725-CV.
Court of Appeals of Texas, San Antonio.
February 18, 2009.

[283 S.W.3d 10]

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Charles S. Frigerio, Hector X. Saenz, Law Offices of Charles S. Frigerio, P.C., Cathy J. Sheehan, Assistant City Attorney, Litigation Division, San Antonio, TX, for Appellee.

Manuel Macias Jr., San Antonio, TX, pro se.

Sitting: CATHERINE STONE, Chief Justice, SANDEE BRYAN MARION, Justice, REBECCA SIMMONS, Justice.

OPINION

Opinion by SANDEE BRYAN MARION, Justice.

In the underlying lawsuit, Manuel Macias, Jr. sued the Hearst Newspaper Partnership, L.P., d/b/a San Antonio Express-News, and Ron Wilson (collectively, "the newspaper"), as well as other defendants. Macias's suit against the newspaper alleged defamation based on eight statements contained in articles written by Ron Wilson for the San Antonio Express-News. The newspaper moved for summary judgment on all eight statements. The trial court rendered summary judgment in favor of the newspaper on four of the statements and denied the newspaper's motion as to the other four statements. This interlocutory appeal by the newspaper ensued.[1] Because we conclude the newspaper established the substantial truth of its articles, we reverse and render judgment in favor of the newspaper.

BACKGROUND

Macias is the former Executive Director of the San Antonio Development Agency ("SADA") and San Antonio Affordable Housing, Inc. ("SAAH"), which is a non-profit community housing organization created by SADA. Diane Gonzalez-Cibrian was SADA's chairwoman and a member of the SAAH board of commissioners. In 2006, a dispute arose between Macias and Gonzalez-Cibrian over SADA and SAAH projects. On September 12, 2006, Macias was, as he alleges in his third amended petition, "constructively terminated" from his position as Executive Director of SADA. The newspaper ran several articles about the dispute and Macias's departure. Macias sued the newspaper alleging it defamed him.

In the course of the underlying litigation, the newspaper moved for summary judgment on Macias's claims against it. The trial court rendered summary judgment in part in favor the newspaper, but denied the newspaper's summary judgment motion with regard to statements

contained in four of Ron Wilson's articles for the Express-News. On appeal, the newspaper argues the trial court erred in denying its summary judgment motion because the challenged statements were substantially true, were protected by fair-report and fair-comment privileges, and were not published with actual malice. Because we conclude the newspaper carried its summary judgment burden of establishing the substantial truth of the challenged statements, we discuss only that basis for summary judgment.

DISCUSSION

Libel is a defamatory statement in written form that tends to injure a living person's reputation and, as a result, exposes the person to public hatred, contempt or ridicule, or financial injury. *See* TEX. CIV. PRAC. & REM.CODE ANN. § 73.001 (Vernon 2005). However, "[t]he truth of the statement in the publication on which the action for libel is based is a defense to the action." *Id.* § 73.005. In a summary judgment proceeding involving a media defendant in which First Amendment protections are applicable, a showing by the defendant-movant of the publication's substantial truth will defeat the non-movant's causes of action. *See McIlvain v. Jacobs*, 794 S.W.2d 14, 15 (Tex.1990); *San Antonio Express News v. Dracos*, 922 S.W.2d 242, 249 (Tex.App.-San Antonio 1996, no writ).

The test used in determining whether a publication is substantially true involves considering whether the alleged defamatory statement was more damaging to the plaintiff's reputation, in the mind of the average reader or listener, than a truthful statement would have been. *McIlvain,* 794 S.W.2d at 16. Such an evaluation involves looking to the "gist" of the publication. *Id.* If the underlying facts as to the gist of the defamatory charge are undisputed, then we may disregard any variance regarding items of secondary importance and determine substantial truth as a matter of law. *Id.*

A. Statement That Macias "Resigned"

In his third amended petition, Macias takes issue with the newspaper's statement, in three of the articles, that he "resigned." According to Macias, this statement was false because he did not resign; instead, he was "constructively terminated." However, in his petition, Macias states Gonzalez-Cibrian demanded that he "execute a letter of resignation immediately." Macias then states: "The Plaintiff, an at-will employee, was induced to tender his hand-written letter of resignation during the executive session, after [he] was promised that he would continue to receive salary and full benefits until October 31, 2006, which was the effective date of his resignation. On September 12, 2006, the Plaintiff tendered his hand-written resignation with an effective date of October 31, 2006...." In his summary judgment affidavit, Macias admitted he was given the option of resigning immediately or being terminated as Executive Director, and "[t]o avoid being fired, I agreed to resign that day."

Because there is no dispute that Macias wrote what he himself characterized as a letter of resignation, we conclude the newspaper's statement that he resigned was substantially true. Also, the statement that he resigned "does not charge [Macias] with the commission of a crime or the violation of any law[, nor does it] accuse him of violating any kind of contract.... [B]y no stretch of the imagination does it charge him with any unethical acts and business dealings. It accuses him of absolutely nothing except what he had a right to do...." *Musser v. Smith Protective Serv., Inc.*, 723 S.W.2d 653, 655 (Tex.

1987) (internal citation omitted). Therefore, we conclude that, in the mind of the average reader, the statement that Macias resigned was no more damaging to his reputation than a statement that he was constructively terminated.

B. Internal Audits and FBI Investigation

Macias also takes issue with the following statements contained in three of the articles that he resigned in the wake of audits and an FBI investigation:

Contained in an October 4, 2006 newspaper article:

Last month, SADA Executive Director Manuel "Manny" Macias Jr. resigned in the midst of ongoing audits by SADA and the city.

Contained in an October 6, 2006 newspaper article:

Macias, SADA's executive director, resigned Sept. 12 after city officials began questioning the use of federal funds on his watch.

Posted to the newspaper's website on December 7, 2006:

Manny Macias, SADA's former executive director, resigned Sept. 12 in the wake of an independent audit of his credit card use, a second audit of whether SADA used federal housing funds appropriately, and the city's plan to defund the embattled agency, whose housing contracts are being investigated by the FBI.

The "gist" of the October 4, 2006 article was that the SADA board was attempting to reassert control over SAAH and was demanding the return of $10,000 withdrawn from the SADA bank account, as well as the return of various financial documents, including credit card records, withheld by SAAH from a special audit. The article explained that auditors "were looking at a number of financial records, including use of SAAH's credit cards by Macias...." The article also mentioned that Southwest Housing, a Dallas developer involved in a SAAH project, was under investigation by the FBI.

The "gist" of the October 6, 2006 article concerned the FBI investigation, the internal audit, and the SADA board's continued attempt to obtain missing financial records. The article again stated that one of the issues to be addressed by the audit was Macias's possible misuse of credit cards. The newspaper reported that Gonzalez-Cibrian said SADA was "particularly interested in documents related to a $20 million apartment complex [SAAH] was building in partnership with Southwest Housing, a Dallas developer under investigation by the FBI in connection with contracts in that city." The article quoted FBI Special Agent Eric Vasay as confirming "an ongoing investigation regarding contracts with SADA and outside entities." The article reported the San Antonio Deputy City Manager as stating the SADA board was informed that "the city believes any money [SAAH] has belongs to SADA and to the city, which administers federal funds that fund SADA." The article also discussed potential tampering with a computer belonging to SADA's "former executive director." Finally, the article stated Macias returned a call requesting an interview, but he could not be reached later the same day.

The "gist" of the December 7, 2006 article was that the SADA computer had been tampered with and that Macias had refused to turn over financial records. The article reported that Macias said he did not know what happened to the computer, it worked fine on his last day, and office computers frequently broke down. The article noted that records from the computer likely would have been reviewed in

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the course of two audits, "one dealing with financial management of the agency and the other with whether SADA properly used and reported federal housing funds administered by the city." The article reported that Gonzalez-Cibrian "pushed for an independent audit of management finances and Macias' use of credit cards," after an SADA employee sent board members a letter claiming the agency was being mismanaged.

In its summary judgment motion, the newspaper proved the truth of the facts alleged in these three articles. The newspaper submitted, as summary judgment proof, Agent Vasay's affidavit in which he confirmed "an ongoing investigation regarding contracts with SADA and outside entities." The newspaper's summary judgment evidence also included a copy of (1) a May 31, 2006 independent audit report that discussed, in part, an analysis of travel expenses and credit card usage; and (2) SADA's application for a temporary restraining order, which stated "the City notified SADA and SAAH that the City was conducting a comprehensive financial audit of SADA, and that the City's audit request included review of all of SAAH's financial and accounting records." Also, in Macias's summary judgment response, Macias admits an independent audit was conducted and consisted of a review of SAAH's credit card and travel policies, and credit card receipts and travel expenses. As a result, we conclude the newspaper's statements in its articles that Macias resigned in the wake of audits and an FBI investigation were substantially true.

C. Airfare and Credit Card Charges

Finally, Macias complains of the following statement in a September 6, 2006 article: "City records show that he charged $400 for airfare for his family and failed to document $1,000 in lunches." The "gist" of this article was that the San Antonio City Council was attempting to dissolve SADA for, in part, various perceived inefficiencies. The article stated, "After an April complaint by a retiring employee, [Macias] was placed under scrutiny for allegedly misusing agency credit cards. City records show that he charged $400 for airfare for his family and failed to document $1,000 in lunches." In its summary judgment motion, the newspaper proved the truth of the facts alleged in the September 6 article. The newspaper's summary judgment evidence included a copy of an independent audit report that stated its analysis of travel expenses and credit card usage revealed a $410.90 charge for airfare for Macias's wife and "various [SADA credit card] charges in the amount of $999.81 ... for out-of-town meals," despite a travel per diem of only $51 per day for meals. The audit stated "[b]oth per diem allowances and meal charges while on travel status should not be allowed." As a result, the newspaper's statement in its September 6, 2008 article was substantially true. Also, we note that the article reported allegations contained within "City records." "When, as here, a case involves media defendants, the defendants need only prove that third party allegations reported in a broadcast were, in fact, made and under investigation; they need not demonstrate the allegations themselves are substantially true." *Dolcefino v. Randolph*, 19 S.W.3d 906, 918 (Tex. App.-Houston [14th Dist.] 2000, pet. denied).

D. Macias's Response to the Motion for Summary Judgment[2]

In his response to the newspaper's summary judgment motion, Macias argued

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the gist of the articles was libelous because none of the articles mentioned an independent audit performed by Steven Porter, which exonerated Macias of any wrongdoing. Macias argued that the articles were not substantially true because they included only negative allegations and did not include any positive statements about him. As summary judgment proof, Macias submitted the affidavit of Steven Porter, whose firm conducted an audit "of limited scope" of the SAAH credit card and travel policies and travel expenses. In his affidavit, Porter states Macias properly accounted for all funds in question and discharged his duties without any indication of wrongdoing. However, a copy of the audit report was not attached to Macias's response and there is no indication in the summary judgment record that a copy of the report was available to the newspaper.

Macias's argument that the articles as a whole are defamatory is based on the theory that "the omission of material facts or misleading presentation of true facts ... can render an account just as false as an outright misstatement." *See Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 115 (Tex.2000). However, "a plaintiff claiming defamation based on a publication as a whole must prove that the publication's `gist' is false and defamatory and that the publication is not otherwise privileged." *Id.* We conclude that even if the Porter audit was available to the newspaper and had actually been quoted in the articles, the "gist" of the four articles would remain unchanged: Macias submitted a letter of resignation, audits were conducted into his credit card usage, and the FBI was conducting its own investigation of SAAH contacts.

CONCLUSION

We reverse that portion of the trial court's judgment denying the newspaper's motion for summary judgment and render a take-nothing summary judgment in favor of the newspaper with respect to Macias's libel claim. The judgment is affirmed in all other respects.

Notes:

1. *See* TEX. CIV. PRAC. & REM.CODE ANN. § 51.014(a)(6) (Vernon 2008).

2. Macias did not file an appellee's brief in this appeal.

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HARVEST HOUSE PUBLISHERS, John Ankerberg, and John Weldon, Appellants,
v.
THE LOCAL CHURCH,
An Unincorporated Association; Living Stream Ministry, A California Non-Profit Corporation; The Church in Houston, A Texas Non-Profit Corporation, The Church in Arlington, A Texas Non-Profit Corporation; Church in Beaumont, A Texas Non-Profit Corporation; The Church in Corpus Christi, A Texas Non-Profit Corporation; The Church in Dallas, Inc., A Texas Non-Profit Corporation; Church in Denton, Inc., A Texas Non-Profit Corporation; The Local Church in El Paso, A Texas Non-Profit Corporation; The Church in Fort Worth, Inc., A Texas Non-Profit Corporation; The Church in Huntsville, Inc., A Texas Non-Profit Corporation; The Church in Plano,

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A Texas Non-Profit Corporation; Church in Odessa A Texas Non-Profit Corporation; The Church in Richardson, A Texas Non-Profit Corporation; The Church in San Antonio, Inc., A Texas Non-Profit Corporation; The Church in Texarkana A Texas Non-Profit Corporation; The Church in Tyler, A Texas Non-Profit Corporation; The Church in Fort Stockton, A Texas Non-Profit Corporation; Church in Laredo, A Texas Non-Profit Corporation; Church in Albuquerque, A New Mexico Non-Profit Corporation; The Church in Anaheim, A California Non-Profit Corporation; The Church in Arcadia, A California Non-Profit Corporation; The Church in Cerritos, A California Non-Profit Corporation; The Church in Atlanta, Inc., A Georgia Non-Profit Corporation; The Church in Baton Rouge, Inc., A Louisiana Non-Profit Corporation; Church in Bellevue, A Washington Non-Profit Corporation; The Church in Bellingham, A Washington Non-Profit Corporation; The Church in Berkeley, The Church in Birmingham, An Alabama Non-Profit Corporation; Church in Boca Raton, Inc., A Florida Non-Profit Corporation; The Church in Boise, An Idaho Non-Profit Corporation; The Church in Cambridge, Inc., A Massachusetts Non-Profit Corporation; The Church in Cary, A North Carolina Non-Profit Corporation; The Church in Chula Vista, A California Non-Profit Corporation; The Church in College Park, A Maryland Non-Profit Corporation; The Church in Cyupress, A California Non-Profit Corporation; The Church in Davis, A California Non-Profit Corporation; The Church in Diamond Bar, A California Non-Profit Corporation; The Church in Dunn Loring, A Virginia Non-Profit Corporation; Church in El Monte, A California Non-Profit Corporation; The Church in Eugene, An Oregon Non-Profit Corporation; The Church in Fairborn, An Ohio Non-Profit Corporation; The Church in Fresno, Inc., A California Non-Profit Corporation; The Church in Fullerton Corporation, A California Non-Profit Corporation; The Church in Huntington Beach, A California Non-Profit Corporation; Church in Irvine, Inc., A California Non-Profit Corporation; Church in Jackson, A Mississippi Non-Profit Corporation; The Church in Jacksonville, Inc., A Florida Non-Profit Corporation; The Church in Kansas City, Inc., A Missouri Non-Profit Corporation; The Church in Lafayette, A Louisiana Non-Profit Corporation; The Church in Little Rock, An Arkansas Non-Profit Corporation; The Church in Long Beach, A California Non-Profit Corporation; Church in Los Angeles, A California Non-Profit Corporation; The Church in Memphis, A Tennessee Non-Profit Corporation; The Church in Miami, Inc., A Florida Non-Profit Corporation; Church in Milwaukee, A Wisconsin Non-Profit Corporation; The Church in Mission Viejo, Inc., A California Non-Profit Corporation; The Church in Montebello, A California Non-Profit Corporation; Church in Monterey Park, A California Non-Profit Corporation; The Church in Moreno Valley, A California Non-Profit Corporation; The Church in Nashville, A Tennessee Non-Profit

Corporation; The Church in Newington, Inc., A Connecticut Non-Profit Corporation; The Church in North Providence, A Rhode Island Non-Profit Corporation; The Church in Nutley, A New Jersey Corporation; The Church in Oklahoma City, Inc., An Oklahoma Non-Profit Corporation;

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The Church in Orlando, A Florida Non-Profit Corporation; The Church in Palatine, An Illinois Non-Profit Corporation; Church of God Whish is at Philadelphia, A Pennsylvania Non-Profit Corporation; The Church in Pleasant Hill, A California Non-Profit Corporation; Church in Portland, An Oregon Non-Profit Corporation; The Church in Pullman, A Washington Non-Profit Corporation; The Local Church in Raleigh, A North Carolina Non-Profit Corporation; The Church in Redding, A California Non-Profit Corporation; The Church in Riverside, A California Non-Profit Corporation; Church in Roseville, A California Non-Profit Corporation; The Church in Sacramento, A California Non-Profit Corporation; The Church in Salt Lake City, A Utah Non-Profit Corporation; Church in San Diego, A California Non-Profit Corporation; The Church in San Francisco, Inc., A California Non-Profit Corporation; Assembly of the San Gabriellers, A California Non-Profit Corporation; The Church in San Jose, A California Non-Profit Corporation; The Church in Santa Clara, A California Non-Profit Corporation; The Church in Santa Clarita, A California Non-Profit Corporation; The Church in Seattle, A Washington Non-Profit Corporation; Church in Shreveport, A Louisiana Non-Profit Corporation; The Church in Spokane, A Washington Non-Profit Corporation; The Church in Streamwood, An Illinois Non-Profit Corporation; The Church in Tacoma, A Washington Non-Profit Corporation; The Church in Tampa, Inc., A Florida Non-Profit Corporation; Church in Tempe, Inc., An Arizona Non-Profit Corporation; The Church in Thousand Oaks, A California Non-Profit Corporation; The Church in Torrance, A California Non-Profit Corporation; The Church in Tucson, Inc., An Arizona Non-Profit Corporation; Church in Tulsa, An Oklahoma Non-Profit Corporation; The Church in Victorville, A California Non-Profit Corporation; The Church in Vista, A California Non-Profit Corporation; The Church in Wichita, Inc., A Kansas Non-Profit Corporation; Church in Yorba Linda, A California Non-Profit Corporation, Appellees.
No. 01-04-00231-CV.
Court of Appeals of Texas, Houston (1st Dist.).
January 5, 2006.
Rehearing Denied May 18, 2006.

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Lynne Liberato, for Harvest House Publishers et al.

J. Shelby Sharpe and Thomas J. Williams, for Donald D. Jackson.

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Douglas M. Selwyn and Craig Trively Enoch, for The Local Church et al.

Panel consists of Chief Justice RADACK and Justices ALCALA and BLAND.

OPINION

SHERRY RADACK, Chief Justice.

This is a libel suit brought by a church against a publisher and two authors after the church was included in a book about "religious cults," as that term is defined in the book. The publisher and authors moved for summary judgment, which the trial court denied. This interlocutory appeal followed. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(b) (Vernon Supp.2005). Because we agree that the passages in the book that refer to the church are not, as a matter of law, defamatory, we reverse the judgment of the trial court and render judgment that the church take nothing from the publisher and authors.

BACKGROUND

A. An Overview of the *Encyclopedia of Cults and New Religions*

John Weldon and John Ankerberg ["the authors"] wrote a book entitled *Encyclopedia of Cults and New Religions* ["the book"], which was published by Harvest House Publishers ["the publisher"]. The book is 700 pages long. It begins with a section entitled "How to Use this Book," which is followed by a 16-page Introduction, 57 separate chapters that describe various religious groups, including a chapter on appellees, The Local Churches and Living Stream Ministry [collectively, "the church"], and concludes with a 66-page section entitled, "Doctrinal Appendix."

The church is not named at all in the Introduction. The chapter on the church is 1 and 1/4 pages long. Living Stream Ministry, the publishing voice of the church, is mentioned once in the chapter.

The Doctrinal Appendix mentions the church twice and Living Stream Ministry once. The first mention of the church is in a chart with 15 other religious groups under the title "Different Concepts of God." The church is next mentioned in a list of 50 other religious groups under the subcategory "Religions, Cults, and the Deity of Christ." Living Stream Ministry is mentioned in a footnote, as the source of a quote from one of the church's founders.

PROPRIETY OF TRIAL COURT'S DENIAL OF SUMMARY JUDGMENT

The authors and publisher moved for a traditional summary judgment, contending that (1) the language of the book is not legally capable of any defamatory meaning, (2) the allegedly defamatory statements were not made with "actual malice," and (3) the statements were protected by the free speech and press provisions of the United States and Texas Constitutions.[1]

A. Standard of Review

When reviewing the denial of summary judgment, we apply the same well-known standards applicable to the granting of summary judgment. *See Associated Press v. Cook*, 17 S.W.3d 447, 451 (Tex.App.-Houston [1st Dist.] 2000, no pet.). For their traditional summary judgment motion, the authors and publisher had the burden to show that no genuine issue of material fact

existed and that they were entitled to judgment as a matter of law. *See* TEX.R. Civ. P. 166a(c); *Swilley v. Hughes*, 488 S.W.2d 64, 67 (Tex.1972). A

defendant who conclusively negates at least one of the essential elements of a cause of action is entitled to summary judgment on that cause of action. *Swilley*, 488 S.W.2d at 67. Likewise, a defendant who conclusively establishes each element of an affirmative defense is entitled to summary judgment. *Id.* Once the movant has established a right to a summary judgment, the burden shifts to the nonmovant. *Marchal v. Webb*, 859 S.W.2d 408, 412 (Tex.App.-Houston [1st Dist.] 1993, writ denied). The nonmovant must respond to the motion for summary judgment and present to the trial court any issues that would preclude summary judgment. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex.1979); *Marchal*, 859 S.W.2d at 412. The summary judgment should be granted if any of the theories advanced in the motion for summary judgment is meritorious. *See Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 626 (Tex.1996).

B. Is the Language of the Book Defamatory as to the Church?

In their first issue on appeal, the publisher and authors contend that the language of the book cannot, as a matter of law, be defamatory. To maintain a cause of action for defamation, the plaintiff must prove that the defendant (1) published a statement (2) that was defamatory concerning the plaintiff (3) while acting with either actual malice, if the plaintiff was a public figure, or negligence, if the plaintiff was a private individual, regarding the truth of the statement. *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex.1998). Whether a publication is capable of being defamatory is initially a question of law to be determined by the court. *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 114 (Tex.2000). To make this determination, the trial court should consider whether the words used are reasonably capable of defamatory meaning by considering the allegedly defamatory statement as a whole. *See Musser v. Smith Protective Servs., Inc.*, 723 S.W.2d 653, 654-55 (Tex.1987). The determination is based on how a person of ordinary intelligence would perceive the entire statement. *See also Bentley v. Bunton*, 94 S.W.3d 561, 579 (Tex.2002). This question is submitted to a jury only if the contested language is ambiguous or of doubtful import. *See Denton Pub. Co. v. Boyd*, 460 S.W.2d 881, 884 (Tex.1970).

1. Is the Introduction Defamatory?

The church claims that it has been defamed by certain references made in the book's Introduction. Specifically, paragraphs 15-17 of the church's petition allege:

15. Within one year of the date of this Complaint, defendant published the *Encyclopedia.* The *Encyclopedia* consists primarily of descriptions of various religious organizations identified by the authors as cults. Preceding these descriptions is a lengthy, introductory section which informs the readers that, all of "the groups contained herein deserve the title" "cult." Under a subheading entitled "Characteristics of Cults," the introduction offers the reader a numbered list of negative attributes that the authors attribute to the "cults" described in the text. The introduction also includes many other statements attributing misdeeds and other approbations to the groups listed in the *Encyclopedia.*

16. Among other things, the *Encyclopedia's* introduction specifically attributes to "cults" and therefore to Plaintiffs' the following:

A. Subjecting members to "physical harm" (Page XXIV).

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B. "[F]raud or deception concerning" "fundraising" and "financial costs." (Page XXIV).

C. "[A]cceptance of shamanism." (Page XXIV).

D. "[E]ngaged in drug smuggling and other criminal activity, including murder." (Page XXV).

E. "[D]enied their followers blood transfusions and medical access." (Page XXV).

F. "[E]ncouraged prostitution." (Page XXV).

F. "[S]ometimes raped women." (Page XXV).

G. "[M]olested children." (Page XXV).

H. "[B]eaten their disciples." (Page XXV).

I. "[P]ractices black magic and witchcraft." (Page XXV).

17. The *Encyclopedia's* introduction expressly and implicitly imputes these "Characteristics of Cults" to the religious organizations described in the text. The language, layout, tone and tenor of the introduction is designed to, and does, cause a reasonable reader to conclude that the organizations described in the *Encyclopedia* were selected for inclusion therein precisely because they possess the "Characteristics of Cults" and commit the misdeeds listed. Furthermore, the authors expressly characterize their descriptions of Plaintiffs as factual: "Facts are facts." (Page XIX).

In their motion for summary judgment, the publisher and authors argue that the Introduction section of the book cannot be defamatory, as a matter of law, because (1) "the foundational context of the Encyclopedia centers on doctrinal and apologetic issues of theology," and (2) the introduction cannot be reasonably interpreted to defame every group in the book. To determine these issues, we consider first whether the label "cult" is actionable. Then, we turn to the issue of whether the negative attributes and practices attributable to "cults" are actionable.

a. Is being labeled a "cult" actionable?

The Introduction of the Encyclopedia defines a "cult" as "a separate religious group generally claiming compatibility with Christianity but whose doctrines contradict those of historic Christianity and whose practices and ethical standards violate those of biblical Christianity." In their motion, the publisher and authors claim that the Introduction "centers on doctrinal and apologetic issues." We agree. Under the Establishment Clause of the First Amendment, civil courts are prohibited from deciding theological matters, or interpreting religious doctrine, or making matters of religious belief the subject of tort liability. *See Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 707, 96 S.Ct. 2372 2379, 49 L.Ed.2d 151 (1976).

The issue of whether a group's doctrines are compatible with Christianity depends upon the religious convictions of the speaker. "Whether [a] statement of religious doctrine or belief is made honestly or in bad faith is of no moment, because falsity cannot be proved." *Tilton v. Marshall*, 925 S.W.2d 672, 679 (Tex.1996). "As such, no jury can be allowed to determine [the truth or falsity of one's religious beliefs] for `[w]hen triers of fact undertake that task, they enter a forbidden domain.'" *Id.* at 680 *(quoting United States v. Ballard*, 322 U.S. 78, 86, 64 S.Ct. 882, 886, 88 L.Ed. 1148 (1944)).

In *Tran v. Fiorenza*, 934 S.W.2d 740, 742 (Tex.App.-Houston [1st Dist.] 1996, writ denied), the plaintiff, a Catholic priest, sued Bishop Fiorenza for defamation because

the bishop wrote a letter in which he stated that the plaintiff had been excommunicated by the Catholic church. This Court held that it could not hear the plaintiff's defamation claim because, to decide whether a tort had, in fact, occurred, we would have to decide whether the plaintiff had been excommunicated, a matter of ecclesiastical concern. *Id.* at 744. The First and Fourteenth Amendments of the United States Constitution prohibit civil courts from deciding such ecclesiastical matters. *Id.* at 743.

Therefore, we conclude that being labeled a "cult" is not actionable because the truth or falsity of the statement depends upon one's religious beliefs, an ecclesiastical matter which cannot and should not be tried in a court of law. *See Sands v. Living Word Fellowship*, 34 P.3d 955, 960 (Alas.2001) (holding that reference to church as "cult" and church member as "cult recruiter" not actionable as defamation because statements convey religious belief and opinion and are not capable of being proven true or false).

b. Is the description of the negative characteristics of a cult actionable?

The Introduction of the book contains a list of 12 "characteristics of cults." The 12 characteristics of cults include the following.

1. Despite the claim to be a friend of Christianity, the new religious are rejecting or hostile to Christianity.

2. Despite the claim to allow for individual expression and to respect members as individuals, we discover a destructive authoritarianism and sanction-oriented mentality: members must obey explicitly or be punished or ex-communicated.

3. Despite a claim to interpret the Bible properly, the Bible is systematically misinterpreted, either through additional revelation that distorts proper biblical interpretation or through alien (mystical, symbolic, subjective) methods of interpretation.

4. Despite a claim to care for members, members are often subject to psychological, physical and spiritual harm through cult dynamics that reject biblical, ethical and pastoral standards.

5. Despite a claim to allow independent thinking, there is a restriction of independent thought, a rejection of reason and logic, and often unquestioning obedience to the leader or organization.

6. Despite public claim for openness and tolerance to other religions, exclusivism and intolerance are taught privately.

7. Despite the claim for independent verification and objective evidence in support of a group's beliefs and practices, the evidence is almost exclusively based in undocumented claim or the subjective realm — mystical experience or powerful occult experience.

8. Despite the claim to offer true spirituality and a genuine experience of God or ultimate reality, and despite the claim not to be occult, what is offered is often occult practices and beliefs.

9. Despite the claim for accurately representing one's history and to give a true portrait of a group's leader(s), there is a distortion — reinvention and cover-up — of a group's history and leader for purely advantageous interests.

10. Despite the claim to trust others, cults may be paranoid or persecution conscious, and they may be oppositional or alienated from the culture, having beliefs, values and practices opposed to those in the dominant culture.

11. Despite the claim for honesty there is use of intimidation or deception on both members and outsiders. There is often fraud or deception concerning a

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group's true teachings, the life of the founder, the group's history, fund-raising, front groups and financial cost.

The section of the book on the "characteristics of cults" concludes with the following paragraph, upon which most of the church's libel claims are based:

When people are manipulated in different ways for ulterior motives, as cults are shown to do in this Encyclopedia, is not this to be condemned? Those cult leaders or gurus who have encouraged their followers to oppose moral convention, denied their followers blood transfusions and medical access, encouraged prostitution for making converts, sometimes raped women, beaten their disciples, molested children, practices black magic and witchcraft, engaged in drug smuggling and other criminal activity, including murder — do they not deserve the condemnation of us all? And such things have occasionally happened even in what many people regard as the "respectable" cults.

The church contends that some of the conduct mentioned in connection with the characteristics of cults — prostitution, rape, beating, molesting children, drug smuggling, and murder — are facts that can be proven false, and, therefore, are actionable under *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20, 110 S.Ct. 2695, 2706-07, 111 L.Ed.2d 1 (1990) (holding that statements of "opinion" may be actionable if containing facts provable as false).

The publisher and authors, however, argue that the characteristics of cults — including the criminal acts that the church contends are provable as false under *Milkovich* — "cannot reasonably be interpreted to defame every group in the book." In other words, the publisher and authors argue that the second element of a defamation claim — that a defamatory statement was made *concerning the plaintiff* — cannot be met. We agree.

If a statement does not concern appellants, it cannot defame them, nor can it injure their reputations. *See Newspapers Inc. v. Matthews*, 161 Tex. 284, 339 S.W.2d 890, 893 (1960). For a plaintiff to recover for the publication of an allegedly libelous statement, the asserted libel must refer to some ascertained or ascertainable person and that person must be the plaintiff. *Id.* The publication need not make direct reference to the plaintiff individually; reference may be indirect, and it is not necessary that every listener understand it, so long as there are some who reasonably do so. *Davis v. Davis*, 734 S.W.2d 707, 711 (Tex. App.-Houston [1st Dist.] 1987, no writ).

Under the group libel doctrine, a plaintiff has no cause of action for a defamatory statement directed to some or less than all of the group when there is nothing to single out the plaintiff. *Eskew v. Plantation Foods, Inc.*, 905 S.W.2d 461, 462 (Tex.App.-Waco 1995, no writ); *Wright v. Rosenbaum*, 344 S.W.2d 228, 231-33 (Tex. Civ.App.-Houston 1961, no writ) (holding that statement that "one of the four ladies" stole dress, but not naming guilty person, was not slanderous of any particular person); *Bull v. Collins*, 54 S.W.2d 870, 871-72 (Tex.Civ.App.-Eastland 1932, no writ) (holding that statement that either A or B stole the money, without specifying guilty party, not slanderous); *Harris v. Santa Fe Townsite Co.*, 58 Tex.Civ.App. 506, 125 S.W. 77, 80 (1910, writ ref'd) (holding that statement that an unnamed "band of nine women" from South Silsbee cut a fence was not libelous because 15 women lived in South Silsbee).

In *Eskew,* the chief executive officer of the defendant company stated in the newspaper that "[I]rregularities in the company's maintenance department prompted

personnel changes. . . . Everyday we hire people, let people go and people quit . . . . I don't want to take the chance of coloring the innocent with any kind of accusation. I don't think everyone we let go had something to do with this. But some of those we let go, we think, were involved." 905 S.W.2d at 462. The plaintiff, one of the employees the defendant company had fired, sued for libel, contending that the chief executive officer's statement identified plaintiff as a wrongdoer even though he was not named in the story. *Id.* The court of appeals stated that "[the chief executive officer's] statement did not malign the entire group and is clearly referable only to an unidentified portion of a group." *Id.* at 463. As such, summary judgment was proper for the defendant company. *Id.* at 464.

Thus, in order for an alleged defamatory statement that is directed to an unidentified group of individuals to be actionable, it must create the inference that *all members* of the group have participated in the activity that forms the basis of the libel suit. If the statement refers to some, but not all members of the group, and does not identify to which members it refers, it is not a statement of and concerning the plaintiff.

The church argues that, under *Gibler v. Houston Post Co.*, 310 S.W.2d 377, 385 (Tex.App.-Houston [1st Dist.] 1958, writ ref'd n.r.e.), the statements regarding the alleged criminal acts are actionable, even if the church is not directly mentioned in connection with the criminal acts. Under *Gibler,* a libel plaintiff may maintain a cause of action, even if not named in the publication, if the language of the publication and the surrounding circumstances are such that friends and acquaintances of the plaintiff recognize that the publication is about the plaintiff. *Id.* In its petition, the church alleges that the book has defamed every group named therein. Specifically, the church alleges that the Introduction of the book "is designed to, and does, cause a reasonable reader to conclude that the organizations described in the *Encyclopedia* were

selected for inclusion therein precisely because they possess the `Characteristics of Cults' and commit the misdeeds listed."

To the contrary, the Introduction of the book specifically states that "[t]he list [of the characteristics of a cult] is not exhaustive. Not all groups have all the characteristics and not all groups have every characteristic in equal measure. . . ." The appropriate inquiry in determining what a reasonable reader would believe, for the purposes of libel, is objective, not subjective. *See New Times v. Isaacks*, 146 S.W.3d 144, 162 (Tex.2004). The question is not whether some actual readers were misled by the publication, as they inevitably will be, but whether the hypothetical reasonable reader could be. *Id.* Moreover, the prefatory language "[t]hose cult leaders or gurus" is restrictive — focused only upon those leaders who commit such acts, not on all leaders or gurus. In sum, considering the Introduction as a whole, we cannot conclude that a reasonable reader could believe that all groups named in the book participate in the criminal activities that plaintiffs claim as the basis of their libel action. No reasonable reader could conclude that the book accuses the church, and, in fact, every other church named in the book, of rape, murder, child molestation, drug smuggling, etc. As such, the allegedly libelous statements in the Introduction are not "of and concerning the church" and are not actionable.

2. Is the Doctrinal Appendix Defamatory?

The church also contends in its petition that it has been defamed by certain portions of language in the Doctrinal Appendix.

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Specifically, paragraph 18 of the petition alleges the following:

18. The Encyclopedia also includes a section entitled "Doctrinal Appendix." This Section attacks the groups included in the Encyclopedia, including Plaintiffs with further defamatory statements including the following:

A. The groups included in the book "accept occult powers." (Page 708);

B. The groups included in the book are "associated with idolatry" and "universally promote idolatry" with its inevitable outcome "human sacrifice." (Pages 710, 721);

C. The groups included in the book engage in "murder," "child sacrifice," "prostitution," and "snake worship" (Pages 714, 722).

In their motion for summary judgment, the publisher and authors argue that the Doctrinal Appendix section of the book cannot be defamatory, as a matter of law, for the same reasons that the Introduction is not defamatory, i.e., because (1) "the foundational context of the Encyclopedia centers on doctrinal and apologetic issues of theology" and (2) the Doctrinal Appendix cannot be reasonably interpreted to defame every group in the book. To determine these issues, we consider first whether being accused of "accepting occult powers" and "promoting idolotry" is actionable. Then, we turn to the issue of whether the negative attributes and practices attributable to "cults" are actionable.

a. Is being accused of "accepting occult powers" and "promoting idolatry" actionable?

The Doctrinal Appendix defines "idolatry" as the "worship of false gods and spirits" and occult [demonic] powers and practices are associated, in the text, with idolatry. The section of the Doctrinal Appendix on the occult and idolatry is entitled "The Occult: The Modern Spiritual Counterfeit."

As with the definition of the term "cult," which we discussed earlier, whether someone worships a false god or accepts occult powers and practices depends upon the speaker's religious beliefs. "To avoid conducting `heresy trials,' courts may not adjudicate the truth or falsity of religious doctrines or beliefs." *Tilton,* 925 S.W.2d at 678-79. "Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs." *Unites States v. Ballard*, 322 U.S. 78, 86-87, 64 S.Ct. 882, 886-87, 88 L.Ed. 1148 (1944).

Because the statement concerns the speaker's religious beliefs, which cannot be proved true or false, an allegation that one is an idolator and accepts occult powers is not actionable.

b. Are the statements regarding human sacrifice, murder, child sacrifice, prostitution, and snake worship actionable?

The publisher and authors argue that the occult practices that are mentioned in the Doctrinal Appendix, "cannot reasonably be interpreted to defame every group in the book." In other words, the publisher and authors argue again that the second element of a defamation claim — that a defamatory statement was made *concerning the plaintiff* — cannot be met. Again, we agree.

None of the passages alleged to be defamatory in the Doctrinal Appendix mention the church at all. The occult practice of human sacrifice, which gives rise to one of the church's libel allegations, is mentioned in the following passage:

As [the Bible verses referenced earlier] suggest, in ancient Israel occult practices were associated with idolatry

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(worship of false god and spirits) and inevitably led to human sacrifice, as is increasingly occurring in the Western world today.

This passage does not accuse the church, or indeed any of the organizations named in the book, of human sacrifice. Instead, it points out that, *in ancient Israel,* idolatry led to human sacrifice, in the authors' opinion. As such, the statement regarding human sacrifice is not of and concerning the church.

The occult practices of child sacrifice and murder, which give rise to another of the church's libel allegations, are mentioned in a section of the Doctrinal Appendix that lists what the authors refer to as "the capacities or methods of fallen angels [demons]." Again, the passage does not refer to the church at all, or any other organization in the book. There is nothing in this list of "demonic powers" to lead a reasonable reader to conclude that the church possesses or uses these powers to commit child sacrifice or murder. As such, the passage in the Doctrinal Appendix that refers to child sacrifice and murder is not of and concerning the church.

The occult practices of child sacrifice, prostitution, and snake worship are mentioned in the following passage from the Doctrinal Appendix.

IDOLATRY (Gr.eidololatria). Idolatry in ancient times included two forms of departure from the true religion: the worship of false gods (whether by means of images or otherwise); and the worship of the Lord by means of images. All the nations surrounding ancient Israel were idolatrous. . . . The gods had no moral character whatsoever, and worship of them carried with it demoralizing practices, including child sacrifice, prostitution and snake worship. . . .

Again, this clearly does not refer to the church or any of the organizations named in the book. It is a historical reference to ancient Israel and what the authors perceive as the result of idolatry in that day and age. As such, it is not a statement of and concerning the church and is not actionable.

In sum, considering the Doctrinal Appendix as a whole, we cannot conclude that a reasonable reader would believe that all groups named in the book participate in the "occult practices" that plaintiffs claim as the basis of their libel action. Because the allegedly libelous statements in the Doctrinal Appendix are not of and concerning the church, they are not actionable.

3. Is the Chapter regarding "The Local Church" Defamatory?

The church does not allege that the chapter on it contains defamatory language. Instead, it argues that the fact that there is a chapter on it would lead a reasonable person to conclude that it "routinely engage[d] in the activities set forth in paragraph 16 and 18 above." Specifically, the petition alleges the following:

19. The *Encyclopedia* contains a section entitled "The Local Church." This section also expressly identifies Living Stream Ministry. When read in conjunction with the *Encyclopedia's* introduction and appendix, this section conveys false and defamatory message [sic] that the Local Church, the Churches, and Living Stream Ministry routinely engage in the activities set forth in paragraph 16 & 18 above. The section of the *Encyclopedia* entitled "The Local Church" is reasonably read in conjunction with and in the context of the *Encyclopedia's* introduction and appendix, including the "Characteristics of Cults" subsection. The contents of these sections, including the defamatory statements described herein, were understood

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by readers to refer to and concern the Plaintiffs herein.

20. The above-described statements are defamatory per se in that they falsely impute immoral, illegal and despicable actions to Plaintiffs. In truth and in fact no Plaintiff has ever engaged in such actions. The false and defamatory statements set forth herein expose Plaintiffs to hatred, contempt, ridicule, and financial injury.

The gist of the church's complaint is that, by calling it a "cult" and including a chapter on it in the book, the publisher and authors have accused it of every "immoral, illegal and despicable action" mentioned in the book. However, as we stated earlier, under the group libel doctrine, a plaintiff has no cause of action for a defamatory statement directed to some or less than all of the group when there is nothing to single out the plaintiff. *Eskew,* 905 S.W.2d at 462. We have

already held that nothing in the book singles out the church as having committed the "immoral, illegal, and despicable" actions alleged in its petition. Simply being included in a group with others who may have committed such "immoral, illegal, and despicable" actions does not give rise to a libel claim.

CONCLUSION

Because the allegedly libel statements are not defamatory, as a matter of law, we sustain the publisher and authors' first issue on appeal. Accordingly, we need not address the remaining issues and decline to do so.

We reverse the judgment of the trial court and render judgment that the church take nothing from the publisher and authors.

Notes:

1. *See* U.S. CONST. amends. I, XIV; TEX. CONST. art. 1, §§ 8, 29.

FORT WORTH PRESS CO. et al.
v.
DAVIS.
No. 13389.
Court of Civil Appeals of Texas. Fort Worth.
June 5, 1936.
Rehearing Denied September 4, 1936.

Appeal from District Court, Tarrant County; A. J. Power, Judge.

Action by W. D. Davis against the Fort Worth Press Company and others. From a judgment in favor of plaintiff, defendants appeal.

Judgment reversed and rendered.

Frank A. Ogilvie, of Fort Worth, for appellants.

L. J. Wardlaw and B. Y. Cummings, both of Fort Worth, and E. G. Senter, of Dallas, for appellee.

BROWN, Justice.

W. D. Davis, appellee, was mayor of the town of North Fort Worth, and subsequent

to the annexation of such territory to the city of Fort Worth was elected mayor of Fort Worth and served several terms.

In the summer of 1934, appellee was a candidate, offering himself for the nomination of county judge of Tarrant county in the Democratic primary. During the campaign, as is customary with candidates for public office, and as appellee had the right to do, he spoke, publicly and privately, and pointed with pardonable pride to the public improvements and municipal achievements which were brought about during his administrations of office as mayor of the city of Fort Worth. These improvements and achievements were pointed to by appellee and referred to as "Monuments" of his administrations.

The Fort Worth Press Company, one of the appellants, for many years has been publishing an evening paper in the city of Fort Worth, known as the "Fort Worth Press." This paper was opposed to the election of appellee as county judge of Tarrant county and undertook to print, and did print, several articles designated as "editorials," in which it attempted to give publicity to some of the public acts and achievements had and done during the administrations of appellee as mayor of the city of Fort Worth, which were designated "Monuments Bill Davis Doesn't Talk About." It also published a bit of doggerel addressed to appellee.

Appellee was defeated for the nomination and in March, 1935, brought suit against appellants, the Fort Worth Press, S. R. Sheldon, and Roscoe Fleming, and also against the E. W.

Scripps Company, alleging that these appellants, by the publication of articles and editorials referred to and the bit of doggerel that was published, had libeled him. Sheldon was the editor of said newspaper and Fleming the assistant editor thereof. Fleming was the author of the editorials and the bit of verse complained about.

Appellee alleged that the editorials and the bit of verse were libelous, that they contained false statements, and that they were actuated by malice; and he sued for both actual and exemplary damages.

Appellants answered that they were not actuated by any malice; that the facts set forth in the editorials were substantially true.

The cause was tried to a jury and was submitted on special issues. The verdict returned was favorable to appellants as to all matters complained of, save and except the first editorial and article which referred to what is known as "the settling basin," which was attempted to be constructed during appellee's tenure of office as mayor as a part of the system built for a water supply for said city. The editorial known as "Monument No. 1" is as follows:

"Monuments Bill Davis Doesn't
Talk About—No. 1
"An Editorial.

"By Now, you've probably heard Bill Davis talk.

"Charming fellow. Talks well.

"And Salesmanship. He could sell ice-packs to an Eskimo.

"But the job Bill Davis wants you to give him is that of County Judge. That's a big and responsible business job, having to do with spending $1,200,000 a year of taxpayers' money.

"That's a lot of money. The man who is entrusted with it ought to be a business man with a business record.

"Well, Bill has a record. He held a big business job once before, for eight years—that of Mayor of Fort Worth.

"How did he stack up ahandling the public's cash and conducting its affairs? He's talked some about that. He has told about the Monuments he left. But he has told only one side.

"In the interest of seeing that voters know something of both sides when they go to the polls, The Press has investigated Bill's record as Mayor. It presents a few of its findings—not all—in the form of four articles on `Monuments Bill Davis Doesn't Talk About.' Below is described the first Monument. Others will follow:

"A Monument to Bill Davis' career as Mayor of Fort Worth, one of those he doesn't talk about in his campaign for County Judge—may be seen by any citizen of Tarrant County who cares to drive a few miles.

"And it's worth looking at. See the picture to the right.

"It looks like the Panama Canal of Tarrant County.

"It swallowed $80,000 of the money of Fort Worth taxpayers.

"And it's absolutely useless, and always was.

"It's the `settling basin' carried almost to completion by the Bill Davis administration

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as Mayor of Fort Worth at the time Lake Worth was planned.

"But it was abandoned, even before completion, and never used.

"Drive out and look at it—before you vote.

"Go west on the White Settlement Road until you reach Higgs' Novel Nook, where you turn north on Roberts' Cutoff Road to Lake Worth.

"One-fourth mile after you turn north, look on the east side of the road and you will see two huge earth walls, about 250 feet apart, with a sheet of water 150 feet wide between them, running east as far as you can see.

"Those walls are the western end of Bill Davis' Settling Basin.

"They run east for half a mile or more.

"The `basin' covers altogether, 14½ acres.

"What a monument!

"Look at it. You paid for it (tho you don't own it now).

"It was begun about the time the Lake Worth dam was being built.

"Why, no one could understand. Water and sanitary engineers said from the start that the thing was so impractical as to be absurd. If it `settled' the water, they said, it would silt up so fast as to be useless in a few years.

"Public sentiment rose against the waste of money.

"Work was stopped.

"After the `basin' was abandoned, it grew up in weeds.

"Bill Davis didn't spend all the money he might have, tho. He didn't build any way to get the water to the `basin' from the lake.

"Here's the aftermath, tho. Sometime ago a landowner bought the land on which the `basin' is located. He tried to use it to store water for irrigation.

"And he found Bill Davis' `settling basin' wouldn't even hold water. It runs thru the bottom and comes out miles down the river.

"As we said, these are monuments Bill Davis doesn't talk about. But now that he is asking for another big business job handling $1,200,000 a year of taxpayers' money, don't you think he ought?

"Ask him.

"And Monday another monument Bill Davis doesn't talk about will be described in this space.

"`Just a little trouble over a camp site' says Bill.

"But that isn't what the judge said.

"Above is a view of the `settling basin' about 250 feet wide from bank crest to bank crest, and 150 feet wide at the water line, which a Bill Davis City administration built to `settle' water from Lake Worth at a cost of $80,000. It is half a mile long. You can see it winding away into the distance in the photograph. It was so impractical it was abandoned before final completion."

This was incorporated in paragraph 5 of appellee's original petition, and the issues submitted concerning this editorial and the favorable answers thereto are as follows:

"1. Do you find from a preponderance of the evidence that the statements made by the defendants, as set forth in paragraph 5 of plaintiff's original petition, pertaining to the settling basin, are substantially true? Answer: No.

"2. Do you find from a preponderance of the evidence that the statements made by defendants as set forth in paragraph 5 of plaintiff's original petition, pertaining to the settling basin, constitute a reasonable and fair comment or criticism of the official acts of plaintiff? Answer: No.

"3. Do you find from a preponderance of the evidence that the statements made by the defendants as set forth in paragraph 5 of plaintiff's original petition pertaining to the settling basin, were published in good faith, without malice and upon probable grounds? Answer: No.

"4. Do you find from a preponderance of the evidence that the statements made by the defendants as set forth in paragraph 5 of plaintiff's original petition, pertaining to the settling basin, constitutes a reasonable and fair comment or criticism of matters of public concern? Answer: No. * * *

"12. Do you find from a preponderance of the evidence that the statements made by the defendants, as set forth in paragraph 5 of plaintiff's original petition, concerning the settling basin, constitutes

libel as that term has been defined? Answer: Yes. * * *

"16. Did the publication of either of said articles result in injury to the plaintiff, W. D. Davis, either to his reputation or feelings, or both? Answer: Yes.

"What sum of money, if any, if paid now in cash will fairly and reasonably compensate the plaintiff for the injury, if any, he may have sustained, as may be shown by the evidence, if any, as the direct and proximate result of the publication of either of said articles, taking into consideration the injury, if any, to the reputation and feelings of plaintiff? State such sum, if any, in dollars and cents. Answer: $1000.00.

"18. Do you find from a preponderance of the evidence that the defendants were guilty of actual malice, as that term is defined herein, in publishing and circulating the statements as set forth in paragraph 5 of plaintiff's original petition? Answer: Yes.

"What amount of money, if any, do you find as exemplary damages? Answer in dollars and cents. Answer: $1631.25."

The defendant E. W. Scripps Company was peremptorily discharged by proper instructions by the trial court. The verdict having been received by the trial court, the appellants and appellee moved for judgment based on such verdict.

Appellants' theory is that the undisputed record shows that the facts and statements made in such editorial concerning the settling basin are substantially true.

Judgment having been rendered for appellee against the three appellants named, awarding appellee the sum of $1,000 actual damages and $1,631.25 exemplary damages, motion for a new trial was duly made, and, upon its being overruled, the cause was properly brought before us for review.

There are fifteen assignments of error, supported by fifteen propositions; but taking the view that we do of this case from the record, we do not consider it necessary to discuss all of the assignments of error.

The first assignment of error asserts that the court erred in not granting appellants' motion for judgment, notwithstanding the verdict, for the reason that material allegations of the "settling basin" article are substantially true. The jury having found against appellee on all other matters complained about, if it can be said that the facts and statements set forth in the settling basin article are substantially true, the first assignment of error should be sustained.

The complaint made by appellee is that the article or editorial referred to charges a waste of the taxpayers' money in the sum of $80,000 expended in attempting to construct the settling basin when no such sum was expended. The city secretary, Henry Keller, testified that he had found

from the minutes of the city commission estimates numbered "1 to 5," inclusive, showing payments made on the settling basin which aggregated the sum of $17,575.94. He testified that he could not find estimates numbered "6, 7, and 8," which were paid.

As pointed out above, appellee has referred to the improvements and achievements accomplished under his administrations as mayor as evidences of his ability and fitness to acceptably occupy the office of county judge of Tarrant county. He was thus claiming the credit for these improvements and achievements which were had and done during the time that he was mayor of the city of Fort Worth.

Appellants were attempting to show that certain improvements were undertaken and things were done officially and in the name of the city of Fort Worth which were not beneficial to the city's interest during appellee's tenure of office, and these were referred to as the "monuments" appellee does not talk about.

Analyzing the settling basin editorial, we find that all of the statements therein are shown by the evidence to be true, excepting the statement "it swallowed $80,000 of the money of Fort Worth taxpayers." What is the charge then that is being made? A waste of the taxpayers' money in the settling basin project. There is no more opprobrium attached to or charged by saying that $80,000 of the taxpayers' money was wasted in this project than there would be should the charge have been made that $17,500 of the taxpayers' money was wasted. If one were charged in an article with embezzling $80,000 or with a swindle involving such sum, and because of the publication of such purported facts, a libel suit should be brought, a complete answer to the cause of action is that the proof indisputably showed an embezzlement of or a swindle in the sum of $17,500. That this

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is the law, we do not believe any one will question.

Following are a few of the many cases which we believe control the case at bar: Quaid v. Tipton, 21 Tex.Civ.App. 131, 51 S.W. 264; Caylor v. Nunn (Tex.Civ.App.) 235 S.W. 264; Express Publishing Co. v. Keeran (Tex.Com.App.) 284 S.W. 913; Enterprise Co. v. Wheat (Tex.Civ.App.) 290 S.W. 212; Enterprise Co. v. Glenn (Tex.Civ.App.) 290 S.W. 806; Ray v. Times Pub. Co. (Tex.Com.App.) 12 S.W. (2d) 165; Belo & Co. v. Fechner (Tex.Civ. App.) 42 S.W.(2d) 641; Lundberg v. Brownsville Herald Pub. Co. (Tex.Civ. App.) 66 S.W.(2d) 375.

The statements found in the article complained about come squarely within the provisions of article 5432, Rev.Civ.Statutes, as amended by Acts 1927, c. 80, § 2 (Vernon's Ann.Civ.St. art. 5432), and the publication thereof is "deemed privileged" by us.

The judgment of the trial court is reversed, and judgment is here rendered for appellants.

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55 Fair Empl.Prac.Cas. 721,
56 Empl. Prac. Dec. P 40,713, 18 Fed.R.Serv.3d 1396
George FARIAS, Plaintiff-Appellant,
v.
BEXAR COUNTY BOARD OF TRUSTEES FOR MENTAL HEALTH MENTAL RETARDATION SERVICES, et al., Defendants-Appellees.
Nos. 89-5620, 90-5504.
United States Court of Appeals,
Fifth Circuit.
March 11, 1991.
Rehearing and Rehearing En Banc
Denied April 12, 1991.

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Glen D. Mangum, David Garcia, Jr., Mangum & White, Inc., San Antonio, Tex., for plaintiff-appellant.

James Eddie Ingram, John T. Reynolds, Butler & Binion, and Roy R. Barrera, Sr., Roy R. Barrera, Jr., Nicholas & Barrera, San Antonio, Tex., for Bexar County Bd. of Trustees and Lopez and Rutledge.

Edward Schweninger, San Antonio, Tex., for Bexar County Bd. of Trustees.

Donald J. Walheim, San Antonio, Tex., for Alamo Heights.

Harvey L. Hardy, San Antonio, Tex., for Castle Hills.

Arthur L. Walker, Austin, Tex., for City of Olmos Park.

Charles S. Frigerio, and Baldemar A. Jimenez, Asst. City Attys., Office of the City Atty., San Antonio, Tex., for City of San Antonio.

James A. Kosub, Malinda A. Gaul, Kosub & Gaul, San Antonio, Tex., for Heard, Hall, Smith, Martin & Oliva.

Appeals from the United States District Court for the Western District of Texas.

Before CLARK, Chief Judge, and GARZA and DAVIS, Circuit Judges.

REYNALDO G. GARZA, Circuit Judge:

George Farias sued various defendants in Texas state court alleging federal and state claims. Several of the defendants removed the case to federal court. After a bench trial, the district judge entered judgment in favor of the defendants. Following this judgment, Farias brought a new suit

in state court alleging similar claims. The federal district judge enjoined the new suit under the relitigation exception to the Anti-Injunction Act. Farias appeals both the earlier judgment and the later injunction to our court. We affirm the judgment but reverse the grant of injunction.

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AN OVERVIEW

George Farias served as executive director of the Bexar County Mental Health Mental Retardation Center from October 1979 to January 1988. For more than two years, Farias worked without a written contract. Thereafter he worked under a series of written letter agreements. Farias accepted his last written employment contract in January 1987. That contract expired by its terms on August 31, 1987, and required the Center's Board of Trustees to give Farias 120 days written notice of the Board's intent not to renew.

After his contract expired on August 31, 1987, Farias worked without a contract. In November 1987, the Board appointed a committee to evaluate Farias's performance as executive director. Less than a month later, on December 8, 1987, the Board voted not to renew Farias's contract. Farias worked for thirty days after the December 8 meeting and received an additional ninety days severance pay.

In April 1988, Farias sued multiple defendants in Texas state court, [1] alleging various state and federal claims. Some of the defendants petitioned for removal to federal district court under 28 U.S.C. Secs. 1441(b) and 1443 based on the fact that Farias had raised federal claims. Farias moved to remand the case to state court on the ground that some defendants had not joined the petition for removal. The district court denied Farias's motion to remand, finding that the nonremoving defendants were merely "nominal" or "formal" parties.

Meanwhile the nonremoving parties filed motions to dismiss under Fed.R.Civ.P. 12(b)(6). Farias filed a motion to strike because the nonremoving parties had never consented to removal. Farias moved, in the alternative, for an extension of time to respond. The district court denied Farias's motions and granted the motions to dismiss.

Nine days after the district court denied his motion for remand, Farias demanded a jury trial and moved, in the alternative, for a jury trial under Fed.R.Civ.P. 39(b). The defendants moved to strike Farias's jury demand under Fed.R.Civ.P. 81(c). [2] The court granted defendants' motion to strike and ordered a bench trial.

Farias filed an amended complaint on May 19, 1989. On June 19, 1989, defendants filed their amended answer. On the first day of trial, Farias objected to some affirmative defenses in the amended answer, claiming that the defenses had not been previously asserted. Defendants denied that the defenses were new. The district court refused to strike the defenses and allowed the defendants to submit evidence supporting those defenses.

After a bench trial, the judge entered final judgment in favor of defendants. Farias then filed another suit in Texas state court alleging violations of the Texas Open Meetings Act, Tex.Rev.Civ.Stat.Ann. art. 6252-17. The new state court action stems from the same transactions that led to the case now before this court. Defendants moved to enjoin the suit in state court under

925 F.2d 866
55 Fair Empl.Prac.Cas. 721, 56 Empl. Prac. Dec. P 40,713, 18 Fed.R.Serv.3d 1396
George FARIAS, Plaintiff-Appellant,
v.
BEXAR COUNTY BOARD OF TRUSTEES FOR MENTAL HEALTH MENTAL
RETARDATION SERVICES, et al., Defendants-Appellees.
Nos. 89-5620, 90-5504. United States Court of Appeals, Fifth Circuit.
March 11, 1991. Rehearing and Rehearing En Banc Denied April 12, 1991.
the relitigation exception of the Anti-Injunction Act. See 28 U.S.C. Sec. 2283. Defendants also requested Rule 11 sanctions against Farias and his counsel. The district court granted the motion to enjoin but denied the request for sanctions.

CASE NUMBER 89-5620

REMOVAL, REMAND AND THOSE NOMINAL PARTIES

Nominal Parties

After some of the defendants petitioned

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for removal [3], Farias moved for remand. See 28 U.S.C. Sec. 1447(c). The district court denied Farias's motion, finding that the nonremoving defendants were merely "nominal" or "formal" parties. Farias challenges the district court's order on the following two grounds: (1.) all defendants named in the state court action must join in or consent to removal when the basis for removal is the district court's federal question jurisdiction and this did not happen; and (2.) even if the nominal-parties exception applies to federal question cases, the nonremoving defendants in this case are more than "nominal" or "formal" parties.

"[A]ll defendants who are properly joined and served must join in the removal petition, and ... failure to do so renders the petition defective." Getty Oil Corp., Div. of Texaco, Inc. v. Insurance Co. of N. Am., 841 F.2d 1254, 1262 (5th Cir.1988) (citations omitted); see Johnson v. Helmerich & Payne, Inc., 892 F.2d 422, 423 (5th Cir.1990). There is an exception to this general rule, however. "Nominal" or "formal" parties need not join in the removal petition. See Robinson v. National Cash Register Co., 808 F.2d 1119, 1123 (5th Cir.1987); B., Inc. v. Miller Brewing Co., 663 F.2d 545, 549-50 (5th Cir. Unit A Dec.1981); Tri-Cities Newspapers, Inc. v. Tri-Cities Printing Pressmen and Assistants' Local 349, Int'l Printing Pressmen and Assistants' Union of N. Am., 427 F.2d 325, 327 (5th Cir.1970). To establish that non-removing parties are nominal parties, "the removing party must show ... that there is no possibility that the plaintiff would be able to establish a cause of action against the non-removing defendants in state court." B., Inc., 663 F.2d at 549.

Diversity/Federal Question, Same Rule Applies

Because the basis for removal jurisdiction in this case was federal question jurisdiction, Farias contends the nominal parties exception is not applicable. The nominal party cases in our circuit have dealt solely with diversity jurisdiction. See, e.g., Robinson, 808 F.2d 1119 (5th Cir.1987); Green v. Amerada Hess Corp., 707 F.2d 201 (5th Cir.1983), cert. denied, 464 U.S. 1039, 104 S.Ct. 701, 79 L.Ed.2d 166 (1984); B., Inc., 663 F.2d 545 (5th Cir.1981); Tedder v. F.M.C. Corp., 590 F.2d 115 (5th Cir.1979); Tri-Cities Newspapers, Inc., 427 F.2d 325 (5th Cir.1970). Until now, the exception has not been applied to a case in which removal is based on federal question jurisdiction. The grandaddy case in our circuit dealing with nominal parties and removal is Tri-Cities Newspapers, Inc., 427 F.2d 325 (5th Cir.1970). Tri-Cities discusses nominal parties as being those parties who are neither necessary nor indispensable to join in the action. Id. at 327. The Tri-Cities test of whether defendants are nominal parties "is whether in the absence of

the [defendant], the Court can enter a final judgment consistent with equity and good conscience which would not be in any way unfair or inequitable to the plaintiff." Id. (quoting Stonybrook Tenants Assoc., Inc. v. Alpert, 194 F.Supp. 552, 559 (D.Conn.1961)). The test places no limitation on whether removal is based on diversity or federal question jurisdiction and neither do we [4]. Since equity is the major concern in the nominal party inquiry, no limitation should be placed on the type of jurisdiction used to remove the action from state to federal court. Similarly, the test for determining a nominal party stated above applies equally whether diversity or federal question jurisdiction is the mode of

removal. The bottom line concern in determining a nominal party is whether the plaintiff can establish a cause of action against the nonremoving defendant in state court.

The bottom line concern answered

In this case, for reasons to be explained, we find the plaintiff could in no way establish a cause of action in state court against the nonremoving defendants. The only duty placed on the nonremoving defendants by Texas law is the duty to enter into a contract between them stipulating the number of the Bexar County Board of Trustees for Mental Health Mental Retardation Services to be appointed from the region. See Tex.Rev.Civ.Stat.Ann. art. 5547-203 Sec. 3.01(a) (Vernon Supp.1990). Farias contends the nonremoving defendants are liable because they were negligent in failing to establish criteria for the selection of Board members, negligent in entrusting authority to the Board of Trustees and negligent in failing to supervise or exercise any degree of control over the Board of Trustees. Although Farias sues on these grounds, no duty existed on the part of the nonremoving defendants to perform these duties. If no duty exists there can be no breach of duty and no negligence. See Leonard v. Aluminum Co. of Am., 767 F.2d 134, 136 (5th Cir.1985).

Citing Montgomery Ward & Co. v. Scharrenbeck, 146 Tex. 153, 204 S.W.2d 508 (Tex.1947), Farias asserts a cause of action exists against the nonremoving defendants for negligent breach of contract in the creation of the Board of Trustees. Scharrenbeck does recognize this cause of action. Id. 204 S.W.2d at 510. The problem, however, is the cause of action is available only to the parties to the contract. See McClendon v. T.L. James & Co., Inc., 231 F.2d 802, 804 (5th Cir.1956); B & C Constr. Co. v. Grain Handling Corp., 521 S.W.2d 98, 102-03 (Tex.Civ.App.--Amarillo 1975, no writ). Since Farias was not a party to this contract, the cause of action is not available to him.

Finally on this point, Farias argues there is a common law duty in Texas to perform contracts with care, skill and faithfulness and the nonremoving defendants breach of this duty constituted negligence resulting in Farias's discharge. This duty does exist under the law of Texas regarding the "thing agreed to be done". Scharrenbeck, 204 S.W.2d at 510. The "thing agreed to be done" among the nonremoving defendants was the creation of a board of trustees pursuant to the provisions of Article 5547-203. This was the "thing agreed to be done" and since it only indirectly affected plaintiff (i.e. he was not a party to the agreement) he may not avail himself of this cause of action. See generally Hart v. Aetna Casualty and Surety Co., 756 S.W.2d 27, 28 (Tex.App.--Amarillo 1988, no writ) (dealing with an insurer and an insured and explaining that the fiduciary duty of good faith and fair dealing between the two does not extend to a third party); Chaffin v. Transamerica Ins. Co., 731 S.W.2d 728, 731-32 (Tex.App.--Houston [14th Dist.] 1987,

writ ref'd n.r.e.) (stating that an insurer's common law duty of good faith and fair dealing does not provide a remedy to an injured third-party). Accordingly, the district court was correct in deeming the nonremoving defendants nominal parties and allowing the case to proceed without their joinder in the removal petition.

TO ERR OR NOT TO ERR IN GRANTING THE NONREMOVING DEFENDANTS

MOTION TO DISMISS

While Farias's motion for remand was pending, each of the nonremoving defendants filed a motion to dismiss under Fed.R.Civ.P. 12(b)(6). The district court granted the motions to dismiss for the same reason it denied the motion for remand: Farias could not state a claim against the nonremoving defendants. Farias argues that the district court improperly dismissed the nonremoving defendants. Alternatively, Farias submits the district court should have allowed him more time to respond to the motions.

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The district court had no jurisdiction over the nonremoving defendants because these defendants did not seek removal, contends Farias. Consequently, it had no jurisdiction to rule on the motions to dismiss. This contention, however, ignores the proposition that removal "ends the power of the state court ... because the entire case is then removed as to all parties whether joined in the petition or not." Allman v. Hanley, 302 F.2d 559, 562 (5th Cir.1962) [5]. The district court did not err in asserting jurisdiction over the nonremoving parties.

As stated above, Farias alternatively argues that the district court should have allowed him more time to respond to the 12(b)(6) motions. Under Fed.R.Civ.P. 6(b), the district judge had discretion to extend the time for Farias to respond. We find no abuse of this discretion, however, because the issues involved in the motions to dismiss were identical to those briefed in the motion for remand. Because Farias could not prevail against the nonremoving parties in state court they were nominal parties. After removal, Farias could not prevail against the nonremoving parties in federal court as well and they were properly dismissed by means of Fed.R.Civ.P. 12(b)(6).

PUNCTUALITY AND THE RIGHT TO A JURY TRIAL

"Within ten days after service of the notice of filing of the removal petition" Farias was required to demand a jury trial. Fed.R.Civ.P. 81(c). On May 23, 1988, notice of removal was served on Farias. A jury trial was demanded by Farias on November 7, 1988. By not timely demanding a jury trial, Farias waived his right to a jury. See Bush v. Allstate Ins. Co., 425 F.2d 393, 395-96 (5th Cir.), cert denied, 400 U.S. 833, 91 S.Ct. 64, 27 L.Ed.2d 64 (1970).

Nevertheless, the district judge could have ordered a jury trial under Fed.R.Civ.P. 39(b). A rule 39(b) motion is discretionary with the judge. Despite "the general principle that a court should grant a jury trial in the absence of strong and compelling reasons to the contrary", Mesa Petroleum Co. v. Coniglio, 629 F.2d 1022, 1029 (5th Cir.1980), we adhere to a long line of precedent in finding no abuse of discretion. "It is not an abuse of discretion by a District Judge to deny a Rule 39(b) motion ... when the failure to make a timely jury demand results from mere inadvertence on the part of the moving party." Bush, 425 F.2d at 396. See O'Malley v. United

States Fidelity and Guaranty Co., 776 F.2d 494, 502 (5th Cir.1985); Fredieu v. Rowan Cos., Inc., 738 F.2d 651, 654 (5th Cir.1984); Rhodes v. Amarillo Hosp. Dist., 654 F.2d 1148, 1154 (5th Cir.1981); Mesa Petroleum Co., 629 F.2d at 1029 (finding no abuse of discretion despite stating the "strong and compelling reasons to the contrary" principle). Farias offered no viable [6] reasons for his delay and therefore we assume the delay resulted from mere inadvertence. Accordingly, the district judge did not abuse his discretion by not granting Farias a jury trial.

TARDY ANSWER [7]

ALLOWED: ABUSE?

Defendants filed their First Amended Answer on June 19, 1989, approximately

one month before trial. This was exactly one month after Farias was granted leave to file his First Amended Complaint. Farias objects that the amended answer contained affirmative defenses not contained in the original answer. Specifically, he contends he was prejudiced by the allowance of the affirmative defenses of qualified and sovereign immunity to be plead in the amended answer. We do not agree.

Defendants Original Answer claimed the defense of governmental immunity. Under the liberal pleading rules used in our federal courts, this type of notice pleading was sufficient to raise these defenses. See Jamieson By and Through Jamieson v. Shaw, 772 F.2d 1205, 1213 (5th Cir.1985). Moreover, "leave [to amend pleadings] shall be freely given when justice so requires." Fed.R.Civ.P. 15(a). Rule 15 encourages leave to amend. "[U]nless there is a substantial reason to deny leave to amend, the discretion of the district court is not broad enough to permit denial." Carson v. Polley, 689 F.2d 562, 584 (5th Cir.1982). The Original Answer gave Farias notice of the defenses of qualified and sovereign immunity as did the Pre-Trial order signed by his attorney. We find no abuse of discretion by the district judge and overrule this point of error.

SOVEREIGN IMMUNITY AND THE BEXAR COUNTY MHMR CENTER

The decisive issue: state or local?

The district court concluded that the Bexar County Mental Health Mental Retardation Center was entitled to immunity against all suits to which the Eleventh Amendment applies. Unless consent is given, the Eleventh Amendment forbids suit against a state, a state agency or department of the state by citizens of the state. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 100, 104 S.Ct. 900, 907, 79 L.Ed.2d 67 (1984). To determine if the Eleventh Amendment bar applies we "must examine the particular entity in question and its powers and characteristics as created by state law to determine whether the suit is in reality a suit against the state itself." Laje v. R.E. Thomason Gen. Hosp., 665 F.2d 724, 727 (5th Cir.1982). Our circuit has formulated the following factors to help resolve this inquiry:

(1) whether state statutes and case law characterize the agency as an arm of the state; (2) the source of funds for the entity; (3) the degree of local autonomy the entity enjoys; (4) whether the entity is concerned primarily with local, as opposed to statewide, problems; (5) whether the entity

has authority to sue and be sued in its own name; and (6) whether the entity has the right to hold and use the property.

Minton v. St. Bernard Parish School Bd., 803 F.2d 129, 131 (5th Cir.1986).

Due to the sparsity of evidence relating to the above factors we are unable to make an inquiry into each one. Nevertheless, we will make do with the evidence which is properly before us. The statute permitting creation of the Center aids us only slightly in the resolution of whether the Center is an "agency of the state." See Tex.Rev.Civ.Stat.Ann. art. 5547-203 Sec. 3.01(c) (Vernon Supp.1990). A complete reading of this section of the statute indicates "[a] community center [or a mental health mental retardation center in this case] is an agency of the state, a governmental unit, and a unit of local government...." Id. (emphasis ours).

The testimony [8] at trial indicated that between seventy and eighty percent of the funding for the Center came from the state, either directly or indirectly. The statute authorizing creation of the Center, however, clearly provides "that the total amount of state funds used in the operation of the facility may not exceed sixty (60) percent of the total operating budget of that facility." Tex.Rev.Civ.Stat.Ann. art. 5547-203 Sec. 3.11(f) (Vernon Supp.1990). There is no evidence, however, "as to

whether any of these [state] funds would be used to pay the judgment." Wheeler v. Mental Health and Mental Retardation Authority of Harris County, Tex., 752 F.2d 1063, 1072 (5th Cir.), cert. denied, 474 U.S. 824, 106 S.Ct. 78, 88 L.Ed.2d 64 (1985). A significant amount of "legislatively appropriated funds does not in and of itself render ... [the center] an arm of the state." Id. The failure of evidence as to where funds will come from to pay an adverse judgment is a controlling factor. See id. at 1073.

We find it important that the authorizing statute for the Center states "[l]ocal agencies which may establish and operate community centers are a county, a city, a hospital district, a school district, or any organizational combination of two (2) or more of these." Tex.Rev.Civ.Stat.Ann. art. 5547-203 Sec. 3.01(a) (Vernon Supp.1990). In other words, local entities created the Center. Furthermore, the Board of Trustees responsible for administration of the center, id. at Sec. 3.05(a), are appointed from among "the qualified voters of the region...." Id. at Sec. 3.02(a).

Although the entity can hold and use land, id. at Sec. 3.11(a), and the purpose of the Center is to aid the "mentally ill and mentally retarded individuals of this state", id. at Sec. 3.01A, we feel the Wheeler decision is controlling in this case. Wheeler concluded that despite these indicia that may suggest a state agency, in reality the Bexar County MHMR is "more like a county or city than an arm of the state." Wheeler, 752 F.2d at 1072-73. There is just too much local involvement and no evidence that an adverse judgment would interfere "with the state's fiscal autonomy." Id. at 1073. Accordingly, the district court erred in concluding the Center was a state agency for purposes of Eleventh Amendment sovereign immunity.

A hollow victory

Despite this error, Farias's victory is hollow. Sovereign immunity applied only [9] to Farias's Sec. 1983 claims and the district court properly ruled against Farias on the merits of those claims. See the sections of this opinion entitled THE HANDWRITING WAS ON THE WALL and PROPERTY, LIBERTY AND DUE PROCESS. Consequently, this error was harmless and reversal is not warranted.

QUALIFIED IMMUNITY AND THE BOARD OF TRUSTEES

In this point of error, Farias complains the district judge applied the wrong legal standard in exonerating the individual defendants from liability on the basis of qualified immunity. Government officials performing discretionary functions cannot be held liable for civil damages unless they violate clearly established constitutional or statutory rights of which a reasonable person would have known. See Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727 2738, 73 L.Ed.2d 396 (1982). Farias asserts the district court improperly allowed a "good faith" defense based on the defendant's subjective belief rather than focusing on objective good faith. The problem with this assertion is that the district court considers the defendants' good faith only if Farias demonstrates that the defendants violated a clearly established right. See Davis v. Scherer, 468 U.S. 183, 197, 104 S.Ct. 3012 3020, 82 L.Ed.2d 139 (1984). Good faith of the defendants was never evaluated by the district judge because he found no unlawful conduct by the defendants. Cf. Anderson v. Creighton, 483 U.S. 635, 639-40, 107 S.Ct. 3034, 3038-39, 97 L.Ed.2d 523 (1987) (explaining the unlawful conduct must be apparent before the objective legal reasonableness analysis is undertaken). Farias had the burden to show the individual defendants violated rights that were clearly established at the time of the conduct in issue. Davis, 468 U.S. at 196, 104 S.Ct. at 3020. The district judge found he did not meet this burden

and after reviewing the record we cannot say this determination was erroneous.

THE HANDWRITING WAS ON THE WALL

Farias claims he was fired as executive director because of his opposition to the purchase of a parcel of property known as the South Flores property. This property is owned by Dr. William Elizondo, a supposed "crony" of two members of the board, Lopez and Rutledge. He claims his statements to the ad hoc building committee, the board and his memorandum to the board all addressed matters of public concern and he was wrongfully discharged (in violation of his First Amendment rights) as a result of these communications. We have reviewed the record and disagree.

To establish a First Amendment violation, Farias must prove: (1) that his speech involved a matter of public concern, Connick v. Myers, 461 U.S. 138, 147, 103 S.Ct. 1684 1690, 75 L.Ed.2d 708 (1983); (2) that his interest in "commenting upon matters of public concern" is greater than defendant's interest in "promoting the efficiency of the public services [they] perform[ ]", Pickering v. Board of Educ. of Township High School Dist. 205, Will County, Ill., 391 U.S. 563, 568, 88 S.Ct. 1731 1734, 20 L.Ed.2d 811 (1968); and that his speech motivated the board's decision not to renew Farias's contract, Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977). The district court ruled against Farias on the first and third issues and did not address the second issue.

In reviewing this point of error, we do not decide whether the speech involved a matter of public concern. Instead, we decide that Farias's speech did not motivate the Board's decision not to renew his contract. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977). The district judge found that even assuming Farias's speech involved a matter of public concern, it was not a motivating factor in the defendants' decision not to renew the contract. After reviewing the entire record we agree that the "handwriting was on the wall." It is apparent to us that the evidence indicated Farias's performance had lessened prior to the time of his dismissal and the actions of the board were warranted. The Center had a deficit, a lost inebriate contract with the City of San Antonio meaning lost revenues for the Center, low morale and complaints among the employees, were the reasons George Farias was discharged. Consequently, since the third prong of a First Amendment violation cannot be established, Farias cannot prevail on this issue. Even assuming there was testimony at trial which supported two disparate conclusions, the district court does not clearly err by choosing either permissible conclusion. See United States v. Yellow Cab. Co., 338 U.S. 338, 342, 70 S.Ct. 177, 179, 94 L.Ed. 150 (1949); Chaney v. City of Galveston, 368 F.2d 774, 776 (5th Cir.1966). This finding was not clearly erroneous. [10] See Ayers v. Western Line Consol. School Dist., 555 F.2d 1309, 1315 (5th Cir.1977).

THE CONTRACT

Farias contends the Board implicitly renewed his contract of employment for another full year by failing to provide notice of its intent not to renew the contract. Texas courts have held "continuance of the employment is, as a matter of law, continuation of the old contract." Thames v. Rotary Eng'g Co., 315 S.W.2d 589, 591 (Tex.Civ.App.--El Paso 1958, writ ref'd n.r.e.); see Fenno v. Jacobe, 657 S.W.2d 844, 846 (Tex.App.--Houston [1st Dist.] 1983, writ ref'd n.r.e.). Texas courts enforce the terms of expired employment contracts when the employee continues to work with the approval of the employer, but the cases suggest that Farias's expired contract does not continue for a full year unless Farias can show that the parties mutually intended

to renew the contract for that period of time.

An implied contract can only arise if the acts and conduct of the parties demonstrate a mutual intention to renew the contract for the intended period. Haws & Garrett Gen. Contractors, Inc. v. Gorbett Bros. Welding Co., 480 S.W.2d 607, 609 (Tex.1972); Farley v. Clark Equip. Co., 484 S.W.2d 142, 147 (Tex.Civ.App.--Amarillo 1972, writ ref'd n.r.e.). The contract in this case was essentially a letter agreement [11]. Farias even admitted this in a letter to the attorney for the Board, Mr. Rapp. The letter agreement stated Farias "may be terminated at any time by the Board without cause." The Board would give 120 days written notice of its intent not to renew.

The events which took place are exactly as the contract provided. Farias accepted the agreement and worked essentially at the whim of the Board until the notice of termination was given on December 8, 1987. The letter agreement was dated January 22, 1987 and the term of the agreement was until August 31, 1987. This was not even a one year agreement. It could not be impliedly renewed for another year. The mutual intent that we see was Farias would continue working until told otherwise; this was what the original agreement stated. The letter agreement continued until notice of termination was given. See Thames, 315 S.W.2d at 589. The Board allowed him to work for thirty days after notice was given and paid him ninety days severance

pay. Thus, the board fulfilled its duties under the contract. The district judge did not err in his treatment of this issue.

PROPERTY, LIBERTY AND DUE PROCESS

A property interest?

Farias claims he had a property interest in the form of an impliedly renewed contract of employment. In order to establish a property interest for due process purposes, Farias must have a legitimate claim of entitlement to continued employment. Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701 2709, 33 L.Ed.2d 548 (1972). To determine this property interest, we look to state law. Bishop v. Wood, 426 U.S. 341, 344, 96 S.Ct. 2074 2077, 48 L.Ed.2d 684 (1976). We agree that Farias had no property interest for due process purposes.

As discussed above, the contract was extended according to its terms when Farias continued working after the term of the contract had expired. Farias was an employee at will and could be terminated without cause. Joachim v. AT & T Information Sys., 793 F.2d 113, 114 (5th Cir.1986); Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733, 734 (Tex.1985). The hallmark of a protected property interest is an entitlement under state law that cannot be removed except for cause. Burris v. Willis Indep. School Dist., 713 F.2d 1087, 1090 (5th Cir.1983) (citations and quotations omitted). Since Farias could be discharged at will, he had no protected property interest, Thompson v. Bass, 616 F.2d 1259, 1265 (5th Cir.1980), cert. denied, 449 U.S. 983, 101 S.Ct. 399, 66 L.Ed.2d 245 (1980), and no right to a due process hearing. See Wells v. Doland, 711 F.2d 670, 675 (5th Cir.1983).

No liberty interest either

Farias also contends he had a liberty interest sufficient to require a name clearing hearing. He asserts that statements made to the media by John R. Heard, one of the Board members, impugned his good name, honor and integrity. "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is dong to him, notice and an opportunity to be heard are essential." Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515 (1971). In order to acquire a liberty interest protected by the Fourteenth Amendment and give rise to a name clearing hearing, Farias must establish the:

charges against him rise to such a level that they create a 'badge of infamy'

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which destroys the claimants ability to take advantage of other employment opportunities. Additionally, the claims must be false and the claimant must show that damage to his reputation and employment opportunities has in fact occurred.

Evans v. City of Dallas, 861 F.2d 846, 851 (5th Cir.1988). The only possible stigmatizing statement made by Heard was that Farias had been fired because of his performance. As previously discussed, the district judge found this to be true and the record supports this conclusion. Moreover, Farias made no showing that damage to his reputation and employment

opportunities had occurred. Consequently, no error was committed in refusing to order a name clearing hearing.

A MERITLESS DEFAMATION CLAIM

Farias claims he was defamed by the statements of Board Member John R. Heard. Statements were made to the media over the radio and printed in the newspaper. According to Farias, Heard's statements viewed alongside Farias's own statements suggest that Farias was lying when he denied that performance had anything to do with his firing.

Farias was required to prove that others understood Heard's words in a defamatory sense. Diesel Injection Sales and Servs., Inc. v. Renfro, 656 S.W.2d 568, 573 (Tex.App.--Corpus Christi 1983, writ ref'd n.r.e.); Bergman v. Oshman's Sporting Goods, Inc., 594 S.W.2d 814, 816 (Tex.Civ.App.--Tyler 1980, no writ). Farias's opinion of the statements has no bearing on whether they were defamatory [12]. Musser v. Smith, 690 S.W.2d 56, 58 (Tex.App.--Houston [14th Dist.] 1985), aff'd, 723 S.W.2d 653 (Tex.1987). Oscar Villareal testified on behalf of Farias that he was listening to a local radio station when he discovered an interview with defendant-Heard. During the radio interview Heard stated Farias was terminated because the Center was changing directions. Similarly, Dottie Segura, Farias's former secretary at the Center testified on behalf of Farias about the allegedly defamatory statements. The gist of her testimony was she thought the newspaper articles were slanderous but upon further direct examination the following was brought out:

Q: What do you mean when you say those articles are slanderous because he was not informed of the reasons for his discharge?

A: I really don't know what I meant.

Q: Are those articles slanderous, in your mind, in any other way?

A: I guess not.

Q: I'm sorry?

A: I guess not.

MR. MANGUM [Farias's attorney]: I'll pass the witness, Your Honor.

We fail to see how Heard's words were defamatory when Farias's witnesses cannot conclusively testify they understood the speech to be defamatory.

Of further importance is the fact the district judge found Heard's statements to be substantially true. After a thorough review of the evidence before us, we concluded this finding correct. Truth of the statements is an absolute defense, Cranberg v. Consumer's Union of U.S., Inc., 756 F.2d 382, 388 (5th Cir.), cert. denied, 474 U.S. 850, 106 S.Ct. 148, 88 L.Ed.2d 122 (1985), and defeats any cause of action for defamation. McIlvain v. Jacobs, 794 S.W.2d 14, 15 (Tex.1990); Gulf Constr. Co. v. Mott, 442 S.W.2d 778, 784 (Tex.Civ.App.--Houston [14th Dist.]

1969, no writ). No error was committed dealing with this issue. The defamation claim was meritless.

ONE LAST GASP: THE DISCRIMINATION CLAIM

As a final point of error, Farias asserts the district judge erred in failing to find that defendants Hall, Heard and Smith voted not to renew Farias's contract on the basis of his national origin and sex. The lower court analyzed this issue using traditional

Title VII principles and Farias claims this analysis was erroneous. We disagree.

Farias's contention appears to be that Title VII principles are inappropriate because the statute applies only to the actions of individuals, not to groups or agencies such as the Board members which allegedly discriminated against him. This is incorrect. Title VII defines "persons" as including "one or more individuals" and "governmental agencies". 42 U.S.C. Sec. 2000e(a). Our standard of review under Title VII is the clearly erroneous standard. See Williams v. Southwestern Bell Tel. Co., 718 F.2d 715, 718 (5th Cir.1983).

The evidence before us demonstrates defendants did not consider Farias's national origin or gender in determining not to renew his contract. Three members of the Board of Trustees [13] that voted not to renew Farias's contract, Lopez, Rutledge and Oliva, were of Hispanic ancestry. Defendant-Smith is Afro-American and the mother of defendant-Heard is Hispanic. The new executive director employed by the Board of Trustees, Hubert, was both male and older than Farias. The interim director of the Center was Richard Trevino, an Hispanic male. Farias cites no evidence of discrimination. Accordingly, we find the ruling of the district judge on this last gasp for relief was not clearly erroneous.

CASE NUMBER 90-5504

SAME RODEO, DIFFERENT ARENA OR DIFFERENT RODEO? THE

RELITIGATION EXCEPTION TO THE ANTI-INJUNCTION ACT

In his federal court complaint, Farias alleged violations of the Texas Open Meetings Act, Tex.Rev.Civ.Stat.Ann. art. 6252-17, but he did not pursue the claims at trial. Farias argues he asserted these alleged violations to show how the defendants had attained their other unlawful objectives, not to obtain relief. Following the trial, Farias filed another suit in a Texas state district court. The claims raised in the new state court action were very similar to the claims originally brought before the federal court. On motion from the defendants, the federal district judge enjoined Farias's new state court action under the relitigation exception to the Anti-Injunction Act. See 28 U.S.C. Sec. 2283.

Under the Anti-Injunction Act, a federal court "may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. Sec. 2283. The "to protect or effectuate its judgments" exception is known as the relitigation exception.

Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988), is the controlling case dealing with this exception and controls our analysis in the case at bar.

Defendants cite us a litany of circuit court decisions relating to this issue. See, e.g., In re Corrugated Container Anti-Trust Litigation, 659 F.2d 1332, 1335 (5th Cir. Unit A Oct. 1981), cert. denied, 456 U.S. 936, 102 S.Ct. 1993, 72 L.Ed.2d 456 (1982); Donelon v. New Orleans Terminal Co., 474 F.2d 1108, 1114 (5th Cir.), cert. denied, 414 U.S. 855, 94 S.Ct. 157, 38 L.Ed.2d 105 (1973); Woods Exploration & Producing Co., Inc. v. Aluminum Co. of Am., 438 F.2d 1286, 1312 (5th Cir.1971), cert. denied, 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736 (1972). We do not decide whether these cases are still good precedent after Chick Kam Choo. As stated, we decide only that Chick Kam Choo controls the disposition of this issue. "The relitigation exception was designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court." Chick Kam Choo, 486 U.S. at 147, 108 S.Ct. at 1690 (emphasis ours). "[A]n essential prerequisite for applying the relitigation exception is that the claims or issues which the federal injunction insulates from litigation in state proceedings actually

ave been decided by the federal court." Id. at 148, 108 S.Ct. at 1690 (emphasis ours). "[T]his prerequisite is strict and narrow." Id. "[T]he fact that an injunction may issue under the Anti-Injunction Act does not mean that it must issue." Id. at 151, 108 S.Ct. at 1692 (emphasis in original).

The issues dealing with the Texas Open Meetings Act were not "actually decided" by the district court in this case. Although Farias raised these claims in his complaint, they were not decided by the trial court. Consequently, under Chick Kam Choo, what looks like the same rodeo in a different arena is really a different rodeo for relitigation exception purposes. The Chick Kam Choo inquiry is whether the "claims or issues ... actually have been decided by the federal court." Id. at 148, 108 S.Ct. at 1690. The grant of injunction in favor of defendants must be reversed.

We add, however, that because it was decided the federal district court improperly enjoined the state district court, this does not mean the state district court will not decide the former action is a bar to the latter action under principles of res judicata. Texas employs several tests for determining whether a prior action operates as a bar for purposes of res judicata. See, e.g., W. Dorsaneo, 5 Texas Litigation Guide Sec. 131.06[b][ii][A]-[E] (1990) (discussing the various approaches). This case may fit one of those tests.

CONCLUSION

Finally, we end this discussion. Case number 89-5620 is AFFIRMED in all respects. Case number 90-5504, dealing with the relitigation exception to the Anti-Injunction Act and the granting of an injunction to enjoin the state district court litigation, is REVERSED.

CLARK, Chief Judge, dissenting:

Federal Rules of Civil Procedure 38 and 39 preserve and embody the right to a trial by jury as guaranteed by the Seventh Amendment. See Fed.R.Civ.P. 38(a). Rule 39(b) provides:

"[N]otwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues." Fed.R.Civ.P. 39(b). In discussing a district court's discretion under Rule 39(b), this court has recently stated that " '[t]echnical insistence upon imposing a penalty for default [under Rule 38] by denying a jury trial is not in the spirit of the rules.' " Daniel Int'l Corp. v. Fischbach & Moore, Inc., 916 F.2d 1061, 1066 (5th Cir.1990) (quoting 9 C. Wright & A. Miller, Federal Practice and Procedure Sec. 2334 at 115-16 (1971)). The majority affirms the district court's denial of Farias' motion for a jury trial on the basis of this circuit's rule that a district court's denial of a Rule 39(b) motion is not an abuse of discretion when the failure to make a timely jury demand is the result of "mere inadvertence."

On November 9, 1988, Farias filed a motion styled "Demand For Jury Trial Or, In The Alternative, Motion For Jury Trial." In that motion, Farias not only attempted to invoke the right to demand a jury trial under Rule 81(c), but also expressly invoked the district court's discretion to grant a jury trial under Rule 39(b). Farias filed this motion within ten days after the district court denied his motion to remand the case. It was filed more than eight months before the case was scheduled for trial. Defendants did not respond to Farias' motion until more than six months after it was filed. The district court did not strike Farias' jury demand/motion until approximately three weeks before trial. The district court's order granting defendants' motion to strike Farias' jury demand/motion states only: "[T]he Court finding said Motion to be meritorious, hereby ORDERS that Plaintiff's demand for a jury be struck, and that this cause be heard without a jury on its scheduled date. Fed.R.Civ.P. 81." (Emphasis supplied.)

Notwithstanding our "mere inadvertence" rule, this circuit's cases construing Rule 39(b) demonstrate that a district court must at least consider more than the movant's inadvertent untimeliness under Rules 38(b) and 81(c). See, e.g., Daniel, 916 F.2d at 1066; Pinemont Bank v. Belk, 722 F.2d 232, 238 (5th Cir.1984); Cox v. C.H. Masland & Sons, Inc., 607 F.2d 138, 143-44 (5th Cir.1979). This court cannot review a

district court's denial of a Rule 39(b) motion without some explanation of the district court's reasons for refusing to exercise its discretion to grant a jury trial. The district court's order gives none.

In today's case, the district court's order is simply too opaque for us to review. Moreover, the district court's bare citation to Rule 81, which applies to jury demands under Rule 38 rather than to motions under Rule 39(b), suggests that the district court did not exercise its discretion under Rule 39(b). Farias filed his Rule 39(b) motion well in advance of trial. Defendants make no effort to show prejudice resulted from Farias' untimely jury demand or from his motion filed more than eight months before the case was tried. For all that we can tell on this record, the delay in ruling on Farias' motion was more due to defendants' late response to Farias' motion than to its timing. Because the district court's order fails to explain adequately why the court denied Farias' motion and because the record shows that the district court failed to exercise its discretion under Rule 39(b), I cannot affirm the result of the bench trial. Therefore, I respectfully dissent.

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1 The suit named as defendants the Bexar County Board of Trustees for Mental Health Mental Retardation Services, Thomas C. Lopez, John R. Heard, Sue M. Hall, Hollis V. Rutledge, Ira Smith, Jr., Bob Martin, Dr. Damaso A. Oliva, the City of Alamo Heights, the City of Castle Hills, the City of Olmos Park, the City of San Antonio, the County of Bexar the Edgewood Independent School District, and the San Antonio Independent School District.

2 Rule 81(c) applies to removed cases and requires a party to demand a jury trial within ten days after being served with a petition for removal. In this case, the defendants filed their petition for removal on May 23, 1988. Farias demanded a jury trial on November 9, 1988, over five months late.

3 The nonremoving defendants are the City of Alamo Heights, the City of Castle Hills, the City of Olmos Park, the City of San Antonio, the County of Bexar, the Edgewood Independent School District and the San Antonio Independent School District.

4 We recognize that Tri-Cities was a decision involving diversity jurisdiction but find this to be of no significance. The question for the district court is whether it would be fair to the plaintiff to enter a judgment in the absence of the nonremoving parties. We note that our decision in this area is in accord with other cases. See Ryan v. State Bd. of Elections of the State of Ill., 661 F.2d 1130, 1134 (7th Cir.1981); Knowles v. American Tempering, Inc., 629 F.Supp. 832, 835 (E.D.Pa.1985). Both cases involved removal based on federal question jurisdiction and involved nominal parties.

5 Although Allman was a case involving removal by a federal officer, we find the quoted proposition to be true in the case at bar also. Allman, 302 F.2d at 562.

6 The reason offered by Farias for his delay in requesting a jury was that his motion for remand would be inconsistent with his jury demand. Such an argument would essentially render Rule 81 meaningless. Farias easily could have filed his jury demand subject to the court's ruling on his motion for remand. The fact he did not do so is indicative of inadvertence. The pendency of removal proceedings does not excuse the requirement of a timely jury demand. See Galella v. Onassis, 487 F.2d 986, 996-97 (2d Cir.1973). Farias's delay cost him a jury and the narrow discretion of the district judge was not abused in this instance. See Blau v. Del Monte Corp., 748 F.2d 1348, 1357 (9th Cir.1984), cert. denied, 474 U.S. 865, 106 S.Ct. 183, 88 L.Ed.2d 152 (1985).

7 The district court actually permitted the defendants to file five separate motions to dismiss or for summary judgment in addition to the First Amended Answer. The relief requested in these motions was denied, however, and we need not decide if it was error to permit the filing of these motions. If any error did occur, Farias suffered no harm and has no complaint.

8 Mr. Farias and the internal auditor for the Bexar County MHMR, Mr. Trevino, testified to these matters.

9 The Eleventh Amendment cannot bar Farias's claims under Title VII, see Fitzpatrick v. Bitzer, 427 U.S. 445, 456, 96 S.Ct. 2666 2671, 49 L.Ed.2d 614 (1976), but it does bar his claims under 42 U.S.C. Sec. 1983 (the free speech and due process claims). See Quern v. Jordan, 440 U.S. 332, 342-43, 99 S.Ct. 1139, 1145-46, 59 L.Ed.2d 358 (1979).

10 The standard of review of the reasons not to renew the contract is found in Fed.R.Civ.P. 52(a), the "clearly erroneous standard." De novo review is given to the "public concern" issue.

11 Farias signed and accepted this letter agreement.

12 Most of the information contained in the newspaper articles was obtained from Farias and constituted his opinion of the events surrounding his dismissal.

13 Six of the nine individuals on the Board, Oliva, Rutledge, Lopez, Heard, Berriozabal and Casias, were of Hispanic descent.

823 S.W.2d 405
Thomas EINHORN and William D. Wright, Appellants,
v.
William LaCHANCE,
Individually and in his official capacity
as Director of Aviation Management, Hermann Hospital Estate;
E. Don Walker, individually and in his official capacity as
President of Hermann Hospital Estate; Ron Stutes,
individually and in his capacity as Chief Operating Officer
of Hermann Hospital; The Hermann Trust f/k/a Hermann
Hospital Estate, by and through its Trustees, Ralph L.
O'Connor, Walter Mischer, Jr., Edward Randall, III, Leonel
Castillo, John Chase, Melinda Perrin, and Mark White, Appellees.
No. 01-90-00769-CV.
Court of Appeals of Texas,
Houston (1st Dist.).
Jan. 16, 1992.

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John A. Buckley, Jr., Andrew J. Mytelka, Janet L. Rushing, Galveston, for appellants.

A.L. Dent, Stephen W. Smith, Houston, for appellees.

Before SAM BASS, DUNN and PRICE, * JJ.

OPINION ON MOTION FOR REHEARING

PRICE, Justice (Assigned).

Appellants have filed a motion for rehearing. We overrule the motion. However, we withdraw our earlier opinion dated October 24, 1991, and substitute this opinion in lieu thereof.

Thomas Einhorn and William D. Wright appeal from a summary judgment in favor of defendants/appellees, William LaChance, individually and in his official capacity as the Director of Aviation Management, Hermann Hospital Trust, E. Don Walker, individually and in his official capacity as President of Hermann Hospital Trust, Ron Stutes, individually and in his capacity as the chief operating officer of Hermann Hospital, and the Hermann Hospital Trust by and through its trustees ("Hermann Hospital").

In 1976, Hermann Hospital contracted with Evergreen Aviation to provide Life Flight services for the hospital. In 1982, Hermann Hospital formed its own Life Flight program and contracted with other hospitals to provide services to those hospitals.

Einhorn and Wright were life flight pilots who worked in Hermann Hospital's program from 1982 until 1986. During their employment, they became involved in a dispute with Hermann Hospital regarding the hospital's policies of overtime compensation and safety regulations.

In August 1984, appellants organized an international professional organization for Life Flight pilots, the National Emergency Medical Services Pilots Association (NEMSPA), to deal with ongoing safety problems in the airborne emergency medical industry. In February 1985, appellants wrote a letter to Hermann Hospital management expressing their concerns regarding safety in the Hermann Life Flight program.

Appellants were fired on January 21, 1986. Appellants contend that they were terminated and discredited by Hermann Hospital in an attempt to stifle their protest and to prevent exposure of Hermann Hospital's alleged numerous illegal actions. They protested their firing to the National Labor Relations Board, which concluded that appellants did not sustain their burden of establishing that they were discharged for reasons other than those advanced by Hermann. On September 4, 1986, appellants filed a $6.3 million suit in the United States District Court for the Southern District of Texas in which they asserted that the defendants' actions violated several federal and state statutes. In that suit, appellants raised the state law defamation claims that resulted in this appeal.

On August 8, 1988, the United States District Court granted summary judgment in favor of the defendants on all claims. Except for the allegations of defamation, the United States Court of Appeals for the Fifth Circuit affirmed the summary judgment. Severing the defamation claims from all the other claims, the fifth circuit reversed the judgment concerning that claim, and remanded the defamation claims to the federal district court. That court dismissed the case without prejudice because of lack of jurisdiction.

On December 12, 1989, appellants filed this action in the state court alleging, as defamatory, the following seven statements:

(A) On January 22, 1986, LaChance allegedly made a statement to a Dr. Strother of Galveston UTMB Hospital "relating to misrepresentation of conflicts of interest plaintiffs allegedly had with a [Hermann Hospital] fixed-wing program that never existed."

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(B) On February 20, 1985, LaChance allegedly stated to a Floyd Helm that "Einhorn and Wright were attempting to form a union."

(C) On February 20, 1985, LaChance allegedly told a Larry Adams that "Einhorn and Wright were attempting to form a union."

(D) On January 20, 1987, LaChance allegedly told R. Gradison of the ABC television network that, "Einhorn and Wright were incompetent [Life Flight] pilots and troublemakers."

(E) In January 1987, LaChance allegedly made some unspecified statements "to K. Norton and others defaming the professional skills and character of Einhorn and Wright."

(F) In the spring of 1986, LaChance allegedly told L. Adams that LaChance "had gotten rid of troublemakers Einhorn and Wright."

(G) A statement on March 8, 1989, made to reporters for the Houston Post, the Houston Chronicle, and wire services that plaintiff Wright was fired for reasons relating "solely to work performance."

On February 5, 1990, appellees filed their first amended motion for summary judgment, and as a basis thereof asserted the following:

(1) There is no summary judgment evidence that the defamatory statements were made (applicable to statements D and F);

(2) The alleged statements are incapable of defamatory meaning as a matter of law (applicable to statements A, B, C, and G);

(3) The alleged statements are substantially true (applicable to statements B and C);

(4) The alleged statements are constitutionally protected opinion (applicable to statements D, E, and F); and

(5) There is no evidence of actual malice, a required element of a public figure plaintiff's proof (applicable to statements A, B, C, D, E, F, and G).

To support their motion, appellees introduced summary judgment evidence consisting of 25 exhibits, including LaChance's affidavit in which he:

(1) denied making any statement concerning the pilots which he knew to be false;

(2) denied making any statement concerning the pilots about which he entertained serious doubts as to its truth;

(3) affirmed and supported his belief that Wright and Einhorn were assisting in the establishment of a fixed wing ambulance service in competition with Hermann Hospital, a direct conflict of interest;

(4) affirmed and supported his belief that Wright and Einhorn were attempting to form a union or similar organization for EMS pilots;

(5) explained that his comments to Ken Norton regarding Wright and Einhorn were based on his belief that the two pilots were using NEMSPA as a forum for their personal vendetta against Hermann;

(6) affirmed and supported his belief that Wright and Einhorn were "liars," based among other things on false statements made by Wright and Einhorn in their federal complaint; and

(7) affirmed and supported his belief that Wright and Einhorn were "incompetent [Life Flight] pilots," based on Wright's negligence in a 1983 helicopter crash, the plaintiffs' poor work performance at Hermann, and their conflict of interest in setting up a competing business.

On May 29, 1990, the trial court granted summary judgment for appellees. However, the order did not specify any grounds on which the court relied to grant the motion.

A defendant who moves for summary judgment has the burden of showing as a matter of law that no material issue of fact exists for the plaintiff's cause of action. Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165, 166-67 (Tex.1987). This may be accomplished by

defendant's summary judgment evidence showing that at least one element of plaintiff's cause of action has been established conclusively

against the plaintiff. Gray v. Bertrand, 723 S.W.2d 957, 958 (Tex.1987). A summary judgment for the defendant disposing of the entire case is proper only if, as a matter of law, the plaintiff could not succeed upon any theories pled. Delgado v. Burns, 656 S.W.2d 428, 429 (Tex.1983).

In Texas, summary judgment may be based on "uncontroverted testimonial evidence of an interested witness ... if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted." TEX.R.CIV.P. 166a(c) (emphasis added); Casso v. Brand, 776 S.W.2d 551, 559 (Tex.1989). An affidavit must show affirmatively that it is based on personal knowledge and that the facts sought to be proved would be "admissible in evidence" at a conventional trial. Brownlee v. Brownlee, 665 S.W.2d 111, 112 (Tex.1984); TEX.R.CIV.P. 166a(f). The affidavit itself must set forth facts and show the affiant's competency, and the allegations contained in the affidavit must be direct, unequivocal, and such that perjury is assignable. Keenan v. Gibraltar Sav. Ass'n, 754 S.W.2d 392, 394 (Tex.App.--Houston [14th Dist.] 1988, no writ). Affidavits may not be based on hearsay. Lopez v. Hink, 757 S.W.2d 449, 451 (Tex.App.--Houston [14th Dist.] 1988, no writ). However, inadmissible hearsay admitted without objection shall not be denied probative value merely because it is hearsay. Dolenz v. A.B., 742 S.W.2d 82, 83-84 n. 2 (Tex.App.--Dallas 1987, writ denied).

When, as in this case, a trial court's order granting summary judgment does not specify the grounds relied on for its ruling, summary judgment will be affirmed on appeal if any of the theories advanced are meritorious. Carr v. Brasher, 776 S.W.2d 567, 569 (Tex.1989). Thus, we must consider whether any of the grounds asserted by defendants supports the summary judgment.

NO SUMMARY JUDGMENT EVIDENCE THAT THE DEFAMATORY STATEMENTS TO GRADISON AND ADAMS WERE MADE (APPLICABLE TO STATEMENTS D AND F)

In an affidavit, LaChance states:

I may have mentioned that Wright and Einhorn had attempted to cause trouble for the hospital before by their baseless complaints to governmental agencies such as the FAA. However, at no time during this interview [with Gradison] did I ever state that Wright and Einhorn were 'incompetent LF pilots,' 'troublemakers,' or words to that effect.

In another affidavit, Einhorn presents hearsay evidence that controverts LaChance's denial:

I have been told that LaChance ... told Larry Adams that he had gotten rid of the troublemakers (i.e., Don Wright and myself).

Robin Gradison told me that LaChance stated in her interview of LaChance that Don Wright and I were incompetent Life Flight pilots and troublemakers.

Although affidavits supporting and opposing motions for summary judgment must "set forth such facts as would be admissible in evidence ... [d]efects in the form of affidavits or attachments

will not be grounds for reversal unless specifically pointed out by objection...." TEX.R.CIV.P. 166a(f). Because appellees did not object to Einhorn's affidavit, they waived any complaint concerning inadmissible evidence as part of the summary judgment record. In reviewing a summary judgment record, a court cannot consider evidence that favors the movant's position unless it is uncontroverted, and evidence favorable to the nonmovant will be taken as true. Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 549 (Tex.1985). Thus, the trial judge could not have relied on this ground for its summary judgment ruling.

THE ALLEGED STATEMENTS REGARDING THE PILOTS' ALLEGED CONFLICT OF INTEREST, UNION ACTIVITIES, AND REASON FOR TERMINATION ARE INCAPABLE OF DEFAMATORY MEANING AS A MATTER OF LAW (APPLICABLE TO STATEMENTS A, B, C, AND G)

A statement is defamatory if the words tend to injure a person's reputation,

exposing the person to public hatred, contempt, ridicule, or financial injury. TEX.CIV.PRAC. & REM.CODE ANN. § 73.001 (Vernon 1986). Whether words are capable of the defamatory meaning the plaintiff attributes to them is a question of law for the court. Musser v. Smith Protective Serv., Inc., 723 S.W.2d 653, 654-55 (Tex.1987). The court construes the statement as a whole in light of surrounding circumstances based upon how a person of ordinary intelligence would perceive the entire statement. Id. Only when the court determines the language is ambiguous or of doubtful import should the jury then decide the statement's meaning and the effect the statement's publication has on an ordinary reader. Id.

The general rule is "oral words though false and opprobrious are not actionable without pleading and proof of special damages." Buck v. Savage, 323 S.W.2d 363, 368 (Tex.Civ.App.--Houston 1959, writ ref'd n.r.e.). However, an exception to this general rule is that words not otherwise actionable per se sometimes become actionable if they refer to a person engaged in a particular business or profession, where they charge him with fraud, indirect dealings, or incapacity, and tend to injure him in his trade, occupation, employment, or business. Id. Because LaChance's statement to Dr. Strother charged appellants with indirect dealing, this statement fits within the exception. Therefore, statement A only is capable of defamatory meaning as a matter of law.

Appellants claim that LaChance's statements, that they were "attempting to form a union" (statements B and C), were defamatory because of the airborne emergency medical services (EMS) industry's prejudice against unions and union activity. Appellants rely on the affidavit of Michael Burke, chairman of the board of NEMSPA, in which he states:

When a pilot is accused of being or represented by an operator to be a union member, sympathizer, or organizer, the claim negatively impacts the individual in his or her ability to obtain or maintain employment as an EMS pilot. Within the industry, the individual who is accused or represented to be a part of union activities will find it difficult, if not impossible, to find employment in the airborne EMS industry.

However, the reaction of Burke is not typical of the meaning an ordinary person would impute to the statements. Organizing a union is a right protected by federal law, not a crime or unethical act. Therefore, as a matter of law, statements B and C were not defamatory.

Wright complains that the statement that he was fired for reasons relating "solely to work performance" was defamatory. Because the statement complained of is nonspecific, statement G is not capable of a defamatory meaning.

The granting of summary judgment was proper as to statements B, C, and G.

THE ALLEGED STATEMENTS CONCERNING APPELLANTS' ATTEMPTS TO FORM A UNION ARE SUBSTANTIALLY TRUE (APPLICABLE TO STATEMENTS B AND C)

Because we have determined that these statements were not capable of defamatory meaning, as a matter of law, this ground does not have to be addressed.

THE ALLEGED STATEMENTS ARE CONSTITUTIONALLY PROTECTED OPINION (APPLICABLE TO STATEMENTS D, E, AND F)

The line between absolutely privileged opinion and actionable assertions of fact are questions of law for the court. Yiamouyiannis v. Thompson, 764 S.W.2d 338, 341 (Tex.App.--San Antonio 1988, writ denied). When the topic is a public issue, speakers may express their opinions about their opponents' views and qualifications without having to prove the substantial "truth" of those opinions in a defamation case. Id.

A public controversy is not simply a matter of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way. Waldbaum v. Fairchild Publications,

Inc., 627 F.2d 1287, 1296 (D.C.Cir.1980). The Supreme Court has made clear that essentially private concerns or disagreements do not become public controversies simply because they attract attention. Time, Inc. v. Firestone, 424 U.S. 448, 454-55, 96 S.Ct. 958, 965-66, 47 L.Ed.2d 154 (1976). Rather, a public controversy is a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants. Waldbaum, 627 F.2d at 1296.

Examination of the summary judgment evidence reveals the following:

(1) In 1984, prior to appellants' filing suit, appellants, "recognizing that the Hermann Hospital Life Flight program provided not only insufficient compensation to the pilots for the job done, but also created a very dangerous situation for those pilots and the persons flying with them, as well as others in the community, organized NEMSPA, an international organization to further their concern for aeromedical safety."

(Emphasis added.)

(2) Wright has served as president of NEMSPA and Einhorn has served as vice-president.

(3) In 1988, "American Medical News" published an article, "Crusading for Safety," which stated, "Leading the drive for aeromedical safety has become a way of life for Don Wright and Tom Einhorn of the National EMS Pilot's Ass'n." According to the article, appellants' crusade for

aeromedical safety "began more than three years ago." The article also recounted how appellants "found themselves at the center of a controversy attracting media attention."

(Emphasis added.)

(4) Wright testified before a U.S. Senate subcommittee at a hearing on the Employee Health and Safety Whistleblower Protection Act. He stated he was "blackballed" after complaining about unsafe flying conditions in Hermann's Life Flight program.

(5) July, 1985, Wright filed a charge against Hermann Hospital with the National Labor Relations Board contending he was transferred "to more onerous or arduous duties because of his activities and/or membership in behalf of NEMSPA."

(6) Appellants, under the auspices of NEMSPA, developed a publication called "Airnet," which addressed issues of aeromedical safety in general, and the Hermann Hospital Life Flight program in particular.

(7) After appellants filed their federal lawsuit, their legal actions against Hermann became the subject of much media attention.

This evidence, to which appellants did not object, clearly shows appellants "thrust" themselves into the "vortex" of the public issue involving aeromedical safety and engaged the public's attention in an attempt to influence its outcome.

Under the principles of Waldbaum and Time, Inc., the references to appellants as incompetent, troublemakers, and liars are assertions of pure opinion. These terms of derision, considered in context and in light of the EMS debate are not capable of proof one way or the other. Therefore, as to each of these statements, the absolute constitutional privilege applies. See Waldbaum, 627 F.2d at 1296; Time, Inc., 424 U.S. at 454-55, 96 S.Ct. at 965-66 (1976).

The granting of summary judgment was proper as to statements D, E and F.

NO EVIDENCE OF ACTUAL MALICE, A REQUIRED ELEMENT OF A PUBLIC FIGURE PLAINTIFF'S PROOF (APPLICABLE TO STATEMENTS A, B, C, D, E, F, AND G)

Because we have determined that statements B, C, and G are not capable of defamatory meaning, as a matter of law, and statements D, E, and F are constitutionally protected opinion, the issue of actual malice pertains only to statement A.

The degree and burden of proof required in a defamation case hinges on the status of the plaintiff as either a public figure or private individual. The parties in this case differ as to how to classify appellants. Appellants classify themselves as private individuals. Defendants conclude that although

appellants could not be considered public figures for all purposes, they were public figures for the limited range of issues in this cause of action.

In trying to determine who is a public figure, the Supreme Court in Gertz v. Robert Welch, Inc., 418 U.S. 323, 351, 94 S.Ct. 2997 3012, 41 L.Ed.2d 789 (1974) created two classes of public figures in addition to government officials: general-purpose and limited-purpose public figures. General-purpose public figures are those individuals who "achieve such pervasive fame or notoriety that [they] become a public figure for all purposes and in all contexts." Id. Such persons have assumed so prominent a role in the affairs of society that they have become celebrities. Tavoulareas v. Piro, 817 F.2d 762, 772 (1987). "Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society," an individual should not be characterized as a general-purpose public figure. Gertz, 418 U.S. at 352, 94 S.Ct. at 3013. Defendants do not contend that appellants have established this kind of prominence.

Limited-purpose public figures achieve their status by "thrust[ing] themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved," Gertz, 418 U.S. at 345, 94 S.Ct. at 3009, or because they "voluntarily inject [themselves] or [are] drawn into a particular public controversy." Id. at 351, 94 S.Ct. at 3012. Defendants contend that appellants are limited-purpose public figures.

Whether an individual is a public figure is a matter of law for the court to decide. Rosenblatt v. Baer, 383 U.S. 75, 88, 86 S.Ct. 669, 677, 15 L.Ed.2d 597 (1966). To help determine limited-purpose public figure status, the District of Columbia circuit in Tavoulareas v. Piro developed a three-step test, which the fifth circuit adopted in Trotter v. Jack Anderson Enter., Inc., 818 F.2d 431, 433 (5th Cir.1987):

(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.

In undertaking this examination, this Court must look through the eyes of a reasonable person at the facts taken as a whole, Waldbaum, 627 F.2d at 1292, and determine the status of appellants as either public or private individuals.

As set out above, appellants were involved in a public controversy. Therefore, the first prong of Trotter, requiring a public controversy, was met. It is apparent that appellants had more than a trivial role in the controversy; thus, the second requirement of Trotter was met. Because there is no dispute that the allegedly defamatory statements were germane to appellants' participation in the controversy, the third requirement of Trotter was satisfied. Consequently, the trial judge could have found that appellants, by voluntarily injecting themselves into a particular public controversy, became limited-purpose or "vortex" public figures.

Although an injured party who is not a public official or public figure only has to prove that the defendants were negligent in making a defamatory statement, Durham v. Cannon Communications, Inc., 645 S.W.2d 845, 851 (Tex.App.--Amarillo 1983, writ dism'd), in order for a public figure to sustain a defamation cause of action, he must prove that the defendants acted with actual malice. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80, 84 S.Ct. 710, 725-26, 11 L.Ed.2d 686 (1964). Proof of actual malice must be by clear and convincing evidence. Gertz, 418 U.S. at 342, 94 S.Ct. at 3008. Actual malice means the statement was made with knowledge

of its falsity, or with reckless disregard for its truth or falsity. New York Times, 376 U.S. at 280, 84 S.Ct. at 726. "Reckless disregard" is defined as a high degree of awareness of probable falsity, for proof of

which the plaintiff must present "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts about the truth of his publication." Id. Although the United States Supreme Court has not decided whether this standard is also constitutionally required when public figures sue private individuals for defamation, the Texas Supreme Court, in a defamation action, Casso v. Brand, 776 S.W.2d 551, 554 (Tex.1989) stated, "We are reluctant to afford greater constitutional protection to members of the print and broadcast media than to ordinary citizens.... Therefore, we join those states which have extended the New York Times standard to defamation suits by public officials and public figures against non-media defendants."

Because we have determined that appellants are limited-purpose public figures, it was incumbent upon them to show, by clear and convincing evidence, that, in his conversation with Dr. Strother, LaChance acted with actual malice.

In his affidavit, LaChance denied making any statement concerning the pilots that he knew to be false, denied making any statement about which he entertained serious doubts concerning its truth, and provided information concerning his knowledge that the statements were not false. He stated that his belief that appellants were involved in a conflict of interest was based on a conversation he had with Mike Beaumont, the manager of Bayport Aviation, a commercial aircraft vendor, in which Beaumont acknowledged that appellants had approached him with the idea of setting up a fixed-wing air ambulance service. However, appellants presented Beaumont's "sworn statement," which was not objected to by appellees, in which he stated:

LaChance came to my office. No one else was present. He said that Hermann had just fired Einhorn and Wright for "conflict of interest." He then said, 'I called you yesterday for a specific reason. I had my attorney on the line listening, and I have a statement of what you told us. I have this statement here and I'd like you to sign it.' He then showed me a one page typed statement. I read it and it stated that I had discussed with Einhorn and Wright about actually setting up a "fixed-wing operation." (In fact, all Einhorn and Wright had discussed with me, was to relay information that Sealy was interested in contracting out a fixed-wing service.) I told LaChance that because the statement he prepared implied that Wright and Einhorn were directly involved in setting up the fixed-wing service, I told LaChance that I would not sign the statement he had prepared.... I wish to state that although Einhorn and Wright attended the December 26, 1985 meeting I had with Dr. Strother, they did not participate in any of the conversation regarding the presentation of the Bayport program.

Such testimony contradicts LaChance's testimony that he did not make any statements with knowledge of the falsity of the statement or with reckless disregard for the truth or falsity of the statement. Concerning statement A, appellants raised a fact question on the issue of actual malice.

The granting of summary judgment was not proper as to statement A.

The judgment of the trial court is affirmed regarding statements B, C, D, E, F, and G. Regarding statement A, the judgment of the trial court is reversed and remanded for further proceedings.

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* The Honorable Frank C. Price, former justice, Court of Appeals, First District of Texas at Houston, participating by assignment.

550 S.W.2d 744
A. D. DOWNER, Appellant,
v.
AMALGAMATED MEATCUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA
et al., Appellees.
No. 19118.
Court of Civil Appeals of Texas, Dallas.
April 1, 1977.
Rehearing Denied April 28, 1977.

Page 745

Tom W. Foster, Houston, for appellant.

L. N. D. Wells, Jr., Mullinax, Wells, Mauzy & Baab, Inc., Patrick F. McGowan, Strasburger & Price, Dallas, for appellees.

GUITTARD, Chief Justice.

In this libel suit, summary judgment was rendered for defendants, and plaintiff appeals. Plaintiff A. D. Downer was formerly secretary-treasurer of a local union affiliated with defendant Amalgamated Meatcutters and Butcher Workmen of North America (the international union). Defendant Maryland Casualty Company (the bonding company) had issued a fidelity bond covering plaintiff's handling of funds for the local union. Plaintiff alleged that the international union made a claim on the bond falsely accusing him of misappropriating union funds and that the bonding company also libeled him by approving and paying the claim. He further alleged that defendant George Elwood, an agent of the international union, made similar false accusations. We hold that the defense of truth of the alleged libelous statements is established by the summary-judgment proof as a matter of law. Consequently, we affirm the summary judgment.

The accusation of misappropriation arose out of plaintiff's admitted use of union funds for personal expenses. Plaintiff contends that the evidence raises a fact issue as to whether these circumstances establish only a debt from him to the union which he fully intended to repay, as evidenced by his entry of the amounts in question on the union's books as "advances." We hold that regardless of the entries on the books and his subjective intention to repay, the funds were nevertheless "misappropriated" within the coverage of the bond, and, consequently, the defense of truth is established as a matter of law.

The alleged libelous statement by the international union is contained in a proof of loss filed by the union with the bonding company. The printed form on which the proof is made contains instructions to the claimant to include an itemized account "of money or property misappropriated, stolen, or embezzled." On this form the union listed a number of items charged to Downer as "advances." Some of the items are marked, "No substantiation." Other items give amounts advanced with "Verified Expenses" deducted. One of these items shows an advance of $800, less "Verified Expenses" of $491, leaving a balance of $309 marked "Charged to A. D.

Downer as expenses for wife and two children on vacation." The total shown on the proof of loss is $2,187.77.

Plaintiff's claim of libel against the bonding company is based on the theory that by approving the union's claim and paying the amount in full, it made libelous statements which further damaged his reputation. The only writings by the bonding company alleged to be defamatory are its draft for $2,187.77 and a transmittal letter from the bonding company to the international union stating that the draft is enclosed in the amount set out in the proof of loss.

Plaintiff joined as a defendant George Elwood, an agent of the international union, who, plaintiff alleged, slandered him in the course of a hearing called by the international

union to determine whether a trusteeship should be imposed on the local union. Plaintiff alleged also that Elwood libeled him in a letter addressed to the president of the international union. This letter referred to plaintiff and another official of the local union and stated: "This has become a serious matter, because, as you know, we removed these two men from office because of their misuse of the members' money."

The "advances" listed in the proof of loss were, in large part, admitted by plaintiff in his deposition, which was before the court on the motion for summary judgment. He admitted also that some of the funds advanced were used for his personal expenses. He asserts, however, that there is a fact issue as to whether these funds were intentionally and fraudulently misappropriated, since the evidence is consistent with an intention on his part to repay the advances.

We conclude that his subjective intent to repay, even if accepted by the finder of fact, would not establish that the charges in the proof of loss were false. Under any interpretation of the summary-judgment proof, plaintiff's use of union's funds was wrongful, whether or not it was in violation of the penal code. Plaintiff does not contend that any of the officers of the union advanced the money to him for his personal expenses or consented to his use of it for that purpose if, indeed, the officers would have had authority to do so. When he "advanced" the union funds to himself and used them for purposes unrelated to union business, he was guilty of "misappropriation," for which the union was justified in making a claim under the bond, regardless of any entries he may have made in the union books evidencing his liability. Consequently, we hold that the summary-judgment proof establishes the defense of truth as a matter of law.

This holding is supported by decisions in analogous cases. In Western Union Telegraph Co. v. Buchanan, 248 S.W. 68, 69 (Tex.Civ.App. San Antonio 1923, no writ), a charge that an employee had "misappropriated" funds of her employer was held not to amount to a charge of a crime per se. In suits on fidelity bonds, coverage for an employee's unauthorized use of his employer's funds has been held not limited to violations of the criminal law. Citizens' Trust & Guaranty Co. v. Globe & Rutgers Fire Ins. Co., 229 F. 326, 330 (4th Cir. 1915) ("fraud or dishonesty"); Massachusetts Bonding and Ins. Co. v. Texas Finance Corp., 258 S.W. 250, 253 (Tex.Civ.App. Dallas 1924, writ dism'd) ("larceny, embezzlement, conversion, or criminal misappropriation"); American Surety Co. v. Meadville Lodge, 114 Pa.Super. 451, 174 A. 591, 594 (1934) ("wrongful abstraction"); and see Great American Ins. Co. v. Langdeau, 379 S.W.2d 62, 65 (Tex.1964) (dictum). In Bell v. Clinton Oil Mill, 129 S.C 242, 124 S.E. 7, 11 (1924), an

action for slander was held not to be supported by proof of statements that an employee's use of funds would be reported to a bonding company which had issued a bond covering losses caused "by any act of personal dishonesty, forgery, theft, larceny, embezzlement, wrongful conversion, abstraction, or misapplication" since the language of the bond did not limit coverage to criminal acts.

Plaintiff relies on Great American Ins. Co. v. Langdeau, 379 S.W.2d 62 (Tex.1964) for its holding that recovery on a bond covering losses from acts of fraud or dishonesty requires a showing that the employee "must have some degree of intent to perform the wrongful act." The supreme court held that a bonded employee who signed checks in blank on the instructions of his superior was not guilty of fraud or dishonesty, since there was no evidence that he actually knew that the money was misappropriated. The opinion recognizes, however, that the intent required for recovery on such a bond "need not be of the degree required for criminal conduct." Id. at 65. In the present case we hold that to the extent wrongful intent is required by the terms of the bond, such intent is shown because the evidence is undisputed that plaintiff intended to use union funds for his personal expenses. This intent is not negated by his assertions that he intended to

repay the money he had wrongfully taken, or even by the book entries showing how much of the union's funds he had used for personal expenses.

Plaintiff further contends that even though he may have used some of the funds in question for his personal use, the truth of the charge that he misappropriated a total of $2,187.77 is not established as a matter of law, and, consequently, a fact issue is presented for determination by a jury. In this connection he insists that a number of the items marked on the proof of loss as "no substantiation" were, in fact, proper expenditures for union purposes, for which he had receipts that the auditor for the international union refused to recognize. He testified in his deposition that after the auditor had examined the books, the claim was reduced to $840.73, which plaintiff then agreed to pay if the union would release him from any further claim, but the president of the international union refused to do so and insisted that a claim be made against the bonding company for the full amount of the claimed deficiency.

In this respect plaintiff relies on a statement in W. Prosser, Torts (4th Ed.) § 116, at 798, to the effect that the defense of truth must extend to the full scope of the alleged defamatory statement and does not preclude recovery of damages if the statement is only partly true. We recognize that if an alleged defamatory statement makes several charges, some of which are true and some of which are false, it is nevertheless an actionable libel. On the other hand, the defense of truth does not require proof that the alleged libelous statement is literally true in every detail; substantial truth is sufficient. For example, a charge that plaintiff had wasted $80,000 of the taxpayers' money was held to be substantially true, even though the actual amount was only $17,500. The court observed that no more opprobrium would be attached to a charge of embezzling the larger sum of money than to a charge of embezzling the smaller sum. Fort Worth Press Co. v. Davis, 96 S.W.2d 416, 419 (Tex.Civ.App. Fort Worth 1936, writ ref'd). Accord Putnam v. Browne,162 Wis. 524, 155 N.W. 910 (1916). In the present case, the damage to plaintiff's reputation is alleged to have resulted from the charge that plaintiff had misappropriated union funds. We do not think that each and every item listed on the proof of loss must be treated as a separate charge, requiring defendants to show the complete accuracy of each item in order to establish the defense of truth. All the items were part of a single claim. We hold that regardless of the existence of a dispute concerning some of the items, the summary-judgment proof shows as a

matter of law that the charge that plaintiff had misappropriated union funds was substantially true. Consequently, the summary judgment was proper.

Affirmed.

987 S.W.2d 100
Wayne DOLCEFINO and KTRK Television, Inc., Appellants,
v.
Sylvester TURNER, Appellee.
No. 14-97-240-CV
Court of Appeals of Texas,
Houston (14th Dist.).
Dec. 30, 1998.
Rehearing Overruled March 25, 1999.

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Charles L. Babcock, David Timothy Moran, Houston, for appellants.

Ronald G. Franklin, Ralph S. Carrigan, Robert E. Lapin, Houston, for appellees.

OPINION

ANDERSON, Justice.

This appeal is from a jury verdict against Wayne Dolcefino and KTRK Television, Inc. (KTRK) in Sylvester Turner's libel suit. The suit arose out of two television news broadcasts aired on KTRK's Channel 13 on December 1, 1991, at 5:30 p.m. and 10:00 p.m., days before the run-off election for mayor of Houston between Turner and Bob Lanier. The broadcasts questioned the role Turner may have played in, and what he knew about, an attempted multi-million dollar insurance scam. The scheme involved one of Turner's clients, Sylvester Foster, who had reportedly drowned in 1986 while sailing near Galveston, but was in fact still alive. Appellants bring eighteen issues on appeal, asserting the following: the complained of statements are true or otherwise not actionable; there is no clear and convincing evidence of actual malice; exemplary damages are improper; there were prejudicial errors in the jury charge; and, there were prejudicial errors on evidentiary rulings. We agree that there is no clear and convincing evidence of actual malice. Accordingly, we reverse and render.

I. Background

Turner is a Harvard-educated attorney, licensed to practice in Texas. During the events at issue in this suit, he was a name partner in the Houston law firm of Barnes, Morse & Turner. In late 1985, his life-long friend, Dwight Thomas, introduced him to Sylvester Foster, who had been a male model and was the owner of several beauty salons and a male modeling studio in Houston. In May of 1986, Turner began drafting Foster's will, in which Foster appointed Thomas executor of his estate. The will was completed and ready to be executed the week of June 16, 1986, and Foster executed the will on June 19, 1986. Turner was not present and one of his law partners handled the execution of the will.

Just days later, Turner learned Foster had apparently fallen overboard during a sailing trip and was presumed to have drowned on June 22, 1986. No body was found. On June 28, 1986, Foster's father, Clinton Foster, and Thomas, met with Turner and asked that Turner probate the

Foster will. In July, Turner notified various life insurance companies of Foster's death. On August 13, 1986, the U.S. Coast Guard issued a formal report, concluding that Foster was "presumed dead and lost at sea." Turner filed an application in Harris County to probate the will on November 21, 1986. On December 15, 1986, Prudential Insurance Company intervened in the probate proceeding and presented evidence that Foster had faked his death. The parties then undertook substantial discovery, including deposition testimony, in the contested probate proceeding.

On July 1, 1987, Foster's father, Clinton Foster, intervened in the probate case. After several requests that Turner withdraw from the case, Clinton Foster's attorneys filed a motion to disqualify Turner and his law firm, arguing that Turner would likely be a fact witness because he had drafted the will. The court disqualified Turner and his firm pending resolution of the will contest. Richard Snell was named temporary administrator of the estate. Turner submitted his bill for $28,000 for legal work performed on the Foster matter. [1] The bill was rejected as not "timely filed."

The probate court ordered Snell, the estate's new administrator, to begin an investigation to determine if Foster was dead. Snell requested the court appoint Elizabeth Colwell, a former investigator for Clyde Wilson who was then employed by Bill Elliott, to attempt to locate Foster. After an almost two-year search, she was unable to locate Foster. On April 12, 1989, the probate court entered a formal order declaring Foster dead. Clinton Foster then filed suit against

several insurance companies, seeking $1.2 million in benefits, plus punitive damages for their bad faith in refusing to pay his claims on the life insurance policies covering his son's life.

Clinton Foster settled one suit, accepting $125,000 from National Western Life Insurance Company, on the condition that if his son were ever found alive, he would return the money. On June 20, 1989, the U.S. Embassy informed Clinton Foster that his son was indeed alive and in prison in Spain. [2] Clinton Foster refused to return the settlement funds to National Western and filed bankruptcy, claiming the settlement funds had been used to pay his attorney, Carston Johannsen.

Meanwhile, Turner had been elected in 1988 to serve in the Texas House of Representatives, and later, he decided to enter the 1991 race for the office of Mayor of the City of Houston. It was a three-way race among Turner, the incumbent Mayor Kathy Whitmire, and Bob Lanier. In the general election on November 5, 1991, Lanier received 43.72 percent of the vote, Turner 35.91 percent, and Whitmire 20.12 percent. The run-off between Lanier and Turner was set for December 7, 1991.

On the Wednesday before Thanksgiving, November 27, 1991, Tom Doerr, the KTRK news director, asked Dolcefino to investigate a news tip the station had received. Clyde Wilson, a private investigator, suggested to Shara Fryer, a Channel 13 news anchor, that KTRK investigate an attempted insurance swindle involving Sylvester Foster. Wilson informed Fryer that Turner had drawn up Foster's will shortly before Foster's disappearance, and Turner had been involved in efforts to obtain life insurance benefits. Fryer passed the information on to Dolcefino, who also knew Wilson and had used him as a source for fifteen years.

That same day, Dolcefino had lunch with Peary Perry, a private investigator who also was a member of Bob Lanier's campaign finance committee. Perry provided Dolcefino with a one-page summary concerning Foster's disappearance and his relationship to Turner, which Turner refers to as a "script" for the story. [3] Documents from the Foster probate file were delivered to Channel 13 that afternoon, apparently on Perry's instructions.

Dolcefino investigated the tip and confirmed Foster was alive and in a Spanish prison on drug charges under the alias, Christopher Laurent Fostier. Dolcefino contacted Bill Elliott, a private investigator whose firm had investigated Foster's disappearance and had been retained by the lawyer for Turner's estranged wife, Cheryl. Elliott told Dolcefino Turner was sharing a house with Dwight Thomas, who was involved with Foster. Elliott also told Dolcefino that he believed there was a conspiracy to stage Foster's disappearance and that Turner was involved in it. Elliott gave Dolcefino a copy of Foster's obituary, a program from his memorial service showing Turner delivered a eulogy, handwritten notes indicating $6.5 million in insurance policies on Foster's life, and a letter to Foster's father from an embassy official in Spain. Elliott also showed Dolcefino a copy of an affidavit from Cheryl Turner, which discussed, among other matters, the couple's financial problems.

Dolcefino also reviewed the documents from the Foster probate file delivered to the station on Wednesday. Included were several depositions that Turner attended. Among them was the deposition of Russ Reinders, a Foster business associate who, along with Keith Anderson, had been on the sailboat outing with Foster, and each signed an affidavit, in Turner's office, falsely attesting that Foster had fallen overboard in Galveston Bay on June 22, 1986. The records also showed Turner had been involved in the execution of a partnership agreement for the RU/Sly

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(pronounced "Are You Sly") Partnership between Foster and Reinders. [4]

The court records painted a picture of Foster's questionable background. Foster was arrested in Las Vegas two months before his disappearance. Jay Bly, a Secret Service agent who had investigated Foster, testified by deposition that Foster and Thomas were engaged in a "chop shop" scam. Foster drove Thomas' Porsche to Las Vegas to have the car dismantled and sold for parts while Thomas planned to collect insurance proceeds on the Porsche, which had been reported stolen.

Foster had also been investigated by the Secret Service for credit card fraud, and he was indicted in Houston on June 13, 1986. Agent Bly attempted to take Foster into custody the night before Foster signed his will in Turner's office, but Foster promised he would turn himself in the following day. Instead, Foster left on a sailing trip. Foster was considered a fugitive from justice at the time of his disappearance.

Additional suspicious circumstances were revealed. Not only had Foster taken out several life insurance policies in the months before his disappearance, he also bought a new Mercedes, a BMW, and a Ford Mustang, all with credit life insurance, in the month before he signed his will. Foster had also applied for an emergency passport just two weeks before his disappearance.

The records also documented Turner's involvement in the Foster case. The court records received by Dolcefino included Turner's deposition, in which he described Foster's will and its

preparation and execution. Turner drafted Foster's will, attempted to have the will probated, and represented Thomas as the named executor in the probate proceeding before he was disqualified. [5] Turner corresponded with many of the life insurance companies in an attempt to get them to pay on the policies. Turner's bill for his services in the Foster probate case, which showed Turner spent 125 hours of his time on the case, was rejected by the court. The affidavits of Reinders and Anderson attesting that Foster had fallen overboard were signed in Turner's office.

On Thanksgiving morning, Dolcefino and a cameraman went to the Turner/Thomas home to interview Thomas. Dolcefino first spoke to Turner outside the home. In response to Dolcefino's statement that Foster was alive and in prison in Spain, Turner said that was the first he had heard of it, but he expressed no curiosity about the matter. Thomas also answered Dolcefino's questions and denied any knowledge that Foster was alive. He also claimed that he and Turner would not have dealt with Foster at all "if we had known that he was doing something out of the ordinary beyond the premise of the law." This assertion caused Dolcefino to question Thomas' credibility because he had learned about the chop shop scam from the probate records.

Dolcefino spoke to other sources on Thursday and Friday. He interviewed Jeffrey Wayne Fry, a Foster business associate with a criminal background, who confirmed Foster was involved in criminal activity. Fry also confirmed the total amount of Foster's insurance policies was $6.5 million. When questioned about whether Turner knew of the scam beforehand, Fry said that Turner "had to know. There is no way that he could not have known."

Dolcefino again interviewed Turner extensively on Friday. Turner denied any involvement in the Foster scheme, and he also denied any problems in his personal life. Dolcefino did not believe Turner because of Cheryl Turner's affidavit. Turner encouraged

appellants to check out the insurance fraud story, and he thought he had satisfied the station's concerns. He left the interview believing the proposed story would not portray him negatively.

Dolcefino also spoke to Elizabeth Colwell, the court-appointed investigator in the Foster matter. She told Dolcefino that Turner was aware of the insurance fraud conspiracy, he refused to cooperate in her investigation, there was $6.5 million in insurance money, Turner attempted to block questioning of Foster's girlfriend, Turner was involved in attempts to get insurance companies to pay off, Turner represented Foster, his girlfriend Christina Batura, and others, and Turner was "in it up to his eyeballs." Colwell testified at trial that she confirmed to Dolcefino the truth of every statement in the broadcasts about which Turner complains.

Dolcefino spoke with Secret Service Agent Bly, who also told Dolcefino that Turner attempted to block the questioning of Foster's girlfriend and that there was $6.5 million in insurance on Foster. He also agreed Turner was uncooperative in the investigation. [6]

Dolcefino unsuccessfully attempted to speak with Foster, who was in prison in Spain. He also was unsuccessful in his attempt to reach Jim McConn, Jr., the attorney for Prudential Insurance Company, which had intervened in the probate case and alleged that Foster was not dead.

Dolcefino prepared his script for the broadcast on Saturday and revised it on Sunday. He spoke to Turner's press secretary, Rickie Rosenberg, several times. He asked for any response to contradict the story and was given none. Several hours before the 5:30 p.m. broadcast, Dolcefino again called Rosenberg to see if Turner had anything to say to rebut the story. He gave Rosenberg the details of the proposed story. Again, Turner provided nothing in response.

The first story aired on Sunday, December 1, 1991, at 5:30 p.m. [7] The broadcast opened with the following: "We begin tonight with word of what may be one of the biggest attempted insurance swindles in recent Houston history, the apparent conspiracy to fake the death of a 30-year old Houston man with criminal troubles and millions of dollars in life insurance." Dolcefino followed with the question: "What role did Houston mayoral candidate, Sylvester Turner, play in this tale of multi-million dollar fraud?" Dolcefino added: "Our focus, what did Sylvester Turner know and when did he know it?" The story told of Foster's disappearance: "It was June of 1986, and 30-year old Sylvester Clyde Foster, a male model and beauty salon owner, had died in a freak accident. Two companions claimed Foster had fallen off a sailboat and into the waters of the Gulf of Mexico six miles south of Galveston. The Coast Guard searched but the body was never found. This week, 13 Undercover learned Sylvester Foster was very much alive and in prison in Salamanca, Spain, under an alias, Christopher Laurent Fostier. Fostier had been arrested after allegedly delivering two kilos of cocaine to a Spanish undercover agent. Dwight Thomas was said to be Foster's closest friend here in Houston."

The story then described the efforts to probate Foster's estate and obtain life insurance benefits. "Both Dwight Thomas and Sylvester Turner were deeply involved in the Sylvester Foster case and the attempt to get life insurance companies to pay off 6.5 million dollars in the wake of the disappearance. But did they know it was all a hoax, a scheme to swindle millions?" Both Thomas and Turner denied, on camera, any involvement in the attempted scam, and Thomas asserted they would have had nothing to do with Foster if they had known anything illegal was involved. "But Thomas and Turner did deal with Sylvester Foster, even after learning he was the target of criminal investigations in early 1986, and they pursued the

estate money even after significant evidence of a possible scam in Foster's death had already surfaced. Dwight Thomas introduced Foster to his friend, attorney Sylvester Turner, in early 1986. And in June of that year, Turner drew up a will for Foster; the timing interesting. On June 13th, Sylvester Foster was indicted by a Houston federal grand jury for massive credit card fraud. On June 19th, Foster rushed to sign the will in Turner's office, leaving the next day for a sailboat trip in the Gulf, despite what friends called his fear of the water. June 22nd, nine days after the indictment, three days after drawing up the will, Foster supposedly falls off the boat in another boat's wake and drowns. Curious? Get this: In the weeks before the bizarre accident, Foster had applied for an emergency passport, bought several luxury cars with life insurance policies attached, and amassed millions in life insurance coverage. Despite the signs of something fishy, Sylvester Turner began the legal effort to get the millions in insurance money released and get mutual friend, Dwight Thomas, appointed as administrator over the estate."

The broadcast then referred to Turner's involvement in the investigations into Foster's disappearance. "Turner also tried to block questioning of a female friend of Foster's in this case, Christina Batura, a woman promised a share of the money in the will. Batura died two years ago in an Hawaiian commuter plane crash, and Secret Service investigators now confirm they found letters and pictures that proved Batura knew Foster was alive, as she tried to collect on his death,

and Turner helped her." Dolcefino acknowledged that Turner asserted he "fully cooperated with all of the investigations into Foster's disappearance, but at least three investigators very close to this case tell us that's simply not true." Turner claimed he was also a victim of the scam, and he was left with unpaid legal bills after the probate judge removed him from the case. Dolcefino responded, "But if that's true, then Sylvester Turner was duped by overwhelming evidence and at least two legal clients with close ties to one of his closest friends."

After the first broadcast, Turner called a news conference for 8:00 p.m. to refute the story. With him at the news conference were the presiding probate judge for the Foster case, John Hutchison, and Jim McConn, the attorney for the principal insurer among the several life insurance companies contesting payment to Foster's beneficiaries. Both indicated they did not believe the charges against Turner, and they stated Turner's conduct in the probate proceeding had been nothing but professional. KTRK sent reporter Mary Ellen Conway to cover the press conference, and she testified she immediately returned to the station and gave Dolcefino her notes and tape.

The station did not air Hutchison's and McConn's statements during its 10:00 p.m. rebroadcast of the Foster story. The 10:00 newscast included a denial from Turner with his statement that the story represented "an all time low in Houston politics," and a charge that the story was furnished to Channel 13 by Bob Lanier's campaign. The newscast also included a videotaped denial from Lanier's campaign manager, Craig Varoga, obtained by Conway after she gave Dolcefino the original press conference footage. Varoga stated: "I think it's ridiculous that every time there is a story in the newspaper or on TV that raises serious questions about Sylvester Turner's public record, that he blames the Bob Lanier campaign." The segment concluded with the statement: "Reporter Wayne Dolcefino and Channel 13 stand by the story."

Other Houston stations aired the Hutchison and McConn statements. Dolcefino blamed the omission on Conway, and the station aired the comments the next day. Jim Masucci, the station's general manager, later referred to the omission of the Hutchison and McConn remarks as a "goof up" by the reporter covering the press conference.

Following the December 1st broadcasts, questions continued about who was the source of the story. Channel 13's news director, Tom Doerr, who knew Dolcefino had a confidential source, asked him if there was a political connection. Dolcefino denied there was such a connection. He explained he did not know if his confidential source was

connected to a campaign, but it did not appear that he was. Turner contends, however, Dolcefino knew Perry was "on the Lanier side of the equation." Dolcefino falsely told other reporters the source was Turner's estranged wife, Cheryl. Tom Doerr asked Clyde Wilson to come forward and acknowledge that he was Channel 13's source for the story. Wilson agreed. The evening newscast on December 5, 1991, included the statement, "Channel 13 has never revealed the source of its story, but today in a surprise move, the real source of the story stepped forward. Clyde Wilson dropped a bombshell today by admitting he leaked the story to Channel 13." Shara Fryer also stated, "Sylvester Turner refused to apologize to Bob Lanier today, though Turner had accused the Lanier campaign of providing the information contained in the Eyewitness News report."

Turner contends his campaign went into a "free fall" after the broadcasts, and he lost the election. He then filed this suit, contending the broadcasts were false, made with malice and that

Dolcefino and KTRK's management entered into a conspiracy to cover up the true source of the story. At trial, Turner cited the following thirteen specific statements in the broadcast as false and defamatory: [8]

1. Sylvester Turner w[as] deeply involved in the Sylvester Foster case and the attempt to get life insurance companies to pay off $6.5 million in the wake of the disappearance.

2. Turner did deal with Sylvester Foster, even after learning he was the target of criminal investigations in early 1986, and they pursued the estate money even after significant evidence of a possible scam in Foster's death had already surfaced.

3. And in June of that year, Turner drew up a will for Foster; the timing interesting.

4. On June 19th, Foster rushed to sign the will in Turner's office.

5. June 22nd, nine days after the indictment, three days after drawing up the will, Foster supposedly falls off the boat in another boat's wake and drowns.

6. Despite the signs of something fishy, Sylvester Turner began the legal effort to get the millions in insurance money released and get mutual friend, Dwight Thomas, appointed as administrator over the estate.

7. Turner also tried to block questioning of a female friend of Foster's in this case, Christina Batura, a woman promised a share of the money in the will.

8. Batura died two years ago in an Hawaiian commuter plane crash, and Secret Service investigators now confirm they found letters and pictures that proved Batura knew Foster was alive, as she tried to collect on his death, and Turner helped her.

9. Sylvester Turner pursued the estate for a year, until a judge removed him from the case over Turner's protest, citing conflicts of interest.

10. In November of 1987, Turner tried to collect more than $28,000 in legal fees from the still unsettled estate for his work.

11. The bill was rejected.

12. But if that's true, then Sylvester Turner was duped by overwhelming evidence and at least two legal clients with close ties to one of his closest friends.

13. Sylvester Turner claims he fully cooperated with all the investigations into Foster's disappearance, but at least

three investigators very close to this case tell us that's simply not true.

After a six-week trial, the jury found the broadcasts were defamatory, false, published with actual malice, authorized by KTRK, and published with actual awareness of probable harm to

Turner's reputation. The jury determined Turner's actual damages were $550,000 and that exemplary damages in the amount of $4,500,000 should be awarded against KTRK and $500,000 against Dolcefino. The trial court limited the exemplary damages against KTRK to $2,200,000, four times the actual damages, as required by section 41.007 of the Texas Civil Practice and Remedies Code. See TEX. CIV. PRAC. & REM.CODE ANN. § 41.007 (Vernon 1988). This appeal resulted.

II. Defamation

Libel is a defamatory statement, expressed in written or other graphic form, which tends to injure a person's reputation, "and thereby 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 (Vernon 1997). [9] The broadcasting of defamatory statements read from a script constitutes libel rather than slander. See Christy v. Stauffer Publications, Inc., 437 S.W.2d 814, 815 (Tex.1969). Whether words are capable of the defamatory meaning the plaintiff attributes to them is a question of law for the court. See Musser v. Smith Protective Serv., Inc., 723 S.W.2d 653, 654-55 (Tex.1987). We must construe the statement as a whole in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive the entire statement. Id. at 655.

Our state libel laws are limited by the constitutional guarantees of freedom of speech and freedom of press within the First Amendment. See Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 30, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971). A showing by the defendant of the substantial truth of its broadcast will defeat the plaintiff's cause of action and entitle the defendant to judgment. See McIlvain v. Jacobs, 794 S.W.2d 14, 16 (Tex.1990); see also TEX. CIV. PRAC. & REM.CODE ANN. § 73.005 (Vernon 1997) ("The truth of the statement in the publication on which an action for libel is based is a defense to the action."). The test used in deciding whether the broadcast is substantially true involves consideration of whether the alleged defamatory statement was more damaging to the plaintiff's reputation, in the mind of the average listener, than a truthful statement would have been. See McIlvain, 794 S.W.2d at 16. "This evaluation involves looking to the 'gist' of the broadcast. If the underlying facts as to the gist of the defamatory charge are undisputed, then we can disregard any variance with respect to items of secondary importance and determine substantial truth as a matter of law." Id. This court has recently interpreted McIlvain to require only proof that third party allegations reported in the questioned broadcast were in fact made and under investigation in order to prove substantial truth; media defendants need not demonstrate the underlying allegations are substantially true. See KTRK Television v. Felder, 950 S.W.2d 100, 106 (Tex.App.--Houston [14th Dist.] 1997, no writ). [10]

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III. The Actual Malice Standard

There is no dispute in this case that Turner, as a sitting state representative and a candidate for mayor of the fourth largest city in the United States, is a public official. Public officials must establish a higher degree of fault than private individuals to recover for defamation. See WFAA-TV, Inc. v. McLemore, 978 S.W.2d 568, 571 (1998). To sustain a defamation cause of action, a public official must prove that the defendant (1) published a statement; (2) that was defamatory concerning the public official or public figure; and (3) that the false statement was made with actual malice. See New York Times Co. v. Sullivan, 376 U.S. 254, 279-80, 84 S.Ct. 710, 11

L.Ed.2d 686 (1964); Casso v. Brand, 776 S.W.2d 551, 555 (Tex.1989); Channel 4, KGBT v. Briggs, 759 S.W.2d 939, 941 (Tex.1988). The United States Supreme Court established the "actual malice" standard for public officials in New York Times, recognizing "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, in that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 376 U.S. at 270, 84 S.Ct. 710.

For purposes of First Amendment litigation, "actual malice" requires that the defamatory statement be made with knowledge that the utterance was false or with reckless disregard of its truth or falsity. See New York Times, 376 U.S. at 280, 84 S.Ct. 710. "Reckless disregard" means that the publisher "in fact, entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968); see also Gertz v. Robert Welch, Inc., 418 U.S. 323, 334 n. 6, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). Negligence, such as failure to investigate, does not constitute actual malice. See St. Amant, 390 U.S. at 733, 88 S.Ct. 1323. In addition, evidence of ill will or spite is not evidence of actual malice under defamation law. See Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 510, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991).

Where, as here, the defamatory statements involve "core" speech that bears directly on a political candidate's fitness and qualifications for office, these principles are heightened. See Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 686-87, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989). The United States Supreme Court has written that there 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 New York Times rule." Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 300, 91 S.Ct. 628, 28 L.Ed.2d 57 (1971). The Harte-Hanks Court emphasized that:

[w]hen a candidate enters the political arena, he must expect that the debate will sometimes be rough and personal and cannot "cry Foul!" when an opponent or an industrious reporter attempts to demonstrate that he lacks the "sterling integrity" trumpeted in the campaign literature and speeches. Vigorous reportage of political campaigns is necessary for the optimal functioning of democratic institutions and central to our history of individual liberty.

491 U.S. at 687, 109 S.Ct. 2678 (citations and internal quotations omitted).

The Texas Supreme Court has repeatedly recognized that the Texas Constitution provides greater rights of free expression than its federal equivalent. [11] See Cain v. Hearst

Corp., 878 S.W.2d 577, 584 (Tex.1994); see also Davenport v. Garcia, 834 S.W.2d 4, 8 (Tex.1992) (noting the continued inclusion in our state constitution of "an expansive freedom of expression clause and rejection of more narrow protections indicates a desire in Texas to ensure broad liberty of speech"); O'Quinn v. State Bar of Texas, 763 S.W.2d 397, 402 (Tex.1988) (concluding "it is quite obvious that the Texas Constitution's affirmative grant of free speech is more broadly worded than the first amendment"). For these reasons, the Texas Supreme Court has consistently held that proof of actual malice requires sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the publication. [12]

IV. Standard of Review

We are required to make an independent assessment of the record to determine if actual malice was established by clear and convincing evidence. See Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485, 501, 510-11, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984). In Bose Corporation, the United States Supreme Court held that the First Amendment requires the appellate court to independently review the evidence to determine whether actual malice is proven with convincing clarity. The Court wrote:

The requirement of independent appellate review reiterated in New York Times 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 ... 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."

466 U.S. at 510-11, 104 S.Ct. 1949. This standard has been adopted and applied in Texas. See Doubleday & Co., Inc. v. Rogers, 674 S.W.2d 751, 755 (Tex.1984).

Actual malice may be inferred from the relation of the parties, the circumstances attending the publication, the terms of the publication itself, and from the defendant's words or acts before, at, or after the time of the communication. [13] International & G.N.R. Co. v. Edmundson, 222 S.W. 181, 184 (Tex. Comm'n App.1920, holding approved); see also Frank B. Hall & Co. v.

Buck, 678 S.W.2d 612, 621 (Tex.App.--Houston [14th Dist.] 1984, writ ref'd n.r.e.) (holding that declarant's knowledge of statement's falsity or serious doubt about its truth can most easily be proved by circumstantial evidence). Mere surmise or suspicion of malice does not carry the probative force necessary to form the basis of a legal inference of malice. See Procter & Gamble Mfg. Co. v. Hagler, 880 S.W.2d 123, 127 (Tex.App.--Texarkana), writ denied per curiam, 884 S.W.2d 771 (Tex.1994). Circumstantial evidence must be sufficient to permit the conclusion that the defendant entertained serious doubts as to the truth of his publication. See St. Amant, 390 U.S. at 731, 88 S.Ct. 1323.

A court of appeals is not a fact finder. See Cain v. Bain, 709 S.W.2d 175, 176 (Tex.1986). Accordingly, a court of appeals may not pass upon the witnesses' credibility or substitute its judgment for that of the jury, even if the evidence would clearly support a different result. See Pool v. Ford Motor Co., 715 S.W.2d 629, 634 (Tex.1986). To establish actual malice, it is not enough for the jury to disbelieve the defendant's testimony, however. See Gonzales v. Hearst Corp., 930 S.W.2d 275, 277 (Tex.App.--Houston [14th Dist.] 1996, no writ). In Harte-Hanks, the United States Supreme Court examined the role of the jury's credibility determinations in the de novo review of actual malice, and stated, "[i]n determining whether the constitutional standard has been satisfied, the reviewing court must consider the factual record in full. Although credibility determinations are reviewed 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.' " Harte-Hanks, 491 U.S. at 688, 109 S.Ct. 2678 (citations omitted). Thus, while we do not substitute our view of the witnesses' credibility, we must consider all the evidence bearing on the circumstances under which the defamatory statements were made when applying the actual malice test.

V. Was there Actual Malice?

In their sixth issue, appellants assert the trial court erred in rendering judgment that Turner recover damages from them, and in refusing to render judgment n.o.v. that appellee take nothing from them, because there is no clear and convincing evidence to support the jury's answer to question No. 3, finding the broadcasts were published with actual malice. After our independent review of the entire record, a discussion of evidence bearing on the issue of actual malice follows. Specifically, we examine Turner's attacks on Dolcefino's investigation, Dolcefino's credibility, Dolcefino's use of allegedly known false statements, Dolcefino's alleged recklessness, omission of other facts from the broadcasts, the purported cover-up of the source of the story and the reasons for the failure to include comments from the Hutchinson/McConn press conference in the second broadcast. This examination is made in the context of evidence gleaned from the entire record concerning appellants' subjective belief in the truth of the statements in the broadcasts.

A. Defendants' Testimony

First, the evidence shows Dolcefino's superiors--his news director, producer, and the station's general manager--expressed their belief in the Turner/Foster story. They did not doubt Dolcefino or the information he reported.

Tom Doerr, the news director for KTRK at the time of the broadcasts, reviewed some of the probate documents, talked to Clyde Wilson, and sat in on Dolcefino's interview with Turner. He testified, when asked if he had any doubt whether he was "getting a straight story" from Dolcefino about the source of the story, that he had "[n]one whatsoever." Dolcefino told Doerr he did not know who delivered the probate documents to the station Wednesday afternoon. When asked whether Dolcefino's "confidential source" was responsible for getting the documents to the station, Doerr replied, "[t]he documents were the documents. You know, who brought those documents by, I don't know." Doerr further testified that, in

his opinion, the broadcast implied Turner was a knowing participant in the insurance scheme, and "[i]n my gut I believed he was a knowing participant. But we were careful to make sure that we reported factually what we knew." Dolcefino brought the first draft of the script by his house Saturday afternoon and they edited it. "Part of my goal in performing that edit was to make sure that what we said was factually true." He acknowledged that at that time they had no direct evidence that Turner was a knowing participant in the scam.

James Masucci, the president and general manager of KTRK at the time of the broadcasts, testified Dolcefino and Doerr called him at home and read the story to him on Sunday afternoon before the broadcasts aired. He acknowledged he was concerned because of the potentially devastating effect on Turner's campaign, but that both assured him the story was "bonafide," true,

and could be substantiated. "They had me totally convinced that everything was true they were about to do." He had no knowledge that anything was false. He was concerned that the timing of the story was "lousy," but determined it would be worse to censor the news. He testified, "the people had the right to know." He made the "rather unprecedented" decision on December 2, 1991, to give Turner three minutes of unedited air time before a scheduled debate with Lanier to answer the allegations in the broadcast. Masucci also acknowledged Channel 13 was involved in a serious competition for ratings with the local CBS affiliate, Channel 11.

Richard Longoria, KTRK's executive producer, also testified at trial. He and Tom Doerr assigned the story to Dolcefino. He acknowledged that all those working on the story were concerned about its timing and recognized it could have an effect on the upcoming election. He testified, "[w]e had checked it out. Wayne had worked very hard on it and diligently, [he] is a very, very good reporter. And our question was: Do we withhold this from the public or do we publish it and let the public decide." He stated there was no information in the December 1 broadcast that he believed to be false, and he had no doubts about the truth of the statements in the broadcasts. He stated that after viewing Dolcefino's interview with Turner on Thanksgiving morning, he believed Turner was not revealing all he knew about the Foster matter. He also noted Turner's reactions were strange in that he expressed no shock at learning for the first time that Foster was alive. He also found Thomas' behavior suspicious. He appeared to be untruthful in that "he was protesting too much," and that "definitely something was fishy."

Longoria acknowledged that on Monday following the story, there was "some embarrassment" that Channel 13 failed to air footage from the McConn/Hutchison press conference. He blamed it on a "goof up" by Conway in that she did not inform the producer that the statements were on the tape. He testified Conway told Dolcefino that the important part of the news conference was Turner's allegation that the story had been hand delivered by the Lanier campaign, so that is what Channel 13 aired. The station corrected the mistake and aired the comments on the 6:00 p.m. news on Monday. Longoria asserted it made no difference where the story came from as long as the facts check out, "[a]nd they did and they do."

Dolcefino testified he believed each of the specific complained of statements was true when he broadcast them and he did not know any statement was false. He also did not entertain any doubts, serious or otherwise, as to their truth. Dolcefino's testimony was unequivocal:

Q: All right. As a general proposition--and we'll get into the specifics here in a moment--did you have actual knowledge of the falsity of any fact whether it relates to Mr. Turner or anybody else in your December 1, 1991 broadcast at all, any way, shape or form?

A: No, sir. And I would never put anything on T.V. that I thought was false or even suspected was false.

Q: All right. Did you recklessly disregard the truth, that is did you in fact, entertain serious doubt about the truth of any of the facts that were on the broadcast that was broadcast on Channel 13 on December 1 of 1991?

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A: No, Mr. Babcock. And from my standard you could take the word serious out of it because if I have any doubt at all, it doesn't go on T.V. because it's--it ain't no story worth that.

Apart from these assertions, Dolcefino's other testimony was contradicted in several areas, raising an issue of credibility with the jury. [14] According to Turner, it is obvious the jury completely disregarded all of Dolcefino's testimony.

B. Turner's Contentions

Turner argued at trial that Dolcefino did not simply "doubt the truth" of the story; rather, he knowingly fabricated his central theme and most of the supporting facts. According to Turner, Dolcefino then sought to cover-up his actions through deception and deliberate falsehood. Turner argues that in this effort, Dolcefino displayed reckless disregard for the truth or falsity of the broadcasts.

1. Alleged False Statements

Turner contends appellants knowingly broadcast false statements about him and that these knowing falsehoods are evidence of actual malice. Falsity alone does not establish actual malice, however. Even erroneous statements are protected so that our Constitutional freedoms of expression will have the " 'breathing space' that they need ... to survive." New York Times, 376 U.S. at 271-72, 84 S.Ct. 710.

Turner first cites to the statements in the broadcasts alleging Turner "pursued the estate money." Turner asserts Dolcefino knew there was no estate money because the estate had a negative net worth. Turner claims Dolcefino knew that all insurance proceeds were payable to specific named individuals rather than to the Foster estate, and that other attorneys represented those beneficiaries. For example, the court records in Dolcefino's possession before the broadcasts showed Neil Pickett represented Russell Reinders in his effort to collect, and Joseph Horrigan and Carston Johannsen represented Clinton Foster. Turner neglected to mention in his brief, however, that he represented Dwight Thomas, one of the life insurance beneficiaries, in his efforts to collect the insurance proceeds. [15]

We fail to see how the questioned statement about Turner's attempts to collect on the life insurance policies can support actual malice when it is substantially true. On July 22, 1986, Turner sent letters to eight insurance companies notifying them of Foster's "death" and requesting that all insurance claim forms be sent to him. [16] In October 1986, Turner sent the Coast Guard's report, in lieu of a death certificate, to the life insurance companies. Turner testified he was hopeful that "at the appropriate time" the insurers would pay based upon the Coast Guard's report. Union Central Life Insurance Company's Yvonne Lamb testified Turner attempted to cause Union Central to pay $800,000 in insurance proceeds to the Foster estate. AIG Insurance Company's Robert Gamble testified AIG received three letters from Turner demanding payment under AIG's policy. Even after he was disqualified as the estate's attorney, an attorney in Turner's office, Rosemarie Morse, "on behalf of Sylvester Turner," sent insurance claim forms to Carolina Central and to AIG. Turner admitted Morse had his authority to send the claim forms.

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We likewise find no merit in Turner's contention that the statement is false and made with malice because insurance proceeds are non-probate and, therefore, not part of Foster's "estate." Whether the funds were probate or non-probate does not change the import of the statement to the average viewer of the broadcast. Technical errors in legal nomenclature do not cause a statement

to be false. See Seymour v. A.S. Abell Co., 557 F.Supp. 951, 956 (D.Md.1983). [17] Moreover, it is undisputed that $800,000 of the Union Central insurance proceeds were payable to the testamentary trust under Foster's will and, therefore, as Foster's probate expert agreed, the funds clearly were part of Foster's probate estate. Thus, even though Turner contends the estate was insolvent, and records showed it was over $300,000 in debt, the $800,000 insurance proceeds payable to the testamentary trust would be part of the probate estate, leaving a substantial positive balance.

In addition, the statements in the broadcast also referred to Turner's efforts to get "the millions in insurance money released." Turner contends the broadcasts erroneously referred to $6.2 million in insurance, when there was actually only about $1.7 million in potential benefits payable. [18] Turner conceded that whatever the amount of insurance, "a scam is a scam." Insurance fraud of $1.7 million is no less defamatory than $6.5 million. Discrepancies as to details, such as the amount of money alleged to have been stolen, do not demonstrate falsity for defamation purposes, much less actual malice. See Downer v. Amalgamated Meatcutters & Butcher Workmen, 550 S.W.2d 744 (Tex.Civ.App.--Dallas 1977, writ ref'd n.r.e.) (affirming summary judgment where defendant published statement that plaintiff embezzled $2,187.77 instead of $840.73); Fort Worth Press Co. v. Davis, 96 S.W.2d 416 (Tex.Civ.App.--Fort Worth 1936, writ ref'd) (charge that plaintiff wasted $80,000 of taxpayers' money held to be substantially true, even though actual amount was only $17,000).

The evidence at trial, found largely in Turner's own testimony, established that Turner pursued the estate money after "significant evidence of a possible scam had surfaced." For example, Foster signed the will three days before his disappearance. His body was not found, despite an extensive Coast Guard search. Foster, a thirty year old single man, had multiple life insurance policies, most of which were taken out in the months before his disappearance. He had also applied for an emergency passport shortly before his "death." Foster had purchased three cars with credit life insurance before his disappearance. Foster was under indictment in both Houston and Las Vegas, and he was scheduled for trial on June 23, 1986, the day after he disappeared. On June 18, 1986, he promised Agent Bly he would turn himself in the next day, but instead he signed his will in Turner's office and left on the "fatal" boat trip. Turner admitted these facts "raised legitimate questions." He also admitted he continued to advocate in the probate proceeding that Foster was dead, despite these suspicious circumstances.

Turner also cites to other examples where certain statements in the broadcast were not literally true in every respect, and he contends Dolcefino admitted at trial that he knew of these mistakes before the broadcasts. First, Turner attacks the statements concerning the drawing and executing of Foster's will. "And in June of that year [1986], Turner drew up a will for Foster; the timing interesting." The date is correct. Turner testified, "we started working on it in May, completed it in June." The statement, "the timing interesting," is clearly opinion, rather than an assertion of fact; it is thus protected by our state constitution. See

Carr v. Brasher, 776 S.W.2d 567, 570 (Tex.1989). [19]

Turner takes issue with the following statements: "On June 19th, Foster rushed to sign the will in Turner's office. June 22nd, nine days after the indictment, three days after drawing up the will, Foster supposedly falls off the boat in another boat's wake and drowns." It is not disputed that Foster signed his will on June 19th, and the statement that he "rushed" to do so is not

defamatory of Turner. In any event, it is a fair characterization. Foster had promised Agent Bly that he would turn himself in, and was facing trial. He spent the night of June 18 at the home of Jon Nelson, who testified Foster was very upset, panicked about the prospect of prison, and was "desperate" on the morning of June 19th. The second statement also is not actionable by Turner because it is not "of and concerning" him. See Holly v. Cannady, 669 S.W.2d 381, 383 (Tex.App.--Dallas 1984, no writ). It appears to refer to the action by Foster in "drawing up his will" before the boating accident. The depositions taken in the probate proceeding, at which Turner was present, contained numerous references to June 19th as the date the will was "drawn up." Turner did not object to this characterization. Accordingly, Dolcefino would have no reason to doubt that the will was drawn up on June 19th, three days before Foster's disappearance, as he reported. In addition, an expert witness, former probate Judge Ashmore, testified the words "signing" and "drawing up" can by used synonymously when referring to the execution of a will.

Next, Turner complains the following statement was known to Dolcefino to be false when he made it: "Turner also tried to block the questioning of a female friend of Foster's in this case, Christina Batura, a woman promised a share of money in the will." At trial, Dolcefino first testified this statement referred to Turner's reluctance to produce Batura for her deposition. He then admitted Turner had not blocked the deposition, but asserted Turner had impeded the Secret Service's efforts to question Batura. Even if we disregard Dolcefino's self-contradictory testimony, as the jury must have done, there is other evidence in the record to support a belief that Turner may have attempted to impede Batura's questioning.

Agent Bly testified Turner blocked Batura's questioning by telling the Secret Service she did not want to take a polygraph or that Turner would advise her not to take it. Colwell confirmed Turner blocked the questioning of Batura by refusing to cooperate with Bly's attempts to interview her. Turner knew Batura had moved to Seattle in 1987, but he did not tell Bly where she was when Bly attempted to find her. Turner also filed answers to interrogatories in the probate case listing Batura's address as Houston when he knew she was living in Seattle, and he knew the Secret Service wanted to have her take a polygraph test. Secret Service Agent Walsh opined that the failure of an attorney to inform the Secret Service of Batura's location would be "blocking" the questioning of a witness.

Turner asserts the statement in the broadcasts that the probate judge "removed him from the case over Turner's protests, citing conflicts of interest" is also false and was known to be false when made. Docefino admitted the order signed by Judge Hutchison did not "cite conflicts of interest." Turner's probate expert, Judy Lenox, testified it was "false" that the probate judge cited conflicts of interest. Her testimony, however, is contradicted by the undisputed documents. The Motion to Disqualify Counsel, which was granted, sought Turner's removal because he would be needed to testify as a fact witness. Thus, the grounds for the motion were that there was a conflict of interest between serving as an attorney and testifying as a witness. Furthermore, even if Dolcefino made a technical error in interpreting the withdrawal order, such an error does not constitute a knowing falsity. See Gonzales, 930 S.W.2d at 277 (holding that "a mistake or error in judgment is not enough" for actual malice).

Finally, Turner contends actual malice is shown by the falsity of Dolcefino's statement questioning whether Turner had been "duped

by overwhelming evidence and at least two legal clients with close ties to one of his closest friends." Thomas was the "close friend," and the two purported clients were Foster and Batura. Turner argued the statement is not accurate because it "indicates that there are two legal clients. I only represented one." Turner asserts Dolcefino admitted he knew before December 1, 1991, that Turner did not represent Christina Batura. Appellants, on the other hand, assert the statement is substantially true. There is evidence that Dolcefino had ample reason to believe Turner represented Batura when Dolcefino made the questioned statement. First, Jay Bly told Dolcefino that Turner represented Batura. Liz Colwell also testified that the statement was true. During her probate deposition, Batura acknowledged she spent several hours going over the Foster matter with Turner before her deposition. She also testified in her deposition that Turner was "acting as my attorney today." After a conference conducted off the record, however, she testified that even though Turner had coordinated her coming to the deposition, there was no attorney-client relationship between them. [20] Other evidence also indicated Turner acted on Batura's behalf. For example, Turner appeared at a sequestration action to oppose sequestration of Foster's hair salon equipment in Batura's possession. Jeff Kaiser, an attorney for First City Bank, testified Batura referred him to Turner in his efforts to sequester the equipment. In the sequestration proceeding, Turner represented to the court that Foster had "plenty of life insurance," and the court denied the sequestration, leaving the property in Batura's possession.

Moreover, Turner acknowledged at trial that it would be accurate to say he was duped by one legal client rather than two. Thus, the statement is substantially true and not actionable. A variance such as the number of clients who acted to mislead Turner may be disregarded. Being duped by two legal clients is certainly no more damaging to one's reputation in the mind of the average listener than the "truth," that Turner was duped by one client. See McIlvain, 794 S.W.2d at 14, 15. Because the statement is substantially true, it cannot form the basis for a finding of actual malice. Furthermore, even if Dolcefino acknowledged that Batura was not Turner's "client" in the strict legal sense, to the average person, it would appear that he acted on her behalf.

In conclusion, we find no clear and convincing evidence that appellants knowingly broadcast false statements about Turner.

2. Reckless Disregard

Turner also asserts Dolcefino acted with reckless disregard for the truth or falsity of the statements in the broadcasts. To support a finding of actual malice, Turner had the burden to provide clear and convincing evidence that Dolcefino not only demonstrated a reckless disregard for the truth or falsity of the statements in the broadcasts, but also that he "in fact entertained serious doubts as to the truth of his publications." St. Amant, 390 U.S. at 731, 88 S.Ct. 1323. The Supreme Court has recognized that this standard may result in cases of harm to reputation that cannot be redressed:

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.

Id. at 731-32, 88 S.Ct. 1323.

a. Dolcefino's Investigation

Turner challenges the thoroughness of Dolcefino's investigation. Indeed, Turner repeatedly asserts in his brief that Dolcefino was personally aware that his central premise was false. It is well settled that failure to

investigate amounts to negligence and does not establish actual malice. See St. Amant, 390 U.S. at 731, 733, 88 S.Ct. 1323. Because the actual malice standard is a subjective one, the Court in Harte-Hanks wrote that the evidence must be sufficient to permit the conclusion that the defendant actually had a "high degree of awareness of ... probable falsity." 491 U.S. at 688, 109 S.Ct. 2678. As a result, the failure to investigate before reporting allegations, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard. See id. The evidence in the record reveals, however, that Dolcefino investigated the case. That Dolcefino believed in the truth of the published statements is demonstrated by corroborating evidence he uncovered during the investigation.

Dolcefino testified he spent twelve to fifteen hours a day from Wednesday morning, November 27, 1991, until Sunday, December 1, 1991, investigating the story. Over those four days, he interviewed over thirty people and reviewed approximately 500 pages of probate court records. Many of the details of Dolcefino's investigation have been recited in the previous discussion of the facts and need not be repeated here. For each complained of statement in the broadcast, Dolcefino asserted he had either a documentary source, a human source, or both. He confirmed every one of the complained of statements with Elizabeth Colwell, the court-appointed investigator. [21]

Based on our review of the entire record, we hold that such evidence is sufficiently probative to negate a jury finding of actual malice. It is our duty, "as expositors of the Constitution, ... [to] 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.' " See Harte-Hanks, 491 U.S. at 686, 109 S.Ct. 2678 (quoting Bose Corp., 466 U.S. at 511, 104 S.Ct. 1949).

b. Deliberate Avoidance of Contradictory Facts

The United States Supreme Court wrote in Harte-Hanks that "[a]lthough failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of the truth is in a different category." 491 U.S. at 692, 109 S.Ct. 2678 (citation omitted). Turner cites, as further evidence of Dolcefino's reckless disregard, facts Dolcefino omitted from the broadcasts. For example, Dolcefino did not include in his story the fact that the Coast Guard had concluded Foster was "lost at sea." He also failed to mention Turner had been disqualified from the probate case for three years before the judge finally declared Foster dead. Turner relies heavily on appellants' efforts to conceal the source of the story as evidence of deliberate avoidance of the truth. Turner characterizes the failure to include the statements made by Hutchison and McConn at the press conference as Dolcefino's decision to avoid the truth which constitutes evidence of Dolcefino's recklessness.

(1) The Cover-Up

Turner made much of the fact the evidence indicated Dolcefino purposely excluded the comments of Hutchison and McConn in the 10:00 p.m. broadcast, and then blamed the exclusion on another reporter's "goof up." Much of the evidence cited to support actual malice includes the actions of KTRK and Dolcefino after the broadcasts. The emphasis at trial was on the effort to conceal the source of the story and that there were political motivations behind it. Both the omission of the press conference and the source of the story are part of what Turner refers to as Channel 13's "cover-up."

(i) The Story's Source

Much of the testimony at trial concerned the source for the story. Dolcefino attempted to conceal that one of the sources of his information was connected to the Lanier campaign. Peary Perry did not recall furnishing any information to Dolcefino. Clyde Wilson testified that he initiated the story. Wilson could not recall who at the Turner camp had given him the tip. He eventually gave the name of Edwin Lewis, who later testified and denied any knowledge of the information or that he had worked on the Turner campaign. Shara Fryer confirmed Wilson called her at home Tuesday evening with the tip, which she forwarded to Dolcefino. Wilson did not recall giving Fryer Peary Perry's name, but acknowledged that if she said he did, he must have. Fryer confirmed Wilson gave her both Perry's name and the name of Bill Elliott as persons who could be contacted for additional information.

Turner incorrectly argues that Dolcefino lied when he denied Perry was "his initial source." The testimony confirms that Clyde Wilson was the original source. Even assuming Peary Perry was the "initial" source for the broadcasts and was motivated by a strong political bias against Turner, that amounts to no evidence of actual malice, let alone clear and convincing evidence. Political motivation does not equate with knowing or reckless falsity. Indeed, "a newspaper's motive in publishing a story--whether to promote an opponent's candidacy or to increase its circulation--cannot provide a sufficient basis for finding actual malice." Harte-Hanks, 491 U.S. at 665, 109 S.Ct. 2678; see also Reuber v. Food Chem. News, Inc., 925 F.2d 703, 715 (4th Cir.1991) ("Actual malice cannot be proven simply because a source of information might also have provided the information to further the source's self-interest."). In addition, Dolcefino's review of over 500 pages of probate records cannot be dismissed simply because these documents may have been furnished by Peary Perry. It is undisputed that these documents were authentic public records. [22] We conclude appellants' efforts to conceal the source of the story, although deceptive and probably inflammatory to the jury, do not constitute clear and convincing evidence that Dolcefino entertained serious doubts as to the truth of the broadcasts.

(ii) The Hutchison/McConn Press Conference

Turner contends that evidence that Dolcefino personally chose not to broadcast the statements by McConn and Hutchinson during the 10:00 p.m. broadcast "was probably the most compelling evidence of his recklessness offered at trial." He relies on the testimony of Mary Ellen Conway to the effect that Dolcefino was "well aware" of the Hutchison and McConn statements, and that Dolcefino omitted their comments because the two men never returned his telephone calls. Even if we assume this testimony is true, the omission of the Hutchison and McConn statements cannot as a matter of law support a finding of actual malice.

Mary Ellen Conway testified Doerr told her to cover Turner's news conference and get a thirty-second sound bite with Turner's reaction to the 5:30 p.m. broadcast. She took a camerawoman with her and took copious notes. She returned to the station between 9:00 and 9:15. She conceded she did not exactly debrief Dolcefino because she was pressed for time, but she left her notes and videotape with him. Conway showed her notes to Faith Dalusio, the segment's producer, and while she was speaking with Dalusio, Dolcefino walked up to them. She testified she did not go over her notes with Dalusio or Rebecca Nieto, the news producer. Conway later asserted she was sure she told Dolcefino about the Hutchison and McConn statements at the press conference. Conway testified that when she heard Turner blame the story on the Lanier campaign, she wanted to hurry to get a comment from the Lanier camp. After leaving her press conference notes with Dolcefino, Conway left immediately

for Lanier headquarters, obtained a statement from Craig Varoga, Lanier's campaign manager, and rushed back to the station, arriving just before the beginning of the 10:00 p.m. news. Conway testified she had no involvement in writing the script for any part of the story that aired at 10 p.m. She testified she did exactly what she was supposed to do and denied she had "goofed up."

Even if we take Conway's testimony as true, as the jury must have done, Dolcefino's omission of the statements, even if deliberate, does not support the conclusion that Dolcefino entertained serious doubts as to the truth of his broadcasts. Moreover, in assessing actual malice, it is the publisher's state of mind "at the time of publication" that is determinative. Bose, 466 U.S. at 498, 104 S.Ct. 1949. Therefore, the Hutchison and McConn statements, made at a press conference at 8:00 p.m., cannot support a finding of actual malice with respect to the 5:30 p.m. broadcast. They likewise do not provide clear and convincing evidence of actual malice as to the 10:00 p.m. broadcast. The Hutchison and McConn comments did not refute any specific statements in the broadcasts and, in particular, they did not refute any statements that Turner claims are libelous. Neither Hutchison nor McConn saw the 5:30 p.m. broadcast, and they did not offer any facts to refute the specific challenged statements in the broadcast. See Howell v. Hecht, 821 S.W.2d 627, 631 (Tex.App.--Dallas 1991, writ denied) (holding there was no evidence of actual malice when a story was republished after the plaintiff denied the story but failed to "state with specificity any facts" which would inform the defendant that the statements made were false). McConn stated he was "here as a lawyer tonight, at Mr. Turner's request, to explain my perceptions of the case." He stated Turner's conduct in the probate case "was not other than professional," although he prefaced his remark by saying, "[t]he issue that I was handling was whether Mr. Foster was dead or not and I was not focusing on Mr. Turner's conduct." McConn also stated he did not believe Turner did anything dishonest or inappropriate "or had anything to do with any scheme that Mr. Foster might have cooked up." [23] McConn did not testify at trial.

Judge Hutchison also stated at the press conference that Turner's conduct in his court had been "very professional" and declared "this is a fairly ridiculous allegation" against Turner. He acknowledged at trial, however, that when he made these statements, he had not seen the 5:30 p.m. broadcast and knew only what he had been told by Turner concerning its contents.

There is no evidence the statements in the press conference caused Dolcefino to entertain serious doubts about the truth of the complained of statements. Therefore, the omission of the McConn and Hutchison statements is not evidence of actual malice. See Brown v. Herald Co., 698 F.2d 949, 951 (8th Cir.1983) (holding that favorable information about plaintiff, reviewed by defendant, but omitted from a broadcast does "not reach the level of malice required by New

York Times "). Even if the comments of Hutchison and McConn had directly challenged the truth of any of the alleged defamatory statements in the broadcasts, they would be legally insufficient to constitute evidence of actual malice. Id.; Speer v. Ottaway Newspapers, Inc., 828 F.2d 475 (8th Cir.1987) (disregarding source who claimed other source's version was a "pack of lies" is not actual malice). As the Fifth Circuit has observed:

While verification of the facts remains an important reporting standard, a reporter, without a "high degree of awareness of their probable falsity," may rely on statements made by a single source even though they reflect only one side of the story without fear of libel prosecution by a public official.

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New York Times Co. v. Connor, 365 F.2d 567, 576 (5th Cir.1966); see also Times-Mirror Co. v. Harden, 628 S.W.2d 859, 865 (Tex.App.--Eastland 1982, writ ref'd n.r.e.).

The emphasis on the alleged "cover-up" is misplaced. Dolcefino was free to rely on and to believe his original sources. See Speer, 828 F.2d at 478 ("A publisher's failure accurately to guess which of two conflicting accounts a jury might later believe does not demonstrate actual malice."). The United States Supreme Court has rejected the inference of actual malice where a witness, although his testimony was not credible, "refused to admit [his mistake] and steadfastly attempted to maintain that no mistake had been made--that the inaccurate was accurate." Bose, 466 U.S. at 512, 104 S.Ct. 1949. This evidence more appropriately addresses the issue of common law malice, which is quite distinct from actual malice required to support a libel action. "The phrase 'actual malice' is unfortunately confusing in that it has nothing to do with bad motive or ill will." Harte-Hanks, 491 U.S. at 666 n. 7, 109 S.Ct. 2678 (citing Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52, n. 18, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971) (Brennan, J.)).

C. The Role of Editorial Control and Judgment

The exercise of editorial judgment to omit information favorable to the plaintiff is no evidence of actual malice. See, e.g., Peter Scalamandre & Sons, Inc. v. Kaufman, 113 F.3d 556, 563 (5th Cir.1997) ("TV Nation was entitled to edit the tape it shot to fit into the short time frame allotted to the sludge segment"). A publication may portray a person in a negative manner without liability because there is no legal obligation to present a "balanced view." Perk v. Reader's Digest Ass'n, Inc., 931 F.2d 408, 412 (6th Cir.1991).

In Miami Herald Publishing Co. v. Tornillo, the newspaper published a political attack on the plaintiff. 418 U.S. 241, 243, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974). The United States Supreme Court held the plaintiff had no right to use a state law to require the paper to publish a reply, and that a statute requiring the publisher to provide balanced coverage was unconstitutional. See id. at 258, 94 S.Ct. 2831. Under the statute, "political and electoral coverage would be blunted or reduced." Id. at 257, 94 S.Ct. 2831. The Court noted "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs. This of course includes discussion of candidates...." Id. (citing Mills v. Alabama, 384 U.S. 214, 218, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966)). The Court also recognized that "[a] responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated." Id.

The New York Times rule creates a "constitutional zone of protection" for errors of fact caused by negligence, recognizing that factual errors may occur in reporting without imposing liability on a media defendant. See Time, Inc. v. Pape, 401 U.S. 279, 291, 91 S.Ct. 633, 28 L.Ed.2d 45 (1971). In New York Times, the United States Supreme Court wrote:

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 ... '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. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars.... 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.

376 U.S. at 279, 84 S.Ct. 710. A media defendant who "maintains a standard of care such as to avoid knowing falsehood or reckless disregard of the truth is thereby given assurance that those errors that nonetheless occur will not lay him open to an indeterminable financial liability." Pape, 401 U.S. at 291, 91 S.Ct. 633.

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Courts recognize the media is not required to include additional facts in its coverage that may cast a public figure in a more favorable light. See Tornillo, 418 U.S. at 258, 94 S.Ct. 2831 ("[T]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials--whether fair or unfair--constitutes the exercise of an editorial control and judgment."); Machleder v. Diaz, 801 F.2d 46, 53 (2d Cir.1986) ("[A] rule that would hold a media defendant liable for broadcasting truthful statements and action because it failed to include additional facts that might have cast the plaintiff in a more favorable or balanced light ... violates the First Amendment."); see also A.H. Belo Corp. v. Rayzor, 644 S.W.2d 71, 85 (Tex.App.--Fort Worth 1982, writ ref'd n.r.e.) (holding there was no actual malice as a matter of law where reporter interviewed several sources, one of whom was plaintiff who provided a conflicting version of events).

We conclude that actual malice has not been shown by appellants' failure to include other facts in their report that may have cast Turner in a more positive light. Nor does the evidence concerning Dolcefino's investigation or the alleged cover-up rise to the level of clear and convincing evidence of reckless disregard for the truth of the statements in the broadcasts.

D. Comparison with Harte-Hanks

Turner contends Harte-Hanks is controlling and asserts he "mirrored" his case after the United States Supreme Court's decision. We find significant differences between Harte-Hanks and this case, however.

This case does not present the same indicia of actual malice as were present in Harte-Hanks. First of all, it is important to note that the newspaper in Harte-Hanks relied on a single source, Alice Thompson, who charged that Connaughton, a candidate for judicial office, had used "dirty tricks," offered bribes, and suborned perjury. See Connaughton v. Harte Hanks Communications,

Inc., 842 F.2d 825, 832 (6th Cir.1988). The newspaper knew Thompson was disgruntled and vindictive, had a criminal background, had undergone "psychiatric treatment for emotional instability and mental problems," had refused a polygraph examination, and she had reported her charges to the local police who had refused to take action. Id. at 831-32. The story had been denied not only by Connaughton, but also by five other witnesses before it was published. The most serious charge made by Thompson was not only highly improbable, but also inconsistent with other facts well known to the defendants, including a taped interview with Connaughton in which he unambiguously denied each allegation of wrongful conduct. The defendants did not listen to an important taped interview with a key witness, nor did they attempt to interview her. In cases involving allegations made by third parties, "recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." 491 U.S. at 688, 109 S.Ct. 2678. In upholding the jury's finding of actual malice, the Court in Harte-Hanks relied on the newspaper's failure to interview the key witness or listen to the tape recorded interview, even though there was reason to doubt the informant's veracity, to find sufficient evidence of an intent to avoid the truth to satisfy the New York Times standard. Id. at 692-93, 109 S.Ct. 2678. The Court found it likely that the defendant's inaction was a product of "a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [the] charges." Id. at 692, 109 S.Ct. 2678.

In this case, in contrast to specific charges of wrongdoing as in Harte-Hanks, the broadcasts did not accuse Turner of being directly involved in the life insurance scam. Instead, the story raised questions about the suspicious circumstances of Foster's "death" and how much Turner knew, as well as questioning Turner's choice of business and personal associates.

Also in contrast to Harte-Hanks, Dolcefino investigated the story before running it, and he did not avoid certain witnesses. Dolcefino did not avoid Turner; he interviewed him extensively, and he repeatedly asked Turner's press secretary for denials and contradictory evidence. In his interview the Friday before the broadcast, Dolcefino stated,

"I want to give you the opportunity to deny in the strongest terms as you want to the suggestions that were made that either you knew about it beforehand or you found out about it later, yet you still pursued it because you were trying to help your friend Thomas get ahold of a six million dollar estate. I'm not accusing you of it, I want to give you the opportunity to respond to it in any way you want to." Turner replied, "[t]hat's not even funny. Anybody that knows me knows that's not in my nature." [24] His concluding remarks to Dolcefino were included in the broadcast: "if the fact is the man is alive the man ought to be dealt with and anyone else who participated in this whole charade should be dealt with in the strictest and severest of terms." Dolcefino repeatedly requested factual information to refute the statements in the story and was given none. Instead, Turner's own press secretary testified Turner merely "laughed" when asked for responsive documents, because there was "nothing to give."

Even if we assume Dolcefino knew Perry worked for the Lanier campaign, and thus, had a political motivation to spread negative publicity about Turner, Dolcefino did not rely solely on Perry. Far from it--he interviewed numerous parties and reviewed hundreds of pages of documentary evidence before he reported the story. These probate court records, which included Turner's deposition, provided Dolcefino with a "complete picture" of the probate proceedings, according to appellants' probate expert. One of Dolcefino's primary sources, Colwell, investigated the matter for almost two years. The fact that Colwell's conversations with Dolcefino may have

been brief does not refute her testimony that she confirmed the truth of each statement in the broadcasts. [25]

In Harte-Hanks, the charges were highly improbable. Here, in contrast, there had been several items in the news that would tend to raise questions about Turner's qualifications and ability to serve as Houston's mayor. As the runoff election approached, Turner began to attract greater scrutiny by the press. Articles in the Houston newspapers reported a suit against Turner for insurance fraud, in which it was alleged that Turner, while acting as an attorney, "misrepresented a client's fire insurance claim." The case was scheduled to go to trial shortly after the runoff election. [26] Newspapers also reported that Turner had failed to repay student loans to Harvard Law School and the University of Houston, and that Harvard had obtained a default judgment against him for $8,439.77. Turner also had a history of many other delinquent bills, including the failure to pay State Bar dues, causing his membership to lapse. The Houston Post reported a bad check charge, and stated that Turner "disregarded notices that a criminal charge had been filed against him causing a warrant to be issued for his arrest."

All of these questionable charges against Turner, together with the lack of credibility shown by both Turner and Thomas in their interviews with Dolcefino, would have supported Dolcefino's belief in the validity of the Foster scheme allegations rather than to doubt their truth. In addition, Dolcefino based his story on reliable information from trustworthy sources, which were primarily the court records, a Secret Service agent, and the official probate court investigator. This court has rejected a claim of fabrication on far less evidence to support the accuracy of the report. See Gonzales, 930 S.W.2d at 282 (holding it is unreasonable to infer a

reporter had willfully published false information when there was a dispute about whether the source in fact provided the information).

VI. Conclusion

Even if we disregard Dolcefino's testimony concerning his belief in the truth of the statements in the broadcasts, as the jury must have done, we find no clear and convincing evidence to support a finding that he did not in fact believe the statements were true or that he entertained serious doubts about the truth of the statements. In short, there is no evidence of an intent to avoid the truth. See Harte-Hanks, 491 U.S. at 692, 109 S.Ct. 2678. We hold the record does not contain clear and convincing evidence to support the jury's finding of actual malice, as alleged in appellants' sixth issue.

In the absence of actual malice, the judgment cannot stand, and we need not address appellants' remaining issues. We reverse the judgment of the trial court and render judgment that Turner take nothing.

APPENDIX

CHANNEL 13 NEWS BROADCAST

5:30 P.M. NEWS--December 1, 1991

BOB BOUDREAUX:

Good evening everyone, and thank you for joining us.

We begin tonight with word of what may be one of the biggest attempted insurance swindles in recent Houston history, the apparent conspiracy to fake the death of a 30-year old Houston man with criminal troubles and millions of dollars in life insurance.

Tonight, Wayne Dolcefino with his 13 exclusive undercover investigation into a mystery with potential explosive political twist.

Wayne.

WAYNE DOLCEFINO:

That's right, Bob, because among the questions: What role did Houston mayoral candidate, Sylvester Turner, play in this tale of multi-million dollar fraud?

We have been investigating Turner's role in this attempted insurance swindle since we first heard about it on the day before the Thanksgiving holiday.

Our focus, what did Sylvester Turner know and when did he know it?

In loving memory, the obituary read.

It was June of 1986, and 30-year old Sylvester Clyde Foster, a male model and beauty salon owner, had died in a freak accident.

Two companions claimed Foster had fallen off a sail boat and into the waters of the Gulf of Mexico six miles south of Galveston.

The Coast Guard searched but the body was never found.

This week, 13 Undercover learned Sylvester Foster was very much alive and in prison in Salamanca, Spain, under an alias, Christopher Lauren Fostier.

Fostier had been arrested after allegedly delivering two kilos of cocaine to a Spanish undercover agent.

Dwight Thomas was said to be Foster's closest friend here in Houston.

We asked him on Thanksgiving morning about Foster's miraculous return from the grave.

DWIGHT THOMAS:

Prison, Spain?

SPEAKER:

Uh-huh.

DWIGHT THOMAS:

Prison, Spain?

Prison, Spain?

SPEAKER:

Sylvester Clyde Foster.

DWIGHT THOMAS:

I know who you're speaking of.

SPEAKER:

Yeah.

DWIGHT THOMAS:

I know nothing about prison in Spain.

SPEAKER:

You don't know that he's alive and he's in prison?

DWIGHT THOMAS:

No.

WAYNE DOLCEFINO:

We found Thomas at his home in Inwood Forest, a home he shares with mayoral candidate Sylvester Turner.

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It's the home Turner has been leasing inside the city limits since he announced plans to run for mayor.

The candidate claims the news about Foster was news to him, too.

SYLVESTER TURNER:

That guy died more than five or six years ago.

SPEAKER

He's not dead.

SYLVESTER TURNER:

As far as we all know.

I mean, he went overboard.

SPEAKER:

He's in Spain.

SYLVESTER TURNER:

Not as far as I know.

WAYNE DOLCEFINO:

Both Dwight Thomas and Sylvester Turner were deeply involved in the Sylvester Foster case and the attempt to get life insurance companies to pay off 6.5 million dollars in the wake of the disappearance.

But did they know it was all a hoax, a scheme to swindle millions?

DWIGHT THOMAS:

No.

I wouldn't set myself up for something crazy like that.

SPEAKER:

And Sylvester Turner didn't know?

DWIGHT THOMAS:

No.

No.

We never would have--in fact, as a mater of fact, we wouldn't have dealt with him at all if we had known that he was doing something out of the ordinary beyond the premise of the law.

WAYNE DOLCEFINO:

But Thomas and Turner did deal with Sylvester Foster, even after learning he was the target of criminal investigations in early 1986, and they pursued the estate money even after significant evidence of a possible scam in Foster's death had already surfaced.

Dwight Thomas introduced Foster to his friend, attorney Sylvester Turner, in early 1986.

And in June of that year, Turner drew up a will for Foster; the timing interesting.

On June 13 th, Sylvester Foster was indicted by a Houston federal grand jury for massive credit card fraud.

On June 19 th, Foster rushed to sign the will in Turner's office, leaving the next day for a sail boat trip in the Gulf, despite what friends called his fear of the water.

June 22 nd, nine days after the indictment, three days after drawing up the will, Foster supposedly falls off the boat in another boat's wake and drowns.

Curious?

Get this: In the weeks before the bizarre accident, Foster had applied for an emergency passport, bought several luxury cars with life insurance policies attached, and amassed millions in life insurance coverage.

Despite the signs of something fishy, Sylvester Turner began the legal effort to get the millions in insurance money released and get mutual friend, Dwight Thomas, appointed as administrator over the estate.

Thomas at first denied he sought control of Foster's estate until we told him about court documents we had viewed.

DWIGHT THOMAS:

The deal of it was, after he passed away, I found out that I was administrator of the estate.

So--

WAYNE DOLCEFINO:

In fact, Thomas petitioned the court to become administrator.

We then asked him why the evidence didn't make him suspicious.

DWIGHT THOMAS:

We looked into that.

I didn't really know--actually, I really didn't want to get too deeply involved in it because I didn't know what was going on.

SYLVESTER TURNER:

There have been times we made out a will for individuals and they die for various reasons shortly thereafter.

And you look at it and you say, well--you know, try and put together the circumstances by which it come about.

I mean, it does happen.

WAYNE DOLCEFINO:

Turner also tried to block questioning of a female friend of Foster's in this case, Christina Batura, a woman promised a share of the money in the will.

Batura died two years ago in an Hawaiian commuter plane crash, and Secret Service investigators now confirm they found letters and pictures that proved Batura knew Foster was alive, as she tried to collect on his death, and Turner helped her.

And investigators say they have statements that Turner's close friend, Dwight Thomas, threatened at least one witness who had told authorities Foster was alive.

Thomas denies he was part of any scam.

DWIGHT THOMAS:

No.

No.

No.

No.

No.

Undoubtedly no.

WAYNE DOLCEFINO:

Sylvester Turner pursued the estate case for a year, until a judge removed him from the case over Turner's protest, citing conflicts of interest.

In November of 1987, Turner tried to collect more than $28,000 in legal fees from the still unsettled estate for his work.

The bill was rejected.

Thomas never gained control of the estate.

And only one of nine insurance companies ever paid off any money in Foster's death.

And that money went to his father.

The mayoral candidate questions the timing of the revelations and claims he, too, was a victim, not part of any conspiracy to conceal Foster's European get-away.

SYLVESTER TURNER:

Sylvester Turner is the one that's been left with the bill.

WAYNE DOLCEFINO:

But if that's true, then Sylvester Turner was duped by overwhelming evidence and at least two legal clients with close ties to one of his closest friends.

SYLVESTER TURNER:

You told me the man is a liar.

The man ought to come back here and be dealt with, if that's the case.

If, in fact, he is, then he ought to be dealt with in the severest of terms.

WAYNE DOLCEFINO:

Do you feel used by him?

SYLVESTER TURNER:

Yeah.

WAYNE DOLCEFINO:

Sylvester Turner claims he fully cooperated with all of the investigations into Foster's disappearance, but at least three investigators very close to this case tell us that's simply not true.

And Bob, we'll continue to pursue the full story both here at home and in Spain.

BOB BOUDREAUX:

Is Foster coming back?

WAYNE DOLCEFINO:

The United States government is trying to extradite him back to Sprain, and we have been trying through the U.S. embassy in Madrid to get contact with him.

BOB BOUDREAUX:

Thank you very much, Wayne. Keep following that one.

CHANNEL 13--December 1 1991

10:00 p.m.

BOB BOUDREAUX:

Good evening, everyone, and thank you for joining us. It may very well be one of the biggest attempted insurance swindles in recent Houston history, the apparent conspiracy

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to fake the death of a Houston man with criminal troubles and millions of dollars in life insurance.

The question raised tonight is what role did mayoral candidate Sylvester Turner play in this insurance fraud? Tonight our Wayne Dolcefino has this exclusive 13 undercover investigation.

WAYNE DOLCEFINO:

In loving memory, the obituary read. It was June of 1986, and 30-year old Sylvester Clyde Foster, a male model and beauty salon owner, had died in a freak accident. Two companions claimed Foster had fallen off a sail boat and into the waters of the Gulf of Mexico six miles south of Galveston. The Coast Guard searched but the body was never found.

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We found Thomas at his home in Inwood Forest, a home he shares with mayoral candidate Sylvester Turner. It's the home Turner has been leasing inside the city limits since he announced plans to run for mayor. The candidate claims the news about Foster was news to him, too.

SYLVESTER TURNER:

That guy died more than five or six years ago.

SPEAKER:

He's not dead.

SYLVESTER TURNER:

As far as we all know. I mean, that's--he went overboard.

SPEAKER:

He's in Spain.

SYLVESTER TURNER:

Not as far as I know.

WAYNE DOLCEFINO:

Both Dwight Thomas and Sylvester Turner were deeply involved in the Sylvester Foster case and the attempt to get life insurance companies to pay off 6.5 million dollars in the wake of the disappearance. But did they know it was all a hoax, a scheme to swindle millions?

DWIGHT THOMAS:

No. I wouldn't set myself up for something crazy like that.

SPEAKER:

And Sylvester Turner didn't know?

DWIGHT THOMAS:

No. No. We never would have--in fact, as a matter of fact, we wouldn't have dealt with him at all if we had known that he was doing something out of the ordinary, beyond the premise of the law.

WAYNE DOLCEFINO:

But Thomas and Turner did deal with Sylvester Foster, even after learning he was the target of criminal investigations in early 1986, and they pursued the estate money even after significant evidence of a possible scam in Foster's death had already surfaced.

Dwight Thomas introduced Foster to his friend, attorney Sylvester Turner, in early 1986. And in June of that year, Turner drew up a will for Foster; the timing interesting.

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On June 13 th, Sylvester Foster was indicted by a Houston federal grand jury for massive credit card fraud. On June 19 th, Foster rushed to sign the will in Turner's office, leaving the next day for a sail boat trip in the Gulf, despite what friends called his fear of the water.

June 22 nd, nine days after the indictment, three days after drawing up the will, Foster supposedly falls off the boat in another boat's wake and drowns. Curious? Get this: In the weeks before the bizarre accident, Foster had applied for an emergency passport, bought several luxury cars with life insurance policies attached, and amassed millions in life insurance coverage.

Despite the signs of something fishy, Sylvester Turner began the legal effort to get the millions in insurance money released and get mutual friend, Dwight Thomas, appointed as administrator over the estate. Thomas at first denied he sought control of Foster's estate until we told him about court documents we had viewed.

DWIGHT THOMAS:

The deal of it was, after he passed away, I found out that I was administrator of the estate.

WAYNE DOLCEFINO:

In fact, Thomas petitioned the court to become administrator. We then asked him why the evidence didn't make him suspicious.

DWIGHT THOMAS:

We looked into that. I didn't really know--actually, I really didn't want to get too deeply involved in it because I didn't know what was going on.

SYLVESTER TURNER:

There have been times we made out a will for individuals and they die for various reasons shortly thereafter. And you look at it and you say, well--you know, try and put together the circumstances by which it come about. I mean, it does happen.

WAYNE DOLCEFINO:

Turner also tried to block questioning of a female friend of Foster's in this case, Christina Batura, a woman promised a share of the money in the will. Batura died two years ago in an Hawaiian commuter plane crash, and Secret Service investigators now confirm they found letters and pictures that proved Batura knew Foster was alive, as she tried to collect on his death, and Turner helped her.

And investigators say they have statements that Turner's close friend, Dwight Thomas, threatened at least one witness who had told authorities Foster was alive. Thomas denies he was part of any scam.

DWIGHT THOMAS:

No. No. No. No. No. Undoubtedly no.

WAYNE DOLCEFINO:

Sylvester Turner pursued the estate case for a year, until a judge removed him from the case over Turner's protest, citing conflicts of interest. In November of 1987, Turner tried to collect more than $28,000 in legal fees from the still unsettled estate for his work. The bill was rejected.

Thomas never gained control of the estate. And only one of nine insurance companies ever paid off any money in Foster's death. And that money went to his father. The mayoral candidate questions the timing of the revelations and claims he, too, was a victim, not part of any conspiracy to conceal Foster's European get-away.

SYLVESTER TURNER:

Sylvester Turner is the one that's been left with the bill.

WAYNE DOLCEFINO:

But if that's true, then Sylvester Turner was duped by overwhelming evidence and at least two legal clients with close ties to one of his closest friends.

SYLVESTER TURNER:

You told me the man is a liar. The man ought to come back here and be dealt with, if that's the case. If, in fact, he is, then he ought to be dealt with in the severest of terms.

SPEAKER:

Do you feel used by him?

SYLVESTER TURNER:

Yeah.

WAYNE DOLCEFINO:

Sylvester Turner claims he fully cooperated with all of the investigations into Foster's disappearance, but at least three investigators very close to this case tell us

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that's simply not true. Wayne Dolcefino, 13 Eyewitness News.

BOB BOUDREAUX:

Now, tonight, Sylvester Turner called a news conference to attack that story as factually false, untrue, and misleading.

SYLVESTER TURNER:

When I have looked at the facts of this case and when you look at them, I think you will conclude that this is an all-time low in Houston politics. And I resent the fact that five days before the campaign, that these type of assertions are being made by anyone with reference to my character and my integrity.

BOB BOUDREAUX:

Turner claims the Foster story was hand-delivered to Channel 13 by opponent Bob Lanier's campaign, and within the last hour, the Lanier campaign reacted.

CRAIG VAROGA:

I think it's ridiculous that every time there's a story in the newspaper or on TV that raises serious questions about Sylvester Turner's public record, that he blames the Bob Lanier campaign.

BOB BOUDREAUX:

Reporter Wayne Dolcefino and Channel 13 stand by the story.

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1 The bill from Turner's law firm reflects a total of 248.25 hours billed on the Foster probate case.

2 Upon confirmation that Foster was alive, the probate court rescinded its order declaring Foster dead and closed the probate file.

3 Shortly before trial, the First Court of Appeals denied mandamus relief to Dolcefino concerning an order to answer questions about information given to him by his confidential informant, Peary Perry. See Dolcefino v. Ray, 902 S.W.2d 163 (Tex.App.--Houston [1st Dist.] 1995, orig. proceeding).

4 According to the agreement, the partnership planned to purchase a boat, Foster and Reinders each agreed to purchase $150,000 in insurance on the life of the other, and if one of them died, the other would collect the insurance proceeds and would own the boat and the business. The policy on Foster's life contained a double indemnity provision in case of accidental death. Thus, Reinders stood to gain $300,000 in insurance proceeds from Foster's death.

5 Turner places significance on the fact that the probate documents Dolcefino reviewed before the broadcasts did not include Foster's will. As discussed, however, the records Dolcefino reviewed did include Turner's probate deposition in which Turner explained the will, its beneficiaries and Foster's life insurance.

6 Evidence at trial shows the Secret Service had listed both Turner and Thomas as suspects in the Foster insurance conspiracy. The United States Attorney's office declined to prosecute them, citing "evidence, though credible, is not sufficiently corroborated to convict," largely because of the deaths of several of the participants in the scheme. Reinders, Anderson, and Batura had all died by that time.

7 Transcripts of the broadcasts are attached as an appendix.

8 Turner also complained that some of the graphics used in the broadcast were defamatory. For example, he complained the visual impact of a triangle showing photographs of Turner, Foster and Thomas at the three points defamed him. Conversely, we note that the broadcasts also depict the extreme lack of credibility shown by Thomas, Turner's "life-long friend," in his denials of knowledge that Foster was alive and in prison in Spain. Thomas admitted at trial that he had been told by Jon Nelson, a Foster acquaintance, that Foster was alive. Keith Anderson also testified about conversations he had with Thomas in 1990 about Foster being alive and in prison in Spain.

9 In his brief, Turner concedes that "a careful reading of the broadcasts reveals that most statements they contain do not 'relate to' Sylvester Turner at all." These statements cannot be defamatory as to Turner. A cause of action for libel accrues if the defendant publishes a false, defamatory statement of fact of and concerning the plaintiff. See Hanssen v. Our Redeemer Lutheran Church, 938 S.W.2d 85, 92 (Tex.App.--Dallas 1996, writ denied).

10 The central premise of Turner's argument on appeal is that the broadcasts charged that he "was a knowing participant in a multi-million dollar fraud." Turner does not quote any statement from the broadcasts where such an accusation can be found, but instead, he argues that the "gist" of the entire broadcast was that Turner was a knowing participant in a criminal conspiracy. See Golden Bear Distrib. Sys. of Texas, Inc. v. Chase Revel, Inc., 708 F.2d 944, 948-49 (5th Cir.1983) (rejecting the defense of truth where the juxtaposition of truthful statements created on overall defamatory effect through the omission of other facts that would have refuted the false impression). Appellants assert that to give credence to Turner's assertion would require recognition of "libel by implication." At trial, Turner's counsel abandoned that theory, acknowledging it was not plead and stating Turner did not "intend to rely on libel by implication to support a judgment in this case, period, end of discussion." In addition, the charge explicitly instructed the jury to "consider the actual language used in the broadcasts" and not "any implied statements or

inferences." Instead, according to appellants, the broadcasts examined events that bore upon Turner's fitness and qualifications to be mayor of Houston and asked what role Turner played in the scheme. Rather than charging that Turner knowingly participated in the fraudulent scheme, the broadcast questioned what Turner may have known, the timing of his knowledge of certain facts, and whether he was "duped" by participants in the scheme. Because of our disposition of the actual malice issue, we need not resolve whether appellants may be held liable for defamatory implications in the broadcast.

11 Article I, section 8 of the Texas Constitution provides:

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.

TEX. CONST. art. I, § 8.

12 See, e.g., Hagler v. Proctor & Gamble Mfg. Co., 884 S.W.2d 771, 772 (1994) (holding ill will cannot prove malice); Channel 4 KGBT, 759 S.W.2d at 941 (holding a mistake was not actionable where the broadcaster denied subjective awareness of the error); Doubleday & Co., Inc. v. Rogers, 674 S.W.2d 751, 755-57 (Tex.1984) (holding that proof a prudent person would not have published or would have first investigated is insufficient); Foster v. Upchurch, 624 S.W.2d 564, 566 (Tex.1981) (holding that naming the wrong person as a killer was a "mistake" and not actual malice); Dun & Bradstreet, Inc. v. O'Neil, 456 S.W.2d 896, 900 (Tex.1970) (holding no evidence of actual malice where publisher admitted "I didn't look at it, I'm afraid, as carefully as I should," because of "an executive breathing down my neck"); El Paso Times, Inc. v. Trexler, 447 S.W.2d 403, 406 (Tex.1969) (holding the complete failure to investigate amounted to no evidence of constitutional malice).

13 In Harte-Hanks, the Court also recognized that "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." 491 U.S. at 668, 109 S.Ct. 2678 (citations omitted). The Court warned, however, that "courts must be careful not to place too much reliance on such factors." Id.

14 Indeed, Dolcefino made personal attacks against Turner's counsel and was referred to by the trial judge, outside the jury's presence, as "the witness from Hell."

15 In addition, Dolcefino may have doubted Turner's disclaimers about his involvement in the probate case because Turner denied knowing about the existence of the insurance policies when he drafted Foster's will, yet his deposition showed he had been involved in changing the insurance beneficiaries to the trust created in the will.

16 Foster had life insurance policies with Prudential Insurance Company, Union Central Life Insurance Company (three policies), National Western Life Insurance Company, AIG Insurance Company, Carolina Central Insurance Company, Gulf Atlantic Life Insurance Company, and Association Life Insurance Company. In addition, Foster applied for a $1 million policy with GEICO, but the policy was not issued because Foster did not complete the required physical examination before his disappearance.

17 For the same reason, Dolcefino's incorrect reference to Thomas as the "administrator" of the estate, rather than its executor, is no evidence of actual malice. The average person would discern no difference between the terms. Even Turner referred to Thomas as the "administrator," both in his interview with Dolcefino and at his 8:00 p.m. press conference.

18 In addition to the approximately $1.7 million in life insurance policies, there was the $1 million GEICO policy that was not issued and numerous credit life insurance policies on various vehicles.

19 As noted earlier, the Texas Constitution specifically protects opinion. See n. 11, supra.

20 Judy Lenox, Turner's probate expert acknowledged that it would have been inappropriate for Turner to represent Batura, one of the beneficiaries of Foster's will, while he represented Thomas as the executor.

21 Turner criticizes Dolcefino's sources because they did not directly link Turner to the insurance scam. Dolcefino's primary sources for the statements in the broadcasts, apart from the probate documents, were Bill Elliott and Liz Colwell. Elliott had been hired by Turner's wife, Cheryl, in connection with the couple's marital problems. Elliott also had employed Colwell when she investigated Foster's disappearance. Although he knew of no evidence linking Turner to the Foster scheme, he believed Turner was involved. Turner criticizes Dolcefino's reliance on Colwell's confirmation because he only spoke to Colwell twice on the phone. The first call lasted five to ten minutes, and the second call was "very short, very minor." Colwell also acknowledged she had no proof, but had a "feeling" that Turner was involved.

22 Turner acknowledged at trial and before this court that Dolcefino received the probate documents on Wednesday afternoon, November 27, 1991. About twenty pages of these records bear a file stamp date of December 16, 1991, but the record indicates that these are certified copies of the same records reviewed before the broadcast on December 1.

23 Dolcefino had seen documents in the probate files showing McConn attempted to take Turner's deposition in the probate case, citing the "crime/fraud" exception to the attorney client privilege as one of the reasons such testimony was permissible. See TEX.R. EVID. 503(d)(1). McConn argued to the court, "any conversation between Foster and his attorneys regarding his intent to stage his disappearance would not be privileged. Conversations relating to the commission of a future crime are not covered by the attorney/client privilege." McConn did not go so far as to accuse Turner of wrongdoing, however.

24 In both Harte-Hanks and Curtis Publishing Co. v. Butts, the defendants had statements from the plaintiffs prior to publication that the account to be published was untrue. See 491 U.S. at 691-93 n. 39, 109 S.Ct. 2678 (citing Chief Justice Warren's concurring opinion in Butts, 388 U.S. 130, 169-70, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967)). Turner's response did not import to Dolcefino any knowledge of the falsity of the proposed publication.

25 Turner asserts the jury rejected Colwell's testimony, and therefore, this court must also disregard it. We disagree. The testimony may be considered with reference to Dolcefino's subjective belief in the truth of his story. He received confirmation from a knowledgeable source, and there is no evidence that he had reason to doubt this confirmation.

26 Turner failed to appear for a scheduled hearing, and the trial court granted a partial summary judgment holding Turner liable for misrepresentation to an insurance company and awarding nearly $50,000 in damages on December 2, 1991. The case was later settled for $13,500.

178 S.W.3d 373
Braden St. John BROWN, Appellant,
v.
SWETT & CRAWFORD OF TEXAS, INC. f/d/b/a/ Insurance Brokers Services, Inc. of Texas f/k/a Alexaner Howden Insurance Services of Texas, Inc.; Aon Corporation; Aon Services Group, Inc.; Swett & Crawford, Inc.; Insurance Brokers Services, Inc.; Pascal M. ("Matt") Galtney; and Blake Bartnik, Appellees.
No. 01-03-00520-CV.
Court of Appeals of Texas, Houston (1st Dist.).
September 15, 2005.

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Jessica P. Wannemacher, McFall, Martinez, Sherwood & Breitbeil, P.C., Mark K.

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Glasser, Tracey M. Robertson, King & Spalding, L.L.P., Kenneth R. Breitbeil, McFall, Sherwood & Breitbeil, Houston, TX, for Appellees.

Panel consists of Chief Justice RADACK and Justices KEYES and ALCALA.

OPINION

SHERRY RADACK, Chief Justice.

Appellant, Braden St. John Brown, filed suit against his employer, Swett & Crawford of Texas, Inc. f/d/b/a Insurance Brokers Services, Inc. of Texas ("IBS"), and his supervisor at IBS, Matt Galtney, alleging that they (1) wrongfully expelled him from a partnership that he had entered into with Galtney; (2) refused to pay him a bonus that he had earned; (3) fraudulently induced him to leave his previous employment by representing that he would continue to be Galtney's "partner" at IBS; (4) tortiously interfered with his relations with, and made defamatory statements about him to, prospective employers; and (5) that IBS negligently hired and supervised Galtney. Galtney and IBS filed a motion for summary judgment, which the trial court granted. We affirm.

I. BACKGROUND

Braden St. John Brown is a wholesale insurance broker. Wholesale brokers act as middlemen between retail insurance agents and insurance companies, and the insurance

companies pay the wholesale broker a "gross commission," which is a percentage of the premium for each policy sold.

Brown met Galtney in 1994, while they were both working for Jarrett Insurance Brokers ("Jarrett"). While at Jarrett, they were treated on the company's books as one person, i.e., they were allocated a gross salary and paid gross commissions, which they split in an agreed-upon proportion. Jarrett, however, paid each of them by way of a separate check, which reflected their split of the commissions.

In 1999, Galtney met a former business acquaintance, Blake Bartnick, who was the president of IBS in Dallas. Galtney and Bartnick began discussing the possibility of Galtney's opening a Houston office for IBS. Galtney indicated that he wished to bring Brown with him to IBS, and began negotiating with IBS on behalf of himself and Brown.

IBS eventually hired both Brown and Galtney. The offer they accepted included a base salary of $590,000, 42% of which went to Brown ($247,800) and 58% of which went to Galtney ($342,200). There was a potential for a bonus based on new business written for IBS by "Houston Team One," which is how IBS referred to the team consisting of Brown and Galtney. The bonus to "Houston Team One" was also to be split in the same proportion as the base salary. Thereafter, the base salary would be adjusted yearly and would be paid to Brown and Galtney as a draw against the gross commissions that they generated. Any amount above the draw would be divided equally between Houston Team One and IBS, and Houston Team One would divide its half of the gross commission in a 42:58 ratio between Brown and Galtney.

Brown and Galtney were both W-2 salaried employees of IBS, and Galtney, as the executive vice-president in charge of the Houston office, was Brown's supervisor. Brown acknowledged that he was an at-will employee of IBS.[1]

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On July 31, 2000, IBS fired Brown after problems attributed to him were discovered in several of the files that he had been handling. Brown was offered a severance, which included full pay and benefits through September 30, 2000, and a payment of a year-end bonus based upon gross commissions earned through the date of his termination.[2] Brown rejected the bonus offered by IBS by writing "VOID" on the face of the bonus check and returning it.

IBS and Galtney filed both traditional and no-evidence motions for summary judgment. Brown filed a motion for partial summary judgment on his partnership and bonus claims. The trial court granted IBS's and Galtney's motions for summary judgment and denied Brown's motion for partial summary judgment. This appeal followed.

II. PROPRIETY OF SUMMARY JUDGMENT

A. STANDARDS OF REVIEW

After adequate time for discovery, a party may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. TEX.R. CIV. P. 166a(i); *Brewer & Pritchard, P.C. v. Johnson,* 7 S.W.3d 862, 866 (Tex.App.-Houston [1st Dist.] 1999), *aff'd,* 73

S.W.3d 193 (Tex.2002). The motion must specify which essential elements of the opponent's claim or defense lack supporting evidence. *See Brewer & Pritchard,* 7 S.W.3d at 866-67. Once the party seeking the no-evidence summary judgment files a proper motion, the respondent must bring forth evidence that raises a fact issue on the challenged elements. *See Jackson v. Fiesta Mart, Inc.*, 979 S.W.2d 68, 71 (Tex.App.-Austin 1998, no pet.). The party with the burden of proof at trial has the burden of proof in the summary judgment proceeding. *Flameout Design & Fabrication, Inc. v. Pennzoil Caspian Corp.*, 994 S.W.2d 830, 834 (Tex.App.-Houston [1st Dist.] 1999, no pet.). The respondent need not "marshal its proof" as for trial but need only "point out" evidence that raises a fact issue on the challenged elements. *Howell v. Hilton Hotels Corp.*, 84 S.W.3d 708, 715 (Tex.App.-Houston [1st Dist.] 2002, pet. denied).

The standard of review in an appeal from a traditional summary judgment requires a defendant who moved for a summary judgment on the plaintiff's causes of action (1) to show there is no genuine issue of material fact as to at least one element of each of the plaintiff's causes of action or (2) to establish each element of the defendant's affirmative defense. *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex.1995). In reviewing a traditional or a no-evidence summary judgment, we assume all the evidence favorable to the nonmovant is true, indulge every reasonable inference in favor

of the nonmovant, and resolve any doubts in favor of the nonmovant. *Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co.*, 51 S.W.3d 573, 577 (Tex.2001). When, as here, the trial court's summary judgment order does not specify the ground or grounds on which summary judgment is rendered, we will affirm the summary judgment if any of the grounds stated in the motion is meritorious. *Id.* (*citing Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex.1989)).

B. PARTNERSHIP CLAIMS

The parties filed cross-motions for summary judgment on Brown's partnership claims. Specifically, IBS and Galtney contended there was no evidence to raise a fact issue concerning whether or not Brown and Galtney/IBS had entered into a partnership agreement. In issue one on appeal, Brown contends the trial court erred by granting IBS/Galtney's motion for summary judgment on his partnership claims.

Article 2.03 of the Texas Revised Partnership Act ("TRPA") sets forth five factors to consider in determining whether a partnership has been created. Those factors include (1) the receipt or right to receive a share of profits of the business; (2) the expression of an intent to be partners of the business; (3) the participation or right to participate in control of the business; (4) the sharing of or agreement to share losses of the business or liability for claims by third parties against the business; and (5) the contribution of or an agreement to contribute money or property to the business. TEX.REV.CIV. STAT.ANN. art. 6132b-2.03(a) (Vernon Supp.2004-2005).

The Supreme Court of Texas has held that, to establish a partnership or joint venture, a plaintiff must show (1) a community of interest in the venture, (2) an agreement to share profits, (3) an agreement to share losses, and (4) a mutual right or control or management of the enterprise. *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 176 (Tex.1997).

IBS and Galtney contend that Brown's partnership claims fail as a matter of law because the evidence conclusively establishes that he had no right to receive a share of the profits of the business because his salary and bonus compensation package was merely compensation for the services of an at-will employee. We agree.

The TPRA provides that "sharing or having a right to share gross returns or revenues" is not indicative of a partnership arrangement. TEX.REV.CIV. STAT.ANN. art. 6132b-2.03(b)(3) (Vernon Supp.2004-2005). Additionally, the supreme court has held that an essential element of a partnership is "a community of profit, an interest in the profits as profits, as distinguished from an interest therein as compensation." *Tanner v. Drake*, 124 Tex. 395, 78 S.W.2d 162, 163 (1935). The supreme court explored this concept further in *Schlumberger Technology Corp.* 959 S.W.2d at 176. In *Schlumberger,* two brothers were hired by a mining company to assist in developing an offshore mining operation. *Id.* at 173. In return, the brothers were paid a consulting fee and a royalty in any diamonds mined through the project. *Id.* When a potential investor in the project pulled out, the brothers sued the investor alleging that it had violated its fiduciary duty as a partner. *Id.* at 174. The supreme court held that the brothers were not partners of the joint venture, but were receiving compensation for services rendered, not a share of the profits of the venture. *Id.* at 176. In so holding, the court stated as follows:

Entitlement to a royalty based on gross receipts is not profit sharing. *See* TEX.REV.CIV. STAT.ANN. art. 6132b, § 7(3)

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(sharing gross returns does not itself establish partnership); *see also* *Patton v. Callaway*, 522 S.W.2d 252, 256 (Tex.Civ.App.-El Paso 1975, writ ref'd n.r.e.). Of course, the payment of consultation fees is not the sharing of profits. Such payments are compensation for services rendered and are unrelated to the venture's profits. *See Grimmett v. Higginbotham*, 907 S.W.2d 1, 2-4 (Tex.App.-Tyler 1994, writ denied) (weekly compensation unrelated to financial requirements of business is no evidence of agreement to share profits or losses); *Gutierrez v. Yancey*, 650 S.W.2d 169, 172 (Tex.App.-San Antonio 1983, no writ) (partners must participate in profits and share them as principals of business and not as compensation).

Id.

The undisputed evidence in this case shows that Brown was entitled to receive a base salary plus 42% of half of the gross commissions attributable to business written out of IBS's Houston office. Brown's base salary, like the consulting fee charged by the brothers in *Schlumberger,* cannot be considered a share of profits. Similarly, Brown's portion of the gross commissions, like the royalty interest paid to the brothers in *Schlumberger,* was compensation for services rendered to IBS, not an interest in the overall profits of IBS. That IBS agreed to divide Brown's and Galtney's portion of gross commissions in a proportion that Brown and Galtney had agreed was appropriate does not change the nature of the bonus from compensation to profits.

Because there was no evidence that Brown shared, or had the right to share profits, IBS and Galtney negated an essential element of Brown's partnership claims. Accordingly, the trial court did not err in granting Galtney's and IBS's motion for summary judgment on these claims.

Accordingly, we overrule Brown's first issue.

C. FRAUD AND CONSPIRACY

In his fourth amended petition, Brown claimed that he was a victim of a fraud and conspiracy between IBS and Brown to remove him from the "partnership." In his brief, Brown claims that "[a] representation and promise was made to Brown that he would continue to be Galtney's partner while at IBS."

The basis of this claim is Brown's contention that he was wrongfully induced to leave his prior employment with promises that he would continue in his "partnership" with Galtney at IBS. As such, this claim is grounded on the premise that he and Galtney were "partners" and that he was fraudulently expelled from the partnership in order to gain control of his "book of business."

However, Brown and Galtney were not partners, as a matter of law, but were at-will employees of IBS. Furthermore, the record shows that they were under a similar financial arrangement while working at their previous employer, Jarrett Insurance Brokers. Because Brown could not have been fraudulently induced into continuing a "partnership" that never existed, his fraud and conspiracy claims fail.

As we have already stated, Brown was an at-will employee of IBS. Brown's status as an at-will employee precludes his claim for fraudulent inducement as a matter of law. *See Haase v. Glazner*, 62 S.W.3d 795, 798 (Tex.2001) (stating that "[w]ithout a binding agreement, there is no detrimental reliance, and thus no fraudulent inducement claim"). There was simply no enforceable agreement to continue Brown's employment at IBS. *See also* *Leach v. Conoco, Inc.*, 892 S.W.2d 954, 961 (Tex.App.-Houston [1st Dist.]1995, writ

dism'd w.o.j) ("An `at will' employee is barred from bringing a cause of action for fraud against his employer based upon the employer's decision to discharge the employee."). Similarly, Galtney, another at-will employee of IBS, was not in a position to promise Brown that his employment at IBS would continue indefinitely, and any reliance on such a statement by Brown would have been unreasonable.[3]

Because Brown cannot allege a cause of action for fraud in connection with his termination as an at-will employee, the trial court did not err in granting IBS's and Galtney's motions for summary judgment on this issue.

Accordingly, we overrule Brown's second issue.

D. ENTITLEMENT TO BONUS

In his fourth amended petition, Brown claimed that he was entitled to a bonus in the amount of $79,700 for the year 2000. The record shows that IBS calculated his bonus at $10,263, the tender of which Brown refused. Brown and IBS and Galtney filed cross-motions for summary judgment on the bonus issue. The trial court granted IBS's and Galtney's motion and denied Brown's motion. In his third issue on appeal, Brown contends that the trial court erred by ruling in favor of IBS and Galtney.

One of the grounds upon which IBS and Galtney relied was judicial estoppel. Specifically, IBS and Galtney contended that Brown was judicially estopped from claiming entitlement to a bonus because he had filed a petition in bankruptcy declaring that the estimated value of his assets was under $50,000.

The doctrine of judicial estoppel, as it relates to bankruptcy pleadings, has been described as follows:

Judicial estoppel is a common law principle that applies when a party tries to contradict his or her own sworn statement given in prior litigation. *See Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir.1988). It is designed to protect the integrity of the judicial process by preventing a party from "playing fast and loose" with the courts to suit the party's own purposes. *Ergo Science, Inc. v. Martin*, 73 F.3d 595, 598 (5th Cir.1996). The primary purpose of the doctrine is not to protect litigants, but rather the integrity of the judiciary. *See Interfirst Corp.*, 858 F.2d at 268. In other words, it is used to prevent the use of intentional self-contradiction as a means of obtaining unfair advantage. *See Andrews,* 959 S.W.2d at 649.

Debtors in a bankruptcy action have an absolute duty to report whatever interests they hold in property, even if they believe the asset is worthless or unavailable to the bankruptcy estate. *See In re Yonikus*, 974 F.2d 901, 904 (7th Cir.1992). Because of the broad scope of § 541(a), a potential personal injury claim that arose prepetition is property of the estate that must be reported. 11 U.S.C.A. § 541(a) (West 1993); *see In re Allen*, 179 B.R. 818, 820 (Bankr.E.D.Tex.1995). When a cause of action accrues before the date the bankruptcy petition is filed, the claim is an interest that the debtor possesses when he or she files the bankruptcy petition. *See Sizemore v. Arnold*, 647 N.E.2d 697, 699 (Ind.Ct.App.1995).

Stewart v. Hardie, 978 S.W.2d 203, 208(Tex. App.-Fort Worth 1998, pet. denied).

However, there are limitations to the doctrine of judicial estoppel based upon bankruptcy pleadings. *See Thompson v. Cont'l Airlines*, 18 S.W.3d 701, 703 n. 1 (Tex.App.-San Antonio 2000, no pet.); *In re Coastal Plains, Inc.*, 179 F.3d 197, 206-07 (5th Cir.1999). The doctrine of judicial estoppel may be applied only when (1) the position of the party to be estopped is clearly inconsistent with its previous position; (2) the court has accepted the prior position; and (3) the party to be estopped has acted intentionally, not inadvertently. *See In re Coastal Plains,* 179 F.3d at 206-07. In considering judicial estoppel for bankruptcy cases, the debtor's failure to disclose is "inadvertent" only when the debtor lacks knowledge of the undisclosed claims or has no motive for their concealment. *See id.* at 210.

In this case, Brown's bankruptcy petition stating that he had assets under $50,000 clearly conflicts with his petition in this case, in which he claims that he is entitled to receive a $79,700 bonus. Additionally, Brown filed his bankruptcy petition *after* his petition in this case. Thus, at the time he filed his bankruptcy petition, he was certainly aware of the existence of the potential asset of his bonus claims in this case. Nor does Brown's response to the summary judgment raise a fact question as to whether he omitted the asset inadvertently. Instead, Brown relies on the fact that the bankruptcy petition was ultimately dismissed on March 20, 2002, and thus, he seems to be contending that the bankruptcy court must not have accepted his prior position that he had less than $50,000 in assets. However, the bankruptcy was dismissed because the trustee "concluded that there [were] no assets to administer for the benefit of the creditors of this estate." *See Dallas*

Sales Co. v. Carlisle Silver Co., 134 S.W.3d 928, 932 (Tex.App.-Waco 2004, no pet.) (stating that bankruptcy court accepted debtors position by authorizing bankruptcy trustee to abandon assets of debtor's bankruptcy estate because assets were of "no or little value to the estate."). Accordingly, we conclude that the bankruptcy court accepted Brown's position that he possessed less than $50,000 in assets. Furthermore, while the bankruptcy was pending, Brown's creditors were prevented from attempting to collect their debts. Thus, Brown benefitted, at least temporarily, by filing the inconsistent bankruptcy petition.

Because the position urged by Brown in the bankruptcy court—that he had fewer that $50,000 in assets, including potential assets—is inconsistent with the position urged in his petition in this case, we conclude that Brown is estopped from claiming that he is entitled to a $79,700 bonus. Therefore, the trial court did not err by granting IBS's and Galtney's motion for summary judgment on the bonus issue. Accordingly, we overrule Brown's third issue.

E. TORTIOUS INTERFERENCE AND DEFAMATION

In his fourth issue on appeal, Brown contends the trial court erred by granting the defendants' summary judgment motion on his claims of tortious interference with prospective business relationships and defamation. Both claims were premised on the allegation that "false, negative and unflattering comments [were] published by IBS and its agents within the industry following Brown's termination."

To establish a cause of action for tortious interference with prospective business relationships, a plaintiff must show (1) there was a reasonable probability that the parties would have entered into a contractual

relationship; (2) the defendant committed an independently tortious or unlawful act that prevented the relationship from occurring; (3) the defendant did such act with a conscious desire to prevent the relationship from occurring or knew that the interference was certain or substantially certain to occur as a result of his conduct; and (4) the plaintiff suffered actual harm or damage as a result of the defendant's interference. *Baty v. ProTech Ins. Agency*, 63 S.W.3d 841, 858 (Tex.App.-Houston [14th. Dist.] 2001, pet. denied). Because Brown's tortious interference claim rests exclusively on the existence of an "independently tortious or unlawful" act by the defendants, we must first determine the validity of Brown's defamation claim.

To prove a cause of action for defamation, a plaintiff must prove that (1) the defendant published a statement of fact, (2) the statement was defamatory; (3) the statement was false, (4) the defendant acted negligently in publishing the false and defamatory statement; and (5) the plaintiff suffered damages as a result. *See WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex.1998).

In his brief, Brown does not point to a specific "statement of fact" that was made to any prospective employer. Instead, he states that "[s]everal of the contacts told Brown that they had received negative information from IBS and its agents." A review of the record cites provided in Brown's brief shows only that some of the people with whom Brown interviewed said that "there were some very unflattering things being said about [him]." One potential employer told Brown, "Well, we— somebody—a person in your company, and I'd rather not disclose who, received a

phone call from somebody that I prefer not to disclose, and Braden, we just can't do it." Another potential employer stated that Brown's "association with [Galtney] hurt him." There was also reference in the record to an anonymous e-mail that was unflattering to Brown. During his deposition, Brown was asked the following:

Question: What other evidence are you aware of, firsthand or secondhand, of you being blackballed in the industry by Matt Galtney or Blake Bartnick or anyone with IBS of Texas?

* * * *

Brown: Personally, every slammed door I received while trying to obtain a job doing what I did. And the exact words that Peter Willis Flemming told me while I was sitting in his office that "Matt called and said some very unflattering things about you."

Brown also claimed that a coworker at IBS, Jennifer Hixon, referred to him as "a walking E & O."[4] Mary Elizabeth Walker, a senior broker assistant at IBS, testified that Hixon said to her that Brown was a "walking E & O." However, Walker heard the statement straight from Hixon, not from "within the gossip circle."

Brown testified that Hixon sent a fax containing very disparaging comments about him to Galtney. Claudia Cox, a retail broker, and Karen Brooks, Cox's assistant, told Brown that Hixon said "some very disparaging things" about him, but that the two women "tuned her out."

Hixon, herself, admitted that she had called Brown a "walking E & O" and that she had made "negative comments" about Brown to people outside IBS.

1. "Negative information," unflattering emails, and "disparaging things"

IBS and Galtney moved for a no-evidence summary judgment, contending that there was no evidence that the "negative information," unflattering emails, and "disparaging things" that were said about Brown were defamatory or false. We agree. Because Brown did not provide any evidence about the substance of the "negative information," unflattering emails and "disparaging things" that he contends IBS and Galtney said or wrote about him, there is nothing in the record to raise a fact question for the jury. Put simply, Brown failed to bring forth any evidence on two elements of his defamation claim, *i.e.,* that the "negative information," unflattering emails, and "disparaging" things that were said about him were either defamatory or untrue. Accordingly, the trial court properly granted IBS's and Galtney's no-evidence motions for summary judgment on these claims.

2. "Walking E & O" statement

The only specific, defamatory statement that Brown contends was made about him was Jennifer's Hixon's statement that Brown was "a walking E & O." In their motions for summary judgment, IBS and Galtney contend that Hixon's statement was not an actionable statement of fact, but was her opinion. We agree.

The First Amendment to the United States Constitution and article 1, section 8 of the Texas Constitution require a plaintiff to establish that the defendant published a false, defamatory statement of fact, rather than an opinion, as an essential element of a cause of action for libel. *A.H. Belo Corp. v. Rayzor*, 644 S.W.2d 71, 79 (Tex.App.-Fort Worth 1982, writ ref'd n.r.e.); *see Carr,* 776 S.W.2d at 570. In other words, the plaintiff must prove that the statements contained false, defamatory facts rather than opinions or characterizations. *A.H. Belo Corp.,* 644 S.W.2d at 80. Whether a statement is an opinion or an assertion of fact is a question of law. *Carr,* 776 S.W.2d at 570. An alleged defamatory statement of opinion requires an implication of undisclosed facts to be actionable. *Bentley v. Bunton*, 94 S.W.3d 561, 584 (Tex.2002).

There is no assertion of fact in Hixon's statement that Brown was a "walking E & O." Instead, the statement clearly expresses Hixon's opinion that Brown was likely to perform his work in such a manner that IBS's errors and omissions insurer would be required to provide coverage when he made a mistake. Similarly, there are no implied, but verifiable, facts in Hixon's statement. *See id.* at 585 (holding that opinion that judge was "corrupt" actionable because statement included implication that opinion was based upon verifiable facts). As such, Hixon's reference to Brown as "walking E & O" is not actionable. *See Associated Press v. Cook*, 17 S.W.3d 447, 454 (Tex.App.-Houston [1st Dist.] 2000, no pet.) (statement that plaintiff was "blight on law enforcement" was statement of opinion and amounted to "little more than name calling"). As such, the trial court properly granted summary judgment on this claim.

Because the trial court properly granted summary judgment on Brown's defamation claims, and because Brown's tortious interference claim is based on the alleged tort of defamation, the trial court also properly granted summary judgment on Brown's tortious interference claim.

Accordingly, we overrule Brown's fourth issue.

F. NEGLIGENT HIRING AND SUPERVISION

In his fourth amended petition, Brown claimed that IBS was negligent in the manner in which it hired and supervised Galtney and Hixon. IBS filed a motion

for summary judgment on this claim, which the trial court granted.

To prevail on a claim for negligent hiring or supervision, the plaintiff is required to establish not only that the employer was negligent in hiring or supervising the employee, but also that the employee committed an actionable tort against the plaintiff. *Castillo v. Gared, Inc.*, 1 S.W.3d 781, 786 (Tex.App.-Houston [1st Dist.] 1999, pet. denied).

As stated earlier, Brown cannot prove an actionable tort, i.e., defamation. Thus, his negligent hiring and supervision claims fail because of lack of causation. Accordingly, we overrule Brown's fifth issue.

G. VICARIOUS LIABILITY

In his sixth issue on appeal, Brown contends that "in the event that the Trial Court's Summary Judgment is reversed in whole or in part, [his claims for vicarious liability, vice-

principal liability, single business enterprise and alter ego as theories of secondary, vicarious or derivative liability] should be remanded for trial along with any claim the Court remands for trial pursuant to this Appeal." Because we have not found reversible error on any other issues raised by appellant, we need not address his sixth issue, and we decline to do so.

III. CONCLUSION

We affirm the judgment of the trial court.

Notes:

1. The document stated as follows:

I further understand that I have the right to terminate my employment at any time for any reason and the Company retains a similar right to terminate my employment. In addition, I understand that no officer, supervisor or other employee of the Company, other than the President of the Company for which I work, has the authority to alter, orally or in writing, the terminable-at-will status of my employment.

2. IBS calculated Brown's bonus as follows:

"The total revenue generated through July 31, 2000 was $1,069,301. Fifty percent of that amount is $534,651. Mr. Brown's 42% share is $224,553. Pursuant to the agreement, the $224,553 is reduced by $214,290 for the compensation Mr. Brown received through September 30, 2000. This includes $190,614 in salary, an auto allowance of $4,615, and accrued vacation in the amount of $19,061. Accordingly, Mr. Brown would receive, if anything, $10,263."

3. We note that there is no evidence that Galtney ever represented to Brown that he would be anything other than an at-will employee of IBS. Brown, in fact, signed an acknowledgment of his status as such.

4. We assume that the phrase "walking E & O" refers to a person whose work performance is likely to cause the company to file a claim with their errors and omissions insurer.

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395 U.S. 444
89 S.Ct. 1827
23 L.Ed.2d 430
Clarence BRANDENBURG, Appellant,

v.

State of OHIO.

No. 492.
Argued Feb. 27, 1969.
Decided June 9, 1969.

Allen Brown, Cincinnati, Ohio, for appellant.

Leonard Kirschner, Cincinnati, Ohio, for appellee.

PER CURIAM.

The appellant, a leader of a Ku Klux Klan group, was convicted under the Ohio Criminal Syndicalism statute for 'advocat(ing) * * * the duty, necessity, or propriety

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of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform' and for 'voluntarily assembl(ing) with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.' Ohio Rev. Code Ann. § 2923.13. He was fined $1,000 and sentenced to one to 10 years' imprisonment. The appellant challenged the consitutionality of the criminal syndicalism statute under the First and Fourteenth Amendments to the United States Constitution, but the intermediate appellate court of Ohio affirmed his conviction without opinion. The Supreme Court of Ohio dismissed his appeal, sua sponte, 'for the reason that no substantial constitutional question exists herein.' It did not file an opinion or explain its conclusions. Appeal was taken to this Court, and we noted probable jurisdiction. 393 U.S. 948, 89 S.Ct. 377, 21 L.Ed.2d 360 (1968). We reverse.

The record shows that a man, identified at trial as the appellant, telephoned an announcer-reporter on the staff of a Cincinnati television station and invited him to come to a Ku Klux Klan 'rally' to be held at a farm in Hamilton County. With the cooperation of the organizers, the reporter and a cameraman attended the meeting and filmed the events. Portions of the films were later broadcast on the local station and on a national network.

The prosecution's case rested on the films and on testimony identifying the appellant as the person who communicated with the reporter and who spoke at the rally. The State also introduced into evidence several articles appearing in the film, including a pistol, a rifle, a shotgun, ammunition, a Bible, and a red hood worn by the speaker in the films.

One film showed 12 hooded figures, some of whom carried firearms. They were gathered around a large wooden cross, which they burned. No one was present

other than the participants and the newsmen who made the film. Most of the words uttered during the scene were incomprehensible when the film was projected, but scattered phrases could be understood that were derogatory of Negroes and, in one instance, of Jews.[1] Another scene on the same film showed the appellant, in Klan regalia, making as peech. The speech, in full, was as follows:

'This is an organizers' meeting. We have had quite a few members here today which are—we have hundreds, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio Dispatch, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken.

'We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you.'

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The second film showed six hooded figures one of whom, later identified as the appellant, repeated a speech very similar to that recorded on the first film. The reference to the possibility of 'revengeance' was omitted, and one sentence was added: 'Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel.' Though some of the figures in the films carried weapons, the speaker did not.

The Ohio Criminal Syndicalism Statute was enacted in 1919. From 1917 to 1920, identical or quite similar laws were adopted by 20 States and two territories. E. Dowell, A History of Criminal Syndicalism Legislation in the United States 21 (1939). In 1927, this Court sustained the constitutionality of California's Criminal Syndicalism Act, Cal. Penal Code §§ 11400—11402, the text of which is quite similar to that of the laws of Ohio. Whitney v. California, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1927). The Court upheld the statute on the ground that, without more, 'advocating' violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it. Cf. Fiske v. Kansas, 274 U.S. 380, 47 S.Ct. 655, 71 L.Ed. 1108 (1927). But Whitney has been thoroughly discredited by later decisions. See Dennis v. United States, 341 U.S. 494, at 507, 71 S.Ct. 857, at 866, 95 L.Ed. 1137 (1951). These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[2] As we

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said in Noto v. United States, 367 U.S. 290, 297—298, 81 S.Ct. 1517, 1520—1521, 6 L.Ed.2d 836 (1961), 'the mere abstract teaching * * * of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.' See also Herndon v. Lowry, 301 U.S. 242, 259—261, 57 S.Ct. 732, 739—740, 81

L.Ed. 1066 (1937); Bond v. Floyd, 385 U.S. 116, 134, 87 S.Ct. 339, 348, 17 L.Ed.2d 235 (1966). A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control. Cf. Yates v. United States, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957); De Jonge v. Oregon, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278 (1937); Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931). See also United Stats v. Robel, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967); Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); Elfbrandt v. Russell, 384 U.S. 11, 86 S.Ct. 1238, 16 L.Ed.2d 321 (1966); Aptheker v. Secretary of State, 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964); Baggett v. Bullitt, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964).

Measured by this test, Ohio's Criminal Syndicalism Act cannot be sustained. The Act punishes persons who 'advocate or teach the duty, necessity, or propriety' of violence 'as a means of accomplishing industrial or political reform'; or who publish or circulate or display any book or paper containing such advocacy; or who 'justify' the commission of violent acts 'with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism'; or who 'voluntarily assemble' with a group formed 'to teach or advocate the doctrines of criminal syndicalism.' Neither the indictment nor the trial judge's instructions to the jury in any way refined the statute's bald definition of the crime

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in terms of mere advocacy not distinguished from incitement to imminent lawless action.[3]

Accordingly, we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action.[4] Such a statute falls within the condemnation of the First and Fourteenth Amendments. The contrary teaching of Whitney v. California, supra, cannot be supported, and that decision is therefore overruled.

Mr. Justice BLACK, concurring.

I agree with the views expressed by Mr. Justice DOUGLAS in his concurring opinion in this case that the 'clear and present danger' doctrine should have no place

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in the interpretatio of the First Amendment. I join the Court's opinion, which, as I understand it, simply cites Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951), but does not indicate any agreement on the Court's part with the 'clear and present danger' doctrine on which Dennis purported to rely.

Mr. Justice DOUGLAS, concurring.

While I join the opinion of the Court, I desire to enter a caveat.

The 'clear and present danger' test was adumbrated by Mr. Justice Holmes in a case arising during World War I—a war 'declared' by the Congress, not by the Chief Executive. The case was

Schenck v. United States, 249 U.S. 47, 52, 39 S.Ct. 247, 249, 63 L.Ed. 470, where the defendant was charged with attempts to cause insubordination in the military and obstruction of enlistment. The pamphlets that were distributed urged resistance to the draft, denounced conscription, and impugned the motives of those backing the war effort. The First Amendment was tendered as a defense. Mr. Justice Holmes in rejecting that defense said:

'The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.'

Frohwerk v. United States, 249 U.S. 204, 39 S.Ct. 249, 63 L.Ed. 561, also authored by Mr. Justice Holmes, involved prosecution and punishment for publication of articles very critical of the war effort in World War I. Schenck was referred to as a conviction for obstructing security 'by words of persuasion.' Id., at 206, 39 S.Ct. at 250. And the conviction in Frohwerk was sustained because 'the circulation of the paper was

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in quarters where a little breath would be enough to kindle a flame.' Id., at 209, 39 S.Ct., at 251.

Debs v. United States, 249 U.S. 211, 39 S.Ct. 252, 63 L.Ed. 566, was the third of the trilogy of the 1918 Term. Debs was convicted of speaking in opposition to the war where his 'opposition was so expressed that its natural and intended effect would be to obstruct recruiting.' Id., at 215, 39 S.Ct. at 253.

'If that was intended and if, in all the circumstances, that would be its probable effect, it would not be protected by reason of its being part of a general program in expressions of a general and conscientious belief.' Ibid.

In the 1919 Term, the Court applied the Schenck doctrine to affirm the convictions of other dissidents in World War I. Abrams v. United States, 250 U.S. 616, 40 S.Ct. 17, 63 L.Ed. 1173, was one instance. Mr. Justice Holmes, with whom Mr. Justice Brandeis concurred, dissented. While adhering to Schenck, he did not think that on the facts a case for overriding the First Amendment had been made out:

'It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country.' 250 U.S., at 628, 40 S.Ct., at 21.

Another instance was Schaefer v. United States, 251 U.S. 466, 40 S.Ct. 259, 64 L.Ed. 360, in which Mr. Justice Brandeis, joined by Mr. Justice Holmes, dissented. A third was Pierce v. United States, 252 U.S. 239, 40 S.Ct. 205, 64 L.Ed. 542, in which again Mr. Justice Brandeis, joined by Mr. Justice Holmes, dissented.

Those, then, were the World War I cases that put the gloss of 'clear and present danger' on the First Amendment. Whether the war power—the greatest leveler of them all—is adequate to sustain that doctrine is debat-

able. The dissents in Abrams, Schaefer, and Pierce show how easily 'clear and present danger' is manipulated to crush what Brandeis called '(t)he fundamental right of free men to strive for better conditions through new legislation and new institutions' by argument and discourse (Pierce v. United States, supra, at 273, 40 S.Ct. at 217) even in time of war. Though I doubt if the c lear and present danger' test is congenial to the First Amendment in time of a declared war, I am certain it is not reconcilable with the First Amendment in days of peace.

The Court quite properly overrules Whitney v. California, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095, which involved advocacy of ideas which the majority of the Court deemed unsound and dangerous.

Mr. Justice Holmes, though never formally abandoning the 'clear and present danger' test, moved closer to the First Amendment ideal when he said in dissent in Gitlow (Gitlow v. People of State of New York, 268 U.S. 652, 45 S.Ct. 626, 69 L.Ed. 1138):

'Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.'

We have never been faithful to the philosophy of that dissent.

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The Court in Herndon v. Lowry, 301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1066, overturned a conviction for exercising First Amendment rights to incite insurrection because of lack of evidence of incitement. Id., at 259—261, 57 S.Ct., at 739—740. And see Hartzel v. United States, 322 U.S. 680, 64 S.Ct. 1233, 88 L.Ed. 1534. In Bridges v. California, 314 U.S. 252, 261—263, 62 S.Ct. 190, 192 194, 86 L.Ed. 192, we approved the 'clear and present danger' test in an elaborate dictum that tightened it and confined it to a narrow category. But in Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137, we opened wide the door, distorting the 'clear and present danger' test beyond recognition.[1]

In that case the prosecution dubbed an agreement to teach the Marxist creed a 'conspiracy.' The case was submitted to a jury on a charge that the jury could not convict unless it found that the defendants 'intended to overthrow the Government 'as speedily as circumstances would permit." Id., at 509—511, 71 S.Ct., at 867. The Court sustained convictions under the charge, construing it to mean a determination of "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[2] Id., at 510, 71 S.Ct., at 868, quoting from United States v. Dennis, 183 F.2d 201, 212.

Out of the 'clear and present danger' test came other offspring. Advocacy and teaching of forcible overthrow of government as an abstract principle is immune from prosecution. Yates v.

United States, 354 U.S. 298, 318, 77 S.Ct. 1064 1076, 1 L.Ed.2d 1356. But an 'active' member, who has a guilty knowledge and intent of the aim to overthrow the Government

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by violence, Noto v. United States, 367 U.S. 290, 81 S.Ct. 1517, 6 L.Ed.2d 836, may be prosecuted. Scales v. United States, 367 U.S. 203, 228, 81 S.Ct. 1469 1485, 6 L.Ed.2d 782. And the power to investigate, backed by the powerful sanction of contempt, includes the power to determine which of the two categories fits the particular witness. Barenblatt v. United States, 360 U.S. 109, 130, 79 S.Ct. 1081 1094, 3 L.Ed.2d 1115. And so the investigator roams at will through all of the beliefs of the witness, ransacking his conscience and his innermost thoughts.

JudgeL earned Hand, who wrote for the Court of Appeals in affirming the judgment in Dennis, coined the 'not improbable' test, United States v. Dennis, 2 Cir., 183 F.2d 201, 214, which this Court adopted and which Judge Hand preferred over the 'clear and present danger' test. Indeed, in his book, The Bill of Rights 59 (1958), in referring to Holmes' creation of the 'clear and present danger' test, he said, 'I cannot help thinking that for once Homer nodded.'

My own view is quite different. I see no place in the regime of the First Amendment for any 'clear and present danger' test, whether strict and tight as some would make it, or free-wheeling as the Court in Dennis rephrased it.

When one reads the opinions closely and sees when and how the 'clear and present danger' test has been applied, great misgivings are aroused. First, the threats were often loud but always puny and made serious only by judges so wedded to the status quo that critical analysis made them nervous. Second, the test was so twisted and perverted in Dennis as to make the trial of those teachers of Marxism an all-out political trial which was part and parcel of the cold war that has eroded substantial parts of the First Amendment.

Action is often a method of expression and within the protection of the First Amendment.

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Suppose one tears up his own copy of the Constitution in eloquent protest to a decision of this Court. May he be indicted?

Suppose one rips his own Bible to shreds to celebrate his departure from one 'faith' and his embrace of atheism. May he be indicted?

Last Term the Court held in United States v. O'Brien, 391 U.S. 367, 382, 88 S.Ct. 1673 1682, 20 L.Ed.2d 672, that a registrant under Selective Service who burned his draft card in protest of the war in Vietnam could be prosecuted. The First Amendment was tendered as a defense and rejected, the Court saying:

'The issuance of certificates indicating the registration and eligibility classification of individuals is a legitimate and substantial administrative aid in the functioning of this system. And legislation to insure the continuing availability of issued certificates serves a legitimate and substantial purpose in the system's administration.' 391 U.S., at 377 378, 88 S.Ct., at 1679.

But O'Brien was not prosecuted for not having his draft card available when asked for by a federal agent. He was indicted, tried and convicted for burning the card. And this Court's affirmance of that conviction was not, with all respect, consistent with the First Amendment.

The act of praying often involves body posture and movement as well as utterances. It is nonetheless protected by the Free Exercise Clause. Picketing, as we have said on numerous occasions, is 'free speech plus.' See Bakery and Pastry Drivers and Helpers Local 802 of International Brotherhood of Teamsters v. Wohl, 315 U.S. 769, 775, 62 S.Ct. 816, 819, 86 L.Ed. 1178 (Douglas, J., concurring); Giboney v. Empire Storage Co., 336 U.S. 490, 501, 69 S.Ct. 684, 690, 93 L.Ed. 834; Hughes v. Superior Court, 339 U.S. 460, 465, 70 S.Ct. 718, 721, 94 L.Ed. 985; National Labor Relations Board v. Fruit and Vegetable Packers, 377 U.S. 58, 77, 84 S.Ct. 1063 1073, 12 L.Ed.2d 129 (Black, J., concurring), and id., at 93, 84 S.Ct. at 1081 (Harlan, J., dissenting); Cox v. Louisiana, 379 U.S. 559, 578, 85 S.Ct. 466, 468, 476, 13 L.Ed.2d 487 (opinion of Black, J.); Amalgamated Food Employees v. Logan Plaza, 391 U.S. 308, 326, 88 S.Ct. 1601 1612, 20 L.Ed.2d 603 (Douglas, J., concurring). That means that it can be regulated when it comes to the 'plus' or 'action' side of the protest. It can be regulated as to

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the number of pickets and the place and hours (see Cox v. Louisiana, supra), because traffic and other community problems would otherwise suffer.

But none of these considerations are implicated in the symbolic protest of the Vietnam war in the burning of a draft card.

One's beliefs have long been thought to be sanctuaries which government could not invade. Br enblatt is one example of the ease with which that sanctuary can be violated. The lines drawn by the Court between the criminal act of being an 'active' Communist and the innocent act of being a nominal or inactive Communist mark the difference only between deep and abiding belief and casual or uncertain belief. But I think that all matters of belief are beyond the reach of subpoenas or the probings of investigators. That is why the invasions of privacy made by investigating committees were notoriously unconstitutional. That is the deep-seated fault in the infamous loyalty-security hearings which, since 1947 when President Truman launched them, have processed 20,000,000 men and women. Those hearings were primarily concerned with one's thoughts, ideas, beliefs, and convictions. They were the most blatant violations of the First Amendment we have ever known.

The line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts.

The example usually given by those who would punish speech is the case of one who falsely shouts fire in a crowded theatre.

This is, however, a classic case where speech is brigaded with action. See Speiser v. Randall, 357 U.S. 513, 536—537, 78 S.Ct. 1332 1346, 2 L.Ed.2d 1460 (Douglas, J., concurring.) They are indeed inseparable and a prosecution can be launched for the overt

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acts actually caused. Apart from rare instances of that kind, speech is, I think, immune from prosecution. Certainly there is no constitutional line between advocacy of abstract ideas as in Yates and advocacy of political action as in Scales. The quality of advocacy turns on the depth of the conviction; and government has no power to invade that sanctuary of belief and conscience.[3]

1. The significant portions that could be understood were:

'How far is the nigger going to—yeah.'

'This is what we are going to do to the niggers.'

'A dirty nigger.'

'Send the Jews back to Israel.'

'Let's give them back to the dark garden.'

'Save America.'

'Let's go back to constitutional betterment.'

'Bury the niggers.'

'We intend to do our part.'

'Give us our state rights.'

'Freedom for the whites.'

'Nigger will have to fight for every inch he gets from now on.'

2. It was on the theory that the Smith Act, 54 Stat. 670, 18 U.S.C. § 2385, embodied such a principle and that it had been applied only in conformity with it that this Court sustained the Act's constitutionality. Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951). That this was the basis for Dennis was emphasized in Yates v. United States, 354 U.S. 298, 320 324, 77 S.Ct. 1064, 1077—1079, 1 L.Ed.2d 1356 (1957), in which the Court overturned convictions for advocacy of the forcible overthrow of the Government under the Smith Act, because the trial judge's instructions had allowed conviction for mere advocacy, unrelated to its tendency to produce forcible action.

3. The first count of the indictment charged that appellant 'did unlawfully by word of mouth advocate the necessity, or propriety of crime, violence, or unlawful methods of terrorism as a means of accomplishing political reform * * *.' The second count charged that appellant 'did unlawfully voluntarily assemble with a group or assemblage of persons formed to advocate the doctrines of criminal syndicalism * * *.' The trial judge's charge merely followed the language of the indictment. No construction of the statute by the Ohio courts has brought it within constitutionally permissible limits. The Ohio Supreme Court has considered the statute in only one previous case, State v. Kassay, 126 Ohio St. 177, 184 N.E. 521 (1932), where the constitutionality of the statute was sustained.

4. Statutes affecting the right of assembly, like those touching on freedom of speech, must observe the established distinctions between mere advocacy and incitement to imminent lawless action, for as Chief Justice Hughes wrote in De Jonge v. Oregon, supra, 299 U.S. at 364, 57 S.Ct. at 260: 'The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental.' See also United States v. Cruikshank, 92 U.S. 542, 552, 23 L.Ed. 588 (1876); Hague v. CIO, 307 U.S. 496, 513, 519, 59 S.Ct. 954, 963, 965, 83 L.Ed. 1423 (1939); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460—461, 78 S.Ct. 1163, 1170—1171, 2 L.Ed.2d 1488 (1958).

1. See McKay, The Preference For Freedom, 34 N.Y.U.L.Rev. 1182, 1203—1212 (1959).

2. See Feiner v. New York, 340 U.S. 315, 71 S.Ct. 303, 95 L.Ed. 295, where a speaker was arrested for arousing an audience when the only 'clear and present danger' was that the hecklers in the audience would break up the meeting.

3. See Mr. Justice Black, dissenting, in American Communications Assn. C.I.O. v. Douds, 339 U.S. 382, 446, 449, 70 S.Ct. 674, 707, 709, 94 L.Ed. 925 et seq.

VIRGIL BINGHAM, Appellant,
v.
SOUTHWESTERN BELL YELLOW PAGES, INC. AND STEPHEN BROWN, Appellees.
No. 2-06-229-CV.
Court of Appeals of Texas, Second District, Fort Worth.
Delivered: January 17, 2008.

Appeal from the 236th District Court of Tarrant County.

Panel A: CAYCE, C.J.; HOLMAN and GARDNER, JJ.

MEMORANDUM OPINION[1] ON REHEARING

ANNE GARDNER, Justice.

On Appellant's motion for rehearing, we withdraw our opinion and judgment of September 20, 2007, and substitute the following. Our ultimate conclusions remain unchanged.

I. Introduction

In this defamation case, Appellant Virgil Bingham appeals from the trial court's grant of summary judgment in favor of Appellees Southwestern Bell Yellow Pages, Inc. ("SWBYPS") and Stephen Brown. In his sole appellate issue, Appellant contends that the trial court erred in granting Appellees' motion.[2] We affirm.

II. Factual and Procedural Background

Appellant was a long-time employee of SWBYPS who worked under Brown as a Senior Account Representative in the company's Fort Worth sales office. On January 15, 2004, Brown suspended Appellant pending the outcome of an internal investigation into allegations concerning Appellant's mishandling of customer advertising accounts. At the conclusion of the investigation, Brown summoned Appellant back to work and demoted him to a lesser sales position.[3]

Appellant responded by filing the underlying suit against Appellees, alleging slander and slander per se after learning of two meetings that Brown held with Vicki Rowland and Bryan Burkhart, two of Appellant's coworkers,[4] during his suspension period. Appellant claimed that, in those meetings, Brown slandered him by comparing his alleged misconduct to that of a former employee ("Holleyhead") who had been terminated for forging customers' signatures on advertising contracts. Appellant also alleged that during the course of those meetings Brown showed Rowland and Burkhart some of the forged contracts contained in the former employee's file and insinuated that Appellant was also a forger and a thief and that he could not be trusted.

Appellees filed a traditional motion for summary judgment with respect to all of Appellant's claims; Appellant filed a timely response with evidence of his own. In the motion, Appellees asserted that (1) any statements made by Brown during the course of his meetings with Rowland and Burkhart are not capable of having a defamatory meaning, (2) Brown's alleged statements are

covered by a qualified privilege, and (3) Appellant's claim for damages must fail as a matter of law.

The parties filed evidence recounting the alleged defamatory statements from the perspective of Brown, Rowland, and Burkhart. Brown described the events that transpired during the course of his meeting with Rowland as follows:

[Rowland] came to my office and was visibly upset. I sensed she was concerned about her job in light of [Appellant's] suspension. In an effort to comfort Ms. Rowland, I explained to her that she did not need to be concerned about her job because SWBYPS does not make employment decisions flippantly. In an effort to convey to her the lengths SWBYPS goes to before making an employment decision, I referred her to a voluminous investigative file on my credenza related to an employee who had been previously terminated. I believed that the thickness of the this file would convey to Ms. Rowland the type of investigation SWBYPS conducts prior to making employment decisions.

In her deposition, Rowland testified that Brown did not say that Appellant had engaged in conduct similar to that of Holleyhead. In her summary judgment affidavit, Rowland averred that Brown began discussing Appellant's suspension, then walked over to a file cabinet and retrieved a large manila envelope from on top of the cabinet. Brown removed several documents and proceeded to show her that customers' signatures had been forged on SWBYPS contracts. She asked Brown if the papers were Appellant's, and Brown said no, they were Holleyhead's. She averred that she "immediately thought to myself that [Brown] was comparing the [Holleyhead] forgeries with why he suspended [Appellant]."

With respect to his meeting with Burkhart, Brown averred:

On or about the next workday following my conversation with Ms. Rowland, Bryan Burkhart came to my office to discuss [Appellant's] suspension. At the time of the conversation, I understood that I was talking to Mr. Burkhart in his capacity as Union Steward. As with Ms. Rowland, I explained to Mr. Burkhart that SWBYPS does not make employment decisions flippantly.

Burkhart testified that during a twenty to thirty-minute "informal" meeting with Brown,

[W]e discussed things that reps had done in the past that were against company policy that had caused some people a lot of years of service to no longer work for the company, you know, that [Appellant] had a lot of years.

And then he showed me where this [Holleyhead] had had a lot of years. And he proceeded to show me basically from a distance what she had done in some sort of forgery, a way of running forgery off a copying machine that cost ultimately cost her her job.

. . . .

He was showing me — I didn't really pay that much attention because he was doing some sort of acetate. He did come over to the other side of the desk, the side of the desk I was on, with the information and did some sort of acetate thing showing me something on signatures. . . .

I really felt like that at that point that he was, I don't know, maybe preparing for what maybe was going to happen to [Appellant].

III. Standard of Review

In a summary judgment case, the issue on appeal is whether the movant met the summary judgment burden by establishing that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002); *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979). The burden of proof is on the movant, and all doubts about the existence of a genuine issue of material fact are resolved against the movant. *Sw. Elec. Power Co.*, 73 S.W.3d at 215.

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. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). Evidence that favors the movant's position will not be considered unless it is uncontroverted. *Great Am. Reserve Ins. Co. v. San Antonio Plumbing Supply Co.*, 391 S.W.2d 41, 47 (Tex. 1965).

A defendant who conclusively negates at least one essential element of the plaintiff's cause of action is entitled to summary judgment on that claim. *IHS Cedars Treatment Ctr. of Desoto, Tex., Inc. v. Mason*, 143 S.W.3d 794, 798 (Tex. 2004). Once the defendant produces sufficient evidence to establish the right to summary judgment, the burden shifts to the plaintiff to come forward with competent controverting evidence raising a genuine issue of material fact with regard to the element challenged by the defendant. *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995). When, as in this case, a trial court grants the defendant's motion without specifying the ground upon which it based its ruling, the summary judgment will be affirmed if any of the theories advanced are meritorious. *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989).

IV. Discussion
A. Appellant's Claim for Damages

Appellees argue that summary judgment was proper in this case because, as a matter of law, Appellant suffered no damages as a result of Brown allegedly defaming him. Appellant counters by arguing, as he did in his response in the trial court, that damages are presumed in slander per se cases.

1. Slander Per Se Claim

A defamatory oral statement may be slander per se, that is in and of itself, or slander per quod. *Minyard Food Stores, Inc. v. Goodman*, 50 S.W.3d 131, 140 (Tex. App.-Fort Worth 2001), *rev'd on other grounds*, 80 S.W.3d 573 (Tex. 2002). If a statement is slanderous per se, no independent proof of damage to the plaintiff's reputation or of mental anguish is required, as the slander itself gives rise to a presumption of general damages.[5] *Bentley v. Bunton*, 94 S.W.3d 561, 604 (Tex. 2002); *Mustang Athletic Corp. v. Monroe*, 137 S.W.3d 336, 339 (Tex. App.-Beaumont 2004, no pet.) (citing*Leyendecker & Assocs., Inc. v. Wechter*, 683 S.W.2d 369, 374 (Tex. 1984) (op. on reh'g)). However, if the statement constitutes slander per quod, the plaintiff must plead and present proof of special damages in order for the alleged defamation to be actionable. *Kelly v. Diocese of Corpus Christi*, 832 S.W.2d 88, 94 (Tex. App.-Corpus Christi 1992, writ dism'd

w.o.j.); *Stearns v. McManis*, 543 S.W.2d 659, 662 (Tex. Civ. App.-Houston [1st Dist.] 1976, writ dism'd); *see Minyard Food Stores, Inc.*, 50 S.W.3d at 140.

Statements are slanderous per se if they are so obviously harmful to the person aggrieved that no proof of their injurious effect is necessary to make them actionable. *Shearson Lehman Hutton, Inc. v. Tucker*, 806 S.W.2d 914, 921 (Tex. App.-Corpus Christi 1991, writ dism'd w.o.j.). Matters characterized as slanderous per se are statements that impute the commission of a crime or cause injury to a person's office, business, profession, or calling. *Minyard Food Stores, Inc.*, 50 S.W.3d at 140. Here, Appellant claims that Brown labeled him a forger in the eyes of his coworkers, Rowland and Burkhart, by implicitly comparing his alleged misconduct with that of Holleyhead. Thus, Appellant argues that Brown's statements, coupled with his conduct during the meeting, were slanderous per se as they "imput[ed] unethical and criminal actions . . . [to Appellant], and did injure [him] in his occupation." We disagree.

Whether language is capable of having a defamatory meaning is a question of law for the trial court. *Musser v. Smith Protective Serv., Inc.*, 723 S.W.2d 653, 655 (Tex. 1987). In determining this question, the court construes the statement as a whole in light of surrounding circumstances based upon how a person of ordinary intelligence would perceive the entire statement. *Id.* at 654-55. If the statement, seen in this light, has but one clear and obvious meaning, then no further inquiry is necessary. *Gray v. HEB Food Store No. 4.*, 941 S.W.2d 327, 329 (Tex. App.-Corpus Christi 1997, writ denied) ("If a statement unambiguously and falsely imputes criminal conduct to plaintiff, it is defamatory per se."). However, if the statement is ambiguous, or if the full effect of the statement cannot be understood without the use of extrinsic evidence, then the trial court must go beyond the snapshot of time in which the statement was published and consider innuendo. *Moore v. Waldrop*, 166 S.W.3d 380, 386 (Tex. App.-Waco 2005, no pet.).[6] An innuendo may be used to explain but not to extend the effect and meaning of the language asserted to be actionable. *Simmons v. Ware*, 920 S.W.2d 438, 451 (Tex. App.-Amarillo 1996, no writ). In some cases, the consideration of innuendo and extrinsic evidence is the only way to know whether a statement is slanderous. *Moore,* 166 S.W.3d at 386.

The test for actionable innuendo is not what construction a plaintiff might place upon the statements, but rather, how the statement would be construed by the average reasonable person or the general public. *Simmons,* 920 S.W.2d at 451; *Arant v. Jaffe*, 436 S.W.2d 169, 176 (Tex. Civ. App.-Dallas 1968, no writ). Again, it is the court's duty to determine if the statements at issue are, in their natural meaning, capable of the defamatory interpretation ascribed to them by the innuendo. *Simmons,* 920 S.W.2d at 451. However, as explained by the Waco Court of Appeals, "once innuendo is being considered, the statement has moved beyond the analysis of slander *per se* and into that of slander *per quod,* because . . . [t]he very definition of `per se,' `in and of itself,' precludes the use of innuendo. If the statement, taken by itself and as a whole, is per se slanderous, it will require no extrinsic evidence to clarify its meaning." *Moore,* 166 S.W.3d at 386.

In this case, Appellant has not identified the specific words he contends are defamatory per se. But it is clear from Rowland's and Burkhart's testimony that Brown did not explicitly say that Appellant was a thief, that he was a forger, or even that Appellant had done something similar to what Holleyhead had done. Instead, Appellant relies on Rowland's and Burkhart's testimony about what they *inferred* from Brown showing them forgeries from Holleyhead's file after or while discussing Appellant, namely, that Appellant had forged signatures like Holleyhead had.

This is a prime example of innuendo. Brown did not say anything that was itself defamatory. Instead, Appellant relies on extrinsic evidence—what Brown showed to Rowland and Burkhart, and what they inferred—to show that Brown's words, when considered in light of his actions, had a defamatory meaning not immediately clear to the average reasonable person or the general public.

Appellant contends that Brown "made it clear" to Rowland and Burkhart that the former employee's "conduct should be compared in mirror-image fashion" with the misconduct for which Appellant had been suspended. In support of his position, Appellant points to Rowland's deposition in which she stated that after being shown the former employee's file "I immediately thought to myself that Mr. Brown was comparing [Holleyhead's] forgeries with why he suspended [Appellant]." Rowland also testified that she knew that Holleyhead had been fired for forgery and, therefore, assumed that Brown was implying that Appellant had engaged in similar conduct.

However, standing alone, Brown's act of displaying forged contracts while discussing the termination of a former employee did not *unambiguously* impute any criminal conduct *to Appellant.* This is shown by the fact that Burkhart and Rowland each interpreted Brown's actions during their respective meetings differently. Unlike Rowland, Burkhart testified in his deposition that he did not interpret Brown's act of displaying the forged contracts as equating Appellant's alleged misconduct with that of the former employee. Rather, Burkhart said:

I didn't think that he was—I don't think that Mr. Brown was comparing the two because they were two separate issues of what had actually transpired and what [Appellant] was being accused of versus what [Holleyhead] had done.

. . . .

I [felt] like that there was a comparison being made in that this was a serious enough offense, and that what [Holleyhead] had done, had been terminated over, and that it was implied that [Appellant] had done this same serious type of action, had taken severe-had done something as wrong as she had.

Additionally, Rowland testified at her deposition that immediately after being shown Holleyhead's file, she asked Brown whether the forgeries contained therein related in any way to Appellant. According to Rowland, Brown answered "no." Rowland also stated that Brown never expressly referred to Appellant as a thief or a forger or said that he could not be trusted. Although Brown's statements and conduct *may* constitute slander per quod when innuendo is considered, absent such considerations, they were not per se slanderous so as to absolve Appellant from proving special damages. *Id.* at 386-87.

2. Appellees Conclusively Negated Special Damages

Assuming, without deciding, that Brown's statements and conduct during his meetings with Rowland and Burkhart were sufficient to constitute slander per quod, we nonetheless conclude that the trial court did not err in granting Appellees' motion for summary judgment because Appellant's claim for damages fails as a matter of law.

In his amended petition, Appellant pleaded and sought recovery for the following special damages: (1) past and future lost earnings and (2) past and future loss of earning capacity.

Appellees countered by filing for summary judgment challenging, among other things, Appellant's claim for damages. In order to properly obtain summary judgment on this ground, Appellees were required to conclusively negate the existence of those damages. *See* TEX. R. CIV. P. 166a(c); *Tate v. Goins, Underkofler, Crawford & Langdon*, 24 S.W.3d 627, 635 (Tex. App.-Dallas 2000, pet. denied). Here, Appellees negated Appellant's special damage claim by producing the transcript of his own deposition in which he admitted to being unaware of any money that he has lost at present as a result of Brown allegedly defaming him. Appellant testified that he anticipated a "potential of loss of income in the future" but stated that it was "hard to say" what, if any, future income would be lost.

While uncertainty as to the amount of damages is not fatal to recovery, lack of evidence or uncertainty as to the fact of damages is. *See Pace Corp. v. Jackson*, 155 Tex. 179, 190, 284 S.W.2d 340, 348 (1955). Damages must be ascertainable in some manner other than by mere speculation or conjecture, and by reference to some fairly definite standard, established experience, or direct inference from known facts. *A.B.F. Freight Sys., Inc. v. Austrian Import Serv., Inc.*, 798 S.W.2d 606, 615 (Tex. App.-Dallas 1990, writ denied). Remote damages, or those damages that are purely conjectural, speculative, or contingent, are too uncertain to be ascertained and cannot be recovered. *See Westech Eng'g, Inc. v. Clearwater Constructors, Inc.*, 835 S.W.2d 190, 205 (Tex. App.-Austin 1992, no writ); *Roberts v. U.S. Home Corp.*, 694 S.W.2d 129, 135 (Tex. App.-San Antonio 1985, no writ).

Once Appellees met their burden to conclusively negate the existence of Appellant's alleged special damages, the burden shifted to Appellant to produce competent controverting evidence in support of the damages pleaded. *See Centeq Realty, Inc.*, 899 S.W.2d at 197. In his response to Appellees' motion, Appellant simply argued, as he does here, that Brown's statements were slanderous per se and, therefore, damages are presumed. Despite submitting 135 pages of summary judgment evidence in support of his response, he failed to cite the trial court to any evidence raising a genuine issue of material fact as to whether Brown's allegedly defamatory statements and conduct had caused him economic or pecuniary loss. He also failed to address the issue in his brief or cite us to any such evidence on appeal. Trial and appellate courts are not required to sift through voluminous deposition transcripts and other summary judgment evidence in search of evidence raising a fact issue. *See Shelton v. Sargent*, 144 S.W.3d 113, 120 (Tex. App.-Fort Worth 2004, pet. denied). Therefore, in the absence of any controverting evidence, we conclude that Appellees were entitled to summary judgment on the ground that Appellant suffered no damages as a matter of law.[7] Because we hold that Appellees are entitled to summary judgment on this ground, we need not address the remaining grounds presented in their motion. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872-73 (Tex. 2006) (holding where summary judgment does not specify grounds relied on, reviewing courts are to affirm if any ground is meritorious); *Ross v. Arkwright Mut. Ins. Co.*, 892 S.W.2d 119, 130 (Tex. App.-Houston [14th Dist.] 1994, no writ) (recognizing that because defendant is entitled to summary judgment based on its negation of damage element of plaintiff's claim, it is unnecessary to consider remaining grounds presented in the motion).

V. Conclusion

Accordingly, we overrule Appellant's issue and affirm the trial court's judgment.

Notes:

1. *See* TEX. R. APP. P. 47.4.

2. This point is sufficient to challenge the summary judgment on all grounds upon which it could have been granted. *See Malooly Bros., Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970); *see also Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473 (Tex. 1995) (reaffirming *Malooly).*

3. Appellant's demotion and suspension are not at issue in this case. Appellant has since filed a grievance with regard to those events pursuant to a collective bargaining agreement and is pursuing his remedy in a labor arbitration under the terms of that agreement.

4. In addition to being an employee of SWBYPS, Burkhart also served as the office's union representative.

5. Compensatory damages in defamation cases are divided into two categories: general and special. *Peshak v. Greer*, 13 S.W.3d 421, 427 (Tex. App.-Corpus Christi 2000, no pet.). General damages are damages for injuries to character or reputation, injuries to feelings, mental anguish, and other like injuries incapable of monetary valuation, *Vista Chevrolet, Inc. v. Barron*, 698 S.W.2d 435, 441 (Tex. App.-Corpus Christi 1985, no writ), while special damages involve some form of pecuniary or economic loss *See Hurlbut v. Gulf Atlantic Life Ins. Co.*, 749 S.W.2d 762, 767 (Tex. 1987).

6. Innuendo is the use of extrinsic evidence to prove a statement's defamatory nature. *Id.* at 385. It includes the aid of inducements, colloquialisms, and explanatory circumstances. *Id.*

7. Without proof of special damages, Appellant's slander per quod claim is not actionable. *Kelly,* 832 S.W.2d at 94; *Stearns,* 543 S.W.2d at 662. Thus, we need not discuss the general damages sought in Appellant's amended petition. *See Kelly,* 832 S.W.2d at 94.

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96 S.W.3d 475
BASIC CAPITAL MANAGEMENT, INC., Appellant,
v.
DOW JONES & COMPANY, INC., d/b/a The Wall Street Journal, Appellee.
No. 03-02-00184-CV.
Court of Appeals of Texas, Austin.
October 17, 2002.

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Thomas V. Murto III, Sachse, for appellant.

David H. Donaldson, Jr., George & Donaldson, LLP, Austin, for appellee.

Before Chief Justice ABOUSSIE, Justices PATTERSON and PURYEAR.

JAN P. PATTERSON, Justice.

In this defamation suit filed by appellant Basic Capital Management, Inc. ("BCM") against Dow Jones & Company, Inc., doing business as *The Wall Street Journal,* we address whether statements in articles published by Dow Jones characterizing a federal indictment are substantially true and therefore not actionable. The district court granted summary judgment in favor of Dow Jones, dismissing BCM's claims of libel and business disparagement. On appeal, BCM challenges the granting of summary judgment, contending that Dow Jones failed to establish that (i) the complained-of statements were true or substantially true, (ii) BCM was a public figure, and (iii) Dow Jones was not negligent. Because we conclude that the statements characterizing the indictment were substantially true as a matter of law, we affirm the judgment of the district court.

FACTUAL AND PROCEDURAL BACKGROUND

The Indictment

On June 14, 2000, the United States Attorney's Office for the Southern District of New York unsealed indictments alleging that members of the five largest crime families in New York, along with other individuals in various parts of the country, engaged in a massive conspiracy to manipulate stock prices. The 107-page indictment at issue here alleged that twenty-three defendants associated to form a

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racketeering enterprise that engaged in "securities fraud, wire fraud, pension fund fraud, illegal kickbacks to union officials, extortion, money laundering, bribery, witness tampering, and murder solicitation." Count One of the indictment described the "means and methods" of the enterprise, alleging that the defendants sought to enrich the enterprise through securities fraud and wire

fraud, and to conceal and promote the enterprise's unlawful activities by laundering proceeds of the scheme.

Although BCM, a Dallas real estate investment firm, was not a named defendant, it was identified as an actor in a pension fund fraud and kickbacks scheme set forth in Count One of the indictment. Specifically, the indictment identified a stock offering by American Realty Trust, a real estate investment trust controlled by BCM, as a "fraudulent investment[] that appeared to be [an] investment[] suitable for pension funds and that w[as] designed to appear legitimate." The indictment further alleged that BCM "agreed with the enterprise to cause American Realty Trust to issue a series of preferred stock" and "further agreed with the enterprise" that for every $10 million in stock sales, BCM "would cause approximately $2 million of the proceeds to be paid secretly to the enterprise."

Included in the list of the twenty-three defendants were Gene Phillips and A. Cal Rossi, who the indictment identified as associated with BCM. The indictment alleged that Gene Phillips "secretly controlled" BCM and agreed with members and associates of the enterprise "to defraud union pension funds in connection with the sale of American Realty preferred stock." The indictment further alleged that Cal Rossi, as managing director of capital markets for BCM, "structured the fraudulent ... [s]tock offering" and "agreed that a portion of the offering proceeds would be used to pay secret bribes to union officials." Phillips and Rossi were named as defendants in several counts of the indictment, including Count One.

The *Wall Street Journal* Articles

On June 15, the day after the indictments were unsealed and arrests were made, the *Journal* ran the first of three articles that named BCM and discussed the allegations contained in the indictment. On June 20 and June 27, following press releases issued by BCM, the *Journal* ran follow-up articles.[1]

June 15

In its "Heard on the Street" column, the *Journal* published an article entitled "Stock-Fraud Case Alleges Organized-Crime Tie" and "Prosecutors Say Stocks Of 19 Firms Were Manipulated." Reporting on the charges against 120 defendants, the article described "the largest one-day securities-fraud indictment ever," alleging various stock manipulation schemes involving microcap stocks and "dot.coms." Recounting a scheme in the indictment to issue fraudulent stock and pay kickbacks to corrupt union officials, reporters for the *Journal* wrote:

The mob's alleged racketeering enterprise also sought to defraud union pension funds by structuring investments that allowed for secret kickbacks to corrupt union officials, the charges said. One of them, officials said, was a preferred stock offering of American Realty Trust, a real-estate investment trust listed on the New York Stock Exchange, allegedly arranged through Gene Phillips, who controlled Basic Capital Management,

the Dallas investment adviser to the REIT.

In a statement, Basic Capital, which manages $2.5 billion and advised four publicly traded real-estate companies, said Mr. Phillips and another key executive were "out of the country," one

on vacation and the other on business. "We are shocked and surprised" by the news, the company said.

June 20

Stock in publicly traded companies affiliated with BCM fell sharply after the indictment was released. As a result, BCM received margin calls, then on June 19 issued a press release that it might default on $37 million in obligations. An assistant reporter with the *Journal*'s Dallas bureau received the June 19 press release about the margin calls. She called BCM for an interview, but its director of investor relations said that no one would be made available for comment. The reporter began to draft an article based on the press release, then read other news stories for background information. Another newspaper characterized the indictment as alleging that "two Dallas men were to launder bribe money and kickbacks that went to pay corrupt union officials and mobsters."[2]

The *Journal* ran the article on June 20. Appearing on page A10, the article, entitled "Basic Capital Reports It Is Likely To Default On Its Margin Calls," contained the following statement: "Federal authorities allege that the enterprise laundered most of its bribe money through Basic Capital Management."

June 27

The reporter wrote another article after receiving a June 26 press release from BCM. In its press release, BCM stated that it was making progress in margin debt restructuring. Appearing on page C8, the article was entitled "American Realty, Basic Capital Reach Agreements On Debt." It summarized the press release and contained a statement that "two men associated with Basic Capital were charged with participating in a moneylaundering scheme with alleged mob ties."

July 12

Complaining about the June 20 article, BCM's general counsel sent a letter on June 29 to the managing editor of the *Journal* asking for a correction. He wrote: "there has been absolutely no allegation made by Federal authorities ... that Basic Capital or any of its officers, directors or employees ever laundered money for anyone." The *Journal* issued a correction on July 12, stating that "[t]wo of Basic Capital Management's former advisers who resigned last month were charged with wire fraud and conspiring to pay illegal kickbacks through Basic Capital Management, but were not charged with money laundering."

The Lawsuit

BCM filed suit against Dow Jones for defamation and business disparagement, alleging that the two statements in the June 20 and June 27 articles falsely stated that BCM was involved in money laundering. BCM did not challenge the June 15 article. Dow Jones filed a traditional motion for summary judgment on the grounds that the articles were not libelous because they were true or substantially true, BCM was a public figure for the

purposes of the suit, and BCM could not prove actual malice or negligence as a matter of law. The district court granted the motion for summary judgment without specifying the ground and rendered judgment in favor of Dow Jones.

ANALYSIS

The standard for reviewing a motion for summary judgment is well established: (i) The movant for summary judgment has the burden of showing that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law; (ii) in deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true; and (iii) every reasonable inference must be indulged in favor of the nonmovant and any doubts resolved in its favor. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548-49 (Tex.1985). When a defendant seeks to obtain summary judgment based on a plaintiffs inability to prove its case, the defendant must conclusively disprove at least one element of each of the plaintiffs causes of action. Tex.R. Civ. P. 166a(c); *Huckabee v. Time Warner Entm't Co.*, 19 S.W.3d 413, 420 (Tex.2000). Once the movant establishes that it is entitled to summary judgment, the burden shifts to the non-movant to show why summary judgment should not be granted. *See Casso v. Brand*, 776 S.W.2d 551, 556 (Tex.1989). Because the trial court's order does not specify the ground or grounds relied on for its ruling, we will affirm the summary judgment if any of the theories that Dow Jones advanced are meritorious. *See Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex.1989).

BCM alleges in its first issue that Dow Jones did not establish as a matter of law that the statements in the June 20 and June 27 articles were true or substantially true. BCM further contends that the June 20 statement, that "Federal authorities allege that the enterprise laundered most of its bribe money through Basic Capital Management," and the June 27 statement, that "two men associated with Basic Capital were charged with participating in a moneylaundering scheme with alleged mob ties," were neither true nor substantially true, because BCM was not named as a defendant and was not mentioned as a participant in a money-laundering scheme. BCM contends that the false reporting harmed its reputation. Because the parties agree that the challenged statements only characterize the allegations of the indictment, and do not purport to portray the underlying events described therein, our task is necessarily limited to determining whether the articles accurately report the charges set forth in the indictment.

To prevail on a defamation claim, the plaintiff must prove that the defendant published a statement that was defamatory about the plaintiff, while acting with either actual malice — if the plaintiff was a public official or public figure — or negligence — if the plaintiff was a private individual — about the truth of the statement. *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex.1998). A written statement is defamatory if it exposes a person to public contempt or financial injury, or if it impeaches a person's reputation. *See* Tex. Civ. Prac. & Rem.Code Ann. § 73.001 (West 1997). To prevail on a business disparagement claim, the plaintiff must prove publication by the defendant of the disparaging words, falsity, malice, lack of privilege, and special damages. *Prudential Ins. Co. of Am. v. Financial Review Servs., Inc.*, 29 S.W.3d 74, 82 (Tex.2000).

A statement that is true or substantially true cannot support a claim for either defamation or business disparagement.

See Hurlbut v. Gulf Atl. Life Ins. Co., 749 S.W.2d 762, 766 (Tex.1987). Therefore, if Dow Jones shows the substantial truth of the articles as a matter of law, it will be entitled to summary judgment. *See McIlvain v. Jacobs*, 794 S.W.2d 14, 15 (Tex.1990).

The substantial truth test stems from the freedom of speech and freedom of press protections of the First Amendment. *See Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516-17, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991). Under the substantial truth test, the truth of the statement in the publication on which an action for libel is based is a defense to the action. *McIlvain,* 794 S.W.2d at 15; *see also* Tex. Civ. Prac. & Rem.Code Ann. § 73.005. A statement is substantially true, and thus not actionable, if its "gist" or "sting" is not substantially worse than the literal truth. *See McIlvain,* 794 S.W.2d at 16; *Dolcefino v. Randolph*, 19 S.W.3d 906, 921 (Tex.App.-Houston [14th Dist.] 2000, pet. denied). This evaluation requires us to determine whether, in the mind of the average person who read the statement, the allegedly defamatory statement was more damaging to the plaintiff's reputation than a truthful statement would have been. *McIlvain,* 794 S.W.2d at 16; *Dolcefino,* 19 S.W.3d at 921. When the underlying facts as to the gist of the libelous charge are undisputed, we disregard any variance regarding items of secondary importance and determine substantial truth as a matter of law. *McIlvain,* 794 S.W.2d at 16.

The June 20 Article

We first examine whether the June 20 article is true or substantially true in stating that the indictment alleges that the racketeering enterprise laundered bribe money through BCM. BCM urges that the statement is false because the indictment does not allege that BCM, Phillips, or Rossi participated in the money-laundering scheme. BCM also argues that the gist of the accusation of money laundering is more damaging to BCM's reputation in the mind of the average reader of the *Journal* than a truthful statement would have been. We disagree with both contentions.

As the substantive racketeering count of the indictment, Count One defines the racketeering enterprise and names twenty-three defendants, including Phillips and Rossi. In addition to describing the money-laundering and kickback schemes engaged in by the enterprise, Count One recites the purposes of the enterprise to include "concealing and promoting the enterprise's unlawful activity by laundering the proceeds of securities fraud and wire fraud." While the indictment does not name BCM as a defendant, it also does not suggest that the company played a passive role. According to Count One of the indictment, BCM "agreed to cause" the issuance of stock and "further agreed with the enterprise" that for every $10 million in stock issued, it would "cause approximately $2 million of the proceeds to be paid secretly to the enterprise."

The crime of racketeering includes a pattern of illegal activity that encompasses a wide range of crimes, including, *inter alia,* bribery, money-laundering, extortion, embezzlement, wire and mail fraud, gambling, and murder. *See* 18 U.S.C. § 1961(1). Here, Count One sets forth a panorama of nineteen racketeering acts that include, *inter alia,* securities fraud, extortion, money-laundering conspiracies, kickback schemes, wire fraud, and witness tampering. While the article could have been more precise in describing BCM's alleged role, it accurately depicted the allegations of the indictment that the *enterprise* engaged in money laundering and that the bribe moneys, *i.e.,* kickbacks, were obtained — as it was alleged — through

the issuance of fraudulent stock by BCM and a second fraudulent investment known as the TradeVentureFund, which was unrelated to BCM. The article was clear that the indictment did not name BCM as a defendant. Moreover, as described in the article, BCM's role was as consistent with the company being an unwitting conduit as with being a knowing participant.

BCM argues that a statement suggesting that BCM was engaged in money laundering would be more damaging to BCM's reputation because of the opprobrium associated with money laundering as well as the availability of forfeiture as a penalty under the federal crime of money laundering. An ordinary reader of the *Journal,* BCM asserts, could reasonably believe from the article that BCM was at risk for a multimillion-dollar forfeiture.

The taint of the alleged defamatory statement is certainly no greater in the mind of the average reader than a more exacting truthful statement would have been. An ordinary reader could well conclude that the description of BCM as a money-laundering conduit carries less "sting" than the portions of the indictment that actually mention BCM's role. In the plain words of the indictment, BCM was alleged to be an active participant in the charged conspiracy.

Moreover, because of the broad availability of forfeiture in RICO[3] cases, BCM was no more exposed to forfeiture for alleged money laundering than it would be for the activities actually alleged in the indictment. RICO provides specifically that a defendant convicted of a violation of the Act "shall forfeit to the United States ... any interest the person has acquired or maintained in violation of section 1962[and] any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962." 18 U.S.C. § 1963(1), (3). Courts have held that the statute creates a mandatory obligation of forfeiture after a RICO conviction. *See, e.g., United States v. Faulkner,* 17 F.3d 745, 774-75 (5th Cir.1994). Thus, the indictment itself raised the specter of forfeiture of any interests of convicted defendants.

A comparison of the challenged statement and the indictment demonstrates that the article was substantially true and not inaccurate, and that any variance was minor. *See McIlvain,* 794 S.W.2d at 16.

The June 27 Article

The June 27 article, as with the June 20 article, arose from a BCM press release. The article reported information from the press release that BCM had avoided threatened margin calls. It also included background information about the indictment. The allegedly defamatory statement, that "two men associated with Basic Capital were charged with participating in a moneylaundering scheme with alleged mob ties," is true or substantially true. That Phillips and Rossi were associated with BCM was clear from BCM's own press release that Phillips and Rossi "stepped aside" from their "day-to-day responsibilities" with the company. Phillips was active in the management of the company, and Rossi was director of capital markets for BCM.

Phillips and Rossi were charged in Count One of the indictment as members of the enterprise, which included members of organized crime families. Count One, a forty-seven page description of the racketeering scheme, listed the "means and

methods of the enterprise," including money laundering, union pension fund fraud, and kickback schemes. Additionally, the indictment alleged that Phillips "agreed ... to defraud union pension funds" and that Rossi structured the stock offering and "agreed that a portion of the proceeds would be used to pay secret bribes." The allegations of the indictment thus fall under the ambit of participating in a money laundering scheme, which includes disguising illegally obtained funds so that the funds appear to come from legitimate sources or activities. *See* 18 U.S.C. § 1956. Money laundering occurs in connection with a wide variety of crimes, including fraud and racketeering. *See id.* Because the gist or sting of the statement characterizing the indictment in the June 27 article is not worse than the literal truth, the statement is substantially true as a matter of law. *See McIlvain,* 794 S.W.2d at 16. We overrule BCM's first issue.[4]

CONCLUSION

We conclude that the statements characterizing the indictment in the June 20 and June 27 articles are substantially true as a matter of law. Because Dow Jones has negated an essential element of BCM's causes of action, we affirm the judgment of the district court granting summary judgment in favor of Dow Jones.

Notes:

1. BCM challenges statements contained in the June 20 and June 27 articles, but none in the initial article on June 15.

2. At oral argument, counsel for BCM advised that BCM did not file a lawsuit against the other newspaper.

3. RICO is an acronym for the Racketeer Influenced and Corrupt Organizations Act. *See, e.g., United States v. Cantu*, 185 F.3d 298, 300 (5th Cir.1999).

4. In light of our disposition of BCM's first issue, we need not address its remaining issues.

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977 S.W.2d 434
136 Lab.Cas. P 58,475
Benjamin Allen BANFIELD and Robert Lindsey, Appellants,
v.
LAIDLAW WASTE SYSTEMS, Appellee.
No. 05-96-01425-CV.
Court of Appeals of Texas,
Dallas.
Aug. 24, 1998.

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Kenneth W. Byford, Maria S.R. Wieman, Byford & Associates, P.C., Dallas, for Appellant.

Dan Hartsfield, Michele Rogers Baird, Sharlee Ann Cole, Gardere & Wynne, L.L.P., Dallas, Samara L. Kline, Baker & Botts, Dallas, for Appellee.

Before LAGARDE, OVARD and ROACH, JJ.

OPINION

ROACH, Justice.

Benjamin Allen Banfield and Robert Lindsey appeal the trial court's summary judgment in favor of Laidlaw Waste Systems. In two points of error, Banfield and Lindsey assert the trial court erred in determining that the National Labor Relations Act (NLRA) [1] preempts their claims for wrongful discharge asserted under the Texas Right to Work Law and their common law defamation claims. Because we conclude that (1) the wrongful discharge claims are preempted by the NLRA, and (2) the statements comprising the basis of appellants' defamation claims are not defamatory as a matter of law, we affirm the trial court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Banfield and Lindsey filed a lawsuit against their former employer, Laidlaw Waste Systems (Laidlaw), alleging they were fired for engaging in union organizing activity. They asserted claims for wrongful discharge in violation of the Texas Right to Work Law, [2] as well as common law claims of defamation, intentional infliction of emotional distress, and negligent supervision. [3] The trial court granted Laidlaw's motion to dismiss for lack of subject matter jurisdiction regarding appellants' claims for wrongful discharge, intentional infliction of emotional distress, and negligent supervision, ruling that the claims were preempted by the NLRA. The trial court granted appellants additional discovery time to pursue their remaining defamation claims. Later, appellants renewed their claims for wrongful discharge, intentional infliction of emotional distress, and negligent supervision and moved for reconsideration of the trial court's dismissal of these claims. [4] Laidlaw moved for summary judgment as to all of appellants' causes of action, including their defamation claim. The trial court granted Laidlaw's motion for summary judgment and denied appellants' motion for reconsideration.

TEXAS RIGHT TO WORK LAW

This appeal requires us to examine the substance of the claims appellants assert under the Texas Right to Work Law to determine whether they are preempted by the NLRA. Among other things, the Texas Right to Work Law provides that a person may not be denied employment based on membership or nonmembership in a labor union. TEX.

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LAB.CODE ANN. § 101.052 (Vernon 1996). Appellants claim that this provision prohibited Laidlaw from discharging them for their union organizing activity. For the purposes of this opinion, we assume, without deciding, that appellants asserted a viable cause of action under this provision.

Several distinct categories of claims are preempted under the NLRA. Section 301 of the NLRA preempts state law claims whenever resolution of the claim requires interpretation of a collective bargaining agreement. Lingle v. Norge Div. of Magic Chef, 486 U.S. 399, 408-10, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988). Relying on Lingle, appellants argue that because resolution of their claims does not require the court to construe a collective bargaining agreement, their claims are not preempted. However, this argument ignores the category of preemption under the NLRA which preempts state and federal courts from exercising jurisdiction on claims that are based upon conduct or activity that is arguably protected or prohibited under sections 7 or 8 of the NLRA. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). Because there is no collective bargaining agreement involved in this case, Lingle is inapplicable.

We begin with the general proposition that state and federal courts must defer to the exclusive jurisdiction of the National Labor Relations Board (NLRB) in all cases arising out of activities that are arguably subject to sections 7 or 8 of the NLRA. Id. The Garmon preemption doctrine focuses on the conduct that forms the basis of the underlying claim and not the characterization of the claim under state law. See Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees of Am. v. Lockridge, 403 U.S. 274, 292, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1971). The pivotal inquiry is whether the state court controversy is the same or different from that which could have been presented to the NLRB. See Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 197, 98 S.Ct. 1745, 56 L.Ed.2d 209 (1978).

Section 7 of the NLRA guarantees employees the right to self-organize, form, join, or assist labor organizations and to engage in other concerted activity for the purposes of collective bargaining. 29 U.S.C.A. § 157 (West 1973). Section 8 prohibits an employer from interfering with an employee's exercise of section 7 rights and deems it an unfair labor practice for an employer to discriminate in the hiring or tenure of employment so as to encourage or discourage membership in a labor organization. 29 U.S.C.A. § 158(a)(1),(3) (West 1973).

Appellants' claims that they were wrongfully discharged for engaging in union organizing activity goes straight to the heart of the activity protected by sections 7 and 8 of the NLRA. Their claims under the Texas Right to Work Law rest solely upon conduct protected by section 7 and which, if interfered with, constitutes an unfair labor practice under section 8.

In support of their contention that their asserted claims for wrongful discharge under the Texas Right to Work Act are not preempted, appellants rely on several cases from other jurisdictions, primarily Willard v. Huffman, 250 N.C. 396, 109 S.E.2d 233, cert. denied, 361 U.S. 893, 80 S.Ct. 195, 4 L.Ed.2d 150 (1959), and Taylor v. Hoisting & Portable Engineers Local Union 101, 189 Kan. 137, 368 P.2d 8 (1962). We do not find the reasoning of these cases compelling. In both cases, the plaintiffs asserted a claim under their state's right to work law for wrongful discharge for membership or nonmembership in a union. Willard, 109 S.E.2d at 235; Taylor, 368 P.2d at 9-10. In holding that the plaintiffs' claims were not preempted by the NLRA, the North Carolina and Kansas Supreme Courts engaged in an unconvincing analysis that seems to ignore the plain import of Garmon. Willard, 109 S.E.2d at 241-242; Taylor, 368 P.2d at 11. In addition, both courts emphasized reliance on section 14(b) of the NLRA, which explicitly allows state regulation of agreements requiring membership in a union as a condition of employment, to support their holdings. Willard, 109 S.E.2d at 242-43; Taylor, 368 P.2d at 12. Later United States Supreme Court opinions have made clear that a state's jurisdiction pursuant to section 14(b) is activated when a union security agreement as described

in section 14(b) is actually negotiated and executed. See Retail Clerks Int'l Ass'n Local 1625 v. Schermerhorn, 375 U.S. 96, 105, 84 S.Ct. 219, 11 L.Ed.2d 179 (1963).

Other cases cited by appellants involve enforcement of union security agreements contrary to state right to work laws. See Sheet Metal Workers Int'l Ass'n v. Nichols, 89 Ariz. 187, 360 P.2d 204 (1961); Smith v. General Motors Corp., 128 Ind.App. 310, 143 N.E.2d 441 (1957); Martin v. Dealers Transp. Co., 48 Tenn.App. 1, 342 S.W.2d 245 (1960). These state actions are precisely the type sanctioned by and excepted from preemption pursuant to section 14(b) of the NLRA. See Schermerhorn, 375 U.S. at 102-03, 84 S.Ct. 219. Because this case does not involve a union security agreement, these decisions are inapplicable to our analysis. The Texas Supreme Court has recognized a private cause of action based upon the Texas Right to Work Act for terminations based on union membership. See Lunsford v. City of Bryan, 156 Tex. 520, 297 S.W.2d 115 (1957); Vasquez v. Bannworths, Inc., 707 S.W.2d 886 (Tex.1986). However, it has never specifically addressed the issue of whether a cause of action exists under the Texas Right to Work Law for the conduct alleged by appellants. The Texas Supreme Court also has never considered whether such an action would be preempted by the NLRA. The only Texas cases addressing the preemption issue with respect to the Texas Right to Work Act are Leiter Manufacturing Co. v. International Ladies' Garment Workers' Union, 269 S.W.2d 409 (Tex.Civ.App.--Dallas 1954, no writ); Borden v. United Ass'n of Journeymen & Apprentices, 316 S.W.2d 458 (Tex.Civ.App.--Dallas 1958), aff'd, 160 Tex. 203, 328 S.W.2d 739 (1959); Carpenters & Joiners Local Union v. Hampton, 457 S.W.2d 299 (Tex.Civ.App.--Tyler 1970, no writ); and Dallas General Drivers, Warehousemen & Helpers Local 745 v. Central Beverage, Inc., 507 S.W.2d 596 (Tex.Civ.App.--Dallas 1974, writ ref'd n.r.e.).

In Leiter, we concluded that because the discharge or layoff for union membership was held to be an unfair labor practice under section 8(a)(3) of the NLRA, an action for reinstatement based on the Texas Right to Work Act alleging the same conduct was preempted. See Leiter, 269 S.W.2d at 410. In Borden, however, we held that a union member's state tort action for damages against two labor unions for interference with his right to work at a construction site in violation of the Texas Right to Work Law was not preempted by the NLRA. Borden, 316 S.W.2d at 460-61. Both Leiter and Borden were decided before the Supreme Court's decision in Garmon.

In Hampton, the Tyler Court of Appeals, relying on Local No. 438 Construction & General Laborers' Union v. Curry, 371 U.S. 542, 83 S.Ct. 531, 9 L.Ed.2d 514 (1963), concluded that the plaintiff's action to enjoin picketing he claimed was to persuade him to use only union workers contrary to the Texas Right to Work Law, was preempted by the NLRA. Hampton, 457 S.W.2d at 302. Likewise, in Central Beverage, this Court concluded that the trial court lacked jurisdiction to enjoin picketing pursuant to article 5154(d) of the Texas Revised Civil Statutes because that statute could not expand "the state court's equitable jurisdiction into the domain pre-empted to the National Labor Relations Board ... as interpreted in Garmon." Central Beverage, 507 S.W.2d at 599.

Other states have found that simply because a cause of action can be founded upon a state right to work law does not necessarily mean that the state court has jurisdiction to hear it. See Walles v. International Bhd. of Elec. Workers, 252 N.W.2d 701, 706-07 (Iowa), cert. denied, 434 U.S. 856, 98 S.Ct. 175, 54 L.Ed.2d 127 (1977); Johnson v. Electronic Sales & Serv. Co., 363 So.2d 716, 718 (La.Ct.App.1978); Arena v. Lincoln Lutheran of Racine, 149 Wis.2d 35, 437 N.W.2d 538, 549-550 (1989).

It is undisputed that the basis of appellants' wrongful discharge claims asserted under the Texas Right to Work Law is their termination for union organizing activities which is conduct subject to the NLRA. See 29 U.S.C.A. §§ 157, 158 (West 1973 & Supp.1998). Appellants' claims do not fall within the exception created by section 14(b) of the NLRA because no union security agreement is involved. See Schermerhorn, 375 U.S. at 102-03, 84 S.Ct. 219. The fact that the Texas

Right to Work Law attempts to regulate conduct also regulated by the NLRA does not confer jurisdiction on the state courts or create an exception to the NLRB's exclusive jurisdiction. See Central Beverage, 507 S.W.2d at 599; Johnson, 363 So.2d at 718. Accordingly, we hold that the trial court lacked subject matter jurisdiction to hear appellants' claims for wrongful discharge under the Texas Right to Work Law because the claims are preempted by the NLRA. We overrule appellants' first point of error.

DEFAMATION CLAIMS

In their second point of error, appellants contend that the trial court erred in ruling their defamation claims were preempted by the NLRA. At the outset, we note that the summary judgment order does not indicate the basis for the trial court's ruling. Laidlaw moved for summary judgment on the defamation claims based on preemption, the statute of limitations, as well as grounds involving the merits of appellants' defamation claims. On appeal, appellants present a single point of error challenging the trial court's ruling on the defamation claims only with respect to the preemption issue. Under that point of error, however, they address the other grounds set forth in Laidlaw's motion for summary judgment.

When there are multiple grounds asserted for summary judgment and the order is silent as to the ground upon which summary judgment was granted, the appealing party must negate all grounds on appeal. See State Farm Fire & Cas. Co. v. S.S., 858 S.W.2d 374, 381 (Tex.1993). We do not reach the issue of preemption with respect to appellants' defamation claims because we conclude that the statements were not defamatory as a matter of law.

A defamatory statement is one in which the words tend to damage a person's reputation, exposing him to public hatred, contempt, ridicule, or financial injury. Einhorn v. LaChance, 823 S.W.2d 405, 410 (Tex.App.--Houston [1st Dist.], writ dism'd w.o.j.), cert. denied, 517 U.S. 1135, 116 S.Ct. 1420, 134 L.Ed.2d 544 (1996). Reference to appellants being "son of a bitching troublemakers" constitutes a constitutionally protected opinion and is, therefore, not defamatory. See Schauer v. Memorial Care Sys., 856 S.W.2d 437, 447 (Tex.App.--Houston [1st Dist.] 1993, no writ); Einhorn, 823 S.W.2d at 412. Likewise, the characterization of appellants as "ring leaders" also cannot be the basis for a defamation claim because it merely relates to the undisputed fact that appellants were in-plant union organizers, "a right protected by federal law, not a crime or unethical act." See Einhorn, 823 S.W.2d at 411. Appellants also complain that Laidlaw managers stated to others that they intended "to fix it so that [appellants] would not be able to get a job anywhere to take care of their families or even get unemployment." These words were merely an expression of an intent to do an act. The words themselves could not, as a matter of law, injure appellants' reputations or expose them to hatred, contempt, ridicule, or financial injury. See id. at 410-11. While the preceding statements are the only ones discussed in appellants' brief, we have also reviewed the remaining statements set forth in the affidavits attached to appellants' response to Laidlaw's motion for summary judgment. We conclude the summary judgment evidence demonstrated, as a matter of law, that the statements were either not defamatory or were true. Appellants' second point of error is overruled.

We affirm the judgment of the trial court.

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1 The National Labor Relations Act, commonly referred to as the Wagner Act, was enacted in 1935. It was amended in 1947 by the National Labor Management Relations Act, known as the Taft Hartley Act. Throughout this opinion, NLRA is used to refer to the National Labor Relations Act as amended by the National Labor Management Relations Act.

2 The current version of the Texas Right to Work Law can be found at sections 101.051 -.053 of the Texas Labor Code. TEX. LAB.CODE ANN. §§ 101.051-053 (Vernon 1996). This was the version in effect at the time of appellant's discharge. The predecessor statute, repealed in 1993, is found in article 5207a of the revised civil statutes.

3 Appellants present no points of error regarding the trial court's judgment with respect to their claims for intentional infliction of emotional distress and negligent supervision.

4 Appellants renewed these claims after the National Labor Relations Board (NLRB) refused to issue a complaint on their charge of Laidlaw's section 8 violation. The NLRB ruled the complaint was time-barred by the applicable six-month limitations period. Appellants' appeal of this refusal was also denied.

RONALD F. AVERY, Appellant
v.
GUADALUPE-BLANCO RIVER AUTHORITY, WILLIAM E. WEST, JR., AS GENERAL MANAGER OF GUADALUPE-BLANCO RIVER AUTHORITY; AND DAVID WELSCH, AS PROJECT DIRECTOR OF PROJECT DEVELOPMENT AT GUADALUPE-BLANCO RIVER AUTHORITY, Appellees.
No. 04-04-00582-CV.
Court of Appeals of Texas, Fourth District, San Antonio.
Delivered and Filed: April 20, 2005.

Appeal from the 25th Judicial District Court, Guadalupe County, Texas, Trial Court No. 04-0499-CV, Honorable B.B. Schraub, Judge Presiding.

AFFIRMED.

Sitting: Alma L. LÓPEZ, Chief Justice, Sandee Bryan MARION, Justice, Phylis J. SPEEDLIN, Justice.

MEMORANDUM OPINION

PHYLIS J. SPEEDLIN, Justice.

Ronald F. Avery appeals the trial court's order granting the plea to the jurisdiction filed by Guadalupe-Blanco River Authority and two of its employees sued in their official capacity, William E. West, Jr. and David Welsch (collectively referred to herein as "GBRA"). Avery's sole argument in response to GBRA's plea at trial and the sole contention raised on appeal is that sovereign immunity does not exist.[1] In his reply brief, Avery acknowledges this to be his sole issue on appeal, stating:

The question on appeal is truly understood by both the Appellant and the Appellees. The issue is the existence of Sovereign or Governmental Immunity by the state over the citizens. If the state has such immunity the TTCA [Texas Tort Claims Act] and CPRC [Civil Practice and Remedies Code] governs [sic] and the Appellant loses his appeal. If the citizens are sovereign over the state they created for their benefit then the Appellees lose on appeal and must return to [the] trial court.

Because the issue in this appeal involves the application of well-settled principles of law, we affirm the trial court's judgment in this memorandum opinion. See Tex. R. App. P. 47.4.

"In Texas, sovereign immunity deprives a trial court of subject matter jurisdiction for lawsuits in which the state or certain governmental units have been sued unless the state consents to suit."[2] *Texas Dept. of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004). Furthermore, employees sued in their official capacity, as in this case, are also entitled to sovereign immunity. *Texas Parks & Wildlife Dept. v. E.E. Lowrey Realty, Ltd.*, 155 S.W.3d 456, 458 (Tex. App.-Waco 2005, no pet.); *Salazar v. Lopez*, 88 S.W.3d 351, 353 (Tex. App.-San Antonio 2002, no pet.). "In a suit against a governmental unit, the plaintiff must affirmatively

demonstrate the court's jurisdiction by alleging a valid waiver of immunity." *Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003).

Avery contends that he need not allege a valid waiver of immunity because sovereign immunity does not exist in Texas. As the foregoing authorities demonstrate, however, Avery's contention is misplaced. We decline Avery's invitation to judicially abrogate the doctrine of sovereign immunity; such a drastic and fundamental change should be made, if at all, by the Legislature or the Supreme Court. *See Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 857 (Tex. 2002) (stating waiver or abrogation of immunity is within Legislature's sole province); *see also Jackson v. City of Galveston*, 837 S.W.2d 868, 871 (Tex. App.-Houston [14th Dist.] 1992, writ denied); *Lynch v. Port of Houston Authority*, 671 S.W.2d 954, 957 (Tex. App.-Houston [14th Dist.] 1984, writ ref'd n.r.e.). Because sovereign immunity is the recognized law in the State of Texas and because Avery has not alleged a valid waiver of immunity, the trial court did not err in granting GBRA's plea to the jurisdiction, and the trial court's order is affirmed.

Notes:

1. During the hearing before the trial court, the following exchange occurred:

THE COURT: Well, let me say this: if I — if I follow what Mr. Avery is saying, and I think I do, he is — he is questioning the existence — the validity of the existence of sovereign immunity.

MR. AVERY: Correct, sir.

2. The Guadalupe-Blanco River Authority is a governmental unit entitled to sovereign immunity. *Guadalupe-Blanco River Authority v. Pitonyak*, 84 S.W.3d 326, 332 n.1 (Tex. App.-Corpus Christi 2002, no pet.).

17 S.W.3d 447 (Tex.App.-Houston[1st Dist.] 2000)
THE ASSOCIATED PRESS, HOUSTON CHRONICLE PUBLISHING CO., MIKE COCHRAN, MARK SMITH, AND TERRY KEEL, Appellants
v.
MAURICE COOK, Appellee
NO. 01-98-00773-CV
In The Court of Appeals For The First District of Texas
May 11, 2000

On Appeal from the 411th District Court Trinity County, Texas Trial Court Cause No. 16,871

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[Copyrighted Material Omitted]

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[Copyrighted Material Omitted]

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Panel consists of Chief Justice Schneider and Justices Andell and Duggan.[*].

OPINION

Lee Duggan, Jr., Justice (Retired).

This libel case is an interlocutory appeal from the trial court's order denying summary judgment to news media defendants and their sources. Maurice Cook ("Cook"), the former Senior Ranger Captain of the Texas Rangers, sued the appellants, The Houston Chronicle Publishing Company ("the Chronicle") and its reporter Mark Smith ("Smith"), together with The Associated Press (the "AP") and its reporter Mike Cochran ("Cochran"), because of several articles that were published about him. Cook also sued Terry Keel ("Keel"), the former Travis County Sheriff who was quoted in the articles.[1] We reverse and render judgment in favor of the appellants.

I. Jurisdiction

As a preliminary matter, this Court has jurisdiction under Civil Practice and Remedies Code section 51.014a(6).[2]

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II. Background

The underlying story of the news articles referring to Cook concerns the Texas Rangers' investigation of the 1990 killings of David Joost, his wife Susan, and their two small children.

The Rangers theorized that David Joost killed his family in anger after discovering an affair by his wife, and then committed suicide. Relatives of the Joost family did not accept this theory.[3]

Because the Rangers resisted disclosing their investigative file, the relatives of the Joost family filed a lawsuit seeking access to it under the Texas Open Records Act. The disclosure would be permitted only if the investigation was inactive. Initially, disclosure of the file was ordered by the court. However, on February 25, 1993 (nearly three years after the shootings), the court conducted another hearing to reconsider its ruling.

At the hearing, Cook testified as Ranger Chief and Custodian of DPS records.[4] He said the Rangers were still investigating evidence in support of the murder/suicide theory. This theory involved the assumption that Susan Joost was having an affair with Jerry Hill, her former employer, and that the affair somehow came to light during a lengthy, late night telephone call between the Joost and Hill residences immediately before the shootings. Cook specifically testified that "there was a lengthy phone call between the Joost residence and the attorney [Hill]" that occurred "the night before [the shootings] at about 12:00 midnight," but that the Rangers did not know the identity of the parties to the conversation because "it doesn't say who is talking. It just has two numbers talking." According to Cook, the Rangers theorized that the phone call may have disclosed the alleged affair, causing David Joost, in anger, to kill his family and then himself.

Following Cook's testimony at the hearing, the Joost family's request for disclosure of the Rangers' investigative file was denied. The Joost case was officially closed by the Rangers in 1995, at which time the investigative file was officially released. After it was released, Phillips learned that Cook falsely testified about the non-existent "late night telephone call." Therefore, Phillips filed a complaint with the Hays County District Attorney alleging that Cook committed perjury. Ultimately, Cook was not indicted by the grand jury. However, articles were published reporting the grand jury proceedings. Keel and Phillips were quoted in the articles.

III. Standard of Review

When the denial of summary judgment is appealed, we apply the same standard of review that governs the granting of summary judgment. Evans v. Dolcefino, 986 S.W.2d 69, 75 (Tex.App.--Houston [1st Dist.] 1999, no pet.). The movant for summary judgment must show there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); Randall's Food Mkts., Inc. v. Johnson, 891 S.W.2d 640, 644 (Tex. 1995). A defendant who conclusively

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negates at least one of the essential elements of a cause of action is entitled to summary judgment on that cause of action. Id. Likewise, a defendant who conclusively establishes each element of an affirmative defense is entitled to summary judgment. Id.

Once the movant has established a right to a summary judgment, the burden shifts to the nonmovant. Marchal v. Webb, 859 S.W.2d 408, 412 (Tex.App.--Houston [1st Dist.] 1993, writ denied). The nonmovant must respond to the motion for summary judgment and present to the trial court any issues that would preclude summary judgment. City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 (Tex. 1979); Marchal, 859 S.W.2d at 412. We must accept as

true evidence in favor of the non-movant, indulging every reasonable inference and resolving all doubts in his or her favor. Evans, 986 S.W.2d at 75.

On appeal, we cannot consider any ground for reversal that was not expressly presented to the trial court by written motion, answer, or other response to the motion for summary judgment. Clear Creek Basin Auth., 589 S.W.2d at 677; Hussong v. Schwan's Sales Enter., Inc., 896 S.W.2d 320, 323 (Tex.App.--Houston [1st Dist.] 1995, no writ). We will affirm the summary judgment if any of the theories advanced in the motion for summary judgment is meritorious. Cincinnati Life Ins. Co. v. Cates, 927 S.W.2d 623, 626 (Tex. 1996); Cigna Ins. Co. v. Rubalcada, 960 S.W.2d 408, 411 (Tex.App.--Houston [1st Dist.] 1998, no pet.).

IV. The Houston Chronicle and Mark Smith

A. Analysis

In the Chronicle and Smith's point of error one, they argue the trial court erred in denying their motion for summary judgment because they negated at least one element of each of Cook's libel claims.[5] For the reasons that follow, we agree.

To maintain a defamation cause of action, the plaintiff must prove that the defendant: (1) published a false statement about the plaintiff; (2) that was defamatory; (3) while acting with either actual malice, if the plaintiff was a public official or public figure, or negligence, if the plaintiff was a private individual, regarding the truth of the statement. See Carr v. Brasher, 776 S.W.2d 567, 569 (Tex. 1989). It is undisputed that Cook, as Captain of the Rangers, was a public official.

Under Civil Practice and Remedies Code section 73.005, "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. Similarly, a showing of substantial truth in a summary judgment case will defeat a defamation claim. McIlvain v. Jacobs, 794 S.W.2d 14, 15-16 (Tex. 1990); Evans, 986 S.W.2d at 76. To determine substantial truth, we consider whether the defamatory statement was more damaging to the plaintiff in the mind of the average reader than a true statement would have been. McIlvain, 794 S.W.2d at 16; Barbouti v. Hearst Corp., 927 S.W.2d 37, 65 (Tex. App.--Houston [1st Dist.] 1996, writ denied). This evaluation involves looking at the "gist" of the broadcast. McIlvain, 794 S.W.2d at 16; KTRK Television v. Felder, 950 S.W.2d 100, 105-106 (Tex. App.--Houston [14th Dist.] 1997, no writ). If the underlying facts as to the gist of the libelous charge are undisputed, then we can disregard any variance with respect toitems of secondary importance and determine substantial truth as a matter of law. McIlvain, 794 S.W.2d at 16; Felder, 950 S.W.2d at 106. Moreover, this Court has held "the implication of a true statement,

however unfortunate, does not vitiate the defense of truth." Hardwick v. Houston Lighting & Power Co., 943 S.W.2d 183, 185 (Tex.App.--Houston [1st Dist.] 1997, no writ).

B. The Disputed Statements

Cook's claims against the Chronicle and Smith are limited to four statements printed in three articles. The disputed statements refer to (1) the late night telephone call; (2) Cook's Fifth

Amendment right; (3) Keel's statement that Cook was a "blight on law enforcement"; and (4) attorney John Phillips' statement that there was "probable cause" to indict Cook.

1. The Chronicle's February 8, 1996 article: "Embattled Rangers Chief Cook to Retire"

The first Chronicle article, published February 8, 1996, stated:

The Chronicle investigation also found that Cook may have embellished or misstated facts during closed-session court testimony when he claimed he had telephone records proving a "lengthy" late-night telephone call from the Joost home to the home of Susan Joost's boss the night of the killings.

In fact, phone records show no such call was made.

This disputed statement was repeated in two subsequent articles.[6]

The summary judgment evidence produced by the Chronicle and Smith establishes that this statement is substantially true. A copy of Cook's closed-court testimony at the February 25, 1993 hearing--which was the subject of the Chronicle's articles--shows Cook testified as follows:

A: But the thing that bothered us about this was the night before [the killings] at about 12:00 midnight or late at night, there was a lengthy phone call between the Joost residence and the attorney [Hill].

***

A: . . . And with that possible affair and a conversation from the telephone, you know, one night before this, a lengthy call from one house to the other house--

Q: What time of night are we talking about?

A: We're talking about 11:00 or 12:00, if I'm not mistaken, a little unusual, and it was reasonably late.

The Chronicle's report summarizing Cook's testimony was accurate, because it was later shown that there was no late night telephone call between the Joost and Hill residences on the night before the killings. The telephone records from the Joost and Hill residences support the conclusions published in the Chronicle, and, more importantly, Cook now admits there are no telephone records corroborating his testimony. Indeed, he has explained that his testimony was based on misinformation or a misunderstanding of the facts as relayed to him by other Rangers. However, Cook's explanation for the testimony is irrelevant to whether the Chronicle accurately reported that Cook misstated the

facts.[7] Finally, Cook's contention that someone might assume from these true facts that he committed perjury is also irrelevant, because Cook cannot assert a cause of action for libel by the implication of true facts. See Hardwick, 943 S.W.2d at 185.

As to the first statement in dispute, we hold the Chronicle and Smith established the substantial truth of these articles as a matter of law; therefore, the trial court erred in denying summary judgment on this claim.

2. The Chronicle's February 9, 1996 article: "Sources Say Top Ranger Got the Boot"

Terry Keel was the Travis County Sheriff when Cook was subpoenaed by the grand jury in February 1996. Keel was quoted in the last three paragraphs of the Chronicle's February 9, 1996 article, headlined as, "Sources Say Top Ranger Got the Boot":

"He is a blight on law enforcement," charged Travis County Sheriff Terry Keel.

Asserting that he had "no ax to grind," Keel, a candidate for the Texas House, said he doubts that Cook's pending departure stems from any specific act or misdeed.

"I really honestly believe it was a culmination of a lot of things, things too numerous to discuss," he said. ". . . Cook has caused unbelievable problems."

Keel was accurately quoted. The gist of the article containing these statements was a report that Cook was forced to resign. Cook does not dispute that he was given an ultimatum--he could choose between retiring, being fired, or transferring to another Ranger division.

We do not reach the question of whether Keel's statements are true or substantially true because they are assertions of opinion--not statements of fact. All assertions of opinion are protected by the First Amendment of the United States Constitution and article I, section 8 of the Texas Constitution. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40, 94 S.Ct. 2997, 3006-07 (1974); Carr, 776 S.W.2d at 570; Evans, 986 S.W.2d at 78. Whether a statement is an assertion of fact or opinion is a question of law to be decided by the court. Schauer v. Memorial Care Sys., 856 S.W.2d 437, 446 (Tex.App.--Houston [1st Dist.] 1993, no writ).

In the present case, we hold that Keel's statements are an expression of opinion. While Keel's statements may be objectionable to Cook, they are little more than name calling. Keel's statement that Cook was a "blight on law enforcement" is not unlike a statement that a political opponent is "widely considered an embarrassment to the judiciary and Republican party"--a statement that was considered constitutionally protected opinion, not a statement of fact. See Howell v. Hecht, 821 S.W.2d 627, 631 (Tex.App.--Dallas 1991, writ denied). Thus, the Chronicle and Smith cannot be held liable for publishing Keel's opinions, no matter how objectionable they are to Cook.

As to the second statement in dispute, we hold the trial court erred in denying the Chronicle and Smith summary judgment.

3. The Chronicle's February 24, 1996 Article: "Former Ranger Cleared of Lying; Cook May Have Invoked the Fifth"

The third article containing disputed statements reported on the grand jury proceedings that were prompted by Phillips' (the Joost family's attorney) filing a complaint against Cook with the Hays County District Attorney. Phillips' complaint alleged that Cook committed perjury

when he testified at the February 25, 1993 hearing. Cook specifically complains of the following:

Former Ranger cleared of lying; Cook may have invoked Fifth

A Hays County grand jury has refused to indict [Cook], who had been accused of lying during a court hearing involving the mysterious 1990 slayings of a former racing commission official and his family.

Sources said Cook invoked his Fifth Amendment right to testify before the grand jury . . . , refusing to testify on the grounds that he might incriminate himself. Cook's attorney, Dick DeGuerin of Houston, refused to confirm that . . . .

The summary judgment evidence establishes that the gist of the article is substantially true. The Chronicle and Smith presented the trial court with the affidavit of Marcos Hernandez, Jr., the Hays County District Attorney who was present in the grand jury room. Hernandez said Cook and three other members of the Texas Rangers were subpoenaed by the grand jury. Cook appeared with his attorney, Dick DeGuerin. When the grand jury called Cook to the grand jury room to testify, he did not. Instead, with Hernandez' permission, DeGuerin addressed the grand jury on Cook's behalf.

According to Hernandez' affidavit, DeGuerin told the grand jury Cook was advised not to testify, and that, if brought into the grand jury room, Cook would not testify. Although DeGuerin did not specifically refer to the Fifth Amendment by name when he addressed the grand jury, Hernandez was under the impression that Cook intended to invoke this right. After DeGuerin and the other Texas Rangers addressed the grand jury, Hernandez discussed with the grand jury Cook's refusal to testify. He informed them that they could require Cook to come into the room and refuse to testify in their presence. The consensus of the grand jury was that they did not want to go through with that formality.

Hernandez said the only legal basis he knew for Cook's refusal to testify was by exercise of his Fifth Amendment right. Hernandez also told Phillips, after the fact, that Cook had invoked his Fifth Amendment right.

The gist of the Chronicle's article is that Cook refused to testify before the grand jury by invoking his Fifth Amendment right, he was not indicted for perjury, and he was cleared by the grand jury. Nonetheless, Cook argues the statement that "Sources said [he] invoked his Fifth Amendment right to testify before the grand jury . . . , refusing to testify on the grounds that he might incriminate himself" is false because (1) he did not personally appear before the grand jury, (2) he was never in a position to invoke his Fifth Amendment right, (3) he did not lie during his in camera testimony, and (4) he had no reason to refuse to testify on the grounds that he might incriminate himself because he had not committed perjury. Cook's argument is without merit. See Swate v. Schiffers, 975 S.W.2d 70, 75 (Tex.App.--San Antonio 1998, pet. denied) (finding statement that "assault" on investigator was substantially true, despite a not guilty judgment on charge, because a truthful statement would not have changed theeffect of article in the average reader's mind); Castillo v. State, 901 S.W.2d 550, 551-52 (Tex.App.--El Paso 1995, pet ref'd) (stating that when party's counsel informs court that party intends to invoke the Fifth Amendment, that is sufficient to keep the party from testifying).

Statements made by DeGuerin in representing Cook to the grand jury are attributable to Cook. See Gavenda v. Strata Energy, Inc., 705 S.W.2d 690, 693 (Tex. 1986) (stating attorney-client relationship is agency; thus, attorney's acts are client's acts). Thus, when DeGuerin appeared before the grand jury as counsel representing Cook, Cook also appeared before the grand jury; when DeGuerin told the grand

jury Cook would refuse to testify, Cook refused to testify. See Castillo, 901 S.W.2d at 552.

The only possible conclusion is that Cook's refusal to testify was based on the Fifth Amendment, even if it was not mentioned by name. If it is false that Cook did not invoke his Fifth Amendment right, Cook had the burden to prove its falsity, which he did not; indeed, he has never even suggested that he had some other legal basis for his refusal to testify.

We conclude that the statement that Cook refused to testify on the grounds that he might incriminate himself is substantially true.[8]

Phillips was quoted in the February 24, 1996 article about the perjury investigation. The relevant portion of the article states:

"What Maurice Cook testified to three years ago was what he had been told or seen in written reports," said DeGuerin. "It's clear he got his understanding of the events from (Texas Ranger) Ron Stewart. All he knew is what Stewart told him . . . through oral and written reports."

* * *

DeGuerin said a transcribed report from an interview Stewart conducted with Jerry Hill included discussion of a possible call shortly before the Joosts' deaths. DeGuerin argued that Cook, reading the interview transcript, would have reason to believe there was such a late-night call.

John Phillips, attorney for the Joost family who presented information to the grand jury, took a harsher view: "There is no doubt (Cook) was lying. He gave specific details of a phone conversation, specific times and a specific day. There was more than probable cause to indict Cook."

Cook is not claiming that the Chronicle misquoted Phillips. Indeed, Phillips still believes Cook was lying and that there was probable cause to indict Cook for perjury. Instead, Cook claims that "Phillips said [I] committed perjury and Smith knew at the time he published the statement it was false."

As stated before, the gist of the Chronicle's February 24, 1996 article is that Cook refused to testify before the grand jury, he was not indicted for perjury, and he was cleared by the grand jury. The article contained statements by Cook's attorney, and by Phillips, the person who brought the complaint against Cook and who testified before the grand jury. Phillips was quoted on his opinion concerning the grand jury proceedings, which is that he believed Cook lied. It would not be surprising to the average reader that Phillips, the person who filed the perjury complaint, believed Cook was lying. Moreover, Phillips' statement concerning the phone call is both literally and substantially true--at the February 25, 1993 hearing regarding the Rangers' investigative file,

Cook's closed-session testimony includes specific details of a time (11:00 p.m. to midnight) and a day for the phone call (March 4, 1990, the day before the Joost shootings).

Cook also complains of the following statement in the Chronicle's February 24, 1996 article:

The issue that brought Cook before the grand jury was whether the Rangers captain committed perjury in a February 23, 1993, closed court hearing . . . .

Cook told the judge he had telephone records proving a "lengthy" late call "the night before" the murders to the home of Jerry Hill, Susan Joost's boss and longtime friend.

Cook argues that this statement is false because he did not specifically tell the judge he had telephone records to prove the late night phone call took place. Although Cook may not have specifically said he had telephone records, it was implied by his testimony that such phone records existed and that he had seen them. Indeed, Cook testified as the Rangers' custodian of records, which inherently suggests he had the records. Cook said "there was a lengthy phone call between the Joost residence and [the Hill residence]." When asked whether he knew if the "late night telephone call" was between Susan Joost and her friend, Kathy Hill, Cook responded:

A: There's no way of knowing because it doesn't say who is talking. It just has two numbers talking.

Clearly, "it" refers to a tangible telephone record that shows (1) a sending and receiving telephone number, (2) the date of the call, and (3) the time of the call. Cook does not offer any other explanation for what "it" refers to; instead, he claims, rather disingenuously, that he does not know what "it" refers to. This statement is not more damaging to Cook's reputation than his current version of the facts, which is that he repeatedly and inaccurately testified to a telephone call that was never made, and to the contents of records that he now claims he had never seen and knew nothing about. Thus, we hold the Chronicle's February 24, 1996 article is substantially true as a matter of law, and the trial court erred in denying summary judgment on this claim.

We sustain the Chronicle and Smith's point of error one. We render judgment for the Chronicle and Smith on Cook's claims for libel.[9]

V. The Associated Press and Mike Cochran

In point of error one, the AP and Cochran argue the trial court erred in denying their motion for summary judgment on Cook's claims for libel. Cook's libel claims against the AP and Cochran are now limited to two articles: (1) a February 8, 1996 AP wire story accurately quoting Keel's criticisms; and (2) a June 7, 1996 AP wire story that incorrectly stated Cook owned 12,000 acres of land in Trinity County (he owned only 12 acres).

A. Quoting Keel

As explained in section IV. B. (2) of this opinion, we hold Keel's statements are assertions of his opinion, protected by the Constitution. The AP and Cochran, like the Chronicle and Smith, cannot be held liable for publishing his criticisms.

B. Cook's Land Ownership

It is undisputed that the AP made a mistake. However, the AP argues that Cook did not establish, by clear and convincing evidence, that the misstatement was published with actual malice.[10] Therefore,

it argues it was entitled to summary judgment as a matter of law. We agree.

A libel defendant is entitled to summary judgment under Texas law if it can negate actual malice as a matter of law. WFAA-TV, Inc. v. McLemore, 978 S.W.2d 568, 574 (Tex. 1998). A libel defendant can negate actual malice by presenting evidence that shows it did not publish the alleged defamatory statement with actual knowledge of any falsity or with reckless disregard for its truth. Id. It is insufficient to show the defendant made an error in judgment. Carr, 776 S.W.2d at 571; See Casso, 776 S.W.2d at 558.

The defendant's burden to negate actual malice is by clear and convincing evidence. McLemore, 978 S.W.2d at 574. An uncontroverted affidavit by the person publishing the statement that indicates the statement was not made with actual malice is sufficient to meet the burden to negate actual malice as a matter of law. Id.

To negate actual malice, the AP presented summary judgment evidence to the trial court that includes an affidavit from Terri Langford, the AP reporter who wrote the article containing this statement. She said that after Cook held a press conference to announce the filing of this lawsuit, she was sent to Trinity County to get a copy of the petition. Langford wanted to determine why Cook had filed the suit in Trinity County, far away from the Austin area where he lived and worked. While waiting for a copy of the petition, Langford also reviewed property tax records showing that Cook owned "12.000" acres of land in Trinity County. Initially, she understood the figure to mean "12,000," and this information was reported in the AP's story. She said that at the time she reported this article, she believed the statements to be true and accurate.

To negate actual malice, the AP also presented an affidavit from John Lumpkin, the AP Dallas Bureau Chief, as summary judgment evidence. Lumpkin said that he believed the 12,000 acre statement was true when the article was published. He said he was comfortable relying on Langford's work because she is a skilled investigative reporter. However, after the article was published, and on his own initiative, Lumpkin asked for the 12,000 acre figure to be double-checked. The AP ran a correction immediately after it determined Cook owned only 12 acres.

We find that the AP met its summary judgment burden to negate actual malice. See, e.g., McLemore, 978 S.W.2d at 574; Casso, 907 S.W.2d at 622; Rogers v. Cassidy, 946 S.W.2d 439, 446 (Tex.App.--Corpus Christi 1997, no writ); Morris v. Dallas Morning News, Inc., 934 S.W.2d 410, 421 (Tex.App.--Waco 1996, writ denied) (holding actual malice negated by uncontroverted affidavits supporting summary judgment). Once the AP met its summary judgment burden with this evidence, the burden shifted to Cook. Cook had to offer specific, affirmative evidence showing the AP either knew the publication was false or entertained serious doubts as to its truth. See Howell, 821 S.W.2d at 631.

Cook does not point this Court to any summary judgment evidence in the record as evidence of actual malice. Instead, he argues that we should examine the relationship between the parties,

Cook, the AP, and Cochran, and from this relationship we should find that the personal animosity between Cook and Cochran is evidence of actual malice. However, actual malice in defamation is a term of art that does not include ill will, evil motive, or spite. Cook's argument, therefore, is insufficient to overcome the AP's summary judgment evidence negating actual malice. See Schauer, 856 S.W.2d at 450 (holding that mere surmise or suspicion of malice

does not carry the probative force necessary to form the basis of a legal inference of malice).

Because Cook presented no controverting summary judgment evidence that the AP believed that the statement in question was false or published with reckless disregard for the truth, the trial court erred in denying summary judgment to AP on this claim.[11] Therefore, we sustain the AP and Cochran's point of error one.

We reverse and render judgment for the AP and Cochran on Cook's libel claims.

VI. Terry Keel

In points of error one and two, Keel argues the trial court erred in denying his motion for summary judgment on Cook's claims for libel, tortious interference with a contract, and intentional infliction of emotional distress.

A. Libel

Keel was sued for his criticisms that were re-published by the Chronicle and the AP. As explained in section IV. B. (2) of this opinion, we hold Keel's statements are assertions of his opinion, protected by the Constitution.[12]

B. Claims against Keel for Tortious Interference with a Contract and Intentional Infliction of Emotional Distress

Keel was sued for tortious interference with a contract and intentional infliction of emotional distress. Keel argues he is entitled to absolute and official immunity because he was sued in his capacity as an elected representative to the House of Representatives.[13] Although Keel is not entitled to absolute legislative immunity, we hold that he is entitled to official immunity.

1. Relevant Facts

After Cook retired from the Rangers, he wanted to be the committee clerk[14] for the House Public Safety Committee. He expressed this interest to State Representative Keith Oakley, who chaired the committee during the 74th Regular Session and expected to be re-appointed to chair the committee during the 75th Regular Session. Cook said he told Oakley he was involved in litigation against Keel, but that Oakley did not express any concerns and did not think it would be a problem. However, because Cook approached Oakley before the legislature had convened, and before the committee was even selected, Oakley told Cook it would not be appropriate to have a committee clerk on staff before the committee chairs were named.

When the 75th Regular Session convened on January 14, 1997, Keel was a newly elected State Representative. Keel expected to be on the House Public Safety

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Committee. On the second day of the session, and before committee appointments were made, Keel approached Oakley and asked him whether he intended to hire Cook and whether he was aware of the ongoing litigation between them. When Oakley responded that he was, Keel ended the conversation by saying he did not know whether Oakley was aware of it.

Oakley was re-appointed to chair the committee on January 23, 1997. As chair of the committee, Oakley was authorized to employ and discharge the staff and employees authorized for the committee. On the day before committee assignments were made, Keel approached Oakley again, on the House floor, and asked about Oakley's plans to hire Cook. When Oakley said he still intended to hire Cook, Keel told him that hiring Cook would not be good for the committee because of things that might come to light during the lawsuit. Sometime thereafter, Cook went to Oakley's office, at which time Oakley told Cook he would not be able to have the job because, with Keel on the committee, he did not think the tension would be good for the committee. Cook was never listed as a government employee in any public documents, nor was Cook ever paid for any work as committee clerk.

2. Absolute Legislative Immunity

Keel argued that he was entitled to absolute legislative immunity from Cook's claims. To be entitled to legislative immunity, Keel was required to show that his actions were functionally legislative. See Lopez v. Trevino, 2 S.W.3d 472, 473 (Tex.App.--San Antonio 1999, pet. dism'd w.o.j.). Courts have applied two tests in determining whether an action is legislative. See id. Under the first test, the court considers whether the underlying facts on which a decision is made are "legislative facts," such as generalizations concerning a policy or state of affairs, or whether the underlying facts are more specific, such as those that relate to particular individuals or situations. Id. If the underlying facts are generalizations, the action is legislative; if they are specific, the decision is administrative. Id. Under the second test, the court focuses on the impact of the action. Lopez, 2 S.W.3d at 474. If the action involves the establishment of a general policy, it is legislative; if it singles out specific individuals, it is administrative. Id.

Courts generally consider employment and personnel decisions to be administrative in nature because they affect a single individual. See Lopez, 2 S.W.3d at 474 (citations omitted). For example, where the action involves the elimination of a position due to budgetary considerations, the decision is legislative because it involves policy considerations and affects the position, not simply the individual. Bogan v. Scott-Harris, 523 U.S. 44, 118 S.Ct. 966, 973 (1998). However, where the action involves the termination of a particular employee, the action is administrative. Id.

Applying the two tests to this case and assuming Cook was employed by the House, we conclude that Keel did not establish that he is entitled to absolute legislative immunity--the underlying facts singled out and related to a specific individual, Cook, rendering the action administrative.

3. Official Immunity

In the motion for summary judgment, Keel also argued that he was entitled to official immunity. As a government official, Keel is immune from suit for the performance of discretionary duties within the scope of his authority, as long as he acted in good faith. See City of Lancaster v. Chambers, 883 S.W.2d 650, 653 (Tex. 1994); City of Columbus v. Barnstone, 921 S.W.2d 268, 272 (Tex.App.--Houston [1st Dist.] 1995, no writ). To be entitled to summary judgment, Keel had to conclusively establish each of these elements as a matter of law.

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We find that Keel is entitled to official immunity, because he established that his communications to Oakley were part of a discretionary duty, within the scope of his authority, and that he acted in good faith. A discretionary duty requires the exercise of personal deliberation, decision, and judgment, whereas ministerial duties are defined with precision and certainty, leaving nothing to the individual's judgment or discretion. Chambers, 883 S.W.2d at 654; Barnstone, 921 S.W.2d at 272. Whether an action is discretionary or ministerial is a question of law. Johnson v. Texas Dep't. of Transp., 905 S.W.2d 394, 397 (Tex.App.--Austin 1995, no writ).

We find that Keel's communicating to Oakley was part of a discretionary duty, because it required the exercise of his personal deliberation, decision, and judgment. He reasonably believed it was within his duties to report a possible staffing problem to the chairman of a legislative committee, and apparently the chairman agreed it would be problematic for the two men to work on the same committee. Cook did not offer any controverting proof to show this was not discretionary, or that this was not within the scope of Keel's duties.

Finally, the parties dispute whether Keel acted in good faith. The test for whether an official acted in "good faith" is whether a reasonably prudent official, under the same or similar circumstances, could have believed that his actions were reasonable. Chambers, 883 S.W.2d at 654. Once the defendant has met his burden of proof on good faith, the burden shifts to the plaintiff to produce controverting evidence--that is, the plaintiff must show that no reasonable person in the defendant's position could have thought the facts were such that they justified the defendant's acts. Id. at 657.

Keel argues that, when he communicated with Oakley, he was acting in good faith because a reasonable state representative could have believed he had a duty to communicate a potential conflict and staffing problem to the committee chairman. He argues that obviously Oakley agreed that it might cause tension and negatively influence the effectiveness of the committee. We agree.

As supporting evidence to negate good faith, Cook offered Keel's deposition testimony regarding a long and tortured history between the two, beginning with when Cook was designated to testify as an expert witness in a case alleging civil rights violations against Keel.[15] However, Cook did not show that a reasonable person in Keel's position could not have believed communicating with the chairman was justified. In fact, the chairman agreed, which indicates Keel's concerns were reasonable.

We conclude that Keel was entitled to official immunity. The trial court erred in denying summary judgment on this ground.

We sustain Keel's points of error one and two, and reverse and render judgment in favor of Keel on Cook's claims for libel, tortious interference with a contract, and intentional infliction of emotional distress.

VII. SUMMARY

We sustain the Chronicle and Smith's point of error one, the AP and Cochran's point of error one, and Keel's points of error one and two. We reverse and render judgment that Maurice Cook take nothing by way of his libel claims against the Chronicle, Smith, the AP, Cochran, and Keel, and his claims for tortious interference with a contract and intentional infliction of emotional distress against Keel.

Notes:

*. The Honorable Lee Duggan, Jr., retired Justice, Court of Appeals, First District of Texas at Houston, participating by assignment.

1. Cook sued other defendants who are not parties to the appeal, the Amarillo News-Globe and John Phillips, another source named in the articles. Cook nonsuited the Globe and Phillips.

2. Section 51.014(a)(6) provides,

A person may appeal from an interlocutory order of a district court . . . that denies a motion for summary judgment that is based in whole or in part upon a claim against or defense by a member of the electronic or print media, acting in such capacity, or a person whose communication appears in or is published by the electronic or print media, arising under the free speech or free press clause of the First Amendment to the United States Constitution, or Article 1, Section 8, of the Texas Constitution, or Chapter 73.

3. They suspected the killings were hired murders because David Joost may have discovered corruption at the Texas Racing Commission. His body was discovered on the morning that he was expected to brief the commission on a controversial contract. The family also grew suspicious because of the way the Rangers maintained tight control over the case, refusing them access to autopsy and lab reports, crime scene photographs, and other evidence. If the deaths were determined to be murder, rather than a murder suicide, the Joost family's relatives could have gained $214,000 in insurance proceeds.

4. Cook's testimony was incorporated as an exhibit to the Chronicle's motion for summary judgment.

5. The Chronicle and Smith's motion for summary judgment was based on five different theories: (1) the articles are substantially true; (2) the articles in dispute are privileged; (3) the articles included protected opinion, and, as a matter of law, are not defamatory; (4) the articles were published without actual malice; and (5) there is no evidence to support Cook's claims.

6. The second Chronicle article, published February 9, 1996, stated:

A Houston Chronicle investigation of the [Joost] case files after the case was officially closed last year showed . . . that Cook may have embellished or misstated facts during closed-session court testimony.

The third Chronicle article, published February 24, 1996, stated:

Cook told the judge he had telephone records proving a "lengthy" late call "the night before" the murders to the home of Jerry Hill, Susan Joost's boss and longtime friend. Cook said that phone call gave credence to the theory that Joost flew into a rage and killed his wife after discovering her on the phone with her boss.

In fact, the Joost phone records show no such call was made. It is possible Cook was referring to a 9:06 p.m. call from Hill's home to the Joosts about three weeks before the killings. Hill said that call, on Feb. 15, 1990, was made on the day his son was born. He denied having an affair with Susan Joost.

7. Even the lead investigator for the Texas Rangers, Ron Stewart, testified that Cook's testimony was not accurate, and that he "overstated" the facts.

8. Even if it is not substantially true that Cook invoked his Fifth Amendment right, exercising a legal right is not defamatory as a matter of law. See Banfield v. Laidlaw Waste Sys., 977 S.W.2d 434, 439 (Tex.App.--Dallas 1998, pet. denied) (finding statements that plaintiffs were "troublemakers" and "ringleaders" was not defamatory as a matter of law because union organizing is a federal right). A statement is defamatory if the words tend to injure a person's reputation, exposing the person to public hatred, contempt, ridicule, or financial injury. Einhorn v. LaChance, 823 S.W.2d 405, 410-11 (Tex.App.--Houston [1st Dist.] 1992, writ dism'd w.o.j.). Whether words are capable of the defamatory meaning the plaintiff attributes to them is a question of law for the court. Id. at 411. The court construes the statement as a whole in light of surrounding circumstances based upon how a person of ordinary intelligence would perceive the entire statement. Id. Here, a person of ordinary intelligence would not construe the article any differently if it had said that DeGuerin addressed the grand jury on Cook's behalf, and that Cook did not testify, because such a person knows the only legal basis for Cook's refusal to testify was by exercise of his Fifth Amendment right.

9. We note that in his Third Amended Petition, the last live pleading before the trial court, Cook abandoned his non-libel claims against the Chronicle and Smith.

10. Cook's claim against Cochran for the land ownership misstatement must fail for the simple reason that he cannot be held liable for an article that he neither wrote nor published. See Carr, 776 S.W.2d at 569 (stating publication is an essential element of a libel action). It is undisputed that he did not write or contribute to the article in any way. Thus, Cochran was entitled to summary judgment on this claim.

11. In his brief, even Cook acknowledges that the reporter "inexplicably" reported that he owned 12,000 acres, because the reporter was "apparently totally unaware that land ownership can be quantified in fractional sections of an acre." This acknowledges that the statement was merely a mistake, made without actual malice. Interestingly enough, not only did Cook not sue Langford for making the statement, he did not even depose her.

12. The parties dispute our jurisdiction over Cook's defamation claim against Keel. Because Keel's statements were quoted in the print media, we have jurisdiction over this claim under Civil Practice and Remedies Code section 51.014(a)(6).

13. We have jurisdiction over these claims under Civil Practice and Remedies Code section 51.014(a)(5), which states that a party may pursue an interlocutory appeal when the trial court denies a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state. Even though Keel urged other theories to support summary judgment on these claims, we may consider only whether he was entitled to summary judgment based on his immunity defenses. See Boozier v. Hambrick, 846 S.W.2d 593, 596 (Tex.App.--Houston [1st Dist.] 1993, no writ) (explaining that the legislative intent was to provide interlocutory appellate review only of the merits of immunity defense).

14. We note that employees of the House are at-will employees, who do not have a long-term contractual relationship with the House.

15. Cook says he told the plaintiff's lawyer in that case that he would not testify unless he was subpoenaed; he was never subpoenaed and he never testified.

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250 U.S. 616
40 S.Ct. 17
63 L.Ed. 1173
ABRAMS et al.

v.

UNITED STATES.

No. 316.
Argued Oct. 21 and 22, 1919.
Decided Nov. 10, 1919.

Mr. Harry Weinberger, of New York City, for plaintiffs in error.

Mr. Assistant Attorney General Robert P. Stewart, for the United States.

Mr. Justice CLARKE delivered the opinion of the Court.

On a single indictment, containing four counts, the five plaintiffs in error, hereinafter designated the defendants, were convicted of conspiring to violate provisions of the

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Espionage Act of Congress (section 3, title I, of Act June 15, 1917, c. 30, 40 Stat. 219, as amended by Act May 16, 1918, c. 75, 40 Stat. 553 [Comp. St. 1918, § 10212c]).

Each of the first three counts charged the defendants with conspiring, when the United States was at war with the Imperial Government of Germany, to unlawfully utter, print, write and publish: In the first count, 'disloyal, scurrilous and abusive language about the form of government of the United States;' in the second count, language 'intended to bring the form of government of the United States into contempt, scorn, contumely, and disrepute;' and in the third count, language 'intended to incite, provoke and encourage resistance to the United States in said war.' The charge in the fourth count was that the defendants conspired 'when the United States was at war with the Imperial German Government, * * * unlawfully and willfully, by utterance, writing, printing and publication to urge, incite and advocate curtailment of production of things and products, to wit, ordnance and ammunition, necessary and essential to the prosecution of the war.' The offenses were charged in the language of the act of Congress.

It was charged in each count of the indictment that it was a part of the conspiracy that the defendants would attempt to accomplish their unlawful purpose by printing, writing and distributing in the city of New York many copies of a leaflet or circular, printed in the English language, and of another printed in the Yiddish language, copies of which, properly identified, were attached to the indictment.

All of the five defendants were born in Russia. They were intelligent, had considerable schooling, and at the time they were arrested they had lived in the United States terms varying from five to ten years, but none of them had applied for naturalization. Four of them testified as

witnesses in their own behalf, and of these three frankly avowed that they were 'rebels,' 'revolutionists,'

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'anarchists,' that they did not believe in government in any form, and they declared that they had no interest whatever in the government of the United States. The fourth defendant testified that he was a 'Socialist' and believed in ' a proper kind of government, not capitalistic,' but in his classification the government of the United States was 'capitalistic.'

It was admitted on the trial that the defendants had united to print and distribute the described circulars and that 5,000 of them had been printed and distributed about the 22d day of August, 1918. The group had a meeting place in New York City, in rooms rented by defendant Abrams, under an assumed name, and there the subject of printing the circulars was discussed about two weeks before the defendants were arrested. The defendant Abrams, although not a printer, on July 27, 1918, purchased the printing outfit with which the circulars were printed, and installed it in a basement room where the work was done at night. The circulars were distributed, some by throwing them from a window of a building where one of the defendants was employed and others secretly, in New York City.

The defendants pleaded 'not guilty,' and the case of the government consisted in showing the facts we have stated, and in introducing in evidence copies of the two printed circulars attached to the indictment, a sheet entitled 'Revolutionists Unite for Action,' written by the defendant Lipman, and found on him when he was arrested, and another paper, found at the headquarters of the group, and for which Abrams assumed responsibility.

Thus the conspiracy and the doing of the overt acts charged were largely admitted and were fully established.

On the record thus described it is argued, somewhat faintly, that the acts charged against the defendants were not unlawful because within the protection of that freedom

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of speech and of the press which is guaranteed by the First Amendment to the Constitution of the United States, and that the entire Espionage Act is unconstitutional because in conflict with that amendment.

This contention is sufficiently discussed and is definitely negatived in Schenck v. United States and Baer v. United States, 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470, and in Frohwerk v. United States, 249 U. S. 204, 39 Sup. Ct. 249, 63 L. Ed. 561.

The claim chiefly elaborated upon by the defendants in the oral argument and in their brief is that there is no substantial evidence in the record to support the judgment upon the verdict of guilty and that the motion of the defendants for an instructed verdict in their favor was erroneously denied. A question of law is thus presented, which calls for an examination of the record, not for the purpose of weighing conflicting testimony, but only to determine whether there was some evidence, competent and substantial, before the jury, fairly tending to sustain the

verdict. Troxell, Administrator, v. Delaware, Lackawanna & Western R. R. Co., 227 U. S. 434, 442, 33 Sup. Ct. 274, 57 L. Ed. 586; Lancaster v. Collins, 115 U. S. 222, 225, 6 Sup. Ct. 33, 29 L. Ed. 373; Chicago & North Western Ry. Co. v. Ohle, 117 U. S. 123, 129, 6 Sup. Ct. 632, 29 L. Ed. 837. We shall not need to consider the sufficiency, under the rule just stated, of the evidence introduced as to all of the counts of the indictment, for, since the sentence imposed did not exceed that which might lawfully have been imposed under any single count, the judgment upon the verdict of the jury must be affirmed if the evidence is sufficient to sustain any one of the counts. Evans v. United States, 153 U. S. 608, 14 Sup. Ct. 939, 38 L. Ed. 839; Claassen v. United States, 142 U. S. 140, 12 Sup. Ct. 169, 35 L. Ed. 966; Debs v. United States, 249 U. S. 211, 216, 39 Sup. Ct. 252, 63 L. Ed. 566.

The first of the two articles attached to the indictment is conspicuously headed, 'The Hypocrisy of the United States and her Allies.' After denouncing President Wilson as a hypocrite and a coward because troops were sent into Russia, it proceeds to assail our government in general, saying:-

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'His [the President's] shameful, cowardly silence about the intervention in Russia reveals the hypocrisy of the plutocratic gang in Washington and vicinity.'

It continues:

'He [the President] is too much of a coward to come out openly and say: 'We capitalistic nations cannot afford to have a proletarian republic in Russia."

Among the capitalistic nations Abrams testified the United States was included.

Growing more inflammatory as it proceeds, the circular culminates in:

'The Russian Revolution cries: Workers of the World! Awake! Rise! Put down your enemy and mine!'

'Yes friends, there is only one enemy of the workers of the world and that is CAPITALISM.'

This is clearly an appeal to the 'workers' of this country to arise and put down by force the government of the United States which they characterize as their 'hypocritical,' 'cowardly' and 'capitalistic' enemy.

It concludes:

'Awake! Awake, you Workers of the World!

REVOLUTIONISTS.'

The second of the articles was printed in the Yiddish language and in the translation is headed, 'Workers—Wake Up.' After referring to 'his Majesty, Mr. Wilson, and the rest of the gang, dogs of all colors!' it continues:

'Workers, Russian emigrants, you who had the least belief in the honesty of *our* government,'

—which defendants admitted referred to the United States government——

'must now throw away all confidence, must spit in the face the false, hypocritic, military propaganda which has fooled you so relentlessly, calling forth your sympathy, your help, to the prosecution of the war.'

The purpose of this obviously was to persuade the persons to whom it was addressed to turn a deaf ear to patriotic

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appeals in behalf of the government of the United States, and to cease to render it assistance in the prosecution of the war.

It goes on:

'With the money which you have loaned, or are going to loan them, they will make bullets not only for the Germans, but also for the Workers Soviets of Russia. *Workers in the ammunition factories, you are producing bullets, bayonets, cannon, to murder not only the Germans, but also your dearest, best, who are in Russia and are fighting for freedom*.'

It will not do to say, as is now argued, that the only intent of these defendants was to prevent injury to the Russian cause. Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce. Even if their primary purpose and intent was to aid the cause of the Russian Revolution, the plan of action which they adopted necessarily involved, before it could be realized, defeat of the war program of the United States, for the obvious effect of this appeal, if it should become effective, as they hoped it might, would be to persuade persons of character such as those whom they regarded themselves as addressing, not to aid government loans and not to work in ammunition factories, where their work would produce 'bullets, bayonets, cannon' and other munitions of war, the use of which would cause the 'murder' of Germans and Russians.

Again, the spirit becomes more bitter as it proceeds to declare that——

'America and her Allies have betrayed [the Workers]. Their robberish aims are clear to all men. The destruction of the Russian Revolution, that is the politics of the march to Russia.

'*Workers, our reply to the barbaric intervention has to be a general strike! An open challenge* only will let the government know that not only the Russian Worker fights for

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freedom, but also *here in America lives the spirit of Revolution*.'

This is not an attempt to bring about a change of administration by candid discussion, for no matter what may have incited the outbreak on the part of the defendant anarchists, the manifest purpose of such a publication was to create an attempt to defeat the war plans of the government of the United States, by bringing upon the country the paralysis of a general strike, thereby arresting the production of all munitions and other things essential to the conduct of the war.

This purpose is emphasized in the next paragraph, which reads:

'Do not let the government scare you with their wild punishment in prisons, hanging and shooting. We must not and will not betray the splendid fighters of Russia. *Workers, up to fight*.'

After more of the same kind, the circular concludes:

'Woe unto those who will be in the way of progress. Let solidarity live!'

It is signed, 'The Rebels.'

That the interpretation we have put upon these articles, circulated in the greatest port of our land, from which great numbers of soldiers were at the time taking ship daily, and in which great quantities of war supplies of every kind were at the time being manufactured for transportation overseas, is not only the fair interpretation of them, but that it is the meaning which their authors consciously intended should be conveyed by them to others is further shown by the additional writings found in the meeting place of the defendant group and on the person of one of them. One of these circulars is headed: 'Revolutionists! Unite for Action!'

After denouncing the President as 'Our Kaiser' and the hypocrisy of the United States and her Allies, this article concludes:-

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'Socialists, Anarchists, Industrial Workers of the World, Socialists, Labor party men and other revolutionary organizations *Unite for Action* and let us save the Workers' Republic of Russia!

'*Know you lovers of freedom that in order to save the Russian revolution, we must keep the armies of the allied countries busy at home*.'

Thus was again avowed the purpose to throw the country into a state of revolution, if possible, and to thereby frustrate the military program of the government.

The remaining article, after denouncing the President for what is characterized as hostility to the Russian revolution, continues:

'We, the toilers of America, who believe in real liberty, shall *pledge ourselves*, in case the United States will participate in that bloody conspiracy against Russia, *to create so great a*

disturbance that the autocrats of America shall be compelled to keep their armies at home, and not be able to spare any for Russia.'

It concludes with this definite threat of armed rebellion:

'If they will use arms against the Russian people to enforce their standard of order, *so will we use arms*, and they shall never see the ruin of the Russian Revolution.'

These excerpts sufficiently show, that while the immediate occasion for this particular outbreak of lawlessness, on the part of the defendant alien anarchists, may have been resentment caused by our government sending troops into Russia as a strategic operation against the Germans on the eastern battle front, yet the plain purpose of their propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution, in this country for the purpose of embarrassing and if possible defeating the military plans of the government in Europe. A technical distinction may perhaps be taken between disloyal and abusive language applied to the *form* of our government or language intended to bring the *form*

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of our government into contempt and disrepute, and language of like character and intended to produce like results directed against the President and Congress, the agencies through which that form of government must function in time of war. But it is not necessary to a decision of this case to consider whether such distinction is vital or merely formal, for the language of these circulars was obviously intended to provoke and to encourage resistance to the United States in the war, as the third count runs, and, the defendants, in terms, plainly urged and advocated a resort to a general strike of workers in ammunition factories for the purpose of curtailing the production of ordnance and munitions necessary and essential to the prosecution of the war as is charged in the fourth count. Thus it is clear not only that some evidence but that much persuasive evidence was before the jury tending to prove that the defendants were guilty as charged in both the third and fourth counts of the indictment and under the long established rule of law hereinbefore stated the judgment of the District Court must be

Affirmed.

Mr. Justice HOLMES, dissenting.

This indictment is founded wholly upon the publication of two leaflets which I shall describe in a moment. The first count charges a conspiracy pending the war with Germany to publish abusive language about the form of government of the United States, laying the preparation and publishing of the first leaflet as overt acts. The second count charges a conspiracy pending the war to publish language intended to bring the form of government into contempt, laying the preparation and publishing of the two leaflets as overt acts. The third count alleges a conspiracy to encourage resistance to the United States in the same war and to attempt to effectuate the purpose by publishing the same leaflets. The fourth count lays a conspiracy

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to incite curtailment of production of things necessary to the prosecution of the war and to attempt to accomplish it by publishing the second leaflet to which I have referred.

The first of these leaflets says that the President's cowardly silence about the intervention in Russia reveals the hypocrisy of the plutocratic gang in Washington. It intimates that 'German militarism combined with allied capitalism to crush the Russian revolution'—goes on that the tyrants of the world fight each other until they see a common enemy—working class enlightenment, when they combine to crush it; and that now militarism and capitalism combined, though not openly, to crush the Russian revolution. It says that there is only one enemy of the workers of the world and that is capitalism; that it is a crime for workers of America, etc., to fight the workers' republic of Russia, and ends 'Awake! Awake, you workers of the world! Revolutionists.' A note adds 'It is absurd to call us pro-German. We hate and despise German militarism more than do you hypocritical tyrants. We have more reason for denouncing German militarism than has the coward of the White House.'

The other leaflet, headed 'Workers—Wake Up,' with abusive language says that America together with the Allies will march for Russia to help the Czecko-Slovaks in their struggle against the Bolsheviki, and that his time the hypocrites shall not fool the Russian emigrants and friends of Russia in America. It tells the Russian emigrants that they now must spit in the face of the false military propaganda by which their sympathy and help to the prosecution of the war have been called forth and says that with the money they have lent or are going to lend 'they will make bullets not only for the Germans but also for the Workers Soviets of Russia,' and further, 'Workers in the ammunition factories, you are producing bullets, bayonets, cannon to murder not only the Germans,

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but also your dearest, best, who are in Russia fighting for freedom.' It then appeals to the same Russian emigrants at some length not to consent to the 'inquisitionary expedition in Russia,' and says that the destruction of the Russian revolution is 'the politics of the march on Russia.' The leaflet winds up by saying 'Workers, our reply to this barbaric intervention has to be a general strike!' and after a few words on the spirit of revolution, exhortations not to be afraid, and some usual tall talk ends 'Woe unto those who will be in the way of progress. Let solidarity live! The Rebels.'

No argument seems to be necessary to show that these pronunciamentos in no way attack the form of government of the United States, or that they do not support either of the first two counts. What little I have to say about the third count may be postponed until I have considered the fourth. With regard to that it seems too plain to be denied that the suggestion to workers in the ammunition factories that they are producing bullets to murder their dearest, and the further advocacy of a general strike, both in the second leaflet, do urge curtailment of production of things necessary to the prosecution of the war within the meaning of the Act of May 16, 1918, c. 75, 40 Stat. 553, amending section 3 of the earlier Act of 1917 (Comp. St. § 10212c). But to make the conduct criminal that statute requires that it should be 'with intent by such curtailment to cripple or hinder the United States in the prosecution of the war.' It seems to me that no such intent is proved.

I am aware of course that the word 'intent' as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended

will ensue. Even less than that will satisfy the general principle of civil and criminal liability. A man may have to pay damages, may be sent to prison, at common law might be hanged, if at the time of his act

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he knew facts from which common experience showed that the consequences would follow, whether he individually could foresee them or not. But, when words are used exactly, a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed. It may be obvious, and obvious to the actor, that the consequence will follow, and he may be liable for it even if he regrets it, but he does not do the act with intent to produce it unless the aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind.

It seems to me that this statute must be taken to use its words in a strict and accurate sense. They would be absurd in any other. A patriot might think that we were wasting money on aeroplanes, or making more cannon of a certain kind than we needed, and might advocate curtailment with success, yet even if it turned out that the curtailment hindered and was thought by other minds to have been obviously likely to hinder the United States in the prosecution of the war, no one would hold such conduct a crime. I admit that my illustration does not answer all that might be said but it is enough to show what I think and to let me pass to a more important aspect of the case. I refer to the First Amendment to the Constitution that Congress shall make no law abridging the freedom of speech.

I never have seen any reason to doubt that the questions of law that alone were before this Court in the Cases of Schenck (249 U. S. 47, 29 Sup. Ct. 247, 63 L. Ed. 470) Frohwerk (249 U. S. 204, 39 Sup. Ct. 249, 63 L. Ed. 561), and Debs (249 U. S. 211, 39 Sup. Ct. 252, 63 L. Ed. 566), were rightly decided. I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is

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greater in time of war than in time of peace because war opens dangers that do not exist at other times.

But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so. Publishing those opinions for the very purpose of obstructing, however, might indicate a greater danger and at any rate would have the quality of an attempt. So I assume that the second leaflet if published for the purposes alleged in the fourth count might be punishable. But it seems pretty clear to me that nothing less than that would bring these papers within the scope of this law. An actual intent in the sense that I have

explained is necessary to constitute an attempt, where a further act of the same individual is required to complete the substantive crime, for reasons given in Swift & Co. v. United States, 196 U. S. 375, 396, 25 Sup. Ct. 276, 49 L. Ed. 518. It is necessary where the success of the attempt depends upon others because if that intent is not present the actor's aim may be accomplished without bringing about the evils sought to be checked. An intent to prevent interference with the revolution in Russia might have been satisfied without any hindrance to carrying on the war in which we were engaged.

I do not see how anyone can find the intent required by the statute in any of the defendant's words. The second leaflet is the only one that affords even a foundation for the charge, and there, without invoking the hatred of German militarism expressed in the former one, it is evident

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from the beginning to the end that the only object of the paper is to help Russia and stop American intervention there against the popular government—not to impede the United States in the war that it was carrying on. To say that two phrases taken literally might import a suggestion of conduct that would have interference with the war as an indirect and probably undesired effect seems to me by no means enough to show an attempt to produce that effect.

I return for a moment to the third count. That charges an intent to provoke resistance to the United States in its war with Germany. Taking the clause in the statute that deals with that in connection with the other elaborate provisions of the Act, I think that resistance to the United States means some forcible act of opposition to some proceeding of the United States in pursuance of the war. I think the intent must be the specific intent that I have described and for the reasons that I have given I think that no such intent was proved or existed in fact. I also think that there is no hint at resistance to the United States as I construe the phrase.

In this case sentences of twenty years imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them. Even if I am technically wrong and enough can be squeezed from these poor and puny anonymities to turn the color of legal litmus paper; I will add, even if what I think the necessary intent were shown; the most nominal punishment seems to me all that possible could be inflicted, unless the defendants are to be made to suffer not for what the indictment alleges but for the creed that they avow—a creed that I believe to be the creed of ignorance and immaturity when honestly held, as I see no reason to doubt that it was held here but which, although made the subject of examination at the

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trial, no one has a right even to consider in dealing with the charges before the Court.

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to

believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798 (Act July 14, 1798, c. 73, 1 Stat. 596), by repaying fines that it imposed. Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants

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making any exception to the sweeping command, 'Congress shall make no law abridging the freedom of speech.' Of course I am speaking only of expressions of opinion and exhortations, which were all that were uttered here, but I regret that I cannot put into more impressive words my belief that in their conviction upon this indictment the defendants were deprived of their rights under the Constitution of the United States.

Mr. Justice BRANDEIS concurs with the foregoing opinion.

AOL, INC., Appellant
v.
DR. RICHARD MALOUF AND LEANNE MALOUF, Appellees

DR. RICHARD MALOUF AND LEANNE MALOUF, Appellants
v.
GRAHAM WOOD, Appellee

No. 05-13-01637-CV
No. 05-14-00568-CV

Court of Appeals Fifth District of Texas at Dallas

April 2, 2015

On Appeal from the County Court at Law No. 3 Dallas County, Texas
Trial Court Cause No. CC-12-06268-C

MEMORANDUM OPINION

Before Justices Fillmore, Stoddart, and Whitehill
Opinion by Justice Stoddart

These consolidated appeals involve motions to dismiss defamation claims under the Texas Citizen's Participation Act[1] (TCPA). AOL, Inc. brings an interlocutory appeal of the denial of its motion to dismiss defamation claims brought by Dr. Richard Malouf and his wife, Leanne Malouf.[2] The Maloufs appeal the final judgment in a severed action dismissing their

claims against Graham Wood after the trial court granted Wood's motion to dismiss under the TCPA. Wood is an employee of AOL and the defamation claims against both involve the same statement written by Wood and published on an AOL website. We consolidated the appeals.

Because we conclude Malouf and his wife failed to establish by clear and specific evidence a prima facie case for each essential element of their defamation claims against AOL and Wood, we reverse the trial court's order denying AOL's motion to dismiss, render judgment dismissing AOL from the lawsuit, and remand this case to the trial court to determine the amounts to be awarded to AOL under section 27.009. TEX. CIV. PRAC. & REM. CODE ANN. § 27.009 (West 2015). We affirm the trial court's judgment dismissing the Maloufs' claims against Wood.

BACKGROUND

Malouf is a dentist and has been the subject of lawsuits alleging Medicaid fraud. *See Shipp v. Malouf*, 439 S.W.3d 432, 436, 438-39 (Tex. App.—Dallas 2014, pet. denied). In June of 2012, the Texas Attorney General intervened in two false claims lawsuits asserting Medicaid fraud against Malouf and others. In October 2012, Wood wrote and AOL published an online article

headlined, "Dentist Richard Malouf Builds Backyard Water Park While Charged with Massive Fraud." In the article, Wood wrote in part:

A Texas dentist charged with defrauding state taxpayers of tens of millions of dollars in a Medicaid scam is using his allegedly not-so-hard-earned bucks on something useful: building a full-fledged water park in his backyard. According to the Texas attorney general, Dr. Richard Malouf raked in millions by putting braces on children who didn't need them and filing false claims under Medicaid. . . . In Texas, homes cannot be seized to make up for unpaid debt, which may be why Malouf is funneling his money into his estate. However, if it can be proven that Malouf used stolen money from falsified claims to fund his home projects, then his home could be seized.

At the end of the article, AOL added links to three other articles under the heading "See

also." The articles were titled: "Foreclosure Scam: 530 Charged for Allegedly Defrauding 73,000 Homeowners"; "How to Spot a Real Estate Scam"; and "When Contractors Stiff Homeowners: How to Make Sure You're Hiring the Right Person." These articles did not refer to Malouf.

Malouf alleged in his live pleading that Wood and AOL defamed him by falsely representing to the public that Malouf had been criminally charged with fraud. Malouf alleged he has never been found guilty of fraud or criminally charged with committing fraud. He prayed for nominal damages and a permanent injunction against the defendants.

AOL and Wood filed motions to dismiss under the TCPA. The trial court initially denied both motions, but the next day granted Wood's motion and dismissed the Maloufs' claims against him. AOL brings an interlocutory appeal from the order denying its motion to dismiss.[3] The Maloufs appeal the final judgment dismissing their claims against Wood.

STANDARD OF REVIEW

We apply a de novo standard of review to issues of statutory construction and to the trial court's ruling under the TCPA. *See Shipp*, 439 S.W.3d at 437; *Am. Heritage Capital, LP v. Gonzalez*, 436 S.W.3d 865, 874 (Tex. App.—Dallas 2014, no pet.); *Pickens v. Cordia*, 433 S.W.3d 179, 183-84 (Tex. App.—Dallas 2014, no pet.); *Avila v. Larrea*, 394 S.W.3d 646, 652-53 (Tex. App.—Dallas 2012, pet. denied).

APPLICABLE LAW

To prevail on a TCPA motion to dismiss, the movant must show by a preponderance of the evidence that the legal action "is based on, relates to, or is in response to the party's exercise"

of free speech. TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b)(1).[4] The "exercise of free speech" is defined as a "communication made in connection with a matter of public concern." *Id.*

§ 27.001(3). A "matter of public concern" includes an issue related to health or safety; environmental, economic or community well-being; the government; a public official or public figure; or a good, product, or service in the marketplace. *Id.* § 27.001(7). If the movant satisfies this burden, then the trial court must dismiss the action unless the party who brought the legal action "establishes by clear and specific evidence a prima facie case for each essential element of the claim in question." *Id.* § 27.005(c). Notwithstanding subsection (c), the trial court shall dismiss the action if the moving party establishes by a preponderance of the evidence each essential element of a valid defense to the non-movant's claim. *Id.* § 27.005(d).

ANALYSIS

A. Matter of Public Concern

AOL and Wood presented evidence that the article was a communication made in connection with a matter of public concern and thus an exercise of free speech. The article communicated that a dentist had been charged with "defrauding state taxpayer of tens of millions of dollars in a Medicaid scam." This communication is connected with matters of health or safety, government, and community well-being. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(7); *Shipp*, 439 S.W.3d at 438-39 (broadcast regarding attorney general allegations of Medicaid fraud against Malouf was made in connection with matter of public concern); *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 81 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (newspaper articles reporting investigation of assisted living facility involved matter of public concern). The communication also related to a service in

the marketplace: Malouf's provision of dental services. *See Avila*, 394 S.W.3d at 655 (television broadcast alleging lawyer provided poor services to clients related to a service in the marketplace). Malouf does not dispute these matters.

Malouf contends the TCPA does not protect defamation and was not intended to apply to media defendants. However, in determining whether Malouf's lawsuit relates to AOL and Wood's exercise of free speech, "we are not called on to determine the truth or falsity of the allegedly defamatory statement; that is a subject for the second part of the analysis under section 27.005(c)." *Shipp*, 439 S.W.3d at 439 n.4; *see also Kinney v. BCG Attorney Search, Inc.*, No. 03-12-00579-CV, 2014 WL 1432012, at *5 (Tex. App.—Austin Apr. 11, 2014, pet. denied) (mem. op.) (determining whether communication meets statutory definition of exercise of free speech does not entail deciding whether speech is true); *In re Lipsky*, 411 S.W.3d 530, 543 (Tex. App.—Fort Worth 2013, orig. proceeding). Whether the TCPA applies does not depend on whether the statement is defamatory or not.

In addition, the plain language of the TCPA does not exclude media defendants from its application. *See Shipp*, 439 S.W.2d at 439, 442 (reversing and rendering order dismissing claims against news reporter under TCPA); *Avila*, 394 S.W.3d at 650-51, 655 (applying TCPA to claims against news reporter and television station). The legislature's intent is clear from the words used in the statute. The purpose of the TCPA is to "encourage and safeguard the constitutional rights of *persons* to petition, speak freely, . . . and, at the same time, protect the rights of a *person* to file

meritorious lawsuit for demonstrable injury." TEX. CIV. PRAC. & REM. CODE ANN. § 27.002 (emphasis added). The term "person" includes "corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity." TEX. GOV'T CODE ANN. § 311.005(2) (West 2013). The TCPA permits a party to a legal action, including media defendants, to file a motion to dismiss if

the legal action relates to the party's exercise of the right of free speech. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(a) (permitting a party to file a motion to dismiss if the legal action is based on, relates to, or is in response to the party's exercise of free speech). Both AOL and Wood are persons and parties under the terms of the statute.

We conclude AOL and Wood are entitled to protection under the TCPA. They showed by a preponderance of the evidence that the Maloufs' legal action is based on or relates to their exercise of the right of free speech. Thus, the burden shifted to the Maloufs to establish by clear and specific evidence a prima facie case for each essential element of their claims. TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c).

B. Essential Elements of Defamation

It is undisputed that AOL and Wood are media defendants. To recover damages for defamation involving media defendants, a plaintiff must prove the media defendant: "(1) published a statement; (2) that defamed the plaintiff; (3) while either acting with actual malice (if the plaintiff was a public official or public figure) or negligence (if the plaintiff was a private individual) regarding the truth of the statement." *Neely v. Wilson*, 418 S.W.3d 52, 61 (Tex. 2013); *Shipp*, 439 S.W.3d at 439-40; *see also WFAA-TV v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998).

The parties agreed in the trial court that for purposes of the motions to dismiss, the Maloufs had established by clear and specific evidence a prima facie case for the first and third elements of the defamation claim. Thus, the only issue before us is whether the Maloufs established the second element—that the statement defamed the plaintiffs—under the statutory standard required by the TCPA.

A defamatory statement "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, integrity, virtue, or reputation. . . ." TEX. CIV. PRAC. & REM. CODE ANN. § 73.001 (West 2011). Statements that are not verifiable as false cannot form the basis of a defamation claim. *Neely*, 418 S.W.3d at 62.

Because AOL and Wood are media defendants and the statement was an exercise of the right of free speech on a matter of public concern, the Maloufs had the burden to prove the statement was false as an essential element of their claims. *Id*. ("The United States Supreme Court and this

Court long ago shifted the burden of proving the truth defense to require the plaintiff to prove the defamatory statements were false when the statements were made by a media defendant over a public concern.").

The supreme court has developed the substantial truth doctrine to determine the truth or falsity of a publication or broadcast: "if a broadcast taken as a whole is more damaging to the plaintiff's reputation than a truthful broadcast would have been, the broadcast is not substantially true and is actionable." *Id*. at 63; *McIlvin v. Jacobs*, 794 S.W.2d 14, 16 (Tex. 1990) ("The test used in deciding whether the broadcast is substantially true involves consideration of whether the alleged defamatory statement was more damaging to [the plaintiff's] reputation, in the mind of the average listener, than a truthful statement would have been."). This evaluation involves determining the essence—the gist or sting—of the publication. *Neely*, 418 S.W.3d at 63.

A publication with specific statements that err in the details but that correctly convey the essence of a story is substantially true and not actionable. *Id*. at 63-64. However, a publication "can convey a false and defamatory meaning by omitting or juxtaposing facts, even though all the story's individual statements considered in isolation were literally true or non-defamatory." *Turner v. KTRK Television, Inc*., 38 S.W.3d 103, 114 (Tex. 2000). We determine the essence or gist of a story "through the lens of a person of ordinary intelligence." *Neely*, 418 S.W.3d at 65.

Malouf does not dispute that he was named as a defendant in two civil false claims (qui

tam) lawsuits alleging Medicaid fraud. The Texas Attorney General intervened in those lawsuits and the petitions were made public in June of 2012. The Attorney General alleged that the defendants made false statements and committed unlawful acts under the Texas Medicaid Fraud Prevention Act, chapter 36 of the Texas Human Resources Code, by, among other things, submitting reimbursement claims for dental or orthodontic services that were not medically necessary or that were never provided. The Attorney General further alleged the defendants' unlawful acts cost the State of Texas "many millions of dollars."

Malouf contends that by use of the words "charged" and "stolen" and by omitting the fact the proceedings against him were civil suits, the article directly imputes criminal activity to Malouf. Malouf testified in his affidavit he has never been charged, indicted, arrested, or found guilty of the crime of Medicaid fraud. Malouf contends the article left the false impression he was "charged with defrauding taxpayers" in criminal proceedings.

The test for truth or falsity is whether the publication taken as a whole is more damaging to the plaintiff's reputation than a truthful publication would have been. *See id*. at 63; *McIlvain*, 74 S.W.2d at 16. A true account which does not create a false impression by omitting material facts or suggestively juxtaposing them is not actionable, regardless of the conclusions that people may draw from it. *See Turner*, 38 S.W.3d at 118; *Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995).

The essence of the article is that Malouf was charged with defrauding state taxpayers in a Medicaid scam. The forum in which those charges were made, either civil or criminal, does not

materially alter the essence or sting of the story. *See Assoc. Press v. Boyd*, No. 05-04-01172-CV, 2005 WL 1140369, at *3 (Tex. App.—Dallas May 16, 2005, no pet.) (mem. op.) ("forum in which those accusations were made, be it criminal or civil, did not materially affect the sting caused by the accurately reported allegations of Boyd's participation in a fraudulent scheme").

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A person of ordinary intelligence would not perceive the article as more damaging to Malouf's reputation because it omitted that the charges were made in civil proceeding. *See id*. ("Simply stated, had the articles specifically noted that the SEC proceeding was civil in nature, it would not have materially changed the gist or sting of the publications in the average reader's mind.").

A person of ordinary intelligence would not perceive the sting of the allegedly false statement as greater than a truthful statement. Put succinctly, the sting of the allegedly false statement that Malouf was charged in a *criminal* proceeding with "defrauding state taxpayers of tens of millions of dollars in a Medicaid scam" is no greater than the true statement that Malouf was charged in a *civil* proceeding with "defrauding state taxpayers of tens of millions of dollars in a Medicaid scam." We conclude a person of ordinary intelligence would not view the article as more damaging to Malouf's reputation than the truthful statement that he had been "charged with defrauding taxpayers" in civil proceedings.

Malouf argues a false assertion of criminal conduct is defamation per se. We agree with this general proposition of law, but it does not help Malouf overcome the facts that the article does not state Malouf was the subject of a criminal charge and the sting of the article was the accurate statement he was charged with defrauding taxpayers in a Medicaid scam; the sting was not whether those charges were made in a civil or criminal proceeding. *See Boyd*, 2005 WL 1140369, at *3 (articles allegedly suggesting SEC allegations against defendant were a criminal prosecution did not help defendant "overcome the hurdle created by the fact that the 'sting' of the articles of which he complains was the accurate reporting of the SEC allegations of his participation in securities fraud and not the omission of whether it was a criminal or civil proceeding").

We conclude Malouf failed to establish by clear and substantial evidence a prima facie case for each essential element of his claims against AOL and Wood.

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Regarding Mrs. Malouf's claims, nothing in the article refers specifically to Mrs. Malouf and she does not argue otherwise. We conclude she failed to establish by clear and specific evidence a prima facie case for each essential element of a defamation claim against AOL and Wood. *See Newspapers, Inc. v. Matthews*, 161 Tex. 284, 339 S.W.2d 890, 893 (1960) (complained-of statement must reference plaintiff or be reasonably understood to do so by people knowing plaintiff); *Shipp*, 439 S.W.3d at 442.

CONCLUSION

We conclude AOL and Wood established this action is based on or relates to their exercise of the right of free speech and the Maloufs did not establish by clear and specific evidence a

prima facie case for each essential element of their defamation claims. Therefore, the trial court erred by denying AOL's motion to dismiss under the TCPA. The trial court did not err by granting Wood's motion to dismiss.

Accordingly, we affirm the trial court's final judgment dismissing the Maloufs' claims against Wood, reverse the trial court's order denying AOL's motion to dismiss, render judgment dismissing the Maloufs' claims against AOL, and remand that case for further proceedings under TEX. CIV. PRAC. & REM. CODE ANN. § 27.009(a).

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/Craig Stoddart/
CRAIG STODDART
JUSTICE

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JUDGMENT

On Appeal from the County Court at Law No. 3, Dallas County, Texas
Trial Court Cause No. CC-12-06268-C.
Opinion delivered by Justice Stoddart. Justices Fillmore and Whitehill participating.

In accordance with this Court's opinion of this date, the trial court's order denying appellant AOL, INC.'s motion to dismiss is **REVERSED** and judgment is **RENDERED** that the claims of appellees DR. RICHARD MALOUF AND LEANNE MALOUF against appellant AOL, INC. are dismissed with prejudice to being refiled. This case is **REMANDED** to the trial court to determine the amounts to be awarded appellant AOL, INC. pursuant to TEX. CIV. PRAC. & REM. CODE ANN. § 27.009.

It is **ORDERED** that appellant AOL, INC. recover its costs of this appeal from appellees DR. RICHARD MALOUF AND LEANNE MALOUF.

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JUDGMENT

On Appeal from the County Court at Law No. 3, Dallas County, Texas
Trial Court Cause No. CC-14-01556-C.
Opinion delivered by Justice Stoddart. Justices Fillmore and Whitehill participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee GRAHAM WOOD recover his costs of this appeal from appellants DR. RICHARD MALOUF AND LEANNE MALOUF.

AOL, INC., Appellant
v.
DR. RICHARD MALOUF AND LEANNE MALOUF, Appellees

DR. RICHARD MALOUF AND LEANNE MALOUF, Appellants
v.
GRAHAM WOOD, Appellee
No. 05-13-01637-CV
No. 05-14-00568-CV
Court of Appeals Fifth District of Texas at Dallas April 2, 2015

Footnotes:

[1.] TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001-.011 (West 2015).

[2.] Because the statements at issue refer to Richard Malouf, we refer to him as Malouf unless necessary to discuss Leanne Malouf.

[3.] *See* Act of May 24, 2013, 83rd Leg., R.S., ch. 1042, H.B. 2935, § 4 (codified at TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(12) (West 2015)).

[4.] It is undisputed the Maloufs filed this suit against AOL and Wood in response to the publication of the article. Thus, the issue is whether the article was an exercise of free speech as defined by the TCPA.

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74 U.S. 700
19 L.Ed. 227
7 Wall. 700
TEXAS
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December Term, 1868

[Syllabus from pages 700-702 intentionally omitted]

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ON original bill.

The Constitution ordains that the judicial power of the United States shall extend to certain cases, and among them 'to controversies between *a State and citizens of another State; . . .* and between a State, or the citizens thereof, and *foreign* States, citizens or subjects.' It ordains further, that in cases in which 'a State' shall be a party, the Supreme Court shall have original jurisdiction.

With these provisions in force as fundamental law, Texas, entitling herself 'the State of Texas, one of the United States of America,' filed, on the 15th of February, 1867, an original bill against different persons; White and Chiles, one Hardenberg, a certain firm, Birch, Murray & Co., and some others,[1] citizens of New York and other States; praying

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an injunction against their asking or receiving payment from the United States of certain bonds of the Federal government, known as Texan indemnity bonds; and that the bonds might be delivered up to the complainant, and for other and further relief.

The case was this:

In 1851 the United States issued its bonds—five thousand bonds for $1000 each, and numbered successively from No. 1 to No. 5000, and thus making the sum of $5,000,000—to the State of Texas, in arrangement of certain boundary claims made by that State. The bonds, which were dated January 1st, 1851, were coupon bonds, payable, by their terms, to the State of Texas or *bearer*, with interest at 5 per cent. semi-annually, and '*redeemable after* the 31st day of December, 1864.' Each bond contained a statement on its face that the debt was authorized by act of Congress, and was '*transferable on delivery*,' and to each were attached six-month coupons, extending to December 31, 1864.[2]

In pursuance of an act of the legislature of Texas, the controller of public accounts of the State was authorized to go to Washington, and to receive there the bonds; the statute making it his duty to deposit them, when received, in the treasury of the State of Texas, to be disposed of '*as may be provided by law;*' and enacting further, that no bond, issued as aforesaid and payable to bearer, should be 'available in the hands of *any* holder until the same shall have been indorsed, *in the city of Austin, by the governor of the State of Texas*.'

Most of the bonds were indorsed and sold according to law, and paid on presentation by the United States prior to 1860. A part of them, however,—appropriated by act of legislature as a school fund—were still in the treasury of Texas, in January, 1861, when the late Southern rebellion broke out.

The part which Texas took in that event, and the position

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in which the close of it left her, are necessary to be here adverted to.

At the time of that outbreak, Texas was confessedly one of the United States of America, having a State constitution in accordance with that of the United States, and represented by senators and representatives in the Congress at Washington. In January, 1861, a call for a convention of the people of the State was issued, signed by sixty-one individuals. The call was without authority and revolutionary. Under it delegates were elected from some sections of the State, whilst in others no vote was taken. These delegates assembled in State convention, and on the 1st of February, 1861, the convention adopted an ordinance '*to dissolve the union between the State of Texas and the other States, united under the compact styled, 'the Constitution of the United States of America*." The ordinance contained a provision requiring it to be submitted to the people of Texas, for ratification or rejection by the qualified voters thereof, on the 23d of February, 1861. The legislature of the State, convened in extra session, on the 22d of January, 1861, passed an act ratifying the election of the delegates, chosen in the irregular manner above mentioned, to the convention. The ordinance of secession submitted to the people was adopted by a vote of 34,794 against 11,235. The convention, which had adjourned immediately on passing the ordinance, reassembled. On the 4th of March, 1861, it declared that the ordinance of secession had been ratified by the people, and that Texas had withdrawn from the union of the States under the Federal Constitution. It also passed a resolution requiring the officers of the State government to take an oath to support the provisional government of the Confederate States, and providing, that if 'any officer refused to take such oath, in the manner and within the time prescribed, his office should be deemed vacant, and the same filled as though he were dead.' On the 16th of March, the convention passed an ordinance, declaring, that whereas the governor and the secretary of state had refused or omitted to take the oath prescribed, their offices were vacant; that

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the lieutenant-governor should exercise the authority and perform the duties appertaining to the office of governor, and that the deposed officers should deliver to their successors in office the great seal of the State, and all papers, archives, and property in their possession belonging or appertaining to the State. The convention further assumed to exercise and administer the political power and authority of the State.

Thus was established the rebel government of Texas.

The senators and representatives of the State in Congress now withdrew from that body at Washington. Delegates were sent to the Congress of the so-called Confederate States at Montgomery, Alabama, and electors for a president and vice-president of these States appointed. War having become necessary to complete the purposed destruction by the South of the Federal

government, Texas joined the other Southern States, and made war upon the United States, whose authority was now recognized in no manner within her borders. The oath of allegiance of all persons exercising public functions was to both the State of Texas, and to the Confederate States of America; and no officer of any kind representing the United States was within the limits of the State except military officers, who had been made prisoners. Such was and had been for several months the condition of things in the beginning of 1862.

On the 11th of January, of that year, the legislature of the usurping government of Texas passed an act—'*to provide arms and ammunition, and for the manufacture of arms and ordnance for the military defences of the State*.' And by it created a 'military board,' to carry out the purpose indicated in the title. Under the authority of this act, military forces were organized.

On the same day the legislature passed a further act, entitled '*An act to provide funds for military purposes*,' and therein directed the board, which it had previously organized, '*to dispose of any bonds and coupons which may be in the treasury on any account, and use such funds or their proceeds for the defence of the State;*' and passed an additional act *repealing the act*

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which made an indorsement of the bonds by the governor of Texas necessary to make them available in the hands of the holder.

Under these acts, the military board, on the 12th January, 1865, a date at which the success of the Federal arms seemed probable, agreed to sell to White & Chiles one hundred and thirty-five of these bonds, then in the treasury of Texas, and seventy-six others deposited with certain bankers in England, in payment for which White & Chiles were to deliver to the board a large quantity of cotton cards and medicines. The former bonds were delivered to White & Chiles on the 15th March following, *none of them being indorsed by any governor of Texas*.

It appeared that in February, 1862, after the rebellion had broken out, it was made known to the Secretary of the Treasury of the United States, in writing, by the Hon. G. W. Paschal, of Texas, who had remained constant to the Union, that an effort would be made by the rebel authorities of Texas to use the bonds remaining in the treasury in aid of the rebellion; and that they could be identified, because all that had been circulated before the war were indorsed by different governors of Texas. The Secretary of the Treasury acted on this information, and refused in general to pay bonds that had not been indorsed. On the 4th of October, 1865, Mr. Paschal, as agent of the State of Texas, caused to appear in the money report and editorial of the New York Herald, a notice of the transaction between the rebel government of Texas and White & Chiles, and a statement that the treasury of the United States would not pay the bonds transferred to them by such usurping government. On the 10th October, 1865, the provisional governor of the State published in the New York Tribune, a '*Caution to the Public*,' in which he recited that the rebel government of Texas had, under a pretended contract, transferred to White & Chiles 'one hundred and thirty-five United States Texan indemnity bonds, issued January 1, 1851, payable in fourteen years, of the denomination of $1000 each, and coupons attached thereto to the amount of $1287.50, amounting in the aggregate, bonds and coupons, to the sum of $156,287.50.'

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His caution did not specify, however, any particular bonds by number. The caution went on to say that the transfer was a conspiracy between the rebel governor and White & Chiles to rob the State treasury, that White & Chiles had never paid the State one farthing, that they had fled the State, and that these facts had been made known to the Secretary of the Treasury of the United States. And 'a protest was filed with him by Mr. Paschal, agent of the State of Texas, against the payment of the said bonds and coupons unless presented for payment by proper authority.' The substance of this notice, it was testified, was published in money articles of many of the various newspapers of about that date, and that financial men in New York and other places spoke to Mr. Paschal, who had caused it to be inserted in the Tribune, about it. It was testified also, that after the commencement of the suit, White & Chiles said that they had seen it.

The rebel forces being disbanded on the 25th May, 1865, and the civil officers of the usurping government of Texas having fled from the country, the President, on the 17th June, 1865, issued his proclamation appointing Mr. A. J. Hamilton, provisional governor of the State; and directing the formation by the people of a State government in Texas.

Under the provisional government thus established, the people proceeded to make a constitution, and reconstruct their State government.

But much question arose as to what was thus done, and the State was not acknowledged by the Congress of the United States as being reconstructed. On the contrary, Congress passed, in March 1867, three certain acts, known as the Reconstruction Acts. By the first of these, reciting that no legal State governments or adequate protection for life or property then existed in the rebel States of Texas, and nine other States named, and that it was necessary that peace and good order should be enforced in them until loyal and republican State governments could be legally established, Congress divided the States named into five *military districts* (Texas with Louisiana being the fifth), and made it the duty

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of the President to assign to each *an officer of the army*, and to detail a sufficient military force to enable him to perform his duties and enforce authority within his district. The act made it the duty of this officer to protect all persons in their rights, to suppress insurrection, disorder, violence, and to punish, or cause to be punished, all disturbers of the public peace and criminals, *either through the local civil tribunals or through military commissions*, which the act authorized. It provided, further, that when the people of any one of these States had formed a constitution in conformity with that of the United States, framed in a way which the statute went on to specify, and when the State had adopted a certain article of amendment named, to the Constitution of the United States, and when such article should have become a part of the Constitution of the United States, *then* that the States respectively should be declared entitled to representation in Congress, and the preceding part of the act become inoperative; and that until they were so admitted any civil governments which might exist in them should be deemed provisional only, and subject to the paramount authority of the United States, at any time to abolish, modify, control, or supersede them.

A State convention of 1866 passed an ordinance looking to the recovery of these bonds; and by act of October of that year, the governor of Texas was authorized to take such steps as he might deem best for the interests of the State in the matter; either to recover the bonds, or to

compromise with holders. Under this act the governor appointed an agent of the State to look after the matter.

It was in this state of things, with the State government organized in the manner and with the *status* above mentioned, that this present bill was directed by this agent to be filed.

The bill was filed by Mr. R. T. Merrick and others, solicitors in this court, on behalf of the State, without *precedent* written warrant of attorney. But a letter from J. W. Throckmorton, elected governor under the constitution of 1866, ratified their act, and authorized them to prosecute

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the suit. Mr. Paschal, who now appeared with the other counsel, in behalf of the State, had been appointed by Governor Hamilton to represent the State, and Mr. Pease, a subsequent governor, appointed by General Sheridan, commander under the reconstruction acts, renewed this appointment.

The bill set forth the issue and delivery of the bonds to the State, the fact that they were seized by a combination of persons in armed hostility to the government of the United States, sold by an organization styled the military board, to White & Chiles, for the purpose of aiding the overthrow of the Federal government; that White & Chiles had not performed what they agreed to do. It then set forth that they had transferred such and such numbers, specifying them, to Hardenberg, and such and such others to Birch, Murray & Co., &c.; that these transfers were not in good faith, but were with express notice on the part of the transferees of the manner in which the bonds had been obtained by White & Chiles; that the bonds were overdue at the time of the transfer; and that they had never been indorsed by any governor of Texas. The bill interrogated the defendants about all these particulars; requiring them to answer on oath; and, as already mentioned, it prayed an injunction against their asking, or receiving payment from the United States; that the bonds might be delivered to the State of Texas, and for other and further relief.

As respected White & Chiles, who had now largely parted with the bonds, the case rested much upon what precedes, and their own answers.

The answer of CHILES, declaring that he had none of the bonds in his possession, set forth:

1. That there was no sufficient authority shown to prosecute the suit in the name of Texas.

2. That Texas by her rebellious courses had so far changed her *status*, as one of the United States, as to be disqualified from suing in this court.

3. That whether the government of Texas, during the term in question, was one *de jure* or *de facto*, it had authorized the

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military board to act for it, and that the State was estopped from denying its acts.

4. That no indorsement of the bonds was necessary, they having been negotiable paper.

5. That the articles which White & Chiles had agreed to give the State, were destroyed *in transitu*, by disbanded troops, who infested Texas, and that the loss of the articles was unavoidable.

The answer of WHITE went over some of the same ground with that of Chiles. He admitted, however, 'that he was informed and believed that in all cases where any of the bonds were disposed of by him, it was known to the parties purchasing for themselves, or as agents for others, *that there was some embarrassment in obtaining payment of said bonds at the treasury of the United States, arising out of the title of this respondent and his co-defendant Chiles*.'

As respected HARDENBERG, the case seemed much thus:

In the beginning of November, 1866, *after* the date of the notices given through Mr. Paschal, one Hennessey, residing in New York, and carrying on an importing and commission business, then sold to Hardenberg thirty of these bonds, originally given to White and Chiles; and which thirty, a correspondent of his, long known to him, in Tennessee, had sent to him for sale. Hardenberg bought them 'at the rate of 1.20 for the dollar on their face,' and paid for them. Hennessey had 'heard from somebody that there was some difficulty about the bonds being paid at the treasury, but did not remember whether he heard that before or after the sale.'

Hardenberg also bought others of these bonds near the same time, at 1.15 per cent., under circumstances thus testified to by Mr. C. T. Lewis, a lawyer of New York:

'In conversation with Mr. Hardenberg, I had learned that he was interested in the Texas indemnity bonds, and meditated purchasing same. I was informed in Wall Street that such bonds were offered for sale by Kimball & Co., at a certain price, which price I cannot now recollect. I informed Mr. Hardenberg of this fact, and he requested me to secure the bonds for him at

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that price. I went to C. H. Kimball & Co, and told them to send the bonds to Mr. Hardenberg's office and get a check for them, which I understand they did. *I remember expressing to Mr. Hardenbery the opinion that these bonds, being on their face negotiable by delivery, and payable in gold, must, at no distant day, be redeemed according to their tenor, and were, therefore, a good purchase at the price at which they were offered*.

'My impression is, that *before* this negotiation I had read a paragraph in some New York newspaper, stating that the payment of the whole issue of the Texas indemnity bonds was suspended until the history of a certain portion of the issue, supposed to have been negotiated for the benefit of the rebel service, should be understood. I am not at all certain whether I read this publication before or after the date of the transaction. *If the publication was made before this transaction I had probably read the article before the purchase was made*. My impression is, that it was a paragraph in a money article, but I attributed no great importance to it. I acted in this matter simply as the friend of Mr. Hardenberg, and received no commission for my services. I am a lawyer by profession, and not a broker.'

Kimball & Co. (the brokers thus above referred to by Mr. Lewis), testified that they had received the bonds thus sold, from a firm which they named, 'in perfect good faith, and sold them in like good faith, as we would any other lot of bonds received from a reputable house.' It appeared, however, that in sending the bonds to Kimball & Co., for sale, the firm had requested that they might not be known in the transaction.

Hardenberg's own account of the matter, as declared by his answer, was thus:

'That he was a merchant in the city of New York; that he purchased the bonds held by him in open market in said city; that the parties from whom he purchased the same were responsible persons, residing and doing business in said city; that he purchased of McKim, Brothers & Co., bankers in good standing in Wall Street, one bond at 1.15 per cent., on the 6th of November, 1866, when gold was at the rate of $1.47 1/4, and declining; that when he purchased the same he made no inquiries of

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McKim, Brothers & Co., but took the bonds on his own observation of their plain tenor and effect at what he conceived to be a good bargain; that afterwards, and before the payment of said bonds and coupons by the Secretary of the Treasury, and at the request of the Comptroller, Hon. R. W. Tayler, he made inquiry of said firm of McKim, Brothers & Co., and they informed him that said bonds and coupons had been sent to them to be sold by the First National Bank of Wilmington, North Carolina; that he purchased on the 8th of November, 1866, thirty of said bonds, amounting to the sum of $32,475, of J. S. Hennessey, 29 Warren Street, New York City, doing business as a commission merchant, who informed him that, in the way of business, they were sent him by Hugh Douglas, of Nashville, Tennessee; that he paid at the rate of 120 cents at a time, to wit, the 8th of November, 1866, when gold was selling at 146 and declining; that the three other bonds were purchased by him on the 8th of November, 1866, of C. H. Kimball & Co., 30 Broad Street, brokers in good standing, who informed him, on inquiry afterwards, that said bonds were handed them to be sold by a banking house in New York of the highest respectability, who owned the same, but whose names were not given, as the said firm informed him they could 'see no reason for divulging private transactions;' and that he paid for last-mentioned bonds at the rate of 120 cents, on said 8th day of November, 1866, when gold was selling at 146 and declining.

'Further answering, he saith that he had no knowledge at the time of said purchase, that the bonds were obtained from the State of Texas, or were claimed by the said State; that he acted on information obtained from the public report of the Secretary of the Treasury, showing that a large portion of similar bonds had been redeemed, and upon his own judgment of the nature of the obligation expressed by the bonds themselves, and upon his own faith in the full redemption of said bonds; and he averred that he had no knowledge of the contract referred to in the bill of complaint, nor of the interest or relation of White & Chiles, nor of any connection which they had with said complainant, or said bonds, nor of the law of the State of Texas requiring indorsement.'

The answer of White mentioned, in regard to Hardenberg's bonds, that they were sold by his (White's) broker;

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that he, White, had no knowledge of the name of the real purchaser, who, however, paid 115 per cent. for them; 'that at the time of the sale, his (White's) broker informed him that the purchaser, or the person acting for the purchaser, did not want any introduction to the respondent, and required no history of the bonds proposed to be sold; that he only desired that they should come to him through the hands of a loyal person, who had never been identified with the rebellion.'

Another matter, important possibly in reference to the relief asked by the bill, and to the exact decree[3] made, should, perhaps, be mentioned about these bonds of Hardenberg.

The answer of Hardenberg stated, that 'on the 16th of February, 1867, the Secretary of the Treasury ordered the payment to the respondent of all said bonds and coupons, and the *same were paid* on that day.' This was literally true; and the books of the treasury showed these bonds as among the redeemed bonds; and showed nothing else. As a matter of fact, it appeared that the agents of Texas on the one hand, urging the government not to pay the bonds, and the holders, on the other, pressing for payment—it being insisted by these last that the United States had no right to withhold the money, and thus deprive the holder of the bonds of interest—the Controller of the Treasury, Mr. Tayler, made a report, on the 29th of January, 1867, to the Secretary of the Treasury, in which he mentioned, that it seemed to be agreed by the agents of the State, that her case depended on her ability to show a want of good faith on the part of the holders of bonds; and that he had stated to the agents, that as considerable delay had already been incurred, he would, unless during the succeeding week they took proper legal steps against the holders, feel it his duty to pay such bonds as were unimpeached in title in the holders' hands. He accordingly recommended to the secretary payment of Hardenberg's and of some others. The agents, on the same day that the controller made his report,

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and after he had written most of it, informed him that they would take legal proceedings on behalf of the State; and were informed in turn that the report would be made on that day, and would embrace Hardenberg's bonds. Two days afterwards a personal action was commenced, in the name of the State of Texas, against Mr. McCulloch, the then Secretary of the Treasury, for the detention of the bonds of Hardenberg and others. This action was dismissed February 19th. On the 15th of the same February, the present bill was filed. On the 16th of the month, the personal suit against the secretary having at the time, as already above stated, been withdrawn, and *no process under the present bill having then, nor until the 27th following, been served on Hardenberg*, Mr. Tayler, Controller of the Treasury, and one Cox, the agent of Hardenberg, entered into an arrangement, by which it was agreed that this agent should deposit with Mr. Tayler government notes known as 'seven-thirties,' equivalent in value to the bonds and coupons held by Hardenberg; to be held by Mr. Tayler 'as indemnity for Mr. McCulloch, against any personal damage, loss, and expense in which he may be involved by reason of the payment of the bonds.' The seven-thirties were then delivered to Mr. Tayler, and a check in coin for the amount of the bonds and interest was delivered to Hardenberg's agent. The seven-thirties were subsequently converted into the bonds called 'five-twenties,' and these remained in the hands of Mr. Tayler, being registered in his name as trustee. The books of the treasury showed nothing in relation to this trust; nor, as already said, anything more or other than that the bonds were paid to Hardenberg or his agent.

Next, as respected the bonds of BIRCH, MURRAY & Co. It seemed in regard to these, *that prior to July*, 1855, Chiles wanting money, applied to this firm, who lent him $5000, on a deposit

of *twelve* of the bonds. The whole of the twelve were taken to the treasury department. The department at first declined to pay them, but finally did pay

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four of them (amounting with the coupons to $4900), upon the ground urged by the firm, that it had lent the $5000 to Chiles on the hypothecation of the bonds and coupons without knowledge of the claim of the State of Texas, and because the firm was urged to be, and was apparently, a holder in good faith, and for value; the other bonds, eight in number, remaining in the treasury, and not paid to the firm, because of the alleged claim of the State of Texas, and of the allegation that the same had come into the possession of said White and Chiles improperly, and without consideration.

The difficulty now was less perhaps about the four bonds, than about these eight, whose further history was thus presented by the answer of Birch, one of the firm, to the bill. He said in this answer, and after mentioning his getting with difficulty the payment of the four bonds——

'That *afterwards, and during the year* 1866, Chiles called upon him with the printed report of the First Comptroller of the Treasury, Hon. R. W. Tayler, from which it appeared that the department would, in all reasonable probability, redeem all said bonds; and requested further advances on said eight remaining bonds; and that the firm thereupon advanced said Chiles, upon the said eight bonds, from time to time, the sum of $4185.25, all of which was due and unpaid. That he made the said advances as well upon the representations of said Chiles that he was the *bon a fide* holder of said bonds and coupons, as upon his own observation and knowledge of their legal tenor and effect; and of his faith in the redemption thereof by the government of the United States.'

The answer said further, that——

'At the time of the advances first made, the firm had no knowledge of the contract referred to in the bill; nor of the interest or connection of said White & Chiles with the complainant, nor of the law of the State of Texas referred to in the bill passed December 16, 1851; and that the bonds were taken in good faith.'

It appeared further, in regard to the whole of these bonds,

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that, in *June*, 1865, Chiles, wanting to borrow money of one Barret, and he, Barret, knowing Mr. Hamilton, just then appointed provisional governor, but not yet installed into office, nor apparently as yet having the impressions which he afterwards by his caution made public, went to him, supposing him well acquainted with the nature of these bonds, and sought his opinion as to their value, and as to whether they would be paid. Barret's testimony proceeded:

'He advised me to accept the proposition of Chiles, and gave it as his opinion that the government would *have* to pay the bonds. I afterwards had several conversations with him on the subject, in all of which he gave the same opinion. Afterwards, (*I cant't remember the exact time*), Mr. Chiles applied to Birch, Murray & Co. for a loan of money, proposing to give some bonds as

collateral security; and at his request I went to Birch, Murray & Co., and informed them of my conversations with Governor Hamilton, and of his opinion as expressed to me. They then seemed willing to make a loan on the security offered. In order to give them further assurance that I was not mistaken in my report of Governor Hamilton's opinion verbally expressed, I obtained from him a letter [letter produced]. It reads thus:

NEW YORK, June 25th, 1865.

HON. J. R. BARRET.

DEAR SIR: In reply to your question about Texas indemnity bonds issued by the U. S., I can assure you that they are perfectly good, and the gov't will certainly pay them to the holders.

Yours truly,

A. J. HAMILTON.'

The witness 'mentioned the conversations had with Governor Hamilton, and also spoke of the letter, and sometimes read it to various parties, some of whom were dealing in these bonds,' and, as he stated, had 'reason to believe that Governor Hamilton's opinion in regard to the bonds became pretty generally known among dealers in such paper.' The witness, however, did not know Mr. Hardenberg.

The questions, therefore, were:

1. A minor preliminary one; the question presented by Chiles's answer, as to whether sufficient authority was shown

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for the prosecution of the suit in the name and in behalf of Texas.

2. A great and principal one; a question of jurisdiction, viz., whehter Texas, at the time of the bill filed or now, was one of the United States of America, and so competent to file an original bill here.

3. Assuming that she was, a question whether the respective defendants, any, all, or who of them, were proper subjects for the injunction prayed, as holding the bonds without sufficient title, and herein—and more particularly as respected Hardenberg, and Birch, Murray & Co.—a question of negotiable paper, and the extent to which holders, asserting themselves holders *bon a fide* and for value, of paper payable 'to bearer,' held it discharged of precedent equities.

4. A question as to the effect of the payments, at the treasury, of the bonds of Hardenberg and of the four bonds of Birch, Murray & Co.

The case was argued by Messrs. Paschal and Merrick, in behalf of Texas; and contra, by Mr. Phillips, for White; Mr. Pike, for Chiles; Mr. Carlisle, for Hardenberg; and Mr. Moore, for Birch, Murray & Co.

The CHIEF JUSTICE delivered the opinion of the court.

This is an original suit in this court, in which the State of Texas, claiming certain bonds of the United States as her property, asks an injunction to restrain the defendants from receiving payment from the National government, and to compel the surrender of the bonds to the State.

It appears from the bill, answers, and proofs, that the United States, by act of September 9, 1850, offered to the State of Texas, in compensation for her claims connected with the settlement of her boundary, $10,000,000 in five per cent. bonds, each for the sum of $1000; and that this offer was accepted by Texas. One-half of these bonds were retained for certain purposes in the National treasury, and the other half were delivered to the State. The bonds thus delivered

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livered were dated January 1, 1851, and were all made payable to the State of Texas, or bearer, and redeemable after the 31st day of December, 1864. They were received in behalf of the State by the comptroller of public accounts, under authority of an act of the legislature, which, besides giving that authority, provided that no bond should be available in the hands of any holder until after indorsement by the governor of the State.

After the breaking out of the rebellion, the insurgent legislature of Texas, on the 11th of January, 1862, repealed the act requiring the indorsement of the governor,[4] and on the same day provided for the organization of a military board, composed of the governor, comptroller, and treasurer; and authorized a majority of that board to provide for the defence of the State by means of any bonds in the treasury, upon any account, to the extent of $1,000,000.[5] The defence contemplated by the act was to be made against the United States by war. Under this authority the military board entered into an agreement with George W. White and John Chiles, two of the defendants, for the sale to them of one hundred and thirty-five of these bonds, then in the treasury of the State, and seventy-six more, then deposited with Droege & Co., in England; in payment for which they engaged to deliver to the board a large quantity of cotton cards and medicines. This agreement was made on the 12th of January, 1865. On the 12th of March, 1865, White and Chiles received from the military board one hundred and thirty-five of these bonds, none of which were indorsed by any governor of Texas. Afterward, in the course of the years 1865 and 1866, some of the same bonds came into the possession of others of the defendants, by purchase, or as security for advances of money.

Such is a brief outline of the case. It will be necessary hereafter to refer more in detail to some particular circumstances of it.

The first inquiries to which our attention was directed by

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counsel, arose upon the allegations of the answer of Chiles (1), that no sufficient authority is shown for the prosecution of the suit in the name and on the behalf of the State of Texas; and (2) that the State, having severed her relations with a majority of the States of the Union, and having by her ordinance of secession attempted to throw off her allegiance to the Constitution and

government of the United States, has so far changed her status as to be disabled from prosecuting suits in the National courts.

The first of these allegations is disproved by the evidence. A letter of authority, the authenticity of which is not disputed, has been produced, in which J. W. Throckmorton, elected governor under the constitution adopted in 1866, and proceeding under an act of the State legislature relating to these bonds, expressly ratifies and confirms the action of the solicitors who filed the bill, and empowers them to prosecute this suit; and it is further proved by the affidavit of Mr. Paschal, counsel for the complainant, that he was duly appointed by Andrew J. Hamilton, while provisional governor of Texas, to represent the State of Texas in reference to the bonds in controversy, and that his appointment has been renewed by E. M. Pease, the actual governor. If Texas was a State of the Union at the time of these acts, and these persons, or either of them, were competent to represent the State, this proof leaves no doubt upon the question of authority.

The other allegation presents a question of jurisdiction. It is not to be questioned that this court has original jurisdiction of suits by States against citizens of other States, or that the States entitled to invoke this jurisdiction must be States of the Union. But, it is equally clear that no such jurisdiction has been conferred upon this court of suits by any other political communities than such States.

If, therefore, it is true that the State of Texas was not at he time of filing this bill, or is not now, one of the United States, we have no jurisdiction of this suit, and it is our duty to dismiss it.

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We are very sensible of the magnitude and importance of this question, of the interest it excites, and of the difficulty, not to say impossibility, of so disposing of it as to satisfy the conflicting judgments of men equally enlightened, equally upright, and equally patriotic. But we meet it in the case, and we must determine it in the exercise of our best judgment, under the guidance of the Constitution alone.

Some not unimportant aid, however, in ascertaining the true sense of the Constitution, may, be derived from considering what is the correct idea of a State, apart from any union or confederation with other States. The poverty of language often compels the employment of terms in quite different significations; and of this hardly any example more signal is to be found than in the use of the word we are now considering. It would serve no useful purpose to attempt an enumeration of all the various senses in which it is used. A few only need be noticed.

It describes sometimes a people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country; often it denotes only the country or territorial region, inhabited by such a community; not unfrequently it is applied to the government under which the people live; at other times it represents the combined idea of people, territory, and government.

It is not difficult to see that in all these senses the primary conception is that of a people or community. The people, in whatever territory dwelling, either temporarily or permanently, and whether organized under a regular government, or united by looser and less definite relations, constitute the state.

This is undoubtedly the fundamental idea upon which the republican institutions of our own country are established. It was stated very clearly by an eminent judge,[6] in one of the earliest cases adjudicated by this court, and we are not aware of anything, in any subsequent decision, of a different tenor.

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In the Constitution the term state most frequently expresses the combined idea just noticed, of people, territory, and government. A state, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. It is the union of such states, under a common constitution, which forms the distinct and greater political unit, which that Constitution designates as the United States, and makes of the people and states which compose it one people and one country.

The use of the word in this sense hardly requires further remark. In the clauses which impose prohibitions upon the States in respect to the making of treaties, emitting of bills of credit, and laying duties of tonnage, and which guarantee to the States representation in the House of Representatives and in the Senate, are found some instances of this use in the Constitution. Others will occur to every mind.

But it is also used in its geographical sense, as in the clauses which require that a representative in Congress shall be an inhabitant of the State in which he shall be chosen, and that the trial of crimes shall be held within the State where committed.

And there are instances in which the principal sense of the word seems to be that primary one to which we have adverted, of a people or political community, as distinguished from a government.

In this latter sense the word seems to be used in the clause which provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion.

In this clause a plain distinction is made between a State and the government of a State.

Having thus ascertained the senses in which the word state is employed in the Constitution, we will proceed to consider the proper application of what has been said.

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The Republic of Texas was admitted into the Union, as a State, on the 27th of December, 1845. By this act the new State, and the people of the new State, were invested with all the rights, and became subject to all the responsibilities and duties of the original States under the Constitution.

From the date of admission, until 1861, the State was represented in the Congress of the United States by her senators and representatives, and her relations as a member of the Union remained unimpaired. In that year, acting upon the theory that the rights of a State under the

Constitution might be renounced, and her obligations thrown off at pleasure, Texas undertook to sever the bond thus formed, and to break up her constitutional relations with the United States.

On the 1st of February,[7] a convention, called without authority, but subsequently sanctioned by the legislature regularly elected, adopted an ordinance to dissolve the union between the State of Texas and the other States under the Constitution of the United States, whereby Texas was declared to be 'a separate and sovereign State,' and 'her people and citizens' to be 'absolved from all allegiance to the United States, or the government thereof.'

It was ordered by a vote of the convention[8] and by an act of the legislature,[9] that this ordinance should be submitted to the people, for approval or disapproval, on the 23d of February, 1861.

Without awaiting, however, the decision thus invoked, the convention, on the 4th of February, adopted a resolution designating seven delegates to represent the State in the convention of seceding States at Montgomery, 'in order', as the resolution declared, 'that the wishes and interests of the people of Texas may be consulted in reference to the constitution and provisional government that may be established by said convention.'

Before the passage of this resolution the convention had

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appointed a committee of public safety, and adopted an ordinance giving authority to that committee to take measures for obtaining possession of the property of the United States in Texas, and for removing the National troops from her limits. The members of the committee, and all officers and agents appointed or employed by it, were sworn to secrecy and to allegiance to the State.[10] Commissioners were at once appointed, with instructions to repair to the headquarters of General Twiggs, then representing the United States in command of the department, and to make the demands necessary for the accomplishment of the purposes of the committee. A military force was orgnaized in support of these demands, and an arrangement was effected with the commanding general, by which the United States troops were engaged to leave the State, and the forts and all the public property, not necessary to the removal of the troops, were surrendered to the commissioners.[11]

These transactions took place between the 2d and the 18th of February, and it was under these circumstances that the vote upon the ratification or rejection of the ordinance of secession was taken on the 23d of February. It was ratified by a majority of the voters of the State.

The convention, which had adjourned before the vote was taken, reassembled on the 2d of March, and instructed the delegates already sent to the Congress of the seceding States, to apply for admission into the confederation, and to give the adhesion of Texas to its provisional constitution.

It proceeded, also, to make the changes in the State constitution which this adhesion made necessary. The words 'United States,' were stricken out wherever they occurred, and the words 'Confederate States' substituted; and the members of the legislature, and all officers of the State,

were required by the new constitution to take an oath of fidelity to the constitution and laws of the new confederacy.

Before, indeed, these changes in the constitution had been

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completed, the officers of the State had been required to appear before the committee and take an oath of allegiance to the Confederate States.

The governor and secretary of state, refusing to comply, were summarily ejected from office.

The members of the legislature, which had also adjourned and reassembled on the 18th of March, were more compliant. They took the oath, and proceeded on the 8th of April to provide by law for the choice of electors of president and vice-president of the Confederate States.

The representatives of the State in the Congress of the United States were withdrawn, and as soon as the seceded States became organized under a constitution, Texas sent senators and representatives to the Confederate Congress.

In all respects, so far as the object could be accomplished by ordinances of the convention, by acts of the legislature, and by votes of the citizens, the relations of Texas to the Union were broken up, and new relations to a new government were established for them.

The position thus assumed could only be amintained by arms, and Texas accordingly took part, with the other Confederate States, in the war of the rebellion, which these events made inevitable. During the whole of that war there was no governor, or judge, or any other State officer in Texas, who recognized the National authority. Nor was any officer of the United States permitted to exercise any authority whatever under the National government within the limits of the State, except under the immediate protection of the National military forces.

Did Texas, in consecuence of these acts, cease to be a State? Or, if not, did the State cease to be a member of the Union?

It is needless to discuss, at length, the question whether the right of a State to withdraw from the Union for any cause, regarded by herself as sufficient, is consistent with the Constitution of the United States.

The Union of the States never was a purely artificial and

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arbitrary relation. It began among the Colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form, and character, and sanction from the Articles of Confederation. By these the Union was solemnly declared to 'be perpetual.' And when these Articles were found to be inadequate to the exigencies of the country, the

Constitution was ordained 'to form a more perfect Union.' It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not?

But the perpetuity and indissolubility of the Union, by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Under the Articles of Confederation each State retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people. And we have already had occasion to remark at this term, that cthe people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,' and that 'without the States in union, there could be no such political body as the United States.'[12] Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

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When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union, and all the guaranties of republican government in the Union, attached at once to the State. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration, or revocation, except through revolution, or through consent of the States.

Considered therefore as transactions under the Constitution, the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The obligations of the State, as a member of the Union, and of every citizen of the State, as a citizen of the United States, remained perfect and unimpaired. It certainly follows that the State did not cease to be a State, nor her citizens to be citizens of the Union. If this were otherwise, the State must have become foreign, and her citizens foreigners. The war must have ceased to be a war for the suppression of rebellion, and must have become a war for conquest and subjugation.

Our conclusion therefore is, that Texas continued to be a State, and a State of the Union, notwithstanding the transactions to which we have referred. And this conclusion, in our judgment, is not in conflict with any act or declaration of any department of the National government, but entirely in accordance with the whole series of such acts and declarations since the first outbreak of the rebellion.

But in order to the exercise, by a State, of the right to sue in this court, there needs to be a State government, competent to represent the State in its relations with the National

governmet, so far as least as the institution and prosecution of a suit is concerned.

And it is by no means a logical conclusion, from the premises which we have endeavored to establish, that the governmental relations of Texas to the Union remained unaltered. Obligations often remain unimpaired, while relations are greatly changed. The obligations of allegiance to the State, and of obedience to her laws, subject to the Constitution of the United States, are binding upon all citizens, whether faithful or unfaithful to them; but the relations which subsist while these obligations are performed, are essentially different from those which arise when they are disregarded and set at nought. And the same must necessarily be true of the obligations and relations of States and citizens to the Union. No one has been bold enough to contend that, while Texas was controlled by a government hostile to the United States, and in affiliation with a hostile confederation, waging war upon the United States, senators chosen by her legislature, or representatives elected by her citizens, were entitled to seats in Congress; or that any suit, instituted in her name, could be entertained in this court. All admit that, during this condition of civil war, the rights of the State as a member, and of her people as citizens of the Union, were suspended. The government and the citizens of the State, refusing to recognize their constitutional obligations, assumed the character of enemies, and incurred the consequences of rebellion.

These new relations imposed new duties upon the United States. The first was that of suppressing the rebellion. The next was that of re-establishing the broken relations of the State with the Union. The first of these duties having been performed, the next necessarily engaged the attention of the National government.

The authority for the performance of the first had been found in the power to suppress insurrection and carry on war; for the performance of the second, authority was derived from the obligation of the United States to guarantee to every State in the Union a republican form of government.

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The latter, indeed, in the case of a rebellion which involves the government of a State, and for the time excludes the National authority from its limits, seems to be a necessary complement to the former.

Of this, the case of Texas furnishes a striking illustration. When the war closed there was no government in the State except that which had been organized for the purpose of waging war against the United States. That government immediately disappeared. The chief functionaries left the State. Many of the subordinate officials followed their example. Legal responsibilities were annulled or greatly impaired. It was inevitable that great confusion should prevail. If order was maintained, it was where the good sense and virtue of the citizens gave support to local acting magistrates, or supplied more directly the needful restraints.

A great social change increased the difficulty of the situation. Slaves, in the insurgent States, with certain local exceptions, had been declared free by the Proclamation of Emancipation; and whatever questions might be made as to the effect of that act, under the

Constitution, it was clear, from the beginning, that its practical operation, in connection with legislative acts of like tendency, must be complete enfranchisement. Wherever the National forces obtained control, the slaves became freemen. Support to the acts of Congress and the proclamation of the President, concerning slaves, was made a condition of amnesty[13] by President Lincoln, in December, 1863, and by President Johnson in May, 1865.[14] And emancipation was confirmed, rather than ordained, in the insurgent States, by the amendment to the Constitution prohibiting slavery throughout the Union, which was proposed by Congress in February, 1865, and ratified, before the close of the following autumn, by the requisite three-fourths of the States.[15]

The new freemen necessarily became part of the people, and the people still constituted the State; for States, like individuals, retain their identity, though changed to some

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extent in their constituent elements. And it was the State, thus constituted, which was now entitled to the benefit of the constitutional guaranty.

There being then no government in Texas in constitutional relations with the Union, it became the duty of the United States to provide for the restoration of such a government. But the restoration of the government which existed before the rebellion, without a new election of officers, was obviously impossible; and before any such election could be properly held, it was necessary that the old constitution should receive such amendments as would conform its provisions to the new conditions created by emancipation, and afford adequate security to the people of the State.

In the exercise of the power conferred by the guaranty clause, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed. It is essential only that the means must be necessary and proper for carrying into execution the power conferred, through the restoration of the State to its constitutional relations, under a republican form of government, and that no acts be done, and no authority exerted, which is either prohibited or unsanctioned by the Constitution.

It is not important to review, at length, the measures which have been taken, under this power, by the executive and legislative departments of the National government. It is proper, however, to observe that almost immediately after the cessation of organized hostilities, and while the war yet smouldered in Texas, the President of the United States issued his proclamation appointing a provisional governor for the State, and providing for the assembling of a convention, with a view to the re-establishment of a republican government, under an amended constitution, and to the restoration of the State to her proper constitutional relations. A convention was accordingly assembled, the constitution amended, elections held, and a State government, acknowledging its obligations to the Union, established.

Whether the action then taken was, in all respects, warranted by the Constitution, it is not now necessary to determine.

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The power exercised by the President was supposed, doubtless, to be derived from his constitutional functions, as commander-in-chief; and, so long as the war continued, it cannot be denied that he might institute temporary government within insurgent districts, occupied by the National forces, or take measures, in any State, for the restoration of State government faithful to the Union, employing, however, in such efforts, only such means and agents as were authorized by constitutional laws.

But, the power to carry into effect the clause of guaranty is primarily a legislative power, and resides in Congress. 'Under the fourth article of the Constitution, it rests with Congress to decide what government is the established one in a State. For, as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State, before it can determine whether it is republican or not.'

This is the language of the late Chief Justice, speaking for this court, in a case from Rhode Island,[16] arising from the organization of opposing governments in that State. And, we think that the principle sanctioned by it may be applied, with even more propriety, to the case of a State deprived of all rightful government, by revolutionary violence; though necessarily limited to cases where the rightful government is thus subverted, or in imminent danger of being overthrown by an opposing government, set up by force within the State.

The action of the President must, therefore, be considered as provisional, and, in that light, it seems to have been regarded by Congress. It was taken after the term of the 38th Congress had expired. The 39th Congress, which assembled in December, 1865, followed by the 40th Congress, which met in March, 1867, proceeded, after long deliberation, to adopt various measures for reorganization and restoration. These measures were embodied in proposed amendments to the Constitution, and in the acts known as the Reconsturction

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Acts, which have been so far carried into effect, that a majority of the States which were engaged in the rebellion have been restored to their constitutional relations, under forms of government, adjudged to be republican by Congress, through the admission of their 'Senators and Representatives into the councils of the Union.'

Nothing in the case before us requires the court to pronounce judgment upon the constitutionality of any particular provision of these acts.

But, it is important to observe that these acts themselves show that the governments, which had been established and had been in actual operation under executive direction, were recognized by Congress as provisional, as existing, and as capable of continuance.

By the act of March 2, 1867,[17] the first of the series, these governments were, indeed, pronounced illegal and were subjected to military control, and were declared to be provisional only; and by the supplementary act of July 19, 1867, the third of the series, it was further declared that it was the true intent and meaning of the act of March 2, that the governments then existing were not legal State governments, and if continued, were to be continued subject to the military commanders of the respective districts and to the paramount authority of Congress. We do not inquire here into the constitutionality of this legislation so far as it relates to military authority, or

to the paramount authority of Congress. It suffices to say, that the terms of the acts necessarily imply recognition of actually existing governments; and that in point of fact, the governments thus recognized, in some important respects, still exist.

What has thus been said generally describes, with sufficient accuracy, the situation of Texas. A provisional governor of the State was appointed by the President in 1865; in 1866 a governor was elected by the people under the constitution of that year; at a subsequent date a governor was appointed by the commander of the district. Each of the

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three exercised executive functions and actually represented the State in the executive department.

In the case before us each has given his sanction to the prosecution of the suit, and we find no difficulty, without investigating the legal title of either to the executive office, in holding that the sanction thus given sufficiently warranted the action of the solicitor and counsel in behalf of the State. The necessary conclusion is that the suit was instituted and is prosecuted by competent authority.

The question of jurisdiction being thus disposed of, we proceed to the consideration of the merits as presented by the pleadings and the evidence.

And the first question to be answered is, whether or not the title of the State to the bonds in controversy was divested by the contract of the military board with White and Chiles?

That the bonds were the property of the State of Texas on the 11th of January, 1862, when the act prohibiting alienation without the indorsement of the governor, was repealed, admits of no question, and is not denied. They came into her possession and ownership through public acts of the general government and of the State, which gave notice to all the world of the transaction consummated by them. And, we think it clear that, if a State, by a public act of her legislature, imposes restrictions upon the alienation of her property, that every person who takes a transfer of such property must be held affected by notice of them. Alienation, in disregard of such restrictions, can convey no title to the alienee.

In this case, however, it is said, that the restriction imposed by the act of 1851 was repealed by the act of 1862. And this is true if the act of 1862 can be regarded as valid. But, was it valid?

The legislature of Texas, at the time of the repeal, constituted one of the departments of a State government, established in hostility to the Constitution of the United States. It cannot be regarded, therefore, in the courts of the United States, as a lawful legislature, or its acts as lawful

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acts. And, yet, it is an historical fact that the government of Texas, then in full control of the State, was its only actual government; and certainly if Texas had been a separate State, and not one of the United States, the new government, having displaced the regular authority, and having established itself in the customary seats of power, and in the exercise of the ordinary functions of

administration, would have constituted, in the strictest sense of the words, a *de facto* government, and its acts, during the period of its existence as such, would be effectual, and, in almost all respects, valid. And, to some extent, this is true of the actual government of Texas, though unlawful and revolutionary, as to the United States.

It is not necessary to attempt any exact definitions, within which the acts of such a State government must be treated as valid, or invalid. It may be said, perhaps with sufficient accuracy, that acts necessary to peace and good order among citizens, such for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government; and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid and void.

What, then, tried by these general tests, was the character of the contract of the military board with White and Chiles?

That board, as we have seen, was organized, not for the defence of the State against a foreign invasion, or for its protection against domestic violence, within the meaning of these words as used in the National Constitution, but for the purpose, under the name of defence, of levying war against the United States. This purpose was, undoubtedly, unlawful, for the acts which it contemplated are, within the express definition of the Constitution, treasonable.

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It is true that the military board was subsequently reorganized. It consisted, thereafter, of the governor and two other members, appointed and removable by him; and was, therefore, entirely subordinate to executive control. Its general object remained without change, but its powers were 'extended to the control of all public works and supplies, and to the aid of producing within the State, by the importation of articles necessary and proper for such aid.'

And it was insisted in argument on behalf of some of the defendants, that the contract with White and Chiles, being for the purchase of cotton-cards and medicines, was not a contract in aid of the rebellion, but for obtaining goods capable of a use entirely legitimate and innocent, and, therefore, that payment for those goods by the transfer of any property of the State was not unlawful. We cannot adopt this view. Without entering, at this time, upon the inquiry whether any contract made by such a board can be sustained, we are obliged to say that the enlarged powers of the board appear to us to have been conferred in furtherance of its main purpose, of war against the United States, and that the contract, under consideration, even if made in the execution of these enlarged powers, was still a contract in aid of the rebellion, and, therefore, void. And we cannot shut our eyes to the evidence which proves that the act of repeal was intended to aid rebellion by facilitating the transfer of these bonds. It was supposed, doubtless, that negotiation of them would be less difficult if they bore upon their face no direct evidence of having come from the possession of any insurgent State government. We can give no effect, therefore, to this repealing act.

It follows that the title of the State was not divested by the act of the insurgent government in entering into this contract.

But it was insisted further, in behalf of those defendants who claim certain of these bonds by purchase, or as collateral security, that however unlawful may have been the means by which White and Chiles obtained possession of the bonds,

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they are innocent holders, without notice, and entitled to protection as such under the rules which apply to securities which pass by delivery. These rules were fully discussed in *Murray* v. *Lardner*.[18] We held in that case that the purchaser of coupon bonds, before due, without notice and in good faith, is unaffected by want of title in the seller, and that the burden of proof in respect to notice and want of good faith, is on the claimant of the bonds as against the purchaser. We are entirely satisfied with this doctrine.

Does the State, then, show affirmatively notice to these defendants of want of title to the bonds in White and Chiles?

It would be difficult to give a negative answer to this question if there were no other proof than the legislative acts of Texas. But there is other evidence which might fairly be held to be sufficient proof of notice, if the rule to which we have adverted could be properly applied to this case.

But these rules have never been applied to matured obligations. Purchasers of notes or bonds past due take nothing but the actual right and title of the vendors.[19]

The bonds in question were dated January 1, 1851, and were redeemable after the 31st of December, 1864. In strictness, it is true they were not payable on the day when they became redeemable; but the known usage of the United States to pay all bonds as soon as the right of payment accrues, except where a distinction between redeemability and payability is made by law, and shown on the face of the bonds, requires the application of the rule respecting overdue obligations to bonds of the United States which have become redeemable, and in respect to which no such distinction has been made.

Now, all the bonds in controversy had become redeemable before the date of the contract with White and Chiles; and all bonds of the same issue which have the indorsement of

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a governor of Texas made before the date of the secession ordinance,—and there were no others indorsed by any governor,—had been paid in coin on presentation at the treasury Department; while, on the contrary, applications for the payment of bonds, without the required indorsement, and of coupons detached from such bonds, made to that department, had been denied.

As a necessary consequence, the negotiation of these bonds became difficult. They sold much below the rates they would have commanded had the title to them been unquestioned. They were bought in fact, and under the circumstances could only have been bought, upon speculation.

The purchasers took the risk of a bad title, hoping, doubtless, that through the action of the National government, or of the government of Texas, it might be converted into a good one.

And it is true that the first provisional governor of Texas encouraged the expectation that these bonds would be ultimately paid to the holders. But he was not authorized to make any engagement in behalf of the State, and in fact made none. It is true, also, that the Treasury Department, influenced perhaps by these representations, departed to some extent from its original rule, and paid bonds held by some of the defendants without the required indorsement.

But it is clear that this change in the action of the department could not affect the rights of Texas as a State of the Union, having a government acknowledging her obligations to the National Constitution.

It is impossible, upon this evidence, to hold the defendants protected by absence of notice of the want of title in White and Chiles. As these persons acquired no right to payment of these bonds as against the State, purchasers could acquire none through them.

On the whole case, therefore, our conclusion is that the State of Texas is entitled to the relief sought by her bill, and a decree must be made accordingly.[20]

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Mr. Justice GRIER, dissenting.

I regret that I am compelled to dissent from the opinion of the majority of the court on all the points raised and decided in this case. $The first question in order is the jurisdiction of the court to entertain this bill in behalf of the State of Texas.

The original jurisdiction of this court can be invoked only by one of the United States. The Territories have no such right conferred on them by the Constitution, nor have the Indian tribes who are under the protection of the military authorities of the government.

Is Texas one of these United States? Or was she such at the time this bill was filed, or since?

This is to be decided as *a political fact*, not as a *legal fiction*. This court is bound to know and notice the public history of the nation.

If I regard the truth of history for the last eight years, I cannot discover the State of Texas as one of these United States. I do not think it necessary to notice any of the very astute arguments which have been advanced by the learned counsel in this case, to find the definition of a State, when we have the subject treated in a clear and common sense manner by Chief Justice Marshall, in the case of *Hepburn & Dundass* v. *Ellxey*.[21] As the case is short, I hope to be excused for a full report of it, as stated and decided by the court. He says:

'The question is, whether the plaintiffs, as residents of the District of Columbia, can maintain an action in the Circuit Court of the United States for the District of Virginia. This depends on the act of Congress describing the jurisdiction of that court. The act gives jurisdiction

to the Circuit Courts in cases between a citizen of the State in which the suit is brought, and a citizen of another State. To support the jurisdiction in this case, it must appear that Columbia is a State. On the part of the plaintiff, it has been urged that Columbia is a distinct political society, and is, therefore, a 'State' according to the

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definition of writers on general law. This is true; but as the act of Congress obviously uses the word 'State' in reference to that term as used in the Constitution, it becomes necessary to inquire whether Columbia is a State in the sense of that instrument. The result of that examination is a conviction that the members of the American Confederacy *only* are the States contemplated in the Constitution. The House of Representatives is to be composed of members chosen by the people of the several States, and each State shall have at least one representative. 'The Senate of the United States shall be composed of two senators from each State.' Each State shall appoint, for the election of the executive, a number of electors equal to its whole number of senators and representatives. These clauses show that the word 'State' is used in the Constitution as designating a member of the Union, and excludes from the term the signification attached to it by writers on the law of nations.'

Now we have here a clear and well-defined test by which we may arrive at a conclusion with regard to the questions of fact now to be decided.

Is Texas a State, now represented by members chosen by the people of that State and received on the floor of Congress? Has she two senators to represent her as a State in the Senate of the United States? Has her voice been heard in the late election of President? Is she not now held and governed as a conquered province by military force? The act of Congress of March 2d, 1867, declares Texas to be a 'rebel State,' and provides for its government until a legal and republican State government could be legally established. It constituted Louisiana and Texas the fifth military district, and made it subject, not to the civil authority, but to the 'military authorities of the United States.'

It is true that no organized rebellion now exists there, and the courts of the United States now exercise jurisdiction over the people of that province. But this is no test of the State's being in the Union; Dacotah is no State, and yet the courts of the United States administer justice there as they do in Texas. The Indian tribes, who are governed by military force, cannot claim to be States of the Union. Wherein does the condition of Texas differ from theirs?-

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Now, by assuming or admitting *as a fact* the present *status* of Texas as a State not in the Union *politically*, I beg leave to protest against any charge of inconsistency as to judicial opinions heretofore expressed as a member of this court, or silently assented to. I do not consider myself bound to express any opinion judicially as to the constitutional right of Texas to exercise the rights and privileges of a State of this Union, or the power of Congress to govern her as a conquered province, to subject her to military domination, and keep her in pupilage. I can only submit to *the fact* as decided by the political position of the government; and I am not disposed to join in any essay to prove Texas to be a State of the Union, when Congress have decided that she

is not. It is a question of fact, I repeat, and of fact only. *Politically*, Texas is not *a State in this Union*. Whether rightfully out of it or not is a question not before the court.

But conceding now the fact to be as judicially assumed by my brethren, the next question is, whether she has a right to repudiate her contracts? Before proceeding to answer this question, we must notice a fact in this case that was forgotten in the argument. I mean that the United States are no party to this suit, and refusing to pay the bonds because the money paid would be used to advance the interests of the rebellion. It is a matter of utter insignificance to the government of the United States to whom she makes the payment of these bonds. They are payable to the bearer. The government is not bound to inquire into the *bon a fides* of the holder, nor whether the State of Taxes has parted with the bonds wisely or foolishly. And although by the Reconstruction Acts she is required to repudiate all debts contracted for the purposes of the rebellion, this does not annul all acts of the State government during the rebellion, or contracts for other purposes, nor authorize the State to repudiate them.

Now, whether we assume the State of Texas to be judicially in the Union (though actually out of it) or not, it will not alter the case. The contest now is between the State of Texas and her own citizens. She seeks to annul a contract

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with the respondents, based on the allegation that there was no authority in Texas competent to enter into an agreement during the rebellion. Having relied upon one fiction, namely, that she *is* a State in the Union, she now relies upon a second one, which she wishes this court to adopt, that she was not a State at all during the five years that she was in rebellion. She now sets up the plea of *insanity*, and asks the court to treat all her acts made during the disease as void.

We have had some very astute logic to prove that judicially she was not a State at all, although governed by her own legislature and executive as 'a distinct political body.'

The ordinance of secession was adopted by the convention on the 18th of February, 1861; submitted to a vote of the people, and ratified by an overwhelming majority. I admit that this was a very ill-advised measure. Still it was the sovereign act of a sovereign State, and the verdict on the trial of this question, 'by battle,'[22] as to her right to secede, has been against her. But that verdict did not settle any question not involved in the case. It did not settle the question of her right to plead insanity and set aside all her contracts, made during the pending of the trial, with her own citizens, for food, clothing, or medicines. The same 'organized political body,' exercising the sovereign power of the State, which required the indorsement of these bonds by the governor, also passed the laws authorizing the disposal of them without such indorsement. She cannot, like the chameleon, assume the color of the object to which she adheres, and ask this court to involve itself in the contradictory positions, that she is a State in the Union and was never out of it, and yet not a State at all for four years, during which she acted and claims to be 'an organized political body,' exercising all the powers and functions of an independent sovereign State. Whether a State *de facto* or *de jure*, she is estopped from denying her identity in disputes with her own citizens. If they have not fulfilled their

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contract, she can have her legal remedy for the breach of it in her own courts.

But the case of Hardenberg differs from that of the other defendants. He purchased the bonds in open market, *bon a fide*, and for a full consideration. Now, it is to be observed that these bonds are payable to bearer, and that this court is appealed to as a court of equity. The argument to justify a decree in favor of the commonwealth of Texas as against Hardenberg, is simply this: these bonds, though payable to bearer, are redeemable fourteen years from date. The government has exercised her privilege of paying the interest for a term without redeeming the principal, which gives an additional value to the bonds. *Ergo*, the bonds are dishonored. *Ergo*, the former owner has a right to resume the possession of them, and reclaim them from a *bon a fide* owner by a decree of a court of equity.

This is the legal argument, when put in the form of a logical sorites, by which Texas invokes our aid to assist her in the perpetration of this great wrong.

A court of chancery is said to be a court of conscience; and however astute may be the argument introduced to *defend* this decree, I can only say that neither my reason nor my conscience can give assent to it.

Mr. Justice SWAYNE:

I concur with my brother Grier as to the incapacity of the State of Texas, in her present condition, to maintain an original suit in this court. The question, in my judgment, is one in relation to which this court is bound by the action of the legislative department of the government.

Upon the merits of the case, I agree with the majority of my brethren.

I am authorized to say that my brother MILLER unites with me in these views.

THE DECREE.

The decree overruled the objection interposed by way of plea, in the answer of defendants to the authority of the solicitors of

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the complainant to institute this suit, and to the right of Texas, as one of the States of the National Union, to bring a bill in this court.

It declared the contract of 12th January, 1865, between the Military Board and White and Chiles void, and enjoined White and Chiles from asserting any claim under it, and decreed that the complainant was entitled to receive the bonds and coupons mentioned in the contract, as having been transferred or sold to White and Chiles, which, at the several times of service of process, in this suit, were in the possession, or under the control of the defendants respectively, and any proceeds thereof which had come into such possession or control, with notice of the equity of the complainant.

It enjoined White, Chiles, Hardenberg, Birch, Murray, Jr., and other defendants, from setting up any claim to any of the bonds and coupons attached, described in the first article of said contract, and that the complainant was entitled to restitution of such of the bonds and coupons and proceeds as had come into the possession or control of the defendants respectively.

And the court, proceeding to determine for which and how many bonds the defendants respectively were accountable to make restitution of, or make good the proceeds of, decreed that Birch and Murray were so accountable for eight, numbered in a way stated in the decree, with coupons attached; and one Stewart (a defendant mentioned in the note at page 702), accountable for four others, of which the numbers were given, with coupons; decreed that Birch and Murray, as also Stewart, should deliver to the complainant the bonds for which they were thus made accountable, with the coupons, and execute all necessary transfers and instruments, and that payment of those bonds, or any of them, by the Secretary of the Treasury, to the complainant, should be an acquittance of Birch and Murray, and of Stewart, to that extent, and that for such payment this decree should be sufficient warrant to the secretary.

And, it appearing—the decree went on to say—upon the pleadings and proofs, that before the filing of the bill, Birch and Murray had received and collected from the United States the full amount of four other bonds, numbered, &c., and that Hardenberg, before the commencement of the suit, had deposited thirty-four bonds, numbered, &c., in the Treasury Department for redemption, of which bonds he claimed to have received payment

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from the Secretary of the Treasury before the service of process upon him in this suit, in respect to which payment and the effect thereof the counsel for the said Birch and Murray, and for the said Hardenberg respectively, desired to be heard, it was ordered that time for such hearing should be given to the said parties.

Both the complainant and the defendants had liberty to apply for further directions in respect to the execution of the decree.

1 These were Stewart, Shaw, &c., who made no resistance by counsel at the argument.

2 For a particular account of these bonds, see Paschal's Annotated Digest, Arts. 442-450.

3 See this last, *infra*, foot of p. 742.

4 Acts of Texas, 1862, p. 45.

5 Texas Laws, 55.

6 Mr. Justice Paterson, in Penhallow *v.* Doane's Admrs., 3 Dallas, 93.

7 Paschal's Digest Laws of Texas, 78.

8 Id. 80.

9 Laws of Texas, 1859-61, p. 11.

10 Paschal's Digest, 80.

11 Texas Reports of the Committee (Library of Congress), 45.

12 County of Lane *v.* The State of Oregon, *supra*, p. 76.

13 13 Stat. at Large, 737.

14 Ib. 758.

15 Ib. 774-5.

16 Luther *v.* Borden, 7 Howard, 42.

17 14 Stat. at Large, 428.

18 2 Wallace, 118.

19 Brown *v.* Davies, 3 Term, 80; Goodman *v.* Simonds, 20 Howard, 366.

20 See the decree, *infra*, p. 741.

21 2 Cranch, 452.

22 Prize Cases, 2 Black, 673.

GLORIA HICKS, Appellant,
v.
GROUP & PENSION ADMINISTRATORS, INC., Appellee.

GULF COAST DIVISION, INC. AND BAY AREA HEALTHCARE GROUP, LTD., Appellants,
v.
GROUP & PENSION ADMINISTRATORS, INC., Appellee.

NUMBER 13-14-00607-CV
NUMBER 13-14-00608-CV

COURT OF APPEALS THIRTEENTH DISTRICT OF TEXAS CORPUS CHRISTI - EDINBURG

September 3, 2015

On appeal from the 94th District Court of Nueces County, Texas.

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OPINION

Before Chief Justice Valdez, and Justices Rodriguez, and Garza
Memorandum Opinion by Justice Garza

In these consolidated interlocutory appeals,[1] appellants Gloria Hicks ("Hicks"), Bay Area Healthcare Group, Ltd. ("BAHG"), and Gulf Coast Division, Inc. ("GCD") appeal the trial court's orders denying their motions to dismiss ("the Motions") that were filed pursuant to the Texas Citizens' Participation Act ("TCPA" or "the Act"), set forth in chapter 27 of the civil practice and remedies code.[2] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.003 (West, Westlaw through Ch. 46, 2015 R.S.); *id.* § 51.014(a)(12) (West, Westlaw through Ch. 46, 2015 R.S.) (providing for the interlocutory appeal of an order denying a

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motion to dismiss filed under section 27.003). The Motions were filed in response to a lawsuit filed by appellee, Group and Pension Administrators, Inc. ("GPA"), against the appellants. Hicks and the Hospital Defendants contend that the trial court erred in denying their Motions.

In appellate cause number 13-14-607-CV, we affirm that part of the trial court's order denying Hicks's Motion to dismiss GPA's claims of business disparagement and tortious interference with prospective relations against her. We reverse that part of the trial court's order denying Hicks's Motion to dismiss GPA's claims of conspiracy and joint enterprise and coercion of a public servant against her and render judgment dismissing those claims against Hicks. In appellate cause number 13-14-608-CV, we reverse the trial court's order denying the Hospital Defendants' Motion to dismiss GPA's claims against them and render judgment dismissing those claims. We remand both causes for further proceedings consistent with this opinion, including consideration by the trial court of an award under section 27.009 of the TCPA of costs and fees relating to the Motions to dismiss. *See id.* § 27.009 (West, Westlaw through Ch. 46, 2015 R.S.).

I. BACKGROUND

In October 2012, GPA was one of four finalists to be awarded a contract to serve as the third-party administrator of Corpus Christi Independent School District's ("CCISD") self-funded health insurance plan. GPA asserts that on Friday, October 26, 2012, Xavier Gonzalez, an assistant superintendent of CCISD, advised GPA representatives that GPA would be awarded the third-party administrator contract on Monday, October 29, 2012.

Hicks, a Corpus Christi resident active in the community, is a member of the board

of trustees for Corpus Christi Medical Center ("CCMC").[3] Hicks learned of CCISD's decision to award the contract to GPA on Friday, October 26, 2012. That afternoon, Hicks sent the following email to six school board members and the superintendent of CCISD:

I am on the Board of Directors for Corpus Christi Medical Center, which includes Bay Area Hospital, Doctors Regional, ER in Portland, ER in Calallen. The message that I would like to convey is that our hospitals have worked with GPA in the past and they are very difficult with all Healthcare providers. If CCISD does elect to go with GPA[,] we will be forced to bill CCISD employees. The billing difficulties are so bad we are unable to file claims and get them paid. It is a bad situation that I wanted to make you aware of. Thank you.[4]

Late in the afternoon on Friday, October 26, assistant superintendent Gonzalez notified a GPA representative that CCISD had decided to award the contract to a different bidder. On Monday, October 29, the school board met as scheduled and awarded the contract to a different bidder.

On March 4, 2013, GPA sued Hicks asserting claims for defamation/libel, defamation/libel per se, business disparagement, and tortious interference with a prospective business relationship. Hicks was served with the lawsuit on March 18, 2013.

On April 3, 2014, GPA filed an amended petition adding the Hospital Defendants, removing the defamation/libel claims, retaining the business disparagement and tortious interference claims, and adding claims for conspiracy, joint enterprise, and coercion of a public servant. *See* TEX. PENAL CODE ANN. § 36.03(a)(1) (West, Westlaw through Ch. 46, 2015 R.S.).

Hicks filed her Motion pursuant to section 27.003(b) of the civil practice and

remedies code on June 2, 2014. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(b). Hicks argued that her Motion was timely because it was filed within sixty days of the date she was served with GPA's amended petition. *See id*. (providing that a motion to dismiss must be filed within sixty days "after the date of service of the legal action"). On August 19, 2014, GPA filed a response to the Motion in which it argued, among other things, that Hicks's Motion must be denied because she failed to file her Motion within sixty days of the date she was served with GPA's original petition. Hicks filed a reply to GPA's response.

On June 16, 2014, the Hospital Defendants filed their Motion pursuant to section 27.003(b). The Hospital Defendants noted that the Motion was timely as it was filed within sixty days of April 16, 2014, the date of service of GPA's amended petition. *See id*. The Hospital Defendants argued that the basis for GPA's claims against them—Hicks's emails—are communications that are protected under the TCPA. The Hospital Defendants also argued that GPA cannot establish "by clear and specific evidence a prima facie case for each essential element" of its claims. *See id*. § 27.005(c) (West, Westlaw through Ch. 46, 2015 R.S.) (providing that a court must dismiss claims if, after a defendant shows that claims relate to the defendant's rights to free speech, petition, or association, a plaintiff cannot establish a prima facie case for each element of claim). GPA filed a response to the Hospital Defendants' Motion, arguing that: (1) its claims are not covered by the TCPA under the "commercial speech" exception, *see id*. § 27.010(b); (2) Hicks's emails are not covered by the TCPA "because they amount to criminal coercion"; (3) the Hospital Defendants failed to meet their burden to show that Hicks's emails are covered by the TCPA; and (4) GPA made a prima facie showing as to each

essential element of its claims. The Hospital Defendants filed a reply in support of their Motion.

On August 28, 2014, the trial court held a hearing on both Hicks's and the Hospital Defendants' Motions. At the hearing, the Hospital Defendants preserved their right to request damages pursuant to section 27.009(1) of the TCPA. *See id.* § 27.009(1) (providing that if a court orders dismissal, it shall award court costs and attorneys' fees to moving party). On September 23, 2014, by separate orders, the trial court denied both Motions without stating the basis for its rulings. This interlocutory consolidated appeal followed.

II. STANDARD OF REVIEW AND APPLICABLE LAW

The TCPA provides a mechanism for early dismissal of suits based on a party's exercise of the right of free speech, the right to petition, or the right of association. *See id.* § 27.003. Section 27.003 allows a litigant to seek dismissal of a "legal action" that is "based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association." *Id.* § 27.003(a). A "'legal action' means a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief." *Id.* § 27.001(6) (West, Westlaw through Ch. 46, 2015 R.S.). "The statute broadly defines 'the exercise of the right of free speech' as 'a communication made in connection with a matter of public concern.'" *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015) (per curiam) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(3) (West, Westlaw through Ch. 46, 2015 R.S.)). "Under this definition, the right of free speech has two components: (1) the exercise must be made in a communication and (2) the communication must be made in connection with a

matter of public concern." *Id.* "[T]he statute defines 'communication' as 'the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.'" *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(1) (West, Westlaw through Ch. 46, 2015 R.S.)). Thus, the statute defines "communication" to include any form or medium—regardless of whether the communication takes a public or private form. *Id.* A "matter of public concern" is defined by the statute to include issues related to health or safety, community well-being, and the provision of services in the marketplace, among other things. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(7) (West, Westlaw through Ch. 46, 2015 R.S.).

The Act imposes the initial burden on the movant to establish by a preponderance of the evidence "that the legal action is based on, relates to, or is in response to the party's exercise" of the right of free speech, the right to petition, or the right of association. *Id.* § 27.005(b). The Act then shifts the burden to the nonmovant, allowing the nonmovant to avoid dismissal only by "establish[ing] by clear and specific evidence a prima facie case for each essential element of the claim in question." *Id.* § 27.005(c). The requirement that a plaintiff present "clear and specific evidence" of "each essential element" means that "a

plaintiff must provide enough detail to show the factual basis for its claim." *In re Lipsky*, 460 S.W.3d 579, 591 (Tex. 2015) (orig. proceeding). "Though the TCPA initially demands more information about the underlying claim, the Act does not impose an elevated evidentiary standard or categorically reject circumstantial evidence." *Id*. When determining whether to dismiss the legal action, the court must consider "the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based." TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a). The court may allow specified

and limited discovery relevant to the motion on a showing of good cause, but otherwise all discovery in the legal action is suspended until the court has ruled on the motion to dismiss. *Id*. §§ 27.003, .006(b).

Under section 27.006 of the TCPA, the trial court may consider pleadings as evidence. *Id*. § 27.006(a). The TCPA does not require a movant to present testimony or other evidence to satisfy the movant's evidentiary burden. *Serafine v. Blunt*, ___ S.W.3d ___, No. 03-12-00726-CV, 2015 WL 3941219, at *4 (Tex. App.—Austin June 26, 2015, no pet. h.).

We review de novo questions of statutory construction. We consider de novo the legal question of whether the movant has established by a preponderance of the evidence that the challenged legal action is covered under the Act. We also review de novo a trial court's determination of whether a nonmovant has presented clear and specific evidence establishing a prima facie case for each essential element of the challenged claims.

Id. at *2 (internal citations omitted).

III. DISCUSSION

A. Hicks's Motion to Dismiss

1. Jurisdiction

As an initial matter, we must address whether we have jurisdiction over Hicks's interlocutory appeal. In its brief, GPA argues that this Court lacks jurisdiction over Hicks's appeal because "[t]he TCPA does not grant the right of interlocutory appeal from the denial of a *motion for leave* to file a motion to dismiss." (Emphasis added.) In support of its argument, GPA cites *Summersett v. Jaiyeola*, 438 S.W.3d 84, 91 (Tex. App.—Corpus Christi 2013, pet. denied). In *Summersett*, the defendant filed a motion for leave to file a motion to dismiss outside the sixty-day window from the return of service, arguing that

service was improper. *Id*. at 88. Following a hearing, the trial court stated, "[t]he only order I'm entering today is that the Motion for Leave is denied." *Id*. at 91. This Court found that we lacked jurisdiction over the appeal because "[a] trial court's denial of a motion for leave or a motion for extension of time to file a motion to dismiss is neither a ruling on the merits of the motion to dismiss, nor a denial 'by operation of law' of a motion to dismiss." *Id*. at 91-92.

We find GPA's reliance on *Summersett* is misplaced. Here, Hicks filed a motion to dismiss; she did not file a motion for leave to file her motion to dismiss. Similarly, the trial court's order denying her motion to dismiss explicitly stated that "Defendant's motion to dismiss is hereby DENIED." GPA argues that after Hicks filed her motion to dismiss and GPA filed a response, Hicks filed a "reply" in support of her motion, in which she argued, alternatively, that the trial court should consider her motion to dismiss because the court can extend the time to file a motion on a showing of good cause. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(b) (West, Westlaw through Ch. 46, 2015 R.S.). GPA argues that by doing so, Hicks "directly asked the trial court to grant her leave[.]" According to GPA, "[t]he trial court could have denied the motion because it decided not to grant leave for Hicks to file an untimely motion." We are unpersuaded by GPA's argument. As noted, the Motion requested dismissal, not leave to file, and the order denying the Motion explicitly denied the motion to dismiss. The civil practice and remedies code expressly provides for interlocutory appeal of a trial court's order denying a motion to dismiss filed under the TCPA. *See id*. § 51.014(a)(12). We conclude that we have jurisdiction over this appeal and proceed to consider the remaining appellate issues.

2. Trial Court's Denial of Hicks's Motion

By a single issue, Hicks contends that the trial court erred in denying her Motion to dismiss because: (1) she established that GPA's claims arose out of her exercise of free speech and right to petition the government; and (2) GPA failed to establish by "clear and specific evidence" a prima facie case for each element of its claims. By sub-issues, she further argues: (1)) her Motion was timely filed because it was filed within sixty days after the date of service of GPA's amended petition; and (2) GPA's claims are not exempt from application of the TCPA either by the "commercial speech" exemption or because the speech constitutes criminal coercion of a public servant.

a. Timeliness of Hicks's Motion

We begin with Hicks's sub-issue by which she contends that her Motion to dismiss was timely filed because it was filed within sixty days after service of GPA's amended petition. The statute requires that a motion to dismiss must be filed within sixty days of

the "legal action." *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(b). "Legal action" is defined as "a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief." *Id*. § 27.001(6). Hicks argues that GPA's amended petition "reformulat[ed] the entire litigation" because it added the Hospital Defendants and asserted new claims against her for conspiracy with the Hospital Defendants and for tortious interference on the basis of "coercion of a public servant." Hicks also argues that she "could not have filed her motion to dismiss within sixty days after service of GPA's Original Petition without the risk of waiving her venue challenges."

We are unpersuaded that Hicks's arguments prevail as to all of GPA's claims. GPA's amended petition added new claims against Hicks for conspiracy and joint

enterprise and coercion of a public servant. However, the business disparagement and tortious interference claims asserted in GPA's amended petition—claims based on Hicks's emails—were also made in its original petition. Thus, Hicks was on notice that GPA was asserting business disparagement and tortious interference claims against her in March 2013—over a year before she filed her Motion in June 2014.

In support of her argument that her Motion was timely filed, Hicks cites *Better Bus. Bureau of Metro. Dallas, Inc.* ("BBB") *v. Ward*. 401 S.W.3d 440, 443 (Tex. App.—Dallas 2013, pet. denied). In *Ward*, a law firm sued the BBB based on the BBB's business rating of "F" assigned to the firm. *Id*. at 442. The suit was filed before the effective date of the TCPA. Months later, after the effective date of the TCPA, Ward joined as a party plaintiff in an amended petition. *Id*. at 443. The BBB filed a motion to dismiss Ward's individual claims against the BBB—the claims added after the effective date of the TCPA—but did not seek dismissal of the law firm's claims against the BBB. *Id*. The trial court denied the BBB's motion to dismiss. *Id*. The Dallas Court of Appeals found that "[t]he definition of 'legal action' in the statute is broad and evidences a legislative intent to treat any claim by any party on an individual and separate basis." *Id*. (citing TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(6)). The court found that the TCPA applied to the BBB's business review and that the trial court erred in denying the BBB's motion to dismiss under the TCPA. *Id*. at 445.

In *In re Estate of Check*, the San Antonio Court of Appeals rejected the categorical argument that Hicks makes here: that a motion to dismiss is timely filed if filed within sixty days of an amended petition. 438 S.W.3d 829, 836 (Tex. App.—San Antonio 2014, no pet.). The *Check* Court found that "such an interpretation would lead to absurd results

not intended by the Legislature." *Id*. The court noted that to permit the filing of any substantive pleading to

reset the deadline for a motion to dismiss . . . is irrational and at odds with one of the purposes of the Act, which is to allow a defendant *early in the lawsuit* to dismiss claims that seek to inhibit a defendant's constitutional rights to petition, speak freely, associate freely, and participate in government as permitted by law.

Id. In *Check*, the movant asserted that his motion to dismiss was timely filed because it was filed within sixty days of service of the nonmovant's amended counterclaim. *Id*. The movant cited *Ward* in support of his argument that the amended counterclaim reset the sixty-day deadline. *Id*. at 837. The *Check* court, however, concluded that *Ward* "actually undermine[d]" the movant's position. The court noted that in *Ward*, the amended petition had asserted new claims; therefore, "because the plaintiff had added new claims, a new deadline was mandated." *Id*. The *Check* court explained, "[e]xtrapolating from *Ward*, in the absence of new parties or claims, the deadline for filing a motion to dismiss would run from the date of service of the original 'legal action.'" *Id*. The court then distinguished *Ward* on the ground that the *Check* nonmovant's amended counterclaim had *not* added new parties or claims. *See id*. Therefore, the court concluded that the movant's motion to dismiss was untimely. *Id*.

In *James v. Calkins*, the First Court of Appeals determined that the plaintiffs' claims asserted in an amended petition—filed after the effective date of the TCPA—were based on different factual allegations than those in the original petition. 446 S.W.3d 135, 146 (Tex. App.—Houston [1st Dist.] 2014, pet. filed). The *Calkins* court found that all of the causes of action in the amended petition "included substantively different factual

allegations" and were new causes of action; therefore, the TCPA applied to all of the claims. *Id*.

In *Miller Weisbrod, LLP v. Llamas-Soforo*, the El Paso Court of Appeals also rejected the position that Hicks urges us to adopt here: to define the term "legal action" broadly to include any subsequent pleading filed in a lawsuit. No. 08-12-00278-CV, 2014 WL 6679122, at *9 (Tex. App.—El Paso Nov. 25, 2014, no pet.) . In *Miller Weisbrod*, a law firm that was added as a defendant in a first amended petition argued that its motion to dismiss was timely filed because it was filed within sixty days of a second amended petition that added two individual defendants. *Id*. The El Paso Court disagreed, stating that, "[w]e see nothing in the statute or its history and purpose to indicate the Legislature intended to create a perpetual opportunity to file a motion to dismiss whenever a pleading qualifies as a 'legal action' under Section 27.001(6)." *Id*. at *10. The court noted that the law firm was named as a defendant and served with the first amended petition, which triggered the law firm's sixty-day deadline for filing a motion to dismiss under the TCPA.

Id. at *11. Because the law firm did not file its motion within the sixty-day deadline, the El Paso Court found that it was not timely filed. *Id*.

In the present case, Hicks argues—as did the law firm in *Miller Weisbrod*—that her motion to dismiss was timely filed because it was filed within sixty days of GPA's amended petition. We agree with the *Ward* court's statement that "[t]he definition of 'legal action' in the statute is broad and evidences a legislative intent to treat any claim by any party on an individual and separate basis." *Ward*, 401 S.W.3d at 443. As noted, GPA's original petition asserted claims of business disparagement and tortious interference with prospective relations against Hicks, and those claims were retained in GPA's amended

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petition.[5] As to those two claims, therefore, Hicks's sixty-day deadline to file a motion to dismiss was triggered when she was served with GPA's original petition and her Motion, filed over a year later, was untimely filed as to those two claims. *See In re Estate of Check*, 438 S.W.3d at 836; *Miller Weisbrod*, *LLP*, 2014 WL 6679122, at *11. Accordingly, we overrule Hicks's timeliness sub-issue as it pertains to her Motion to dismiss GPA's business disparagement and tortious interference with prospective relations claims against her.

GPA's amended petition, however, asserted two new claims against Hicks: "conspiracy and joint enterprise" and criminal coercion of a public servant. *See* TEX. PENAL CODE ANN. § 36.03(a)(1) (West, Westlaw through Ch. 46, 2015 R.S.). Both claims are—like GPA's business disparagement and tortious interference claims—based on Hicks's emails. In its "conspiracy and joint enterprise" claim, GPA asserts that Hicks and the Hospital Defendants "combined or collaborated their efforts to engage in the unlawful practices [of business disparagement and tortious interference with prospective relations]." GPA asserts that "[a]ll of the defendants, or, alternatively, at least one of the defendants, committed an unlawful, overt act or acts to further the object or course of action. . . . At least one defendants, [sic] though more likely all of the defendants respectively, committed a tort against GPA while acting within the scope of the enterprise." Although no "tort" or "unlawful" act is specifically identified, the only conduct complained of is Hicks's emails.

GPA's "coercion of a public servant" claim is included in a section added to GPA's tortious interference with prospective relations claim. Specifically, GPA alleged that:

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Defendants coerced seven members of the CCISD Board of Trustees and the CCISD Superintendent with a threat to retaliate against CCISD through a campaign of direct billing CCISD teachers if CCISD contracted with GPA as CCISD intended to do. Using

this threat as a means of coercion, Defendants influenced public servants, i.e. the CCISD Board of Trustees and the CCISD Superintendent, in the specific exercise of their official powers and the specific performance of their official duties.

Because these two claims against Hicks were first asserted in GPA's amended petition, we conclude that Hicks's Motion to dismiss was timely filed as to these two claims. *See In re Estate of Check*, 438 S.W.3d at 837; *Ward*, 401 S.W.3d at 445.

Accordingly, we sustain Hicks's timeliness sub-issue as it pertains to GPA's conspiracy and joint enterprise and coercion of a public servant claims against her. We therefore proceed to determine whether the trial court erred in denying Hicks's Motion as to those claims under the TCPA.

b. Application of TCPA to GPA's Conspiracy and Coercion Claims

We next determine whether Hicks established by a preponderance of the evidence that the TCPA applies to her statements. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b). Section 27.003 provides that a party may file a motion to dismiss if a legal action "is based on, relates to, or is in response to [that] party's exercise of the right of free speech, right to petition, or right of association." *Id.* § 27.003(a). Section 27.001(3) defines "exercise of the right of free speech" as "a communication made in connection with a matter of public concern." *Id.* § 27.001(3). "Matter of public concern" is defined as including an issue related to "health or safety," "environmental, economic, or community well-being," and "a good, product, or service in the marketplace." *Id.* § 27.001(7)(A), (B), (E). "Exercise of the right to petition" is defined as including a communication pertaining to "a proceeding of the governing body of any political subdivision of this state." *Id.* §

27.001(4)(A)(vii). Section 27.005(b) provides that a court "shall dismiss a legal action against a moving party if the moving party shows by a preponderance of the evidence" that the action is based on, relates to, or is in response to the moving party's exercise of the right of free speech, right to petition, or right of association. *Id.* § 27.005(b).

The record shows that Hicks's emails related to whether, if CCISD selected GPA as its third-party administrator, insurance claims made by CCISD's teachers would be promptly and satisfactorily paid. Hicks's email expressed concern that GPA's past performance as being "difficult" with health care providers likely would result in CCISD's employees being billed for health care costs. We conclude that Hicks's emails related to the health and economic well-being of CCISD's employees and also related to a "service" offered by GPA in the marketplace. *See id.* § 27.001(7)(A), (B), (E). We conclude, based on the facts alleged in GPA's pleadings and in response to Hicks's Motion, that Hicks met her initial burden of showing by a preponderance of the evidence that her statements were made in connection with a matter of public concern and that

GPA's conspiracy and coercion of a public servant claims relate to those statements so that the TCPA applies to those claims. *See id*. § 27.001(3), (7)(A), (B), (E), 27.005(b); *see In re Lipsky*, 460 S.W.3d at 586.

GPA contends that Hicks's emails do not relate to the exercise of her right to free speech or the right to petition because: (1) the TCPA applies only to public speech, and Hicks's emails were private speech; (2) Hicks's statements are exempt from the TCPA under the commercial speech exemption under section 27.010(b), *see* TEX. CIV. PRAC. & REM. CODE ANN. § 27.010(b); and (3) Hicks's emails constitute criminal coercion under the penal code and therefore fall outside the protection of the TCPA. *See* TEX. PENAL

CODE ANN. § 36.03(a)(1). After the parties filed briefs, the Texas Supreme Court rejected GPA's first argument in *Lippincott*, 462 S.W.3d at 509. The Court held that the statutory definition of "communication" includes both public and private communication. *See id*.

GPA also argues that the TCPA does not apply to Hicks's statements because the statements fall within the "commercial speech" exemption. Section 27.010(b) provides that:

This chapter does not apply to 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.

TEX. CIV. PRAC. & REM. CODE ANN. § 27.010 (West, Westlaw through Ch. 46, 2015 R.S.). Section 27.010(b) thus provides, in relevant part, that a statement is exempt from the TCPA if the action is against a person primarily engaged in selling services and the statement arises from the sale of services. *See id*. This provision has been construed such that, for the exemption to apply, the statement must be made for the purpose of securing sales in the goods or services of the person making the statement. *See Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd*., 416 S.W.3d 71, 88-89 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). The party asserting the exemption (here GPA) bears the burden of proving its applicability. *Id*. at 89.

GPA argues that Hicks's emails fall within the commercial speech exemption because she was a member of the Hospital Defendants' Board of Directors and the Hospital Defendants "primarily engage in the business of selling healthcare services." According to GPA, "Hicks, on behalf of the Hospital Defendants, endeavored to place her hospitals at an advantageous position to sell healthcare services at higher

reimbursements—that would be paid by CCISD's self-funded insurance plan." Hicks responds that as an unpaid member of the hospital's governing board, she "was not selling anything." Hicks notes that "[t]he only services at issue were third[-]party insurance companies' services, and only GPA was selling them." GPA continues to assert that Hicks and the Hospital Defendants had an economic interest in the CCISD board's decision to award the insurance contract to a different provider. Even assuming, without deciding, that GPA's assertion is correct—that Hicks and the Hospital Defendants stood to gain if the CCISD board chose a different provider—that does not alter the fact that Hicks was not "a person primarily engaged in the business of selling or leasing goods or services." *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.010(b); *see also Schimmel v. McGregor*, 438 S.W.3d 847, 857-58 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (finding that a lawyer's statements that allegedly induced the City of Galveston to back out of an agreement to purchase properties was not commercial speech because his intended audience, the City, was not a "potential buyer or customer" of his services). We conclude that GPA has failed to establish the applicability of the "commercial speech" exemption. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.010(b); *Schimmel*, 438 S.W.3d at 857-58.

We next address GPA's argument that Hicks's emails do not constitute protected conduct under the TCPA because "they amount to criminal coercion." A person commits the offense of coercion of a public servant if he "influences or attempts to influence a public servant in a specific exercise of his official power or a specific performance of his official duty or influences or attempts to influence a public servant to violate the public servant's known legal duty[.]" TEX. PENAL CODE ANN. § 36.03(a)(1). The penal code

defines "coercion" as "a threat, however communicated" to take certain actions. *Id.* § 1.07(a)(9) (West, Westlaw through Ch. 46, 2015 R.S.). Thus, "coercion" must involve a "threat." Because the penal code does not define "threat," we must give the term its common ordinary meaning. *Jaster v. Comet II Const., Inc.*, 438 S.W.3d 556, 563-64 (Tex. 2014). "Threat" is defined, in relevant part, as "an expression of intention to inflict evil, injury, or damage." *See* Merriam-Webster's Online Dictionary, < http://www.merriam-webster.com/dictionary/threat > (last visited July 2, 2015).

According to GPA, Hicks "threatened the school board members that if the CCISD retained GPA to administer the CCISD's self-funded health insurance plan, then the Hospital Defendants would refuse to work with the CCISD's self-funded health insurance plan and would instead 'be forced to bill CCISD employees.'" We do not construe Hicks's emails as expressing an intention to inflict evil, injury, or damage, and therefore, the emails do not constitute a "threat." *See id.* Accordingly, Hicks's emails do not constitute coercion of a public servant.

Because we have held that Hicks's emails—which formed the basis for GPA's claims of coercion of a public servant and conspiracy and joint enterprise—constitute protected conduct under the TCPA, we must next determine whether GPA met its burden to establish, by clear and specific evidence, a prima facie case for every essential element of its claims. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c).

Because we have already concluded that Hicks's emails do not constitute a "threat," GPA cannot establish a prima facie case for coercion of a public servant. *See* TEX. PENAL CODE ANN. §§ 1.07(a)(9), 36.03(a)(1). In other words, GPA has not met its

burden of establishing by clear and specific evidence a prima facie case for the "threat" element of this claim. *See id.*; TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c).

Civil conspiracy requires (1) two or more persons who agree upon an object, (2) a meeting of minds on the object to be accomplished, and (3) one or more overt, unlawful acts committed in furtherance of the conspiracy, (4) which results in damages. *Guevara v. Lackner*, 447 S.W.3d 566, 582 (Tex. App.—Corpus Christi 2014, no pet.). The elements of a joint enterprise are (1) an agreement (express or implied) among the members of the group, (2) a common purpose to be carried out by the group, (3) a community of pecuniary interest among the members in that common purpose, and (4) an equal right to direct and control the enterprise. *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 525, 530 (Tex. 2003). An appellate court first looks to the evidence of an agreement or agreements among the members of the group to ascertain their possible common purposes, and then it considers if the evidence supports a finding of a joint enterprise with respect to each possible common purpose. *Id.* at 531.

In its amended petition, in the section asserting a claim for "conspiracy and joint enterprise," GPA asserts that the defendants "collaborated their efforts to engage in the unlawful practices set forth above." As to GPA's "joint enterprise" theory, GPA's amended petition does not identify any "agreement" or parties to it, does not identify any "common purpose," and does not identify any "community of pecuniary interest" involved in the alleged joint enterprise. *See id.*

Our review of GPA's amended petition reveals that the only allegedly "unlawful practice" about which GPA complains as a basis for its conspiracy and joint enterprise claim is Hicks's emails. GPA has not provided evidence of—or even identified—any other

"unlawful practice." We have already determined that Hicks met her initial burden of showing by a preponderance of the evidence that her statements were made in connection

with a matter of public concern so that the TCPA applies to GPA's "conspiracy and joint enterprise" claim. GPA offers no other evidence regarding the alleged unlawful nature of Hicks's act of sending the emails. Therefore, we conclude that GPA has not established, by clear and specific evidence, a prima facie case on its claims for conspiracy or joint enterprise. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c).

We therefore hold that because Hicks established by a preponderance of the evidence that GPA's conspiracy and joint enterprise and coercion of a public servant claims are based on, relate to, or are in response to her exercise of her right to free speech, and because GPA failed to establish a prima facie case on any essential element of its conspiracy and joint enterprise or coercion of a public servant claims, the trial court erroneously denied Hicks's Motion to dismiss those claims under the TCPA. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b), (c). We reverse that part of the trial court's order denying Hicks's Motion to dismiss GPA's conspiracy and joint enterprise and coercion of a public servant claims against Hicks and render judgment dismissing those claims against Hicks.

B. The Hospital Defendants' Motion to Dismiss

By a single issue, the Hospital Defendants contend on appeal that the trial court erred in denying their Motion.

In their Motion, the Hospital Defendants argued that: (1) they can show by a preponderance of the evidence that all of GPA's claims against them are based on Hicks's emails, in which she was exercising her right of free speech and right to petition; and (2)

GPA cannot establish by clear and specific evidence a prima facie case for each essential element of its claims. *See id*. In its amended petition, GPA asserted against the Hospital Defendants the same claims it asserted against Hicks: business disparagement, tortious interference with prospective contract, and conspiracy and joint enterprise. All of GPA's claims are based on Hicks's emails.

In its response, GPA argued that: (1) its claims are not covered by the TCPA under the "commercial speech" exception, *see id*. § 27.010(b); (2) Hicks's emails are not covered by the TCPA "because they amount to criminal coercion"; (3) the Hospital Defendants failed to meet their burden to show that Hicks's emails are covered by the TCPA; and (4) GPA made a prima facie showing as to each essential element of its claims.

We have already determined that (1) Hicks's emails constitute protected conduct under the TCPA, (2) the emails do not fall within the "commercial speech" exemption, and (3) the emails do not constitute criminal coercion. For the reasons discussed above,

we find that the Hospital Defendants have established by a preponderance of the evidence that all of GPA's claims are based on Hicks's exercise of her right to free speech. *See id*. § 27.005 (b). To defend against the Hospital Defendants' Motion, GPA's burden under the TCPA was to establish by clear and specific evidence a prima facie case for each essential element of its claims against the Hospital Defendants. *See id*. § 27.005(c).

1. Business Disparagement

"Business disparagement or 'injurious falsehood applies to derogatory publications about the plaintiff's economic or commercial interests.'" *In re Lipsky*, 460 S.W.3d at 591 (quoting 3 DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 656,

at 615 (2d ed. 2011)). "'To prevail on a business disparagement claim, a plaintiff must establish that (1) the defendant published false and disparaging information about it, (2) with malice, (3) without privilege, (4) that resulted in special damages to the plaintiff.'" *Id*. at 592 (quoting *Forbes Inc. v. Granada Biosciences, Inc*., 124 S.W.3d 167, 170 (Tex. 2003)). In their Motion, the Hospital Defendants asserted that GPA "cannot present by clear and specific evidence a prima facie case that [Hicks's] statements were false, committed with malice and without privilege, or caused [GPA] special damages—i.e., caused [GPA] to lose the bid from the School District."

In its response, GPA pointed to the following evidence in support of its claim: (1) Hicks's emails; (2) an unsworn "declaration" by Lynn Huckaby, branch director of GPA's San Antonio, Texas, office; and (3) an unsworn "declaration" by Jeff McPeters, a GPA senior sales executive.[6] Huckaby's declaration states, in relevant part, that: (1) on Friday, October 26, 2012, Huckaby and other GPA staff members met with Xavier Gonzalez, CCISD Assistant Superintendent; (2) on the afternoon of October 26, 2012, Gonzalez said that GPA had won the CCISD business; and (3) around 5:00 p.m. on October 26,[7] Gonzalez called and said "GPA did not end up getting the business after all, despite what he had said earlier." The McPeters declaration states, in relevant part:

Because of the business disparagement and interference by Gloria Hicks and Corpus Christi Medical Center with GPA's prospective relations with the Corpus Christi Independent School District, GPA suffered direct pecuniary loss by losing the fees to service the subject contract in the approximate amount of $2,289,528, which includes $603,792 for fees for

claims administration, $129,384 for utilization review, and approximately $30,000 for other servicing fees on a yearly basis.

In their reply to GPA's response, the Hospital Defendants objected to McPeters's declaration as conclusory "because it fails to provide underlying facts to support the conclusion these Defendants disparaged or interfered with GPA's prospective relations and it contains unsupported legal conclusions." Similarly, the Hospital Defendants objected to Huckaby's declaration as containing inadmissible hearsay, i.e., Gonzalez's statements to Huckaby.

Assuming, without deciding, that the declarations are adequate substitutes for an affidavit, *see* TEX. CIV. PRAC. & REM. CODE ANN. § 132.001(a) (West, Westlaw through Ch. 46, 2015 R.S.), we agree that McPeters's declaration is conclusory. In *Lipsky*, the supreme court found "general averments of direct economic losses and lost profits" insufficient to satisfy the minimum requirements of the TCPA. *See In re Lipsky*, 460 S.W.3d at 593. The Court noted that "[o]pinions must be based on demonstrable facts and a reasoned basis." *Id*.

With regard to GPA's hearsay objection to Huckaby's declaration, we note that an objection that a declaration contains hearsay is an objection to the form of the declaration. *Stone v. Midland Multifamily Equity REIT*, 334 S.W.3d 371, 374 (Tex. App.—Dallas 2011, no pet.). A defect in the form of a declaration must be objected to in the trial court and failure to obtain a ruling from the trial court on an objection to the form of a declaration waives the objection. *Id*. Here, although the Hospital Defendants raised their hearsay objection to the trial court, the record does not reflect that the trial court ruled on the objection. Therefore, the Hospital Defendants waived their hearsay objection. *See id*. Nonetheless, even considering the hearsay, we conclude that the Huckaby declaration

provides no evidence of causation. The declaration simply states that, on the afternoon of October 26, Gonzalez said that GPA had won the CCISD business and then later that day, said that it had not. The declaration provides no clear and specific evidence that Hicks's emails caused CCISD to award the contract to another bidder.

Even if we consider GPA's pleadings, we find no evidence establishing that Hicks's emails caused CCISD to award the contract to another bidder. GPA alleged in its amended petition: "Mr. Gonzalez told Mr. McPeters that the Superintendent and some board members received an email that really stirred them up (i.e., the October 26 email), that the email was 'political,' and that due to the email, CCISD decided not to award the contract to GPA." However, as noted above, McPeters's declaration does not expressly state that Hicks's emails caused CCISD to award the contract to another bidder.

We conclude that GPA's supporting evidence does not establish, by clear and specific evidence, a prima facie case on the essential element of causation. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c).

2. Tortious Interference with Prospective Business Relations

To prevail on a claim for tortious interference with prospective business relations, a plaintiff must establish that (1) a reasonable probability existed that the plaintiff would have entered into a business relationship with a third party; (2) the defendant either acted with a conscious desire to prevent the relationship from occurring or knew the interference was certain or substantially certain to occur as a result of the conduct; (3) the defendant's conduct was independently tortious or unlawful; (4) the interference proximately caused the plaintiff injury; and (5) the plaintiff suffered actual damage or loss as a result. *McGregor*, 438 S.W3d at 860 (citing *Coinmach Corp. v. Aspenwood Apartment Corp.*,

417 S.W.3d 909, 923 (Tex. 2013); *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 726 (Tex. 2001)). In GPA's response to the Hospital Defendants' Motion, it asserts, in a section addressing its tortious interference claim, that "[d]efendants' interference caused CCISD to not award the contract to [GPA], as CCISD had intended and informed [GPA] it would." As evidence to support this claim, GPA cites Huckaby's declaration. As we have noted, however, Huckaby's declaration provides no such evidence of causation. We conclude that GPA's supporting evidence does not establish, by clear and specific evidence, a prima facie case on the essential element of causation in its claim for tortious interference with prospective business relations. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c); *McGregor*, 438 S.W.3d at 860-61 ("The fact that Schimmel's alleged conduct occurred roughly contemporaneously with the City of Galveston's and the Department of Public Safety's consideration of whether to move forward with the purchases does not establish that Schimmel's conduct *caused* the governmental agencies to act as they did.) (emphasis in original).

3. Conspiracy and Joint Enterprise and Coercion of a Public Servant

As noted earlier, the sending of Hicks's emails is the only allegedly "unlawful practice" that the Hospital Defendants are accused of "conspiring" to engage in. We have already determined that Hicks met her burden of showing that her statements were made in connection with a matter of public concern so that the TCPA applies to GPA's conspiracy and joint enterprise claim. Because GPA's conspiracy and joint enterprise claims against the Hospital Defendants are based solely on Hicks's emails, and because we have found that GPA failed to establish a prima facie case on the essential element of causation on either of GPA's alleged underlying torts, we conclude that GPA has not

established, by clear and specific evidence, a prima facie case on its claims against the Hospital Defendants for conspiracy and joint enterprise. *See West Fork Advisors, LLC v.*

SunGard Consulting Services, LLC, 437 S.W.3d 917, 920 (Tex. App.—Dallas 2014, pet. filed) ("Conspiracy is a derivative tort because '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.'").

We also have already determined that GPA did not establish coercion of a public servant by clear and specific evidence. Accordingly, GPA's claim of coercion of a public servant against the Hospital Defendants also fails.

We hold that the trial court erred in denying the Hospital Defendants' Motion to dismiss GPA's claims. We sustain the Hospital Defendants' sole issue.

IV. CONCLUSION

In appellate cause number 13-14-607-CV, we affirm that part of the trial court's order denying Hicks's Motion to dismiss GPA's claims of business disparagement and tortious interference with prospective relations against her, and remand those claims to the trial court. We reverse that part of the trial court's order denying Hicks's Motion to dismiss GPA's claims of conspiracy and joint enterprise and coercion of a public servant against her, and render judgment dismissing those claims.

In appellate cause number 13-14-608-CV, we reverse the trial court's order denying the Hospital Defendants' Motion to dismiss GPA's claims against the Hospital Defendants and render judgment dismissing GPA's claims against the Hospital Defendants. We remand both causes for further proceedings consistent with this opinion, including consideration by the trial court of an award of costs and fees relating to the

motions to dismiss under section 27.009 of the TCPA. *See id.* § 27.009 (West, Westlaw through Ch. 46, 2015 R.S.).

DORI C. GARZA
Justice

Delivered and filed the 3rd day of September, 2015.

Footnotes:

[1] In appellate cause number 13-14-607-CV, the appellant is Gloria Hicks. In appellate cause number 13-14-608-CV, the appellants are Bay Area Healthcare Group, Ltd. ("BAHG") and Gulf Coast Division, Inc. ("GCD"). BAHG owns and operates Corpus Christi Medical Center, a hospital system. GCD is an affiliate of HCA, Inc., a Nashville-based owner and operator of hospitals. We refer to BAHG and GCD

collectively as "the Hospital Defendants." Pursuant to GPA's unopposed motion to consolidate the appeals, we have consolidated the appeals.

[2.] The TCPA is also known as the Anti-SLAPP statute. *See In re Estate of Check*, 438 S.W.3d 829, 830 (Tex. App.—San Antonio 2014, no pet.). "SLAPP" is an acronym for "Strategic Lawsuit Against Public Participation." *Id*. at 830 n.1.

[3.] CCMC is the d/b/a for BAHG.

[4.] On Saturday afternoon, October 27, Hicks sent essentially the same email to four CCISD school board members (three of whom had received the Friday email) and to the administrative assistant to the superintendent.

[5.] All of GPA's claims are factually based on Hicks's emails.

[6.] We note that neither declaration includes a jurat as specified in section 132.001(d) of the civil practice and remedies code. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 132.001(d) (West, Westlaw through Ch. 46, 2015 R.S.).

[7.] We note the declaration states Gonzalez called at 5:00 p.m. "on Friday, October 29, 2012." We assume that "29" is a typographical error.

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NEWSPAPER HOLDINGS, INC., IntegraCare of Texas, LLC, and Charlotte Patterson, Appellants
v.
CRAZY HOTEL ASSISTED LIVING, LTD., Crazy Hotel Assisted Living, GP, LLC, Leisure Life Senior Apartment Housing II, Ltd., and Charles V. Miller, Jr., Appellees.

No. 01–12–00581–CV.

Court of Appeals of Texas,
Houston (1st Dist.).

Oct. 24, 2013.
Rehearing En Banc Overruled Dec. 19, 2013.

[416 S.W.3d 75]

James M. McCown, Patrick P. Sicotte, Nesbitt, Vassar & McCown, L.L.P., Addison, TX, Robert Parke Latham, Amanda Z. Patrick, Jackson & Walker L.L.P., Dallas, TX, for Appellants.

David Nathaniel Harvey, Harvey & Associates, P.L.L.C., Houston, TX, W. Barry Montgomery, Kalbaugh, Pfund & Messersmith, Richmond, VA, Matthew J. Kita, Dallas, TX, for Appellees.

Panel consists of Chief Justice RADACK and Justices BLAND and HUDDLE.

OPINION

JANE BLAND, Justice.

This defamation case arises from a series of articles published in the Mineral Wells Index (the Index), a newspaper owned by Newspaper Holdings, Inc. (NHI). The articles reported regulatory compliance problems and official investigations into the Crazy Water Retirement Hotel, a local Mineral Wells assisted living facility, and examined the conduct of Charles Miller, president of the Hotel's corporate owner.[1] Charlotte Patterson, the Chief Compliance Officer of IntegraCare, a home health and hospice agency, was a source for some of the information contained in some of the articles. She contacted the newspaper after she learned that Miller had attempted to bar the Hotel's residents from using IntegraCare for their home health care.

The Hotel and Miller sued Patterson, IntegraCare, and NHI ("the newspaper defendants") for defamation, business disparagement, and tortious interference with contract. The Hotel alleged that NHI, and in some instances, Patterson, who was a managerial employee of IntegraCare, published false and defamatory statements about Miller and the Hotel and interfered with the Hotel's contractual relationships with its residents. Patterson, IntegraCare, and NHI responded to the suit by moving to dismiss it under the newly-enacted Texas Citizens' Participation Act (TCPA). *See*Tex. Civ. Prac. & Rem.Code Ann. §§ 27.001–27.011 (West Supp.2012). The trial court denied the motion.

NHI, IntegraCare, and Patterson appeal, contending that they have met the requirements for dismissal under the TCPA—namely, that they have showed that the allegedly defamatory statements constitute the exercise of protected free speech, and that the Hotel and Miller have failed to make a prima facie case for each of their claims. IntegraCare and Patterson also claim that Miller and the Hotel failed to provide any evidence that the published statements were false or made with negligence or actual malice, or that Miller and the Hotel incurred damages as a result of the challenged publications. For their part, Miller and the Hotel respond that we lack jurisdiction to consider the appeal. We grant rehearing, withdraw

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our earlier opinion, and issue this one in its stead. We vacate our earlier judgment. Our disposition remains unchanged. We hold that we have appellate jurisdiction, and we reverse.

Background

Events leading to suit

From 2010 through 2011, the Index published articles about problems encountered at the Hotel. In an end-of-the-year article reviewing its major stories in 2010, it summarized the articles as follows:

Month after month in 2010 complaints from residents and employees at the Crazy Water Retirement Hotel kept city and state inspectors returning to the building, investigating complaints of unsafe conditions, building disrepair, failure to provide services and verbal abuse of residents.

After going without air conditioning, hot water and gas to cook food and dry clothes for days at a time in August, residents of the Crazy Water Retirement Hotel had significant amounts of water come through the ceilings during the first week of September after a roofing job was left incomplete for several weeks.

As the roof remained unrepaired into September, the Department of Aging and Disability Services pulled the facility's assisted living license and attempted to close that portion of the facility.

However as residents were fed in the lobby of the building because of rainwater coming through the dining room ceiling that weekend, owner Charles Miller was granted a temporary restraining order against the case by a judge in Austin which essentially nullified any [e]ffect of license suspension.

A nurse in the assisted-living portion of the building was also accused of verbal abuse of a resident and was terminated.

State investigators cited a myriad of problems throughout the building and its management.

Though the roofing work was completed in October, the state and the city continued to respond to complaints at the facility through December.

In the first half of 2011, the Index also reported on

• the Hotel's five-month lapse in payment of its water bill, which put it on the verge of having the water turned off;

• Miller's negotiations with the city of Mineral Wells to pay the past due water bill;

• the Hotel's failure to fully meet its negotiated payment obligations to the city in a timely manner;

• Texas Department of Adult and Disabled Services' investigations, which revealed licensing violations stemming from uncorrected problems with the physical plant; and

• the Hotel's hiring of a management company to rehabilitate the Hotel and that company's decision to sever its ties with the Hotel just a few months later due to delays and paperwork problems in connection with the Hotel's state license application.

In early August 2011, Miller authored a letter to the Hotel's residents informing them that the Hotel would no longer allow IntegraCare home health or hospice workers into the building. The letter advised patients that they were limited to choosing between two other service providers: Health Care Partners at Home or Beyond Faith. A resident who was an IntegraCare patient called Patterson to complain about the Hotel's decision. Patterson contacted

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Miller in an attempt to resolve the issue. They quickly reached an impasse, so Patterson called the county district attorney, the Texas Department of Aging and Disability Services, and the Mineral Wells city manager to inform them of the Hotel's actions.

The Index named Patterson as a source for its next article about the Hotel, entitled, "Miller target of fraud probe," which it published on August 31. The Hotel and Miller's original petition focuses on that article, which we reproduce below in its entirety:

District Attorney Mike Burns said Tuesday he will be meeting with investigators from the State Attorney General's office concerning an investigation into the Crazy Water Retirement Hotel and its owner, Charles Miller.

"Their Medicaid Fraud unit is opening a case on it," he said. Burns said his office has been in contact with the AG's office, though he did not provide specific details discussed in their correspondence.

Thomas Kelley with the Texas AG's press office said in an e-mail, "We can only confirm that this is an ongoing investigation."

"I should hear from them and have a meeting with them in a few days," Burns noted, adding the investigation was in its infancy and a decision on what, if any, future action will be taken against Miller will likely not be made anytime soon.

While Burns did not elaborate on the scope of this case, the DA's office has been busy over the past few weeks investigating the legality of demands made by Miller that residents of the Crazy Water choose one of two preferred home health providers.

The first such letter, sent to residents Aug. 5, listed the two remaining choices for home health care, specifically stating the facility would "no longer be allowing IntegraCare Home Health or Hospice in our building."

When IntegraCare's chief corporate compliance officer, Charlotte Patterson, contacted Burns, the threat of a grand jury subpoena from the DA's office reportedly led to Miller's decision to rescind that demand, Patterson noted.

At that time, Patterson said her concern was that Miller would try to achieve the same result by including the home health care restrictions in a future lease agreement, citing a statement in Miller's rescission letter stipulating residents can retain their current provider "under your current lease."

Her fears were realized when, about two weeks later, Miller sent residents a subsequent letter informing those unwilling to choose one of the two preferred providers to "consider this letter to you to be Crazy Water's advance written notice of its intent to terminate your current agreement effective September 30, 2011."

While the letter refers to lease terms allowing either the hotel or its residents to "terminate the agreement, without cause, by giving written notice to the other party 30 days in advance of the effective termination date" Burns confirmed he is currently investigating whether the eviction notice is in violation of any law.

Also included in the eviction notice was a section informing residents that today is the last day the hotel will operate as a licensed assisted-living facility.

In response to the latest development, Patterson said IntegraCare has not been made aware of the details of the case but, as with any investigation, is willing to assist in any way possible.

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"I've been told that they might contact us for information or statements," she said, "but that has not occurred yet."

Patterson said this case involves a number of possible areas of focus for prosecutors, such as "varying issues of patient choice and, I think, the question of elderly abuse."

In the meantime, she said, IntegraCare employees remain dedicated to assisting Crazy Water residents however they can, as evidenced on Aug. 22, when three workers volunteered their time to assist two residents in their move to a facility in Jacksboro.

"On our own, [IntegraCare is] continuing to try to find alternative living arrangements" for residents of the hotel, Patterson noted.

Neither Miller nor Crazy Water manager Juan Guardado returned numerous calls and e-mails requesting a comment.

After Miller learned that the district attorney planned to embark on an investigation, the Hotel reversed its earlier position with respect to visits from IntegraCare. In an August 12, 2011 letter to residents, Miller rescinded the earlier limitation on providers and informed the residents that the Hotel would allow their health care provider of choice, including IntegraCare, into the building.

On August 18, however, the Hotel reverted to its original stance. Miller notified the residents who continued to receive services from IntegraCare that the Hotel intended to terminate their leases effective September 30, after which they would have the option either to sign new leases restricting their choice of home health care providers to one of the two approved providers or to vacate their apartment by October 1. The Index reported these developments in an August 14, 2011 article:

Mineral Wells Police Chief Mike McAllester said he was contacted by an IntegraCare representative questioning whether Miller's action [in restricting home health care providers] was legal. After discussing details, McAllester said the department's position was that a property owner cannot restrict who renters allow in their residences.

He contacted the district attorney, who reportedly agreed and began an investigation into the matter.

On September 9, the Index reported that the district attorney "previously stated he met with investigators from the state Attorney General's office concerning an investigation into Miller and the hotel," and that "their Medicaid fraud unit is opening a case on it." A reporter from the Index contacted the attorney general's office and received confirmation that it had an ongoing investigation into the Hotel, but no further comment. The newspaper contacted Miller for his response, and he gave "no comment."

In January 2012, the Attorney General applied for a temporary restraining order "to gain access to [the Hotel] ... for the purpose of conducting an investigation to determine whether the facility is operating as an unlicensed assisted living facility and to determine whether any resident neglect has occurred in violation of Chapter 247 of the Texas Health and Safety Code." The application alleged that the Texas Department of Aging and Disability Services (DADS) received a complaint in September 2011 that the Hotel was being operated as an unlicensed assisted living facility in violation of state law and, when the DADS sent an investigator to the Hotel, the facility staff denied her entry. An affidavit from the investigator supported these allegations.

Trial court proceedings

The Hotel and Miller instituted this suit in late 2011, bringing claims for defamation,

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business disparagement, and tortious interference against the defendants. Patterson and IntegraCare moved to dismiss the claim in mid-March 2012, and, in a separate motion filed a few days later, NHI also sought dismissal. Both motions invoke the parties' free speech rights under the TCPA as grounds for dismissal.

The trial court held a hearing on April 16th. At that hearing, plaintiffs' counsel moved to withdraw from representation. The trial court acknowledged that, "for purposes of the statute[,] ... the hearing has already started," but it granted a continuance to allow the Hotel and Miller time to obtain new counsel. The trial court resumed the hearing on May 29th, more than 30 days later, and signed an order denying the newspaper defendants' motions to dismiss on May 30th.

Discussion

I. Appellate Jurisdiction

As a threshold matter, we address Miller and the Hotel's motion to dismiss this appeal for lack of jurisdiction. Section 27.008 of the Civil Practice in Remedies Code, entitled "Appeal," provides:

(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) An appeal or other writ under this section must be filed on or before the 60th day after the date the trial court's order is signed or the time prescribed by Section 27.005 expires, as applicable.

Tex. Civ. Prac. & Rem.Code Ann. § 27.008.

The TCPA sets strict deadlines for filing, hearing, and ruling on a motion to dismiss. Absent a showing of good cause, the defendant must move to dismiss pursuant to the TCPA "not later than the 60th day after the date of service of the legal action." Tex. Civ. Prac. & Rem.Code Ann. § 27.003(b). A hearing on the motion must occur by the 30th day after the date the defendant serves the motion, and the trial court must rule on the motion by the 30th day after the hearing. *Id.*§§ 27.004, 27.005(a).

Miller and the Hotel rely on the Fort Worth Court of Appeals's recent decision in *Jennings v. Wallbuilders Presentations, Inc.* to contend that the TCPA does not authorize an interlocutory appeal of a trial court's signed order denying a motion to dismiss under the TCPA. 378 S.W.3d 519 (Tex.App.-Fort Worth 2012, no pet.). The *Jennings* court held that the language in the TCPA conferred jurisdiction to review a decision under the TCPA, but only if the motion is denied by operation of law, and not if the trial court signs an order denying the motion. *Id.* at 526–28. The Fort Worth Court of Appeals reasoned that the legislature intended to ensure that a court would review and rule on the motion, but not that its ruling would be subject to appellate review. *See id.* at 527.

We need not decide whether we agree with the Fort Worth Court of Appeals' interpretation of section 27.008, because the trial court in this case signed its order denying the motion too late—the defendants' motions to dismiss were overruled by operation of law. The statute allows a trial court to hear a motion more than thirty days after the filing date of the motion to dismiss, but only when its docket

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conditions require it. *See*Tex. Civ. Prac. & Rem.Code Ann. § 27.004 (declaring that "[a] hearing on a motion [to dismiss] must be set not later than the 30th day after the date of service of the motion unless the docket conditions of the court require a later hearing."). In this case, the trial court continued the hearing solely at Miller and the Hotel's request, but it made no finding that the docket conditions of the court required a hearing outside the thirty days. Because the statute does not authorize a continuance of the hearing based solely on a party's request, the continuance did not stop the statutory-deadline clock; thus,

the motions were denied by operation of law on May 16, 2012, thirty days after the initial hearing. *See*Tex. Civ. Prac. & Rem.Code Ann. §§ 27.005 (ruling required "not later than the 30th day following the date of the hearing on the motion"); 27.008(a), (c) (providing that if court does not rule on motion to dismiss under TCPA by 30th day after hearing, motion "is considered to have been denied by operation of law and the moving party may appeal" "on or before the 60th day after the date ... the time prescribed by Section 27.005 expires"). Patterson, IntegraCare, and NHI timely filed their notices of appeal on June 19th. Because the trial court issued its ruling more than thirty days after hearing the motion, we hold that we have jurisdiction over this appeal.

II. Standard of review

We consider the TCPA's language and purpose in determining the applicable standard of review. In enacting the TCPA, the Legislature explained that its purpose "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 courts are to "construe it liberally to effectuate its purpose and intent fully." *Id.*§ 27.011(b).

In deciding whether to grant a motion under the TCPA and dismiss the lawsuit, the statute instructs a trial court to "consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based." *Id.* § 27.006. The court must determine: (1) whether the moving defendant has shown "by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of the right of free speech, the right to petition, or the right of association"; and (2) whether the plaintiff has shown "by clear and specific evidence a prima facie case for each essential element of the claim in question." *Id.*§ 27.005(b), (c). The first step of this inquiry is a legal question we review de novo. *See* *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625 (Tex.2008).

The legislature's use of the term "prima facie case" in the second step implies a minimal factual burden: "[a] prima facie case represents the minimum quantity of evidence necessary to support a rational inference that the allegation of fact is true." *Rodriguez v. Printone Color Corp.*, 982 S.W.2d 69, 72 (Tex.App.-Houston [1st Dist.] 1998, pet. denied). The statute nonetheless requires that the proof offered address and support each element of every claim asserted with clear and specific evidence. *See*Tex. Civ. Prac. & Rem.Code Ann. § 27.005(b), (c). Accordingly, we examine the pleadings and the evidence to determine whether Miller and the Hotel marshaled "clear and specific" evidence to support each alleged element of their causes of action. We review the pleadings and evidence in a light favorable

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to Miller and the Hotel. *Cf. Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227 (Tex.2004); *Fort Bend Indep. Sch. Dist. v. Gayle*, 371 S.W.3d 391, 394 (Tex.App.-Houston [1st Dist.] 2012, pet. denied).

III. Right to dismissal under the TCPA

Patterson, IntegraCare, and NHI contend that they showed both that Miller and the Hotel's claims against them are in response to the exercise of their right to free speech, by a preponderance of the evidence, and that Miller and the Hotel failed to present clear and specific evidence to support each element of their claims to establish their prima facie case. We address each contention in turn.

A. Exercise of the right to free speech, petition, and association

The TCPA defines "the exercise of the right of free speech" as "a communication made in connection with a matter of public concern." *Id.*§ 27.001(1). A "matter of public concern" includes, among other things, issues relating to "health or safety," and "environmental, economic, or community well-being." *Id.*§ 27.001(7)(A), (B). The business of operating an assisted living facility is a highly regulated one. *See*Tex. Health & Safety Code Ann. §§ 247.001–247.069 (West 2010 & Supp.2012) (the Assisted Living Facility Licensing Act (AFLA)); 40 Tex. Admin. Code §§ 46.1–46.71 (chapter entitled "Contracting to Provide Assisted Living and Residential Care Services"). To "ensure that assisted living facilities in this state deliver the highest possible quality of care," the legislature specifically has provided for both state and municipal enforcement of licensing requirements. *See*Tex. Health & Safety Code Ann. §§ 247.0011, 247.031 (West 2010). The Index's articles relate directly to Miller and the Hotel's obligations to fulfill the licensing requirements and standards set forth in these laws and regulations. AFLA not only permits, but encourages an open airing of information relating to an assisted living facility's quality of care. *See*Tex. Health & Safety Code Ann. § 247.068 (West Supp.2012) (making it unlawful for a person licensed to operate an assisted living facility to retaliate "against a person for filing a complaint, presenting a grievance, or providing in good faith information relating to personal care services provided by the license holder").

In considering the statements attributed to Patterson and IntegraCare, we observe that the statute reflects the specific public concern of ensuring that assisted living facility residents retain the right to choose their own health care professionals. *See*Tex. Health & Safety Code Ann. § 247.067(c) (West Supp.2012) (providing that "[a] resident of an assisted living facility has the right to contract with a [licensed] home and community support services agency ... or with an independent health professional for health care services"); *see also id.*§ 247.0011(1) (including as components of quality care "resident independence and self-determination"). We hold that, as defined by the legislature, a preponderance of the evidence establishes that each of the articles at issue in this suit involve communications made in connection with a matter of public concern and relate to the exercise of free speech. Accordingly, Patterson, IntegraCare, and NHI have met the

first requirement for obtaining dismissal under the TCPA. We next turn to whether the Hotel and Miller have adduced sufficient evidence to establish a prima facie case for each of their claims.

B. Plaintiffs' prima facie case

1. Defamation

To maintain a defamation cause of action, the plaintiff must prove that the

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defendant (1) published a statement; (2) that was defamatory concerning the plaintiff; (3) while acting with either actual malice, if the plaintiff was a public official or public figure, or with negligence, if the plaintiff was a private individual, regarding the truth of the statement. *WFAA–TV, Inc. v. McLemore,* 978 S.W.2d 568, 571 (Tex.1998).

"Whether words are capable of the defamatory meaning the plaintiff attributes to them is a question of law for the court." *Carr v. Brasher,* 776 S.W.2d 567, 569 (Tex.1989). Questions of law are subject to de novo review. *In re Humphreys,* 880 S.W.2d 402, 404 (Tex.1994). Whether a publication is an actionable statement of fact depends on its verifiability and the context in which it was made. *See Bentley v. Bunton,* 94 S.W.3d 561, 581 (Tex.2002).

a. NHI

As the owner of a newspaper, NHI claims that Miller and the Hotel failed to overcome NHI's evidence that the alleged defamatory statements either are substantially true or that it exercised due care in making them, thereby requiring dismissal of the claims against it.

Before addressing NHI's appellate challenge that its showing that the reported statements are substantially true entitles it to dismissal, we consider Miller and the Hotel's contention that the version of the TCPA in effect when NHI moved to dismiss their petition does not permit dismissal based on that defense. On rehearing, Miller and the Hotel point to the Legislature's recent passage of subsection 27.005(d), which provides:

Notwithstanding the provisions of Subsection (c), the court shall dismiss a legal action against the moving party if the moving party establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim.

Act of June 14, 2013, 83d Leg. R.S., ch. 1042, § 2, 2013 Tex. Sess. Law Serv. (codified at Tex. Civ. Prac. & Rem.Code Ann. § 27.005). According to Miller and the Hotel, the subsequent addition of subsection 27.005(d) shows that the pre-amendment Act's silence on this issue means that movants cannot base a dismissal motion upon a showing of

substantial truth. We disagree. Section 27.011 of the TCPA explains that "[t]his chapter does not abrogate or lessen any other defense ... available under other constitutional, statutory, case, or common law or rule provisions," and declares that "[t]his chapter shall be construed liberally to effectuate its purpose and intent fully." *Id.*§ 27.011. The TCPA's declared purpose "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 (West Supp.2012). An interpretation of the TCPA that would prohibit a movant from procuring dismissal based on a showing of truth would thwart the Legislature's declared purpose for enacting the TCPA and render section 27.011 a nullity. Tex. Gov't Code Ann. § 311.023 (West 2013) (providing that, in interpreting statute, court may consider object sought to be attained by statute and consequences of particular statutory construction). The Legislature could not have intended such a result. *See In re Derzapf,* 219 S.W.3d 327, 332 (Tex.2007). We reject Miller and the Hotel's urged interpretation and hold that the pre-amendment TCPA allows a movant to procure dismissal based on a successful showing of substantial truth.

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Our grant of rehearing also permits us to revisit our analysis of the merits of NHI's substantial truth defense in light of the Supreme Court's intervening decision in *Neely v. Wilson,* No. 11–00228, 418 S.W.3d 52, 2013 WL 3240040 (Tex. June 28, 2013). In *Neely,* the Supreme Court clarified its prior opinion in *McIlvain v. Jacobs,* 794 S.W.2d 14 (Tex.1990), explaining that accurate reporting of third-party allegations, standing alone, is not enough to satisfy the substantial truth defense; rather, if a media defendant "reports that allegations were made and an investigation proves those allegations to be true, the defamation claim is brought within the scope of the substantial truth defense." *Id.* at *8. The Court expressly disapproved of the analysis of *McIlvain*'s holding on that issue in *Green v. CBS, Inc.,* 286 F.3d 281 (5th Cir.2002), and *KTRK Television v. Felder,* 950 S.W.2d 100 (Tex.App.-Houston [14th Dist.] 1997, no writ), both of which we relied on in analyzing NHI's challenge to Miller and the Hotel's claims. The United States Supreme Court has held that, in a suit against a media defendant, the plaintiff bears the burden of proving that the alleged defamatory statements are false. *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 776–77, 106 S.Ct. 1558 1564, 89 L.Ed.2d 783 (1986) (holding that common-law presumption that defamatory speech is false cannot stand when plaintiff sues media defendant for speech of public concern), *cited in Miranda v. Byles,* 390 S.W.3d 543, 554 (Tex.App.-Houston [1st Dist.] 2012, pet. filed). Our own court's precedent on this issue does not clearly identify which party properly bears the burden, nor has the Texas Supreme Court definitively addressed that issue. *See Miranda,* 390 S.W.3d at 554. We need not decide it in this case, however, because, in moving for dismissal, the defendants either presented proof of substantial truth or due diligence in their reporting or contended that the speech itself is incapable of defamatory meaning.

We consider whether the record as a whole allows a rational inference that any of the Index's factual allegations was false. In the context of a defamation claim, a showing of falsity requires more than minor inaccuracies in the alleged defamatory statements. *See Turner v. KTRK Tel., Inc.*, 38 S.W.3d 103, 115 (Tex.2000) (noting that substantial truth doctrine "precludes liability for a publication that correctly conveys a story's 'gist' or 'sting' although erring in the details"). A statement is substantially true if the alleged defamatory statement was no more damaging to plaintiff's reputation, in the mind of the average listener, than a truthful statement would have been. *McIlvain v. Jacobs*, 794 S.W.2d 14, 16 (Tex.1990); *Langston v. Eagle Printing Co.*, 797 S.W.2d 66, 69–70 (Tex.App.-Waco 1990, no writ) (concluding that statement is substantially true even if it exaggerates plaintiff's misconduct, as long as average reader would not attach any more opprobrium to plaintiff's conduct merely because of exaggeration).

Miller and the Hotel base their defamation claims against NHI on several statements made in the Index's reports, each of which we address in turn. They first challenge the report that "The Texas Department of Aging and Disability Services [DADS] determined in a September 2010 investigation that [a nurse working at the Hotel] verbally abused, threatened, and intimidated a resident." This statement refers to an alleged incident in which a licensed vocational nurse (LVN) reacted to a patient's resistance to taking medication. Miller and the Hotel deny that the event took place, but do not contest that the DADS's investigation proved the contrary. The Index's report refers to "documents

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released by DADS" that the Hotel did not look into the resident's allegations before the state's investigation of the incident as well as other documentation, including the DADS's own investigative report and determination. Miller and the Hotel do not dispute the existence or authenticity of the documentation that the Index relied on in writing its article or the report that a Hotel attendant corroborated the resident's version of the event. The Index could accurately characterize the conduct found by the report as "elder abuse." As no evidence exists to counter the Index's showing that its report of the administrative determination is substantially true, it does not provide a basis for Miller and the Hotel's defamation claim.

Miller and the Hotel point next to the Index article entitled "Miller target of fraud probe," because, they contend, it falsely indicates that the Attorney General's office had opened an investigation into the Hotel owner's activities for possible Medicaid fraud. The article at issue focuses on the letters that the Hotel, under Miller's signature, sent to its residents informing them that IntegraCare would not be permitted to enter its facility and purporting to require the residents to select as their home health care provider one of two named providers. The article attributes to Mike Burns, the Palo Pinto County District Attorney, statements that "th[e State Attorney General's] Medicaid fraud unit is opening a case on it," and that the district attorney's office had met with the Attorney General's office. In an affidavit accompanying NHI's motion to dismiss, Chris Agee, the Index's

reporter who wrote the article, testified that Burns had informed him that his office had been investigating the legality of Miller and the Hotel's demands that the Hotel residents choose between only two health care providers as well as the propriety of the August 18, 2011 letter. Agee contacted the Attorney General's office to verify Burns's comments. The Attorney General's office confirmed that it had an ongoing investigation but would not provide further details.

With respect to the Index's August 31 article that Miller was the target of a fraud probe, the record contains evidence that the Hotel's state license to operate as an assisted living facility had lapsed and had not been renewed as of the date the Index published the article. Texas statute recognizes an assisted-living facility resident's right to contract with a licensed home and community support service agency to deliver health care services to the residents at the facility, a right echoed in the licensing standards for those facilities. *See*Tex. Health & Safety Code Ann. § 247.067(c); 40 Tex. Admin. Code 92.5(b). By requiring the residents to choose between two named providers and by prohibiting them from choosing IntegraCare as their provider, the Hotel imposed a restriction on the residents' choices in violation of applicable licensing requirements. The article specified that the district attorney's office was investigating the legality of the Hotel's attempt to restrict the residents to choose between two home health care providers. The article also explained that the investigation was "in its infancy" and ongoing, and reported that the Attorney General did not identify the investigation's subject matter, only that it was "an ongoing investigation." The fact that the article mentions Medicaid does not, on balance, tip it from being substantially true to being false and defamatory. *See Turner,* 38 S.W.3d at 115 (explaining that error in details does not render media defendant liable for defamation as long as article is substantially true).

Miller and the Hotel also point to the statement, in an August 23rd article, that the Hotel had served "eviction notices"

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on its residents. The article describes a Hotel letter as amounting to an eviction notice "for any resident unwilling to change his or her home health care provider" from IntegraCare to one of the two preferred home health providers. The article quotes the letter, verbatim, as directing residents who failed to change from IntegraCare that they should: "consider this letter to you to be Crazy Water's advance written notice of its intent to terminate your current agreement effective September 30, 2011." While Miller and the Hotel object to the use of the term "eviction notice" to describe the letter's effect on residents who preferred to remain patients of IntegraCare, the characterization reasonably describes one possible view of the letter's content.

Finally, Miller and the Hotel allege, as defamatory, the Index's use of descriptive words in reporting about the living conditions at the Hotel, such as stating that the Hotel had a "myriad" of problems and describing water leaks as causing water to "cascade" into

the building. In an affidavit submitted with the NHI's motion to dismiss, Index Editor David May testified that

The Index has received, and, on occasion, reported on numerous complaints by others about the hotel ... ranging from health and sanitary issues to fire code and structural violations. Many of these complaints resulted in investigations by City and State officials. At various times over the past few years, the City of Mineral Wells or the [DADS] threatened to shut down the Hotel because of structural or safety deficiencies.

Miller and the Hotel do not dispute May's testimony. The Index's immoderate—in the Hotel's view—word choice does not present a prima facie case that the descriptions, viewed in context, are less than substantially true. *See Langston,* 797 S.W.2d at 69 (exaggeration alone does not render substantially true publication actionable).

NHI also moved to dismiss on the ground that Miller and the Hotel failed to show that NHI acted negligently. Private plaintiffs must prove that the defendant was at least negligent. *See* *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809, 819 (Tex.1976) (holding that "a private individual may recover damages from a publisher or broadcaster of a defamatory falsehood as compensation for actual injury upon a showing that the publisher or broadcaster knew or should have known that the defamatory statement was false"); *see also Gertz,* 418 U.S. at 347, 94 S.Ct. 2997, 41 L.Ed.2d 789 (holding that states may define for themselves the appropriate standard of liability for a publisher of a defamatory falsehood injurious to a private individual "so long as they do not impose liability without fault"). Texas courts have defined negligence in the defamation context as the "failure to investigate the truth or falsity of a statement before publication, and [the] failure to act as a reasonably prudent [person]." *Marathon Oil Co. v. Salazar*, 682 S.W.2d 624, 631 (Tex.App.-Houston [1st Dist.] 1984, writ ref'd n.r.e.) (citing *El Paso Times, Inc. v. Trexler*, 447 S.W.2d 403, 406 (Tex.1969)).

In his affidavit submitted with NHI's motion, reporter Agee testified about the August 31 article:

The Article summarizes the information I received from the state attorney general's office and from the local district attorney. It also summarizes the quotes and information I received from Charlotte Patterson at Integra. I had no reason to doubt the credibility of those sources. Based on the consistency of their statements, the consistency of the written documents shown to me, I had

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no reason to doubt the credibility or accuracy of those sources or the information conveyed by them. Based on this information and these sources, I believed at the time the Article was published that the statements therein were substantially true, if not literally true....

The article also recites that "[n]either Miller nor [the Hotel] manager Juan Guardado returned numerous calls and e-mails requesting comment." Miller and the Hotel did not provide any evidence controverting these efforts or suggesting that Agee should have more fully investigated some aspect of the report to satisfy due diligence before reporting. Because Miller and the Hotel did not respond to the Index's showing by adducing clear and specific evidence that the challenged statements made in the articles were false or negligently reported, they have not made a prima facie case to support Miller and the Hotel's defamation claim against NHI.

b. Patterson and IntegraCare

Patterson and IntegraCare contend that they should prevail on their motion to dismiss as well, because Miller and the Hotel have failed to provide evidence to show that Patterson acted negligently or intentionally in making any alleged defamatory statements. "Fault is a constitutional prerequisite for defamation liability." *McLemore,* 978 S.W.2d at 571 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347, 94 S.Ct. 2997, 3010–11, 41 L.Ed.2d 789 (1974)). "Private plaintiffs must prove that the defendant was at least negligent." *Id.* Miller and the Hotel's defamation claims against Patterson and IntegraCare stand on two statements quoted in the Index: (1) Patterson's statement that "[t]his case involves a number of possible areas of focus for prosecutors, such as "varying issues of patient choice and, I think, the question of elderly abuse," and (2) her statement that Miller told IntegraCare that it was denying it access to the Hotel because IntegraCare was not "sending referrals."

We first examine whether either of these statements was defamatory. "[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 [the] publication and not merely on individual statements." *Bentley,* 94 S.W.3d at 579. To determine whether language is capable of having a defamatory meaning, a court should construe the statement as a whole, in light of the surrounding circumstances, and based upon a reasonable person's perception of it. *Vice v. Kasprzak,* 318 S.W.3d 1, 17 (Tex.App.-Houston [1st Dist.] 2009, pet. denied).

With respect to the first statement, "elderly abuse" was a strong choice of words, but Patterson softened her meaning by indicating that some doubted the applicability of the term, noting it only as a "possible area of focus." Her statement, viewed in context, refers to Miller and the Hotel's conduct in forcing the residents to choose between accepting one of two preferred providers or leaving the facility—and the official investigation into whether that conduct amounted to unlawful interference in the residents' choice of health care providers. The record shows that Patterson had personal knowledge that state and local officials had opened investigations into the matter. Miller and the Hotel acknowledge that ongoing investigations existed; they take issue with the descriptions of the investigation's scope. But an objectively reasonable person could

conclude, in context, that the statement had a basis in fact, and thus we hold that the record lacks a prima facie showing that

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Patterson failed to exercise due care in making it.

We examine the second statement to determine whether it is reasonably capable of a defamatory meaning. In *Musser v. Smith Protective Services*, the Texas Supreme Court held that a former employer's letter in which it sarcastically accused the plaintiff of taking accounts with him when he left the business was not reasonably capable of a defamatory meaning. 723 S.W.2d 653, 655 (Tex.1987). The Court reasoned that the statement "call[ed] plaintiff a strong and successful competitor," and that it did not accuse the plaintiff of committing a crime or violating a law or contract. *Id.*

Miller and the Hotel do not offer an alternative reason for the end of the parties' business relationship with IntegraCare. In the articles, neither the Index nor Patterson suggested that the Hotel's problem lay in its motive for excluding IntegraCare as a provider; rather, their thrust was that, regardless of the reason for it, the Hotel's decision to exclude IntegraCare thwarted the patients' right to choose their own health care provider. We hold that a statement speculating about the Hotel's motive for its decision is not defamatory as a matter of law. *See id.* We hold that Miller and the Hotel failed to marshal clear and clear and specific evidence to support their defamation claim against IntegraCare.

2. Business disparagement

To prevail on a business disparagement claim, a plaintiff must establish that (1) the defendant published false and disparaging information, (2) with malice, (3) without privilege, (4) that resulted in special damages to the plaintiff. *Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762, 766 (Tex.1987). "A business disparagement claim is similar in many respects to a defamation action." *Forbes Inc. v. Granada Bioscis., Inc.*, 124 S.W.3d 167, 170 (Tex.2003). The two torts differ in the interest protected: a defamation claim protects an injured party's personal reputation, while a business disparagement claim protects economic interests. *Id.* "[A] business disparagement defendant may be held liable 'only if he knew of the falsity or acted with reckless disregard concerning it, or if he acted with ill will or intended to interfere in the economic interest of the plaintiff in an unprivileged fashion.' " *Id.* (quoting *Hurlbut,* 749 S.W.2d at 766).

Miller and the Hotel's business disparagement claims lack merit for the same reasons we reject their defamation claims: the lack of any evidence that the alleged defamatory statements made by the Index were false, and, with respect to Patterson, that she acted with malice—a higher burden than the negligent conduct that Miller and the Hotel failed to show for their defamation claim against her.

3. Tortious interference

To establish a cause of action for tortious interference, a plaintiff must prove that (1) a contract subject to interference exists, (2) the defendant committed a willful and intentional act of interference with the contract, (3) the act proximately caused injury, and (4) the plaintiff sustained actual damages or loss. *ACS Invs., Inc. v. McLaughlin*, 943 S.W.2d 426, 430 (Tex.1997). "Ordinarily, merely inducing a contract obligor to do what it has a right to do is not actionable interference." *Id.*

The Hotel offered its residents a contractual option of whether to remain at the Hotel and change to one of its two preferred health care providers or leave the Hotel to continue to receive health care services from IntegraCare. Nothing in the record suggests that NHI, Patterson,

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or IntegraCare influenced the Hotel residents to do anything other than exercise that option. Miller and the Hotel therefore fail to sustain their burden to make a prima facie case of interference with a contractual obligation.

IV. Applicability of Statutory Exclusion for Commercial Speech

Finally, the Hotel contends that IntegraCare and NHI are for-profit corporations primarily engaged in the business of selling or leasing goods or services and that the challenged statements arise out of their provision of commercial services, thereby triggering the TCPA exclusion for commercial speech. TCPA section 27.010(b) provides that "[t]his chapter does not apply to 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 or a commercial transaction in which the intended audience is an actual or potential buyer or customer." Tex. Civ. Prac. & Rem.Code Ann. § 27.010(b). The Hotel observes that (1) the statements involved the Hotel's business relationship with IntegraCare, and (2) the Hotel's residents were both IntegraCare customers and newspaper subscribers.

In *Simpson Strong–Tie Co., Inc. v. Gore*, 49 Cal.4th 12, 109 Cal.Rptr.3d 329, 230 P.3d 1117 (Cal.2010), the Supreme Court of California considered "the scope and operation of the exemption for commercial speech" set forth in the exemption to its own anti-SLAPP statute, which is similar to the Texas statute's exemption. *See id.*, 109 Cal.Rptr.3d 329, 230 P.3d at 1123 (quoting Cal.Code Civ. Proc. § 425.17(c)).[2] It devised a four-prong analysis for determining whether the exemption applies. Courts should examine whether:

(1) the cause of action is against a person primarily engaged in the business of selling or leasing goods or services;

(2) the cause of action arises from a statement or conduct by that person consisting of representations of fact about that person's or a business competitor's business operations, goods, or services;

(3) the statement or conduct was made either for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services or in the course of delivering the person's goods or services; and

(4) the intended audience for the statement or conduct [is an actual or potential buyer or customer].

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Id., 109 Cal.Rptr.3d 329, 230 P.3d at 1129.[3]

The *Simpson* court first noted, as a matter of statutory construction, that the burden of proving the applicability of an exemption from the provisions of an anti-SLAPP statute falls on the party asserting it. *See id.,* 109 Cal.Rptr.3d 329, 230 P.3d at 1124 ("One claiming an exemption from a general statute has the burden of proving that he comes within the exemption.") (citations omitted); *see generally McIntyre v. Ramirez,* 109 S.W.3d 741, 745 (Tex.2003) (holding that doctor had burden of proof to show he was exempted from general applicability of emergency care statute). We follow the California Supreme Court's analysis in *Simpson* and conclude that the burden rested with the Hotel to show that the statute does not apply to its suit against NHI and IntegraCare. *See Simpson,* 109 Cal.Rptr.3d 329, 230 P.3d at 1126 ("The burden of proof as to the applicability of the commercial speech exemption, therefore, falls on the party seeking the benefit of it—i.e., the plaintiff.").

The Hotel did not meet its burden to establish that the statements at issue were commercial speech unprotected by the TCPA. With respect to the newspaper, it is undisputed that NHI was in the business of reporting community events, but the Hotel's complained-of statements do not arise out of the lease or sale of the goods or services that NHI sells—newspapers. To read news content to constitute statements "arising out of the sale or lease" of newspapers would swallow the protections the statute intended to afford; such a construction does not match the statute's dual purpose of safeguarding the right to speak, to associate, and to petition the government, while protecting the right of an aggrieved person to file a meritorious defamation suit. *See*Tex. Civ. Prac. & Rem.Code Ann. § 27.002.

As for IntegraCare, its employees had a statutory duty to report problems with respect to care of the elderly to certain state authorities, and it proffered Patterson's affidavit that her statements involved matters of public health and safety. *See e.g.,*Tex. Hum. Res.Code Ann.. § 48.051(a) (West 2013) (requiring that "a person having cause to believe that an elderly ... person is in the state of abuse, neglect, or exploitation ... shall" report same to Department of Protective and Regulatory Services); Tex. Health and

Safety Code Ann. § 260A.002(a) (West Supp.2012) ("A person, including an owner or employee of a facility, who has cause to believe that the physical or mental health or welfare of a resident has been or may be adversely affected by abuse, neglect, or exploitation caused by another person shall report the abuse, neglect, or exploitation in accordance with this chapter."). Patterson complained about the Hotel's actions to the local district attorney, the Department of Aging and Disability Services, the Mineral Wells City Manager, and the Texas Attorney General Consumer Protection Division. Patterson was also a source for the newspaper coverage.

The Hotel counters that its business dispute with IntegraCare was the reason Patterson complained, not any public safety concern. The motive for making the statements aside, however, Patterson made none in connection with "the sale or lease of goods, services, or an insurance product or a commercial transaction," nor was her "intended audience an actual or potential buyer or customer." Although the Hotel's residents may have learned about Patterson's statements and complaints through reading the newspaper, she did not direct

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the complained-of comments to them to secure the sale of goods or services. The newspaper concluded that the matters involved in Patterson's statements were newsworthy to the general public, and thus reported them aside from IntegraCare's commercial interests. The Hotel did not adduce evidence that the statements were otherwise made in a commercial context. We hold that the Hotel failed to establish that its suit against IntegraCare involved statements, directed to customers, arising out of a commercial transaction, rather than statements, directed to state officials and the general public, concerning a matter of public health and safety.

Conclusion

We hold that NHI, Patterson, and IntegraCare satisfied their burden under the TCPA to show that Miller and the Hotel's claims against them are based on statements that they made in the exercise of rights to free speech and to petition the government. *See*Tex. Civ. Prac. & Rem.Code Ann. § 27.005(b). We further hold that Miller and the Hotel have failed to sustain their burden to show a prima facie case for each essential element of their claims, or that their lawsuit falls within the commercial speech exemption to the statute. *See id.* §§ 27.005(c), 27.010(b). We therefore reverse the trial court's denial of the defendants' motions to dismiss, and we remand the case to the trial court for further proceedings as required by the statute and to order dismissal of the suit. *See id.* § 27.009(a).

Notes:

[1.] Appellees Crazy Hotel Assisted Living, Ltd., Crazy Hotel Assisted Living, GP, and Leisure Life Senior Apartment Housing II, Ltd. did business as the Crazy Water Retirement Hotel, and we collectively refer to them as the Hotel.

[2.] The California provision declares that:

> Section 425.16 does not apply to any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services, including, but not limited to, insurance, securities, or financial instruments, arising from any statement or conduct by that person if both of the following conditions exist: [¶] (1) The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services, or the statement or conduct was made in the course of delivering the person's goods or services, [and ¶] (2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer....
>
> Cal.Code Civ. Proc. § 425.17(c).

[3.] We have modified the fourth prong of this test to track the Texas statute. *Compare*Tex. Civ. Prac. & Rem.Code Ann. § 27.010(b)*with*Cal.Code Civ. Proc. § 425.17(c).