IN THE SUPREME COURT OF TEXAS

No. 16-0098

THE DALLAS MORNING NEWS, INC. AND STEVE BLOW, PETITIONERS

v.

JOHN TATUM AND MARY ANN TATUM, RESPONDENTS

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

Argued January 10, 2018.

JUSTICE BROWN delivered the unanimous opinion of the Court with respect to Parts I, II, III.B, and IV, the opinion of the Court with respect to Part III.A, in which CHIEF JUSTICE HECHT, JUSTICE GREEN, JUSTICE GUZMAN, and JUSTICE DEVINE joined, and an opinion with respect to Part III.C, in which CHIEF JUSTICE HECHT and JUSTICE JOHNSON joined.

JUSTICE BOYD filed a concurring opinion, in which JUSTICE LEHRMANN and JUSTICE BLACKLOCK joined.

Words—so innocent and powerless as they are, as standing in a dictionary, how potent for

> *good and evil they become in the hands of one who knows how to combine them.*[1]
>
> —Nathaniel Hawthorne

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

I
Background

A. Facts

Paul Tatum was the son of John and Mary Ann Tatum.[2] At seventeen years old, Paul was a smart, popular, and athletic high-school student. By every indication, he was a talented young man with a bright

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

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

future. One mid-May evening, Paul, driving alone, crashed his parents' vehicle on his way home from a fast-food run. The vehicle's airbag deployed, and the crash was so severe that investigators later discovered Paul's eyelashes and facial tissue at the scene. The crash's cause has never been conclusively established and no evidence suggests that Paul was intoxicated or otherwise under the influence of any substance when the crash occurred.

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

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

and mentally stable young man. For the Tatums, these observations underscored the plausibility of their theory that Paul's car crash generated a brain injury that led to his suicide.

In addition to establishing a scholarship fund in his name, the Tatums sought to memorialize Paul by writing an obituary, which they published by purchasing space in The Dallas Morning News. The obituary stated that Paul died "as a result of injuries sustained in an automobile accident." The Tatums chose this wording to reflect their conviction that Paul's suicide resulted from suicidal ideation arising from a brain injury rather than from any undiagnosed mental illness. The Dallas Morning News published the obituary on May 21, 2010. More than 1,000 people attended Paul's funeral.

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

The column characterized suicide as the "one form of death still considered worthy of deception." While it did not refer to the Tatums by name, it quoted from

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

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

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

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

B. Procedural history

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

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

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

defamatory because it tends to injure the Tatums' reputations and to expose them to public hatred, contempt, or ridicule." *Id.*

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

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

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

substantially true; and the court of appeals did not properly analyze actual malice.

II
Law

A. Defamation

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

Texas recognizes the common-law rule that defamation is either per se or per quod. *See Lipsky*, 460 S.W.3d at 596. Defamation per se occurs when a statement is so obviously detrimental to one's good name that a jury may presume general damages, such as for loss of reputation or for mental anguish. *Hancock v. Variyam*, 400 S.W.3d 59, 63–64 (Tex. 2013). Statements that injure a person in her office, profession, or

occupation are typically classified as defamatory per se. *Id.* at 64. Defamation per quod is simply defamation that is not actionable per se. *Lipsky*, 460 S.W.3d at 596.

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

Both the U.S. Constitution and the Texas Constitution "robustly protect freedom of speech," *Rosenthal*, 529 S.W.3d at 431, and the Texas Constitution expressly acknowledges a cause of action for defamation. *See* Tex. Const. art. I, § 8 ("Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege. . . ."); *see also Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989). These documents also impose substantive limits on defamation law. *See Cain v. Hearst Corp.*, 878

S.W.2d 577, 584 (Tex. 1994) ("[T]he Texas Constitution [has] independent vitality from the federal constitution, and [it] impose[s] even higher standards on court orders which restrict the right of free speech."). Among these limits, to avoid the threat to free speech that unrestrained defamation liability poses, the U.S. Constitution "imposes a special responsibility on judges whenever it is claimed that a particular communication is [defamatory]." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 505 (1984). For appellate judges, one of these responsibilities is to comply with the "requirement of independent appellate review" as a matter of "federal constitutional law." *Bose*, 466 U.S. at 510; *see also Doubleday & Co., v. Rogers*, 674 S.W.2d 751, 755 (Tex. 1984) ("[T]he first amendment requires the appellate court to independently review the evidence.")

B. Standard of review

We review a denial of summary judgment de novo. *See Neely*, 418 S.W.3d at 59. In the interest of efficiency, "we consider all grounds presented to the trial court and preserved on appeal." *Id.* "When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor." *Rincones*, 520 S.W.3d at 579 (citing *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005)). A trial court properly grants a defendant's traditional motion for summary judgment "if the defendant disproves at least one element of each of the

plaintiff's claims or establishes all elements of an affirmative defense to each claim." *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997) (internal citation omitted). Similarly, it is proper for the trial court to grant a defendant's no-evidence motion for summary judgment if the plaintiff has produced no more than a scintilla of evidence on an essential element of the cause of action, that is, if the plaintiff's evidence does not rise "to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600–01 (Tex. 2004) (quoting *Merrell Dow Pharm. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)).

III
Analysis

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

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

defamatory). The second step is to answer whether the meaning—if it is reasonably capable of arising from the text—is reasonably capable of defaming the plaintiff. *See id.*

1. What does the column mean?

a) Law

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

(1) Common law

Texas cases recognize a distinction between a statement that is defamatory by its text alone and a statement that is defamatory only by reason of "extrinsic evidence" and "explanatory circumstances." *Moore v. Waldrop*, 166 S.W.3d 380, 385 (Tex. App.—Waco 2005, no pet.); *see also Gartman v. Hedgpeth*, 157 S.W.2d 139, 141–43 (Tex.1941) (discussing the distinction). The common law employed the term "defamation per se" to refer to the first type of statement—one defamatory by its text alone. *See Defamation Per Se*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining as

defamatory "per se" a "statement that is defamatory in and of itself"). Similarly, at common law, "defamation per quod" referred to a statement whose defamatory meaning required reference to extrinsic facts. *See Defamation Per Quod*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining as defamatory "per quod" a statement whose defamatory meaning is "not apparent but [must be] proved by extrinsic evidence showing its defamatory meaning").

However, this distinction "is not the same as that between defamation which is actionable of itself and that which requires proof of special damage." W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 111, at 782 (5th ed. 1984). Despite the difference, we have also characterized as "defamation per se" statements that are "so obviously hurtful to a plaintiff's reputation that the jury may presume general damages, including for loss of reputation and mental anguish." *Hancock*, 400 S.W.3d at 63–64. In this usage, "[a] statement that injures a person in her office, profession, or occupation is typically classified as defamatory per se." *Id.* at 64. With regard to special damages, "[d]efamation per quod is defamation that is not actionable per se." *Lipsky*, 460 S.W.3d at 596. Unfortunately, "the terms 'defamation per se' and 'defamation per quod' are used indiscriminately in both senses." KEETON ET AL. *supra*, § 111, at 782 n.41.

Thus, for clarity, we introduce the following terms. To begin, "textual defamation" refers to the common-law concept of defamation per se, that is, defamation that arises from the statement's text without reference

to any extrinsic evidence. On the other hand, "extrinsic defamation" refers to the common-law concept of defamation per quod, which is to say, defamation that *does* require reference to extrinsic circumstances. Moreover, as we noted in *In re Lipsky*, "Texas has not abandoned t[he] distinction" between defamation so harmful that the jury may presume general damages and defamation that requires the plaintiff to prove special damages. 460 S.W.3d at 596 n.13. Thus, we ratify the continued usage of (and distinction between) "defamation per se" and "defamation per quod" as used in relation to special damages. *See id.*; *Hancock*, 400 S.W.3d at 63–64. This case concerns, in part, the distinction between textual defamation and extrinsic defamation.

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

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

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

communicates a defamatory statement, we refer to the plaintiff's theory as "defamation by implication."

(2) Defamation by implication

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

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

textual defamation need not. *See Billington*, 226 S.W.2d at 497.

Turner v. KTRK Television, Inc. is our foundational case recognizing defamation by implication *See generally*, 38 S.W.3d 113. There, we held "that a plaintiff can bring a claim for defamation when discrete facts, literally or substantially true, are published in such a way that they create a substantially false and defamatory impression by omitting material facts or juxtaposing facts in a misleading way." *Id.* at 115. In particular, *Turner* focused on the "converse of the substantial truth doctrine." *See id.* (citing *McIlvain v. Jacobs*, 794 S.W.2d 14, 16 (Tex.1990)). The converse of that doctrine, we held, is that a defendant may be liable for a "publication that gets the details right but fails to put them in the proper context and thereby gets the story's 'gist' wrong." *See id.* Although *Turner* used the word "gist," commentators were relatively quick to point out that the decision actually addressed libel by implication.[8]

The issue in *Turner* was whether a plaintiff could bring a "gist" claim based on "the entirety of a publication and not merely on individual statements." *Id.* We

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

answered that question in the affirmative, *see id.*, and we have maintained the same approach in subsequent cases.[9] Indeed, just last term we held that "[i]n making the initial determination of whether a publication is capable of a defamatory meaning, we examine its 'gist.' That is, we construe the publication 'as a whole. . . .'" *Rosenthal*, 529 S.W.3d at 434 (citations omitted). Thus, *Turner* and its progeny recognize that a plaintiff can rely on an entire publication to prove that a defendant has implicitly communicated a defamatory statement.

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

> published under the heading "CRIME" and [was] accompanied by Rosenthal's mug shot from a prior unrelated charge. The article state[d] under the aforementioned "Welfare Queen" title that Rosenthal, described as a "University Park mom," ha[d] "figured out how to get food stamps while living in the lap of luxury." It then invite[d] the reader to see

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

> how Rosenthal "pulls it off" despite the assumption that one living in the affluent Park Cities would "never qualify."

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

Thus, we acknowledge that in a textual-defamation case, a plaintiff may allege that meaning arises in one of three ways. First, meaning may arise explicitly. *See Bentley*, 94 S.W.3d at 569 ("[Y]'all are corrupt, y'all are the criminals, [and] y'all are the ones that oughta be in jail."). Second, meaning may arise implicitly as a result of the article's entire gist. *See Rosenthal*, 529 S.W.3d at 439 ("[E]valuating the article 'as a whole . . . ' [t]he article's gist is that. . . ." (citation omitted)). Third, as in this case, the plaintiff may allege that the defamatory meaning arises implicitly from a distinct portion of the article rather than from the article's as-a-whole gist. As other courts have recognized, the distinction between "as-a-whole" gist and "partial" implication is important. *See, e.g.*, *Sassone v. Elder*, 626 So. 2d 345, 354 (La. 1993) ("[P]laintiffs prove that the alleged implication is the *principal* inference a reasonable reader or viewer will draw. . . ."); *see also*

C. Thomas Dienes & Lee Levine, *Implied Libel, Defamatory Meaning, and State of Mind: The Promise of* New York Times Co. v. Sullivan, 78 IOWA L. REV. 237, 289 (1993) ("The distinction between inferences that may reasonably be drawn from a publication, on the one hand, and the meaning a reasonable reader would ascribe to the publication, on the other, is crucial. . . .").

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

"Implication," on the other hand, refers to the inferential, illative, suggestive, or deductive meanings that may emerge from a publication or broadcast's discrete parts. Implication includes necessary logical entailments as well as meanings that are merely suggested. Thus, in the sentence "John took some of the candy," implication includes both the *logical entailment* that John took at least one piece of the candy as well as the *suggestion* that John did not take every piece of the candy. "Defamation by implication," as a subtype of textual defamation, covers both "gist" and "implication."

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

(3) Construing implications

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

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

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

overly subjective. The reason is that when applying the "would" standard to implications, the court necessarily must prefer what one reader would discern over what another reader would discern. Since not all reasonable readers "would" perceive all implications, "would" does not capture the entirety of the "reasonably capable" standard.

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

To return to the example above, is Mrs. Dalloway speaking to another person? Is it a servant? Was it the servant's job to get the flowers? Has Mrs. Dalloway implied that the servant is doing her job poorly? Does the servant have a cause of action for slander, or even slander per se, against Mrs. Dalloway? From the nine words that comprise the sentence, any lawyer might construct a chain of implications that required

answering each question "yes" and demonstrated that some reader "could" construe the sentence as defamatory. And with only "could" at its disposal, no court would have any choice but to pass the question on to the jury.

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

Instead, when the plaintiff claims defamation by implication, the judicial task is to determine whether the meaning the plaintiff alleges arises from an objectively reasonable reading. *See Isaacks*, 146 S.W.3d at 157 (explaining that "*the* hypothetical reasonable

reader" is the standard by which to judge a publication's meaning (emphasis added)). "The appropriate inquiry is objective, not subjective." *Id.* The objectively reasonable reader has made little appearance in our cases discussing gist. The reason, as discussed above, is that publications usually have a single gist that no reasonable reader could fail to notice. Thus, in gist cases, the "would" standard renders the objectively reasonable reader redundant.

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

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

(4) Meaning's limits

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

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

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

Our point in reciting these black-letter applications of our defamation law is to emphasize that the analytical framework for considering ambiguities does not evaporate simply because the plaintiff alleges an implicit meaning. Put differently, a plaintiff who

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

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

exert too great a "chilling effect" on First Amendment activities.

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

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

One option would be to leave the issue for a jury to decide. However, "[p]roviding triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently to narrow the category, nor served to eliminate the danger that decisions by triers

of fact may inhibit the expression of protected ideas." *Id.* at 505; *see also Ollman v. Evans*, 750 F.2d 970, 997 (D.C. Cir. 1984) (Bork, J., concurring) ("The only solution to the problem libel actions pose would appear to be close judicial scrutiny to ensure that cases about types of speech and writing essential to a vigorous first amendment do not reach the jury."). Since the determination whether a publication is "reasonably capable" of a given meaning involves a textual analysis rather than a credibility determination, displacing the jury does not present any grave danger to due process. Thus, as the U.S. Supreme Court has acknowledged many times, it is consonant with our nation's heritage to recognize a rule requiring judges to answer some of the factual questions that defamation cases present.

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

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

A second category of protection disallows defamation by implication, whether altogether or in certain contexts. Some states have taken this approach. *See Sassone*, 626 So. 2d at 354; *Diesen v. Hessburg*, 455 N.W.2d 446, 451 (Minn. 1990). Our decision in *Turner* holds that a public figure can "bring a claim for

defamation when discrete facts, literally or substantially true, are published in such a way that they create a substantially false and defamatory impression by omitting material facts or juxtaposing facts in a misleading way." *Turner*, 38 S.W.3d at 115. Our cases allow public figures—and by extension, private figures, *see Rosenthal*, 529 S.W.3d at 434—to bring cases alleging defamation by implication. These precedents prevent us from relying on wholesale rejection of defamation by implication to protect the freedoms that the First Amendment enshrines.

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

hope that asking a court to decide from the outset whether a statement is an opinion will limit the number of defamation-by-implication claims that reach a jury.

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

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

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

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

First, the evidence of intent must arise from the publication itself. In considering whether the publication demonstrates such an intent, the court must, as always, "evaluate the publication as a whole rather than focus on individual statements." *Rosenthal*, 529 S.W.3d at 437. Of the myriad considerations that exist

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

Second, in consonance with our precedent and in accord with the judiciary's traditional role when considering plain meaning, the intent or endorsement inquiry "is objective, not subjective." *See Isaacks*, 146 S.W.3d at 157. Objectivity is one feature that distinguishes this limit from the *Sullivan* tests that address culpability. *See, e.g.*, *Stepanov v. Dow Jones & Co.*, 987 N.Y.S.2d 37, 44 (2014) (noting that actual malice and textually demonstrated intent are "two entirely

separate issues"). If the publication itself indicates that the defendant intended to communicate a certain meaning, it is not relevant (at this stage) that the defendant did not *in fact* intend to communicate that meaning. Similarly, the defendant's subjective views about whether a statement is defamatory have no relevance at this stage. By the same token, a defendant will not be subject to liability for subjectively intending to convey a defamatory meaning that the publication's text does not actually support. In either case, the question is whether the publication indicates by its plain language that the publisher intended to convey the meaning that the plaintiff alleges.

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

arises will be sufficient textual evidence that the publisher meant to communicate it.

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

b) Analysis

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

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

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

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

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

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

As to the first meaning the Tatums allege, we agree that the column's text supports the discrete implication that the Tatums acted deceptively. The standard is whether an objectively reasonable reader would draw the implication that the Tatums allege. Here, the gist of Blow's column is that bereaved families often do society a disservice by failing to explicitly mention when suicide is the cause of death. Blow holds up the

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

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

The second alleged meaning rests on the premise that the column means that Paul had a mental illness. We do not agree that the column conveys that meaning. Though the column does say that "mental illness" "often" underlies suicide, the column does so immediately after citing the statistic that suicide is "the third-leading cause of death among young people." The author's use of the word "often" means the column does not logically entail that all suicides are the result of mental illness. And we think the space between the discussion of the Tatums and the discussion of mental illness negates the inferential construction that the Tatums allege—especially since the reference to

mental illness follows a citation to a population-level statistic rather than the example paragraphs. But even if we agreed that the column implies that Paul had a mental illness, we could not agree that the column communicates the further implication that the Tatums ignored it or that their treatment of Paul is what led to his suicide. Thus, we conclude that the second meaning the Tatums allege does not arise from an objectively reasonable reading of the column.

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

2. Is the meaning defamatory?

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

In Texas, a statement is defamatory libel by statute if it "tends to injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation." TEX. CIV. PRAC. & REM. CODE § 73.001. In addition, under

our state's common law, a statement is defamatory per se when it is "so obviously harmful that general damages, such as mental anguish and loss of reputation, are presumed." *Lipsky*, 460 S.W.3d at 596; *see also Hancock*, 400 S.W.3d at 63. For example, "[a]ccusing someone of a crime, of having a foul or loathsome disease, or of engaging in serious sexual misconduct" constitutes defamation per se. *Lipsky*, 460 S.W.3d at 596; *see also Moore*, 166 S.W.3d at 384. Moreover, "[r]emarks that adversely reflect on a person's fitness to conduct his or her business or trade are also deemed defamatory per se." *Lipsky*, 460 S.W.3d at 596.

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

B. Opinion

We conclude that of the defamatory meanings the Tatums allege, the only one capable of arising from Blow's column is the implicit statement that the Tatums acted deceptively. However, "statements that are not verifiable as false" are not defamatory. *Neely*, 418

S.W.3d at 62 (citing *Milkovich*, 497 U.S. at 21–22). And even when a statement is verifiable, it cannot give rise to liability if "the entire context in which it was made" discloses that it was not intended to assert a fact. *See Bentley*, 94 S.W.3d at 581. A statement that fails either test—verifiability or context—is called an opinion.

1. Arguments

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

The Tatums contend that the charge of deception is verifiable. The accusation turns on whether the Tatums drafted the obituary with a deceptive mental state. Though the News argues this makes the accusation unverifiable, the law determines mental states all the time. Defamation, the very body of law at issue, has developed a robust process for determining whether a defendant's mental state constitutes actual malice. It

cannot be the case, the Tatums argue, that defamation law can ascertain a defendant's mental state but not a plaintiff's. As for context, the Tatums argue that "a reasonable reader . . . would conclude that Blow is making objectively verifiable assertions regarding the Tatums and their deliberate misrepresentations of fact in the Obituary." Thus, in the Tatums' view, the statement is both verifiable and contextually stated as a fact.

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

2. Law

"[S]tatements that are not verifiable as false cannot form the basis of a defamation claim." *Neely*, 418 S.W.3d at 62 (citing *Milkovich*, 497 U.S. at 21–22). However, *Milkovich* requires courts to focus not only "on a statement's verifiability," but also on "the entire context in which it was made." *Bentley*, 94 S.W.3d at 581. And even when a statement *is* verifiable as false, it does not give rise to liability if the "entire context in

which it was made" discloses that it is merely an opinion masquerading as fact. *See Bentley*, 94 S.W.3d at 581; *see also Isaacks*, 146 S.W.3d at 157 ("[*Milkovich* protects] statements that cannot 'reasonably [be] interpreted as stating actual facts'. . . ." (second alteration in original) (citations omitted)). Thus, statements that cannot be verified, as well as statements that cannot be understood to convey a verifiable fact, are opinions. Whether a statement is an opinion is a question of law. *See Bentley*, 94 S.W.3d at 580. Finally, the type of writing at issue, though not dispositive, must never cease to inform the reviewing court's analysis.

3. Analysis

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

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

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

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

C. Truth

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

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

The statement is literally true because the Tatums' obituary is deceptive. It leads readers to believe something that is not true. It states that Paul died from injuries arising from a car accident when in fact

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

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

The Tatums also respond that deception implies intentionality. We agree. But the Tatums plainly and intentionally omitted from the obituary the crucial fact that Paul committed suicide. Their motive with regard to the omission is immaterial to whether the obituary is deceptive. What matters is that they intentionally

omitted that Paul committed suicide; in so doing, they drafted an obituary that conveyed a deceptive message to the substantial majority of the News's readership. At root, the Tatums' argument regarding intentionality muddles the concepts of intentionality and moral blameworthiness. True, an intentional deception often brings with it the implication of wrongdoing, but that is not always the case. And it is certainly not the case here, where the column's author expressly stated that "the last thing I want to do is put guilt on the family of suicide victims." Accordingly, we conclude that the column is literally true.

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

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

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

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

IV
Conclusion

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

_____

Jeffrey V. Brown
Justice

OPINION DELIVERED: May 11, 2018

APPENDIX

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

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

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

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

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

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

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

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

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

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

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

But is that always best?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And she's so right.

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

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

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

Honesty is the first step.

See Steve Blow, *Shrouding suicide in secrecy leaves its danger unaddressed*, THE DALLAS MORNING NEWS (July

12, 1010), https://www.dallasnews.com/news/news/2010/07/12/20100620-Shrouding-suicide-in-secrecy-leaves-its-9618.

IN THE SUPREME COURT OF TEXAS

No. 16-0098

THE DALLAS MORNING NEWS, INC. AND STEVE BLOW, PETITIONERS,

v.

JOHN TATUM AND MARY ANN TATUM, RESPONDENTS

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

JUSTICE BOYD, joined by JUSTICE LEHRMANN and JUSTICE BLACKLOCK, concurring.

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

[1] *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 171 (1967) (Black, J., concurring).

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

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

The Court begins its twenty-five-page analysis by introducing the new labels "textual defamation" and "extrinsic defamation" for what courts have always called "defamation per se" and "defamation per quod." This case involves textual defamation, the Court explains, which includes both explicit defamation—which is textual and does not involve extrinsic evidence—and implicit defamation (which the Court now calls defamation by implication)—which exists when a

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

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

[5] *Id.*

[6] *Mittelman v. Witous*, 552 N.E.2d 973, 978 (Ill. 1989), *abrogated by Kuwik v. Starmark Star Mktg. & Admin., Inc.*, 619 N.E.2d 129 (Ill. 1993).

publication's text creates a false and defamatory impression (making it the converse of the substantial-truth doctrine), but is not to be confused with defamation by innuendo, which is actually a type of extrinsic defamation. Textual defamation by implication involves the publication's gist, which may arise implicitly because of the article's as-a-whole gist (in which case the substantial-truth doctrine may apply), but only if it is reasonably capable of a defamatory meaning, which does not mean it is or is not ambiguous, but does mean it is capable of at least one defamatory meaning, and whether it is ambiguous depends on how many meanings it is reasonably capable of, but that does not mean all reasonable readers would perceive all possible implications because that standard when applied in gist cases renders the objectively reasonable reader redundant. Or defamation by implication may arise from a partial or discrete implication, which really means the gist of a part of the article (but the Court doesn't call that a gist), to which implication the substantial-truth doctrine does not apply. But it does not mean that a reasonable reader could perceive a defamatory meaning, and instead means that the implication the plaintiff alleges arises from an objectively reasonable reading, although the implication may or may not be ambiguous. But regardless of whether the defamation by implication arises from the as-a-whole gist or a discrete implication, the decision whether it is reasonably capable of a defamatory meaning must not exert too great a chilling effect on First Amendment activities—a particular concern in implication cases. So the plaintiff has an especially rigorous burden in

such cases, which does not impose a heightened standard of meaning and does not make the implication presumptively an opinion, but does require the plaintiff to provide additional affirmative evidence from the text itself that suggests the defendant objectively intended or endorsed the defamatory inference, a likely scenario if the gist is capable of a defamatory meaning but not necessarily likely if the discrete implication is capable of a defamatory meaning, so the court must conduct an especially vigorous review to confirm the defendant's intent to convey the meaning the plaintiff alleges.

Got it?

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

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

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

fresh start can bring any sanity, and predictability, to this very important area of the law."[9]

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

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

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

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

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

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

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

_____

Jeffrey S. Boyd
Justice

Opinion Delivered: May 11, 2018

AFFIRM in Part, and REVERSE and REMAND, Opinion Filed December 30, 2015.

[SEAL]

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-14-01017-CV

JOHN TATUM AND MARY ANN TATUM,
Appellants
V.
THE DALLAS MORNING NEWS, INC.
AND STEVE BLOW, Appellees

On Appeal from the 68th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-11-07371

OPINION

Before Justices Lang, Fillmore, and Whitehill
Opinion by Justice Whitehill

Appellants John and Mary Ann Tatum sued appellees Steve Blow and The Dallas Morning News (DMN) for libel regarding a column that Blow wrote and DMN published one month after the Tatums' son Paul committed suicide. The column, captioned "Shrouding suicide leaves its danger unaddressed," criticized people who are dishonest about loved ones' suicides. Although

the column did not mention the Tatums by name, it quoted from Paul's obituary and it described him and events surrounding his death. People who were familiar with the situation understood the column to refer to Paul and his parents. In addition to their libel claims, the Tatums also asserted DTPA claims against DMN.

Appellees won a take-nothing summary judgment.

In two appellate issues, the Tatums urge that the trial court erred in granting the summary judgment dismissing their libel and DTPA claims.

We conclude that summary judgment was proper as to the Tatums' DTPA claims but not as to their libel claims. Accordingly we affirm in part, reverse in part, and remand the case to the trial court for further proceedings consistent with this opinion.

I. Background

A. Factual Allegations.

We draw this factual recitation from the allegations in the Tatums' live petition:

The Tatums were Paul Tatum's parents. In May 2010, Paul was a seventeen-year-old high school student. He was an excellent and popular student, an outstanding athlete, and had no history of mental illness.

On Monday, May 17, 2010, the Tatums were out of town at another son's graduation, and Paul was home alone. That night, Paul was involved in a one-car

automobile accident. After the accident, he began sending incoherent text messages to friends.

He made his way home from the accident scene and began drinking champagne. He then called a friend, and their conversation prompted her and her mother to drive to the Tatums' house during the early morning hours of May 18. Paul's friend went in the house and found Paul "dazed, confused, irrational, incoherent, and apparently in physical anguish and holding one of the family's firearms." Paul's friend left him alone to tell her mother the situation, and as she left she heard a gunshot. Paul died from a gunshot wound to the head.

The Tatums wrote an obituary for Paul and paid DMN to publish the obituary in the *Dallas Morning News* newspaper. Believing that Paul's suicide was caused by a brain injury he sustained in the earlier automobile accident, the Tatums stated in the obituary that Paul died "as a result of injuries sustained in an automobile accident." The obituary was published on May 21, 2010.

One month later, on Father's Day, June 20, 2010, DMN published a column written by Blow. The Tatums construed the column to (i) accuse them of lying about the cause of Paul's death, (ii) state falsely that Paul committed suicide in a "time of remorse" over the accident, (iii) insinuate that Paul was mentally ill, and (iv) suggest that the Tatums were responsible for Paul's death and had done a disservice to others by

failing to use his obituary as a platform to educate the world about mental illness and suicide.

Additionally, the summary judgment evidence established that the Tatums were out of town the day the column was published. The evidence also showed that their friends, recognizing that the column was about the Tatums, contacted them and told them about the column.

This lawsuit followed.

B. The Column.

The summary judgment evidence included a copy of the printed version of the newspaper column that prompted this suit. The column's headline was "*Shrouding* suicide leaves its danger unaddressed." (Emphasis added). There was a page break in the middle of the column, and a slightly different headline appeared over the remainder of the column when it resumed on another page: "Shrouding suicide in secrecy leaves its danger unaddressed." The column, with emphasis added, stated as follows:

> So I guess we're down to just one form of death still considered *worthy of deception.*
>
> I'm told there was a time when the word "cancer" was never mentioned. Oddly, it was considered an embarrassing way to die.
>
> It took a while *for honesty* to come to the AIDS epidemic. Ironically, the first person I knew to die of AIDS was said to have cancer.

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

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

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

Honesty is the first step.

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[1] The Tatums sued Julie Hersh in a separate lawsuit. That lawsuit was dismissed, and the Tatums appealed. That appeal is also being decided today, *John Tatum and Mary Ann Tatum v. Julie Hersh*, No. 05-14-01318-CV.

C. Procedural History and Appellate Issues.

The Tatums sued both appellees for libel and libel *per se.* They also sued DMN for DTPA violations. DMN counterclaimed for its attorneys' fees under the DTPA.

Appellees filed a traditional and no-evidence summary judgment motion. About three months later, they filed an amended traditional and no-evidence summary judgment motion. The Tatums timely responded.

The trial court granted appellees' amended summary judgment motion, and the Tatums timely filed a notice of appeal. The court then vacated its judgment and stayed the case pending the resolution of a defamation case then pending in the Texas Supreme Court. The trial court later lifted the stay and again rendered a take-nothing summary judgment against the Tatums. The court also dismissed DMN's counterclaim with prejudice. The court did not state the basis for any of its rulings. The Tatums timely filed a second notice of appeal.

The Tatums assert two appellate issues: (1) The trial court erred by granting summary judgment on their libel claims; and (2) the trial court erred by granting summary judgment on their DTPA claims. For the reasons discussed below, we accept the former and reject the latter.

II. Standard of Review

We review a summary judgment de novo. *Neely v. Wilson*, 418 S.W.3d 52, 59 (Tex. 2013). In the interest

of judicial economy, we consider all grounds presented to the trial court and preserved on appeal. *Id.* at 60.

When reviewing a traditional summary judgment for a defendant, we determine whether the defendant conclusively disproved an element of the plaintiff's claim or conclusively proved every element of an affirmative defense. *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997). We must take evidence favorable to the nonmovant as true, and we must indulge every reasonable inference and resolve every doubt in the nonmovant's favor. *Sysco Food Servs., Inc. v. Trapnell*, 890 S.W.2d 796, 800 (Tex. 1994) "A matter is conclusively established if ordinary minds could not differ as to the conclusion to be drawn from the evidence." *In re Estate of Hendler*, 316 S.W.3d 703, 707 (Tex. App.—Dallas 2010, no pet.).

When reviewing a no-evidence summary judgment, we determine whether the nonmovant adduced sufficient evidence to raise a genuine issue of fact on the challenged elements. *Smith v. Deneve*, 285 S.W.3d 904, 909 (Tex. App.—Dallas 2009, no pet.). We review the evidence in the light most favorable to the nonmovant, crediting evidence favorable to that party if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). A no-evidence summary judgment should be reversed if the evidence is sufficient for reasonable and fair-minded jurors to differ in their conclusions. *Anderton v. Cawley*, 378 S.W.3d 38, 46 (Tex. App.—Dallas 2012, no pet.).

III. ANALYSIS

A. Issue One: Did the trial court err by dismissing the Tatums' libel claims?

The Tatums' first appellate issue argues that the trial court erred by granting summary judgment on their libel claims. We agree with the Tatums.

1. Applicable Law.

Defamation has two forms: slander and libel. *Austin v. Inet Techs., Inc.*, 118 S.W.3d 491, 496 (Tex. App.—Dallas 2003, no pet.). Slander is an oral defamation. *Id.* This case involves libel, which is a defamation expressed in written or other graphic form. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 73.001 (West 2011).

If, as concerns the present case, the plaintiff is a private individual rather than a public official or public figure, the elements of defamation are: (1) the defendant published a statement, (2) the statement was defamatory concerning the plaintiff, and (3) the defendant acted with negligence regarding the statement's truth.[2] *Neely*, 418 S.W.3d at 61; *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998). The

[2] If the plaintiff is a public official or a public figure, the required culpability is elevated from negligence to actual malice; that is, the plaintiff must prove that the defendant published the defamatory statement with knowledge that it was false or with reckless disregard as to whether it was true or false. *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998). Moreover, a public figure must prove actual malice by clear and convincing evidence. *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 119 (Tex. 2000).

plaintiff must also prove damages unless the defamatory statements are defamatory *per se*. *In re Lipsky*, 460 S.W.3d 579, 593 (Tex. 2015) (orig. proceeding).

A statement is defamatory if it tends to (i) injure a person's reputation, (ii) expose him to public hatred, contempt, ridicule, or financial injury, or (iii) impeach his honesty, integrity, or virtue. *Am. Heritage Capital, LP v. Gonzalez*, 436 S.W.3d 865, 875 (Tex. App.—Dallas 2014, no pet.); *see also* CIV. PRAC. § 73.001.

Examples of defamation *per se* include (i) accusing someone of a crime, (ii) accusing someone of having a foul or loathsome disease, (iii) accusing someone of serious sexual misconduct, and (iv) disparaging another's fitness to conduct his or her business or trade. *In re Lipsky*, 460 S.W.3d at 596.

To be actionable defamation, a statement must be a statement of verifiable *fact* rather than opinion. *See Neely*, 418 S.W.3d at 62 ("[S]tatements that are not verifiable as false cannot form the basis of a defamation claim."); *see also Am. Heritage Capital*, 436 S.W.3d at 875; *Main v. Royall*, 348 S.W.3d 381, 389 (Tex. App.—Dallas 2011, no pet.). But a statement couched as an opinion may be actionable if it expressly or implicitly asserts facts that can be objectively verified. *Avila v. Larrea*, 394 S.W.3d 646, 658 (Tex. App.—Dallas 2012, pet. denied).

We construe an allegedly defamatory publication as a whole in light of the surrounding circumstances and based on how a person of ordinary intelligence would perceive it. *Turner*, 38 S.W.3d at 114. The

hypothetical "person of ordinary intelligence" is one who exercises care and prudence, but not omniscience, when evaluating an allegedly defamatory communication. *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 157 (Tex. 2004).

Placing the burden of proving truth or falsity is a complex matter. The Supreme Court has held that a defamation plaintiff must prove falsity if (i) the plaintiff is a public figure, or (ii) the defendant is a media defendant and the statement involves a matter of public concern. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16, 19–20 & n.6 (1990); *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775–76 (1986); *see also Turner*, 38 S.W.3d at 116; *Klentzman v. Brady*, 456 S.W.3d 239, 263–64 (Tex. App.—Houston [1st Dist.] 2014, pet. pending). In cases not covered by these mandates, Texas has generally made truth an affirmative defense to defamation. *See* CIV. PRAC. § 73.005(a) (truth is a defense to a libel action); *see also Neely*, 418 S.W.3d at 62 (mentioning "the defense of truth" and citing § 73.005); *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.") (footnote omitted).

But recent Texas defamation cases may suggest that the plaintiff always has the burden of proving falsity. In *Lipsky*, for example, the supreme court said, "Defamation's elements include (1) the publication of a *false* statement of fact to a third party. . . ." 460 S.W.3d at 593 (emphasis added). We recently cited *Lipsky* and placed the burden of proving falsity on the plaintiff in

a libel case involving the Texas Citizens Participation Act, CIV. PRAC. §§ 27.001-.011. *See D Magazine Partners, L.P. v. Rosenthal*, No. 05-14-00951-CV, 2015 WL 5156908, at *5, *8 (Tex. App.—Dallas Aug. 28, 2015, pet. filed). We do not address this question here, however, because we conclude that the Tatums raised a genuine fact issue regarding falsity even if they bore the burden.

2. Summary Judgment Grounds.

Appellees asserted several summary judgment grounds. Their traditional grounds were:

- The column was not "of and concerning" the Tatums.
- The column was not capable of the defamatory meaning ascribed by the Tatums.
- The column was true or substantially true.
- The column was privileged as a fair, true, and impartial account of official proceedings.
- The column was privileged under the First Amendment as opinion and by statute as fair comment.
- Appellees negated actual malice, defeating the Tatums' libel claims entirely if they are limited-purpose public figures and defeating their exemplary damage claims if they are private figures.

Appellees' no-evidence grounds were:

- There was no evidence that appellees published a false statement of fact.
- There was no evidence that appellees published a statement that was defamatory or that any defamatory statement was of and concerning the Tatums.
- There was no evidence of actual malice.
- To the extent a negligence standard applies, there was no evidence of negligence.

3. Did the Tatums raise a genuine fact issue regarding whether the column was about them?

A defamation plaintiff must prove that the allegedly defamatory statement referred to him or her. *Newspapers, Inc. v. Matthews*, 339 S.W.2d 890, 893 (Tex. 1960). In that regard, the statement must point to the plaintiff and to no one else. *Id.* at 894. "A statement does not have to refer to the plaintiff by name, however, if people who know and are acquainted with the plaintiff reasonably understand from reading the statement that it referred to the plaintiff." *Main*, 348 S.W.3d at 395; *see also Houseman v. Publicaciones Paso del Norte, S.A.*, 242 S.W.3d 518, 525 (Tex. App.—El Paso 2007, no pet.) ("A publication is 'of and concerning the plaintiff' if persons who knew and were acquainted with him understood from viewing the publication that the defamatory matter referred to him.").

Here, the column did not mention Paul or the Tatums by name. But, after discussing a situation three months earlier in which a famous person's company falsely reported his suicide as an apparent heart attack, it did say that a recent suicide was described in an obituary as having been the result of a car accident:

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

Thus, a threshold question is whether the Tatums presented evidence sufficient to raise a genuine fact issue as to whether people who knew the Tatums would reasonably understand that the column referred to them. For the reasons discussed below, we conclude that they did.

The Tatums' response relied on the following evidence:

One, John Tatum testified by affidavit that his friend Lee Simpson called to inform him about the column the day it was published.

Two, John Tatum also testified that his minister called him about the column as well.

Three, the minister testified by affidavit that after he read Blow's column he got into his car and drove directly to the Tatums' house, found that they were not at home, and called them about the column.

These affidavits create a reasonable inference that persons who knew the Tatums also knew that the column referred to them.

Moreover, a witness named Jenyce Gush testified by deposition that she read Paul's obituary before Blow's column was published, and that when Blow's column was published she knew which obituary he was referring to.

Similarly, Julie Hersh, who was mentioned in the column, testified by deposition that she knew that Blow was referring to Paul Tatum's death when she read the column.

The Tatums also filed copies of a number of emails bearing on the subject. One was an email to Blow in which the author wrote, "He [Paul] was a popular and accomplished young man and many people understood to whom you referred."

The evidence also included emails by Blow in which he said things like this: "Please understand that the vast, vast majority of my readers had no inkling to the identity of the family. And those who did know were already aware of the confusion caused by the obituary. My column told them nothing they didn't already know." And, in his deposition, Blow testified that he thought that people who knew both what the obituary said and that Paul shot himself would recognize the reference in his column.

Viewing the evidence in the light most favorable to the Tatums, we conclude that a reasonable person

could find that people who knew the Tatums would reasonably understand that the column referred to the Tatums.

Our decision in *Backes v. Misko*, No. 05-14-00566-CV, 2015 WL 1138258 (Tex. App.—Dallas Mar. 13, 2015, pet. denied), further supports this conclusion. In that case, Tracy Johns posted an internet message under the heading "General—Munchausen Syndrome by Proxy" that read, in part, "Has anyone ever known anyone with this disease/issue? If you have STRONG suspicions . . . to whom do you turn them over?" *Id.* at 14, at *4. Karen Misko took the post to be directed at her and sued Johns for libel. *Id.* at 15–16, at *5. In response to Johns's dismissal motion under the Texas Citizens Participation Act, Misko filed affidavits by five people who testified that they knew Misko and believed that the post was directed at her. *Id.* at 24–25, at *13. We held that these affidavits provided clear and specific evidence that the post was about Misko, even though Misko was not named in it. *Id.* at 24–27, at *13–14. Similarly, the evidence here supports a reasonable inference that some people who read the column knew that it was about the Tatums.

Accordingly, neither a traditional nor a no-evidence summary judgment could properly be granted against the Tatums on the theory that the column was not about them.

4. Did the Tatums raise a genuine fact issue regarding whether the column was capable of defaming them?

Whether a publication is capable of a defamatory meaning is initially a question for the court. *Turner*, 38 S.W.3d at 114. If a publication is of ambiguous or doubtful import, however, the jury must determine its meaning. *Id.* We construe an allegedly defamatory publication as a whole, in light of the surrounding circumstances, based on how a person of ordinary intelligence would perceive it. *Id.*

Again, a statement is defamatory if it tends to (i) injure the subject's reputation, (ii) expose him to public hatred, contempt, ridicule, or financial injury, or (iii) impeach his honesty, integrity, or virtue. *Am. Heritage Capital*, 436 S.W.3d at 875. Even if the statements in a publication are not defamatory when taken individually, a publication can be defamatory if it creates a defamatory impression by omitting material facts or juxtaposing facts in a misleading way. *Turner*, 38 S.W.3d at 115.

Appellees make a threshold argument that the Tatums must satisfy the standard for libel *per se* because they did not plead or prove libel *per quod* or special damages. We disagree.

Libel *per quod* is simply libel that is not actionable *per se*. *See Hancock v. Variyam*, 400 S.W.3d 59, 64 (Tex. 2013) ("Defamation *per quod* is defamation that is not actionable *per se.*"). The Tatums' live pleading asserted "Libel" as count 1 and "Libel *per se*" as count 2. By

pleading "Libel" and "Libel *per se*" separately, they used "Libel" as a shorthand for libel *per quod*—much as the *Hancock* court used "defamation" as a shorthand for "defamation *per quod*." *See id.* at 62 ("In this defamation suit involving two physicians, we clarify a longstanding distinction between defamation and defamation *per se*. . . ."). We thus conclude that the Tatums pled claims for both libel *per quod* and libel *per se*.

Appellees also argue on appeal that any libel *per quod* claim fails because the Tatums did not plead or prove special damages. Because we see no matching argument in appellees' amended motion for summary judgment, that argument is not properly before us. *See McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 341 (Tex. 1993) ("A motion [for summary judgment] must stand or fall on the grounds expressly presented in the motion.").

Turning to the "defamatory meaning" question, the Tatums argue that the column is capable of defaming them because ordinary readers could perceive it to (i) accuse them of committing deception by fabricating a connection between Paul's car accident and his suicide to "shroud" his suicide in secrecy, (ii) suggest that Paul suffered from a mental illness and the Tatums turned a blind eye to it, and (iii) suggest that the Tatums prevented a "timely intervention" that might have saved Paul's life if only they had been honest. Appellees, however, counter that no ordinary reader would think the column defames the Tatums. They also argue that the column contains only nonactionable

rhetorical hyperbole in the course of advocating societal change. We agree with the Tatums on all three points.

As to the Tatums' first point, we agree that the column is capable of a defamatory meaning about them because a person of ordinary intelligence could read the column to accuse the Tatums of deception about the cause of Paul's death and a statement is defamatory if it impeaches a person's honesty or integrity. *See* CIV. PRAC. § 73.001; *Am. Heritage Capital*, 436 S.W.3d at 875.

Generally speaking, the column's italicized words quoted above reflect a theme of alleged dishonesty by people, including those who wrote Paul's obituary, who refuse to acknowledge that someone committed suicide. More specifically, the column's first four paragraphs state Blow's opinion that people generally consider a death by suicide "worthy of deception" and mention "honesty" and being "open" about other causes of death.

The next seven paragraphs describe two recent occurrences meant to illustrate Blow's point—the events surrounding the deaths of Ted Pillsbury and Paul Tatum. The account about Pillsbury states that "his company" fabricated reports that Pillsbury had suffered a heart attack when actually he had shot himself to death.

Next, specifically as to Paul's death, Blow wrote that the paid obituary said Paul died "as a result of injuries sustained in an automobile accident," but

Paul's death "turned out to have been a suicide." Blow continued, "There was a car crash, all right, but death came from a self-inflicted gunshot wound in a time of remorse afterward." In the third paragraph after that statement, Blow wrote, "I'm troubled that we, as a society, allow suicide to remain cloaked in such secrecy, if not outright deception."

The above parts alone could cause a person of ordinary intelligence to read the column as accusing the Tatums of deceit by writing an obituary that stated a false cause of Paul's death and concealed the true cause of his death (for their own self-benefit and to the detriment of society as a whole).

To accuse someone of deception is to impeach his or her honesty and integrity. *See Deception*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (1981) ("the act of deceiving, cheating, hoodwinking, misleading, or deluding"); *see also Deceive, id.* ("to cause to believe the false"); *Deceive*, GARNER'S DICTIONARY OF LEGAL USAGE (3d ed. 2011) ("to induce someone to believe in a falsehood"); *Deceive*, THE NEW OXFORD AMERICAN DICTIONARY (2001) ("cause (someone) to believe something that is not true, typically in order to gain some personal advantage").[3] Thus, a person of ordinary intelligence could, under the circumstances, at this point alone read the column to

[3] We may consult dictionaries to determine the generally accepted or commonly understood meaning of words. *See Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 127 (Tex. 2010) (citing dictionaries as aids to interpreting an insurance policy).

have a defamatory meaning by impeaching the Tatums' honesty and integrity.

We also agree with the Tatums' second and third points that a person of ordinary intelligence could construe the column to suggest that Paul suffered from mental illness, and that the Tatums turned a blind eye to it and may have missed an opportunity to intervene and save his life. Although the column does not expressly make these assertions, roughly the last third of the column discusses the prevalence of suicide (specifically among young people), laments public silence about suicide's frequent cause (mental illness), and concludes, "Awareness, frank discussion, timely intervention, treatment—those are the things that save lives. Honesty is the first step." By juxtaposing Paul's story with this discussion, the column invites the reader to associate Paul's suicide with mental illness and the Tatums with those who do not engage in life saving "frank discussion" and "timely intervention." The closing line, "Honesty is the first step," also invites the reader to contrast "honesty" with a "dishonest" obituary published about Paul's death.

For the above reasons, we conclude that a person of ordinary intelligence could construe the column to suggest that Paul suffered from mental illness and his parents failed to confront it honestly and timely, perhaps missing a chance to save his life. This meaning is defamatory because it tends to injure the Tatums' reputations and to expose them to public hatred, contempt, or ridicule. *See* CIV. PRAC. § 73.001.

We are not persuaded by appellees' characterization of the column as nonactionable rhetorical hyperbole. Rhetorical hyperbole is extravagant exaggeration employed for rhetorical effect. *Backes*, 2015 WL 1138258, at *14. But appellees do not explain how the column amounts to rhetorical hyperbole. We perceive no "extravagant exaggeration" in the column. To the contrary, the column's tone is generally sober, and it purports to be grounded in factual details such as the circumstances of Pillsbury's and Paul's deaths, data about the prevalence of suicide among young people, and Julie Hersh's public efforts to reduce the shame and stigma surrounding mental illness.

Appellees also argue that the column cannot reasonably be read to suggest that Paul had a mental illness. They state that several paragraphs separate the column's description of Paul's suicide from its discussion of mental illness. They also argue that the description of Paul as "popular" is inconsistent with an imputation of mental illness, as is the assertion that he committed suicide in a "time of remorse" after a car crash. We are unpersuaded.

The distance between the column's discussion of Paul's case and its discussion of mental illness is not so great that a reader of ordinary intelligence could not connect the two, and the closing exhortation for frank discussion, timely intervention, and honesty tends to tie the end of the column back to the two specific illustrations of "deception." Saying someone is popular is not inconsistent with the premise that he is mentally ill, nor is asserting that someone committed suicide out

of remorse over a car crash inconsistent with the premise that he was mentally ill.

Because we conclude that the column is capable of a defamatory meaning, there is at least a fact issue regarding this element, and appellees' traditional and no-evidence grounds attacking that element cannot support the trial court's judgment.[4]

5. Did the Tatums raise a genuine fact issue regarding whether the column was neither true nor substantially true?

Appellees' summary judgment motion argued that (i) they proved the column was true or substantially true and (ii) the Tatums had no evidence of any false statement of fact in the column. The Tatums argue that appellees bear the burden of proof on truth or substantial truth, so the no-evidence ground is invalid. *See* TEX. R. CIV. P. 166a(i). Because we conclude that the evidence raised a genuine fact issue regarding whether the column was true or substantially true regarding the Tatums, we need not decide which side had the burden of proof. *Cf. Neely*, 418 S.W.3d at 66 n.12 (the distinctions among the varying burdens of proof as to truth or falsity are "less material at summary judgment").

If a defamatory statement is true or substantially true, it is not actionable. *See id.* at 62; *McIlvain v.*

[4] This opinion should not be construed to hold that the column necessarily defamed the Tatums. Rather, we conclude only that it is capable of having that meaning.

Jacobs, 794 S.W.2d 14, 15 (Tex. 1990). A publication is substantially true if, in the average reader's mind, the allegedly defamatory statement is not more damaging to the plaintiff's reputation than a truthful statement would have been. *Neely*, 418 S.W.3d at 63. Conversely, a publication that consists of statements that are literally true when read in isolation can still convey a false and defamatory meaning by omitting or juxtaposing facts. *Id.* at 64.

We determine substantial truth by assessing the publication's "gist." *See id.* at 63–64. A publication's gist is its main point, material part, or essence, as perceived by a reasonable person. *D Magazine Partners*, 2015 WL 5156908, at *7.

a. What is the column's gist regarding the Tatums?

The Tatums argue that "[t]he false gist of the Column is that [they] dishonestly characterized their son's death in the Obituary as a means to 'shroud' his suicide in secrecy." The first question is whether an ordinarily intelligent person could construe the column as conveying that gist. *See Neely*, 418 S.W.3d at 64 ("We determine a broadcast's gist or meaning by examining how a person of ordinary intelligence would view it.") (footnote omitted). Although appellees contend that the column's gist does not include any comment on the Tatums' character or their actions, we disagree.

The column's headline and opening sentence announce that deception and secrecy are the column's

topics. The column describes Paul's obituary and death immediately after it describes the fabricated cause of death that was advanced after Ted Pillsbury's suicide. The column then implies that the obituary's reference to the cause of Paul's death was false by saying, "There was a car crash, all right, but death came from a self-inflicted gunshot wound in a time of remorse afterward." Almost immediately after describing Paul's suicide, the column states, "I'm troubled that we, as a society, allow suicide to remain cloaked in such secrecy, if not outright deception." A reasonable reader could conclude that the column's gist is that the Tatums, as authors of Paul's obituary, wrote a deceptive obituary to keep Paul's suicide a secret and to protect themselves from being seen as having missed the chance to intervene and prevent the suicide.[5]

b. Is there evidence that the column's gist was false?

We next ask whether there was evidence that the column's gist was false. The Tatums argue that there was, focusing specifically on the intent that the word "deception" implies. They argue that the column's gist includes an assertion that they falsely ascribed Paul's death to "injuries sustained in an automobile accident" with the intent to mislead and deceive readers and to cover up his suicide. And they argue that this gist is

[5] We conclude only that a reasonable factfinder could conclude that this is the column's gist, and this opinion should not be construed to hold that this is necessarily the column's gist. That question remains to be decided by the factfinder.

false because they submitted evidence that they believed in good faith that Paul committed suicide because he suffered a brain injury in the car accident that in turn induced his suicidal thoughts. We agree with the Tatums.

The Tatums submitted evidence showing that:

One, their motive in stating that Paul died "as a result of injuries sustained in an automobile accident" was to express their belief, after investigation, that the best explanation of the underlying cause of Paul's suicide was a brain injury sustained in the auto accident.

Two, they did not mention suicide in the obituary because (i) they believed it would give a false impression that Paul committed suicide as a result of depression or other mental illness and (ii) they did not feel it would honor Paul's memory to include morbid details about his death or to include overly scientific information.

Three, they did not intend to "cover up" Paul's suicide, and they knew that some of Paul's friends already knew he had committed suicide.

(1) Deceptive Intent.

Crediting the Tatums' evidence as we must, we conclude that a reasonable factfinder could find that the column's gist was false. We agree that the column's gist associates the obituary with "deception," which denotes an intention to deceive, often for personal advantage. *See Deceive*, THE NEW OXFORD AMERICAN

DICTIONARY ("cause (someone) to believe something that is not true, typically in order to gain some personal advantage"). The gist also implies that the explanation the Tatums gave for the cause of Paul's death was false and that Paul committed suicide because of "remorse" rather than because of injuries suffered in the auto accident. And the gist includes an implication that the Tatums' motive for deceiving readers was to conceal that Paul had suffered from a mental illness that the Tatums failed to confront.

We are unpersuaded by appellees' contrary arguments. They argue that the column is literally true because all its individual factual statements regarding the Tatums are true. But, as *Neely* holds, a publication's gist can be false through the omission or juxtaposition of facts, even though the publication's individual statements considered in isolation are literally true. 418 S.W.3d at 64.

Appellees also assert that the obituary's omission of Paul's suicide shows that it was in fact a "deception." But as discussed above, "deception" implies intent to deceive, and the Tatums raised a genuine fact issue as to whether they had such an intent.

Appellees further argue that the column does not omit or juxtapose facts in such a way as to make its gist false. We disagree. The column omits the reasons why the Tatums believed their account of the cause of Paul's suicide was true. The column (i) uses the word "deception," (ii) juxtaposes the discussion of Paul's suicide and obituary with the story of the fabrication

after Ted Pillsbury's suicide, and (iii) juxtaposes the discussion of Paul's suicide and obituary with advocacy regarding secrecy, suicide, and the need for honesty and intervention.

Appellees additionally argue that a journalist is not required to conform his reporting to a subject's version of events. Nonetheless, a journalist may not omit and juxtapose facts in such a way as to make the facts reported convey a false gist or meaning. *See id.*

Based on their view of the column's gist, appellees next argue that the cause of Paul's suicide and the Tatums' belief about that cause are irrelevant to the issue of truth. We are not persuaded. The column's gist is not simply that the Tatums omitted the fact that Paul committed suicide from the obituary. The gist is that they stated a false cause of death, shrouded Paul's suicide in secrecy, intended to mislead and deceive the readers, and may have wanted to conceal Paul's mental illness and their own failure to intervene.

Accordingly, the Tatums submitted enough evidence to raise a genuine fact issue regarding whether they believed what they said in the obituary was true, did not intend to mislead or deceive anyone, and did not believe Paul suffered from mental illness.

(2) Brain Injury as Causing the Suicide.

Appellees also argue that there is no evidence to support the Tatums' theory that a brain injury made

Paul suicidal. This argument misses the point. The truth of the column's gist hinges on whether the Tatums intended to deceive when they wrote the obituary, not necessarily on the strength of the scientific evidence supporting their belief about the cause of Paul's suicide.

Nonetheless, the Tatums filed affidavits by two experts. One expert explained the severity of Paul's auto accident, and the other opined that Paul committed suicide because of a brain injury sustained in that accident. Appellees made objections to the affidavits in the trial court, which the trial court overruled. On appeal, appellees argue only that the affidavits are too speculative. *See Duncan-Hubert v. Mitchell*, 310 S.W.3d 92, 103 (Tex. App.—Dallas 2010, pet. denied) (objection that opinions are speculative can be raised for the first time on appeal). We conclude otherwise.

Specifically, the first affidavit is by Dr. Robert Cargill, who possesses a Ph.D. in bioengineering. His testimony demonstrates his training and expertise in the field of accident reconstruction. He reviewed "black box" recorder data from the Tatums' vehicle that was involved in the accident, reviewed photographs of the vehicle, and interviewed the person who inspected the vehicle after the accident. Based on his investigation, he concluded that the primary impact involved in the accident was "moderate to severe," and that the accident was severe enough that "it would have subjected a human occupant of the vehicle to, at a very minimum, the risk of a mild TBI [traumatic brain injury], such as a concussion."

The other affidavit is by Dr. Joseph Kass, a medical doctor and neurologist who possesses expertise in neurocognitive disorders such as traumatic brain injuries. Kass reviewed Cargill's report about the accident, interviewed the Tatums, reviewed Paul's conduct before and after the accident as reported by his friends, and reviewed other documents such as Paul's medical history and death certificate. Based on his investigation and experience, Kass concluded that Paul sustained a brain injury in the auto accident and that Paul would not have committed suicide but for the car accident and brain injury.

Based on the above, we conclude that the expert affidavits are not speculative and the trial court did not err by overruling appellees' objections. Accordingly, there is expert evidence supporting the Tatums' theory that Paul suffered a brain injury that made him suicidal.

c. Was the column's gist substantially true?

The next question is whether the false gist of the column is nevertheless substantially true. As explained above, a false gist is substantially true and nonactionable if it is no more damaging to the plaintiff's reputation than a truthful publication would have been. *See Neely*, 418 S.W.3d at 63. Thus, if the column's false gist—that the Tatums wrote Paul's obituary with the intent to deceive—is more damaging to the Tatums' reputations than a true statement would have been, then the gist is not substantially true.

We resolve this question in the Tatums' favor. A reasonable juror could conclude that a hypothetically true column would have been less damaging to the Tatums' reputation because it would have mentioned that the Tatums claimed to have written the obituary in a good faith belief in its truth and without an intent to deceive. The actual column, however, can be read to allow and encourage the reader to conclude that the Tatums had no basis for attributing Paul's death to injuries sustained in the earlier car crash and that they wanted to deceive the obituary's readers about the cause of Paul's death, perhaps to conceal their own failure to save his life through an intervention.

Neely's substantial truth analysis is instructive. In that case, Dr. Neely was disciplined for self-prescribing medications, but a news broadcast about him could reasonably have been understood to report that he was actually disciplined for operating on patients while using dangerous drugs or controlled substances. *Id.* at 66. Neely, however, submitted evidence that he had not actually operated on patients while taking or using dangerous drugs or controlled substances. *Id.* at 66–67. Based on that evidence, the court concluded that a factfinder could find that the false gist—that Neely was disciplined for operating while using drugs—was more damaging to Neely's reputation than the truth—that Neely was disciplined for self-prescribing medications. *Id.* at 67–68.

Applying *Neely* here, we conclude that a reasonable factfinder could find that the column's false gist, as discussed above, was more damaging to the Tatums'

reputation than a hypothetical truthful account that acknowledged their claims that they reached a good faith conclusion about the cause of Paul's suicide and did not accuse them of deception.

d. Conclusion.

Because the evidence raises a genuine fact issue that the column's gist was neither true nor substantially true, appellees' traditional and no-evidence summary judgment grounds addressing truth and substantial truth cannot support the trial court's judgment.

6. Did appellees establish as a matter of law that the column is privileged as a fair account of official proceedings or as a fair comment on a matter of public concern?

By statute, a newspaper or other periodical enjoys a privilege against libel actions regarding the publication of certain matters, including (i) a fair, true, and impartial account of an official proceeding to administer the law, CIV. PRAC. § 73.002(b)(1)(B), and (ii) a reasonable and fair comment on or criticism of a matter of public concern published for general information, *id.* § 73.002(b)(2). Because these privileges are affirmative defenses, *see Denton Publ'g Co. v. Boyd*, 460 S.W.2d 881, 882, 885 (Tex. 1970) (interpreting predecessor statute

to § 73.002), appellees' summary judgment motion had to conclusively prove their elements to prevail.[6]

a. Did appellees conclusively prove the official proceeding privilege?

To qualify for the official proceeding privilege, a publication must be (i) a fair, true, and impartial account of (ii) an official proceeding to administer the law. CIV. PRAC. § 73.002(b)(1)(B). For this privilege to apply, however, the law requires that the comment at issue "purported to be, and was, only a fair, true and impartial report of what was stated at the meeting, regardless of whether the facts under discussion at such meeting were in fact true, unless the report was made with malice." *Denton Publ'g Co.*, 460 S.W.2d at 883.

In the case at bar, appellees argue that the column was a fair report of findings by the Dallas Police Department and the medical examiner that Paul had committed suicide. The Tatums, however, present

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[6] In *D Magazine Partners* we said that the supreme court's 2000 *Turner* opinion suggests that lack of privilege might be an element of a defamation plaintiff's case, while its 2013 *Neely* opinion indicates that privilege is a defense. 2015 WL 5156908, at *6 n.6. We resolved that case, however, without deciding the issue because the placement of the burden there would not have affected the outcome.

Although *Turner* contains a passing remark in dicta that a defamation plaintiff must prove that the publication is not privileged, 38 S.W.3d at 115, it does not cite *Denton Publishing Co.* or hint that it overrules that case's holding that "privilege is an affirmative defense," 460 S.W.2d at 885. We thus conclude that *Denton Publishing Co.* is still controlling law.

several responsive arguments, including that the column is not an account of official proceedings at all.

We agree with the Tatums. Even assuming that investigations by the police and the medical examiner are "official proceedings," the column does not purport to report about those proceedings. It does not mention those proceedings, nor does it report any statements or findings made in the course of those proceedings. Thus, the column does not qualify for the official proceeding privilege. *See id.* (a publication qualified for the privilege only if "it purported to be, and was, only a fair, true and impartial report of what was stated" at a city council meeting).

b. Did appellees conclusively prove the fair comment privilege?

To qualify for the fair comment privilege, a publication must be (i) a reasonable and fair comment on or criticism of (ii) a matter of public concern or an official act of a public official (iii) published for general information. CIV. PRAC. § 73.002(b)(2). Appellees argue that the column is a fair comment on a matter of public concern, specifically "society's tendency to avoid open discussion of suicide and how that leaves its dangers underestimated." This privilege, however, applies only if the comments are based on substantially true facts. *Neely*, 418 S.W.3d at 70.

The Tatums respond to appellees' fair comment privilege theory by arguing that (i) the column is not on a matter of public concern to the extent it concerns

them, and (ii) the column is not a fair comment because it is not true.

We agree with the Tatums' second argument and thus do not address their first.

We have already concluded that a reasonable reader could conclude that the column presents a false gist about the Tatums. That is, as *Neely* illustrates, enough to raise a genuine fact issue on the fair comment privilege.

The *Neely* court explained the fair comment privilege as follows:

> Comments based on substantially true facts are privileged if fair; comments that assert or affirm false statements of fact are not privileged. We long ago stated that it "is the settled law of Texas, that a false statement of fact concerning a public officer, even if made in a discussion of matters of public concern, is not privileged as fair comment."

Id. (quoting *Bell Publ'g Co. v. Garrett Eng'g Co.*, 170 S.W.2d 197, 204 (Tex. 1943)). Because the evidence in *Neely* raised a genuine fact issue as to whether a news broadcast was substantially true, the court held that the defendants were not entitled to summary judgment based on the fair comment privilege. *Id.*

Here, because we have concluded that the evidence in this case raises a genuine fact issue as to whether the column is substantially true, the summary judgment cannot be upheld based on the fair comment privilege.

7. Are the column's statements about the Tatums nonactionable opinions?

We next consider appellees' summary judgment ground that the column contains only nonactionable opinions. The test here is whether the defamatory statement is verifiable as false. *See id.* at 62 ("[S]tatements that are not verifiable as false cannot form the basis of a defamation claim."); *see also Bentley v. Bunton*, 94 S.W.3d 561, 579–85 (Tex. 2002) (accusations that a judge was "corrupt" were sufficiently verifiable to constitute actionable statements of fact). Whether a statement is a statement of fact or opinion is a question of law. *Am. Heritage Capital*, 436 S.W.3d at 875.

The Tatums argue that an accusation of deception is verifiable and therefore actionable, while appellees argue that it is not. We agree with the Tatums.

In adopting the "verifiable as false" test in *Bentley* and *Neely*, the Texas Supreme Court relied on the United States Supreme Court's decision in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). In that case, Milkovich sued Lorain for publishing an article that essentially accused him of perjury. *See id.* at 4–7. Milkovich lost on summary judgment and appealed all the way to the Supreme Court. *Id.* at 10. The Supreme Court reversed the summary judgment against Milkovich, explaining the verifiable-as-false test as follows:

> Foremost, we think *Hepps*[7] stands for the proposition that a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, like the present, where a media defendant is involved. Thus, unlike the statement, "In my opinion Mayor Jones is a liar," the statement, "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin," would not be actionable. *Hepps* ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection.

Id. at 19–20 (footnotes omitted).

By using the statement "In my opinion Mayor Jones is a liar" as an example of an actionable statement of fact, the Court took the position that such a statement can be proven false. Later in the opinion, the Court held that the defendant's statement that Milkovich committed perjury was "sufficiently factual to be susceptible of being proved true or false." *Id.* at 21.

Similarly, in *Bentley* the Texas Supreme Court considered whether repeated statements that a particular judge was "corrupt" were nonactionable statements of opinion. 94 S.W.3d at 583. Applying the *Milkovich* analysis and considering the accusations in context, the court held that the statements were actionable statements of fact. The court noted that the

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[7] *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986).

defendant had repeatedly stated that his accusations of corruption were based on objective, provable facts and on evidence that he had seen. *Id.* at 583–84.

In light of *Milkovich, Neely*, and *Bentley*, we conclude that the column's gist that the Tatums were deceptive when they wrote Paul's obituary is sufficiently verifiable to be actionable in defamation. Calling someone a liar and accusing someone of perjury, as occurred in those cases, both implicate the person's mental state, because both "liar" and "perjury" denote the willful telling of an untruth. Nevertheless, the *Milkovich* Court concluded that calling someone a liar and accusing someone of perjury are both sufficiently verifiable to support a defamation claim. 497 U.S. at 19–21.

In the present case, the column's implicit assertion that the Tatums committed deception is similar—an accusation that the Tatums willfully wrote a misleading obituary for the purpose of deceiving readers, possibly to protect themselves from suspicion of being negligent or inattentive parents. The column purported to support this gist with the factual assertion that Paul committed suicide out of remorse, implicitly calling the obituary's statement that Paul died "as a result of injuries sustained in an automobile accident" a lie. Although the Tatums' mental states when they wrote the obituary may not be susceptible of direct proof, we conclude that they are sufficiently verifiable through circumstantial evidence, such as the investigation into the possible causes for Paul's suicide that the Tatums undertook, to make the column's defamatory gist about them verifiable under *Milkovich* and *Neely.*

Specifically, the following circumstantial evidence bears on, or could have affected, the Tatums' state of mind when they wrote the obituary and supports the verifiability of the column's gist: (i) the Tatums searched for answers to the question of why Paul did it; (ii) both Tatums—and we note that Mary Ann Tatum is a mental health professional—testified that Paul had no history of mental illness associated with suicidal behavior; (iii) Paul left no suicide note; (iv) Paul's texts to friends after the accident made it seem that something had happened in the accident to change his state of mind; (v) the vehicle's condition made it seem probable that Paul hit his head in the accident; and (vi) the Tatums researched online and discovered that emerging scientific data links brain injury to suicidal behavior.

Appellees, however, cite several cases from other jurisdictions to support their argument that the column's gist is an unverifiable opinion. For the reasons discussed below, we conclude that their cases are distinguishable or otherwise unpersuasive.

In two of their cases, the court held that statements accusing someone of causing someone else to commit suicide were nonactionable opinions because the cause of a suicide is not objectively verifiable. *Gacek v. Owens & Minor Distrib., Inc.*, 666 F.3d 1142, 1147–48 (8th Cir. 2012); *Scholz v. Bos. Herald, Inc.*, No. SUCV201001010, 2013 WL 4081413, at *9–12 (Mass. Super. Ct. Mar. 29, 2013), *aff'd*, 41 N.E.3d 38 (Mass. 2015). These cases are distinguishable because the case before us does not turn on the verifiability of the column's statement about the cause of Paul's suicide.

Rather, this case turns on the verifiability of the column's accusation of deception against the Tatums. Accordingly, *Gacek* and *Scholz* are not on point.

Appellees also direct us to *Haynes v. Alfred A. Knopf Inc.*, 8 F.3d 1222 (7th Cir. 1993). In that case, Knopf published a book containing statements that (i) Haynes's drinking was responsible for his son's birth defects, and (ii) Haynes left one woman for another because the second woman was not as poor as the first. *Id.* at 1226–27. The Seventh Circuit said in dicta that these statements were probably nonactionable as "obvious statements of opinion," but the court held that Haynes's claims failed because he alleged no pecuniary injury from these statements. *Id.* We are not necessarily convinced that Knopf's first statement about Haynes was an unverifiable opinion. Regardless, the statements involved in *Haynes* are not similar to the accusation of deception that we address here. *Haynes* is distinguishable.

Finally, appellees cite *West v. Thomson Newspapers*, 872 P.2d 999 (Utah 1994). West successfully ran for mayor of a Utah town. *Id.* at 1000–01. After West's election, Thomson ran columns asserting that before the election West had opposed a proposal that the town should purchase a municipal power system, but that he changed his position after he was elected. *Id.* at 1001 & n.1. West sued for defamation, he lost the case on summary judgment, and the case came before the Utah Supreme Court. The court agreed with West that the columns reasonably carried the defamatory implication that West had misrepresented his position

on municipal power in order to win the election, but it held that this implication was not subject to objective verification. *Id.* at 1019. Accordingly, the court held that the columns were nonactionable opinions. *Id.* at 1020. To the extent *West* is similar to the instant case, we disagree with it.

Although the *West* court acknowledged and purported to apply the *Milkovich* analysis, it disregarded *Milkovich*'s conclusions that accusing a person of being a liar or committing perjury can be sufficiently verifiable to constitute an actionable statement of fact rather than a nonactionable opinion. Our supreme court, however, has embraced the *Milkovich* verifiability test. *See Neely*, 418 S.W.3d at 62; *Bentley*, 94 S.W.3d at 579–85. We therefore decline to follow *West*.

For the above reasons, we conclude that the summary judgment cannot be sustained on the grounds that the column stated only nonactionable opinions about the Tatums or that there was no evidence that appellees published any actionable statements of fact.

8. Did the Tatums raise a genuine fact issue that appellees acted with the necessary degree of culpability?

Appellees' summary judgment motion argued that they conclusively negated the element of actual malice, that the Tatums could produce no evidence of actual malice, and that the Tatums could produce no evidence of negligence if that standard applied. On appeal, the Tatums argue that they (i) are required to prove only

negligence because they are not public figures and (ii) produced sufficient evidence of both actual malice and negligence. We agree with the Tatums.

a. Applicable Law.

Under Supreme Court precedents, a defamation plaintiff must prove that the defendant acted with actual malice if the plaintiff is a public official, a public figure, or a limited-purpose public figure. *Neely*, 418 S.W.3d at 61. In this context, "actual malice" means knowledge of, or reckless disregard for, the falsity of a statement. *Bentley*, 94 S.W.3d at 591; *see also N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964). "Reckless disregard" means that the publisher entertained serious doubts about the publication's truth or had a high degree of awareness of the publication's probable falsity. *Bentley*, 94 S.W.3d at 591.

But private figures suing a media defendant (as we have here) must prove only negligence to recover defamation damages. *See Neely*, 418 S.W.3d at 61. In this context, negligence has two prongs: (1) the publisher knew or should have known that the defamatory statement was false, and (2) the factual misstatement's content was such that it would warn a reasonably prudent editor or broadcaster of its defamatory potential. *See id.* at 72.

If a defamatory statement about a private figure involves a matter of public concern, however, and the defendant is a media defendant, the private figure plaintiff must prove actual malice to recover punitive

damages. *Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc.*, 434 S.W.3d 142, 156–57 (Tex. 2014) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974)).

Public figure status is a question of law for the court. *Neely*, 418 S.W.3d at 70. Appellees, however, do not contend that the Tatums are public officials or general-purpose public figures. *See Pickens v. Cordia*, 433 S.W.3d 179, 185 (Tex. App.—Dallas 2014, no pet.) (describing general-purpose public figures as those who have achieved such pervasive fame or notoriety as to be public figures for all purposes). We therefore do not address whether those categories apply here.

Limited-purpose public figures are generally people who have thrust themselves to the forefront of a particular public controversy to influence its resolution, or who have voluntarily injected themselves or been drawn into a public controversy. *Id.* at 187. We employ a three-part test to assess whether a plaintiff is a limited-purpose public figure:

> (1) the controversy at issue must be public both in the sense that people are discussing it and people other than the immediate participants in the controversy are likely to feel the impact of its resolution;
>
> (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.

WFAA-TV, Inc., 978 S.W.2d at 571.

We do not consider the defamatory statement itself in determining whether the plaintiff is a public figure. *See Neely*, 418 S.W.3d at 71 ("[T]he allegedly defamatory statement cannot be what brought the plaintiff into the public sphere; otherwise, there would be no private figures defamed by media defendants.").

b. Are the Tatums limited-purpose public figures?

Based on the record before us, we conclude that the Tatums were not limited-purpose public figures. Appellees' contrary argument fails on the first prong we referenced above—the existence of a public controversy for the Tatums to participate in.

Appellees argue that a public controversy existed over the official cause of Paul's death. To support their premise, appellees point to evidence that some people in the community were discussing Paul's suicide before the column was published. But a topic is not a public controversy merely because some people are talking about it:

> 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.

WFAA-TV, Inc., 978 S.W.2d at 572. In short, there must first be a controversy before it can be a public one.

And, for a matter to be a public controversy, its resolution must affect people beyond its immediate participants. *See id.* at 571; *see also Einhorn v. LaChance*, 823 S.W.2d 405, 411 (Tex. App.—Houston [1st Dist.] 1992, writ dism'd w.o.j.) ("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.").

Although there is evidence that people in Paul's high school community were discussing his death generally, and that unspecified others in north Dallas were also discussing it before the column was published, there is no evidence that the cause or manner of Paul's death affected anyone other than the Tatums.

Similarly, although there is evidence that the Tatums disagreed with the "manner of death" finding of suicide on Paul's death certificate and tried to persuade the medical examiner to change it, there is no evidence that the outcome of this alleged controversy affected anyone except the Tatums.

Accordingly, because there is no evidence of a public controversy that could make the Tatums limited-purpose public figures, we conclude that the Tatums are private figures for purposes of this summary judgment appeal. Thus, they must prove only negligence to recover compensatory damages. *See Neely*, 418 S.W.3d at 61.

But the Tatums must prove actual malice to recover exemplary damages if the defamatory statement involved a matter of public concern (as opposed to a

public controversy) and appellees are media defendants. *See Waste Mgmt. of Tex., Inc.*, 434 S.W.3d at 156–57. "Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community . . . or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public. . . ." *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (internal quotations and citations omitted).

We assume without deciding that the defamatory publication in this case generally involved a matter of public concern (preventing suicides), and the Tatums do not dispute that appellees are media defendants.

c. Did the Tatums raise a genuine fact issue as to negligence and actual malice?

The Tatums argue that the following evidence raises a genuine fact issue as to the elements of negligence and actual malice:

- An expert witness testified by affidavit that appellees' failure to contact the Tatums for an explanation of the obituary before publishing the column fell short of journalistic standards promulgated by DMN and by the Society of Professional Journalism.

- The summary judgment evidence conflicts on certain points regarding the newspaper's investigation into Paul's death and the manner in which Blow learned about the immediate cause of Paul's death. For example, the internal sources that Blow said he

contacted before publishing the column denied having discussed the matter with him.

- Blow testified that he did not review any documents regarding Paul's death or the car accident earlier that night, did not interview anyone with the Dallas Police Department or the medical examiner's office, and did not attempt to contact the Tatums before drafting the column.

- Finally, the Tatums point to their minister's testimony that he called Blow to express his concerns about the column and that Blow's first response was, "Did I get my facts right?"

(1) Negligence.

We conclude that the evidence raised a genuine fact issue as to negligence. Specifically, the Tatums produced evidence that Blow did not contact them to determine the basis for their choice of words in Paul's obituary, and that this failure to contact them was a breach of journalistic standards and the newspaper's own policies. There was also evidence from which a reasonable jury could find that a proper investigation would have revealed that the Tatums had a good faith belief that Paul's death was in fact caused by injuries sustained in a car accident. There is thus some evidence from which a reasonable factfinder could find negligence's first prong—that appellees should have known of the defamatory statement's falsity, but failed to use reasonable care to ascertain the truth of the column's gist. *See Neely*, 418 S.W.3d at 72.

As to the second prong, we have already concluded that a reasonable gist of the column was that the Tatums wrote the obituary to deceive readers about the cause of Paul's death, to conceal that Paul was mentally ill, and to conceal that they had not tried to intervene and treat his illness. These matters create a genuine fact issue regarding whether the column's contents would have warned a reasonably prudent publisher of its defamatory potential. *See id.*

(2) Actual Malice.

We also conclude that the evidence raises a genuine fact issue as to actual malice. We acknowledge that evidence of a negligent investigation, standing alone, does not raise a fact issue on actual malice:

> [T]he failure to investigate the facts before speaking as a reasonably prudent person would do is not, standing alone, evidence of a reckless disregard for the truth, but evidence that a failure to investigate was contrary to a speaker's usual practice and motivated by a desire to avoid the truth may demonstrate the reckless disregard required for actual malice.

Bentley, 94 S.W.3d at 591 (footnotes omitted).

But the Tatums adduced evidence of more than a mere negligent investigation. They also produced evidence from which a reasonable jury could find that (i) Blow misrepresented his investigation and sources of information and (ii) Blow had some motive not to

probe into the column's truth regarding the Tatums and the obituary.

As to whether Blow misrepresented his investigation and the sources of his information, Blow testified by deposition that he learned the information about Paul's death that he used in his column from one of his colleagues at DMN. He testified that he knew that Bruce Tomaso and Kevin Sherrington looked into Paul's death, and that he could not remember specifically which of them provided him with the information he used in the column. But Tomaso and Sherrington were also deposed, and they both testified that they did not remember having a conversation with Blow about Paul's death. A reasonable juror could conclude that Blow was not honest when he testified about the sources of his information about Paul's death. This is some evidence of actual malice. *See Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1070–71 (5th Cir. 1987) (courts have upheld actual malice findings when "the supposed source of the story disclaimed giving the information"); *see also Celle v. Filipino Reporter Enter., Inc.*, 209 F.3d 163, 190 (2d Cir. 2000) (defendant's self-contradictory testimony about the source of his information supported actual malice finding).

There was also evidence that Blow did not adhere to his usual practice of investigation when he wrote the column. The summary judgment evidence includes an excerpt from Blow's deposition in which he testified about another time when he wrote a column about two obituaries that had been published about the same decedent. On that occasion, he said, he attempted to

contact the author of one of the obituaries. But, here he did not attempt to contact the Tatums before publishing the column at issue in this case. Blow explained that he acted differently in investigating this column because he had been told that Paul's family did not want to discuss the matter. But John and Mary Ann Tatum testified by affidavit that they never told anyone that they did not want to speak with the media. The Tatums' friend Lee Simpson testified by affidavit that he was contacted by Tomaso about Paul's death and that Tomaso did not ask him whether the Tatum family wanted to be contacted. Thus, there is evidence that Blow did not investigate this column with the same thoroughness that he did for a previous column and that his explanation for the difference was not true.

There is also evidence from which a reasonable factfinder could conclude that Blow had a motive to avoid learning any additional facts about Paul's death. In his affidavit, Blow said that he wrote the column to express his opinion that "it is troubling that society allows suicide to remain cloaked in secrecy and deception, and that secrecy about suicide leaves us greatly underestimating the danger of it." He also testified by deposition that if he discovered "a deception, a misleading obituary, that's fair game for commentary." Additionally, Julie Hersh testified by deposition that she met with Blow before he published the column and that they were both "outraged" by the lack of discussion about suicide. Thus, Blow had a motive not to learn if there was any explanation for the way the

Tatums chose to write the obituary other than the supposed desire to deceive the obituary's readers. Had he investigated further and learned facts suggesting that the Tatums had no intent to deceive, this would have undercut the whole thrust of the column, which began with a reference to deception and ended with a call for honesty.

We conclude that there was more than a scintilla of evidence showing more than a mere failure to conduct a reasonable investigation. Viewed in the light most favorable to the Tatums, the evidence raised a genuine issue of material fact as to the actual malice element.

9. Conclusion

We sustain the Tatums' first issue. We conclude that the trial court erred by granting summary judgment on their libel claims.

B. Issue Two: Did the trial court err by dismissing the Tatums' DTPA claims?

In their second appellate issue, the Tatums contend that the trial court erred by granting summary judgment on their DTPA claims against DMN. We disagree and affirm the judgment as to those claims.

1. Applicable Law and Summary Judgment Grounds.

The Tatums' DTPA claims are based on § 17.46(b)(24) of the DTPA, which provides that it is a false, misleading, or deceptive act or practice to "fail[ ] to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed." TEX. BUS. & COM. CODE ANN. § 17.46(b)(24) (West 2011). The elements of the Tatums' claims were thus (i) they were consumers, (ii) DMN used or employed the act or practice defined in § 17.46(b)(24), (iii) the Tatums relied on DMN's act or practice to their detriment, and (iv) DMN's act or practice was a producing cause of economic or mental-anguish damages. *See id.* § 17.50(a)(1)(A)-(B).

DMN asserted the following traditional summary judgment grounds against the Tatums' DTPA claims:

- The Tatums are not consumers.
- DMN did not commit a false, misleading, or deceptive act that the Tatums relied on.
- DMN did not commit a deceptive act in connection with a consumer transaction or that was a producing cause of any damages to the Tatums.

DMN also asserted the following no-evidence grounds:

- There was no evidence that the Tatums were consumers.
- There was no evidence DMN committed a false, misleading, or deceptive act listed in § 17.46(b), or that the Tatums relied on any complained of act.
- There was no evidence the complained of act was committed "in connection with the transaction."
- There was no evidence the complained of act was a producing cause of the Tatums' damages.

2. Did the Tatums raise a genuine fact issue that DMN violated § 17.46(b)(24)?

In our analysis of this question, we focus on DMN's second no-evidence ground and particularly the first requirement of § 17.46(b)(24)—that the defendant "fail[ed] to disclose information concerning goods or services." *Id.* § 17.46(b)(24); *see also Brennan v. Manning*, No. 07-06-0041-CV, 2007 WL 1098476, at *4 (Tex. App.—Amarillo Apr. 12, 2007, pet. denied) (mem. op.) (the undisclosed information must be about the goods or services being rendered). We conclude that the Tatums adduced no evidence of this requirement.

The Tatums argue that the service at issue is publishing the obituary. As stated in their brief, their

DTPA claims stem from DMN's alleged "practices and deception surrounding its sale of obituary services to the Tatums." They argue that the "information" DMN failed to disclose was "Mr. Blow's controversial practice of attacking obituaries." In their affidavits, both Tatums said that they would not have published the obituary as worded if they had known that DMN "had someone on staff who had a history of criticizing obituaries like Steve Blow."

The Tatums' argument fails because the "information" that DMN allegedly failed to disclose does not concern the service they bought. As the Tatums urge, the service they bought was Paul's obituary. The evidence shows that DMN published Paul's obituary, and the Tatums do not allege that the obituary itself did not conform to their order. Rather, the Tatums contend that DMN should have disclosed that its columnist, Blow, had previously written columns critical of obituaries that had appeared in the newspaper. In our view, this fact does not relate to the DMN's obituary services themselves, and thus it does not constitute "information concerning" those services, as is required by § 17.46(b)(24).

We reject the Tatums' second appellate issue.

IV. Conclusion

We reverse the trial court's summary judgment to the extent it orders the Tatums to take nothing on their libel and libel *per se* claims. We affirm the judgment to the extent it orders the Tatums to take nothing

on their DTPA claims. We remand the case for further proceedings consistent with this opinion.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

CAUSE NO. DC-11-07371

JOHN TATUM and MARY ANN TATUM,	§	**IN THE DISTRICT COURT OF**
Plaintiffs,	§	
	§	**DALLAS COUNTY, TEXAS**
v.	§	
THE DALLAS MORNING NEWS, INC. and STEVE BLOW,	§	**68TH JUDICIAL DISTRICT**
Defendants,	§	

FINAL JUDGMENT

On June 15, 2013, the Court granted Defendants The Dallas Morning News, Inc. and Stew Blow's ("Defendants") Amended Motion for Final Summary Judgment as to all claims and causes of action by Plaintiffs John Tatum and Mary Ann Tatum ("Plaintiffs"). On July 12, 2013, the Court denied Defendants' Motion for Finding of Groundlessness in relation to Defendants' counterclaim under the Deceptive Trade Practices Act. On September 18, 2013, the Court entered its Order Vacating Order Granting Defendants' Amended Motion for Final Summary Judgment and Vacating Final Judgment and entered its Order Staying Case until the motion for rehearing then pending before the Texas Supreme Court in *Neely v. Wilson*, 2013 WL 3240040 (Tex. 2013), was either ruled upon or overruled by operation of law. On January 31, 2014, the Supreme Court denied the motion for rehearing in *Neely v. Wilson* and issued a corrected opinion. Accordingly.

Defendants should have final summary judgment as provided herein.

IT IS THEREFORE, ORDERED, ADJUDGED. AND DECREED that the stay is hereby lifted.

IT IS THEREFORE, ORDERED, ADJUDGED, AND DECREED that all claims and causes of action by Plaintiffs against Defendants in the above-styled and numbered cause are dismissed with prejudice to the re-filing of same and that Plaintiffs take nothing against Defendants.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that all counterclaims and causes of action by Defendants against Plaintiffs in the above-styled and numbered cause are dismissed with prejudice to the re-filing of same and that Defendants take nothing against Plaintiffs.

IT IS FURTHER ORDERED. ADJUDGED AND DECREED that all court costs be assessed against Plaintiffs.

All relief requested in this case not expressly granted is denied. This judgment finally disposes of all parties and all claims and is appealable.

SIGNED this the 8 day of July, 2014.

/s/ Martin Hoffman
JUDGE PRESIDING

FILE COPY

RE: Case No. 16-0098 DATE: 9/28/2018
COA #: 05-14-01017-CV TC#: DC-11-07371

STYLE: THE DALLAS MORNING NEWS, INC. v. TATUM

Today the Supreme Court of Texas denied the motion for rehearing in the above-referenced cause.