

No. 22-0103

IN THE SUPREME COURT OF TEXAS

POLK COUNTY PUBLISHING COMPANY and VALERIE REDDELL,

Petitioners,

v.

TOMMY LAMAR COLEMAN,

Respondent.

**BRIEF OF AMICI CURIAE
FREEDOM OF INFORMATION FOUNDATION OF TEXAS,
TEXAS PRESS ASSOCIATION, AND TEXAS ASSOCIATION
OF BROADCASTERS IN SUPPORT OF PETITIONERS**

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ABBREVIATION GLOSSARY

“Article” refers to the article “Battle lines drawn over prosecutor’s conduct” published in the Polk County Enterprise.

“Coleman” refers to Respondent Tommy Lamar Coleman.

“Publisher” refers to Petitioner Polk County Publishing Company.

RECORD REFERENCES

Court of Appeals Opinion “Slip Op. [pg.#]”

INTEREST OF AMICI CURIAE

The Freedom of Information Foundation of Texas (“FOIFT”) is a non-profit organization that strives to ensure that the public’s business is conducted in public and to protect the liberties of free speech and press guaranteed by the First Amendment. To further these goals, FOIFT hosts educational seminars, organizes a hotline with voluntary attorneys to explain open government laws, and submits amicus briefs in cases raising important issues regarding open government and freedom of speech and the press.

The Texas Press Association (“TPA”) is a non-profit trade association organized over 140 years ago to serve as the voice of the Texas newspaper industry. TPA currently represents 328 paid-circulation newspapers published in Texas. TPA promotes the welfare of Texas newspapers, encourages higher standards of journalism, and plays an important role in protecting the public’s right to know as an advocate of First Amendment liberties.

The Texas Association of Broadcasters (“TAB”) is a non-profit trade association established 70 years ago to represent the interests of Texas’ 1,200+ free, over-the-air radio and television stations. TAB works to promote and protect a favorable economic and regulatory climate for broadcasting and to educate members

and the public at large about the opportunities available and advances possible through the efforts of free, over-the-air broadcast operations.

Because of their shared commitment to principles of free speech and freedoms of the press, amici FOIFT, TPA, and TAB urge the Court to use this case as an opportunity to confirm the standards governing the substantial truth doctrine and to enforce the Defamation Mitigation Act bar on using evidence of a published correction for anything other than damage mitigation.

No fees or costs were paid in connection with the preparation of this brief.

TEX. R. APP. P. 11(c).

SUMMARY OF ARGUMENT

The court of appeals committed two errors that require correction to avoid undermining fundamental protections for media First Amendment rights.

First, the court of appeals' substantial truth analysis failed to ask the critical question required by longstanding Court precedent—whether the Article was more damaging to Coleman's reputation in the mind of an ordinary reader than a truthful publication would have been. Courts must assess the gist of a publication, but that is not the end of the inquiry. Courts must also compare the publication with a truthful report. The court of appeals here performed the first step but not the second. Its failure to do so led it to the wrong conclusion on substantial truth. The critical facts implicating Coleman's professional reputation (his actions as part of a legal team opposing Morton's post-conviction proceedings) were not impacted by the comparatively unimportant information a truthful publication would have included (labeling the stage of the proceedings as post-conviction rather than “prosecution”). The Court should reaffirm and correctly model application of the complete test for determining substantial truth.

Second, the court of appeals quoted and relied on the Publisher's correction in contravention of the Defamation Mitigation Act (the “DMA”). The point of the DMA is to encourage parties in defamation cases to take pre-litigation steps to

minimize the harm of any allegedly defamatory statement. One way the statute furthers that purpose is by barring the use of evidence regarding a published correction other than for assessing damage mitigation. The court of appeals nonetheless quoted the Publisher's correction in full and relied on the correction to support its analysis rejecting Publisher's arguments on appeal. The Court should enforce the DMA's evidentiary requirements to avoid the chilling effect the court of appeals' opinion will have on future efforts to resolve disputes involving media publications.

ARGUMENT AND AUTHORITIES

I. The Court should confirm the longstanding test for establishing substantial truth.

The court of appeals' analysis of the substantial truth issue requires correction because the court lost sight of the key question: whether the alleged defamation was more damaging to Coleman's reputation in the mind of an average reader than a truthful statement would have been.

For more than 30 years, this Court has consistently adhered to this "test" for establishing substantial truth. *See McIlvain v. Jacobs*, 794 S.W.2d 14, 16 (Tex. 1990) (substantial truth test "involves consideration of whether the alleged defamatory statement was more damaging to [the plaintiff's] reputation, in the mind of the average listener, than a truthful statement would have been"); *see also Scripps NP*

Operating, LLC v. Carter, 573 S.W.3d 781, 793 (Tex. 2019) (substantial truth analysis “requires consideration of whether, in the mind of an average reader, the alleged defamatory publication is more damaging to the plaintiff’s reputation than a true statement would be”); *D Magazine Partners, LP v. Rosenthal*, 529 S.W.3d 429, 434 (Tex. 2017) (“under the substantial truth doctrine a publication’s truth or falsity depends on whether the publication taken as a whole is more damaging to the plaintiff’s reputation than a truthful publication would have been”) (internal quotation omitted); *KBMT Operating Co. v. Toledo*, 492 S.W.3d 710, 714 (Tex. 2016) (“The test for whether a report . . . is substantially true is whether the broadcast taken as a whole is more damaging to the plaintiff’s reputation than a truthful broadcast would have been.”) (internal quotation omitted); *Neely v. Wilson*, 418 S.W.3d 52, 66 (Tex. 2013) (“We examine whether the gist was more damaging to the plaintiff’s reputation, in the mind of a person of ordinary intelligence, than a truthful statement would have been.”).

Over the years, the Court has also provided guidance for how to resolve this question. Specifically, the Court has emphasized the “importance of assessing a publication’s gist,” explaining that (1) a publication may be substantially true even if it contains erroneous details so long as it correctly conveys the gist of the story, and (2) a publication containing individual statements that are literally true may still be

false if it omits or juxtaposes facts in a way that conveys a false or defamatory meaning. *D Magazine*, 529 S.W.3d at 434. But the analysis does not end there. Once courts assess the publication’s gist, they must still take the next step of “comparing it to a truthful report.” *Toledo*, 492 S.W.3d at 714.

Here, the court of appeals quoted the substantial truth “test” and analyzed the gist but failed to complete the analysis by comparing the gist to a truthful report. *See* Slip Op. 12-17. Instead, the court focused entirely on the meaning of “prosecution” within the context of the Article. *See id.* 14-17. This analysis, while perhaps necessary, was not sufficient. The court should have—but failed to—take the necessary next step of asking whether the Article as written was more damaging to Coleman’s reputation than an article that properly explained the stage of the Morton proceedings in which Coleman participated. The answer to that question is “no.”

An article containing every fact insisted on by Coleman would be no less harmful than the Article as published because all of the potentially reputation-damaging facts remain unchanged. Coleman does not dispute that he:

- Participated in the legal team opposing Morton’s bid for post-conviction relief;
- Made comments in a 2011 hearing that mocked Morton’s request to subject a key piece of evidence to DNA testing; and

- Lost his position with the Williamson County District Attorney’s Office in 2012 after his boss lost re-election.

To an ordinary reader, additional information regarding the years of the Morton prosecution and Coleman’s law school graduation, and reference to the proceedings as “post-conviction” rather than “prosecution,” would have a comparatively negligible impact.

The Court should fill in the gaps in the court of appeals’ opinion to confirm that substantial truth analysis “requires” courts to both “determine[e] the import of the broadcast as a whole—its gist to the ordinary listener” *and* “compar[e] it to a truthful report” to determine whether the publication is “more damaging to the plaintiff’s reputation than a truthful [publication] would have been.” *Toledo*, 492 S.W.3d at 714 (internal quotation omitted).

II. The Court should enforce the statutory prohibition on using media corrections as evidence outside the context of damage mitigation.

The Court should also take this opportunity to enforce the DMA’s requirement that evidence regarding a publisher correction is off limits for all purposes except damage mitigation. *See* TEX. CIV. PRAC. & REM. CODE § 73.061(b).

The DMA requirement is clear and unequivocal: “the contents of the correction, clarification, or retraction are not admissible in evidence at trial except in mitigation of damages.” *Id.*; *see also Warner Bros. Entm’t, Inc. v. Jones*, 611 S.W.3d 1,

11 (Tex. 2020) (“A timely and sufficient Change is admissible at trial only in mitigation of damages under Section 73.003(a)(3).”). This provision is an essential aspect of the bundle of “sticks and carrots” provided by the DMA “to induce plaintiffs and defendants to take prompt action to rectify defamatory publications so any ensuing damages are ameliorated.” *Warner Bros. Ent’mt*, 611 S.W.3d at 10. As members of this Court have recognized, this protection is necessary so publishers and broadcasters can get their stories right without fear of reprisal. *See Hogan v. Zoanni*, 627 S.W.3d 163, 191 (Tex. 2021) (Hecht, C.J., dissenting) (under the common law, “the defendant may worry that retreating from his statements would signal a lack of confidence in their accuracy”).

The court of appeals’ opinion illustrates the problems that arise in the absence of the DMA’s protections. In a good faith effort to address Coleman’s complaints regarding the Article, the Publisher issued a correction adding information regarding the dates of (1) the Morton criminal trial, (2) Coleman’s law school attendance and graduation, and (3) the post-conviction proceedings to exonerate Morton. *See Slip Op. 17*. The correction also noted that the post-conviction proceedings in which Coleman participated should not have been described as a “prosecution.” *See id.* Under the DMA, the correction and its contents have no bearing on the merits of Coleman’s claim. *See TEX. CIV. PRAC. & REM. CODE* § 73.061(b). But the court of

appeals disregarded the DMA's mandate and not only cited the correction in its analysis of the Article's meaning but reproduced the correction in full to reject the Publisher's arguments on appeal. Slip Op. 17.

The court of appeals' opinion, if followed, will chill the very efforts to mitigate allegedly defamatory statements that the Legislature sought to encourage by passing the DMA. *See* TEX. CIV. PRAC. & REM. CODE § 73.061(b). The Court has previously acknowledged but not directly applied Section 73.061. *See Warner Bros. Ent'mt*, 611 S.W.3d at 11. The Court should do so now and confirm that the DMA means what it says—courts cannot rely on evidence regarding the fact or contents of media corrections for any purpose other than damage mitigation.

CONCLUSION AND PRAYER

The Court has an important opportunity to confirm legal protections that are fundamental to the media's First Amendment rights. The Court should reaffirm that the longstanding test for assessing substantial truth requires courts to both assess the gist of a publication *and* compare its impact on an ordinary reader with the impact of a truthful publication. The Court should also enforce the DMA and instruct courts not to consider evidence regarding published corrections for any purpose other than damage mitigation.

Respectfully submitted,

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/s/ Ryan Paulsen

Ryan Paulsen

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was forwarded to all counsel of record via electronic service in accordance with the Texas Rules of Appellate Procedure on September 7, 2023.

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