

No. 22-\_\_\_\_\_

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**IN THE SUPREME COURT OF TEXAS**

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MONTGOMERY J. BENNETT AND THE DALLAS EXPRESS MEDIA,  
INC. D/B/A THE DALLAS EXPRESS,

*Petitioners,*

v.

STEVEN MONACELLI AND THE DALLAS WEEKLY, INC.,

*Respondents.*

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FROM THE TWELFTH COURT OF APPEALS AT TYLER  
No. 12-22-00044-CV

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**PETITION FOR REVIEW**

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## STATEMENT OF THE CASE

- Nature of the Case:*** This is an expedited appeal from a motion to dismiss a defamation lawsuit brought by Petitioners Montgomery J. Bennett and The Dallas Express Media, Inc. d/b/a *The Dallas Express* against Respondents Steven Monacelli and The Dallas Weekly, Inc. arising out of an article authored by Monacelli and published by The Dallas Weekly, Inc. about Mr. Bennett and *The Dallas Express*. (1CR.14–24; 2CR.507, 511–512.)
- Trial Court:*** 173rd Judicial District Court, Henderson County, Texas, Hon. Scott Williams, presiding.
- Trial Court’s Disposition:*** The trial court denied Respondents’ motion to dismiss under the Texas Citizens Participation Act, Chapter 27 of the Texas Civil Practice and Remedies Code (the “TCPA”), and overruled their objections to Petitioners’ evidence. (2CR.507–510.)
- Court of Appeals’ Opinion:*** *Monacelli v. Bennett*, No. 12-22-00044-CV, 2022 WL 3754716 (Tex. App.—Tyler, Aug. 30, 2022). (App’x B (slip copy).)
- Court of Appeals’ Disposition:*** In an opinion by Justice Neely, the court reversed the trial court’s denial of Respondents’ TCPA motion to dismiss. (App’x B.) On September 30, 2022, the panel denied Petitioners’ motion for panel rehearing. (App’x D.) No motion for rehearing or en banc reconsideration is pending.

## **STATEMENT OF JURISDICTION**

The Court has jurisdiction under Texas Government Code section 22.001(a) because the case presents a question that is important to the jurisprudence of the state, and the case does not involve a matter in which the jurisdiction of the court of appeals is made final by statute.

## **ISSUE PRESENTED**

This case presents an important question about the breadth of the statutory “accurate reporting” defense in Texas Civil Practice and Remedies Code section 73.005(b) for defamation cases: whether a newspaper is entitled to that defense if the gist of the article is defamatory and the newspaper goes beyond merely restating a third party’s allegations and instead adopts a gist that the substance of the allegations is true.



## STATEMENT OF FACTS

This case arises out of an article authored by Steven Monacelli and published by The Dallas Weekly, Inc. (collectively, “Respondents”) about Montgomery J. Bennett and *The Dallas Express* (collectively, “Petitioners”) titled “Formerly Black Owned Dallas Express Resurrected As Right Wing Propaganda Site.” (1CR.51–53.) In the article, Respondents attacked and smeared both *The Dallas Express* and Mr. Bennett, as its publisher, because of Mr. Bennett’s perceived political views and support for former President Donald Trump. Without regard for the truth and with no factual support, Respondents maligned *The Dallas Express* as “fake news” and a “right wing propaganda site.” (1CR.51–53.) The article further reported that *The Dallas Express* “was described by *D Magazine* as a pay-to-play ‘news’ site run by a Chicago-based operation called Metric Media News that owns hundreds of such bogus news sites all across the country.” (1CR.51–53.)

Contrary to those statements, however, *The Dallas Express* is a 501(c)(3) non-profit organization that has never accepted money in return for the publication of content and has never been owned or run by Metric Media. (1CR.9; 2CR.331–332.) Respondents and the court of appeals both assume (rightly so) that *D Magazine*’s allegations—which were repeated by Respondents—were

false. In fact, *D Magazine* later corrected its statements, and Respondents altered their article in response.<sup>1</sup>

Petitioners demanded a retraction or correction of Respondents' false and defamatory statements and received only an insufficient "correction"—which was itself inaccurate<sup>2</sup>—and an editor's note. (1CR.57; 2CR.332.) Petitioners then filed this defamation lawsuit. (1CR.332–336, 341–349.) Respondents moved to dismiss under the TCPA and, following briefing and a hearing, the trial court denied Respondents' motion and overruled their evidentiary objections. (1CR.25–46; 2CR.507–510.) Respondents appealed. (2CR.511–512.)

The court of appeals concluded that the trial court erred because *The Dallas Weekly's* statement that *The Dallas Express* was "right-wing propaganda" was a constitutionally protected opinion. (Op. at 7–8 (App'x B).) It further

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<sup>1</sup> Notably, although the court of appeals opinion relied on a purported "correction" by *The Dallas Weekly* in response to a correction made by *D Magazine* (Op. at 3 (App'x B)), *The Dallas Weekly's* purported correction was itself inaccurate and thus does not fall within the statutory defense. (1CR.20–23.) Instead of alleging that *The Dallas Express* was run by Metric Media, which *D Magazine* described as having owned hundreds of "dubious" news sites, *The Dallas Weekly's* "correction" said that *The Dallas Express* was Metric Media, which it described as owning hundreds of "bogus" news sites. (2CR.347.) Thus, the purported "correction" was itself both actually false and a false portrayal of *D Magazine's* correction.

<sup>2</sup> See *supra* note 1.

held that Respondents established as a matter of law at the motion-to-dismiss stage that the statements were protected by the “accurate reporting” defense under section 73.005(b) for the article’s remaining defamatory statements—that *The Dallas Express* was a “pay-to-play” fake news website run by Metric Media. (*Id.* at 6–7.) The court of appeals did not consider or address Petitioners’ argument that *The Dallas Weekly* should not be able to avail itself of that statutory defense because the article did more than just report on *D Magazine*’s allegations. (*See generally id.*) The article went beyond merely restating *D Magazine*’s allegations and instead adopted a gist that the substance of the allegations was true. The court of appeals addressed only whether the statements dealt with a matter of public concern and, after concluding in a brief paragraph that they did, held that the defense applied as a matter of law. (*See id.*)

Petitioners moved for rehearing on the basis that the court of appeals failed to address the problematic statements in the context of the article as a whole, but the court of appeals denied the motion in less than forty-eight hours. (*See Order Denying Mot. for Reh’g (App’x D).*)

## SUMMARY OF THE ARGUMENT

Section 73.005(b) provides that, in a case involving a newspaper, there is a defense to a defamation claim for “an accurate reporting of allegations made by a third party regarding a matter of public concern.” TEX. CIV. PRAC. & REM. CODE § 73.005(b). But neither the statute nor Texas law can or should protect articles that go beyond restating the allegations and adopt a gist that the substance of the third party’s allegations are true. Respondents’ article was not just an “accurate report” of *D Magazine*’s prior statements. Instead, the gist of Respondents’ article falsely implied that *D Magazine*’s statements were true and that *The Dallas Express* is—as alleged by *D Magazine*—a sham publication run by a network of “pink slime” news sites that accepted money in exchange for publishing articles. (1CR.51–53.)

The court of appeals entirely ignored the false and defamatory gist of the article. This approach to section 73.005(b) would allow newspapers to avoid liability even if they go beyond reporting a third party’s false statements and adopt and give credence to them. The Court should grant the petition for review to make clear that courts must analyze the overall gist of a publication before applying section 73.005(b).

## ARGUMENT AND AUTHORITIES

### 1. Reasons to Grant the Petition

This case satisfies several of the discretionary factors for granting review. *See* TEX. R. APP. P. 56.1. First, this petition touches on constitutional issues; namely, the scope of the First Amendment’s protections granted to the press for restating allegations made by third parties on a matter of public concern. Second, this petition involves the construction of a statute: Texas Civil Practice and Remedies Code section 73.005(b). The petition presents the Court with the opportunity to make clear that the section 73.005(b) defense does not apply if the defendant does more than merely report on a third-party’s allegations and instead adopts a gist that the substance of the allegations is true. This petition squarely presents that issue and gives the Court the opportunity to stress the importance of the gist analysis in the context of the “accurate reporting” defense. Although the Court implied that the gist analysis would apply to the defense under section 73.005(b) in *Dallas Morning News v. Hall*, 579 S.W.3d 370 (Tex. 2019), it addressed the issue more in the context of the official-proceeding privilege under Texas Civil Practice and Remedies Code section 73.002. The court of appeals in this case plainly did not understand the import of undertaking the gist analysis in the context of

analyzing whether a defendant was entitled to a defense under section 73.005(b), and this Court should make clear that such an analysis is required. This is a matter of importance to Texas jurisprudence that should be clarified.

**2. The court of appeals misapplied Texas Civil Practice and Remedies Code section 73.005(b).**

Texas Civil Practice and Remedies Code section 73.005 provides a defense to defamation claims:

TRUTH A DEFENSE. (a) The truth of the statement in the publication on which an action for libel is based is a defense to the action.

(b) In an action brought against a newspaper or other periodical or broadcaster, the defense described by Subsection (a) applies to an accurate reporting of allegations made by a third party regarding a matter of public concern.

(c) This section does not abrogate or lessen any other remedy, right, cause of action, defense, immunity, or privilege available under the Constitution of the United States or this state or as provided by any statute, case, or common law or rule.

TEX. CIV. PRAC. & REM. CODE § 73.005. As described below, the “accurate reporting” defense in section 73.005(b) should not apply when the newspaper does more than just repeat the third party’s allegations. But in concluding that the defense applies in this case, the court of appeals ignored that issue and analyzed only whether the statements were about a matter of public concern. (Op. at 7 (App’x B).) The court of appeals erred by failing to even

analyze whether Respondents here merely repeated *D Magazine*'s allegations or did more and adopted a gist that the substance of the allegations was true.

**A. The court of appeals' approach ignores this Court's instructions to consider the "gist" of an article when evaluating a defamation claim.**

This Court has instructed that defamation can arise by implication or from the gist of the article as a whole. *See Dallas Morning News v. Tatum*, 554 S.W.3d 614, 627–29 (Tex. 2018); *D Magazine Partners, L.P. v. Rosenthal*, 529 S.W.3d 429, 434 (Tex. 2017); *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103 (Tex. 2000). If the article's gist is defamatory, a plaintiff can maintain a libel claim based on "the entirety of the publication and not merely on individual statements," which may themselves be true. *Turner*, 38 S.W.3d at 115; *see also Rosenthal*, 529 S.W.3d at 438; *In re Lipsky*, 460 S.W.3d 579, 594 (Tex. 2015).

A plaintiff may also establish defamation by implication, which "refers to the inferential, illative, suggestive, or deductive meanings that may emerge from a publication or broadcast's discrete parts." *Tatum*, 554 S.W.3d at 629. Thus, a plaintiff can "bring a claim for defamation when discrete facts, literally or substantially true, are published in such a way that they create a substantially false and defamatory impression by omitting material facts or juxtaposing facts in a misleading way." *Turner*, 38 S.W.3d at 115.

In both types of defamation cases, courts must look beyond the truth of any individual statement and must, instead, look at the broader context of the statements at issue. *See Rosenthal*, 529 S.W.3d at 438. Truth of any individual statement does not prevent a defamation claim. *See id.*

Here, the court of appeals ignored this Court’s precedent and focused solely on Respondents’ repetition of *D Magazine*’s false statements, without looking to the article as a whole—or even to other parts of the article. (*See Op.* at 7 (App’x B).) By focusing solely on the *D Magazine* statements, the court of appeals concluded that they were accurate restatements of allegations made by *D Magazine* (which, notably, were false). (*Id.*) But the court of appeals ignored that Respondents placed *D Magazine*’s allegations—that *The Dallas Express* was a “pay-to-play” website run by an organization with a network of fake news websites—in the context of the broader article, which described *The Dallas Express* as “fake news,” “right-wing propaganda” and “the latest iteration of a sort of local ‘news’ publication that is funded by wealthy individuals with clear political agendas.” (*Id.*) In that context, the article adopts *D Magazine*’s allegations and conveys a gist that the substance of the allegations is true.



Had the court of appeals properly considered the article as a whole, it would have concluded that Respondents did more than merely “accurately report” *D Magazine*’s allegations; instead, Respondents adopted them and gave them credence. As outlined below, such conduct is not protected by section 73.005(b). The court of appeals erred by concluding otherwise at the motion-to-dismiss stage.

**B. This Court should make clear that section 73.005(b) does not protect the newspaper if an article published by a newspaper goes beyond merely restating a third party’s allegations and adopts a gist that the substance of the allegations is true.**

By its plain language, section 73.005(b) only applies to an “accurate report[]” of a third party’s statements on a matter of public concern. *See* TEX. CIV. PRAC. & REM. CODE § 73.005(b). But even truthful statements about third-party allegations can be the basis of a defamation action when the publication goes beyond merely reporting on a third-party’s statements. *See, e.g., Scripps NP Operating, LLC v. Carter*, 573 S.W.3d 781, 792 (Tex. 2019); *Rosenthal*, 529 S.W.3d at 437–38. Although Petitioners asserted in the trial court and the court of appeals that Respondents were not entitled to the defense because they went beyond mere reporting, (2CR.309, 319–320, 324), the court of appeals did not address these issues before deciding at the motion-to-dismiss

stage that Respondents were entitled to the defense as a matter of law. This Court should grant review to ensure that Texas courts do not skip this important step in analyzing section 73.005(b).

Moreover, the Court should grant review to make clear that the defense in section 73.005(b) does not protect a publication that goes beyond merely reporting on a third party's statements. In *Scripps*, a newspaper claimed that it was entitled to summary judgment on a defamation claim because the allegedly defamatory statements were true, in part because “the Newspaper merely reported third-party allegations against [the plaintiff] and did so accurately . . . .” *Scripps*, 573 S.W.3d at 791. Section 73.005(b) did not apply to the claim because suit was filed before that section was enacted. *Id.* at 792. Thus, the newspaper asked the Court to recognize a common-law defense that would mirror section 73.005(b). *Id.* The Court concluded it did not need to consider whether to recognize such a defense because the article “went beyond merely restating the allegations of a third party and instead adopted a gist that the substance of the allegations was itself true.” *Id.* at 792–93. In other words, even if the defense existed in common law, the newspaper would not have been able to invoke it because the article did more than merely restate a third

party's allegations. The Court should grant review here to clarify that the same principle applies in the context of section 73.005(b).

Nothing in this Court's opinion suggests that it would reach a different result in a case to which section 73.005(b) applies. To the contrary, the opinion makes clear that the "accurate reporting" defense (whether statutory or common-law) cannot apply where the gist of the article goes beyond merely reporting the third-party's statements and adopts a gist that the substance of the allegations is true. *See id.*

Similarly, in *Rosenthal*, this Court found that the gist of a *D Magazine* article was false even though it accurately restated representations made by the subject of the article to a governmental body. 529 S.W.3d at 437–38.<sup>3</sup> In that case, the plaintiff qualified for SNAP benefits (food stamps) while living in an expensive house in an affluent school district. *Id.* at 431–32. *D Magazine* wrote an article about the plaintiff titled "The Park Cities Welfare Queen," in which it reported information disclosed by the plaintiff in her application for benefits from the Texas Health and Human Services Commission. *Id.* at 432, 438–39.

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<sup>3</sup> *Rosenthal* involved a different but similar statute that provides a privilege for "publications that are 'reasonable and fair comment[s] on or criticism[s] of ... matter[s] of public concern published for general information.'" *Id.* at 441 (quoting TEX. CIV. PRAC. & REM. CODE § 73.002).

Although *D Magazine* argued that each statement in the article was “literally, or at least substantially, true” and that it merely reported statements that the plaintiff made to the Texas Health and Human Services Commission, the Court held that the article was actionable because its gist—when considered as a whole—falsely implied that the recipient had committed fraud. *Id.* at 441–42.

Finally, in *Hall*, the Dallas Morning News reported that a company was under investigation and was the subject of a lawsuit. 579 S.W.3d at 374. This Court found that the Dallas Morning News accurately reported that the company was under investigation for healthcare fraud and that the article did not contain false implications, unlike *Rosenthal*. *Id.* at 381–82. Because the case involved reporting on an investigation by law enforcement and allegations in a lawsuit, the Court focused primarily on the official-proceedings privilege in section 73.002 and not the “accurate reporting” defense. *Id.* at 380–81.<sup>4</sup> The Court did not expressly hold in *Hall* that lower courts must look to the entire

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<sup>4</sup> The opinion cited to section 73.005, but the Court’s focus was on the official-proceedings privilege, and the Court did not address section 73.005 in detail.

Thus, in other contexts, this Court has recognized that when a publication does more than simply repeat third-party statements, but goes further and implies that those statements are true or adopts them, the publication may not be privileged. But the Court has never expressly held that this analysis applies to section 73.005(b), and the court of appeals' analysis here shows that this Court's guidance is needed.

Had it been clear to the court of appeals in this case that it must look to the gist of the article when analyzing section 73.005, it would have concluded that the defense did not apply—and certainly should not have been applied as a matter of law at the motion-to-dismiss stage of the case. Respondents' article went beyond reporting *D Magazine*'s statements and made additional statements that implied that *D Magazine*'s false assertions were true. The gist of Respondents' article was that *The Dallas Express* is an illegitimate publication that accepted payment in return for the publication of content. (1CR.51–53.) At the end of the article, *The Dallas Weekly* specifically states that “the recently resurrected Dallas Express is just the latest iteration of a sort of local ‘news’ publication that is funded by wealthy individuals with clear political agendas.” (1CR.52.) As with the *D Magazine* article, *The Dallas Weekly* refers to *The Dallas Express* as “fake news”—a further implication that Respondents

were stating that *The Dallas Express* is a sham publication. (1CR.51–53.) Section 73.005(b) should not apply under those circumstances.

As a recent federal district court opinion noted in considering a related defense (the fair-report privilege), “a reporter who ... presents material under the pretense of a fair report when it is in actuality a sham effort to put forward one side’s party line, is deservedly ousted from the protection of the privilege.” *Butowsky v. Folkenflik*, No. 4:18CV442, 2019 WL 2518833, at \*15 (E.D. Tex. Apr. 17, 2019) (citation and internal quotation marks omitted). The court of appeals’ misapplication of section 73.005(b) would permit a newspaper to republish false statements by third parties even if the newspaper adopts and gives credence to those false statements. The Court should grant the petition for review to make clear that courts must analyze the overall gist of a publication before applying section 73.005(b).

### **CONCLUSION AND PRAYER**

Petitioners ask the Court to grant this petition for review and hold that the court of appeals erroneously interpreted section 73.005(b) of the Texas Civil Practice and Remedies Code. Petitioners ask the Court to remand for the court of appeals to address any other issues necessary for final disposition that this Court does not reach.

Dated: November 14, 2022

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief was prepared using Microsoft Word 2016 in Equity font. The font size in the text is 14-point. The font size in the footnotes is 13-point. This brief contains 3,085 words, not counting the sections excluded by TEX. R. APP. P. 9.4(i)(1).

*/s/ Richard B. Phillips, Jr.*

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Richard B. Phillips, Jr.



**Tab  
A**

MAR 07 2022

Betty Herrera  
District Clerk

Henderson County, Texas  
IN THE DISTRICT COURT km, Deputy

CAUSE NO. CV21-0575-173

MONTGOMERY J. BENNETT and  
DALLAS EXPRESS MEDIA, INC. D/B/A  
THE DALLAS EXPRESS,

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*Plaintiffs,*

v.

173RD JUDICIAL DISTRICT

STEVEN MONACELLI and THE  
DALLAS WEEKLY, INC.,

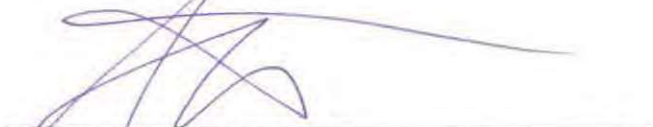
*Defendants.*

HENDERSON COUNTY, TEXAS

**ORDER DENYING DEFENDANTS' MOTION TO  
DISMISS UNDER THE TEXAS CITIZENS PARTICIPATION ACT**

On February 9, 2022, the Court heard the motion to dismiss under the Texas Citizens Participation Act filed by Defendants Steven Monacelli and The Dallas Weekly, Inc. (collectively, "Defendants"). After considering the parties' briefing, arguments, and evidence, the Court ORDERS that Defendants' motion should be, and hereby is, DENIED.

SIGNED THIS 7 DAY OF March, 2022.

  
\_\_\_\_\_  
JUDGE PRESIDING

**Tab  
B**

**NO. 12-22-00044-CV**

**IN THE COURT OF APPEALS**

**TWELFTH COURT OF APPEALS DISTRICT**

**TYLER, TEXAS**

***STEVEN MONACELLI AND THE  
DALLAS WEEKLY, INC.,  
APPELLANTS***

§ ***APPEAL FROM THE 173RD***

***V.***

§ ***JUDICIAL DISTRICT COURT***

***MONTGOMERY J. BENNETT AND  
DALLAS EXPRESS MEDIA, INC.  
D/B/A THE DALLAS EXPRESS,  
APPELLEES***

§ ***HENDERSON COUNTY, TEXAS***

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***MEMORANDUM OPINION***

In this accelerated interlocutory appeal, Appellants Steven Monacelli and *The Dallas Weekly, Inc.*<sup>1</sup> challenge the trial court’s order denying their motion to dismiss pursuant to the Texas Citizens Participation Act (TCPA). See TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.003 (West 2020), 51.014(12) (West Supp. 2021). In five issues, Appellants argue that (1) the trial court erred by denying their motion to dismiss, (2) Appellees failed to establish by clear and specific evidence a prima facie case of each element of their claim, (3) Appellants satisfied their burden to establish a defense or affirmative defense as a matter of law, (4) the trial court abused its discretion by failing to exclude Appellees’ affidavits, and (5) Appellants are entitled to costs, attorney’s fees, and sanctions. We reverse and render in part and reverse and remand in part.

**BACKGROUND**

Appellee, Montgomery J. Bennett, is a businessman in the hospitality industry and a supporter of conservative political causes and candidates in Texas. Articles favorable to Bennett

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<sup>1</sup> We will refer to Appellants collectively as “Appellants” and individually as “Monacelli” and “*Dallas Weekly*,” respectively. We will refer to Appellees collectively as “Appellees” and individually as “Bennett” & “*Dallas Express*,” respectively.

and his companies were published in *Dallas City Wire*, which is published by Metric Media. An October 2020 article entitled “As Local News Dies, a Pay-for-Play Network Rises in Its Place” in *The New York Times* reported that Bennett used “pay-for-play” websites to advocate for government stimulus funds for the hotel industry during the COVID-19 pandemic. On February 8, 2021, Bennett announced that he was launching *The Dallas Express* as a non-profit local news source that would present news about Dallas “straight down the center.”

Monacelli authored, and *Dallas Weekly* published, an article entitled “Formerly Black Owned Dallas Express Resurrected As Right Wing Propaganda Site.” The full article, which was published on February 12, 2021, read as follows:

Between 1892 and 1970, the *Dallas Express* was a Black newspaper in Dallas, perhaps the largest and most influential during its existence. It notably publicized lynchings, attacked racial segregation and promoted issues like public housing. Now, the name is being used to publish right-wing propaganda funded by a wealthy Texas Republican donor, Monty Bennett. This is but the latest resurrection of *Dallas Express* as a fake news site. Prior to Bennett’s takeover, *Dallas Express* was described by D Magazine as a pay-to-play “news” site run by a Chicago-based operation called Metric Media News that owns hundreds of such bogus news sites all across the country, which are known in the industry as “pink slime.” Bennett himself was previously accused by D Magazine and the New York Times of utilizing these websites for PR, an allegation which Bennett disputed – ironically, on a pay-to-play website, *Dallas City Wire*.

Just two weeks after *Dallas Express* was identified as being a part of the same “pink slime” network as *Dallas City Wire*, Bennett announced the creation of the newly resurrected *Dallas Express* on February 8, presenting the new outlet as a “strictly objective” antidote to what he sees as biased news media. “I can’t take it anymore – and I know many of you can’t either. The *Dallas Express* was created for one purpose[:] to help make our city a better place. That’s it. It’s a non-profit operation and there’s no other agenda,” Bennett writes.

Yet a review of the stated “core beliefs” of the paper reveals a rather clear agenda, or at the very least, a set of biases that cannot be considered “objective.” Take for example the statement that “regulations undermine individual and business productivity, and should not exist unless there is evidence they serve a public interest more important than liberty and productivity.” Other statements express disdain for programs that foster “dependency” (read: welfare) and characterize taxes as “generally oppressive.” These are obviously conservative positions.

Bennett is also a board member of Texans for Education Reform, a group which has been bankrolled by the likes of the Hunt family, who are known for their billions in oil wealth as well as their donations to conservative politics. It’s not clear that the Hunts fund *Dallas Express* – which is ostensibly formed as a nonprofit – but it would not be out of character for the family, considering their late scion, H.L. Hunt, funded his own right-wing propaganda network called the Life Line Foundation, Inc.

It’s also not clear whether they actually have any local reporters. Most of the names associated with recent articles reveal writers who are based in other states. But what is clear is that the recently resurrected *Dallas Express* is just the latest iteration of a sort of local “news” publication that is funded by wealthy individuals with clear political agendas. And certainly, a far cry from the historical legacy of the original *Dallas Express*.

A call placed [to] the number on the *Dallas Express* website went to voicemail and has not been returned. [hyperlink to D Magazine article]

The parties agree that *D Magazine* subsequently modified its article by removing the statements “pay-to-play” and “fake news” that appeared in the original version. After *D Magazine* modified its article, Appellants removed the “pay to play” and “fake news” statements from their article, but the “right-wing propaganda” statements remained. Appellants also changed “described by *D Magazine*” to “reported by *D Magazine*.”

*Dallas Express* and Bennett filed suit against Monacelli and *Dallas Weekly* in Henderson County, Texas,<sup>2</sup> asserting claims for libel and libel per se. Appellees contended that the statements in Monacelli’s article that *Dallas Express* is a “right wing propaganda site” and that characterize *Dallas Express* prior to Bennett’s takeover as “fake news” and a “pay-to-play ‘news’ site” that was once “run by a Chicago-based operation called Metric Media” that “owns hundreds of bogus news sites all across the country” are defamatory. Appellees also alleged that the statements were published with actual malice because they were made “with reckless disregard for whether they were false and specifically intended to substantially injure or harm [Appellees].” In their answer, Monacelli and *Dallas Weekly* entered a general denial and alleged, among other affirmative defenses, that the challenged statements are “accurate reports of allegations made by third parties regarding matters of public concern under Texas Civil Practice & Remedies Code § 73.005(b)” and are “expressions of opinion and other statements that are not assertions of fact and are not actionable.”

Appellants moved to dismiss Appellees’ claims against them pursuant to the TCPA. In their TCPA motion, Appellants argued that (1) the TCPA applies because Appellees’ claims are based upon Appellants’ exercise of the right of free speech; (2) Appellees cannot establish by clear and convincing evidence a prima facie case for each essential element of their claims because the statements at issue are opinion or rhetorical hyperbole and not objectively verifiable, based on statements that are “literally or substantially true, and are “privileged as fair and reasonable comment on matters of public concern[,]” and (3) Appellants are entitled to costs, attorney’s fees, and expenses. Appellants also sought sanctions, contending that the case “is clearly designed to chill reporting on the controversies surrounding [Appellees].” Appellees filed a response, in which they alleged that they established a prima facie case for each element of their claims, the statements

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<sup>2</sup> In his petition, Bennett asserted that he is a resident of both Dallas County and Henderson County, and he contended that he was a resident of Henderson County when the cause of action accrued. Appellees did not challenge venue.

at issue are not constitutionally protected opinions, and Appellants did not establish any affirmative defense as a matter of law.<sup>3</sup>

After conducting a hearing, the trial judge denied Appellants' TCPA motion.<sup>4</sup> This appeal followed.

### **MOTION TO DISMISS PURSUANT TO THE TCPA**

In issue one, Appellants argue that the trial court erred by denying their motion to dismiss, and in issue three, Appellants contend that they established defenses or affirmative defenses as a matter of law. Because these issues are intertwined and dispositive, we will address them together.

#### **Standard of Review and Applicable Law**

We review a trial court's ruling on a TCPA motion to dismiss de novo. *Dallas Morning News, Inc. v. Hall*, 579 S.W.3d 370, 377 (Tex. 2019); *Kassab v. Pohl*, 612 S.W.3d 571, 577 (Tex. App.—Houston [1st Dist.] 2020, pet. denied). Under the de novo standard, we make an independent determination and apply the same standard the trial court used in the first instance. *Fawcett v. Grosu*, 498 S.W.3d 650, 656 (Tex. App.—Houston [14th Dist.] 2016, pet. denied). We view the evidence in the light most favorable to the nonmovant. *Dolcefino v. Cypress Creek EMS*, 540 S.W.3d 194, 199 (Tex. App.—Houston [1st Dist.] 2017, no pet.).

“One of the foundational principles of American democracy is the freedom to comment on matters of public concern.” *D Magazine Partners, L.P. v. Rosenthal*, 529 S.W.3d 429, 433 (Tex. 2017). The purpose of the TCPA “is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.” TEX. CIV. PRAC. & REM. CODE ANN. § 27.002 (West 2020). Although we construe the TCPA liberally “to effectuate its purpose and intent fully[,]” it “does not abrogate or lessen any other defense, remedy, immunity, or privilege available

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<sup>3</sup> Bennett asserted in his response to the motion to dismiss that he was “targeted” by Appellants “because of his marriage to a Hispanic woman.” Bennett also stated in his response that it is his “belief and experience that far-left ideologues are discriminatory and outright racist to (usually conservative) white males that intermarry with Black or Hispanic women.”

<sup>4</sup> The judge of the 173rd District Court of Henderson County, the Honorable Dan Moore, recused himself, and the case was assigned to the Honorable Scott Williams, Judge of the Henderson County Court at Law.

under other constitutional, statutory, case or common law or rule provisions.” *Id.* § 27.011(a) (West 2020).

To fulfill its stated purpose, the TCPA provides a mechanism for early dismissal of a cause of action to which it applies, such as one that is based on, relates to, or is in response to a party’s exercise of the right of free speech. *Id.* § 27.003 (West 2020); see *Baylor Scott & White v. Project Rose MSO, LLC*, 633 S.W.3d 263, 275 (Tex. App.—Tyler 2021, pet. denied). The TCPA’s early dismissal procedure is intended “to identify and summarily dispose of lawsuits designed only to chill First Amendment rights, not to dismiss meritorious lawsuits.” *In re Lipsky*, 460 S.W.3d 579, 589 (Tex. 2015). The TCPA defines “exercise of the right of free speech” as “a communication made in connection with a matter of public concern.” TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(3) (West 2020). A “matter of public concern” includes a statement regarding (1) a public figure or other person “who has drawn substantial public attention due to the person’s official acts, fame, notoriety, or celebrity;” (2) an issue related to “political, social, or other interest to the community;” or (3) “a subject of concern to the public.” *Id.* § 27.001(7); see *Snyder v. Phelps*, 562 U.S. 443, 453, 131 S. Ct. 1207, 1216, 179 L. Ed. 2d 172 (2011).

Courts review TCPA motions to dismiss using a three-step analysis. *Youngkin v. Hines*, 546 S.W.3d 675, 679 (Tex. 2018). First, the movant must establish that the TCPA applies. See TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.003(a) (West 2020), 27.005(b) (West Supp. 2021). If the movant satisfies that threshold requirement, the burden shifts to the non-movant to establish “by clear and specific evidence a prima facie case for each essential element of the claim in question.” *Id.* § 27.005(c). Lastly, even if the nonmovant establishes a prima facie case, the trial court shall dismiss the legal action if the moving party establishes an affirmative defense or other grounds on which the moving party is entitled to judgment as a matter of law. *Id.* § 27.005(d). In determining whether a legal action should be dismissed under the TCPA, “the court shall consider the pleadings, evidence a court could consider under Rule 166a, Texas Rules of Civil Procedure, and supporting and opposing affidavits stating the facts on which the liability or defense is based.” *Id.* § 27.006 (West 2020).

### **Analysis**

“All assertions of opinion are protected by the [F]irst [A]mendment of the United States Constitution and article 1, section 8 of the Texas Constitution.” *Carr v. Brasher*, 776 S.W.2d 567, 570 (Tex. 1989). Because assertions of opinion are protected by the First Amendment, “to be



actionable, a statement must assert an objectively verifiable fact rather than an opinion.” *Johnson v. Phillips*, 526 S.W.3d 529, 535 (Tex. App.—Houston [1st Dist.] 2017, pet. denied); *see also Howell v. Hecht*, 821 S.W.2d 627, 631 (Tex. App.—Dallas 1991, writ denied).

“Speech concerning matters of public interest is protected by the First and Fourteenth Amendments to the United States Constitution, Article 1, Section 8 of the Texas Constitution, and Chapter 73 of the Texas Civil Practice and Remedies Code.” *Williams v. Cordillera Commc’ns, Inc.*, 26 F. Supp. 3d 624, 633 (S.D. Tex. 2014). Section 73.005 of the Texas Civil Practice and Remedies Code provides as follows:

- (a) The truth of a statement in the publication on which an action for libel is based is a defense to the action.
- (b) In an action brought against a newspaper or other periodical or broadcaster, the defense described by Subsection (a) applies to an accurate reporting of allegations made by a third party regarding a matter of public concern.

TEX. CIV. PRAC. & REM. CODE ANN. § 73.005(a), (b) (West 2017). Under Section 73.005, “media outlets that accurately report allegations made by a third party about matters of public concern can assert the truth as a defense.” *Hall*, 579 S.W.3d at 380; *see also Brinkley v. Fishbein*, 110 F.2d 62, 64 (5th Cir. 1940). Moreover, Section 73.002 of the Texas Civil Practice and Remedies Code provides that publication by a newspaper or other periodical is privileged and not a ground for a libel action if it consisted of reasonable and fair comment on a “matter of public concern published for general information.” TEX. CIV. PRAC. & REM CODE ANN. § 73.002 (West 2017). The fair comment privilege protects defendants in a libel suit stemming from publication of articles on matters of public concern published for general information; however, the privilege does not extend to false statements of fact. *Neely v. Wilson*, 418 S.W.3d 52, 70 (Tex. 2013).

The statements Appellees assert are defamatory are the ones regarding “right-wing propaganda,” “fake news,” and “pay-to-play.” Appellees did not dispute that the TCPA applies. Therefore, the burden shifted to Appellees to establish by clear and specific evidence a prima facie case for each essential element of their claims. *See* TEX. CIV. PRAC. & REM CODE ANN. § 27.005(c). Because, as explained herein, we ultimately conclude that Appellants established defenses as a matter of law regarding the challenged statements, we need not address this step in the TCPA analysis. *See Youngkin*, 546 S.W.3d at 681; *In re Estate of L.R.M.*, No. 13-19-00598-CV, 2021 WL 5365097, at \*3 (Tex. App.—Corpus Christi Nov. 18, 2021, no pet.) (mem. op.);

*Sinkin & Barretto, P.L.L.C. v. Cohesion Props., Ltd.*, No. 04-20-00106-CV, 2021 WL 1649525, at \*5 (Tex. App.—San Antonio Apr. 28, 2021, no pet.) (mem. op.); *Choctaw Constr. Servs. LLC v. Rail-Life R.R. Servs., LLC*, 617 S.W.3d 143, 151 (Tex. App.—Houston [1st Dist.] 2020, no pet.) (all assuming without deciding that appellee met the burden of establishing a prima facie case under the TCPA and proceeding to determine whether appellant established affirmative defense).

Monacelli’s article reported, with attribution to the source (*D Magazine*), the “pay-to-play” and “fake news” statements regarding Appellees. Therefore, we must determine whether the challenged statements were about matters of public concern. See TEX. CIV. PRAC. & REM. CODE ANN. § 73.005(b). In deciding whether speech is of public concern, we must examine the content, form, and context of that speech, as revealed by the entire record. *Snyder*, 562 U.S. at 453, 131 S. Ct. at 1216. A statement that is allegedly defamatory must be examined within its context and in light of the surrounding circumstances. See *Olivia v. Davilla*, 373 S.W.3d 94, 103-04 (Tex. App.—San Antonio 2011, pet. denied). “In considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said.” *Snyder*, 562 U.S. at 454, 131 S. Ct. at 1216. We conclude that the source of, motivation for, and editorial integrity of news outlets, on which Monacelli’s article reports and raises questions regarding Bennett and *Dallas Express*, involve political and social issues and, therefore, are legitimate matters of public concern. See TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(7) (defining “public concern”), § 73.005(b) (providing that the truth defense applies to “accurate reporting of allegations made by a third party regarding a matter of public concern”); see *Snyder*, 562 U.S. at 453-54, 131 S. Ct. at 1216. Therefore, we further conclude that the defense provided by Section 73.005(b) protects Appellants’ publication of the “pay-to-play” and “fake news” statements, which were contained in the original *D Magazine* article. See TEX. CIV. PRAC. & REM. CODE ANN. § 73.005(b).

We now turn to the “right-wing propaganda” statement. As discussed above, assertions of opinion are constitutionally protected. *Carr*, 776 S.W.2d at 570. This protection is also reflected in Section 73.002 of the Texas Civil Practice & Remedies Code, which provides that the publication of statements that constitute “reasonable and fair comment or criticism of” a “matter of public concern published for general information[]” is privileged and therefore not a ground for a libel action. TEX. CIV. PRAC. & REM. CODE ANN. § 73.002(a), (b)(2). Appellees argue that the “right-wing propaganda” statement is objectively false rather than a non-actionable opinion

because the facts upon which it is based are false. We disagree. Merriam-Webster's Collegiate Dictionary defines "propaganda" as "the spreading of ideas, information, or rumor for the purpose of helping or injuring an institution, a cause, or a person," or "ideas, facts, or allegations spread deliberately to further one's cause or to damage an opposing cause[.]" MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 996 (11th ed. 2011). We conclude that, when viewed in the context of the entire article in which it appears, the "right-wing propaganda" statement is clearly Monacelli's opinion regarding the likely editorial viewpoint, direction, and potential bias of *Dallas Express* and Bennett. Because such matters are of public concern, we conclude that Appellants established as a matter of law that the "right-wing propaganda" statement is a protected opinion. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 73.002(b)(2); *Carr*, 776 S.W.2d at 570.

Because Appellants established defenses as a matter of law, the trial court erred by denying Appellants' TCPA motion to dismiss. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(d). Accordingly, we sustain issues one and three and render judgment dismissing Appellees' claims. We need not address issues two and four, as they would not result in greater relief. *See* TEX. R. APP. P. 47.1.

#### ATTORNEY'S FEES, COSTS, AND SANCTIONS

In issue five, Appellants contend that they are entitled to attorney's fees, costs, and sanctions. The TCPA provides that a party who prevails on a motion to dismiss shall be awarded costs and reasonable attorney's fees and may be awarded sanctions "as the trial court determines sufficient to deter the party who brought the legal action from bringing similar actions[.]" TEX. CIV. PRAC. & REM. CODE ANN. § 27.009(a) (West 2020). Because we render judgment granting Appellants' motion to dismiss, as the trial court should have done, we sustain issue five and remand the cause to the trial court for further proceedings, as explained below.

#### DISPOSITION

Having sustained issues one, three, and five, we *reverse* the trial court's order denying Appellants' motion to dismiss, *render* judgment dismissing Appellees' claims against them, and *remand* the case for a determination of attorney's fees and costs, as well as a determination of whether an award of sanctions is appropriate and, if so, in what amount. *See id.*; *see also* TEX. R.

APP. P. 43.3(a) (providing that Court of Appeals must render the judgment the trial court should have rendered except when a remand is necessary for further proceedings).

**GREG NEELEY**  
Justice

Opinion delivered August 30, 2022.  
*Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.*

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## COURT OF APPEALS

### TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

#### JUDGMENT

AUGUST 30, 2022

NO. 12-22-00044-CV

STEVEN MONACELLI AND THE DALLAS WEEKLY, INC.,

Appellants

V.

MONTGOMERY J. BENNETT AND DALLAS EXPRESS MEDIA, INC. D/B/A THE  
DALLAS EXPRESS,

Appellees

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Appeal from the 173rd District Court

of Henderson County, Texas (Tr.Ct.No. CV21-0575-173)

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THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, because it is the opinion of this Court that there was error in the judgment of the court below, it is ORDERED, ADJUDGED and DECREED that the trial court's order denying the motion to dismiss be **reversed**, and judgment **rendered** dismissing Appellees' claims. It is further ORDERED, ADJUDGED and DECREED that the case be **remanded** for a determination of court costs and attorney's fees to be awarded, and a determination of an award of sanctions, if any, and for **further proceedings** consistent with this opinion, and that the decision be certified to the court below for observance.

Greg Neeley, Justice.

*Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.*

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CHIEF JUSTICE  
JAMES T. WORTHEN

JUSTICES  
BRIAN HOYLE  
GREG NEELEY

CLERK  
KATRINA MCCLENNY

CHIEF STAFF ATTORNEY  
KERI L. HUNT

## TWELFTH COURT OF APPEALS

Friday, September 30, 2022

Mr. Martin R. Bennett  
130 E. Corsicana St., Ste 302  
Athens, TX 75751  
\* DELIVERED VIA E-MAIL \*

Mr. Thomas S. Leatherbury  
2001 Ross Ave., Ste. 3900  
Dallas, TX 75201-2975  
\* DELIVERED VIA E-MAIL \*

**RE:** Case Number: 12-22-00044-CV  
Trial Court Case Number: CV21-0575-173

**Style:** Steven Monacelli and The Dallas Weekly, Inc.  
v.  
Montgomery J. Bennett and Dallas Express Media, Inc. d/b/a The Dallas Express

You are hereby notified that in the above-described case, the following decision and order was this day made and entered by this Court:

"Appellees' Motion for Rehearing having been duly considered, it is **ORDERED** that said motion be, and hereby is **OVERRULED**."

Very truly yours,

By: Katrina McClenny  
Katrina McClenny, Clerk



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Vernon's Texas Statutes and Codes Annotated  
Civil Practice and Remedies Code (Refs & Annos)  
Title 4. Liability in Tort  
Chapter 73. Libel  
Subchapter A. General Provisions

V.T.C.A., Civil Practice & Remedies Code § 73.005

§ 73.005. Truth a Defense

Effective: May 28, 2015

[Currentness](#)

- (a) The truth of the statement in the publication on which an action for libel is based is a defense to the action.
- (b) In an action brought against a newspaper or other periodical or broadcaster, the defense described by Subsection (a) applies to an accurate reporting of allegations made by a third party regarding a matter of public concern.
- (c) This section does not abrogate or lessen any other remedy, right, cause of action, defense, immunity, or privilege available under the Constitution of the United States or this state or as provided by any statute, case, or common law or rule.

**Credits**

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985. Amended by [Acts 2015, 84th Leg., ch. 191 \(S.B. 627\)](#), § 1, eff. May 28, 2015.

V. T. C. A., Civil Practice & Remedies Code § 73.005, TX CIV PRAC & REM § 73.005  
Current through the end of the 2021 Regular and Called Sessions of the 87th Legislature.

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## Formerly Black Owned Dallas Express Resurrected As Right Wing Propaganda Site

February 12, 2021

By Steven Monacelli, the Dallas Weekly

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Now, the name is being used to publish right-wing propaganda funded by a wealthy Texan Republican donor, Monty Bennett.



Photo Credit: [ashfordinc.com](https://www.ashfordinc.com)

This is but the latest resurrection of *Dallas Express* as a fake news site. Prior to Bennett's takeover, *Dallas Express* was described by D Magazine as a pay-to-play "news" site run by a Chicago-based operation called Metric Media News that owns hundreds of such bogus news sites all across the country, which are known in the industry as "pink slime." Bennett himself was previously accused by D Magazine of utilizing these websites for PR, an allegation which Bennett disputed — ironically, on a pay-to-play website, *Dallas City Wire*.

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This site uses Akismet to reduce spam. [Learn how your comment data is processed.](#)

### Automated Certificate of eService

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Associated Case Party: MontgomeryJ.Bennett

Name	BarNumber	Email	TimestampSubmitted	Status
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Stephen C.Rasch		stephen.rasch@hklaw.com	11/14/2022 9:45:55 PM	SENT

Associated Case Party: Steven Monacelli

Name	BarNumber	Email	TimestampSubmitted	Status
Thomas S. Leatherbury	12095275	tleatherbury@velaw.com	11/14/2022 9:45:55 PM	SENT