Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **13th day of May, 2021** are as follows:

BY Weimer, C.J.:

2020-CC-01175 *JACOB JOHNSON VS. DARYL PURPERA, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS LOUISIANA LEGISLATIVE AUDITOR, STATE OF LOUISIANA, THROUGH LOUISIANA LEGISLATIVE AUDITOR (Parish of East Baton Rouge)*

REVERSED. SUMMARY JUDGMENT GRANTED. SEE OPINION.

Retired Judge John D. Crigler, appointed Justice ad hoc, sitting for Crain, J., recused in case number 2020-CC-01175 only

Hughes, J., concurs in part, dissents in part and assigns reasons.

Genovese, J., dissents for the reasons assigned by Griffin, J.

Griffin, J., dissents and assigns reasons.

05/13/21

SUPREME COURT OF LOUISIANA

NO. 2020-CC-01175

JACOB JOHNSON

VERSUS

DARYL PURPERA, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS LOUISIANA LEGISLATIVE AUDITOR, STATE OF LOUISIANA, THROUGH LOUISIANA LEGISLATIVE AUDITOR

On Supervisory Writ to the Nineteenth Judicial District Court,
Parish of East Baton Rouge

WEIMER, Chief Justice[1]

This case involves a defamation claim brought by the executive director of a public agency against the State of Louisiana and the Louisiana Legislative Auditor arising out of statements appearing in two audit reports and the summaries which accompanied the release of those audit reports. Plaintiff maintains the audits cast his conduct in connection with his duties at the agency in a defamatory light. The defendants moved for summary judgment, but the district court denied the motion, finding the existence of genuine issues of material fact. The court of appeal denied writs. We granted certiorari, primarily to determine whether the lower courts erred in concluding that genuine issues of material fact preclude summary judgment. Finding that there are no genuine issues of material fact, and that the questions presented are all questions of law, we further find that the statements are not actionable as a matter of law, but rather are statements of opinion relating to matters

[1] Retired Judge John D. Crigler, appointed Justice *ad hoc*, sitting for Justice William J. Crain.

of public concern that do not carry a provably false factual connotation. As such, the statements are entitled to full constitutional protection. Therefore, we reverse the judgments of the lower courts and grant summary judgment in favor of defendants.

FACTS AND PROCEDURAL HISTORY

The Health Education Authority of Louisiana ("HEAL") is a corporate and public body constituting an instrumentality of the State of Louisiana and exercising public and essential governmental functions. La. R.S. 17:3053. Its primary mission is to promote medical and health educational activities in the state of Louisiana by planning, acquiring, constructing, reconstructing, rehabilitating, improving and developing facilities in communities in Louisiana where graduate medical education is offered, and by providing for the financing of such projects. La. R.S. 17:3051. HEAL is governed by a board of trustees that employs an executive director, who is an unclassified employee of the state. La. R.S. 17:3053(G). During the time period relevant hereto, plaintiff Jacob Johnson served as HEAL's Executive Director.

The Legislative Auditor is charged by the constitution with the duty and responsibility of auditing the fiscal records of the state, its agencies, and political subdivisions. La. Const. art. III, § 11. Pursuant to the authority granted it by the constitution, the Legislative Auditor elected to perform two audits of HEAL: (1) a financial audit for the fiscal year ending June 30, 2016; and (2) an informational audit examining HEAL's operations (including sources and uses of funds) for the years 2012-2016.

An audit team was formed, and on June 22, 2016, the Auditor met with members of HEAL's Board and Mr. Johnson to discuss the Auditor's preliminary findings. In connection with that meeting, the Auditor prepared a bullet list of deficiencies that had been identified with respect to HEAL's operations. Basically,

the deficiencies revolved around HEAL's bonding activity, certain professional services contracts, travel and reimbursement costs, and Board administration. While the meeting was confidential, and conducted for the purpose of permitting HEAL to supply additional information regarding the alleged deficiencies, Mr. Johnson avers that the preliminary findings were shared with members of the Board of Regents in July of that year, a fact the Auditor disputes.[2]

In any event, on December 16, 2016, the Auditor conducted an exit interview with HEAL Board members and employees, including Mr. Johnson, to discuss the contents of the financial and informational audits and to provide HEAL with a final opportunity to supply any information that might alter the contents of the audits. Following that meeting, on December 28, 2016, the Auditor released its final financial audit report on HEAL, as well as a one-page summary of the report. The informational audit was finalized and released by the Auditor on January 18, 2017. It, too, was accompanied by a one-page summary. On or about January 23, 2017, the Auditor's office issued a press release with a link to the informational audit. The press release, which bears the heading "HEAL's Operations Marked by Lack of Construction Projects, Increasing Expenses, Noncompliance," basically repeats the information provided in the one-page summary of the informational audit.

Both audits, and their accompanying summaries, report and reiterate the deficiencies first pointed out to the HEAL Board at the June 2016 meeting and

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[2] During the time period covered by the audits, HEAL operated under the auspices of the Department of Health. By 2016 La. Acts 577, effective August 1, 2016, HEAL was transferred to the Department of Education and placed under the Board of Regents to operate under its own authority.

thereafter at the exit interview in December, 2016. Thus, with respect to HEAL's bonding activity, the informational audit[3] reports:

> **HEAL has not funded a construction project since 2004.**
> **HEAL financed nine construction projects over 35 years, from its creation in 1968 through 2004.**
>
> . . . .
>
> In 2015, HEAL issued revenue refunding bonds totaling $6.6 million. **Prior to these refunding bonds, HEAL's most recent bond issuance occurred 11 years prior, in 2004.** ...
>
> During the House of Representatives Health and Welfare committee meeting on May 24, 2016, the HEAL executive director testified that HEAL had completed a YMCA project last year, but that statement was inaccurate. In July 2015, the State Bond Commission conditionally approved the issuance of $6 million in revenue refunding bonds to provide for the acquisition and construction of the Greater New Orleans YMCA's flagship location. However, as of the date of this report, these bonds have not been issued because the YMCA is still searching for a location for its new facility. **As a result, HEAL has funded no construction projects since 2004.**

With respect to HEAL's professional services contracts, the audit reports:

> **HEAL management executed contracts that circumvented state purchasing oversight controls and violated state purchasing regulations.**
>
> During our review of professional services expenses, we identified contracts signed only by the HEAL executive director and not approved by LDH's undersecretary, which **circumvented state purchasing oversight controls and violated state purchasing regulations.** During the time period of our review, HEAL was statutorily under the oversight of the LDH undersecretary. While HEAL was authorized to determine the necessity of contracting for professional services, the undersecretary of LDH's Office of Management and Finance had the sole authority to solicit for bids and execute such contracts. The results of our review of those contracts are as follows:

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[3] The financial audit and the informational audit identify basically the same perceived shortcomings with respect to HEAL's professional services contracts, employing substantially similar language to do so. Because the informational audit is the more comprehensive of the documents, encompassing more of the language plaintiff alleges to be defamatory, and because it is the audit most cited by plaintiff, it is quoted here. The statements that appear in bold print appear that way in the audit.

Consulting Contract to Facilitate Strategic Planning. During fiscal year 2015, HEAL attempted to amend a consulting contract with SSA Consultants (SSA) to extend the original contract terms from a one-year contract totaling $19,500 to a three-year contract totaling $172,000. LDH did not approve this contract amendment, as the dollar amount of the contract required that the agency follow a competitive Request for Proposals process. Subsequently, HEAL created a new contract with the same consulting agency for a three-year term totaling $172,000. The state Office of Contractual Review (OCR) did not approve this contract because it was classified as a professional services contract rather than a consulting contract. **Despite not receiving approval from LDH and OCR, HEAL's executive director executed the contract as an LDH contract, with his signature only, and without the required competitive bid.** Documentation provided to us by LDH showed that the department notified the executive director each time the contract was denied that the contract was for consulting services that exceeded $50,000, and thus required a competitive award process. As of June 30, 2016, a total of $50,671 has been paid on this contract. In addition, as of June 30, 2016, there was an additional $54,427 of outstanding invoices owed to the consultant for work performed through fiscal year 2016.

Because HEAL was not compliant with state requirements regarding the execution of the contract, the Commissioner of Administration has the option to either ratify and affirm the contract if it is in the best interests of the State or terminate the contract and compensate the consultants for actual expenses incurred for services performed prior to termination. Once we brought this issue to the attention of the HEAL Board and SSA, SSA informed us that they would no longer perform services under this contract or any other business with HEAL.

Legal Services. An amendment to one of the legal services contracts with Kinney, Ellinghausen, Richard & DeShazo, extending the contract to a term of four years, was not approved by the LDH undersecretary, the Attorney General, or the Joint Legislative Committee on the Budget (JLCB) as required. Contracts for legal services, and subsequent amendments, require the approval of the Attorney General; however, no such approval was obtained on this amendment. Contracts of more than three years but no more than five years require approval of the JLCB; however, no such approval was obtained. **Again, the executive director signed this contract extension but did not obtain the approval and required signature authority of the LDH undersecretary, obligating LDH and the state without proper authority.** Once we brought this issue to the HEAL Board's attention, HEAL revised the contract amendment to involve only an extension of the dollar amount, an increase from $65,000 to $150,000, but not the length of the original contract. This revised amendment was subsequently approved by the Attorney General and the LDH undersecretary as required.

Accounting Services. A contract extension for accounting services with Luther Speight & Company to perform bookkeeping and provide interim financial statements was not approved by the LDH undersecretary or the JLCB. **Again, the executive director signed this contract extension but did not obtain the approval and required signature authority of the LDH undersecretary, obligating LDH and the state without proper authority. Also, this contract was for a term of four years and was not approved by JLCB as required.** Once we brought this issue to the HEAL Board's attention, HEAL amended the contract to include a term of one year and subsequently obtained approval from the LDH undersecretary as required.

Lobbying Services. One contract with Southern Strategy Group, identified as a social services contract, did not meet the definition of a social services contract. By law, social services contracts promote the general welfare of the citizens of Louisiana and include, but are not limited to, contracts for rehabilitation services, health-related counseling, drug and alcohol training and treatment, etc. This contract was for the purpose of governmental relations and legislative planning services. This contract was not approved by the LDH undersecretary. By law, state entities cannot expend funds to lobby the Legislature or local government authorities. **Again, the executive director signed this contract but did not obtain the required approval and signature authority of the LDH undersecretary, obligating LDH and the state without proper authority.** Once we brought this issue to the HEAL Board's attention, the Board canceled the contract.

However, it appears HEAL did use services for lobbying, possibly in violation of state law. During several committee meetings of the 2016 Regular Legislative Session, an employee of Southern Strategy Group provided testimony regarding Senate Bill 230 (Act 577). The employee indicated that he was a representative of HEAL's legal counsel, Kinney Ellinghausen. In addition, a search of the Louisiana Board of Ethics website revealed that a member of one of HEAL's legal firms, Jones Walker, LLP, is currently registered as a lobbyist for HEAL. As noted above, state entities cannot expend funds for lobbying.

With respect to travel and reimbursements, the audit reports:

HEAL was not compliant with state regulations for travel mileage reimbursements ...

State Travel Reimbursements. During our review of supporting documentation, we identified 58 dates where the executive director requested reimbursement for mileage within his official domicile of New Orleans. The mileage reimbursement requests ranged from one to 29 miles. According to state travel regulations, employees may not be reimbursed for travel within their domicile unless they have obtained an authorization for routine travel as a regular and necessary part of the

> employee's duties. We reviewed the executive director's annual travel authorization forms and approved reimbursement forms. However, we did not note any specific mention of authorization for travel within domicile. The executive director was paid $215.73 in violation of state travel regulations.

And, finally, with respect to administration and operations, the audit reports:

> **HEAL participated in proposed legislation that would expand its service area, double its total bonding authority, and allow autonomy in its operations, without a transition plan for effective and efficient ongoing operations.**
>
> During the 2016 Regular Legislative Session, the Legislature passed Act 577, which was effective August 1, 2016. ...
>
> Prior to August 1, 2016, LDH provided services to HEAL for human resources, payroll, and related benefits management; accounting and payment management services; contract administration services; and state email accounts and information technology support. When the Act became effective on August 1, 2016, LDH discontinued its support for HEAL. HEAL had no transition plan in place and found itself with no email services and no way to pay its employees or its bills. ...

HEAL's Board responded to the audits, concurring with several of the recommendations suggested therein. In particular, the Board indicated that it had directed plaintiff, its Executive Director, to comply without exception to state procurement rules, and created a committee composed of two Board members and the Executive Director to evaluate future procurements and to guide the process from beginning to end. It also resolved to adhere to state travel requirements. The Board's response was published along with the audits.

Convinced that the audits unduly cast his actions in a negative light, plaintiff filed the instant suit seeking damages for defamation.[4] Named as defendants were Daryl Purpera, individually, and in his official capacity as Louisiana Legislative Auditor, and the State of Louisiana, through the Louisiana Legislative Auditor.

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[4] Plaintiff's petition alleges that he was unfairly targeted and singled out for criticism because of his race. These allegations are serious, and not to be taken lightly, but because of the narrowness of the motion before the court, they are not relevant to the issues discussed herein.

Following a ruling by the district court sustaining an exception of no cause of action to his original petition, plaintiff filed a Restated, Supplemental and Amending Petition. Defendants responded by filing a Special Motion to Strike pursuant to La. C.C.P. art. 971. The district court granted the motion to strike with respect to the Legislative Auditor in his individual capacity. It denied the motion as to the State of Louisiana and the Legislative Auditor in his official capacity, ruling that the state entities could not avail themselves of the Article 971 special motion to strike.

In response, the remaining defendants–Daryl Purpera in his official capacity as Louisiana Legislative Auditor and the State of Louisiana through the Louisiana Legislative Auditor–filed a motion for summary judgment. The motion rested on two grounds: (1) the statements in the audits are not defamatory as a matter of law; and (2) the statements in the audits are all true. The district court allowed the parties to conduct limited discovery, following the conclusion of which the motion for summary judgment was briefed and orally argued.

At the conclusion of the hearing, the district court denied defendants' motion for summary judgment. Acknowledging that whether words are capable of having a defamatory meaning is a question of law, the district court nevertheless reasoned that questions of fact as to the subjective intentions of the Auditor precluded summary judgment:

> [I]t is alleged and supported by jurisprudence that whether it's defamatory per se is a question of law to be decided by the court. But as with so many issues, there must be a determination of fact before the question of law can be decided. As argued by the plaintiff, it is more than just an allegation of a crime. There can be an allegation or publication which diminishes the status of the plaintiff in the eyes of the public. And we can get down to splitting hairs as to whether saying that Mr. Johnson testified before the legislature, and his testimony was not correct is an allegation of perjury or not. But it certainly could be interpreted in that way if the trier of fact were to make a determination that that is what the auditor was alleging. The same is true for the

> malfeasance and other allegations against the executive director. ... As I mentioned, this may be a determination that is considered a determination of law, but it cannot be made without all of the facts. I think there are issues of fact which preclude this court making such a legal determination at this point, so the motion for summary judgment is denied.

Defendants sought supervisory review from this ruling. Following briefing and argument, ordered pursuant to La. C.C.P. art. 966(H), a divided panel of the court of appeal denied defendants' writ application. The majority explained:

> While the question of whether a communication is defamatory is one of law, genuine issues of material fact exist herein, specifically as to whether or not defendants/relators, Daryl Purpera and the State of Louisiana through the Louisiana Legislative Auditor, implicitly accused plaintiff, Jacob Johnson, of violations of criminal law. See **Costello v. Hardy**, 2003-1146 (La. 1/21/04), 864 So.2d 129, 140. As noted by the district court, the implication and interpretation of the challenged statements, and whether the Legislative Auditor's reports accuse Johnson of perjury, theft, and malfeasance, are questions of fact properly reserved for a jury. Under a theory of defamation *per se*, words which expressly or implicitly accuse another of criminal conduct, or which by their very nature tend to injure one's personal or professional reputation, without considering extrinsic facts or circumstances, are considered defamatory *per se*. **Kennedy v. Sheriff of East Baton Rouge**, 2005-1418 (La. 7/10/06), 935 So.2d 669, 675. As such, summary judgment is not appropriate at this time.
>
> Moreover, genuine issues of material fact remain concerning Johnson's status as a public official, the designation of which is critical, as he is unable to assert a theory of defamation by innuendo if categorized as such. **Fitzgerald v. Tucker**, 98-2313 (La. 6/29/99), 737 So.2d 706, 717. Under a theory of defamation by innuendo, a plaintiff may recover for truthful statements of fact which carry a false, defamatory implication about another. In other words, defamatory meaning can be insinuated from an otherwise true communication. ***Id.*** Herein, if the statements contained in the Legislative Auditor's reports are true, and if held to be a public official, Johnson is unable to assert a claim of defamation by innuendo. Consequently, as genuine issues of material fact exist concerning the extent of Johnson's authority and duties as HEAL executive director, specifically as related to, and contrasted with, the HEAL Board of Trustees, summary judgment is not appropriate at this time.

Johnson v. Purpera, 19-1503 (La.App. 1 Cir. 9/10/20) (unpublished).

Chief Judge Whipple dissented from the writ denial. Her *de novo* review of the record led her to conclude that the audit reports did not contain any defamatory words; rather, "the LLA simply discovered that certain rules and regulations were not followed by Johnson, as HEAL Executive Director, in specific instances, and noted that a statement made by Johnson was inaccurate based on facts as outlined in the audit reports." ***Id.*** Chief Judge Whipple found that, as a matter of law, a statement that a public agency did not always comply with paperwork requirements is not defamatory, and that the audits in question did not impute any violation of criminal law to either HEAL or Mr. Johnson. Further, she found that the challenged statements in the audits are not "provably false," but "merely convey the auditors' professional judgments that HEAL and Johnson's practices fell short of state policy." ***Id.*** As statements of opinion relating to matters of public concern that do not contain a provably false factual connotation, Chief Judge Whipple concluded the statements are constitutionally protected, citing **Lamz v. Wells**, 2005-1497 (La.App. 1 Cir. 6/9/06), 938 So.2d 792, 798, and **Romero v. Thomson Newspapers (WI), Inc.**, 94-1105 (La. 1/17/95), 648 So.2d 866, 870 (citing **Milkovich v. Lorain Journal Co.,** 497 U.S. 1, 20 (1990)). She would have granted the writ, reversed the district court's judgment, and rendered judgment in favor of defendants.

This court granted defendants' application for supervisory review, primarily to address and clarify the respective roles of the court and the trier of fact in resolving defamation claims and, more particularly, in assessing whether words are capable of a defamatory meaning and whether a plaintiff is a public official. **Johnson v. Purpera**, 20-01175 (La. 1/12/21), 308 So.3d 298.

LAW AND ANALYSIS

This case comes before the court via a motion for summary judgment. As a result, our review is *de novo*, using the same criteria that govern the district court's consideration of whether summary judgment is appropriate. **Kennedy v. Sheriff of East Baton Rouge**, 05-1418, p. 25 (La. 7/10/06), 935 So.2d 669, 686. Pursuant to La. C.C.P. art. 966(A)(3), a court must grant a motion for summary judgment "if the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law." Notably, while the burden of proof remains with the movant, if, as here, the movant will not bear the burden of proof at trial of the matter, the movant's burden on the summary judgment motion does not require him to negate all essential elements of the adverse party's claim, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim; thereafter, the burden is on the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law. La. C.C.P. art. 966(D)(1).

The motion for summary judgment before the court arises out of plaintiff's claim for defamation. Emanating from La. C.C. art. 2315, defamation is a tort involving the invasion of a person's interest in his or her reputation and good name. **Kennedy**, 05-1418 at 4, 935 So.2d at 674; **Costello v. Hardy**, 03-1146, p. 12 (La. 1/21/04), 864 So.2d 129, 139. Four elements are necessary to establish a claim for defamation: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault (negligence or greater) on the part of the publisher; and (4) resulting injury. ***Id.***; RESTATEMENT (SECOND) OF TORTS § 558 (1977). As we explained in **Costello**, the fault requirement is generally referred

to in the jurisprudence as malice, actual or implied. **Costello**, 03-1146 at 12, 864 So.2d at 139.

Given the foregoing, in order to prevail on a defamation claim, a plaintiff must prove "'that the defendant, with actual malice or other fault, published a false statement with defamatory words which caused plaintiff damages.'" ***Id.*** (quoting **Trentecosta v. Beck**, 96-2388, p. 10 (La. 10/21/97), 703 So.2d 552, 559). If even one of the required elements of the tort is lacking, the claim fails. ***Id.***

Because of their chilling effect on the exercise of free speech, defamation actions traditionally have been found particularly appropriate for resolution by summary judgment. "Summary adjudication, we have recognized, is a useful procedural tool and an effective screening device for avoiding the unnecessary harassment of defendants by unmeritorious actions which threaten the free exercise of rights of speech and press." **Kennedy**, 05-1418 at 25, 935 So.2d at 686.

Consistent with this maxim, the defendants filed a motion for summary judgment asserting the plaintiff will not be able to establish two essential elements of his defamation claim: (1) defamatory words; and (2) a false statement of fact. In addressing the first ground on which the defendants' summary judgment is based–whether the words used in the audits are capable of a defamatory meaning–both the district court and the court of appeal majority began their analysis by acknowledging that the question of whether a communication is defamatory is one of law. Nevertheless, both lower courts opined that genuine issues of material fact exist with respect to whether the challenged words implicitly accuse plaintiff of a crime and are, thus, defamatory *per se*, and that this determination is one for the trier of fact in the first instance. On this point, the lower courts erred.

While defamation is a state law tort, the First Amendment to the U.S. Constitution and its prohibition against any law abridging freedom of speech or of the press impose constraints where public officials and public concerns are involved. **Kennedy**, 05-1418 at 6, 935 So.2d at 675. As a consequence, and in order to avoid the chilling effect and self-censorship that defamation cases invite, it falls to the court to determine in the first instance whether words fall outside the realm of protected speech. **New York Times Co. v. Sullivan**, 376 U.S. 254, 285 (1964) (quoting **Pennekamp v. Florida**, 328 U.S. 331, 335 (1946)) (Where the question is whether the line between speech unconditionally guaranteed and speech which may legitimately be regulated has been crossed, "we 'examine for ourselves the statements in issue and the circumstances under which they were made to see whether they are of the character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.'"). This is the rule that has obtained and been consistently observed by the courts in Louisiana. **Costello**, 03-1146 at 13, 864 So.2d at 140 (citing **Sassone v. Elder**, 626 So.2d 345, 352 (La. 1993)) ("The question of whether a communication is capable of a particular meaning and whether that meaning is defamatory is ultimately a legal question for the court."); **Fitzgerald v. Tucker**, 98-2313, p. 11 (La. 6/29/99), 737 So.2d 706, 716 (quoting **Mashburn v. Collin**, 355 So.2d 879, 886-87 (La. 1977)) ("[W]hen interpretation of a communication in light of the constitutional requirements is involved, our scope of review is to examine in depth the "statements in issue" and the "circumstances under which they were made," and to "re-examine the evidentiary basis of the lower court decision in the light of the Constitution.").

As we explained in **Sassone**, whether a communication is capable of a particular meaning and whether that meaning is defamatory is a question for the

court; whether a communication, which is capable of a defamatory meaning, was so understood by its recipient is a question for the trier of fact or the jury. **Sassone**, 626 So.2d at 352. Thus, in the determination of whether a given communication is defamatory, three questions typically arise. The first is whether the communication was reasonably capable of conveying the particular meaning or innuendo ascribed to it by the plaintiff. The second is whether that meaning is defamatory in character. And, finally, the third question is whether the meaning in question was in fact conveyed to and understood by the recipient of the communication. The first two questions are reserved for resolution by the court. The third is for the jury or the trier of fact to decide. ***Id.***; RESTATEMENT (SECOND) OF TORTS § 614 (1977).

In this case, the lower courts abandoned the long-standing rule regarding the respective roles of the court and the jury in defamation cases and the responsibility to determine, in the first instance, whether the challenged words in the audits are capable of the particular meaning ascribed to them by the plaintiff and whether that meaning is defamatory. It is not the role of the jury or the trier of fact to determine "the implication and interpretation of the challenged statements," at least insofar as imputations of criminal conduct are concerned. The words themselves are not in dispute, and they are in the record. It is uniquely the role of the court to determine if those words are capable of a particular meaning and if that meaning is defamatory.

In the same vein, the majority of the court of appeal erred in assigning to the jury or trier of fact the determination of whether plaintiff is a public official. Since the seminal decision of the U.S. Supreme Court in **New York Times v. Sullivan**, *supra*, the determination of whether the plaintiff in a defamation action is a public

official is foundational, as it controls the plaintiff's burden of proof.[5] For that reason, the Court has ruled that the question of whether a person is a public official or a private figure is a question of law for the court to resolve. **Rosenblatt v. Baer**, 383 U.S. 75, 88 (1966) ("[I]t is for the trial judge in the first instance to determine whether the proofs show [plaintiff] to be a 'public official.'"). Indeed, until the present decision, the rule in the First Circuit has been precisely that. **Guzzardo v. Adams**, 411 So.2d 1148, 1150 (La. App. 1 Cir. 1982) ("[T]he trial judge was correct in deciding that issue [whether the proofs show plaintiff to be a 'public official'] rather than sending same to the jury."). As with the determination of whether words are capable of a particular meaning and whether that meaning is defamatory, the determination of whether a plaintiff is a "public official" is one reserved for the court.

Turning to the merits of the summary judgment motion, defendants contend that the words in the audits are not defamatory as a matter of law. "By definition, a statement is defamatory if it tends to harm the reputation of another so as to lower the person in the estimation of the community, deter others from associating or dealing with the person, or otherwise expose the person to contempt or ridicule." **Kennedy**, 05-1418 at 4-5, 935 So.2d at 674 (citing **Costello**, 03-1146 at 13, 864 So.2d at 140, and **Trentecosta**, 96-2388 at 10, 703 So.2d at 559). "Thus, a communication which contains an element of personal disgrace, dishonesty, or disrepute undoubtedly satisfies the definition of defamatory." **Fitzgerald**, 98-2313 at 11, 737 So.2d at 716. However, not all defamatory statements are actionable, as many are protected by the First Amendment's guarantee of freedom of speech. ***Id.***

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[5] In **New York Times**, the Court held that the First Amendment prohibits a public official from recovering damages arising from a defamatory falsehood published in relation to his or her official conduct unless the public official proves that the statement was made with "actual malice;" *i.e.*, with knowledge that it was false or with reckless disregard of whether it was false or not. **New York Times**, 376 U.S. at 279-80.

As the court explained in **Fitzgerald**, there are three types of defamatory statements that are actionable in Louisiana: (1) false defamatory statements of fact; (2) statements of opinion which imply false defamatory facts; and (3) truthful statements which carry a defamatory implication. ***Id.***, 98-2313 at 11-13, 737 So.2d at 716-17. This latter, or third, type of defamatory statement is referred to in the jurisprudence as defamation by implication or innuendo, and "occurs when one publishes *truthful* statements of fact, and those *truthful* facts carry a false, defamatory implication." ***Id.***, 98-2313 at 12, 737 So.2d at 717. In other words, it occurs where a defamatory meaning can be insinuated from an otherwise true statement. ***Id.***; **Schaefer v. Lynch**, 406 So.2d 185, 188 (La. 1981). However, it is actionable only if the statements regard a private individual *and* private affairs. ***Id.***, 98-2313 at 13, 737 So.2d at 717. Where public affairs are concerned, the publication of true statements is encouraged, and there can be no civil or criminal liability for such, regardless of ill-will or improper motive on the part of the speaker. **Schaefer**, 406 So.2d at 188 (citing **Garrison v. State of Louisiana**, 379 U.S. 64, 74 (1964)).

In the instant case, a majority of the court of appeal theorized that the plaintiff might have available to him a claim of defamation by innuendo, depending on his status as either a private individual or a public official. Finding that genuine issues of material fact remain concerning plaintiff's status, the court of appeal concluded that, on this basis, summary judgment is not appropriate "at this time." Respectfully, in this conclusion, the court of appeal erred.

The error occurred because, as discussed *supra*, the question of whether plaintiff is a public official or a public figure is a question of law for the court to resolve. The question should not have been relinquished to a future jury. Furthermore, while the question of plaintiff's status as a private individual or public

official is a legal one this court can reach,[6] it is not necessary for us to do so in this instance because defamation by innuendo is only available when, as noted above, statements regard a private individual *and* private affairs. **Schaefer**, 406 So.2d at 188. Here, the audits address the administration and operations of a public agency, HEAL. As such, they address matters of public concern. **Connick v. Myers**, 461 U.S. 138, 146 (1983) (Speech in relation to a matter of public concern is speech "relating to any matter of political, social, or other concern to the community.") Certainly, the management (or possible mismanagement) of a public agency is a matter of concern to the public; therefore, on that basis alone, defamation by innuendo is unavailable to the plaintiff. See **Fitzgerald**, 98-2313 at 16-17, 737 So.2d at 720 (because mismanagement by the Louisiana State Board for the Certification of Substance Abuse Counselors which resulted in the issuance of unnumbered and improperly executed certificates and the issuance of those certificates were matters of public concern, defendant's truthful statement of fact did not give rise to a claim of defamation by innuendo).

Because defamation by innuendo is unavailable to plaintiff, to be actionable, the audits must contain either false defamatory statements of fact about the plaintiff or statements of opinion which imply false defamatory facts about the plaintiff.

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[6] A "public official" has been variously defined as a person or persons "among the hierarchy of government employees who have, or appear to have, substantial control over the conduct of government affairs," and as a person who holds a governmental position that "has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees." **Rosenblatt**, 383 U.S. at 85, 86. While we do not decide the issue of whether plaintiff is a public official here, we note that plaintiff's position as Executive Director of HEAL, a public agency, made him the public face of that agency. Indeed, the premise of his defamation suit is that the public would regard him as the person responsible for the operations of the agency, and attribute to him its deficiencies (as well as successes). Moreover, in his role as Executive Director (a position created by statute), plaintiff represented the agency before the legislature and negotiated and signed state contracts worth substantial sums of money, strongly suggesting that he was in a position to "have, or appear to have, substantial control over the conduct of government affairs."

Fitzgerald, 98-2313 at 11-13, 737 So.2d at 716-717; RESTATEMENT (SECOND) OF TORTS §§ 565 & 566 (1977).

The threshold question in any defamation action is whether the words complained of are capable of a defamatory meaning. **Costello**, 03-1146 at 15, 864 So.2d at 141. This question is answered by reading the publication as a whole. **Sassone**, 626 So.2d at 352; **Cortez v. Shirley**, 555 So.2d 577, 579 (La.App. 1 Cir. 1989). The challenged words must be construed according to the meaning that will be given them by reasonable individuals of ordinary intelligence and sensitivity, and they must be understood in the context in which they were used and in the manner shown by the circumstances under which they were used. **Cortez**, 555 So.2d at 580-81. Ultimately, the question posed to the court is whether a particular statement is objectively capable of having a defamatory meaning, considering the statement as a whole, the context in which it was made, and the effect it is reasonably intended to produce in the mind of the average listener. **Sassone**, 626 So.2d at 352; **Kosmitis v. Bailey**, 28,585, p. 3 (La. App. 2 Cir. 12/20/96), 685 So.2d 1177, 1180.

As this court has noted, defamatory words have traditionally been classified into two categories: those that are defamatory *per se* and those that are capable of a defamatory meaning. **Costello**, 03-1146 at 13-14, 864 So.2d at 140. "Words which expressly or implicitly accuse another of criminal conduct, or which by their very nature tend to injure one's personal or professional reputation, even without considering extrinsic facts or circumstances, are considered defamatory per se." ***Id.***

Here, the plaintiff maintains that the audits falsely accuse him of criminal conduct and are, thus, defamatory *per se*. Specifically, plaintiff points to language in the informational audit which reports:

> During the House of Representatives Health and Welfare committee meeting on May 24, 2016, the HEAL executive director testified that HEAL had completed a YMCA project last year, but that statement was inaccurate. In July 2015, the State Bond Commission conditionally approved the issuance of $6 million in revenue refunding bonds to provide for the acquisition and construction of the Greater New Orleans YMCA's flagship location. However, as of the date of this report, these bonds have not been issued because the YMCA is still searching for a location for its new facility.

Plaintiff maintains that this statement is tantamount to an accusation of perjury.

In a similar vein, plaintiff points to language in the audit reporting that (1) "HEAL has not funded a construction project since 2004" and (2) when HEAL was statutorily removed from the oversight of the Louisiana Department of Health "HEAL had no transition plan in place and found itself with no email services and no way to pay its employees or its bills." He maintains that these statements are tantamount to an accusation that he committed malfeasance in office.

Additionally, plaintiff points to the following language in the audit as tantamount to an accusation of theft:

> During our review of supporting documentation, we identified 58 dates where the executive director requested reimbursement for mileage within his official domicile of New Orleans. The mileage reimbursement requests ranged from one to 29 miles. According to state travel regulations, employees may not be reimbursed for travel within their domicile unless they have obtained an authorization for routine travel as a regular and necessary part of the employee's duties. We reviewed the executive director's annual travel authorization forms and approved reimbursement forms. However, we did not note any specific mention of authorization for travel within domicile. The executive director was paid $215.73 in violation of state travel regulations.

While we agree with plaintiff that a speaker can accuse someone of a crime without stating the statutory basis for the offense,[7] in this instance, considering the

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[7] Thus, for example, we concluded in **Kennedy** that an allegation to law enforcement officers that the plaintiff "had passed counterfeit or unlawful tender at its restaurant" could be construed as a false accusation of the crime of monetary instrument abuse, La. R.S. 14:72.2, even though the criminal statute was not cited by the speaker. **Kennedy**, 05-1418 at 5, 935 So.2d at 675.

statements in the context of the paragraphs in which they appear as well as in the context of the audits overall, we are inexorably led to the conclusion that they are not capable of being understood by a reasonable viewer as accusations of perjury, malfeasance and/or theft, as plaintiff maintains.

As regards the statement that plaintiff's testimony before a legislative committee regarding completion of a YMCA project was "inaccurate," this statement appears in a section of the informational audit which reports on HEAL's bonding activity. In that paragraph, the auditor explains that conditional approval for issuance of $6 million in revenue refunding bonds had been obtained, but that the bonds had not yet been issued because the YMCA had not found a location for its new facility; therefore, the statement that the YMCA project had been "completed" was "inaccurate." In other words, according to the audit, the statement told only part of the story. This is hardly an allegation of perjury. By definition, perjury is the intentional making of a false statement on a matter material to the issue or question in controversy. La. R.S. 14:123. In the understanding of a reasonable individual of ordinary intelligence and sensitivity, the statement that an individual's account of an event is "inaccurate," is hardly an accusation that individual committed the offense of perjury. There is no mention of an oath; no intimation of an intent to mislead. In short, there are present in the statement none of the elements that would constitute, or be understood by the reasonable person as alleging, the crime of perjury. Moreover, rather than being directed at plaintiff personally, the comment, when considered in context, is more generally offered as evidence of the Board's failure to fund a construction project since 2004, and not as an allegation of criminal wrongdoing on the part of the plaintiff.

Insofar as the statement that plaintiff was paid $215.73 "in violation of state travel regulations" is concerned, it is clear from a reading of the statement, in context, that the auditor is merely pointing out that state travel regulations require special authorization in order for an employee to receive reimbursement for travel within his or her domicile, and that documentation indicating that plaintiff received that special authorization was not specifically mentioned in his annual travel authorization forms and approved reimbursement forms. This allegation of missing documentation is hardly an allegation of theft;[8] nor would it be understood as such by a reasonable individual of ordinary intelligence. There is no suggestion by the auditor of fraudulent conduct or of an intent to misappropriate on the part of the plaintiff.

With respect to the statements that "HEAL has not funded a construction project since 2004" and that when HEAL was removed from the oversight of the Louisiana Department of Health "HEAL had no transition plan in place and found itself with no email services and no way to pay its employees or bills," these statements do not, as plaintiff alleges, accuse plaintiff of malfeasance in office. In fact, the statements do not even refer to plaintiff. HEAL and its executive director are not synonymous. Repeatedly and consistently, the audit distinguishes between the two. The comments plaintiff complains of as defamatory are clearly directed at the HEAL Board and its performance.[9] Therefore, however distasteful plaintiff may

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[8] Theft is the "misappropriation of taking of anything of value which belongs to another, either without the consent of the other to the misappropriation or taking, or by means of fraudulent conduct, practices, or representations." La. R.S. 14:67. It requires an intent to deprive the other permanently of whatever may be the subject of the misappropriation or taking. ***Id.***

[9] Plaintiff did not begin working at HEAL until 2011, and only became Executive Director in December 2012, so the agency's bonding activity, or lack thereof, since 2004 clearly references the Board's performance, and not the plaintiff's. Further, the audit makes clear that the responsibility for development of a transition plan was that of the Board, and not plaintiff, as immediately following the sentence noting that HEAL had no transition plan in place, the audit states: "We asked for a transition plan that would address the changes outlined by the legislation, but none was provided. **We reviewed the Board meeting minutes but found no discussion of a transition plan if legislation were passed."** [emphasis supplied].

find the comments, they are not capable of being understood by a reasonable person as intending a defamatory meaning toward plaintiff and, thus are not actionable.[10] See **Sassone**, 626 So.2d at 355 (to be actionable, statements must be capable of being understood by a reasonable person as intending a defamatory meaning *to these plaintiffs*); See also RESTATEMENT (SECOND) OF TORTS § 564 (1977).

In addition to the foregoing statements in the audits, plaintiff points to a section in the informational audit that appears under the heading "HEAL management executed contracts that circumvented state purchasing oversight controls and violated state purchasing regulations." Therein, the audit identifies four professional service contracts signed by plaintiff (a consulting contract with SSA Consultants, a legal services contract with Kinney, Ellinghausen, Richard & DeShazo, an accounting services contract with Luther Speight & Company, and a contract for lobbying services with Southern Strategy Group) which did not have the approval and signature authority of the undersecretary of the Louisiana Department of Health, which, during the time period of the audits, had statutory oversight of HEAL. This section of the audit identifies each of the contracts and, after explaining the nature, circumstances and required signatures for each, recites, as to each: "[T]he executive director signed this contract [or contract extension] but did not obtain the approval

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[10] The same result obtains with respect to plaintiff's complaints regarding the audit's statement noting that some Board members did not receive annual ethics training and that attendance at Board meetings was poor, that HEAL had failed to obtain financial audits in the past, and that plaintiff received salary performance increases. None of these statements could be understood by a reasonable person as intending a defamatory meaning to this plaintiff. (Contrary to plaintiff's protestation, there is absolutely no language in the audits that could be construed as suggesting that plaintiff improperly gave himself the salary increases. The audit simply states: "[W]e noted that the executive director has received salary performance increases of 7.6% in 2014, 4% and a subsequent 2% increase in 2015, and a 3% increase in 2016."). A similar conclusion results with respect to the "embargoed emails" plaintiff claims were distributed indiscriminately by the Auditors' office. The emails–which alert to the LLA's upcoming public release of audits–do not contain any reference to plaintiff, identifying only the agency itself, and not any of its staff or management. A reasonable person reading these emails would not understand them as intending a defamatory meaning to this plaintiff.

and required signature authority of the LDH undersecretary, obligating LDH and the state without proper authority." Plaintiff maintains that these statements accuse him of illegal conduct and, at the very least, diminish his status in the eyes of the public and, thus, are defamatory *per se*.

Whether or not one or more of these statements regarding the execution of professional service contracts "without proper authority," and "in circumvention of state purchasing oversight controls" and "in violation of state purchasing regulations" can be construed as attributing criminal conduct to plaintiff, we have no difficulty concluding that they are objectively capable of having a defamatory meaning. While there is no imputation in the statements that plaintiff lacked integrity or acted immorally or unethically or with the requisite *mens rea* to constitute the crime of malfeasance,[11] the allegations nevertheless call into question plaintiff's professional competence and reputation, and can reasonably be viewed as having the effect of lowering plaintiff in the estimation of the community.

Of course, the determination that words are capable of a defamatory meaning does not end our inquiry in this case, for, as we have pointed out, not all defamatory statements are actionable. A statement of opinion relating to matters of public concern that does not contain a provably false factual connotation is entitled to full constitutional protection. **Romero v. Thomson Newspapers (Wisconsin), Inc.**, 94-1105, p. 7 (La. 1/17/95), 648 So.2d 866, 870 (citing **Milkovich v. Lorain Journal**

[11] Malfeasance in office is committed when a public officer or employee intentionally refuses to perform any duty lawfully required of him or intentionally performs any such duty in an unlawful manner. La. R.S. 14:134. As we explained in **State v. Petitto**, 10-0581 (La. 3/15/11), 59 So.3d 1245, 1254, the statute requires that the act or failure to act must be intentional on the part of the public officer or employee. Mere inadvertence or negligence, or even criminal negligence, will not constitute a violation of the statute.

Co., 497 U.S. 1, 20 (1990)). This principle has its origin in oft-quoted language from **Gertz v. Robert Welch, Inc.**, 418 U.S. 323, 339-40 (1974):

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.

Drawing from the **Gertz** language, this court has declared "that the First Amendment freedoms ... affords [sic], at the very least, a defense against defamation actions for expressions of opinion." **Mashburn**, 355 So.2d at 885. From this declaration has evolved the rule that if a statement expresses an opinion, unless the opinion implies a false and libelous fact, a defamation action will not succeed. **Romero**, 94-1105 at 8, 648 So.2d at 870; **Bussie v. Lowenthal**, 535 So.2d 378, 381 (La. 1988); **Fitzgerald**, 98-2313 at 12, 737 So.2d at 717. This, as the court has explained, is because falsity is an indispensable element of any defamation claim, and a pure statement of opinion, which is based totally on the speaker's or writer's subjective view, can neither be true nor false. **Bussie**, 535 So.2d at 381.

Admittedly, the determination of whether a statement is an assertion of fact or a mere expression of opinion is somewhat "difficult to state in abstract terms." **Mashburn**, 355 So.2d at 885. As a practical matter, however, "the crucial difference between statement of fact and opinion depends upon whether ordinary persons hearing or reading the matter complained of would be likely to understand it as an expression of the speaker's or writer's opinion, or as a statement of existing fact." ***Id.*** As the court explained in **Mashburn**:

> The opinion may be ostensibly in the form of a factual statement if it is clear from the context that the maker did not intend to assert another objective fact but only his personal comment on the facts which he had stated. An expression of opinion occurs when the maker of the comment states the facts on which his opinion of the plaintiff is based

> and then expresses a comment as to the plaintiff's conduct, qualifications or character; or when both parties to the communication know the facts or assume their existence and the comment is clearly based on the known or assumed facts in order to justify the comment.

Id.

Whether a statement constitutes a constitutionally protected assertion of opinion is a question for the court to resolve. **Fitzgerald**, 98-2313 at 11, 737 So.2d at 716; **Mashburn**, 355 So.2d at 887. Resolution of the issue depends on the facts of each particular case and "upon the circumstances in which the statement was made, and the reasonable inferences which may be drawn from a statement of opinion will vary depending upon the circumstances of the case." **Fitzgerald,** 98-2313 at 13, 737 So.2d at 718.

With these precepts in hand, we consider separately the portions of the audits which plaintiff identifies as defamatory, keeping in mind that each statement must be considered in the context of the entire report.

The first statement plaintiff points to is the comment in the section of the audit addressing HEAL's bonding activity; more specifically, the sentence which reports that "[d]uring the House of Representatives Health and Welfare committee meeting on May 24, 2016, the HEAL executive director testified that HEAL had completed a YMCA project last year, *but that statement was inaccurate*." (Emphasis supplied.) This statement is immediately followed by a recitation of the facts on which that statement is based: "In July 2015, the State Bond Commission conditionally approved the issuance of $6 million in revenue refunding bonds to provide for the acquisition and construction of the Greater New Orleans YMCA's flagship location. However, as of the date of this report, these bonds have not been issued because the YMCA is still searching for a location for its new facility." Plaintiff does not dispute that the

facts recited are true; rather he takes issue with the characterization of his testimony. Given the circumstances surrounding the statement, we have no difficulty concluding that ordinary persons reading it would be likely to understand it as an expression of the auditor's opinion. Indeed, the statement has all the earmarks of opinion: the auditor states the facts on which his opinion is based and expresses a comment as to plaintiff's conduct. The word "accuracy" is, by nature, a subjective term. No undisclosed facts are implied. In the context of the audit, the statement characterizing plaintiff's testimony as "inaccurate" is an expression of pure opinion.

The second statement(s) plaintiff identifies derive from the section of the audit titled: "HEAL management executed contracts that circumvented state purchasing oversight controls and violated state purchasing regulations." Directly following this statement, the audit explains:

> During our review of professional services expenses, we identified contracts signed only by the HEAL executive director and not approved by LDH's undersecretary, which **circumvented state purchasing oversight controls and violated state purchasing regulations.** During the time period of our review, HEAL was statutorily under the oversight of the LDH undersecretary. While HEAL was authorized to determine the necessity of contracting for professional services, the undersecretary of LDH's Office of Management and Finance had the sole authority to solicit for bids and execute such contracts. The results of our review of those contracts are as follows:

The audit then proceeds to identify four contracts–a consulting contract with SSA Consultants, a legal services contract with Kinney, Ellinghausen, Richard & DeShazo, an accounting services contract with Luther Speight & Company, and a lobbying services contract with Southern Strategy Group. As to each of the contracts, the audit documents the facts surrounding the confection of each contract, the terms thereof, the approvals/signatures required for each, and the corrective action taken to cure the deficiencies/missing approvals once the auditors brought those deficiencies

to the attention of the HEAL Board. Thus, for example, with respect to the consulting contract, the audit recites:

> During fiscal year 2015, HEAL attempted to amend a consulting contract with SSA Consultants (SSA) to extend the original contract terms from a one-year contract totaling $19,500 to a three-year contract totaling $172,000. LDH did not approve this contract amendment, as the dollar amount of the contract required that the agency follow a competitive Request for Proposals process. Subsequently, HEAL created a new contract with the same consulting agency for a three-year term totaling $172,000. The state Office of Contractual Review (OCR) did not approve this contract because it was classified as a professional services contract rather than a consulting contract. **Despite not receiving approval from LDH and OCR, HEAL's executive director executed the contract as an LDH contract, with his signature only, and without the required competitive bid.** Documentation provided to us by LDH showed that the department notified the executive director each time the contract was denied that the contract was for consulting services that exceeded $50,000, and thus required a competitive award process. As of June 30, 2016, a total of $50,671 has been paid on this contract. In addition, as of June 30, 2016, there was an additional $54,427 of outstanding invoices owed to the consultant for work performed through fiscal year 2016.
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> Because HEAL was not compliant with state requirements regarding the execution of the contract, the Commissioner of Administration has the option to either ratify and affirm the contract if it is in the best interests of the State or terminate the contract and compensate the consultants for actual expenses incurred for services performed prior to termination. Once we brought this issue to the attention of the HEAL Board and SSA, SSA informed us that they would no longer perform services under this contract or any other business with HEAL.

A similar analysis is offered as to each of the three remaining identified contracts.[12] For example, as regards the legal services contract, the audit reports:

> An amendment to one of the legal services contracts with Kinney, Ellinghausen, Richard & DeShazo, extending the contract to a term of four years, was not approved by the LDH undersecretary, the Attorney General, or the Joint Legislative Committee on the Budget (JLCB) as required. Contracts for legal services, and subsequent amendments, require the approval of the Attorney General; however, no such approval was obtained on this amendment. Contracts of more than three years but no more than five years require approval of the JLCB; however, no such approval was obtained. **Again, the executive director signed this**

[12] The full text of each of these paragraphs appears at pages 5-6, *supra*.

> **contract extension but did not obtain the approval and required signature authority of the LDH undersecretary, obligating LDH and the state without proper authority.** Once we brought this issue to the HEAL Board's attention, HEAL revised the contract amendment to involve only an extension of the dollar amount, an increase from $65,000 to $150,000, but not the length of the original contract. This revised amendment was subsequently approved by the Attorney General and the LDH undersecretary as required.

When this section of the audit is read in its entirety, we believe that ordinary persons reading it would likely understand that the statements suggesting that plaintiff "circumvented state purchasing oversight controls and violated state purchasing regulations," thereby "obligating LDH and the state without proper authority" are simply opinions voiced by the Auditor based on the facts documented. Indeed, as evidenced by the examples provided above, the audit articulates the facts on which the audit's conclusions are based, spelling out precisely the basis for the conclusions drawn. There is no suggestion of an undisclosed, or implied, defamatory fact. And, significantly, plaintiff does not allege that any of the underlying facts recited are false. In fact, he does not dispute signing the documents along with the third party contractors, or that the requisite approvals are missing; he merely disputes the efficacy of the contracts. As a result, none of the facts recited are provably false.

Clearly, an ordinary person reading the audits, we believe, would understand the language alleged by plaintiff to be defamatory simply conveys the Auditor's professional judgments or opinions based on the facts disclosed to the Auditor (and reported in the audits) during the audit process.[13] This is true for the remaining statements alleged by plaintiff to be defamatory: the statement that it "appears" that

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[13] Our analysis is not altered by the language in the one page summaries that accompanied each of the audits. The summaries simply repeat the conclusions, or opinions, of the Auditor and reference and incorporate the full audits; therefore, they must be considered in that context and not in isolation. Moreover, the word "findings" in the context of an audit is a term of art, and its use in that context does not convert an obvious opinion into a statement of fact.

HEAL used services for lobbying, "possibly" in violation of state law; and the statement that plaintiff was paid $215.73 for travel reimbursement "in violation of state travel regulations." In each of these instances, the audit reports the facts on which the Auditor's judgment or opinion is based. In the instance of lobbying services, in particular, the use of the words "appears" and "possibly" underscores the subjective nature of the assessment. In the instance of travel reimbursement, the audit states the basic facts. Plaintiff does not dispute that he received reimbursement for travel within the City of New Orleans, which was HEAL's domicile. Whether that reimbursement complies with state law is a matter of professional judgment, or opinion.

Based on the above analysis, we find that none of the statements in the audits identified by plaintiff as objectionable are actionable, defamatory statements. Rather, the statements are opinions, or conclusions, of the auditors based on disclosed facts and, as such, are not provably false. The opinions expressed do not imply the existence of false defamatory facts. As a result, they are entitled to full constitutional protection, **Romero**, 94-1105 at 7, 648 So.2d at 870, and the defendants are entitled to summary judgment in their favor.

As the Supreme Court noted nearly sixty years ago, where public issues are concerned, speech "should be uninhibited, robust, and wide-open, and ... it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." **New York Times**, 376 U.S. at 270. That precept rings especially true in this case, where the Louisiana Legislative Auditor is charged by statute with the obligation to "call attention to those matters required by governmental auditing standards, including reportable conditions, failure to comply with laws and regulations, and such additional matters that may be included in a management

letter." La. R.S. 24:516(A)(2).[14] In other words, it is the role and the duty of the Auditor to examine the facts and offer a professional judgment based on the disclosed facts as to any problems that might have been uncovered in the operations of the state, its agencies, or political subdivisions after reviewing those facts. Where, as here, the audit report articulates all the facts and then offers a finding or conclusion based on those disclosed facts, that finding or conclusion is a statement of opinion, which cannot form the basis of a defamation claim. Otherwise, as the Legislative Auditor argues, the utility of the office, and the public debate surrounding government affairs, will be significantly diminished.

CONCLUSION

For the foregoing reasons, the judgments of the court of appeal and the district court are reversed. Defendants' motion for summary judgment is granted, and the plaintiff's case is dismissed with prejudice.

REVERSED; SUMMARY JUDGMENT GRANTED

[14] Of course, a different analysis obtains where private citizens and private affairs are involved. See, e.g., **Costello v. Hardy,** supra. This case involves public officials and matters of public concern. Moreover, the defendants, governmental entities, are entitled to the protection of the **New York Times** standard. **Davis v. Borskey,** 94-2399, p.10 (La. 9/5/95), 660 So.2d 17, 23 n.8.

SUPREME COURT OF LOUISIANA

No. 2020-CC-01175

JACOB JOHNSON

VS.

DARYL PURPERA, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS LOUISIANA LEGISLATIVE AUDITOR, STATE OF LOUISIANA, THROUGH LOUISIANA LEGISLATIVE AUDITOR

On Supervisory Writ to the 19th Judicial District Court, Parish of East Baton Rouge

HUGHES, J. concurs in part and dissents in part.

While I agree with most of the majority opinion, I find troubling the bold statement that "The executive director was paid $215.73 in violation of state travel regulations." This statement, specific in person and amount, is easily perceived as a statement of fact, even though it is in the greater context of the audit, and states wrongful conduct that could amount to an ethical, if not a criminal, violation. The statement would be safe if preceded by "it appears" or "in our opinion," but it is not.

SUPREME COURT OF LOUISIANA

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On Supervisory Writ to the 19th Judicial District Court,
Parish of East Baton Rouge

GRIFFIN J., dissents and assigns reasons.

As the majority opinion correctly notes, this case turns on whether the statements made by Defendant, Daryl Purpera (in his official capacity), were defamatory. Three questions arise when considering whether statements were defamatory. The first is whether the communication was capable of conveying the particular meaning or innuendo ascribed to it by plaintiff. The second is whether that meaning is defamatory in character. The third is whether the communication, capable of defamatory meaning, was so understood by its recipient. There is no dispute that the first two questions are left for the court to decide; nor that the third is left to the trier of fact. *Sassone v. Elder*, 626 So. 2d 345, 352 (La. 1993); RESTATEMENT (SECOND) OF TORTS § 614 (1977). The majority excludes consideration of the third question by the trier of fact because it finds that the words complained of were not defamatory as a matter of law.

Words can be defamatory in a number of ways. At issue here is defamation *per se*.[1] Words which expressly or implicitly accuse another of criminal conduct, or which by their very nature tend to injure one's personal or professional reputation, even without considering extrinsic facts or surrounding circumstances, are considered defamatory *per se*. *Costello v. Hardy*, 03-1146, p. 13-14 (La. 1/21/04), 864 So. 2d 129, 140. A defendant does not need to claim that a plaintiff violated a specific statute; they need only accuse him or her of conduct which is criminal. *Kennedy v. Sheriff of E. Baton Rouge*, 05-1418, p. 5 (La. 7/10/06), 935 So. 2d 669, 675. In the case *sub judice*, plaintiff, Jacob Johnson, pointed out several statements that can be seen as amounting to perjury, theft, or malfeasance in office:

> During the House of Representatives Health and Welfare committee meeting on May 24, 2016, the HEAL executive director testified that HEAL had completed a YMCA project last year, but that statement was inaccurate. In July 2015, the State Bond Commission conditionally approved the issuance of $6 million in revenue refunding bonds to provide for the acquisition and construction of the Greater New Orleans YMCA's flagship location. However, as of the date of this report, these bonds have not been issued because the YMCA is still searching for a location for its new facility.
>
> "HEAL has not funded a construction project since 2004."
>
> "Heal had no transition plan in place and found itself with no email services and no way to pay its employees or its bills."
>
> During our review of supporting documentation, we identified 58 dates where the executive director requested reimbursement for mileage within his official domicile of New Orleans. The mileage reimbursement requests ranged from one to 29 miles. According to state travel regulations, employees may not be reimbursed for travel within their domicile unless they have obtained an authorization for routine travel as a regular and necessary part of the employee's duties. We reviewed the executive director's annual travel authorization forms and approved reimbursement forms. However, we did not note any specific mention of authorization for travel within domicile. The executive director was paid $215.73 in violation of state travel regulations.

[1] In contrast, defamation by innuendo applies to statements that regard a private individual *and* private affairs. *Fitzgerald v. Tucker*, 98-2313, p. 13 (La. 6/29/99), 737 So. 2d 706, 717. The statements and facts in this case are obviously matters of public concern because they deal with compliance with state law; and statements regarding "compliance with the law [are] a matter of public concern." *Walker v. Board of Regents of University of Wisconsin System*, 300 F. Supp. 2d 836, 861 (W.D. Wisc. 2004) (collecting sources).

While recognizing that these statements can be read as falsely alleging criminal conduct, the majority finds that, *in context*, no reasonable person of ordinary intelligence and sensitivity could read them in such manner. The majority places no limits on its "in context" theory.

The majority also finds that the Defendant's statements about the YMCA project cannot be read as an allegation of perjury because the defendant used the word "inaccurate." Thus, "accuracy" is a purely subjective opinion-based term and not a factual allegation of criminal conduct. I respectfully disagree. Because I would find the statements at issue were capable of conveying allegations of criminality and were defamatory in character, I would affirm the district court's denial of summary judgment.

Additionally, the majority advances a policy argument that should summary judgment not be granted "the utility of the office [of the Legislative Auditor] and the public debate surrounding government affairs, will be significantly diminished." I am concerned, however, about the opposite issue – citizens whose reputations are damaged by government actors. Surely our First Amendment was not intended to grant government actors *carte blanche* power to defame their citizens and leave them without recourse.[2]

Finally, based on the facts in this case and the evidence presented, I do not believe this case to be in a posture for summary judgment.

[2] Official capacity suits are suits against the government entity. *Will v. Michigan dept. of State Police*, 491 U.S. 58, 71 (1989). Government entities do not enjoy the same First Amendment protections afforded to citizens. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 139 (1973) (Stewart, J., concurring) ("The First Amendment protects the press from governmental interference; it confers no analogous protection on the government").