

sufficiency reviews and issuing advisory opinions, I dissent.

**I. GATES'S LIABILITY:
DEFAMATION, CONSPIRACY, AND JOINT AND SEVERAL LIABILITY**

I disagree with the Court's holding that no clear and convincing evidence exists to support the jury's finding that Gates acted with actual malice. To the contrary, though Gates contends he never believed Bentley was corrupt, he participated on Bunton's program numerous times when Bunton repeatedly talked about Bentley's alleged corruption. And, on at least two of those occasions, Gates agreed with Bunton's statements, and Gates even listed additional examples of Bentley's alleged corruption. Based on the Court's extensive discussion about defamation jurisprudence and the actual malice standard, I conclude that this is clear and convincing evidence to support the jury's finding that Gates acted with actual malice.

The jury also found that Bunton and Gates conspired to defame Bentley. The jury assessed the damages Bunton and Gates each caused individually, but the trial court refused to hold them jointly and severally liable for the total damages. In response to Bentley's argument that the trial court erred in refusing to impose joint and several liability on Bunton and Gates, the court of appeals conceded that conspirators can be held jointly liable for acts done in furtherance of a conspiracy. ___ S.W.3d at ___. However, the court of appeals concluded that, "[i]n order to be entitled to judgment for joint and several liability, Bentley was required to secure a jury finding on the amount of damages he suffered as a result of the conspiracy itself." ___S.W.3d at ___ (citing *Belz v. Belz*, 667 S.W.2d 240, 243 (Tex. App.–Dallas 1984, writ ref'd n.r.e.)). The court of appeals explained that Gates could not be liable for the damages the jury awarded

against Bunton, because many of the defamatory acts occurred before Gates’s involvement in the Q & A program. ___ S.W.3d at ___. The court of appeals concluded that, to impose joint and several liability, a separate finding on the conspiracy damages was required but not submitted, and Bentley waived any objection to the charge as submitted. ___ S.W.3d at ___. Consequently, the court of appeals rejected Bentley’s argument that the trial court should have held Gates and Bunton jointly and severally liable. ___ S.W.3d at ___.

A. APPLICABLE LAW

A civil conspiracy is “a combination by two or more persons to accomplish an unlawful purpose, or to accomplish a lawful purpose by unlawful means.” *Firestone Steel Products Co. v. Barajas*, 927 S.W.2d 608, 614 (Tex. 1996); *see also State v. Standard Oil Co.*, 107 S.W.2d 550, 559 (Tex. 1937). “The essential elements are: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result.” *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983) (citations omitted).

A party who joins in a conspiracy is jointly and severally liable “for *all acts done by any of the conspirators* in furtherance of the unlawful combination.” *Carroll v. Timmers Chevrolet, Inc.*, 592 S.W.2d 922, 926 (Tex. 1979) (quoting *State v. Standard Oil*, 107 S.W.2d at 559) (emphasis added); *see also Akin v. Dahl*, 661 S.W.2d 917, 921 (Tex. 1983) (“[O]nce a civil conspiracy is found, each co-conspirator is responsible for the action of any of the co-conspirators which is in furtherance of the unlawful combination.”). Thus, if a conspiracy is proven, it can extend liability in tort beyond the active

wrongdoer to those conspirators who may have merely planned, assisted, or encouraged the wrongdoer's acts. *See Carroll*, 592 S.W.2d at 926. All the plaintiff must show for the alleged conspirators to be held jointly and severally liable is that they acted "in pursuance of the *common purpose* of the conspiracy." *Carroll*, 592 S.W.2d at 928 (citing *Berry v. Golden Light Coffee Co.*, 327 S.W.2d 436, 440 (Tex. 1959)) (emphasis added). "The gist of a civil conspiracy is the damage resulting from commission of a wrong which injures another, and not the conspiracy itself." *Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp.*, 435 S.W.2d 854, 856 (Tex. 1968).

B. ANALYSIS

The court of appeals' holding ignores the fact that all members of a conspiracy are liable for their co-conspirators' wrongful acts. And, even if a co-conspirator's acts occurred before the conspiracy formed, all the conspiring parties are liable for those acts, as long as those acts are made in furtherance of the "common goal" of the conspiracy — in this case, defaming Bentley. *See Akin*, 661 S.W.2d at 921; *Carroll*, 592 S.W.2d at 926.

Here, the jury found that Bunton published defamatory statements about Bentley with "actual malice" and "malice." The jury also found that Gates agreed with Bunton's defamatory statements and published his agreement with "actual malice" and "malice." Finally, the jury found that Bunton and Gates conspired to publish defamatory statements about Bentley. Thus, both Bunton and Gates acted with actual malice, and Bentley established the elements of the conspiracy. Accordingly, under Texas law, Gates and Bunton are jointly and severally liable "for all acts done by any of the conspirators" in furtherance of the

“common purpose” of the conspiracy. *Carroll*, 592 S.W.2d at 926; *see also Akin*, 661 S.W.2d at 921. In other words, our jurisprudence does not require the trial court to separately submit each co-conspirator’s civil conspiracy damages. When the jury found that liability for a civil conspiracy existed, this finding requires the legal conclusion to impose joint and several liability on the co-conspirators.

Because the co-conspirators’ common purpose in this case was to defame Bentley, the trial court was obligated to impose joint and several liability on Gates for all the damages arising from the common purpose, including those damages arising from defamatory statements made before Gates “joined” the conspiracy. *See Akin*, 661 S.W.2d at 921; *Carroll*, 592 S.W.2d at 926. Therefore, I would reverse the court of appeals’ holding about Bunton’s and Gates’s joint and several liability and render the judgment the trial court should have rendered based on the jury’s verdict. That is, Bunton and Gates, as co-conspirators, were jointly and severally liable for the total damages the jury found against each individual co-conspirator defendant.

II. MENTAL ANGUISH DAMAGES

A. APPLICABLE LAW

The United States Supreme Court has held that plaintiffs in state courts may not recover presumed or punitive damages for defamation if they do not show liability based on actual malice, which is “knowledge of falsity or reckless disregard for the truth.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). Thus, defamed plaintiffs who need only prove a lower culpability standard than actual malice may only recover compensation for “actual injury.” *Gertz*, 418 U.S. at 349. However, actual injuries are not

limited to out-of-pocket losses. *Gertz*, 418 U.S. at 350. “Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and *mental anguish and suffering*.” *Gertz*, 418 U.S. at 350 (emphasis added); *see also Time, Inc. v. Firestone*, 424 U.S. 448, 460 (1976).

In Texas, the standard for reviewing an excessive damages complaint is factual sufficiency of the evidence. *See Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406 (Tex. 1998); *Rose v. Doctors Hosp.*, 801 S.W.2d 841, 847-48 (Tex. 1990); *Pope v. Moore*, 711 S.W.2d 622, 624 (Tex. 1986). Further, Texas jurisprudence dictates that the standard for reviewing whether a trial court should have ordered a remittitur is factual sufficiency. *Rose*, 801 S.W.2d at 847-48; *Larson v. Cactus Util. Co.*, 730 S.W.2d 640, 641 (Tex. 1987). Because whether damages are excessive and whether a remittitur is appropriate are factual determinations that are final in the court of appeals, this Court lacks jurisdiction to review such findings, consider excessive damages complaints, and suggest remittiturs. TEX. CONST. art. V, § 6; TEX. GOV’T CODE § 22.225(a); TEX. R. APP. P. 46; *Akin*, 661 S.W.2d at 921; *Sweet v. Port Terminal R.R. Ass’n*, 653 S.W.2d 291, 295 (Tex. 1983); *Hall v. Villarreal Dev. Corp.*, 522 S.W.2d 195, 195 (Tex. 1975).

B. ANALYSIS

Because the Court concludes that clear and convincing evidence exists to prove Bunton acted with actual malice in defaming Bentley, the Court’s remaining constitutionally appropriate inquiry is solely

whether there is legally sufficient evidence to support the damages awarded. *See* TEX. CONST. art. V, § 6; TEX. GOV'T CODE § 22.225(a); *see also* *Hall*, 522 S.W.2d at 195 (Texas Supreme Court lacks jurisdiction to entertain factual insufficiency points.). But, ignoring our jurisprudence and the constitutional restraints on this Court's appellate review power, the Court impermissibly conducts a factual sufficiency review of the record — heavily putting its thumb on the scale — to conclude that the mental anguish damages award “is not merely excessive and unreasonable; it is far beyond any figure the evidence can support.” ___ S.W.3d at ___. The Court explains that “while the record supports Bentley's recovery of some amount of mental anguish damages, it does not support the amount of those damages found by the jury.” ___ S.W.3d at ___. And then, based on no authority whatsoever, the Court remands the case to the court of appeals “to reconsider” the excessiveness of the jury's mental anguish damages award or “to suggest” a remittitur. ___ S.W.3d at ___.

The Court asserts two reasons for why this case permits the Court to review the excessiveness of the jury's mental anguish damages award. First, relying on *Gertz*, the Court holds that “the First Amendment requires appellate review of amounts awarded for non-economic damages in defamation cases to ensure that any recovery only compensates the plaintiff for actual injuries and is not a disguised disapproval of the defendant.” ___ S.W.3d at ___. The Court reasons that the possibility that a jury may award significant damages “unrestrained by meaningful appellate review” poses a threat to First Amendment speech. ___ S.W.3d at ___.

But the Court misreads and misapplies *Gertz* and can only have done so purposely. Thus, the Court uses this First Amendment case as a mere guise to reach a damages issue that this Court otherwise

cannot consider. In *Gertz*, the U.S. Supreme Court expressly limited its holding that defamed private plaintiffs may recover compensation only for “actual injuries” to situations in which state law sets a lower culpability standard than actual malice. *Gertz*, 418 U.S. at 349. The Supreme Court stated: “[T]he private defamation plaintiff who established liability *under a less demanding standard* than [that stated by *New York Times v. Sullivan*, 376 U.S. 254 (1964)] may recover only such damages as are sufficient to compensate him for *actual injury*.” *Gertz*, 418 U.S. at 349 (emphasis added). Thus, a reviewing court is authorized to review damage awards and limit a defamed plaintiff’s damages to those reflecting “actual injury” when the culpability standard is less than actual malice. *Gertz*, 418 U.S. at 349.

In contrast, when a state court applies the actual malice standard the Supreme Court announced in *New York Times*, 376 U.S. at 279-80, for determining liability for defaming public figures, *Gertz*’s concern about the type and amount of damages is no longer an issue. Under the *New York Times* test, the First Amendment “prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’ — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” *New York Times*, 376 U.S. at 279-80. Thus, a public figure plaintiff who shows the defamatory statements were made with actual malice can recover both actual and punitive damages, as long as “competent evidence” supports the damages award. *Herbert v. Lando*, 441 U.S. 153, 164 & n.12 (1979).

Here, Bentley is a public figure, and the trial court required the jury to find actual malice before imposing liability on Bunton and Gates. Consequently, *Gertz*’s requirement that state courts limit damages to those reflecting actual injury when the state’s law creates a lower culpability standard for private plaintiff

defamation cases simply does not apply.

Additionally, even if we assume that *Gertz's* constitutional concerns about damages applies in a public figure defamation case in which actual malice is the culpability standard, the Court improperly relies on *Gertz* to reverse the mental anguish damages award. The Court assumes that “actual injury” under *Gertz* excludes mental anguish, and therefore, *Gertz* authorizes the Court to specially scrutinize the mental anguish damages here. However, the Court refuses to recognize that, in the face of its desire to apply First Amendment rights to limit damages, the *Gertz* Court explicitly included mental anguish damages as “actual injuries” that a private defamed plaintiff can recover. *Gertz*, 418 U.S. at 349-50. And, in a later case, the Supreme Court reaffirmed that a private plaintiff may recover mental anguish damages even under a lower culpability standard and required only that the actual damages awarded be supported by “competent evidence.” *See Time, Inc.*, 424 U.S. at 460.

In *Time, Inc.*, the U.S. Supreme Court did not apply the *New York Times* actual malice test because the plaintiff was not a public figure. *Time, Inc.*, 424 U.S. at 454-55. After refusing to apply the actual malice standard, the Supreme Court flatly rejected *Time's* argument that *Gertz* did not permit a recovery for mental anguish damages, because, according to *Time*, “the only compensable injury in a defamation case is that which may be done to one’s reputation.” *Time, Inc.*, 424 U.S. at 460. The Supreme Court stated: “In [*Gertz*] we made it clear that States could base awards on elements other than injury to reputation, specifically listing ‘personal humiliation, and mental anguish and suffering’ as examples of injuries which might be compensated consistently with the Constitution upon a showing of fault.” *Time, Inc.*, 424 U.S. at 460.

Here, the Court does not go so far as the defendant in *Time, Inc.* to assert that *Gertz* does not allow a defamed plaintiff to recover mental anguish damages. The Court instead reads *Gertz* to mandate “appellate review of non-economic damages in defamation cases to ensure that any recovery only compensates the plaintiff for actual injuries.” ___ S.W.3d at ___. But again, even if we assume *Gertz* applies to public figure defamation cases, nothing in *Gertz* even suggests that this Court must apply special appellate scrutiny other than the review this Court typically conducts when examining mental anguish damages awards. The Supreme Court expressly held in *Time, Inc.* that mental anguish is an actual injury for which defamed private plaintiffs may recover damages.

In sum, the Court relies on a defamation case that holds contrary to what the Court reads it to say, and stretches that case’s holding beyond recognition, to impermissibly review the mental anguish damages award in a manner contrary to the Court’s established no evidence review. Furthermore, *Gertz*’s constitutional concern that a jury’s discretion in awarding damages not “inhibit the vigorous exercise of First Amendment freedoms” is not an issue here, because that case and its progeny recognize that a defamed private plaintiff may recover mental anguish damages as actual injury even when state law does not require an actual malice showing. *See Gertz*, 418 U.S. at 349; *see also Time, Inc.*, 424 U.S. at 460; *Herbert*, 441 U.S. at 164 & n.12. Finally, and most importantly, *Gertz*’s concern that damage awards for defamed private plaintiffs not chill First Amendment rights is otherwise protected in First Amendment cases (like the present case) that involve public figures. That is because, before imposing liability, the Supreme Court requires that a public figure defamation plaintiff produce clear and convincing evidence that the defendant acted with actual malice. *See, e.g., New York Times*, 376 U.S. at 279-80. And, when a public figure

defamation plaintiff has met this onerous burden of proving actual malice, the Supreme Court has upheld the compensatory and punitive damages awarded. *See, e.g., Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 661, 693 (1989).

The Court also relies on Texas common law to impermissibly conduct a factual sufficiency review of the mental anguish damages award. The Court acknowledges that courts of appeals have authority to consider excessive damages complaints, but it further contends that this Court has “rejected the view that [the courts of appeals’] authority displaces [this Court’s] obligation to determine whether there is any evidence at all of the amount of damages determined by the jury.” ___ S.W.3d at ___ (citing and quoting *Saenz v. Fidelity & Guar. Ins. Underwriters*, 925 S.W.2d 607, 612 (Tex. 1996)). But *Saenz* is totally inapplicable.

In *Saenz*, this Court applied a traditional no evidence review to a \$250,000 mental anguish damages award that a plaintiff recovered against her workers’ compensation insurance carrier. *Saenz*, 925 S.W.2d at 612. The Court acknowledged the *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 444 (Tex. 1995), factors for proving mental anguish and discussed the limited evidence the plaintiff offered to show her mental anguish. Then, the Court concluded that there was “no evidence. . . that Saenz suffered mental anguish or that \$250,000 would be fair and reasonable compensation.” *Saenz*, 925 S.W.2d at 614. Thus, the Court rendered judgment that the plaintiff take nothing. *Saenz*, 925 S.W.2d at 614.

Here, unlike *Saenz* where the Court held there was no evidence of mental anguish at all, the Court observes that “[t]he record leaves no doubt that Bentley suffered mental anguish as a result of Bunton’s and Gates’s statements.” ___ S.W.3d at ___. As the Court explains, Bentley testified that the ordeal had cost

him time, deprived him of sleep, caused him embarrassment in the community in which he had spent almost all of his life, disrupted his family, and distressed his children at school. Bentley said this experience was the worst of his life. Friends testified that Bentley had been depressed, that his honor and integrity had been impugned, that his family had suffered, too, adding to his own distress, and that he never would be the same. And Bunton's relentlessness in accusing Bentley of corruption caused him much anxiety. ___ S.W.3d at ___.

But, after listing this parade of horrors, the Court remarkably holds that, while this evidence supports Bentley's recovering "some amount of mental anguish damages," this is no evidence that Bentley suffered mental anguish damages amounting to \$7 million. ___ S.W.3d at __, __. Then, based on this amazing conclusion, the Court holds that a remand is necessary for the court of appeals to "reconsider" the excessiveness of the jury's mental anguish damages award, advises that the court of appeals suggest a remittitur, and opines that the case may need to be retried. ___ S.W.3d at __. It is no surprise to me that the Court cites no authority for remanding the case with these instructions. For there is none. And, the Court entirely glosses over the fact, as it must to reach its conclusion, that the court of appeals already considered the excessive damages complaint. Indeed, the court of appeals concluded, "[t]here is nothing in the record to suggest that the jury was guided by anything other than a conscientious consideration of the evidence and the instructions of the trial court. We conclude that the evidence is legally and factually sufficient to support the jury's award of \$7,150,000." ___ S.W.3d at __. Yet the Court ignores this holding, inappropriately assumes a fact-finder role, and sends the case back to the court of appeals.

The U.S. Supreme Court has recognized that the Constitution does not "impose upon the States

any limitations as to how, within their own judicial systems, factfinding tasks shall be allocated.” *Time, Inc.*, 424 U.S. at 461. A state may apply its methods for making factual determinations, as long as some element of the state court system determines that the defendants are at fault. *Time, Inc.*, 424 U.S. at 464. This statement certainly demonstrates that our state’s rules for appellate courts’ reviewing claims of excessive damages — factual sufficiency in the courts of appeals only — applies to reviewing mental anguish damage awards in defamation cases. TEX. CONST. art. V, § 6; TEX. GOV’T CODE § 22.225(a); *Sweet*, 653 S.W.2d at 294-95; *see also Maritime Overseas*, 971 S.W.2d at 406; *Rose*, 801 S.W.2d at 847-48; *Pope*, 711 S.W.2d at 624.

Thus, contrary to the Court’s holding, it is clear that the First Amendment does not require this Court to review the evidence supporting the mental anguish damages award to determine if it is “reasonable” — a proxy for factual sufficiency review. Simply put, the Court oversteps its constitutional appellate review boundaries to conduct what effectively results in a factual sufficiency review of the mental anguish damages award and issues a wholly advisory opinion to the court of appeals about those damages. Applying our traditional legal sufficiency standard for reviewing damages awards, I would hold that there is some evidence to support the damages the jury awarded. *See Bradford v. Vento*, 48 S.W.3d 749, 754 (Tex. 2001).

III. DISPOSITION

The Court’s writings in this case suggest three different views about this case’s final disposition: (1) JUSTICE HECHT holds that Bunton is liable while Gates is not and that a remand is required for the court

of appeals to reconsider the mental anguish damages award; (2) CHIEF JUSTICE PHILLIPS holds that Bunton and Gates are not liable and thus the Court should enter a take nothing judgment against Bentley; and (3) I would hold that Bunton and Gates are liable and thus the Court should enter the judgment the trial court should have rendered based on the jury's verdict and determine Bunton and Gates jointly and severally liable.

Despite these three clearly distinctive, non-majority positions about the case's final outcome, JUSTICE HECHT's remand disposition wins the day, because seven Justices join in the judgment "remanding this cause to the court of appeals for further proceedings." *See* ___ S.W.3d at ___. It completely escapes me how three Justices who agree with this remand disposition can join CHIEF JUSTICE PHILLIPS' opinion that neither Gates nor Bunton are liable. Though these Justices agree that no liability exists whatsoever, they join in a judgment that remands to the court of appeals solely to reassess the damages awarded.

The Court's split on the disposition certainly suggests that this case, particularly JUSTICE HECHT's writing about why a remand is necessary, should not carry any precedential value. Indeed, when the U.S. Supreme Court is dead-locked in a case because a Justice is recused, the Supreme Court renders a judgment that affirms the lower court's judgment "by an equally divided Court" and that "judgment is without force as precedent." *See Ohio ex re. Eaton v. Price*, 364 U.S. 263, 264 (1960). Similarly, because JUSTICE HECHT does not have a majority for his remand rationale, this case should have no precedential value.

IV. CONCLUSION

“Oh what a tangled web we weave,
When first we practise to deceive!”

SIR WALTER SCOTT, *Marmion*, canto vi., stanza 17.

The Court’s writing is nothing more than an epistle of the First Amendment Gospel according to JUSTICE HECHT, the effect of which is to transmogrify Texas law about reviewing mental anguish damages awards in defamation cases. I would hold that there is clear and convincing evidence to support the jury’s findings that Gates and Bunton acted with actual malice in defaming Bentley. And, because the jury found Bunton and Gates were co-conspirators, I would impose joint and several liability for the damages the jury awarded. Because the Court holds otherwise, I dissent.

James A. Baker, Justice

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