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No. 12-0522

IN THE SUPREME COURT OF TEXAS

WASTE MANAGEMENT OF TEXAS, INC.,
Petitioner/Cross-Respondent,

v.

TEXAS DISPOSAL SYSTEMS LANDFILL, INC.,
Respondent/Cross-Petitioner.

On Petition for Review from the Third Court of Appeals, Austin, Texas
No. 03-10-00826-CV

TEXAS DISPOSAL SYSTEMS LANDFILL, INC.'S RESPONSE TO WASTE MANAGEMENT'S POST-SUBMISSION BRIEF

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ATTORNEYS FOR RESPONDENT/CROSS-PETITIONER TEXAS DISPOSAL SYSTEMS LANDFILL, INC.

March 14, 2014

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Texas Disposal Systems Landfill, Inc. submits this Response to Waste Management's Post-Submission Brief (filed February 27, 2014, more than 12 weeks after oral submission).

I. The Law Recognizes that Businesses Have Reputations That Can Be Valued.

A. The Court should reject Waste Management's invitation to change the law to prohibit businesses from recovering for harm to reputation.

At oral argument, Justice Willett asked: "How would a [plaintiff] prove reputation damages in a case like this and quantify those damages?"[1] Waste Management's counsel replied, "Our position is that a corporation cannot prove general reputation damage."

Justice Willett followed up: "[F]or the sake of argument, assuming we disagree and believe a corporation can, under appropriate circumstances, assert and prove reputation damages. How might a corporation do that? How might they quantify that?"[2] Waste Management, through its counsel, reiterated that "I don't believe it can be proven."

It is absolutely clear that Waste Management is asking this Court to effect a fundamental change to the law of defamation. But its request is supported by

[1] This quote is at approximately the 38:35 mark of the oral argument video recording, http://texassupremecourt.mediasite.com/mediasite/Play/9aa283a8ad9240ccbefc6f742aaebb101d.
[2] *Id.* at approximately 40:14.

neither law nor logic. Texas Disposal has briefed, at length, the long line of case law establishing that (1) for-profit businesses have reputations that can be harmed and that are entitled to redress through defamation lawsuits, (2) when a for-profit business suffers reputational harm, that harm is economic, and (3) presumed reputational damages are appropriately awarded to businesses in cases of defamation *per se*. *See, e.g.*, TDSL Response Br. at 38-42. Waste Management's arguments otherwise in its post-submission brief raise no new points.

B. The actual malice requirement prevents the unchecked award of presumed damages.

When speech addresses a matter of public concern, the First Amendment forbids the award of presumed damages unless the plaintiff can prove constitutional actual malice, by clear and convincing evidence. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974). This is true even if the plaintiff is a private figure, as was the plaintiff in *Gertz*.

Thus, Waste Management errs by claiming that "[t]he actual malice requirement does not apply in defamation *per se* cases involving a private plaintiff," WM Post-Sub. Br. at 4, if that statement is meant to address the most meaningful distinction between defamation and *per se*: the presumption of damages. Affirming the award of reputation damages to Texas Disposal poses no danger of unchecked presumed damage awards, for speech on the internet or anywhere else.

II. Substantial Evidence Supports the Finding of Actual Malice.

A. Waste Management ignores the established standard of review.

Waste Management argues that the denial of actual malice by its witnesses is sufficient grounds to reverse the judgment. WM Post-Sub. Br. at 9. This is wrong, and is contrary to this Court's clear explanation of how jury findings of actual malice are reviewed.

A majority of this Court in *Bentley v. Bunton*, 94 S.W.3d 561, 599-600 (Tex. 2002), held that when a jury finds actual malice despite the denials of a statement's author, those denials must be disregarded when they are contradicted, because the jury found them to not be credible. *Id.* at 597-98 (noting that even in cases requiring independent appellate review, juries retain the authority to judge witness credibility and their findings will not be disturbed unless they are clearly erroneous). The reviewing court then examines the undisputed facts "along with any other evidence that the jury could have believed provides clear and convincing proof of actual malice." *Id.* at 599. Texas Disposal has previously provided the Court with detailed discussion of the evidence supporting actual malice (*see, e.g.*, TDSL Response Br. at 14-24, 44-60), and will not repeat that discussion here.

Waste Management, in contending that self-serving denials are sufficient to negate actual malice, cites *Huckabee v. Time Warner Entertainment Co.*, 19 S.W.3d 413, 420 (Tex. 2000). But *Huckabee* was a summary judgment case in

which the plaintiff adduced no evidence to counter the defendant's detailed denial of actual malice; this Court found that summary judgment for the defendant was appropriate under those circumstances. *Id.* at 424-30. As the Court recognized in *Bentley*, review of a jury finding of actual malice, in a case with substantial evidence contradicting the defendant's self-serving denial, requires a markedly different type of review. Under the appropriate review, the finding of actual malice must be affirmed.

B. Waste Management argues against strawmen.

Waste Management asserts that its "intent to compete with TDSL cannot constitute clear and convincing evidence of actual malice." WM Post-Sub. Br. at 10. Texas Disposal has never suggested that competitive motive alone is sufficient to sustain an actual malice finding.

Waste Management also argues that "TDSL does not automatically win because the statements were made covertly." *Id.* at 12. Again, Texas Disposal has never suggested that Waste Management scheming to disguise the source of the Action Alert allows it to "automatically win." Waste Management argues against points simply not raised by Texas Disposal.

A court reviewing a jury finding of actual malice must look at the evidence "in its entirety." *Bentley*, 94 S.W.3d at 596. Actual malice is almost always proven by circumstantial evidence, *id.*, and the cumulative effect of such evidence

can support a jury's finding, even if no single piece is sufficient standing alone. Here, the evidence of malice is not only clear and convincing; it is overwhelming.

C. Waste Management cannot rely on the 1994 TNRCC employee memos to negate its 1997 actual malice, or as an alternate cause of 1997 damage to Texas Disposal's reputation.

Waste Management continues to attempt to rely on memoranda written in 1994 by certain TNRCC employees to justify its knowingly false Action Alert in 1997. Waste Management asserts that three TNRCC engineers "strongly believed that TDSL's liner design failed to comply with Subtitle D requirements." WM Post-Sub. Br. at 9-10. In support, Waste Management cites the testimony of Action Alert contributor Al Erwin and former TNRCC employee Ron Bond, upon whom Don Martin, the Action Alert's primary author, allegedly relied.

But Waste Management ignores these witnesses' remarkable concessions. Erwin, who was a source for the allegation that TDSL was an "exception" to federal environmental rules, admitted that TDSL in fact did *not* receive such an exception, 6 RR at 138. Bond admitted that he never even saw the Texas Disposal permit application that was approved, and also conceded that it did not receive an "exception." 9 RR at 11, 17. Martin testified that he intended to communicate that Texas Disposal was not compliant with Subtitle D (though he later testified otherwise), RR5 176, 242-43, and admitted that it would be false to make such an allegation of noncompliance. RR5 174, 176. Nor did Waste Management rely "on

a neutral government agency," WM Post-Sub. Br. at 10; the TNRCC *never* found that Texas Disposal was an "exception" to federal law.

Waste Management argues that the "TNRCC concerns were ongoing" when the Action Alert was issued in 1997. WM Post-Sub. Br. at 15-16. The evidence shows no such ongoing concerns. The TNRCC memos Waste Management tried but failed to get into evidence were all dated in 1994, and Texas Disposal received its Subtitle D approval in 1994. There is simply no credible evidence or argument that in 1997 Waste Management could have honestly believed that there was an "ongoing" debate over whether Texas Disposal received an "exception" to Subtitle D – particularly in light of the extensive testimony, from multiple witnesses, that the "exception" statement was false. *See* TDSL Response Br. at 14-17 (describing the evidence of falsity), 44-49 (describing the extensive evidentiary support for the jury's findings of falsity and actual malice).

III. Waste Management Fails to Show Error in the Damage Award.

A. Three Action Alert recipients testified that the document negatively affected their opinion of Texas Disposal.

Waste Management asserts that no recipients of the Action Alert "even change[d] their favorable opinions of TDSL." WM Post-Sub. Br. at 13. This is simply wrong. After reading the Action Alert, Brigid Shea "took a poor impression of TDS." RR5 52. George Cofer testified that the document "caused me, personally, a lot of concerns." RR4 184. Lauren Ross, who had earlier

recommended that the League of Women Voters endorse Texas Disposal's landfill permit application, testified that the Action Alert "sounded like there was some corners that were being cut and that maybe [the TDSL landfill] wasn't really as protective as it should be," RR4 228, and that the documents caused her to question whether Texas Disposal complied with governing rules and regulations, RR4 230. Texas Disposal has quoted and cited this testimony previously. TDSL Response Br. at 10-11. Each of these witnesses ultimately came to realize the Action Alert was false, but that does not negate the fact that the Action Alert was received and believed, causing reputational harm.

B. Reputation damages can be economic in nature.

In support of its argument that damages to a for-profit business' reputation should be considered non-economic, Waste Management erroneously asserts that "special damages are economic damages, while general damages are non-economic damages"; because reputation damage is a type of general damage, it is argued, then reputation damage must be non-economic. WM Post-Sub. Br. at 16-17.

The error here is in the characterization of general and special damages. They are not, and never have been, distinguished by whether they are economic or not. Rather, general damages are "[d]amages that the law presumes follow from the type of wrong complained of," *Morrill v. Cisek*, 226 S.W.3d 545, 550 (Tex.

App. – Houston [1st Dist.] 2006, no pet.) (quoting Black's Law Dictionary 394-95 (7th ed. 1999)), whereas special damages are "[d]amages that are alleged to have been sustained in the circumstances of a particular wrong," *id.* (quoting Black's Law Dictionary 396 (7th ed. 1999)). *See also Baylor University v. Sonnichsen*, 221 S.W.3d 632, 636 (Tex. 2007) (special damages are "those damages which result naturally, but not necessarily, from the defendant's wrongful acts" (internal quotations omitted)).

Waste Management relies on cases involving an individual's reputation to argue that reputation damages are non-economic. WM Post-Sub. Br. at 16-17. By doing so, it ignores the facts of this case, and the overwhelming weight of authority. *See, e.g.*, Restatement (Second) Of Torts § 561 cmt. b ("A corporation for profit has a *business reputation* and may therefore be defamed in this respect.") (emphasis added); *General Motors Acceptance Corp. v. Howard*, 487 S.W.2d 708, 712 (Tex. 1972) (corporations can maintain libel actions for reputational harm). Waste Management cites not a single Texas case holding that the reputation of a business is "non-economic."

Waste Management argues that Texas Disposal was not damaged because its revenues increased after the Action Alert's distribution. WM Post-Sub. Br. at 18. Decline in revenue is not a prerequisite for a business to recover damages; for example, a slower rise in revenue than reasonably projected, or a decline in the

value of the business, can justify a damage award. *See, e.g.*, *Texas Instruments, Inc. v. Teletron Energy Mgmt., Inc.*, 877 S.W.2d 276, 279 (Tex. 1994) (projected increases in future business are appropriate to consider in calculating damages); *Checker Bag Co. v. Washington*, 27 S.W.3d 625, 641 (Tex. App. – Waco 2000, pet. denied) (loss of value of business can be the measure of damage to goodwill or business reputation).

C. The record supports the jury's award of remediation expenses.

Texas Disposal presented evidence that it incurred $1,174,869.03 in expenses to remedy the negative effects of the Action Alert. These expenses consisted of two categories: actual out-of-pocket expenses paid to outside consultants, and the value of estimated time spent by Texas Disposal employees in response to the Action Alert. In its briefing, Texas Disposal described the evidence supporting this damage claim, with record citations to the evidence itself. TDSL Response Br. at 67-68. The jury awarded $450,952.03 in remediation expenses, less than 40 percent of what TDSL requested.

Waste Management now claims that (1) Texas Disposal provided no record citation to rebut Waste Management's claim that these expenses were simply "ordinary expenses," and (2) that some of the expenses did not relate to the Action Alert because they pre-dated its issuance. Neither point has merit. Texas Disposal cited in its brief to the actual exhibits showing the damage elements. Bobby

Gregory gave testimony that the expenses were those incurred "directly to counteract the effects of the Action Alert in San Antonio and Austin," RR3 159, and gave specific examples, *id.* 159-62. He also explained the methodology used to allocate staff time to responding to the Action Alert. *Id.* 171-72. As to Waste Management's argument that there were two invoices with time entries (out of hundreds, and which invoices also included post-Action Alert matters) that pre-dated the Action Alert – a point never raised by Waste Management at trial – the jury was provided with evidence supporting more than $1.1 million in damages, and awarded only 38 percent of that number. The evidence would have supported a much larger award than the jury made – even discounting the two entries about which Waste Management complains regarding timing – and the jury was well within its discretion to award the amount it determined.

IV. The Action Alert's Meaning is Not Ambiguous.

Waste Management contends that the Court of Appeals twice "held that the Action Alert was, in fact, ambiguous." WM Post-Sub. Br. at 21. This is highly misleading.

Before the first trial, the trial court held as a matter of law that several statements in the Action Alert were defamatory. CR 3971. Waste Management has never appealed this ruling, which is a holding that the statements were *unambiguously* defamatory.

There is a meaningful difference between defamatory and defamatory *per se*; a statement can be defamatory without meeting the requirements of *per se*. *See, e.g.*, *Hancock v. Variyam*, 400 S.W.3d 59, 62 (Tex. 2013) (explaining that "defamatory" means a statement that tends to injure a person's reputation, while a "defamatory *per se*" statement is one that "injures a person in her office, profession, or occupation"). Texas Disposal consistently argued that the statements also were defamatory *per se* as a matter of law.

The trial court disagreed, but found there was a fact issue on defamation *per se*, so the issue was submitted to the jury. This is the context in which the Court of Appeals found ambiguity: not over whether the Action Alert's *meaning* was defamatory, but rather whether "Waste Management libeled Texas Disposal *in a manner injurious to its business*." *Texas Disposal Systems Landfill, Inc. v. Waste Management Holdings, Inc.*, 219 S.W.3d 563, 582 (Tex. App. – Austin 2007, pet. denied) (emphasis added). As characterized by the Third Court on the second appeal, the trial court "was not convinced as a matter of law that no ambiguities remained *on the issue of whether the statements were defamatory per se*," and thus that the second jury "was asked to determine whether those statements 'tend to affect an entity injuriously in its business, occupation, or office, or charge an entity with illegal or immoral conduct?'" *Waste Management of Texas, Inc. v. Texas*

Disposal Systems Landfill, Inc., 2012 WL 1810215 at *4, 5 (Tex. App. – Austin 2012, pet. granted) (not reported in S.W.3d) (emphasis added).

Waste Management now implies that the Court of Appeals' opinions held that the statements were ambiguous as to defamatory meaning. That clearly was not the case. Waste Management also reiterates its argument that defamation *per se* can never be a fact issue and must always be determined as a matter of law. While Texas Disposal continues to maintain that the statements at issue were indeed defamatory *per se* as a matter of law, Texas law has long allowed the submission of *per se* to the jury if the court believes there are ambiguities *as to that issue* – a principle recognized by this Court just last year. *Hancock v. Variyam*, 400 S.W.3d at 66.

V. There Is No Trend Away from Recognizing Defamation *Per Se*.

Texas Disposal's post-submission letter brief (filed December 5, 2013) pointed out that the most recent state high court to address the viability of defamation *per se* was the Iowa Supreme Court in *Bierman v. Weier*, 826 N.W.2d 436 (Iowa 2013). The *Bierman* opinion was not cited by Waste Management or its *amici*. The Iowa Supreme Court performed a thorough survey of states that have addressed the question of whether to retain the established common-law doctrine of defamation per se, finding that 26 states have retained per se (Iowa becoming the twenty-seventh), while six states have abolished per se – and only one of those

in the past 15 years. Texas Disposal cited *Bierman* to provide the Court with the most recent foreign state high-court opinion discussing *per se*, and to rebut the suggestion of Waste Management and its *amici* that the trend of modern authority is toward refusing to recognize defamation *per se*.

Rather than addressing *Bierman*'s discussion and analysis of the reputed trend, Waste Management argues that "TDSL would lose this case under *Bierman*" because in Iowa, libel *per se* is available only to private-figure plaintiffs. WM Post-Sub. Br. at 22-23. Iowa law does differ from established Texas law in this regard. But the point of citing *Bierman* to this Court was not what party would "win" had this case been an Iowa case, but rather to direct this Court to a very recent and helpful discussion of relevant issues.

CONCLUSION AND PRAYER

Texas Disposal prays that this Court uphold the judgment of the Court of Appeals on all issues raised in Waste Management's Petition for Review.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on the following counsel for Defendants *via* first class mail, with courtesy copies *via* email, on the 14th day of March, 2013:

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CERTIFICATE OF COMPLIANCE

Pursuant to TEX. R. APP. P. 9.4(*i*)(3), I certify that the foregoing document contains 2,919 words, excluding any parts exempted by TEX. R. APP. P. 9.4(*i*)(1). As Respondent understands the applicable rules, there is no aggregate word limit for a party's briefing in the Texas Supreme Court. The aggregate of Respondent's briefing thus far consists of 26,606 words. In making this Certificate of Compliance, I am relying on the word count provided by the software used to prepare the document. This is a computer-generated document created in Microsoft Word, using 14-point Times New Roman typeface for all text, except for footnotes which are in 12-point Times New Roman typeface.

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