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

BRIEF ON THE MERITS

William W. Ogden
Texas Bar No. 15228500
bogden@ogblh.com
OGDEN, GIBSON, BROOCKS, LONGORIA & HALL, L.L.P.
1900 Pennzoil South Tower
711 Louisiana
Houston, Texas 77002
(713) 844-3000
(713) 844-3030 (Fax)

Thomas R. Phillips
Texas Bar No. 00000102
tom.phillips@bakerbotts.com
BAKER BOTTS L.L.P.
98 San Jacinto Blvd., Suite 1500
Austin, Texas 78701
512-322-2565
512-322-8363 (Fax)

Robert M. (Randy) Roach, Jr.
Texas Bar No. 16969100
rroach@roachnewton.com
Daniel W. Davis
Texas Bar No. 24040767
ddavis@roachnewton.com
ROACH & NEWTON, L.L.P.
Heritage Plaza
1111 Bagby Street, Suite 2650
Houston, Texas 77002
(713) 652-2800
(713) 652-2029 (Fax)

Amy J. Schumacher
Texas Bar No. 24028241
aschumacher@roachnewton.com
ROACH & NEWTON, L.L.P.
101 Colorado Street, No. 3502
Austin, Texas 78701
(512) 656-9655
(512) 474-5802 (Fax)

Attorneys for Waste Management of Texas, Inc.

ORAL ARGUMENT REQUESTED

Identity of Parties and Counsel

Parties	Counsel
Waste Management of Texas, Inc. *Petitioner, Cross-Respondent* *Defendant below*	Robert M. ("Randy") Roach, Jr. Texas Bar No. 16969100 rroach@roachnewton.com Daniel W. Davis Texas Bar No. 24040767 ddavis@roachnewton.com ROACH & NEWTON, L.L.P. 1111 Bagby, Suite 2650 Houston, Texas 77002 (713) 652-2032 (713) 652-2029 (Fax) Amy J. Schumacher Texas Bar No. 24028241 aschumacher@roachnewton.com ROACH & NEWTON, L.L.P. 101 Colorado Street, No. 3502 Austin, Texas 78701 (512) 656-9655 (512) 474-5802 (Fax) Thomas R. Phillips Texas Bar No. 00000102 tom.phillips@bakerbotts.com BAKER BOTTS L.L.P. 98 San Jacinto Blvd., Suite 1500 Austin, Texas 78701 512-322-2565 512-322-8363 (Fax)

William W. Ogden
Texas Bar No. 15228500
bogden@ogblh.com
Thomas M. Gregor (trial counsel)
Texas Bar No. 24032245
tgregor@ogblh.com
OGDEN, GIBSON, BROOCKS, LONGORIA & HALL, L.L.P.
1900 Pennzoil South Tower
711 Louisiana
Houston, Texas 77002
(713) 844-3000
(713) 844-3030 (Fax)

Mollie C. Lambert (trial counsel)
Texas Bar No. 04508480
mlambert@cohnlambertlaw.com
COHN & LAMBERT
126 N. Travis
P.O. Box 490
Cleveland, Texas 77328
(281) 592-5243
(281) 592-5244 (Fax)

Texas Disposal Systems Landfill, Inc.
Respondent, Cross-Petitioner
Plaintiff Below

John J. McKetta, III
mmcketta@gdhm.com
James A. Hemphill
jhemphill@gdhm.com
GRAVES, DOUGHERTY, HEARON & MOODY, P.C.
401 Congress Avenue, Suite 2200
Austin, Texas 78701
(512) 480-5600
(512) 480-5816 (Fax)

Table of Contents

Appendix

Index of Authorities

Cases

Statutes

Other Authorities

Rules

Treatises

Statement of the Case

Nature of the case:	Defamation and defamation per se claim brought by Texas Disposal Systems Landfill based on statements appearing in an "Action Alert" prepared on behalf of Waste Management. CR 15–17.
Original trial court:	126th District Court of Travis County Honorable Paul Davis, presiding
Original trial court disposition:	Take-nothing judgment for Waste Management based on jury's verdict. Supp. CR 4505–06.
Original court of appeals panel:	Third Court of Appeals at Austin Chief Justice W. Kenneth Law (author) Justice Bob Pemberton Justice B.A. Smith (not participating on rehearing)
Original court of appeals disposition:	First opinion Take-nothing judgment for Waste Management affirmed. Opinion on rehearing Reversed and remanded for a new trial on defamation and defamation per se; affirmed with respect to business competition claims now no longer at issue. *Tex. Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.*, 219 S.W.3d 563 (Tex. App.—Austin 2007, pet. denied) .
Trial court on remand:	126th District Court of Travis County Hon. Stephen Yelenosky, presiding
Trial court disposition on remand:	Judgment on jury's verdict for Texas Disposal Systems Landfill for $450,592.03

	in mitigation expenses, $5,000,000 in reputation damages, and $10,000,000 in exemplary damages that was reduced to $1,651,184.06, plus interest. CR 148–49.
Court of appeals panel after second trial:	Third Court of Appeals at Austin Chief Justice J. Woodfin ("Woody") Jones Justice Bob Pemberton Justice Jeff L. Rose (author)
Court of appeals disposition after second trial:	Affirmed. *Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc.*, No. 03–10–00826–CV, 2012 WL 1810215 (Tex. App.—Austin May 18, 2012, pet. filed) (not designated for publication).

Statement of Jurisdiction

This Court has jurisdiction over this appeal under TEX. GOV'T CODE § 22.001(a)(2) because, in affirming a jury instruction that the $5 million award need not be supported by evidence, the court of appeals' holding conflicts with the holdings of the United States Supreme Court and this Court under both the free speech provisions of the United States and Texas Constitutions and the common law of this State. *See, e.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Bentley v. Bunton*, 94 S.W.3d 561 (Tex. 2002); *Saenz v. Fidelity & Guar. Ins. Underwriters*, 925 S.W.2d 607 (Tex. 1996).

Moreover, this Court has jurisdiction over this appeal under TEX. GOV'T CODE § 22.001(a)(6) because the court of appeals committed several errors of such importance to the jurisprudence of the state on questions that have not been definitively resolved, such as:

- permitting a corporation to recover presumed damages under the doctrine of defamation per se,

as well as errors of settled law, such as:

- awarding substantial actual damages without any proof that they were actually sustained, under the view that the doctrine of defamation per se excuses such proof,

- affirming the trial court's decision to submit the legal issue of defamation per se to the jury,
- affirming the trial court's judgment based on a jury finding of actual malice,
- affirming the trial court's award of punitive damages, and
- affirming the trial court's decision to exclude relevant evidence that might reasonably have caused the jury to reach a different result.

All require correction by this Court.

Issues Presented

Issue I: The First Amendment protects speech on matters of public concern by ensuring that defamation damages compensate a plaintiff only for actual injury to reputation rather than to punish a speaker. Did the court of appeals err by affirming a $7 million defamation judgment supported by no evidence of any actual, compensable injury to reputation?

Issue II: Texas law does not support jury findings unsupported by evidence in any context. Did the court of appeals err by holding that the doctrine of presumed damages trumps the requirement that damages must be supported by competent evidence?

Issue III: A jury must be properly instructed on the law and must base its verdict on the evidence. The trial court expressly instructed the jury that "damage to reputation may be presumed; no evidence is required of damages." Did the court of appeals err by holding that this "no evidence" instruction conveyed to the jury that it must limit its award to "fair and reasonable" compensation of actual reputational injury?

Issue IV: Did the court of appeals err by holding that the jury could decide the legal question of whether a statement was defamation per se?

Issue V: Did the court of appeals err by holding that a corporation can recover for the inherently personal tort of defamation per se?

Issue VI: Did the court of appeals err by holding that ambiguous, jargon-filled statements that were substantially true and/or amounted to mere opinion constitute defamation per se?

Issue VII: Did the court of appeals err by holding that an attempt to gain competitive business advantage was sufficient malice to support punitive damages?

Issue VIII: Did the court of appeals err by holding that it was unnecessary for TDS to exclude alternate causes of harm to its reputation in order to prove causation of damages?

Issue IX: Did the court of appeals err in holding there was some, or alternatively sufficient, evidence to support the jury's award for costs allegedly incurred in fighting Waste Management's Action Alert?

Issue X: Did the court of appeals err by excluding evidence demonstrating that experts on the staff of the neutral TNRCC agreed with the accuracy of the supposedly defamatory statements?

Statement of Facts

The court of appeals' statement of the facts is correct in part. *Waste Mgmt. of Tex., Inc. v. Tex. Disposal Systems Landfill, Inc.*, No. 03–10–00826–CV, 2012 WL 1810215 (Tex. App.—Austin May 18, 2012, pet. filed) (not designated for publication). Waste Management repeats key facts here to clarify and to provide record citations.

Texas Disposal Systems (TDS) developed a novel landfill system that relied solely on clay in the soil to prevent waste from leaching into the surrounding soil and water. 7 RR 214-21; 8 RR 100-07; 20 RR Def. Exh. 140. While initially skeptical of this unproven approach, the Texas Natural Resource Conservation Commission (TNRCC) eventually permitted the landfill after a lengthy and internally contentious process. 9 RR 5-22; *see also* 8 RR 158-96, 17 RR Def. Exhs. 13, 14, 18, 22.

TDS sought (and ultimately obtained) waste service contracts with the city governments of Austin and San Antonio, proposing to use its new landfill. 3 RR 106-24. Waste Management sought those same contracts. 3 RR 106, 115-16, 123. During the bidding process, Waste Management approached public-relations consultant Don Martin about drafting an Action Alert to call community attention to possible problems with the TDS landfill. 3 RR 142; 5 RR 78-80. This one-page Alert forms the basis of TDS's defamation per se claim against Waste

Management. The Action Alert contained these technical statements about the potential negative effects of the landfill:

> Privatized Transfer Station: . . . There are no restrictions on the types of waste that may be disposed of at the TDS landfill, with the exception of hazardous waste. And the City has specifically placed no upper limit on the amount of waste that may be processed through the transfer station. . . .
>
> Landfill Liner and Leachate Collection: Unlike other landfills in the Travis County area, TDS's landfill applied for and received an exception to the EPA Subtitle D environmental rules that require a continuous synthetic liner at the landfill and a leachate collection system utilizing a leachate blanket to collect water that comes in contact with garbage (so that it cannot build up water pressure in a landfill). TDS requested and received state approval to use only existing clay soils as an approved "alternative liner" system, rather than use an expensive synthetic liner over the clay. Other landfills in Central Texas and San Antonio in similar clay formations are using a full synthetic liner in addition to the clay soils.

13 RR Pl. Exh. 1 [attached as Tab E].

The Action Alert was faxed to various members of the Austin environmental community. 3 RR 126. This record contains no evidence that any of those recipients permanently changed their opinion of TDS based on the Action Alert. 3 RR 148, 183-84; 4 RR 214, 230, 233; 5 RR 6-8, 58, 62-63, 66-67; 6 RR 20-21; 7 RR 39, 151-52, 231; 10 RR 76-77; *see also* 4 RR 214-16. TDS won—and Waste Management lost—both the Austin and San Antonio waste service contracts. 3 RR 149.

At the first trial, the jury found that the statements were false and made with

actual malice, but caused TDS no damages. At the second trial on remand, the trial court instructed the jury that "no evidence of damage to reputation is required." CR 53. This jury returned a verdict in favor of TDS for $450,592.03 in mitigation expenses, $5,000,000 in reputation damages, and $10,000,000 in exemplary damages that was statutorily reduced to $1,651,184.06, plus pre- and post-judgment interest. The court of appeals affirmed the trial court's judgment.

Summary of the Argument

This case has been tried twice: the first trial resulted in a take-nothing judgment, and the second resulted in a $25 million verdict, which was reduced to a $7 million judgment. Most of that judgment—$5 million—was for "loss of reputation," about which the trial court instructed the jury that "no evidence of damage to reputation is required." The court of appeals upheld that instruction on the mistaken theory that reputation damages in a defamation per se case need not be proved.

But whatever presumption is permitted, it has no application to this case, because the plaintiff here is not an individual, but an impersonal entity—specifically, a corporation. The rationale behind the per se damages doctrine simply does not apply when the claimant is a corporation.

Moreover, whatever the nature of the claimant, the United States Supreme Court has recognized that this presumption gives juries "largely uncontrolled discretion" to make substantial damage awards, risks suppression of "the vigorous exercise of First Amendment freedoms," and "invites juries to punish unpopular speech." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). Because of those concerns, the Court prohibited a private individual from recovering presumed damages in cases where a defendant's liability was not based on actual malice. *Id.* In *Bentley v. Bunton*, a plurality of this Court observed in a public figure case that

"similar concerns are raised . . . when a defendant *is* shown to have acted with actual malice." 94 S.W.3d 561, 606 (Tex. 2002) (Hecht, J.) (emphasis added). Thus, four members of this Court explicitly, and a fifth implicitly, concluded "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." *Id.*

Although the court of appeals paid lip service to this heightened standard of review, it completely failed to act upon it, instead affirming the $5 million damage award based largely on the factoid that plaintiff sought an even larger award. Moreover, apart from any constitutional concerns, the court of appeals also disregarded the fundamental common-law principle, articulated by this Court in many contexts, that the amount of damages must be supported by evidence. *See, e.g., Saenz v. Fidelity & Guar. Ins. Underwriters*, 925 S.W.2d 607, 614 (Tex. 1996). Therefore, in violation of both constitutional commands and common law precepts, both the trial court and the court of appeals effectively allowed this jury to "pick a number and put it in the blank." The result punished the public speech of an out-of-town competitor to the benefit of a local favorite, even though the challenged speech occupied "the highest rung of the hierarchy of First Amendment values." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759

(1985).

The court of appeals' evidentiary review of both actual malice and falsity was also inadequate. Indeed, the evidence in the record demonstrates as a matter of law that the statements were substantially true, and thus judgment should have been rendered that plaintiff take nothing on the entire claim. Beyond that, the jury was deprived of crucial evidence on that issue. Thus, at the very least, the entire cause must be reversed and remanded for a new trial.

Finally, the plaintiff's abandonment of the one cause of action properly available to a commercial entity seeking compensation for allegedly false statements—business disparagement—in favor of a claim that is far easier to prove should not be permitted. Defamation, defamation per se, and presumed damages have no place in this type of corporate litigation.

Thus, this Court can reverse and render a take-nothing judgment on any of several grounds. Alternatively, the Court could reform and render the judgment or reverse and remand this cause to a lower court for further proceedings.

Argument

I. The court of appeals erred when it failed to limit TDS's recovery to the compensation of actual injuries supported by legally sufficient evidence, thus affirming the jury's unconstitutional punishment of unpopular speech of public concern.

During a period when Waste Management and TDS were competing against each other for waste disposal contracts in San Antonio and Austin, Waste Management hired a consultant who circulated an "Action Alert" to certain community leaders. The Alert raised environmental, traffic, and public safety concerns associated with TDS's new landfill. TDS claims that the Alert was defamatory per se and that it is entitled to "presumed damages." Over objection, the trial court asked the jury to decide whether the statements were defamatory per se. 11 RR 7-8. If the jury so found, the court then instructed the jury that "no evidence of damage to reputation is required" to select a dollar amount to compensate TDS for the damage to its corporate reputation. CR 53.

As discussed in section II of this brief, the Action Alert was ambiguous but substantially true; therefore, it was not defamatory, much less defamatory per se. But even if it was defamatory per se, First Amendment concerns would prevent recovery of any damages that are not supported by evidence—except perhaps nominal damages—because the speech is of public concern about a public figure. Finally, constitutional concerns aside, the court of appeals' incomplete review does

not comply with this Court's common law requirement that damage awards must be supported by evidence and independently requires reversal.

A. The First Amendment requires appellate courts to protect speech of public concern about a public figure from the unrestrained financial punishment that can accompany presumed damages.

1. To establish liability and recover damages for actual injuries, a public figure like TDS must prove that the publisher made a defamatory statement with actual malice.

The United States Supreme Court has repeatedly described the First Amendment as the "constitutional safeguard . . . 'fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). "'The maintenance of the opportunity for free political discussion . . . is a fundamental principle of our constitutional system.'" *New York Times Co.*, 376 U.S. at 269 (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931)). The Court has also recognized that the risk of large jury awards in defamation cases can threaten "the vigorous exercise of First Amendment freedoms." *Gertz*, 418 U.S. at 349; *see also Rosenblatt v. Baer*, 383 U.S. 75, 88 n.15 (1966) (describing "a course [that] will both lessen the possibility that a jury will use the cloak of a general verdict to punish unpopular ideas or speakers, and assure an appellate court the record and findings required for

review of constitutional decisions"); *New York Times Co.*, 376 U.S. at 378-79 (observing that even if a defamation defendant could survive a large judgment, "the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive").

Of course, "[t]here is no constitutional value in false statements of fact." *Gertz*, 418 U.S. at 340. The United States Supreme Court has considered the competing interests in compensating public officials and public figures who have been defamed by false statements of fact with the "profound national commitment" to "uninhibited, robust, and wide-open" debate of issues of public importance. *New York Times Co.*, 376 U.S. at 270. In those situations, the Court has held that the First Amendment requires public officials and public figures to show that a publisher of defamatory statements published them with actual malice in order to establish liability. *Id.* at 279-80 (prohibiting public officials from recovering damages for a defamatory statement relating to official conduct); *see also Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 156 (1967) (applying the "rigorous federal requirements" of *New York Times* to "public figures").

TDS has not disputed that Waste Management's speech, the Action Alert, was speech of a public concern about a public figure. *Waste Mgmt.*, 2012 WL 1810215, at *3 n.1. As discussed in section III, this record contains no evidence

that Waste Management published the Action Alert with actual malice. But even if this Court concludes that the record contains some evidence of actual malice, it should not permit TDS to recover "general" or "presumed" damages that exceed nominal damages because the $5 million damage award was not supported by evidence.

2. Because a private individual must prove—at a minimum—that the publisher made a defamatory statement with actual malice to recover presumed damages, a public figure who is the subject of speech of public concern must meet a higher burden.

The United States Supreme Court has explained that the state interest in compensating private individuals for defamatory statements differs from that for compensating public figures. *Gertz*, 418 U.S. at 345-46. "Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements then private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater." *Id.* at 343. Often, "those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id.* at 345. TDS is undisputedly a public figure involved in issues of public concern.

Importantly, even in cases involving private individuals where the state interest in protecting those individuals is increased, the United States Supreme Court has recognized that the "state interest extends no further than compensation for actual injury." *Id.* at 349. As a result, the Court requires a private individual seeking presumed or punitive damages to at least meet the standard for public figures articulated in *New York Times*. *Id.* The Court explained that the heightened burden was required because "the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury . . . ." *Id.* at 349. "[T]he States have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury." *Id.* Although the Court left open the possibility that presumed damages might be available to private individuals upon a showing of actual malice, it criticized the practice as "compound[ing] the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms." *Id.*

Because the state's interest in compensating public figures is less than its interest in compensating private individuals, the public figure in this case should not be compensated in the same way a private individual might be: TDS should not recover presumed damages by meeting the same standard required of a private individual. Similarly, awarding a public figure who is the subject of speech of

public concern presumed damages for proving the same element it must prove to establish liability—actual malice—is not consistent with the First Amendment concerns articulated by the United States Supreme Court in *New York Times v. Sullivan* and *Gertz*. Four members of this Court expressed these concerns with presumed damages in *Bentley v. Bunton*. 94 S.W.3d 561, 605.

3. In cases involving speech of public concern about a public figure, evidence of actual injury should be required to support any award that exceeds nominal damages.

In *Bentley v. Bunton*, a plurality of this Court recognized that giving juries "'largely uncontrolled discretion . . . to award damages where there is no loss'" raises similar First Amendment concerns to those analyzed in *Gertz*. 94 S.W.3d at 605 (quoting *Gertz*, 418 U.S. at 349-50) ("Damage awards left largely to a jury's discretion threaten too great an inhibition of speech protected by the First Amendment."). While recognizing that non-economic damages to an individual's character and reputation "cannot be determined by mathematical precision" and therefore require "that a jury have some latitude in awarding such damages," that latitude does not go as far as giving the jury "carte blanche to do whatever it will . . ." *Id.* at 605.

The plurality thus concluded that the latitude that should be afforded to the jury "does not insulate its verdict from appellate review for evidentiary support." *Id.* at 606. Instead, "[t]he jury is bound by the evidence in awarding damages, just

as it is bound by the law." *Id.* Therefore, presumed damages beyond nominal damages should not be available when speech of public concern about a public figure is involved—especially when that public figure is a non-human entity that cannot suffer the type of general damages that presumed damages were historically designed to compensate. This Court should grant this case to make the plurality's evidentiary requirement the law for defamation per se claims involving public figures and speech of public concern, if not for all defamation cases. When conducting the proper review, this Court will discover that the record contains legally insufficient evidence to support the jury's award of $5 million in reputation damages.

B. If this Court permits presumed damages even when the speech is of public concern about a public figure, the Court should require courts to conduct the meaningful review articulated by the plurality in *Bentley*.

Even if this Court permits a corporation to recover presumed damages in excess of nominal damages when speech of public concern is at issue, this Court should enforce the *Bentley* standard of review by "requir[ing] 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." *Bentley*, 94 S.W.3d at 605.

1. Meaningful review is especially appropriate here because economic damages for corporations can be quantified.

The *Bentley* standard of review is particularly applicable here because presumed damages do not serve a useful function when the plaintiff seeks to recover quantifiable economic damages—damages that, if they actually exist, could be proven by objective facts, figures, or data. *See Szczepanik v. First S. Trust Co.*, 883 S.W.2d 648, 649 (Tex. 1994). Permitting the jury to presume and award otherwise quantifiable economic damages serves no purpose other than to permit "disguised disapproval of the defendant."

The common law has long recognized two distinct categories of damages in defamation cases: special and general. Special damages represent "actual pecuniary loss," or in the language of the Restatement, "the loss of something having economic or pecuniary value." RESTATEMENT (2D) TORTS § 575, cmt. d (1977); Sack, ON DEFAMATION § 2:8 (4th Ed. 2012). By contrast, general damages differ from special damages in that they are intrinsically noneconomic; they address psychic harm such as general harm to reputation, personal humiliation, mental anguish, and suffering. RESTATEMENT (2D) TORTS § 621 cmt. a, b (1977). "This presumption of general damage to reputation from a defamatory publication that is actionable per se affords little control by the court over the jury in assessing the amount of damages." *Id.* cmt. a. Texas law recognizes the same distinction.

Exxon Mobil Corp. v. Hines, 252 S.W.3d 496, 501 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (separating actual damages in defamation actions into two categories: (1) "economic," "special," or "out-of-pocket" damages and (2) "noneconomic" or "general" damages).

This Court and lower courts have repeatedly embraced the principle that the presumption of damages extends only to general damages, not special damages. *See Bentley*, 94 S.W.3d at 604 ("Our law presumes that statements that are defamatory per se injure the victim's reputation and entitle him to recover general damages, including damages for loss of reputation and mental anguish.") (citing *Leyendecker & Assocs., Inc. v. Wechter*, 683 S.W.2d 369, 374 (Tex. 1984)); *see also Downing v. Burns*, 348 S.W.3d 415, 425 (Tex. App.—Houston [14th Dist.] 2011, no pet.) ("[E]conomic damages are not general damages which can be presumed to flow from defamation per se.").

The principle that the presumption of damages extends only to general damages and not to special damages makes sense in light of the nature of the damages. The proof cataloged by this Court in support of presumed damages is a classic litany of personal noneconomic injuries: mental anguish, deprived sleep, embarrassment, disruption to family, distress for children, and a sense of humiliation. *See Bentley*, 94 S.W.3d at 606. Such damages are inherently unquantifiable, but they are also commonly appreciated by members of the

community. Thus, jurors can use a personal perspective to assign a dollar amount to mental anguish, even if the plaintiff cannot prove a reasonably-certain dollar amount of mental anguish.

By contrast, special damages can be calculated, pleaded, and proved to a reasonable certainty. So, a presumption of quantifiable economic damages without any requirement of proof would be contrary to this Court's jurisprudence requiring evidence to support jury findings generally, and reasonably certain proof of damages such as lost profits, based "on objective facts, figures, or data from which the amount of lost profits may be ascertained." *Szczepanik*, 883 S.W.2d at 649.

The entire purpose of presumed damages is to allow a deserving plaintiff to recover for noneconomic injuries that are inherently difficult to prove—not the recovery of economic damages that the plaintiff should be able to prove with evidence, but cannot. Texas law does not support allowing TDS to recover via presumed damages $5 million in alleged economic losses that it could not prove because it actually obtained the contracts it sought. *See Leyendecker*, 683 S.W.2d at 375.

Related to the principle that the presumption of economic damages is inappropriate, presumed damages are particularly inappropriate for corporations. Virtually all defamation per se cases concern natural persons and speech that is so obviously odious and reprehensible that psychic injury is reasonably anticipated.

See, e.g., Exxon Mobil Corp., 252 S.W.3d at 500 (claim that ex-employees participated in an "elaborate funding scheme" in order to "defraud" a gift program); *Morrill v. Cisek,* 226 S.W.3d 545, 550 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (claim that ex-husband had forged documents, committed fraud, and failed to pay child support); *Marshall v. Mahaffey,* 974 S.W.2d 942, 948 (Tex. App.—Beaumont 1988, pet. denied) (claim that ex-wife was "sleazy," a "slut," and a "gold digger").

These cases, involving outrageous accusations against natural persons, teach that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." *Dun & Bradstreet*, 472 U.S. at 760. Thus, the evidence in support of presumed damages almost always evokes a subjective, psychic injury that may be experienced by a natural person. *See, e.g.*, *Bentley*, 94 S.W.3d at 606 (depression, anxiety, sleep deprivation, mental anguish, and distress over his children); *Leyendecker*, 683 S.W.2d at 374 (mental anguish).

If the defamation plaintiff is a corporation, however, like TDS, the entire rationale supporting presumed damages at common law vanishes. *See* Prosser and Keeton, THE LAW OF TORTS §111 (5th Ed. 1984) ("A corporation is regarded as having no reputation in any personal sense, so that it cannot be defamed by words, such as those imputing unchastity, which would affect the purely personal repute

of an individual."). A corporation "has no character to be effected by libel and no feelings to be injured." *Golden North Airways, Inc. v. Tanana Publ'g Co.,* 218 F.2d 612, 624 (9th Cir. 1954). Corporations do not experience sleeplessness, humiliation, depression, or anxiety. *See* Fred T. Magaziner, *Corporate Defamation and Product Disparagement,* 75 COLUM. L. REV. 963, 983 (1975) ("The rule of *per se* liability—tools by which probable psychic damage was assessed – could have no possible relevance to corporations, because corporations can suffer no psychic damage."). Corporations cannot recover mental anguish damages under Texas law. *Huddleston v. Pace*, 790 S.W.2d 47, 52 (Tex. App.—San Antonio 1990, writ denied) ("Since a corporation is not capable of emotional responses or sufferings of the mind, we find that these [mental anguish] damages are improper as a matter of law."). Nor can corporations recover for an invasion of personal privacy. *FCC v. AT&T, Inc.*, 131 S. Ct. 1177, 1185 (2011). "Although a corporation may maintain an action for libel, it has no personal reputation and may be libeled only by imputation about its financial soundness or business ethics." *Golden Palace, Inc. v. Nat'l Broad. Co.*, 386 F. Supp. 107, 109 (D.D.C. 1974).

The doctrine of presumed damages was originally intended to address the emotional, subjective, and psychic injuries—which can be suffered only by natural persons, not corporations. TDS cannot recover for presumed damages that it cannot suffer. Accordingly, because presumed damages were not properly

awarded in the situation here, this Court should render judgment that TDS take nothing on its claim for presumed reputation damages.

2. If a plaintiff fails to provide sufficient evidence of actual damages, presumed damages cannot exceed nominal damages.

If the Court holds that presumed damages are viable in this case, the question remains whether, absent proof, presumed damages entitle a plaintiff to anything more than nominal damages under Texas law. While other jurisdictions are split on this issue, this Court has recently indicated that Texas permits the presumption of only nominal damages. *Compare, e.g.*, *W.J.A. v. D.A.*, 43 A.3d 1148, 1150 (N.J. 2012) (permitting only nominal recovery) *with Barlow v. Int'l Harvester Co.*, 522 P.2d 1102, 1117 (Idaho 1974) (permitting non-nominal recovery); *see Salinas v. Salinas*, 365 S.W.3d 318, 320 (Tex. 2012) ("[T]he law does not presume any particular amount of damages beyond nominal damages."). Despite being made aware of *Salinas*, the court of appeals concluded that Texas law permits the recovery of $5 million, far in excess of nominal damages.

The underlying purpose of defamation per se, like all torts, is to compensate the plaintiff for injuries suffered. *See Gertz*, 418 U.S. at 341 ("The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood."). However, when damages are presumed, juries can overstep the bounds of compensation in order to show a

"disguised disapproval of the defendant." *Bentley*, 94 S.W.3d at 605; *see also* David A. Anderson, *Reputation, Compensation and Proof*, 25 WM. & MARY L. REV. 747, 749 (1983) ("[T]he process of fixing an amount of presumed damages is inherently irrational. . . . In this respect, presumed damages may be more pernicious than punitive damages."); *cf. Gertz* at 350 ("[J]uries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused.").

While not providing the windfall desired by plaintiffs, nominal damages serve a purpose—public vindication of the plaintiff's damaged reputation. *W.J.A.*, 43 A.3d at 1150 ("Where a plaintiff does not proffer evidence of actual damage to reputation, the doctrine of presumed damages permits him to survive a motion for summary judgment and to obtain nominal damages, thus vindicating his good name.").

This Court and other courts have consistently stated the principle that presumed damages entitle a plaintiff to only nominal damages unless compensable harm can be proven. *See Salinas*, 365 S.W.3d at 320; *Bentley*, 94 S.W.3d at 605; *see also Snead v. Redland Aggregates Ltd.*, 998 F.2d 1325, 1332 (5th Cir. 1993); *Swate v. Schiffers*, 975 S.W.2d 70, 74 (Tex. App.—San Antonio 1998, pet. denied); *Adolph Coors Co. v. Rodriguez*, 780 S.W.2d 477, 488 (Tex. App.—Corpus Christi 1989, writ denied). Because the court of appeals in this case held to

the contrary—that TDS could recover $5 million (far in excess of nominal presumed damages)—this Court should clarify and hold that presumed damages support only a nominal damages award under Texas law.

Further, even if damages are presumed, that presumption is rebuttable. If the evidence affirmatively demonstrates that the plaintiff's reputation was not harmed, the jury must be entitled to award no damages. *See Adolph Coors*, 780 S.W.2d at 488 ("It does not require the jury actually to find any amount of damages . . . ."). For example, a plaintiff may not be entitled to even nominal damages if his reputation is so bad that he is defamation-proof. *See, e.g.*, *Ray v. Time, Inc.*, 452 F. Supp. 618, 622 (W.D. Tenn. 1976), *aff'd* 582 F.2d 1280 (6th Cir. 1978) (holding that the habitual criminal and confessed murderer of Martin Luther King, Jr., could not be further defamed by accusations of robbery).

Permitting the rebuttal of presumed damages for defamation per se by contrary evidence is consistent with the presumed damages allowed for trespass. In trespass, "[e]very unauthorized entry is a trespass, regardless of the degree of force used, even if no damage is done, or the injury is slight, and gives rise to a cause of action for nominal damages at least." *Johnson v. Phillips Petroleum Co.*, 93 S.W.2d 556, 558–59 (Tex. Civ. App.—Amarillo 1936, no writ). However, a jury is still entitled to award zero damages for trespass when the evidence shows there was no harm. *See Jernigan v. Page*, 662 S.W.2d 760, 763 (Tex. App.—

Corpus Christi 1983, writ ref'd n.r.e.), *disapproved on other grounds by Ojeda de Toca v. Wise*, 748 S.W.2d 449, 450 (Tex. 1988) ("In the case before us, appellants testified as to having made improvements on the land in question; therefore, the jury could properly have found that appellees were not entitled to lost rents."); *Cage Brothers v. Friedman*, 312 S.W.2d 532, 535 (Tex. Civ. App.—San Antonio 1958, writ ref'd n.r.e.); *cf. Barnes v. Mathis*, 353 S.W.3d 760, 765 (Tex. 2011) ("And although Mathis presented evidence that the flooding permanently damaged his land, Barnes's witness, a real estate appraiser, testified that the value of the property was unchanged by the flow. There was also evidence that there was no non-economic damage.").

Importantly, TDS won the waste disposal contracts it sought, and two different juries found accordingly that TDS sustained no lost profits, no lost contracts, and no lost customers. CR 51, Supp. CR 4272-73; 3 RR 149. Nevertheless, in the second trial, when the jury was instructed that it could presume damages without regard to the evidence presented, the jury awarded $5 million. CR 53. This case, where an unrestrained application of presumed damages permitted a for-profit corporation to obtain a multi-million dollar recovery despite not losing any profits, demonstrates the need for this Court to clarify how the doctrine of presumed damages should be applied in Texas.

Presumed damages do not properly permit a greater-than-nominal recovery

of damages that are not only unsupported but are actually contradicted by the evidence. Accordingly, this Court should, if it decides not to render judgment that TDS take nothing on its claim for presumed reputation damages, at least hold that TDS recover no more than nominal damages.

3. Although the court of appeals claimed that it conducted the meaningful review described in *Bentley*, it did not.

Here, no meaningful appellate review was possible because the trial court's improper instruction allowed the jury to base its decision not on evidence quantifying lost reputation, but rather on a general dislike of Waste Management and a general desire to benefit the local, family-owned competitor. The full—and wholly inadequate—extent of the court of appeals' review as follows:

> Texas Disposal's president Bob Gregory testified that publication of the Action Alert injured Texas Disposal's reputation in the amount of $10 million. In support of that amount, he explained why it was important for a business like Texas Disposal to have a good reputation, what a good reputation is worth to a company, which he characterized as "priceless," and specifically why it was important for Texas Disposal to have a good environmental reputation, pointing out specific examples of environmental-reputation problems in Austin. He stated that, before publication of the Action Alert, Texas Disposal had a good reputation in the central Texas community, and Austin in particular, for running an environmentally sensitive or sound landfill. He then described his impression of the environmental community's reaction to the Action Alert, including reports that some of its members had "turned a cold shoulder" to Texas Disposal after the Action Alert, and that Texas Disposal appeared to be, at the very least, no different from other landfills. Gregory also provided financial information about Texas Disposal, including information about the dollar amounts of its contracts that Texas Disposal claimed were put

> at risk by publication of the Action Alert. Finally, he described in detail the actions he and his company had to take to counteract or remedy the damage to its reputation. In addition to Gregory, the jury heard testimony from Austin community members and environmentalists about their concerns when the Action Alert was published. Finally, the jury heard testimony about Waste Management's purpose in publishing the Action Alert—to give the impression that Texas Disposal's landfill was less environmentally sound and to have an adverse effect on Texas Disposal in general.

Waste Mgmt., 2012 WL 1810215, at *13. The "specifics" cited were:

- "actions [Gregory] and his company had to take to counteract or remedy the damages to its reputation"—which TDS also claimed as its remediation damages and, if considered as reputational damages, would amount to a double recovery; and
- "contracts that Texas Disposal claimed were put at risk"—even though TDS obtained those contracts. Texas law does not support hypothetical damages that can be affirmatively shown not to have occurred.[1] *See Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 50 (Tex.1998).

Despite this complete absence of evidence, the Court concluded:

> Taking all the evidence into consideration, we cannot say that the

[1] For example, if a pedestrian is struck and killed in a cross-walk when a driver runs a stoplight, the estate can recover the decedent's lost earnings. If the pedestrian leaps to safety and continues life as normal, the pedestrian cannot recover for lost earnings that were merely put at risk by the negligent driver.

> jury's award of $5 million in reputation damages was excessive or unreasonable. Further, given that the jury rejected part of Texas Disposal's request for its costs and expenses and all of its claim for lost profits, and that it reduced Gregory's estimate of $10 million in reputation damages to $5 million, the jury's award here does not appear to be "disguised disapproval" of Waste Management.

Id. at *14.

In fact, the evidence recited by the court of appeals is no evidence at all. A plaintiff's request for $10 million is not, without more, evidence to support an award of half of that amount. Here, all the court of appeals cites as evidence are attempts to lionize TDS and demonize Waste Management—the very types of situation that the First Amendment protects against.

Accordingly, this Court should grant review and render judgment that TDS take nothing on its claim for presumed reputation damages, or alternatively, that TDS recover at most nominal damages on its claim for personal reputation damages.

II. The Action Alert was not defamatory per se.

Even absent constitutional concerns, the Action Alert in this case does not meet the high threshold necessary to be defamatory per se. The extension of defamation per se beyond its intended bounds creates significant jurisprudential problems. Defamation per se developed in a convoluted, almost haphazard, fashion, leading to inconsistencies and loopholes. *See* Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546, 546 (1903) ("It is, as a whole, absurd in theory, and very often mischievous in its practical operation."). In particular, the tort of defamation per se breaks down when the plaintiff is a corporation and when, as here, the legal determination of defamation per se is submitted to a jury.

A. The court of appeals erred by permitting the jury to decide TDS's claim for defamation per se.

One requirement of defamation per se, drawn from libel per se, is that the statement must be defamatory on its face, without resort to extrinsic evidence. "The very definition of 'per se,' 'in and of itself,' precludes the use of innuendo. If the statement, taken by itself and as a whole, is slanderous, it will require no extrinsic evidence to clarify its meaning." *Moore v. Waldrop*, 166 S.W.3d 380, 386 (Tex. App.—Waco 2005, no pet.); *see also Bingham v. Sw. Bell Yellow Pages, Inc.*, No. 2-06-229-CV, 2008 WL 163551, at *4 (Tex. App.—Fort Worth 2008, no

pet.) (not designated for publication) (consideration of extrinsic evidence moves the case from libel pro se to libel per quod); *Clemens v. McNamee,* 608 F. Supp. 2d 811, 827 (S.D. Tex. 2009) ("Once the court considers extrinsic evidence and innuendo, the statement becomes slander per quod . . . .").

The jury of course can decide predicate questions like truth or publication, but those questions do not relate to whether the words themselves are defamatory per se. *See W. Tex. Utils. Co. v. Wills*, 164 S.W.2d 405, 411 (Tex. Civ. App.—Austin 1942, no writ) ("When these questions [publication and meaning] are determined it then becomes a question of law whether the words are slanderous per se."). If a court cannot determine that a statement is defamatory per se as a matter of law, then only the question of whether the statement defamatory (or constitutes business disparagement) should be submitted to the jury. *See Downing v. Burns*, 348 S.W.3d 414, 425 (Tex. App.—Houston [14th Dist.] 2011, no pet.); *Terry v. Schiro*, No. 01–07–00060–CV, 2007 WL 2132461, at *3 n.3 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (not designated for publication). "Because the decision whether an alleged defamatory statement is defamatory per se or per quod affects the level of proof required, that question is initially determined by the trial court as a matter of law." *Hancock v. Variyam*, 345 S.W.3d 157, 164 (Tex. App.—Amarillo 2011, pet. granted).

The statement that TDS applied for and received state approval via an

exception to the normal Subtitle D rule to use in situ clays rather than a synthetic liner and leachate blanket is not, "standing alone, of and by itself," a defamatory statement. Instead, it is indeed full of ambiguities and requires considerable expert explanation—far from the equivalent of calling someone a "slut" or a "child abuser."

The jury found that the Action Alert was defamatory per se only after days of extrinsic expert testimony to explain the meaning and context of the Action Alert. *See, e.g.*, 4 RR 235-36; 7 RR 20-23, 97-99, 123-29, 191-201. TDS presented no less than four experts to try to explain how the Action Alert was defamatory per se. They explained "Subtitle D requirements"; the difference between a "leachate collection system" and a "leachate collection blanket"; the conflicting federal statutes and regulations defining "hazardous waste"; the engineering technology of installing synthetic liners, finger drains and compacting sidewalls; and the state of TNRCC permit approvals and liner designs used at "other Central Texas landfills." *See, e.g.*, 4 RR 235-36 (Dr. Ross); 7 RR 20-23 (Dr. Drenth); 7 RR 97-99, 123-29 (Dr. Kier); 7 RR 191-201 (Dr. Chandler).

The need for this type of extrinsic evidence legally precludes TDS's claim for defamation per se because the statement is not manifestly defamatory on its face. The highly technical statements in the Action Alert were not of the inflammatory type that impute immoral or illegal conduct with sufficient

obviousness to constitute defamation per se.

B. The court of appeals reversibly erred by concluding that the evidence supporting falsity was legally sufficient.

Even if submitting the question of defamation per se to the jury was proper, the evidence on falsity is legally insufficient because the Action Alert was substantially true as a matter of law. TDS cannot recover for either defamation or defamation per se if the "gist or sting" of the statements in the Action Alert is the same or less harmful than the true facts, when taken as a whole and as understood by a reasonable reader of ordinary intelligence. *See McIlvain v. Jacobs*, 794 S.W.2d 14, 16 (Tex. 1990); *see also Neely v. Wilson*, 331 S.W.3d 900, 914 (Tex. App.—Austin 2011, pet. granted) (not engaging in a "technical analysis" or viewing the statement with "the critical analysis of a mind trained in the law"). "[D]iscrepancies as to details do not demonstrate falsity for defamation purposes." *UTV of San Antonio, Inc. v. Ardmore, Inc.*, 82 S.W.3d 609, 612 (Tex. App.—San Antonio 2002, no pet.). "It is not the function of the court to serve as senior editor to determine if reporting is absolutely, literally true." *ABC, Inc. v. Shanks*, 1 S.W.3d 230, 235 (Tex. App.—Corpus Christi 1999, no pet.). For example:

- A TV broadcast that a doctor was disciplined for taking "dangerous drugs" and the implication that he operated on patients while under the influence of drugs was substantially true, despite doctor's evidence that he only self-

prescribed non-dangerous muscle relaxants and that he had never operated on a patient while under the influence of the drugs. *Neely*, 331 S.W.3d at 923-24.

- A statement that a doctor "assaulted" an investigator trying to serve a subpoena was substantially true, even though the doctor later obtained a not guilty judgment. *Swate*, 975 S.W.2d at 75.
- A statement that a charity spent only 10% of its revenue on patient care was substantially true, despite an audit showing that the charity actually spent 43% of its revenues on patient care—an error of more than 400%. *Rogers v. Dallas Morning News*, 889 S.W.2d 467, 471–73 (Tex. App.—Dallas 1994, writ denied).

In light of these precedents, the challenged statements in the Action Alert conclusively meet the Texas test for substantial truth.

1. The statements that TDS received an "exception" are substantially true because TDS was permitted to construct its landfill without a synthetic liner and leachate collection system utilizing a leachate blanket.

The statement that TDS got an "exception" to Subtitle D rules requiring a synthetic liner and a continuous leachate blanket is both literally and substantially true. The so-called performance design in Section (a)(1) is an exception to the composite liner defined in Section (a)(2) of the regulations, which requires both a

synthetic liner and a continuous leachate collection system. 13 RR Pl. Exh. 30 (EPA Subtitle D Rule). By erroneously truncating parts of the Action Alert, the trial court asked the jury if it was false to say that TDS received an exception to "the EPA Subtitle D environmental rules," which is not all that the Action Alert said. CR 47, 50. The court should have asked if it was false to say that TDS received an exception to "the EPA Subtitle D environmental rules that require a continuous synthetic liner at the landfill and a leachate collection system utilizing a leachate blanket to collect water that comes in contact with garbage (so that it cannot build up water pressure in a landfill)." *See* 13 RR Pl. Exh. 1 (Action Alert).

Without the trial court's hyper-technical and misleading wordsmithing in the jury charge, the truth of the "exception" statement is clear, given the unchallenged evidence that (1) 95% of the landfills in the country use the standard composite liner design, (2) none of the engineers, including Dr. Kier, Dr. Chandler, Dr. Ross or Dr. Bonaparte, had ever seen any other solid waste landfill lacking both a synthetic liner and utilizing only "finger drains," (3) Dr. Chandler, who designed the leachate collection system, has never designed another landfill using the same system, (4) the TNRCC's list of alternate liner designs approved in 1997 showed only two other landfills using in situ clays with no synthetic liner, and no other landfills relying only on leachate finger drains. *See* 20 RR Def. Exh. 140. When the entire statement is viewed in light of all the circumstances, the "exception"

statement is literally and substantially true as a matter of law.

Moreover, improperly excluded testimony from the TNRCC would have shown that TNRCC engineers "in fact agree that the design as submitted was deficient under Subtitle D and did not meet the requirements." 7 RR 49 (offer of proof by Ogden).

2. The "hazardous waste" statement is substantially true because the TDS landfill cannot take hazardous waste.

Similarly, the "hazardous waste" statement is substantially true. It is a fact that the landfill cannot take hazardous waste; moreover, the statement is exactly the same as the sign posted by TDS at the entrance to its facility. Defendant's Ex. 80.

3. The "other landfills" statement is substantially true because the existence of landfills with grandfathered exceptions is a secondary detail.

The statement that "other landfills" in Central Texas are using synthetic liners is plainly true. The uncontradicted evidence shows that of the ten other landfills surveyed, one landfill closed and the others all amended their permits to include composite liners. TDS was the only landfill that continued to rely on in situ clays alone in all post-Subtitle D cells. *See* 7 RR 138-39 (testimony of Dr. Kier); 7 RR 241 (testimony of Dr. Chandler); 8 RR 77-78 (testimony of Dr. Bonaparte); 20 RR Def. Exh. 140. The fact that other landfills had grandfathered

sections, allowing them to finish filling out pre-Subtitle D liners, is precisely the kind of secondary detail that the law treats as inconsequential. *See McIlvain*, 794 S.W.2d at 16 (disregarding "any variance with respect to items of secondary importance").

4. The "leachate collection system" implication is substantially true because TDS does not have a continuous leachate blanket system.

The "implication" that TDS did not have a leachate collection system is doubly erroneous. First, this is not what the words of the Action Alert actually say. The jury was thus permitted to find falsity based on a distortion of the Action Alert. Second, what the Action Alert says is that TDS does not have a continuous leachate blanket system, which is undeniably true. It is literally true to say that TDS's "finger drains" are so unconventional as to be found nowhere else in the known landfill universe. *See* 7 RR 221, 230. A substantially true account is not made actionable merely because a reader might infer additional but unstated false or defamatory facts. *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995); *Neely*, 331 S.W.3d at 915. The gist or sting of this undisputed fact equals or exceeds any statement in the Action Alert.

5. The asserted "environmentally less protective" implication misstates the Action Alert and is non-actionable opinion.

Finally, the jury's finding that the Action Alert contains an "implication"

that TDS is environmentally less protective than other landfills is clearly erroneous, for two reasons. First, the court's charge misstates what the Action Alert actually says. The entire paragraph in the Action Alert, taken as a whole, makes clear that TDS requested and received state approval. *See* 13 RR Pl. Exh. 1. Second, the qualitative evaluation that any one landfill is "less protective" than any other is not a fact, but an opinion. The relative safety levels of different landfills are not objectively verifiable, and there is no evidence in the record purporting to state otherwise. "Texas case law plainly protects those communications that are not objectifiably verifiable." *Burch v. Coca-Cola Co.*, 119 F.3d 305, 325 (5th Cir. 1997). For example:

- A statement that the plaintiff is "incompetent" is a non-actionable opinion. *Robertson v. Sw. Bell Yellow Pages, Inc.*, 190 S.W.3d 899, 903 (Tex. App.—Dallas 2006, no pet.).
- A statement that the plaintiff's premises are "dangerous and unhealthy" is a non-actionable opinion. *MKC Energy Invests., Inc. v. Sheldon*, 182 S.W.3d 372, 378 (Tex. App.—Beaumont 2005, no pet.)
- A statement that a doctor's surgical procedures were "totally unreasonable and substantially failed to meet the professionally recognized standards" is a non-actionable opinion. *Morris v. Blanchette*, 181 S. W.3d 422, 425–26

(Tex. App.—Waco 2005, no pet.).

- A statement that land application of sewer sludge is harmful to human health and the environment is a non-actionable opinion. *Peter Scalamandre & Sons, Inc. v. Kaufman*, 113 F.3d 556, 562 (5th Cir. 1997).

An implication then that TDS's landfill is "dangerous and unhealthy" is likewise a non-actionable opinion. Since all of the statements in the Action Alert fall well within the parameters of Texas precedent on substantial truth, the evidence is legally insufficient to support a finding of falsity. TDS therefore cannot recover any damages for defamation or defamation per se.

Because the evidence supporting falsity is legally insufficient, the court of appeals should have rendered a take-nothing judgment instead of affirming the trial court's judgment for over $7 million in mitigation expenses, presumed lost reputation damages, and punitive damages. Accordingly, this Court should grant review and render a take-nothing judgment.

C. If the evidence in the record is insufficient to prove that the publication was substantially true, the excluded evidence would have completed the record to prove substantial truth.

The court of appeals further erred by permitting the trial court to exclude exculpatory evidence on the question of falsity. *See* 8 RR 158-96 (offer of proof on TNRCC and Bond evidence); 10 RR 5; 21 RR Def. Exh. 143. The trial court excluded the admissible evidence from the TNRCC as hearsay despite the express

wording of the hearsay exception which admits state agency reports or data compilations "in any form." *See* TEX. R. EVID. 803(8). The excluded TNRCC evidence would have demonstrated to the jury that the concerns within the Action Alert were not self-servingly manufactured by Don Martin and Al Erwin for the purpose of harming TDS. Instead, the evidence would have show that the Action Alert reflected the views of the professional engineering staff of the neutral regulatory body responsible for public safety as well.

The TNRCC evidence would have demonstrated to the jury that Martin and Erwin were not manufacturing falsities, but were instead accurately reporting on the current concerns within the Texas regulatory agency responsible for evaluating scientific concerns pertaining to the TDS landfill:

> They will testify through these reports and live that in their opinion the performance modeling submitted even with the finger drains never did comply with Subtitle D. That is an evaluative professional engineering judgment, and they in fact agree that the design as submitted was deficient under Subtitle D and did not meet the requirements.

7 RR 49 (offer of proof by Ogden).

Accordingly, if the Court decides that trial court's only harmful error was the exclusion of this evidence, the Court should remand the case to the trial court for a new trial.

III. The court of appeals reversibly erred by concluding that the evidence supporting actual malice was legally sufficient.

In order to recover for defamation as a public figure, TDS was required to prove that the Action Alert was published with actual malice—"either knowledge of the falsity or reckless disregard for the truth." *See Hearst Corp. v. Skeen*, 159 S.W.3d 633, 637 (Tex. 2005). All of the theories by which TDS attempted to support actual malice are legally insufficient under Texas law.

A. The disbelief of witnesses' testimony, absent actual evidence of a reckless disregard for falsity, does not constitute actual malice.

Even if the testimony of the authors of the Action Alert is completely discounted, TDS still failed to meet its burden to present clear and convincing evidence of actual malice. *See Casso v. Brand*, 776 S.W.2d 551, 558 (Tex. 1989) ("It is not enough for the jury to disbelieve defendant's testimony. Rather, the plaintiff must offer clear and convincing affirmative proof to support a recovery."). The actual malice test focuses on the authors' subjective state of mind at the time of publication. Proof of reckless disregard tests whether the author in fact entertained serious doubts as to the truth of his publication. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

There were only two people who directly contributed to the Action Alert: Don Martin and Al Erwin. Both testified as to their belief in the accuracy of the statements. Erwin testified that he relied upon statements from the TNRCC

engineers who reviewed and then disapproved the TDS permit. 6 RR 109–10; 120–23. One of the TNRCC engineers, Ron Bond, was allowed to testify that he told Erwin the TDS design was deficient. 9 RR 9–10. Martin testified that he relied upon Erwin, and that he also relied upon other credible sources of information: his eight years experience in the industry, his personal experience in watching liner installations, and his dealings with a number of landfill engineers over the years. 5 RR 208, 212–20.

Further, additional (but excluded) evidence from the TNRCC staff engineers would have further confirmed that Martin's and Erwin's testimony was correct. The excluded evidence included "feedback and criticism and comment from the TNRCC engineers which were in many cases identical in substance to the criticisms that are included in the Action Alert." 7 RR 43–44 (offer of proof by Ogden).

Other than the direct testimony of Martin and Erwin and the excluded testimony from the TNRCC, there was no evidence regarding Martin's or Erwin's state of mind at the time of the Action Alert. Holding that the jury's apparent disbelief of their testimony satisfies the constitutional requirement of actual malice is as illogical as concluding that a criminal conviction could be upheld based on no evidence other than disbelief of the defendant's claim of innocence. *See Casso*, 776 S.W.2d at 558.

B. Technical and evaluative assessments, even if subsequently proven wrong, do not constitute legally sufficient evidence of actual malice.

The statements in the Action Alert are the precise type of technical, scientific, and regulatory jargon that are legally insufficient to support a finding of actual malice. Whether TDS had an "exception" or an "alternative" to Subtitle D; whether TDS used "leachate finger drains" as opposed a "leachate blanket"; whether compacted in situ clays are less reliable than a composite liner—these are all the types of technical and evaluative assessments that simply cannot lend themselves to a characterization of knowing falsity.

Faced with more inflammatory language than is at issue here, the Fifth Circuit held that technical assessments (such as environmental safety) could not show actual malice. *See Peter Scalamandre & Sons, Inc.*, 113 F.3d at 562. In *Peter Scalamandre*, a television broadcast criticized the deposit of sewer sludge in West Texas as environmentally unsafe. *Id.* at 560. The statements were far more critical than those at issue here: a source in the story criticized the plaintiffs sludge deposit as "an illegal haul and dump operation" that would only "poison" the people of West Texas. *Id.* at 562. As was the case here, there were honest differences of opinion concerning the environmental reliability of the plaintiff's landfill practices. *See id.* Though caustically worded, the Fifth Circuit held that the challenged statements could not support a finding of actual malice as a matter

of law:

> Kaufman professed his sincere belief that the land application of sludge is dangerous, and will eventually be proved harmful. His figurative reference to "poison" is hyperbolic, but exaggeration does not equal defamation. Merco repeatedly claims experts and agencies have stated sludge is safe, and argues those opinions prove Kaufman should have known his statements were false. However, these expert opinions are merely that – opinions. Moreover, because an "expert" endorses a certain practice does not mean all reasonable debate on the merits or safety of that practice is foreclosed.

ld. at 562; *see also Ezrailson v. Rohrich*, 65 S.W.3d 373, 382 (Tex. App.—Beaumont 2001, no pet.) (article criticizing whether silicone implants and shunts were antigenic, and comparing the plaintiff's tests to an unrelated test, constituted a type of scientific dispute that does not constitute defamation as a matter of law).

In similar highly-technical circumstances, the United States Supreme Court has recognized that "imprecise" language "reflecting a misconception" is not defamatory. *See Bose Corp. v. Consumer's Union of United States, Inc.*, 466 U.S. 485, 492 (1984). In *Bose*, a Consumer's Union report inaccurately described sound distortion in the plaintiff's speaker system as moving "along the wall" and "about the room." *Id.* at 487-89. The Supreme Court held that this type of technical assessment was insufficient to show malice as a matter of law: "[T]he difference between hearing violin sounds move around the room and hearing them wander back and forth fits easily within the breathing space that gives life to the First Amendment." *Id.* at 513. In language highly reminiscent of the choice of

words at issue in this case, the Supreme Court concluded as follows:

> The choice of such language, though reflecting a misconception, does not place the speech beyond the outer limits of the First Amendment's broad protective umbrella. Under the District Court's analysis, any individual using a malapropism might be liable, simply because an intelligent speaker would have to know that the term was inaccurate in context, even though he did not realize his folly at the time. The statement in this case represents the sort of inaccuracy that is commonplace in the forum of robust debate in which the *New York Times* rule applies.

Id. at 513.

The opinions expressed and choice of words used in the Action Alert fit within the analysis of these cases. Obviously, TDS believes that its landfill design is safe and reliable. Just as obviously, however, some landfill engineers and Texas regulators disagree strongly and believe that a synthetic liner with a leachate blanket—which is used in over 95% of municipal landfills today—is a preferred design. The fact that TDS believes in the reliability of a landfill with no synthetic liner and no leachate blanket "does not mean all reasonable debate on the merits or safety of that practice is foreclosed." *Peter Scalamandre*, 113 F.3d at 562.

C. Ambiguous semantics do not constitute legally sufficient evidence of actual malice.

The use of "exception" in the Action Alert, as opposed to "alternative," is legally insufficient to support a finding of knowing falsity. A document that generates a "number of possible rational interpretations" does not create a fact

issue on malice for the jury to decide. *Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971) In *Pape*, the Court found actual malice lacking as a matter of law, despite the fact that a magazine article contained an arguable misinterpretation of a civil rights commission report. *Id.* at 290. Central to the Court's analysis was the recognition that the commission report—much like the EPA regulations in this case—was loaded with ambiguities and capable of conflicting interpretations:

> Time's omission of the word "alleged" amounted to the adoption of one of a number of possible rational interpretations of a document that bristled with ambiguities. The deliberate choice of such an interpretation, though arguably reflecting a misconception, was not enough to create a jury issue of "malice" under *New York Times*. To permit the malice issue to go to the jury . . . would be to impose a much stricter standard of liability on errors of interpretation or judgment than on errors of historic fact.

Id. at 290; *see also Beck v. Lone Star Broad. Co.*, 970 S.W.2d 610, 617 (Tex. App.—Tyler 1998, pet. denied) (holding that a defendant's statement "may be lacking in technical accuracy" but is sufficiently close to negate reckless disregard). This analysis should control here. The statements in the Action Alert require specialized technological knowledge to identify as true or false. Although some readers might conclude that the statements are misinterpretations of regulations and technical manuals, they are not defamatory.

"An understandable misinterpretation of ambiguous facts does not show actual malice, but inherently improbable assertions and statements made on

information that is obviously dubious may show actual malice." *Hearst*, 159 S.W.3d at 638; *Bentley*, 94 S.W.3d at 596. In *Hearst*, for example, the challenged statements criticized a district attorney as having a win-at-all-cost "rule," resulting in a justice system that was "tainted and inequitable." *Hearst*, 159 S.W.3d at 636. The plaintiff challenged the article as false, noting that the cases surveyed in the article amounted to only 0.04% of the indictments handled during his service, which could not support the characterization of his practice as systemic or a "rule." *Id.* at 637. The Court held that the defendant's mere choice of words was legally insufficient to support a finding of malice. *Id.* at 639. Similarly, in this case, whether one characterizes the TDS landfill as an "exception" or as an "alternative" is the precise type of semantic choice of words that is legally insufficient to support a finding of knowing falsity.

Because the evidence supporting actual malice is legally insufficient, this Court should grant review and render a take-nothing judgment.

D. The excluded evidence constituted conclusive evidence controverting malice that a reasonable jury could not have disregarded.

The improperly-excluded TNRCC evidence would have demonstrated to the jury that Martin and Erwin were not acting with actual malice by manufacturing falsities, but were instead accurately reporting on the regulatory agency expert's scientific concerns pertaining to the TDS landfill. *See* 7 RR 49 (offer of proof by

Ogden). "[T]he documents ratify the same opinions and conclusions that Erwin was told and that he in turn relayed to Martin." 7 RR 49 (offer of proof by Ogden). For example, Kier received comments from the TNRCC engineers that were identical to the concerns in the Action Alert:

> To summarize for the Court, Robert Kier is a hydrologist retained by the plaintiff, Texas Disposal Systems, and one of the people responsible for obtaining approval of their alternative liner permit to comply with Subtitle D. In 1994, he worked with a series of engineers at the Texas Natural Resources Conservation Commission to obtain approval for the alternate liner design about which you've already heard. In the course of those meetings, he got feedback and criticism and comment from the TNRCC engineers which were in many cases identical in substance to the criticisms that are included in the Action Alert.

7 RR 43-44 (offer of proof by Ogden). Similarly, the excluded testimony of Bond of the TNRCC would have established that the TNRCC engineering staff did not believe that the TDS landfill design protected the environment:

> Q. Well, given all this, wouldn't it have been easier just to go ahead and approve the permit?
> A. It would have been easier, but it would not have been right—
> Q. Why not?
> A. —in my judgment. Because I could not in good conscience sign off on a proposal that I did not believe was—met the requirement of the regulations or protected the environment.

21 RR Def. Exh. 143, pp. 53-54 (deposition of Bond, admitted only for purpose of offer of proof).

The TNRCC evidence would have thus conclusively demonstrated that

Martin and Erwin did not draft the Action Alert with "knowledge that it was false or with reckless disregard of whether it was false or not." *See New York Times*, 376 U.S. at 280. Rather, the TNRCC evidence would have demonstrated that Martin and Erwin drafted the Action Alert in accordance with the scientific views of the TNRCC engineers.

Because the court of appeals had previously held that malice could be based solely on disbelieving the testimony of Martin and Erwin, Waste Management could not rely on Martin's and Erwin's testimony alone. *See Tex. Disposal Sys. Landfill*, 219 S.W.3d at 577. By preventing Waste Management from putting on the TNRCC staff evidence to independently support their testimony, the trial court made it impossible for Waste Management to meet the court of appeals' requirement to negate the presumption of malice it allowed based on disbelieving the author. This evidence would have conclusively disproven the jury's actual malice finding and therefore led to the rendition of an improper verdict.

Accordingly, this Court should grant review and render judgment that TDS take nothing on its claims for defamation and defamation per se, or alternatively, remand this case for a new trial based on application of the proper evidentiary standards.

IV. The court of appeals reversibly erred by concluding that the evidence supporting causation of damages was legally sufficient.

The evidence is insufficient because the jury's verdict is not supported by any evidence that the Action Alert actually caused damage to TDS. To prove causation, Texas law requires that TDS make two showings: 1) demonstrate a direct causal connection and 2) rule out alternate, plausible causes of any negative impression of TDS's landfill design. *See Lenger v. Physician's Gen. Hosp., Inc.*, 455 S.W.2d 703, 706 (Tex. 1970). TDS not only failed to do either, but it actually attempted to reverse the burden to prove causation. 7 RR 52-53 (argument of Hemphill). Because TDS cannot prove causation, the judgment of the court below must be reversed.

A. TDS failed to show that the Action Alert, and not other existing negative publications, caused any supposed lost reputation.

TDS failed to establish any causation of reputation damages because no witness could testify to any damage actually caused by the Action Alert: no lost sales, no lost customers, no protests, no adverse act of any kind. 3 RR 183-84 (Gregory); 4 RR 214 (Cofer); 5 RR 6-7 (Dr. Ross); 5 RR 66-67 (Shea); 6 RR 20-21 (Farris); 7 RR 39 (Drenth); 7 RR 151-52 (Dr. Kier); 7 RR 231 (Dr. Chandler); 10 RR 76-77 (Armbrust). To the contrary, Dr. Kier testified that he knew of no effect caused by the Action Alert.

Moreover, TDS failed to eliminate other causes of any potential lost

reputation. "Where the proof discloses that a given result may have occurred by reason of more than one proximate cause, and the jury can do no more than guess or speculate as to which was, in fact, the efficient cause, the submission of such choice to the jury has been consistently condemned by this court and by other courts." *Lenger*, 455 S.W.2d at 706 (quoting *Ramberg v. Morgan*, 218 N.W. 492 (Iowa 1928)). "[W]here there is no basis for determining how much of the damages suffered resulted from the wrongful acts of the defendant and how much resulted from some other causes, a judgment would be based on mere conjecture and could not be upheld." *Univ. Computing Co. v. Mgmt. Science Am., Inc.*, 810 F.2d 1395, 1398 (5th Cir. 1987) (quotation omitted). A judgment cannot be upheld "when the evidence equally supports two alternatives." *Jelinek v. Casas*, 328 S.W.3d 526, 532 (Tex. 2010).

Here, TDS failed to account for the effect of other negative writings, such as pre-existing criticisms by the engineering staff of the TNRCC staff. Additional excluded testimony from the TNRCC would have detailed other sources of negative publicity, such as "public task force reports and public records, that raised the same concern as is raised in the Action Alert." 7 RR 48 (offer of proof by Ogden).

The evidence also demonstrated that the reputation of TDS had previously been publicly called into question in news articles published before the Action

Alert. 4 RR 42-44. TDS made no attempt to negate any of the other sources of challenges to its reputation, as the law requires. *See Lenger*, 455 S.W.2d at 706. Instead, in the related context of whether a diminished reputation hindered negotiations, Drenth admitted that he could not differentiate between the Action Alert and "other reasons." 7 RR 37-38 (cross-examination of Drenth).

In the absence of any evidence supporting the $5 million award for reputation damages—for example, testimony that any party's impression of TDS was actually diminished by the Action Alert—TDS cannot recover. Although the jury picked a damage number, as the Court instructed it to do, TDS is not legally entitled to recover that or any number as damages.

B. TDS failed to show that the Action Alert caused the normal fixed costs it claimed as remediation costs.

TDS cannot recover its remediation expenses because it failed to demonstrate that any such expenses were caused by the Action Alert. Remediation expenses based on mere assumptions are not recoverable. *See Astoria Indus. of Iowa, Inc. v. SNF, Inc.*, 223 S.W.3d 616, 629 (Tex. App.—Fort Worth 2007, pet. denied). TDS merely presumed that the majority of its ordinary expenses for a two-year period were solely due to the Action Alert, without addressing the fact that salaries are a recurring expense not subject to recovery. 9 RR 68–69.

TDS offered no evidence that its claimed remediation expenses were

incurred only because of the Action Alert or were beyond its normal fixed costs; TDS merely offered Gregory's conclusory testimony that he attributed 80% of his time over two years to dealing solely with the Action Alert. *See* 3 RR 171–72; 13 RR Pl. Exh. 4 (wage allocation chart). In fact, several expenses included in the $450,000 of remediation damages occurred before the Action Alert was even issued. 13 RR Pl. Exh. 4. TDS cannot recover its normal operating costs absent legally sufficient evidence that the fixed costs were caused by the Action Alert.

After initially protesting that it would be "basically impossible" to negate alternate sources of its remediation expenses, Gregory later announced that he had done the impossible task of apportioning damages to the Action Alert. 4 RR 47, 49. He never testified about the basis for his opinion, and certainly did not provide any methodology to support his opinion, thus rendering his assertion as non-probative and no evidence as a matter of law. *See Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 232 (Tex. 2004).

Because the evidence supporting causation is legally insufficient, the court of appeals should have rendered a take-nothing judgment instead of affirming the trial court's judgment for over $7 million in mitigation expenses, presumed lost reputation damages, and punitive damages. Accordingly, this Court should grant review and render a take-nothing judgment.

C. If this Court determines that the record is legally sufficient on causation of damages, the improper exclusion of the TNRCC staff evidence was harmful.

The improperly-excluded TNRCC staff evidence would have also demonstrated that the Action Alert was not the sole source of concern in the community regarding TDS's landfill design, but that those same concerns existed within the TNRCC as well. *See* 7 RR 48-49 (offer of proof by Ogden). "[T]here was public comment and controversy, including public task force reports and public records, that raised the same concern as is raised in the Action Alert," and "they would have come from a more authoritative source." 7 RR 48 (offer of proof by Ogden). The excluded TNRCC staff evidence would have negated causation of damages in two ways: 1) it would have demonstrated that there was an impartial source of statements critical of TDS that was separate and apart from the Action Alert—the publicly available regulatory documents; and 2) it would have demonstrated that the safety engineers of the TNRCC had the same concerns about the TDS landfill before the Action Alert was even drafted. By excluding the evidence, the Court created the impression that the Action Alert stood as the sole criticism of the TDS landfill design.

Because of the improper instruction on presumption of damages, Waste Management could not rely on the absence of evidence regarding causation or the amount of damages. Rather, Waste Management was required by the charge to

affirmatively demonstrate a lack of damages. By preventing Waste Management from putting on the TNRCC staff evidence demonstrating a lack of damages, the trial court reversed the burden of proof and effectively directed a finding of damages against Waste Management.

D. The court of appeals erred by affirming an instruction that eliminated the requirement that the jury consider evidence of causation of damages.

The trial court's instruction—that "no evidence of damage to reputation is required"—is contrary to Texas law, and it invited the jury to assess TDS's supposed injury without reference to Waste Management's statements. CR 53. That jury instruction also left the amount of the award completely to the jury's unbridled discretion, regardless of what amount of damages the jury thought the actual preponderance of the evidence might support or limit. This case is apparently the first time such a drastic instruction has been given to a jury. This Court should clarify whether that distinction is appropriate under Texas law.

1. A jury award must be supported by evidence, and instructing a jury to the contrary is reversible error.

The trial court's instruction in Question No. 7 cannot be squared with this Court's express rejection, in many contexts, of the idea that a jury can award any damage figure it chooses regardless of the evidence. *Saenz v. Fidelity & Guar. Ins. Underwriters*, 925 S.W.2d 607, 614 (Tex. 1996) ("Juries cannot simply pick a

number and put it in the blank."). To the contrary, this Court has recognized that a jury must always be "bound by the evidence in awarding damages, just as it is bound by the law." *Bentley*, 94 S.W.3d at 605-06. The common-law requirement applies to defamation per se cases. *See Bentley*, 94 S.W.3d at 606-07 (remanding because there was "no evidence that Bentley suffered mental anguish damages in the amount of $7 million"). Importantly, the requirement that jury findings must be supported by the evidence does not have an exception or qualification. *See Saenz*, 925 S.W.2d at 614 ("There must be evidence that the amount found is fair and reasonable compensation, just as there must be evidence to support any other jury finding.").

Appellate review of a jury's award would be impossible if the jury was not bound by the evidence. *Cf. Daylin, Inc. v. Juarez*, 766 S.W.2d 347, 352 (Tex. App.—El Paso 1989, writ denied) ("Once the existence of some pain and mental anguish has been established, the incalculable quantity awarded cannot logically be refuted or shown to be factually insufficient because there are no objective facts to calibrate measurement."). This Court has rejected the concept that any damage award should be immune from meaningful evidentiary review. *See Saenz*, 925 S.W.2d at 614 ("[T]he law requires appellate courts to conduct a meaningful evidentiary review of those determinations.").

Here, a meaningful appellate review was not possible because the trial

court's improper instruction allowed the jury to base its decision not on evidence quantifying lost reputation, but rather on a general dislike of Waste Management and a general desire to benefit a local competitor. The inadequacy of the review undertaken by the court of appeals is detailed in section I.B.3. of this brief.

2. The error was harmful because an improperly instructed jury awarded $5 million in presumed damages, after a properly instructed jury at the first trial awarded $0 with no presumed damages.

The improper instruction dramatically changed the result in the case. Two juries have now both found that TDS suffered no lost profits, no lost business, and lost not a single customer based on the Action Alert. Nonetheless, as predicted by the court of appeals, the erroneous instruction resulted in the jury awarding $5 million in presumed damages as disproval of speech about a popular local public figure on a matter of public concern, despite there being no proof, no standards, no actual injury, and no meaningful guidelines for appellate review. *See Tex. Disposal Sys. Landfill*, 219 S.W.3d at 585 (noting that the instruction would likely lead to a different verdict). In the spoliation context, this Court has noted that because a presumption instruction's "very purpose is to 'nudge' or 'tilt' the jury," the likelihood of harm from an improper presumption instruction is "substantial." *See Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 724 (Tex. 2003). Even if this Court holds that presumed damages can be recovered and that those presumed

damages can be greater than a nominal amount, this Court should remand so that the jury can be properly instructed.

Accordingly, this Court should grant review and render judgment that TDS take nothing on its claims for defamation and defamation per se, or alternatively, remand this case for a new trial with a proper jury instruction.

V. The court of appeals reversibly erred by concluding that the evidence supporting punitive damages was legally sufficient because the intent to gain a competitive business advantage does not constitute evidence of statutory malice.

The evidence in this case is legally insufficient to support the level of statutory malice required to support the punitive damages award. "Malice" requires "a specific intent by the defendant to cause substantial injury or harm to the claimant." TEX. CIV. PRAC. & REM. CODE § 41.001(7). Thus, statutory malice requires much more than negligence, business competition, or even unethical behavior. *See Quest Int'l Comms., Inc. v. AT&T Corp.*, 167 S.W.3d 324, 327 (Tex. 2005) (recognizing that "in a competitive global economy, time is often of the essence for businesses, jobs, and national productivity and prosperity," the balance of interest requires a "standard that exemplary damages are available only if a corporation ignores an extreme risk of harm."). In other words, being selfish in business does not equate to being malicious.

Rather than mere business competition, statutory malice requires clear and convincing evidence of outrageous, malicious, or otherwise morally culpable conduct designed to harm. *See Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 16 (Tex. 1994). The harm must be extraordinary such as death, grievous physical injury, or financial ruin. *Moriel*, 879 S.W.2d at 24; *see also Rusty's Weigh Scales & Servs., Inc. v. N. Tex. Scales, Inc.*, 314 S.W.3d 105, 112 (Tex. App.—El Paso

2010, no pet.); *Kinder Morgan N. Tex. Pipeline, L.P. v. Justiss*, 202 S.W.3d 427, 447 (Tex. App.—Texarkana 2006, no pet.). For example, the construction of a pipeline that improperly resulted in the destruction of more than 600 trees and a levee that the landowners erected to prevent flooding – did not give rise to malice. *Kinder Morgan*, 202 S.W.3d at 448. Although there was some risk of injury, building the pipeline did not constitute clear and convincing evidence of an extreme risk of extraordinary harm. *Id.* at 449 (citing *Ellis County State Bank v. Keever*, 936 S.W. 2d 683 (Tex. App.—Dallas 1996, no writ)).

Here, Waste Management's business conduct does not fall to the level of statutory malice required to support exemplary damages. The jury may have thought that Waste Management's conduct was at worst "unethical"; it is in fact not disputed that the conduct of both parties was highly "competitive," and that Waste Management was motivated by a sense of urgency since "time is often of the essence." However, Texas law makes plain that these factors will not support exemplary damages. The intent to gain a competitive advantage by winning a contract bid cannot be equated with the malicious intent to inflict extraordinary harm required to support exemplary damages.

Because the evidence supporting statutory malice is legally insufficient, the court of appeals should have rendered a take-nothing judgment on punitive damages. Accordingly, this Court should grant review and render a take-nothing

judgment on punitive damages.

VI. TDS abandoned the proper remedy designed for a corporation - business disparagement.

TDS's allegations formed the basis of a business disparagement claim, not claims for defamation or defamation per se. Although the torts have similarities, they also have important differences. *See* Charles M. Hosch, *Annual Survey of Texas Law: Business Torts*, 56 S.M.U.L.R. 1171 (2003) ("The distinction between a personal defamation by libel or slander and a claim for business or commercial disparagement is subtle but important."). First, as this Court has recognized, the two torts protect distinctly different interests: "The action for defamation is to protect the personal reputation of the injured party, whereas the action for injurious falsehood or business disparagement is to protect the economic interests of the injured party against pecuniary loss." *Hurlbut v. Gulf Atlantic Life Ins. Co.*, 749 S.W.2d 762, 766 (Tex. 1987); *see also Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 170 (Tex. 2003) ("[D]efamation actions chiefly serve to protect the personal reputation of an injured party, while a business disparagement claim protects economic interests."). The two torts also have different statutes of limitation. *See* TEX. CIV. PRAC. & REM. CODE § 16.002(a), 16.003; *Dwyer v. Sabine Mining Co.*, 890 S.W.2d 140, 142 (Tex. App.—Texarkana 1994, writ denied). The torts have different pleading and proof requirements: falsity and malice must always be pleaded and proved in a business disparagement claim but

are not always required in a defamation or defamation per se claim. *Hurlbut*, 749 S.W.2d at 766; *see also WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998) (requiring only negligence for suits brought by private individuals); *Randall's Food Markets, Inc.*, 891 S.W.2d at 646 (providing that truth is an affirmative defense in suits brought by private individuals). Finally, because "the communication must play a substantial part in inducing others not to deal with the plaintiff," a business disparagement claim requires proof of special—not general—damages in the form of pecuniary loss. *Hurlbut*, 749 S.W.2d at 767.

Rather than recovering for a defamation or defamation per se cause of action designed for natural persons, as a corporation TDS could only seek to recover the types of damages awarded by the jury here through a business disparagement claim. *See id.* As a for-profit corporation, TDS has no "personal" reputation to protect, only economic interests. As such, damage to any business reputation can be expressed in pecuniary terms.

TDS abandoned the only valid cause of action that could have supported the economic interest damages awarded by the jury.[2] Although business

[2] Remanding the case in the interest of justice to allow TDS to try its abandoned business disparagement claim is unnecessary. Because this case involves speech of public concern about a public figure, questions about falsity and malice (required elements of a business disparagement claim) were submitted in connection with TDS's defamation claim.

disparagement was part of TDS's live pleading at trial, it did not seek a jury question or obtain any finding on business disparagement. *See* CR 20-21, 45-57. Because a corporation cannot abandon an appropriate claim for business disparagement and then seek recovery instead under the inappropriate (but easier) personal torts of defamation or defamation per se, this Court should grant review and hold that TDS is not entitled to recover on those claims.

A. Defamation per se is an inherently personal tort.

One requirement of defamation per se, drawn from slander per se, is that the statement must fall into one of the four categories of crime, disease, sexual misconduct, and professional dishonesty. As discussed in section I.B.1. of this brief, this requirement makes defamation per se nonsensical for corporations, as opposed to natural persons, because only natural persons can suffer the kind of harm that slander per se was designed to address. While a natural person may experience real but subjective manifestations of injury such as mental anguish, sleeplessness, or embarrassment, corporations can suffer none of those harms.

B. The criteria for defamation per se does not work if the plaintiff is a corporation.

Additionally, the definition of "defamation per se" breaks down if the plaintiff is a corporation. In particular, one of the four categories provides that a statement is defamation per se "if it injures a person in his office, business,

profession, or occupation." *Pitts & Collard, L.L.P. v. Schechter*, 369 S.W.3d 301, 329 (Tex. App.—Houston [1st Dist.] 2011, no pet.). Even disregarding the use of "person" in the definition, there is another problem—the definition becomes meaningless when applied to a corporation. A natural person has a life outside his business (hopefully), but a corporation is nothing but a business. If defamation per se was appropriate for corporations, a for-profit corporation such as TDS would always be able to forgo a claim for disparagement in favor of the much easier tort of defamation per se.

Accordingly, this Court should grant review and render judgment that TDS take nothing on its claims for defamation and defamation per se.

Prayer

Accordingly, Waste Management urges this Court to grant its Petition for Review, reverse the judgment of the court of appeals, and render judgment that TDS take nothing, or at most nominal damages, on its claims. Alternatively, Waste Management reform the judgment and award TDS only remediation damages. Alternatively, Waste Management urges this Court to remand this case with the guidance necessary for the court of appeals and the trial court.

As to each issue raised in this brief, Waste Management prays for the following relief in the alternative, depending on the described ruling. For example:

Sufficiency of the Evidence

- If the evidence of the falsity of the Action Alert and/or actual malice is legally insufficient: a take-nothing judgment.
- If the evidence of the falsity of the Action Alert and actual malice is legally sufficient, but the evidence of both reputation damages and remediation damages is legally insufficient: a take-nothing judgment or a judgment for nominal damages.
- If the evidence of the falsity of the Action Alert, actual malice, and remediation damages is legally sufficient, but the evidence of reputation damages is legally insufficient: a judgment for remediation damages (review statutory malice for punitives).
- If the evidence of the falsity of the Action Alert, actual malice, and remediation and/or reputation damages is legally sufficient, but the evidence of statutory malice is legally insufficient: a judgment for remediation and/or reputation damages (review statutory malice for punitives).
- If the evidence of the falsity of the Action Alert, actual malice, remediation, and some reputation damages is legally sufficient, but the evidence of the amount of reputation damages awarded is legally

insufficient: remand to the court of appeals for further proceedings/remittitur after review of statutory malice for punitives.

Other Holdings

- Defamation per se is not a proper claim here: Conduct legal sufficiency review of the falsity of the Action Alert, actual malice, remediation and reputation damages, and statutory malice in light of remaining defamation claims.
- Presumed damages are not available here: Conduct legal sufficiency review of the falsity of the Action Alert, actual malice, remediation and reputation damages, and statutory malice in light of remaining defamation claims.
- If presumed damages are available but the jury instruction was erroneous: remand for new trial.
- The exclusion of the TNRCC evidence was harmful error: remand for new trial.

Respectfully submitted,

/s/ Robert M. ("Randy") Roach, Jr.

Robert M. ("Randy") Roach, Jr.
Texas Bar No. 16969100
rroach@roachnewton.com
Daniel W. Davis
Texas Bar No. 24040767
ddavis@roachnewton.com
ROACH & NEWTON, L.L.P.
1111 Bagby, Suite 2650
Houston, Texas 77002
(713) 652-2032
(713) 652-2029 (Fax)

Amy J. Schumacher
Texas Bar No. 24028241
aschumacher@roachnewton.com
ROACH & NEWTON, L.L.P.
101 Colorado Street, No. 3502
Austin, Texas 78701
(512) 656-9655
(512) 474-5802 (Fax)

Thomas R. Phillips
Texas Bar No. 00000102
tom.phillips@bakerbotts.com
BAKER BOTTS L.L.P.
98 San Jacinto Blvd., Suite 1500
Austin, Texas 78701
512-322-2565
512-322-8363 (Fax)

William W. Ogden
Texas Bar No. 15228500
bogden@ogblh.com
OGDEN, GIBSON, BROOCKS, LONGORIA & HALL, L.L.P.
1900 Pennzoil South Tower
711 Louisiana
Houston, Texas 77002
(713) 844-3000
(713) 844-3030 (Fax)

Certificate of Compliance

This document contains 14,282 of a permissible 15,000 words as defined by TEX. R. APP. P. 9.4(i)(1).

/s/ Robert M. ("Randy") Roach, Jr.
Robert M. ("Randy") Roach, Jr.

Certificate of Service

On May 7, 2013, a copy of this Brief was served on counsel for all parties by electronic service and/or Certified Mail, Return Receipt Requested.

/s/ Robert M. (“Randy”) Roach, Jr.
Robert M. (“Randy”) Roach, Jr.

A

2012 WL 1810215
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.

MEMORANDUM OPINION
Court of Appeals of Texas,
Austin.

WASTE MANAGEMENT
OF TEXAS, INC., Appellant.
Texas Disposal Systems
Landfill, Inc, Cross–Appellant,
v.
TEXAS DISPOSAL SYSTEMS
LANDFILL, INC., Appellee.
Waste Management of Texas, Inc., Cross–Appellee.

No. 03–10–00826–CV. | May 18, 2012.

From the District Court of Travis County, 126th Judicial District No. D–1–GN–97–012163, Stephen Yelenosky, Judge Presiding.

Attorneys and Law Firms

William W. Ogden, Ogden, Gibson, Broocks, Longoria & Hall, L.L.P., Houston, TX, John J. McKeeta, III, Graves, Dougherty, Hearon & Moody, P.C., Amy J. Schumacher, Roach & Newton, L.L.P., Austin, TX, Mollie C. Lambert, Cohn & Lambert, Cleveland, TX, for appellant.

James A. Hemphill, Graves, Dougherty, Hearon & Moody, P.C., Austin, TX, Thomas M. Gregor, Ogden, Gibson, Broocks, Longoria & Hall, L.L.P., Robert M. (Randy) Roach, Jr., Daniel W. Davis, Roach & Newton, L.L.P., Houston, TX, for appellant.

Before Chief Justice JONES, Justices PEMBERTON and ROSE.

Opinion

MEMORANDUM OPINION

JEFF ROSE, Justice.

***1** This is a defamation case that was previously tried to a jury, reversed and remanded on appeal, and tried to a jury again. In this second appeal, Waste Management of Texas, Inc., challenges, in seven issues, the second jury verdict in favor of Texas Disposal Systems Landfill, Inc., and in one cross-issue, Texas Disposal challenges the district court's application of the statutory cap to the jury's award of exemplary damages. For the reasons set forth below, we will affirm the judgment.

BACKGROUND

The factual and procedural background of this case is detailed at length in *Texas Disposal Systems Landfill, Inc. v. Waste Management Holdings, Inc.*, 219 S.W.3d 563 (Tex.App.-Austin 2007, pet. denied) (*Texas Disposal I*). Generally stated, however, Waste Management and Texas Disposal are competitors in the waste-removal and landfill-services industry serving the Austin and San Antonio markets. This case arises from Waste Management's January 30, 1997, anonymous publication of a one-page document, titled “Action Alert,” to Austin environmental and community leaders. The Action Alert conveyed to its readers allegations that increased traffic and environmental problems would result from Texas Disposal's proposed landfill contract with the City of San Antonio, questioned the environmental integrity of Texas Disposal's landfill in Travis County, and urged recipients of the document to contact public officials in San Antonio, Austin, and the media with the readers' “concerns.” After publication of the Action Alert, Texas Disposal filed suit against Waste Management alleging that it had attempted to disparage Texas Disposal's reputation to eliminate it as a competitor and asserting claims for defamation, tortious interference with an existing prospective contract, business disparagement, and antitrust violations based on the alleged conduct. *See id.* at 570. After various motions for summary judgment that eliminated most of these claims, Texas Disposal tried its defamation claim to a jury, which found that statements in the Action Alert were false and made with actual malice, but that Texas Disposal had suffered no damages. The district court entered a take-nothing judgment against Texas Disposal, which it appealed in *Texas Disposal I.*

In *Texas Disposal I*, this Court held, among other things, that the district court had erred by refusing to include a question about defamation per se in the jury charge. Specifically, we held that because there were underlying fact issues regarding whether Waste Management's Action Alert was defamatory per se—i.e., whether the meaning and effect of the words in the Action Alert tended to affect Texas Disposal injuriously

in its business—the district court had abused its discretion by refusing to submit Texas Disposal's requested defamation-per-se question and instruction. *Id.* at 583–84. The omitted question would have instructed the jury that a statement is defamatory per se if it affects an entity injuriously in its business, occupation, or office, and then asked the jury to determine if the statements and implications in the Action Alert were defamatory per se. The question further instructed the jury that, in making its determination, it should consider the Action Alert as a whole and in light of the surrounding circumstances. *Id.* at 580–81. Based on that charge-error holding, we remanded the case to the district court for a new trial. *See id.* at 584.

***2** Regarding damages, we held that if the jury found on remand that the statements in the Action Alert were defamatory per se, then Texas Disposal would be entitled to some amount of presumed general damages for injury to its reputation. We based this holding on the legal presumption that a plaintiff who is the subject of a statement that is found to be defamatory per se suffered at least some actual damages even without independent proof of general damages. *Id.* at 584. We further noted that the amount of actual damages is left to the jury's discretion and that proof of actual injury is required to recover special damages such as lost profits, incurred costs, and lost-time value. *Id.* at 581 n. 19, 584 n. 22.

On remand, the district court included in the jury charge a question on defamation per se with its associated instructions, and the jury found in favor of Texas Disposal, awarding it $450,592.03 for reasonable and necessary expenses, $0 for lost profits, $5 million for injury to Texas Disposal's reputation by the defamatory statements, and $20 million as exemplary damages based on the jury's finding that Waste Management published the defamatory statements with malice. Applying the statutory cap to the jury's award of exemplary damages, the district court treated the jury's $5 million award for injury to Texas Disposal's reputation as non-economic damages and reduced the exemplary damage award to $1,651,184.06.

Defamation

The issues in this second appeal solely involve Texas Disposal's claim that Waste Management's publication of the Action alert defamed Texas Disposal. "The law of defamation addresses injury to reputation by communications—usually words." 1 Robert D. Sack, *Sack on Defamation* § 1:1 (4th ed.2011); *see Texas Disposal I,* 219 S.W.3d at 580; *Black's Law Dictionary* 479 (9th ed.2009) (defining defamation as the "act of harming the reputation of another by making a false statement to a third person"). The law of defamation encompasses the common law claims of libel and slander. *See Sack on Defamation* at § 1.1. Because of constitutional concerns that often arise in defamation claims, the elements of a cause of action for defamation can vary depending on the identities of the parties and the character of the alleged defamatory statement. *See Sack on Defamation* § 2:1. For example where, as here, the case involves public speech about a matter of public concern, the plaintiff must show that the defendant published a false, defamatory statement about the plaintiff with actual malice. [1] *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964); *Texas Disposal I,* 219 S.W.3d at 574–75. In this context, "actual malice" means that the defendant published the statement with knowledge of its falsity or with reckless disregard to its falsity. *See New York Times*, 376 U.S. at 279–80; *Bentley v. Bunton*, 94 S.W.3d 561, 590 (Tex.2002); *Texas Disposal I,* 219 S.W.3d at 575. Whether a statement is defamatory is a question of law. *See Musser v. Smith Prot. Servs., Inc.*, 723 S.W.2d 653, 654 (Tex.1987). If the defamatory statement alleges that the plaintiff committed a crime, has contracted a "loathsome disease," is "unchaste" or has committed serious sexual misconduct, or tends to injure a person in his office, profession, or occupation, the defamatory statement is considered defamatory per se, which means that the communication will support a cause of action for defamation without proof of actual pecuniary loss. *See Salinas v. Salinas*, —— S.W.3d ——, No. 11–0131, 2012 WL 1370869, at *2 (Tex. Apr. 20, 2012) (citing *Bentley*, 94 S.W.3d at 604); *Texas Disposal I,* 219 S.W.3d at 580; *Sack on Defamation* § 2:8:2. Stated another way, a finding of defamation per se entitles the plaintiff to a presumption of general damages. *See Bentley*, 94 S.W.3d at 604 (addressing libel per se). [2] This distinction is thought by some to have developed because each of these categories of defamatory statements involves circumstances in which it would be difficult for the subjects of the statement to trace specific financial losses. *See Sack on Defamation* at § 2:8:2. Whether a communication constitutes defamation per se is usually a legal question for the court. *See Texas Disposal I,* 219 S.W.3d at 581.

1 The district court treated Texas Disposal as a public figure and the subject of the Action Alert as a public issue. Because neither party challenges this treatment, we do not address it.

2 In contrast, statements that are defamatory per quod are actionable only upon allegation and proof of damages

—i.e., the plaintiff must prove both the existence and amount of the damages. *See Texas Disposal Systems Landfill, Inc. v. Waste Management Holdings, Inc.*, 219 S.W.3d 563 (Tex.App.-Austin 2007, pet. denied).

WASTE MANAGEMENT'S APPEAL

***3** Waste Management challenges the district court's judgment in seven issues, arguing that the district court erred by (1) instructing the jury that it could award presumed damages without any proof of damages; (2) asking the jury to determine whether statements in the Action Alert were defamatory per se; (3) rendering judgment on Texas Disposal's claim for defamation despite the fact that the cause of action is designed to protect the personal reputation of a natural person, not a business such as Texas Disposal; (4) rendering judgment for Texas Disposal when the evidence was insufficient to show that Waste Management wrote and distributed the Action Alert with actual malice; (5) rendering judgment for Texas Disposal when the evidence was insufficient to support the $5 million injury-to-reputation award and the finding that the Action Alert was false, and insufficient to show causation and common-law malice; (6) excluding certain of Waste Management's evidence; and (7) awarding exemplary damages that are grossly disproportionate to the offense.

Presumed damages

In its first issue, Waste Management asserts that the district court erred in submitting the following question to the jury:

QUESTION NO. 7

What sum of money, if paid now in cash, would fairly and reasonably compensate [Texas Disposal] for damage to its reputation caused by the publication of the statements or implications regarding which you answered "Yes" to Question No. 4?

....

Damage to reputation in the past.

With respect to the publication of statements and implications regarding which you answered "Yes" in answer to Question No. 6, *damage to reputation may be presumed; no evidence is required of damages.* With respect to the publication of statements and implications, regarding which you answered "No" in your answer to Question No. 6, there must be evidence of damage to reputation proximately caused by that publication....

(Emphasis added.)[3] Waste Management contends that the emphasized portion of this instruction to Question 7 was improper because it allowed the jury to "award any amount it chose for reputation damages regardless of the evidence" and because it "directed the jury to award excessive damages." We disagree.

3 Question No. 4 asked the jury whether Waste Management made the false statement in the Action Alert with actual malice—i.e., "knowing it was false or with reckless disregard of whether it was true or not." Question No. 6 asked the jury whether the statements in the Action Alert "affect an entity injuriously in its business, occupation, or office, or charge an entity with illegal or immoral conduct."

Initially, we note that the instruction correctly states Texas law—statements that are defamatory per se are presumed to injure the claimant's reputation and entitle the claimant to recover general damages, including damages for loss of reputation, without proof of injury. *See Salinas*, 2012 WL 1370869, at *2 (citing *Bentley*, 94 S.W.3d at 604); *Texas Disposal I*, 219 S.W.3d at 584; *Peshak v. Greer*, 13 S.W.3d 421, 427 (Tex.App.-Corpus Christi 2000, no pet.); *see also Black's Law Dictionary* 1334 (defining proof as the "establishment or refutation of an alleged fact by evidence"). Although an argument might be made that the instruction here is awkwardly drafted, it does not, as Waste Management suggests, give the jury the unfettered right to award "any amount it chose." It merely informs the jury that, having determined that the statements in the Action Alert are defamatory per se, the jury may presume that Texas Disposal suffered damage. After a semicolon, the instruction then explains that "to presume" damages means that "no evidence is required of damages." *See Black's Law Dictionary* 1304 (defining "presume" as "[t]o assume beforehand; to suppose to be true in the absence of proof"); *Webster's Third New Int'l Dictionary* 1976 (2002) (defining "presume" as "to accept as true or credible without proof").

***4** The question and instruction also properly limit the jury's award in that, under the question as posed, the jury may only award an amount that "would fairly and reasonably compensate" Texas Disposal for the damage to its reputation. A question that requests fair and reasonable damages cannot be said to direct a jury to award excessive damages or to allow the jury to award any amount regardless of the

evidence. Further, perhaps with the exception of nominal damages, any amount awarded by the jury is subject to an evidentiary review. *See Bentley*, 94 S.W.3d at 606 (holding that jury award for injury to reputation subject to evidentiary review); *see also Salinas*, 2012 WL 1370869, at *2 (noting that regarding defamation per se, the law does not presume any particular amount of damages beyond nominal damages and that the amount of damages is a question for the jury). Thus, although the jury may presume that Texas Disposal suffered damage without proof that Texas Disposal suffered damages, it must only award that amount of damages that "fairly and reasonably compensates" Texas Disposal, and on review, there must be evidence supporting the amount awarded. As such, the instruction here was not improper. We overrule Waste Management's first issue.

Defamation per se

In its second issue, Waste Management asserts that the district court erred by asking the jury whether certain statements in the Action Alert "tend to affect an entity injuriously in its business, occupation, or office, or charge an entity with illegal or immoral conduct"—i.e., the defamatory-per-se standard—because whether a statement is defamatory per se is a question of law for the court to answer. Rather than ask the jury this "ultimate legal question of defamation per se," Waste Management contends that the district court should have asked the jury predicate questions of fact regarding the exact meaning and effect of the words in the Action Alert and then "entered judgment for Texas Disposal only if defamation per se existed as a matter of law." In making this assertion, Waste Management purports to rely on our decision in *Texas Disposal I*, arguing that we directed the district court to ask the jury the predicate fact questions. We disagree.

In *Texas Disposal I*, we held that although defamation per se is generally a legal question, a trial court may pass that inquiry to the jury if ambiguities exist about the meaning and effect of the words. *See Texas Disposal I*, 219 S.W.3d at 581 (citing *Musser*, 723 S.W.2d at 655). We then determined that the district court's refusal to find in pre-trial rulings that the statements in the Action Alert were defamatory per se did not mean that the court believed the statements were not defamatory per se, but rather demonstrated that the district court "was not convinced as a matter of law that no ambiguities remained on the issue" of whether the statements were defamatory per se. *Id.* Accordingly, because Texas Disposal had preserved charge error by submitting in writing "substantially correct questions and instructions related to these issues" and by objecting in writing to the exclusion of these questions in the proposed charges, we held that it was error for the district court to refuse to submit Texas Disposal's requested question and instructions about defamation per se to the jury when the question was raised by the written pleadings and supported by the evidence, namely evidence that Waste Management defamed Texas Disposal in a manner injurious to its business. *See id.* at 582 (citing Tex.R. Civ. P. 278 for the proposition that "court is required to submit questions, instructions, and definitions raised by written pleadings and supported by evidence" and summarizing Texas Disposal's requested questions and instructions). We also noted that although whether a statement is defamatory per se is generally a legal question, there existed underlying ambiguities in the facts of this case that could not be decided as a matter of law and needed to go to the jury—specifically, "the exact meaning and effect of the words because much of the Action Alert's defamatory character arose not from its blatant statements but, rather, from the impressions it created and inferences it encouraged." *See id.* at 582–83 (citing *Musser*, 723 S.W.2d at 655).

***5** On remand, the district court approved a jury charge that instructed the jury on the meaning of "defamatory" and asked the jury to determine whether certain statements from the Action Alert were defamatory and, if so, whether the statements were made with actual malice. For those statements that the jury found had been made with actual malice, the 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?" As seen in the chart below, the question submitted to the jury on remand is virtually identical to the question we approved as being "substantially correct" in the appeal of the first trial. *See id.* at 582.

Omitted question from first trial	Question submitted at second trial
"Were any of the following statements, impressions, or implications from the Action Alert, or the Action Alert as a whole, ... defamatory *per se?* "	"With respect to each of the statements or implications below ..., does the statement or implication tend to affect an entity injuriously in its business, occupation, or office, or charge an entity with illegal or immoral conduct?"

1. "There are no restrictions on the types of waste that may be disposed of in the [Texas Disposal] landfill, with the exception of hazardous waste."	"There are no restrictions on the types of waste that may be disposed of in the [Texas Disposal] landfill, with the exception of hazardous waste."
2. "The [Texas Disposal] facility applied for and received an exception to the EPA Subtitle D environmental rules." [4]	"The [Texas Disposal] facility "applied for and received an exception to the EPA Subtitle D environmental rules."

Footnotes

5 "Leachate" is "[a] liquid that has passed through or emerged from solid waste." *See* Tex. Admin. Code § 330.3(78) (2012) (Texas Commission on Environmental Quality, Definitions).

6. "The Action Alert taken as a whole."	[see above] "does the statement or implication tend to affect an entity injuriously in its business, occupation, or office, or charge an entity with illegal or immoral conduct."
"A statement is defamatory *per se* if it tends to affect an entity injuriously in its business, occupation, or office, or charges an entity with illegal or immoral conduct."	
"In deciding whether a statement, impression, or implication is defamatory or defamatory *per se*, you are to consider a reasonable person's perception of the statement, impression, or implication in the context of the Action Alert as a whole, and in light of the surrounding circumstances."	"You are to consider an ordinary person's perception of the statement or implication in the context of the Action Alert as a whole, and in light of the surrounding circumstances."

***6** (Omitted question is quoted from Texas Disposal's "Supplemental Proposed Jury Definitions, Instructions, and Questions" from the first jury trial of this matter; formatting and order changed in remand question for comparison purposes.) As such, the district court submitted a question that is consistent with our holding in *Texas Disposal I. See id.* at 582–83. Thus, not only was it not error for the district court to submit this question and instruction to the jury, the district court was bound to do so under the law of the case. *See Texas Parks & Wildlife Dep't v. Dearing*, 240 S.W.3d 330, 347 (Tex.App.-Austin 2007, pet. denied) (discussing law-of-the-case doctrine and holding that trial court abuses its discretion if it fails to carry out mandate of appellate decision). Likewise, absent rare circumstances that are not evident here, we are bound by our initial decision that the district court erred when it failed to submit to the jury the requested jury question and instructions regarding defamation per se. *See Briscoe v. Goodmark Corp.*, 102 S.W.3d 714, 716 (Tex.2003); *Dearing*, 240 S.W.3d at 348 ("Under the law-of-the-case doctrine, a court of appeals is ordinarily bound by its initial decision on a question of law if there is a subsequent appeal in the same case.") (citing *Briscoe*, 102 S.W.3d at 716).

But even if the question and instructions submitted to the jury on retrial had not tracked the question and instruction we reviewed and approved in *Texas Disposal I*, the submitted question and instruction properly asked the jury to resolve the ambiguities that existed regarding the meaning and effect of the statements and implications in the Action Alert. *See id.* at 582–83. Specifically, the submitted question and instructions asked the jury to determine whether the statements, looked at from an ordinary person's perception of the statement or implication in the context of the Action Alert as a whole and in light of the surrounding circumstances, affected Texas Disposal's "business, occupation, or office, or charge [Texas Disposal] with illegal or immoral conduct." *See Musser*, 723 S.W.2d at 655 (holding that fact question about meaning and effect of words may be passed to jury); *Restatement (Second) Torts* § 614(2) (1977) (providing that "jury determines whether a communication, capable of a defamatory meaning, was so understood by its recipient"). In other words, the jury here was asked to determine both whether the defamatory statements in the Action Alert affected Texas Disposal's business as described and also whether an ordinary person under the circumstances would have understood it to have that effect. Again, allowing the jury to answer what would ordinarily be a legal question is proper where, as here, there are underlying ambiguities that require resolution. *See Musser*, 723 S.W.2d at 655; *Texas Disposal I*, 219 S.W.3d at 581.

Waste Management contends that it was improper to submit this question to the jury because "statements must be defamatory per se as a matter of law." Specifically, Waste Management contends that to be defamatory per se, the trial court must determine as a matter of law that the statements are (1) immediately and obviously harmful based on common experience, (2) without resorting to extrinsic evidence, and

(3) when viewed as a whole. But Waste Management cites to no authority for this three-part test, and we do not agree that it accurately states the law with regard to the facts of this case. We simply note this Court and several of our sister courts have deemed a statement that injures a person in his office, business, profession, or occupation as defamatory per se. *See, e.g., Pitts & Collard, L.L.P. v. Schechter,* —— S.W.3d ——, 2011 WL 6938515 (Tex.App.-Houston [1st Dist.] 2011, no pet. h.); *Cullum v. White,* —— S.W.3d ——, 2011 WL 6202800 (Tex.App.-San Antonio 2011, pet. denied) ("Publications are 'libel per se if they include statements that (1) unambiguously charge a crime, dishonesty, fraud, rascality, or general depravity, or (2) are falsehoods that injure one in his office, business, profession, or occupation.' " (quoting *Main v. Royall,* 348 S.W.3d 381, 390 (Tex.App.-Dallas 2011, no pet.)); *Morrill v. Cisek,* 226 S.W.3d 545, 549 (Tex.App.-Houston [1st Dist.] 2006, no pet.) ("Defamation is actionable per se if it injures a person in his office, business, profession, or occupation."); *Texas Disposal I,* 219 S.W.3d at 581. Likewise, section 573 and comment e to section 569 of the *Restatement (Second) of Torts* classify statements affecting another's business, trade, profession, or office as defamatory per se. *See Restatement (Second) Torts* §§ 569 cmt. e, 573. Waste Management emphasizes, however, that the statements in the Action Alert are "dry and technical" and thus were not "immediately and obviously harmful based on common experience" because they are not "highly inflammatory language that imputes immoral or illegal conduct." But again, the relevant questions here are whether the statements in the Action Alert are defamatory—i.e., whether they tend "to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him," *see id.* § 559—and if so, whether the defamatory statements affect Texas Disposal's business, trade, profession or office, *id.* at §§ 569, 573.

***7** Waste Management also argues that the statements in the Action Alert cannot be considered defamatory per se because they are not defamatory on their face, as shown by the fact that Texas Disposal had to produce extrinsic evidence or innuendo to show the statements were defamatory. But even assuming without deciding that Waste Management's premise here is correct, we disagree that extrinsic evidence was necessary to show the statements' defamatory nature or, in fact, that Texas Disposal produced evidence for that purpose. First, the defamatory nature of the statements is apparent from the face of the Action Alert, which asserts that Texas Disposal operated its landfill as an exception to EPA rules, did not have a required leachate collection system, and accepted harmful or dangerous waste other than hazardous waste at its landfill. Each of these statements plainly implies that Texas Disposal's landfill was dangerous or environmentally inferior. [6] Second, it appears that the purpose of Texas Disposal's evidence was to establish the falsity of these statements and implications and to show that Waste Management made the statements with actual malice.

6 The specific EPA rule referred to here is found at 40 C.F.R. § 258.40 (1997) (EPA Design Criteria for Municipal Solid Waste Landfills).

Finally, Waste Management argues that it was error for the district court to ask the jury about "isolated" sections of the Action Alert because Texas law requires the statement be "viewed as a whole." *See, e.g., Turner v. KTRK Television, Inc.,* 38 S.W.3d 103, 114 (Tex.2000) ("We have long held that an allegedly defamatory publication should be construed as a whole in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive it.") In making this argument, Waste Management suggests that the jury charge here lifts the relevant sentences or phrases out of context and thus reduces the jury to "microscopic wordsmithing, rather than requiring their consideration of the Action Alert taken as a whole." We disagree. The Action Alert itself was an exhibit available to the jury, and the charge clearly, plainly, and frequently directs the jury to consider the Action Alert's implications and statements "as a whole" and "in light of the surrounding circumstances." Further, the defamatory-per-se question instructs the jury to consider "an ordinary person's perception of the statement or implication in the context of the Action Alert as a whole, and in light of the surrounding circumstances." Thus, the jury did not consider only isolated portions of the Action Alert. We overrule Waste Management's second issue on appeal.

Business disparagement

In its third issue, Waste Management argues that the district court erred in entering judgment for Texas Disposal because Texas Disposal had "abandoned any claim for business disparagement that might have supported the damages it sought and obtained." In making this argument, Waste Management relies on its related assertion, which it urged in its second issue but which we address here, that only a natural person can maintain a defamation cause of action. Specifically, Waste Management argues that it was error for the district court to submit the defamation-per-se question to the jury because a cause of action for defamation is available only to natural persons, not to corporations such as Texas

Disposal. Therefore, Waste Management asserts, because Texas Disposal abandoned its business disparagement claim, Texas Disposal has no way to recover the damages it seeks to recover here. But Waste Management cites no persuasive authority for this proposition, and the Texas Supreme Court has specifically "recognized that a corporation, as distinguished from a business, may be libeled." *See General Motors Acceptance Corp. v. Howard*, 487 S.W.2d 708, 712 (Tex.1972) (citing *Newspapers, Inc. v. Matthews*, 339 S.W.2d 890 (Tex.1960); *Bell Publ'g Co. v. Garrett Eng'g Co.*, 170 S.W.2d 197 (Tex.1943)); *see also Snead v. Redland Aggregates Ltd.*, 998 F.2d 1325, 1328 n. 3 (5th Cir.1993) (interpreting Texas law to allow a corporation to bring a cause of action for libel) (citing *Brown v. Petrolite Corp.*, 965 F.2d 38, 43 n. 5 (5th Cir.1992); *Howard*, 487 S.W.2d at 712); *Spincic v. Haber*, No. B14–87–00569–CV, 1988 WL 34894, at *4 (Tex.App.-Houston [14th Dist.] Apr. 14, 1988, no writ) (mem. op., not designated for publication) ("A defamation action lies on behalf of a corporation just as on behalf of an individual.") (citing *Howard*, 487 S.W.2d at 708); *Restatement (Second) of Torts* § 561 ("One who publishes defamatory matter concerning a corporation is subject to liability to it ... if the corporation is one for profit, and the matter tends to prejudice it in the conduct of its business or to deter others from dealing with it ...."); *id.* at cmt. b ("A corporation for profit has a business reputation and may therefore be defamed in this respect."). Accordingly, Waste Management's argument here is without merit and we overrule its third issue on appeal.

Actual Malice

***8** In its fourth issue, Waste Management asserts that there is insufficient evidence to uphold the jury's finding that Waste Management published the alleged defamatory statements or implications in the Action Alert with actual malice. In *Texas Disposal I*, Waste Management raised, and we rejected, the same argument, although stated more broadly. *See* 219 S.W.3d at 574–75 (rejecting Waste Management's argument that the take-nothing judgment should be affirmed because there was not clear and convincing evidence of actual malice). Here, Waste Management specifically urges that there is insufficient evidence of actual malice because (1) "technical inaccuracies or rephrasings in matters of engineering and regulatory jargon are not sufficient to show falsity," (2) "the statements in the Action Alert, at worst, are no more than an understandable misinterpretation of ambiguous facts, which is insufficient to show actual malice as a matter of law," and (3) Waste Management's agents "had a rational basis for believing the truth of the statements."

We have reviewed the evidence in this case and determined that it is essentially the same evidence that was presented in the first trial, which we reviewed in our analysis of the evidence supporting that first jury's finding of actual malice as asserted by Waste Management in its cross-appeal in *Texas Disposal I*. *See* 219 S.W.3d at 574–80. Although the first jury was asked about the Action Alert in general terms —i.e., "Was the Action Alert false as it related to [Texas Disposal]?" and "At the time the Action Alert was published, did [Waste Management] know it was false or have serious doubts about its truth?"—and the second jury was asked separate questions about discrete parts of the Action Alert—e.g., whether the implication from the Action Alert that Texas Disposal does not have a leachate collection system was false when made and, if false, whether Waste Management made the statement knowing it was false or with reckless disregard to its falsity—our opinion in *Texas Disposal I* reviews that section of the Action Alert which served as the basis for the discrete questions presented in the retrial. Thus, to the extent that Waste Management's challenge here to the evidence supporting actual malice overlaps our recitation of the standard of review and our evidentiary analysis in *Texas Disposal I*, we adopt here that standard of review and analysis as appropriate to our review of this case. *See id.* (holding that the record contained clear and convincing evidence that when Waste Management published the Action Alert, at a minimum it had serious doubts about the Action Alert's accuracy); *see also* Tex.R.App. P. 47.1 ("The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to a final disposition of the appeal."). We will, however, address the additional issues raised by Waste Management in this appeal that were not addressed in *Texas Disposal I*. *See* Tex.R.App. P. 47.1.

***9** Waste Management first argues that the statements in the action alert are the type of "technical, scientific, and regulatory jargon that are legally insufficient to support a finding of actual malice." It references as examples the words "exception" versus "alternative," "leachate finger drains" versus "leachate blanket," and whether compacted *in situ* clays are less reliable than a composite liner, arguing that these are "technical and evaluative assessments that simply cannot lend themselves to a characterization of knowing falsity." Initially, we note that the applicable section of the Action Alert does not refer to "leachate finger drains" or to whether compacted *in situ* clays are less reliable than a composite:

> ***Landfill Liner and Leachate Collection:*** Unlike other landfills in the Travis County area, [Texas Disposal]'s landfill applied for and received an exception to the EPA Subtitle D environmental rules that require a continuous synthetic liner at the landfill and a leachate collection system utilizing a leachate blanket to collect water that comes in contact with garbage (so that it cannot build up water pressure in a landfill). [Texas Disposal] requested and received state approval to use only existing clay soils as an approved "alternative liner" system, rather than use an expensive synthetic liner over the clay. Other landfills in Central Texas and San Antonio in similar clay formations are using the full synthetic liner in addition to the clay soils.

Nevertheless, in support of its argument, Waste Management relies on the Supreme Court's decision in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), which held that the imprecise language used in the publication at issue—specifically whether sound from speakers traveled "along the wall" versus "about the room"—did not support an inference of actual malice:

> The statement in this case represents the sort of inaccuracy that is commonplace in the forum of robust debate to which the *New York Times* rule applies. [*Pape,*] 401 U.S., at 292. "Realistically, ... some error is inevitable; and the difficulties of separating fact from fiction convinced the Court in *New York Times, Butts, Gertz,* and similar cases to limit liability to instances where some degree of culpability is present in order to eliminate the risk of undue self-censorship and the suppression of truthful material." *Herbert v. Lando,* 441 U.S. 153, 171–172 (1979). "[E]rroneous statement is inevitable in free debate, and ... must be protected if the freedoms of expression are to have the 'breathing space' that they 'need ... to survive .' " *New York Times* [ ], 376 U.S. at 271–272 (citation omitted).

Id. at 513. But unlike the underlying facts of *Bose Corp.*, there is evidence in this record that the language used was not merely inaccurate or made in error, but instead was known to be incorrect by the parties instrumental in drafting the Action Alert and was specifically chosen to be negative for Texas Disposal and to prevent San Antonio from awarding a contract to Texas Disposal. The principal author of the Action Alert, Don Martin, testified that he knew that Texas Disposal's landfill complied with EPA Subtitle D rules and knew that it would be false to say that Texas Disposal was not in compliance with Subtitle D, but that he intended the Action Alert to give the reader the impression that Texas Disposal had a "loophole" around those environmental rules such that it did not comply. *See* 42 C.F.R. § 258.40 (setting forth EPA's design criteria for municipal solid-waste landfills). He also testified that the purpose of the Action Alert was to suggest to its readers that Texas Disposal's landfill was less environmentally safe. Likewise, Waste Management employees involved with Martin in drafting the Action Alert testified that they knew that Texas Disposal's landfill was in compliance with Subtitle D, that it was false to suggest that Texas Disposal operated its landfill under an exception to Subtitle D, that it was false to suggest that Subtitle D requires a continuous synthetic liner in order to be in compliance with Subtitle D, that it was false to say that Texas Disposal's landfill did not have a leachate collection system, and that it was false to say that Texas Disposal's landfill accepted everything except for hazardous waste. Thus, rather than constituting imprecise language reflecting a misconception of a technical issue, *see Bose,* 466 U.S. at 492, 513, the evidence here demonstrates that the concept was fully understood and that the language used was deliberately chosen to have a harmful effect on Texas Disposal.

***10** Relatedly, Waste Management argues that the Action Alert merely expresses a difference of opinion regarding the safety and reliability of Texas Disposal's landfill and that differences of opinion cannot show actual malice. It relies, in part, on the Fifth Circuit's holding in *Peter Scalamandre & Sons, Inc. v. Kaufman. See* 113 F.3d 556, 562 (5th Cir.1997) (holding that differences of opinion could not show actual malice). But again the evidence in this case demonstrates that the statements and implications expressed in the Action Alert were not different opinions as to disputed matters, but were statements and implications known to be false by people involved with the drafting of the Action Alert that were specifically intended to give the impression that Texas Disposal's landfill was less environmentally sound than other landfills.

Waste Management focuses its argument on its assertion that, even though Texas Disposal believes its landfill to be environmentally sound, other landfill engineers and regulators strongly disagree; thus, Waste Management asserts, the implication that Texas Disposal's landfill is less environmentally sound than other similarly situated landfills is simply opinion that cannot support actual malice. But the Action Alert falsely states that the Texas Disposal landfill operates as an *exception* to EPA rules requiring a synthetic liner and a leachate collection system, *see* 42 C.F.R. § 258.40, and that Texas Disposal is allowed to operate using only the

clay soil under the landfill as an "alternate liner"—in other words, that Texas Disposal's landfill does not have a liner or leachate collection system—whereas other landfills in the area use a full synthetic liner under the same conditions. Likewise, the Action Alert falsely states that the Texas Disposal landfill accepts all trash except for hazardous waste. These are not opinions regarding the relative environmental soundness of the landfill, but rather factual assertions that Texas Disposal's landfill does not have the environmental safeguards that the EPA requires and that other landfills in similar situations use.

Waste Management also argues that "the statements in the Action Alert are, at worst, a rational and understandable interpretation of regulations and technical manuals that 'bristle with ambiguities' and require specialized technological knowledge to identify as true [or] false." *See Time Inc. v. Pape*, 401 U.S. 279, 290 (1971) (referencing a document that "bristled with ambiguities"). Specifically, Waste Management argues that "whether one characterizes the [Texas Disposal] landfill as an 'exception' or as an 'alternative' is the type of semantic choice of words that is legally insufficient to support a finding of knowing falsity." But several Waste Management employees who participated in the drafting of the Action Alert, and its principal author, Martin, testified that when the memo was drafted, they understood that there were two ways to comply with Subtitle D—i.e., either a performance-based design or a composite liner—and that they knew that Texas Disposal's so-designated "alternative design" was in compliance with Subtitle D. Likewise, they stated that they knew that Texas Disposal's landfill had a leachate collection system and that Subtitle D did not require a continuous synthetic liner. This knowledge, coupled with the principal author's testimony that the intent behind using the word "exception" in the Action Alert was to convey the message that Texas Disposal's landfill was not in compliance with Subtitle D, belies Waste Management's argument here that Subtitle D "bristles with ambiguities," at least with regard to this particular statement, and that use of the word "exception" is a "rational and understandable interpretation" of Subtitle D. Instead, it suggests, as the jury found, that it was a deliberate mischaracterization of the Texas Disposal landfill's compliance with EPA rules. We further emphasize that, as complicated and technical as EPA rules may be, it is clear from the text of Subtitle D that there are two acceptable designs and that neither of the two designs are "exceptions" to the design rules:

> ***11** (a) New MSWLF units and lateral expansions shall be constructed:
>
> (1) In accordance with a design approved by the Director of an approved State or as specified in § 258.40(e) for unapproved States. The design must ensure that the concentration values listed in Table 1 of this section will not be exceeded in the uppermost aquifer at the relevant point of compliance, as specified by the Director of an approved State under paragraph (d) of this section, or
>
> (2) With a composite liner, as defined in paragraph (b) of this section and a leachate collection system that is designed and constructed to maintain less than a 30–cm depth of leachate over the liner.

EPA Design Criteria for Municipal Solid Waste Landfills, 40 C.F.R. § 258.40 (1997).

Finally, Waste Management argues that the evidence was legally insufficient to find actual malice because the principal author of the Action Alert testified to his "honest belief in the accuracy of the Action Alert's statements at the time of publication and because the statements in the Action Alert have rational support in the known facts." But as we explained in *Texas Disposal I*, "[b]ased on the jury's affirmative answers to falsity and actual malice, the jury must have disbelieved these self-serving statements. As long as that determination was reasonable, we too should ignore this evidence." *Texas Disposal I*, 209 S.W.3d at 577 (citing *Bentley*, 94 S.W.3d at 599). *Texas Disposal I* then went on to examine the evidence supporting the jury's finding of falsity and actual malice, concluding that it was clear and convincing. *Id.* at 579. Based on essentially the same evidence and analysis we relied on in *Texas Disposal I*, *see id.* at 577–80, specifically the fact that Waste Management's consultant, the principal author of the Action Alert, and at least some of the Waste Management employees involved in drafting the Action Alert knew at the time that certain of the statements were false, we again conclude that there is clear and convincing evidence in the record that when Waste Management published the Action Alert, it had, at a minimum, serious doubts about its accuracy.

We overrule Waste Management's fourth issue.

Sufficiency of the evidence

In its fifth issue, Waste Management brings legal- and factual-sufficiency challenges on the following grounds: (1) the evidence supporting the jury's $5 million injury-to-reputation award is legally insufficient because there is no evidence that the Action Alert caused any injury to Texas Disposal; (2) the evidence supporting the jury's finding of falsity is

legally and factually insufficient because the Action Alert was substantially true as a matter of law; (3) there is no evidence to support causation because Texas Disposal failed to establish that Texas Disposal's reputation was injured, that it incurred remediation costs, or that there were not other causes for its damages; and (4) the evidence is legally and factually insufficient to support the level of common law or statutory malice for an award of exemplary damages.

Standard of review

***12** A party challenging the legal sufficiency of the evidence supporting an adverse finding on an issue for which an opposing party has the burden of proof will prevail if (1) there is a complete absence of evidence of a vital fact, (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, (4) the evidence conclusively establishes the opposite of the vital fact. *See City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex.2005); *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex.2003). "More than a scintilla of evidence exists when the evidence supporting the finding, as a whole, rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex.1997) (quoting *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex.1995) (internal quotes omitted)). But if the evidence is so weak that it does no more than create a mere surmise or suspicion of its existence, its legal effect is that it is no evidence. *See Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex.1983).

When conducting a legal-sufficiency review, we view the evidence in the light most favorable to the judgment, crediting favorable evidence if a reasonable fact finder could and disregarding contrary evidence unless a reasonable fact finder could not. *City of Keller*, 168 S.W.3d at 807. We indulge every reasonable inference that would support the trial court's findings. *Id.* at 822. "The final test for legal sufficiency must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review." *Id.* at 827.

When an appellant attacks the factual sufficiency of an adverse finding on an issue on which he did not have the burden of proof, the appellant must demonstrate that the finding is so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust. *See Cain v. Bain*, 709 S.W.2d 175, 176 (Tex.1986) (per curiam). We review the factual sufficiency of the evidence to support a jury verdict by considering and weighing all the evidence in a neutral light, and we will set the verdict aside "only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Id.* at 176. However, this Court is not a fact finder, and we may not pass upon the credibility of the witnesses or substitute our judgment for that of the trier of fact, even if a different answer could be reached upon review of the evidence. *See Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 407 (Tex.1998).

Injury to reputation

Waste Management asserts that the jury's award of $5 million for reputation damages is not supported by legally sufficient evidence because there is "[no] evidence that publication of the Action Alert caused the claimed damages." Specifically, Waste Management complains that "[n]o witness identified a single customer that [Texas Disposal] lost or a single adverse act taken against [Texas Disposal]." It also suggests that, to be entitled to reputation damages, Texas Disposal would have had to elicit testimony, for example, that a person's impression of Texas Disposal was actually diminished by the publication of the Action Alert. In support of its argument that the jury's finding must be supported by evidence that the publication caused the claimed damages, Waste Management relies on the Texas Supreme Court's decisions in *Bentley*, 94 S.W .3d at 605–06, and *Saenz v. Fidelity & Guaranty Insurance Underwriters*, 925 S.W.2d 607, 614 (Tex.1996).

***13** In *Bentley*, the Texas Supreme Court held that the First Amendment requires appellate review of amounts awarded for mental-anguish and reputation 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." *See Bentley*, 94 S.W.3d at 605 (discussing non-economic award to person in defamation per se case). But in addressing the defendant's initial argument regarding whether an award of reputation damages was supported by the evidence, the *Bentley* court rejected the defendant's argument that the evidence did not support any award of reputation damages, holding that "[o]ur law presumes that statements that are defamatory per se injure the victim's reputation and entitle him to recover general damages, including damages for loss of reputation." *Id.* at 604. Thus, in the present case, we presume that publication of the Action Alert injured Texas Disposal's reputation, based on the jury's finding that the Action Alert was defamatory per se.

Beyond that presumption, however, we must still review the evidence to determine whether its supports the amount awarded for reputation damages. *See id.* at 605–06 (noting that the jury is bound by the evidence in awarding damages). Although the jury has some latitude and discretion in assessing reputation damages, there must be evidence in the record that $5 million is fair and reasonable compensation for the injury to Texas Disposal's reputation. *See id.*

In this case, Texas Disposal's president Bob Gregory testified that publication of the Action Alert injured Texas Disposal's reputation in the amount of $10 million. In support of that amount, he explained why it was important for a business like Texas Disposal to have a good reputation, what a good reputation is worth to a company, which he characterized as "priceless," and specifically why it was important for Texas Disposal to have a good environmental reputation, pointing out specific examples of environmental-reputation problems in Austin. He stated that, before publication of the Action Alert, Texas Disposal had a good reputation in the central Texas community, and Austin in particular, for running an environmentally sensitive or sound landfill. He then described his impression of the environmental community's reaction to the Action Alert, including reports that some of its members had "turned a cold shoulder" to Texas Disposal after the Action Alert, and that Texas Disposal appeared to be, at the very least, no different from other landfills. Gregory also provided financial information about Texas Disposal, including information about the dollar amounts of its contracts that Texas Disposal claimed were put at risk by publication of the Action Alert. Finally, he described in detail the actions he and his company had to take to counteract or remedy the damage to its reputation. In addition to Gregory, the jury heard testimony from Austin community members and environmentalists about their concerns when the Action Alert was published. Finally, the jury heard testimony about Waste Management's purpose in publishing the Action Alert —to give the impression that Texas Disposal's landfill was less environmentally sound and to have an adverse effect on Texas Disposal in general.

***14** Taking all the evidence into consideration, we cannot say that the jury's award of $5 million in reputation damages was excessive or unreasonable. Further, given that the jury rejected part of Texas Disposal's request for its costs and expenses and all of its claim for lost profits, and that it reduced Gregory's estimate of $10 million in reputation damages to $5 million, the jury's award here does not appear to be "disguised disapproval" of Waste Management. *See id.* at 605 (requiring evidentiary review of exemplary damages to ensure that award is not jury's "disguised disapproval of the defendant").

Falsity

In its second evidentiary-sufficiency argument, Waste Management asserts that the "evidence on falsity is insufficient because the Action Alert was substantially true as a matter of law, or is protected as non-actionable opinion." Specifically, Waste Management asserts that "the 'gist or sting' of statements in the Action Alert is the same or less harmful than the true facts, when taken as a whole and as understood by a reasonable reader of ordinary intelligence." *See Turner*, 38 S.W.3d at 115 (noting that "the substantial truth doctrine precludes liability for a publication that correctly conveys a story's 'gist' or 'sting' although erring in the details). We disagree.

The "gist" or "sting" of the Action Alert is that Texas Disposal's landfill is environmentally unsound and less protective than other landfills, including Waste Management's competing landfill, because it uses an "alternative liner" system through an "exception" to EPA rules, whereas "other landfills" use the "require[d] ... continuous synthetic liner ... and a leachate collection system...." *See Texas Disposal I*, 219 S .W.3d at 577. The truth, as we discussed in *Texas Disposal I* and as demonstrated by the evidence in the record here, is that Texas Disposal's landfill does not operate under an exception to EPA rules, but rather uses a performance-design method that is designed in part to complement the environment in which it operates and that is one of two methods specifically allowed or sanctioned under Subtitle D rules. *See* 40 C.F.R. § 258.10(a). The evidence also shows that the performance-design method is, under EPA rules, environmentally equal to the other method allowed under EPA rules, which requires a continuous synthetic liner. *See id.* Further, the evidence shows that Texas Disposal's landfill was approved and licensed by the Texas Natural Resource Conservation Commission (TNRCC), [7] and that the landfill's location in a "low permeability" clay formation gives it some environmental advantages over other landfills. Accordingly, Waste Management's argument that the "gist" or "sting" of the statements in the Action Alert are not less harmful than the true facts falls flat.

7 The TNRCC, or Texas Natural Resource Conservation Commission, was the administrative agency charged with the statutory authority to issue solid-waste permits between 1993 and 2004. The Legislature

changed TNRCC's name to the Texas Commission on Environmental Quality in 2001, to be fully effective as of January 1, 2001. *See* Act of May 28, 2001, 77th Leg., R.S., ch. 965, § 18.01, 2001 Tex. Gen. Laws 1933, 1985; *See also* Act of July 25, 1991, 72d Leg., 1st C.S., ch. 3, § 1.058, 1991 Tex. Gen. Laws 4, 20 (changing name from the Texas Water Commission to the TNRCC); TCEQ History, http://www.tceq.texas.gov/about/tceqhistory.html (last visited April 23, 2011).

Waste Management argues that characterizing Texas Disposal's compliance with EPA rules as an "exception" is both literally and substantially true because Texas Disposal was allowed to construct its landfill without a continuous synthetic liner and leachate-collection system utilizing a leachate blanket. Specifically, it asserts that the "so-called performance design" method in section (a)(1) of Subtitle D is an exception to section (a)(2), which requires a design that includes both a synthetic liner and continuous leachate collection system, and that the jury should have been asked "if it was false to say that [Texas Disposal] received an exception to 'the EPA Subtitle D environmental rules that require a continuous synthetic liner at the landfill and a leachate collection system utilizing a leachate blanket to collect water that comes in contact with garbage (so that it cannot build up water pressure in landfill).' " But that construction makes no sense. The evidence establishes, and the plain language of Subtitle D shows, that there are two methods of compliance —one is the performance-design method, which may include or not include any of these systems depending on the site, and the other is the "general" or "default" method that has specified requirements regardless of the site. Operation under either of these methods is within the Subtitle D rules. If something is included within a rule, compliance with it cannot be said to be an exception. *See Black's Law Dictionary* 644 (defining exception as "[s]omething that is excluded from a rule's operation").

***15** Also in support of this argument, Waste Management complains that the jury question regarding the Action Alert's "exception" statement was taken out of context. It points to evidence showing that (1) 95% of the landfills in the country use a composite liner design; (2) none of the expert engineers "had ever seen any other solid waste landfill lacking both a synthetic liner and utilizing only 'finger drains' "; (3) the designer of Texas Disposal's leachate collection system has never designed another landfill using the same system; and (4) TNRCC's 1997 list of alternate liner designs showed only two other landfills using *in situ* clays with no synthetic liner and no other landfills relying only on leachate drains. But while this evidence may show that Texas Disposal's leachate system is not commonly used in other landfills, it does not inform the issue of whether Texas Disposal's leachate system is an "exception" to EPA rules. That inquiry is informed by provisions of the EPA rule itself, which as discussed above, provides two alternate, but equally authorized under the rule, methods for design compliance. *See* 40 C.F.R. § 258.40(a). And the evidence in the record here shows that Texas Disposal's landfill design complied with this EPA rule. Accordingly, the Action Alert's statement that Texas Disposal's landfill was an exception to EPA rules is not substantially true. In fact, based on the evidence and the jury's finding, it is false.

Likewise, the district court did not, as Waste Management maintains, "erroneously truncat[e] parts of the Action Alert" in its questions to the jury. As set forth fully above, the jury was asked to answer whether the Action Alert's statement that Texas Disposal "applied for and received an exception to the EPA subtitle D environmental rules" was false when made. Although that question does not include the full sentence from the Action Alert, the jury was provided with a complete copy of the Action Alert and was instructed in the jury charge "to consider an ordinary person's perception of the statement or implication *taken as a whole*," and "construed in light of the surrounding circumstances and based upon how a person of ordinary intelligence would understand the *entire* statement or implication." (Emphasis added.)

Relatedly, Waste Management argues that the statement in the Action Alert that "There are no restrictions on the types of waste that may be disposed of at the [Texas Disposal] landfill, with the exception of hazardous waste," is substantially true because the Texas Disposal landfill cannot take hazardous waste and because the statement is "exactly the same as the sign posted at the entrance to the [Texas Disposal] facility." Initially, we note that the evidence shows that the sign at the Texas Disposal facility does not state that there are no restrictions on the types of waste that the landfill may accept, nor does the sign suggest that hazardous waste is the only type of waste that the facility may not accept. Instead, the sign provides that—

NO HAZARDOUS WASTE ACCEPTED

***16** Non-hazardous special waste drums sludge and liquids will also be refused or returned at haulers expense unless previously approved by management in writing.

(Graphics omitted.) A plain reading of this sign suggests at least two reasonable interpretations: (1) the landfill does not accept hazardous waste, or (2) the landfill does not accept hazardous waste and certain other types of non-hazardous waste. This sign does not, however, support Waste Management's suggestion that, outside of hazardous waste, there are no restrictions on the type of waste that may be disposed of at the landfill. Regardless, the evidence in the record supports the jury's finding that this statement in the Action Alert is false. Witnesses at trial testified that, in addition to hazardous waste, the landfill did not accept, and could not accept pursuant to the terms of its license, radioactive waste, class 1 nonhazardous industrial waste, sludge, bulk liquids, automobile parts, tires, certain types of contaminated soil, used oil, and untreated medical waste. Further, the author of the Action Alert testified that he was familiar with the technical definition of "hazardous waste." Accordingly, the evidence is both legally and factually sufficient to support the jury's finding that the statement is false.

Waste Management also proclaims the truthfulness of the Action Alert statement that "other landfills in Central Texas and San Antonio in similar clay formations are using the full synthetic liners in addition to the clay soils." Specifically, Waste Management argues that of the ten surveyed landfills, one had closed and the others had amended their permits to include composite liners and, Waste Management argues, "[t]he fact that other landfills had grandfathered sections, allowing them to finish filling out pre-Subtitle D liners, is precisely the kind of secondary detail that the law treats as inconsequential." But again, there is legally and factually sufficient evidence to support the jury's finding that this statement was false when it was made. Waste Management's witness Loren Alexander testified that a "full synthetic liner" is a liner that covers the "entire bottom of the landfill." In response to the question, "were any landfills in Travis County using full synthetic liners as of the date of the Action Alert," Alexander responded, "No." Further, Alexander and Robert Drenth, a former regional vice president of Waste Management, testified that, as of the date of the Action Alert, Waste Management's Williamson County landfill did not have a synthetic liner and its Austin and Comal County landfills did not have full synthetic liners.

Waste Management also takes issue with the jury's finding regarding the Action Alert's "implication that Texas Disposal's landfill does not have a leachate collection system." First, Waste Management asserts that the jury question does not properly reflect what the Action Alert actually says and, second, that what the Action Alert does state is substantially true because the landfill does not have a continuous leachate-blanket system. As set forth above, the Action Alert statement provides that, "Unlike other landfills in the Travis County area, [Texas Disposal]'s landfill applied for and received an exception to the EPA Subtitle D environmental rules that require a continuous synthetic liner at the landfill and a leachate collection system...." The clear import of this statement is that, having been granted an exception to the EPA rule requiring a continuous synthetic liner *and* a leachate collection system, the Texas Disposal landfill has neither a continuous synthetic liner nor a leachate collection system. Further, Waste Management's regional vice president at time of the Action Alert acknowledged on cross-examination that the statement implies that Texas Disposal's landfill does not have a leachate collection system. Thus, a jury question asking about the implication of this statement—i.e., that Texas Disposal's landfill did not have a leachate collection system—was proper.

***17** The jury found that the Action Alert's implication regarding a leachate collection system was false, and the evidence supports that finding. Texas Disposal's witness Doctor Robert Kier, testifying as an expert in hydrogeology, testified that Texas Disposal's landfill has a leachate collection system, which he defined as "an engineered system to collect leachate that accumulates on the bottom or sides of a landfill" to prevent the leachate from migrating into the groundwater. He further testified that it would be false to characterize Texas Disposal's landfill as not having a leachate collection system. Engineer Pierce Chandler, who designed the Texas Disposal landfill's leachate-collection system in 1994, testified that he considered the system that he designed for the landfill—a system of interconnected drains—to be a leachate collection system and providing a detailed description of the system in support of that conclusion. Likewise, there is documentary evidence in the record, including a letter from TNRCC, that refers to the landfill's leachate collection system. Conversely, there is nothing in the record to suggest that Texas Disposal's landfill does not have a leachate collection system.

Finally, Waste Management argues that the jury's finding that the Action Alert contains an implication that Texas Disposal's landfill is environmentally less protective than other area landfills is "erroneous" for two reasons: (1) the jury charge misstates what the Action Alert actually says; and (2) "less protective" is an opinion rather than a fact. Initially, we note that the Action Alert makes the following assertions regarding

the environmental aspects of Texas Disposal's landfill: it has no restrictions on the type of non-hazardous waste it will accept, it operates under an exception to EPA regulations requiring a continuous synthetic liner or leachate collection system, it uses only the clay soil under the landfill as an "alternative liner" system rather than an expensive synthetic liner over the clay, and it is unlike the other landfills in the area that use full synthetic liners. The Action Alert then provides contact information for those readers who have "environmental or traffic" concerns. The principal author of the Action Alert, Don Martin, testified that the purpose of the Action Alert was to show that Texas Disposal's landfill was "different," that it had an inferior design, and that it was less environmentally safe. Accordingly, the jury charge was proper. *See* Tex.R. Civ. P. 278 (requiring trial court to submit questions, instructions and definitions that are raised by the pleadings and evidence); *Elbaor v. Smith,* 845 S.W.2d 240, 234 (Tex.1993) (citing rule 278 for the proposition that trial courts must submit requested questions to the jury if the pleadings and evidence support them).

Waste Management contends that, regardless of whether this jury question was proper, the "environmentally less protective" implication is merely an expression of opinion and not actionable fact. *See Gertz,* 418 U.S. at 339–40 (noting in dicta that "there is no such thing as a false idea"). Waste Management argues that the relative safety levels of different landfills are not objectively verifiable and there is no evidence in the record to support a conclusion to the contrary. But each of the cases on which Waste Management relies involve situations where the opinion is the publication. [8] In this case, the alleged opinion is inferred from the false statements in the Action Alert about Texas Disposal's landfill, and those statements are objectively verifiable. Stated another way, the implication of the false statements is that the landfill is less environmentally safe than other landfills. Regardless, however, the law provides that a statement is non-actionable opinion if it is not capable of being proved true or false. *See Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 19–20 (1990). In *Milkovich,* the Supreme Court noted that if a speaker of an alleged opinion states the facts upon which he bases the opinion, and those facts are either incorrect or incomplete or if his assessment of those facts is erroneous, the statement may still imply a false assertion of fact. *Id.* at 18–19. As set forth previously, Texas Disposal presented evidence that its landfill has restrictions on the type of non-hazardous waste it may accept, the landfill does not operate under an exception to EPA rules that require a continuous synthetic liner and leachate collection system, and the landfill has a leachate collection system that complies with EPA rules.

8 *See Peter Scalamandre & Sons, Inc. v. Kaufman,* 113 F.3d 556, 562 (5th Cir.1997) (holding that statement that land application of sewer sludge is harmful to human health and the environment is opinion); *Robertson v. Southwestern Bell Yellow Pages, Inc.,* 190 S.W.3d 899, 902 (Tex.App.-Dallas 2006, no pet.) (holding that statement that plaintiff was "incompetent" is opinion); *MKC Energy Invs., Inc. v. Sheldon,* 182 S.W.3d 372, 378 (Tex.App.-Beaumont 2005, no pet.) (holding that statement that plaintiff's premises were "dangerous and unhealthy" is opinion); *Morris v. Blanchette,* 181 S.W.3d 422, 425 (Tex.App.-Waco 2005, no pet.) (holding that statement that doctor's surgical procedures were "totally unreasonable and substantially failed to meet the professional, recognized standards" is opinion).

***18** We conclude that there is evidence in the record to support the jury's finding of falsity. Further, considering all the evidence in the record, we cannot say that the jury's finding of falsity is so one-sided that it is clearly wrong or manifestly unjust. Accordingly, we hold that the evidence was legally and factually sufficient.

Causation

In its third evidentiary-sufficiency argument, Waste Management contends that the evidence is insufficient to support causation because Texas Disposal failed to establish that the Action Alert caused Texas Disposal any new reputation damage or remediation damage and because Texas Disposal did not "negate alternate causes of damage it suffered." Regarding reputation, this is essentially the same argument that Waste Management makes regarding the legal sufficiency of the evidence supporting the jury's award of reputation damages—i.e., that there must be evidence that publication of the Action Alert caused damage to Texas Disposal's reputation—and for the same reasons, the argument here is also without merit: "Our law presumes that statements that are defamatory per se injure the victim's reputation and entitle him to recover general damages, including damages for loss of reputation and mental anguish." *Bentley,* 94 S.W.3d at 604; *See Gertz,* 418 U.S. at 349. Thus, because the jury found that the Action Alert is defamatory per se, Texas Disposal is presumed to have suffered damage and is entitled to some amount of damages. *See Bentley,* 94 S.W.3d at 604–05.

As to Waste Management's assertions regarding the evidence supporting remediation damages—i.e., that Texas Disposal

failed to establish that its remediation expenses were caused by the publication of the Action Alert—Texas Disposal's witnesses testified that it incurred expenses in its attempts to remedy damages caused by the Action Alert. Specifically, Bob Gregory testified that Texas Disposal devoted staff time worth more than $700,000 in an effort to combat the Action Alert and that Texas Disposal had incurred actual out-of-pocket expenses of $450,592.02 for consultants it hired to combat the effects of the Action Alert. These consultant expenses were supported by documentary evidence in the form of billing invoices. We conclude that there is evidence to support the jury's finding that Texas Disposal suffered remediation damages. Further, considering all the evidence in the record, we cannot say that the jury's finding here is so one-sided that it is clearly wrong or manifestly unjust. Accordingly, we hold that the evidence was legally and factually sufficient.

Exemplary damages

In its final evidentiary-sufficiency argument, Waste Management challenges the award of exemplary damages—$20 million awarded by the jury, reduced to $1.6 million by the district court's application of the statutory cap—arguing that the evidence was insufficient to support the jury's finding of common-law malice.

Under the applicable chapter 41 of the civil practice and remedies code,[9] a claimant may be awarded exemplary damages "only if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from ... fraud [or] malice...." *See* Former Tex. Civ. Prac. & Rem.Code Ann. § 41.003(a). "Malice" covers both intentional torts and gross negligence, and as to intentional torts, it means "a specific intent by the defendant to cause substantial injury to the claimant." *See id.* at 109.[10]

9 As will be discussed in more detail in our analysis of Texas Disposal's single issue on appeal, the Legislature's 2003 amendments to chapter 41, *see* Act of June 2, 2003, 78th Leg., R.S., ch. 204, §§ 13.02–.09, 2003 Tex. Gen. Laws 847, 886–89, do not apply to this case, which was filed in 1997.

10 Malice is defined as

(A) a specific intent by the defendant to cause substantial injury or harm to the claimant; or

(B) an act or omission

(i) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and

(ii) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

Act of Apr. 11, 1995, 74th Leg., R.S., ch. 19, § 1, 1995 Tex. Gen. Laws 108, 109 (hereinafter "Former Tex. Civ. Prac. & Rem.Code).

***19** In this case, there was evidence that Waste Management's specific purpose in publishing the Action Alert was to harm Texas Disposal by preventing the consummation of an almost-final contract with the City of San Antonio worth millions of dollars over the course of several years. There was also evidence that Waste Management's specific purpose in publishing the Action Alert was to adversely affect Texas Disposal's ability to procure a long-term contract with the City of Austin for waste management services that was in the bidding stage when Waste Management published the Action Alert, which meant that Texas Disposal could not contact Austin city officials directly regarding any matter. Specifically, Martin, the consultant hired to draft the Action Alert, testified that he was told by Waste Management that the Action Alert needed to be done quickly to prevent the consummation of the San Antonio contract. He also testified that a purpose of the Action Alert was to make it appear that Texas Disposal's landfill was not in compliance with EPA regulations, that Texas Disposal had "some loophole around the Subtitle D regulations," and that the Texas Disposal landfill had an inferior design and was less environmentally safe than other landfills in central Texas. And to effect that purpose, he directed the publication of the Action Alert to San Antonio city officials and to the Austin environmental community. The Action Alert itself directs readers to contact San Antonio and Travis County officials with concerns or comments. Likewise, Waste Management's lobbyist Al Erwin testified that the purpose of the Action Alert was to raise questions about the environmental integrity of Texas Disposal's landfill. Thus, there is evidence in the record to support the jury's finding that Waste Management published the false statements or publications with the specific intent to cause Texas Disposal substantial harm.

Waste Management argues that the evidence supporting a finding of malice must show "much more than negligence, business competition, or even unethical behavior," citing for support the Texas Supreme Court's decision in *Qwest International Communications, Inc. v. AT & T Corp.*, 167 S.W.3d 324, 326–27 (Tex.2005) (recognizing that

"in a competitive global economy, time is often of the essence for businesses, jobs, and national productivity and prosperity. The Legislature's balance of such-competing interests requires courts to adhere to the standard that exemplary damages are available only if a corporation ignores an extreme risk of harm."). But *Qwest* principally involved whether the defendant was grossly negligent in laying cable rapidly and, as a result of the rapidity, repeatedly cutting AT & T's cables. *See id.* at 327. While the supreme court also considered AT & T's argument that Qwest's policy showed a specific intent to cause substantial harm to AT & T—i.e., the common-law malice prong of the applicable definition—it rejected that argument because "a general corporate policy to work rapidly is insufficient (without more) to support exemplary damages." *See id.* at 326. In this case, unlike *Qwest*, there is more than a corporate policy to work rapidly or, for example, compete aggressively; there is evidence that Waste Management intended to substantially harm Texas Disposal. Accordingly, *Qwest* does not inform our decision here.

***20** Waste Management also contends that there must be evidence that it engaged in "outrageous, malicious, or otherwise morally culpable conduct" and that the resulting harm is extraordinary, such as "death, grievous physical injury, or financial ruin." *See Rusty's Weigh Scales and Serv., Inc. v. North Tex. Scales, Inc.*, 314 S.W.3d 105, 112 (Tex.App.-El Paso 2010, no pet.) (quoting *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 16 (Tex.1994) (noting that exemplary damages punish a defendant for "outrageous, malicious, or otherwise morally culpable conduct")); *Kinder Morgan N. Tex. Pipeline, L.P. v. Justiss*, 202 S.W.3d 427, 447 (Tex.App.-Texarkana 2006, no pet.). But *Rusty's* incorrectly suggests that a claimant must show both common law malice *and* gross negligence to prove malice under the civil practice and remedies code, and importantly, its discussion of "death, grievous physical injury, or financial ruin" is done in the context of a discussion of gross negligence rather than common-law malice. *See Rusty's*, 314 S.W.3d at 112; *see also* Former Tex. Prac. & Rem.Code Ann. § 41.001(7) (defining malice as specific intent to cause substantial harm or gross negligence). Likewise, *Moriel* and *Kinder Morgan* involve analyses of what evidence is required to support a finding of gross negligence—i.e., that the defendant acted with an extreme degree of known risk in conscious indifference to the rights, safety, or welfare of others—rather than an analysis of common law malice. *See Moriel*, 879 S.W.2d at 19–21 (discussing the statutory definition of gross negligence); *Kinder Morgan*, 202 S.W.3d at 447 (setting forth the gross-negligence prong of the applicable definition of malice). Thus, these cases do not inform our decision here either.

In sum, to be eligible to recover exemplary damages in this case, the civil practice and remedies code required Texas Disposal to show that Waste Management acted with malice, which under the applicable definition of malice could be either common-law malice or gross negligence. As discussed above, there is evidence in this case to support the jury's finding that Waste Management acted with specific intent to cause substantial harm to Texas Disposal—i.e., common-law malice. Further, considering all the evidence in the record, we cannot say that the jury's finding of actual malice is so one-sided that it is clearly wrong or manifestly unjust. Accordingly, we hold that the evidence was legally and factually sufficient and overrule Waste Management's fifth issue.

Exclusion of evidence

In its sixth issue, Waste Management asserts that the district court erred in excluding on hearsay grounds four TNRCC documents regarding Texas Disposal's solid-waste permit, including two letters from TNRCC to Texas Disposal (Exhibits 13 and 14) and two TNRCC interoffice memos (Exhibits 18 and 22). Waste Management argues that the district court's decision to sustain Texas Disposal's hearsay objection and exclude these exhibits was error because rule 803(8) of the Texas Rules of Evidence provides a hearsay exception for "[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies setting forth ... the activities of the office or agency." *See* Tex.R. Evid. 803(8)(A). We disagree.

***21** We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *In re J.P.B.*, 180 S.W.3d 570, 575 (Tex.2005) (per curiam). A trial court abuses its discretion if it acts arbitrarily or unreasonably or without reference to any guiding rules and principles. *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex.2002) (per curiam) (citing *Downer v. Aquamarine Operators, Inc.*, 791 S.W.2d 238, 241–42 (Tex.1985)). We may not reverse simply because we disagree with the trial court's decision; rather we may reverse only if the trial court acted in an arbitrary or unreasonable manner. *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex.1991) (citing *Downer*, 791 S.W.2d at 242). Further, even if the trial court abused its discretion in admitting or excluding the evidence, reversal is warranted "only if the error probably caused the rendition of an improper judgment." *See Bay Area Healthcare Grp., Ltd. v. McShane*,

239 S.W.3d 231, 234 (Tex.2007); *see also* Tex.R.App. P. 44.1(a)(1). "We review the entire record, and require the complaining party to demonstrate that the judgment turns on the particular evidence admitted." *Nissan Motor Co. Ltd. v. Armstrong*, 145 S.W.3d 131, 144 (Tex.2004). "Thus, if erroneously admitted or excluded evidence was crucial to a key issue, the error was likely harmful." *Reliance Steel & Aluminum Co. v. Sevcik*, 267 S.W.3d 867, 873 (Tex.2008). "By contrast, admission or exclusion is likely harmless if the evidence was cumulative, or if the rest of the evidence was so one-sided that the error likely made no difference." *Id.*

Initially, we note that Waste Management does not provide any support for its assertion that the district court abused its discretion by excluding the evidence as hearsay. Instead, its briefing on this issue is limited to why the excluded evidence was relevant to this case and how the exclusion prejudiced Waste Management. An appellant who fails to adequately brief an issue waives that issue. *See* Tex.R.App. P. 38(i) (requiring appellate briefs to "contain a clear and concise argument for the contentions made"); *Divine v. Dallas Cnty.*, 130 S.W.3d 512, 513–14 (Tex.App.-Dallas 2004, no pet.); *see also General Servs. Comm'n v. Little–Tex. Insulation Co., Inc.*, 39 S.W.3d 591, 598 n. 1 (Tex.2001) (holding that issue not properly briefed was not before the court). Nevertheless, we will address the merits of this issue, beginning with some background information about the exhibits.

During the summer of 1993, Texas Disposal asked TNRCC to modify its existing permit to allow it to use an "in situ alternate liner design" in its landfill. During the permitting process, the TNRCC staff generated letters and internal memoranda regarding Texas Disposal's modification request. Exhibit 13 is a November 24, 1993, letter to Texas Disposal regarding TNRCC's review of the alternate-liner-design information Texas Disposal had included with its modification request.[11] Among other matters, the letter recommends that Texas Disposal incorporate "a leachate collection system ... into the alternate liner design demonstration." Exhibit 14 is a TNRCC letter dated April 29, 1994, notifying Texas Disposal that, based on TNRCC's preliminary review of the alternate-liner documents submitted with Texas Disposal's modification request, TNRCC was "disapprov[ing]" Texas Disposal's alternate liner design. Exhibit 18 is a September 7, 1994 TNRCC interoffice memorandum regarding its Municipal Solid Waste Division's review of Texas Disposal's alternate liner design proposal. In that memo, the author recommends to the TNRCC deputy executive director that TNRCC require Texas Disposal to install a leachate collection system. Exhibit 22 is a November 9, 1994 TNRCC interoffice memo from three TNRCC engineers to Ron Pedde, also a TNRCC engineer, regarding their "opinion" of Texas Disposal's alternate liner design system and its compliance with Subtitle D. In the memo, the engineers state that they "cannot recommend approval of the proposed alternate liner design." TNRCC ultimately approved Texas Disposal's alternate liner design system on November 16, 1994.

11 Exhibit 13 is actually dated November 24, 1998, but that date appears to have been stamped on the letter after it was generated and other evidence in the record refers to a similar letter dated November 24, 1993. Further, TNRCC ultimately approved Texas Disposal's modification request by November 16, 1994—i.e., well prior to 1998. Accordingly, because it does not appear to affect the resolution of this issue, we will assume that the correct date for Exhibit 13 is November 24, 1993.

***22** According to its offer of proof, Waste Management considered these documents to be expert opinion testimony of TNRCC engineers showing "that the engineers tasked with enforcing Subtitle D did not believe at the time that [Texas Disposal] had actually complied with Subtitle D, that they hadn't met the standards." Waste Management argued that the exhibits were relevant to issues regarding truth, causation, damages, and malice. In deciding to exclude the evidence, the district court ruled that the statements in these documents—

> are relevant to whether or not the [Texas Disposal landfill] system is protective or is as protective, whether or not it complies with Subtitle D, ... but it's hearsay. And it doesn't fall into the exception for public record given that this is expert opinion. If anything, it's opinion testimony and only competent if it's expert opinion on a crucial ultimate issue here of truth. And I do not believe the public record exception was intended to cover or does cover those circumstances—or that circumstance whether you consider it based on the untrust —or the untrustworthiness aspect of that exception or otherwise.

Stated another way, the district court found that it should not admit these exhibits under the public-record exception to the hearsay rule because the court considered the documents' status as opinion testimony to render them untrustworthy, *see* Tex.R. Evid. 803(8) (providing that public records may be admitted as exception to hearsay rule "unless the

sources of information or other circumstances indicate lack of trustworthiness"), or because the court determined that rule 803(8) did not cover expert opinion testimony of this type. Given the fact that, at the time the documents were presented, the court had little or no information regarding the authors' qualifications to give the expert opinions set forth in the documents, *see id.* 702 (requiring expert witness to be qualified to give expert testimony "by knowledge, skill, experience, training, or education"), or regarding the reliability of the opinions, *see id.; E.I. du Pont de Nemours & Co ., Inc. v. Robinson,* 923 S.W.2d 549, 557 (Tex.1995), we cannot say that the district court abused its discretion by determining that the hearsay exceptions did not apply and excluding this evidence.

Further, even if we were to assume that the excluded evidence was admissible and the trial court erred in excluding it, it appears the information in these documents was cumulative of evidence that was admitted into the record. Specifically, Erwin testified that the TNRCC staff engineers did not believe that Texas Disposal's leachate collection system was sufficient and that they believed that leachate would leak into the groundwater. Erwin explained why the TNRCC staff engineers disapproved of Texas Disposal's system, including that computer modeling did not agree with Texas Disposal's information. Further, Ron Bond, a former TNRCC engineer and the author of exhibits 14 and 18, testified that he told someone at Waste Management that the TNRCC had concerns about leachate generation, sidewall leakage, and other matters at the Texas Disposal landfill. Thus, other evidence presented at trial showed that TNRCC staff had concerns regarding the landfill's ability to protect the environment. To this extent, the excluded evidence was cumulative and, as such, its exclusion was harmless. *See Sevcik,* 267 S.W.3d at 873. We overrule Waste Management's sixth issue.

Exemplary Damages

***23** In its final issue, Waste Management challenges the jury's exemplary damage award, asserting that it is grossly disproportionate to the alleged offense and, as a result, violates substantive due process. An assessment of grossly excessive exemplary damages violates a party's substantive due process rights because it " 'furthers no legitimate purpose and constitutes an arbitrary deprivation of property.' " *See Bennett v. Reynolds,* 315 S.W.3d 867, 873 (Tex.2010) (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 418 (2003)); *see also* U.S. Const. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law"); *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 433 (2001) (holding that the Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor). Waste Management asserts that its conduct, which it contends could only have resulted in economic harm, "was not sufficiently egregious to warrant a $1.6 million punitive damages award."

In our de novo review of whether the exemplary damage award is unconstitutionally excessive, we must consider three guideposts adopted by the United States Supreme Court:

1. "the degree of reprehensibility of the defendant's misconduct";

2. "the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award"; and

3. "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."

Bennett, 315 S.W.3d at 873 (quoting *Campbell,* 538 U.S. at 418) (referred to as the "*Gore* guideposts" in reference to the Supreme Court's decision in *BMW of North Am., Inc. v. Gore,* 517 U.S. 559 (1996), which introduced these factors).

The first *Gore* guidepost, which focuses on the reprehensibility of the conduct, is "the most important indicium of the reasonableness of a punitive damages award." *See Gore,* 517 U.S. at 575. In determining the degree of reprehensibility of the defendant's conduct, we are guided by five nonexclusive factors: (1) whether the harm inflicted was physical rather than economic; (2) whether the tortious conduct showed "an indifference to or a reckless disregard for the health or safety of others"; (3) whether "the target of the conduct had financial vulnerability"; (4) whether "the conduct involved repeated actions," not just "an isolated incident"; and (5) whether the harm resulted from "intentional malice, trickery, or deceit," as opposed to "mere accident." *See Bennett,* 315 S.W.3d at 874 (quoting *Campbell,* 538 U.S. at 419) (some internal quotes omitted). The presence of any one of these factors may still not be enough to support an award of exemplary damages, and the absence of all of these factors renders the award suspect. *Campbell,* 538 U.S. at 419 (citing *Gore,* 517 U.S. at 576–77).

***24** Given that this case involves no physical harm or danger to individuals, the first and second reprehensibility

factors do not weigh in favor of an award of exemplary damages. Likewise, the fourth factor, regarding whether the conduct involved "repeated actions" or an "isolated incident," would seem to weigh against an award of exemplary damages because Waste Management published only one Action Alert.

The remaining reprehensibility factors, however, appear to provide more support for an award of exemplary damages. There is evidence in the record that Texas Disposal was financially vulnerable because, at the time the Action Alert was published, Texas Disposal was finalizing a long-term contract with the City of San Antonio that the Action Alert was intended to harm, and also because the Action Alert threatened Texas Disposal's existing relationship with the City of Austin and its contemporaneous efforts to bid and win another City of Austin contract. Also, there was some evidence that the publication of the Action Alert was deliberately timed to coincide with a restriction on Texas Disposal's ability to communicate with City of Austin officials that was in effect as part of the bidding process. While there is no evidence to suggest that Waste Management's publication of Action Alert "threaten[ed] financial ruin" for Texas Disposal, *see Bennett*, 315 S.W.3d at 878, the evidence did show that Waste Management deliberately targeted long-term contracts that represented millions of dollars for Texas Disposal over the next several years. Thus, although the evidence established that Texas Disposal was eventually able to consummate its contract with the City of San Antonio and continue its existing contractual relationship with the City of Austin, it was financially vulnerable, when Waste Management published the Action Alert, to the type of defamation in the Action Alert. Texas Disposal argues that the Action Alert put its business at risk and harmed its general relationship with the City of Austin. Thus, the financial-vulnerability factor appears to be neutral at best or, more likely, to weigh slightly in favor of an award of exemplary damages. Finally, the remaining reprehensibility factor—i.e., whether the harm resulted from "intentional malice, trickery, or deceit," as opposed to "mere accident"—also favors exemplary damages because, as discussed previously, the evidence established that Waste Management specifically intended to cause substantial harm to Texas Disposal. In sum, then, although a close question, the reprehensibility analysis in the second *Gore* guidepost weighs slightly in favor of an award of exemplary damages on the facts of this case.

Because the reprehensibility factors in this case do not conclusively support an award of exemplary damages here, our analysis of the propriety of the award here turns largely on Supreme Court's second *Gore* guidepost—i.e., the disparity between actual or potential and exemplary damages, or the "Supreme Court's ratio analysis." *See Bennet*, 315 S.W.3d at 877 (holding that because only malice factor was shown, "the Supreme Court's ratio analysis must be assiduously followed").

***25** The United States Supreme Court has not formulated a "a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable" awards of exemplary damages, *see Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18–19 (1991), but it has warned that an award that exceeds a 4:1 ratio of exemplary to actual damages "may be close to the line ... of constitutional impropriety." *See Campbell*, 538 U.S. at 425; *see also Bennett*, 315 S.W.3d at 877 n. 47 (noting same and explaining that 4:1 ratio is derived from Anglo–American tradition of "imposing 'double, treble or quadruple damages to deter and punish' " (quoting *Campbell*, 538 U.S. at 425)). The Texas Supreme Court has applied this 4:1 ratio under circumstances similar to this case—i.e., where the reprehensibility factors did not conclusively favor exemplary damages, with the strongest being that the conduct was the result of intentional malice rather than mere accident—and determined that a 4.33 to 1 ratio exceeded constitutional limits. *See Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299 (Tex.2006). On facts which it described as "not meaningfully distinguishable from those in *Gullo Motors*," the Texas Supreme Court determined that an exemplary to actual damage award of 47 to 1 was constitutionally excessive. *See Bennett*, 315 S.W.3d at 878. But unlike those cases, the ratio of exemplary damages to actual damages in this case is far below the 4:1 threshold the Supreme Court has flagged for our caution. Here, the jury awarded Texas Disposal $5,450,592.03 in actual damages and $20 million in exemplary damages, which results in a 3.66 to 1 ratio. But more importantly, after correctly applying the statutory cap on exemplary damages, an issue that we discuss in more detail below, the district court reduced the exemplary damages award to $1,651,184 .06, resulting in an exemplary damage award that is *one third* of the actual damages—i.e., 3/10 (.3) to 1 ratio or, stated more dramatically, one-tenth of the 4:1 ratio. This ratio does not trigger constitutional concerns. Further, the *Gore* analysis also considers the potential harm, and the evidence here established that Waste Management's Action Alert was intended to have an adverse effect on contracts worth tens of millions of dollars to Texas Disposal. Thus, the second *Gore* guidepost, which focuses on the disparity between the actual or potential harm and the punitive damages awarded, tips in Texas Disposal's favor.

The final *Gore* guidepost calls for a comparison between the exemplary damages awarded and the civil penalties that could have been imposed for comparable misconduct. *See Bennett*, 315 S.W.3d at 880 ("The final guidepost compares the exemplary damages with legislatively authorized civil sanctions."). There are, however, no civil penalties for the publication of defamatory statements. To the extent that, by analogy, the Legislature's exemplary damages cap constitutes "legislatively authorized civil sanctions," that analysis also supports the constitutionality of the damage award here. For example, federal courts in this situation have looked to whether the exemplary damages awarded comport with statutory caps on damages because damage caps "represent[ ] a legislative judgment similar to the imposition of a civil fine." *Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020, 1045 (9th Cir.2003); *see also EEOC v. Federal Express Corp.*, 513 F.3d 360, 378 (4th Cir.2008) (noting that exemplary damages award that falls within statutory cap is reasonable and constitutional); *Romano v. U–Haul Int'l*, 233 F .3d 655, 673 (1st Cir.2000) ("[A] punitive damages award that comports with a statutory cap provides strong evidence that a defendant's due process rights have not been violated."). Here, the jury awarded $5 million in exemplary damages, but the district court, as discussed more fully below, reformed the award to $1,651,184.06, which equals the maximum amount of statutory damages allowed in a case with this level of actual damages under the civil practice and remedies code. *See* Tex. Civ. Prac. & Rem.Code Ann. § 41.008(b). Thus, while there are no civil penalties for comparison, the amount of exemplary damages awarded here comports with the applicable statutory cap and, to the extent that damage caps are analogous to a legislatively set civil penalty, the third *Gore* guidepost favors an award of exemplary damages.

***26** After reviewing the "*Gore* " guideposts, we cannot say that the exemplary damage award here violates Waste Management's due process rights. Further, the award is permissible under Texas law because, as capped by the district court, it is within the statutory range of exemplary damages allowed under the civil practice and remedies code. *See* Tex. Civ. Prac. & Rem.Code Ann. § 41.008(b). Accordingly, we overrule Waste Management's final issue.

TEXAS DISPOSAL'S APPEAL

In its single issue on cross-appeal, Texas Disposal challenges the district court's application of the statutory cap on exemplary damages to the jury's $20 million award of exemplary damages.[12] Texas Disposal does not dispute the applicability of the statutory cap to its exemplary-damages award, but rather asserts that the district court erred in its calculation of the statutory cap by erroneously characterizing the jury's $5 million award for injury to Texas Disposal's reputation as "non-economic damages." *See* Former Tex. Civ. Prac. & Rem.Code Ann. § 41.008(b) (exemplary damages cap). This characterization was error, Texas Disposal argues, because damages awarded to a for-profit corporation for injury to its reputation must be "economic damages" as that phrase is defined in the applicable version of chapter 41 because of the pure economic nature of a for-profit corporation. *See id.* § 41.001(5) (defining "economic damages" as "compensatory damages for pecuniary loss"). Inasmuch as the Legislature amended chapter 41 in 2003 to include "injury to reputation" in the list of specific examples of "noneconomic damages," this issue likely presents a question of first and last impression for this Court, as Texas Disposal's counsel correctly noted at oral argument. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 13.02, 2003 Tex. Gen. Laws 847, 887 (adding definition of "noneconomic damages" and including damages awarded to compensate a claimant for "injury to reputation" in that definition) (codified at Tex. Civ. Prac. & Rem.Code Ann. § 41.001(12) (West 2008)).

12 The statutory cap on exemplary damages is codified in chapter 41 of the Texas Civil Practice & Remedies Code. *See* Tex. Civ. Prac. & Rem.Code Ann. § 41.008(b) (West Supp.2011) (providing formula to determine the maximum amount of exemplary damages to which a claimant is entitled); *see also id.* § 41.002 (Chapter 41 "applies to any action in which a claimant seeks damages relating to a cause of action."). Because this case was filed in 1997, or prior to the Legislature's 2003 modifications and amendments to chapter 41, the version of chapter 41 applicable here is the version enacted by the Legislature in 1995. *See* Act of Apr. 11, 1995, 74th Leg., R.S., ch. 19, § 1, 1995 Tex. Gen. Laws 108, 110 (applicable version of Chapter 41); *see also* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 23.02(a), 2003 Tex. Gen. Laws 847, 898 (establishing effective date of Sept. 1, 2003 for Legislature's 2003 changes to Chapter 41).

Standard of review

Our review of this issue turns on construction of the pre–2003 version of the Texas Civil Practice & Remedies Code. Statutory construction is a question of law that we review de novo. *See State v. Shumake*, 199 S.W.3d 279, 284 (Tex.2006). Our primary objective in statutory construction is to give

effect to the Legislature's intent. *See id.* We seek that intent "first and foremost" in the statutory text. *Lexington Ins. Co. v. Strayhorn*, 209 S.W.3d 83, 85 (Tex.2006). "Where text is clear, text is determinative of that intent." *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex.2009) (op. on reh'g) (citing *Shumake*, 199 S.W.3d at 284; *Alex Sheshunoff Mgmt. Servs. v. Johnson*, 209 S.W.3d 644, 651–52 (Tex.2006)). We use definitions prescribed by the Legislature and any technical or particular meaning the words have acquired; otherwise we construe the words according to their plain and common meaning unless a contrary intent is apparent from the context. *City of Rockwall v. Hughes*, 246 S .W.3d 621, 625–26 (Tex.2008). We also presume that the Legislature was aware of the background law and acted with reference to it. *See Acker v. Texas Water Comm'n*, 790 S.W.2d 299, 301 (Tex.1990). We further presume that the Legislature selected statutory words, phrases, and expressions deliberately and purposefully. *See Texas Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex.2010); *Shook v. Walden*, 304 S.W.3d 910, 917 (Tex.App.-Austin 2010, no pet.). Our analysis of the statutory text may also be informed by the presumptions that "the entire statute is intended to be effective" and that "a just and reasonable result is intended." Tex. Gov't Code Ann. § 311.021(2), (3) (West 2005). Likewise, we may consider such matters as "the object sought to be attained," "circumstances under which the statute was enacted," legislative history, "common law or former statutory provisions, including laws on the same or similar subjects," "consequences of a particular construction," and the enactment's "title." *See id.* § 311.023(1)-(5), (7) (West 2005). However, only when the statutory text is ambiguous—i.e., susceptible to more than one reasonable interpretation—"do we 'resort to rules of construction or extrinsic aids.' " *Entergy Gulf States, Inc.*, 282 S.W.3d at 437 (quoting *In re Estate of Nash*, 220 S.W.3d 914, 917 (Tex.2007)).

Statutory cap on exemplary damages

***27** The applicable version of chapter 41 of the civil practice and remedies code "establishes the maximum exemplary damages that may be awarded" to a claimant in a civil case. *See* Former Tex. Civ. Prac. & Rem.Code Ann. § 41.002(b). To be entitled to an award of exemplary damages, the claimant must first prove "by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from" fraud, malice, or, in wrongful death actions, gross negligence or a wilful act or omission. *See id.* § 41.003(a). Even after a claimant has so proven, however, any amount awarded as exemplary damages is then subject to section 41.008(b), which provides a formula for establishing the maximum amount of exemplary damages based on the character and amount of claimant's other awarded damages:

> (b) Exemplary damages awarded against a defendant may not exceed an amount equal to the greater of:
>
> (1)(A) two times the amount of economic damages; plus
>
> (B) an amount equal to any noneconomic damages found by the jury, not to exceed $750,000; or
>
> (2) $200,000.

Id. § 41.008(b) (commonly referred to as the "statutory cap" on exemplary damages). Under this calculation then, a higher economic-damage award results in a higher exemplary-damages cap. *See id.* § 41.008(b)(1)(A). The applicable version of chapter 41 does not define "non-economic damages," but it defines "economic damages" as follows:

> "Economic damages" means compensatory damages for pecuniary loss; the term does not include exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society.

Id. § 41.001(4).

Using this definition of "economic damages," the district court here determined that the $5 million in damages awarded to Texas Disposal for injury its reputation were non-economic for purposes of calculating the statutory cap, meaning that only $750,000 of the $5 million awarded for reputation damages could be used in the cap calculation. *See id.* § 41.008(b)(1)(B) (allowing lesser of non-economic damages or $750,000). The jury's award of $450,592.03 for lost profits and expenses was Texas Disposal's only economic damages for purposes of calculating the statutory cap. Accordingly, the district court's final judgment reduced the jury's $20 million exemplary damages award to $1,651,184.06:

> $450,592.03 X 2 = $901,184.06 (two times the amount of economic damages)
>
> ____ *$750,000.00* (non-economic damages capped by statute)
>
> $1,651,184.06

See id. § 41.008(b).

Analysis

Texas Disposal argues that the district court should have characterized the jury's $5 million award for injury to Texas Disposal's reputation as economic damages for purposes of this cap and, as a result, should have finally awarded Texas Disposal $10,901,184.06 in exemplary damages—i.e., two times an economic damages total of $5,450,592.03—arguing that damages to a for-profit corporation's reputation are economic damages as that term is defined under the applicable version of chapter 41. While Texas Disposal's argument here regarding the types of damages that a for-profit corporation can suffer makes for an interesting debate, we ultimately disagree that the reputation damages awarded by the jury here are economic damages under the applicable definition.

***28** To determine whether the jury's $5 million award for damages to Texas Disposal's reputation should be classified as "economic" or "non-economic" damages, we look first to the applicable definition of economic damages:

> "Economic damages" means compensatory damages for pecuniary loss; the term does not include exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society.

See id. § 41.001(4); *see also Lexington Ins. Co.*, 209 S.W.3d at 85 (directing courts to look "first and foremost" at statutory text to determine the Legislature's intent). "Compensatory damages" are damages that are awarded to make up for an injury. *See Webster's* 463 (defining same as "damages awarded to make good or compensate for an injury sustained); *Black's Law Dictionary* 445 ("Damages sufficient in amount to indemnify the injured person for the loss suffered."). "Pecuniary loss" refers to a loss of money. *See St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 531 (Tex.2002) ("The ordinary meaning of 'pecuniary' is 'of or pertaining to money.' "); *see* also *Webster's* 1663 (defining "pecuniary" as "of or relating to money"). Thus, under the plain language of the applicable definition, "economic damages" are damages that are awarded to compensate an injured claimant for a loss of money. As such, our focus here is directed to whether the jury's award of $5 million to Texas Disposal for injury to its reputation was intended to compensate Texas Disposal for a monetary loss that it suffered—i.e., economic damages—or, by negative implication, whether the award was to compensate Texas Disposal for a non-monetary injury.

Texas Disposal presented evidence that the publication of the Action Alert caused actual monetary losses in the form of consultant and attorney expenses, lost time for its employees, lost profits due to delays in the San Antonio and Austin contracts, and carrying-cost and depreciation expenses on equipment. Specifically, Texas Disposal presented testimonial and documentary evidence that it incurred the following types and amounts of expenses or losses as a result of the Action Alert's publication:

- $450,592.03 in consultant and attorney expenses to counteract the effects of the Action Alert's publication;
- $724,277 for the value of the time spent by Texas Disposal employees in connection with the publication of the Action Alert;
- $721,058 for estimated lost profits from contracts with the cities of Austin and San Antonio ($491,707 for San Antonio and $229,351 for Austin); and
- $304,900.61 for equipment carrying-cost and depreciation expenses incurred because of the delay in finalizing the contract with the City of San Antonio, which Texas Disposal characterized as also being part of it lost profits.

With regard to Texas Disposal's reputation, Bob Gregory of Texas Disposal testified that in his opinion, publication of the Action Alert injured Texas Disposal's reputation by causing Texas Disposal to lose credibility with the public and the environmental community and by slowing Texas Disposal's base-business growth in the two years following publication of the Action Alert. Based on Texas Disposal's calculations, Gregory estimated that, in his opinion, Texas Disposal should have earned approximately $1.9 million more in income than it actually did in the two years after publication of the Action Alert. When asked to express in monetary terms the amount of damage done to Texas Disposal's reputation, Gregory said that a business's reputation was "priceless" and almost impossible to value because it involved trust issues and standing in the environmental community, but that he estimated that it was in the range of $10 million. Gregory did not, however, testify as to what amount, if any, of the $1.9 million in foregone earnings he attributed to the publication of the Action Alert; instead, his testimony regarding the $1.9 million estimate was more in the nature of showing a

decline in Texas Disposal's business. Further, Texas Disposal asked the jury in closing argument to award $1,025,958 for its lost profits, $1,174,869.03 for its expenses, and for the jury to use its judgment in deciding what amount to award Texas Disposal for the "hard-to-quantify reputation" damages, using as guidance Gregory's $10 million figure, but not referring to the $1.9 million base-business figure. In sum, Texas Disposal claimed the evidence showed that publication of the Action Alert (1) caused Texas Disposal to lose $2,200,827.64 in lost profits and other expenses, and (2) injured Texas Disposal's reputation in an amount that was difficult to calculate, but that Texas Disposal would estimate at $10 million.

***29** After hearing this evidence, the jury was asked in two questions to determine what sum of money would fairly and reasonably compensate Texas Disposal for (1) its past lost profits and reasonable and necessary expenses and (2) damage to its reputation. The jury awarded Texas Disposal, in response to the first question, $0 for its lost profits and $450,592.03 for its reasonable and necessary expenses —which amount exactly corresponds with the evidence regarding the amount it spent on consultants and attorneys— and in response to the second question, $5 million for damage to Texas Disposal's reputation. Given the evidence, Texas Disposal's characterization of the evidence, the jury charge, and the jury's award, we conclude that the jury awarded $450,593.03 to compensate Texas Disposal for its monetary losses of lost profits and other expenses—i.e., economic damages—and the jury awarded $5 million in damages to compensate Texas Disposal for the non-monetary—i.e., non-economic—injury to its reputation.

Our analysis here, with its underlying focus on the purpose of the award, is supported by the Texas Supreme Court's general characterization of reputation damages as non-economic damages in *Bentley*. *See* 94 S.W.3d at 605. While *Bentley* involved defamation of an individual rather than of a corporation, the supreme court's conclusion was focused, like ours here, on the damage suffered and not on who suffered the damage: "Non-economic damages like [mental anguish, character, and reputation damages] cannot be determined with mathematical precision; by their nature, they can be determined only by the exercise of sound judgment." *See id.* Pecuniary damages—e.g., lost profits, out-of-pocket expenses for consultants and attorneys—can be determined by mathematical precision because they are concrete and already expressed in dollars. Non-pecuniary losses—e.g., harm to reputation, mental anguish—cannot be easily calculated and translated into monetary terms because they are not expressed in dollars and often not concrete. Thus, a corporation injured by defamatory remarks may suffer pecuniary losses, such as lost profits and out-of-pocket expenses, as a result of that defamation that we may correctly and easily characterize with proper proof as economic damages. But it may also suffer non-pecuniary losses—i.e., non-economic losses—such as injury to its reputation that cannot be readily quantified or translated into a monetary loss—e.g., loss of standing in the community and tarnished image. There is some logic to Texas Disposal's argument that because a corporation's reason for being is pecuniary in nature, it can suffer only pecuniary damages, but the fact remains that Texas Disposal can and did suffer the type of injury to its reputation that is similar in nature to that suffered by an individual—i.e., loss of standing, tarnished image—that did not result in a direct or readily measurable pecuniary loss to Texas Disposal. [13]

13 In a related argument, Texas Disposal asserts that "economic damages" mean damages that can be estimated and compensated by money, and that damages for injury to a for-profit corporation's reputation fit within this definition because injuries to a for-profit corporation's reputation can be estimated, valued, and compensated in monetary terms. But all damages, including obviously non-economic or non-monetary damages, can be and are regularly estimated in and compensated by money. *See Black's Law Dictionary* 447 (9th ed.2009) (noting in its definition of "damages" that phrase "pecuniary damages" is a redundancy because damages are always pecuniary). Also, based on the plain language of the Legislature's definition of economic damages, what is important for our determination here is the purpose of the award—i.e., whether the award compensates Texas Disposal for a monetary loss or, by negative implication, a non-monetary loss—and not whether the loss can be estimated and compensated with money.

Texas Disposal argues that, based on the language of the applicable statute, damages awarded to a corporation for injury to its reputation are economic damages because the statute's definition does not list "injury to reputation" in its list of excluded damages. *See* Former Tex. Civ. Prac. & Rem.Code Ann. § 41.001(4). This argument suggests that the definition's list of excluded damages is exhaustive, but there is no indication of such an intent in the text of the definition and, further, the list of excluded damages fails to include some other types of damages that, while not listed, are obviously not pecuniary losses—e.g., loss of enjoyment of life. *See* Tex. Gov't Code Ann. § 311.005(13) (West 2005) (" '[i]ncludes'

and 'including' are terms of enlargement and not of limitation or exclusive enumeration, and use of the terms does not create a presumption that components not expressed are excluded"); *Texas Health Ins. Risk Pool v. Southwest Serv. Life Ins. Co.*, 272 S.W.3d 797, 804 (Tex.App.-Austin 2008, no pet.); *see also* Tex. Civ. Prac. & Rem.Code Ann. § 41.001(12) (including "loss of enjoyment of life" in current definition of "non-economic" damages). At most, this omission of reputation from the list of excluded damages merely indicates that reputation damages, and for that matter any other unlisted damages, are not expressly *excluded* by definition. It does not, however, obviate the definition's initial requirement that, to be considered economic damages, the damages must have been awarded to compensate the injured party for its pecuniary losses.

***30** In a related argument, Texas Disposal argues that because all of the excluded damages are types of injuries that only individuals can suffer, then it necessarily follows that only those types of damages—i.e., that are ordinarily available only to people and that are "highly subjective" to a person's feelings or pain—can be said to be excluded from the applicable definition of economic damages. Because a corporation cannot suffer these types of personal damages, Texas Disposal concludes, any damages to a corporation must be economic. But as discussed above, the fact that a corporation's reason for being is pecuniary does not preclude it from suffering non-monetary losses, such as its standing in the community, that cannot be readily translated into money damages. More important to our analysis here, however, is the fact that the statutory list of excluded damages is not exclusive. *See* Tex. Gov't Code Ann. § 311.005(13).

Finally, Texas Disposal argues that the Legislature's 2003 amendment to chapter 41, which specified that reputation damages are non-economic, demonstrates that reputation damages to a corporation were considered economic damages under the prior definition applicable here. [14] Stated another way, Texas Disposal argues that the 2003 modifications to chapter 41 changed reputation damages from economic to non-economic, at least for purposes of a for-profit corporation. We find this argument unpersuasive, if only for the reason that a similar argument could easily be made for the opposite construction—i.e., that the 2003 amendment clarifies the already existing rule that reputation damages are non-economic damages. But more importantly, our analysis here is restricted to the text of the applicable statute, not the text of the later-modified statute. *See Texas v. Fidelity & Deposit Co. of Md.*, 223 S.W.3d 309, 311 (Tex.2007) (declining to consider the Legislature's post-petition modifications to statute and instead confining its analysis to the applicable statute as it existed prior to modification). But even considering the 2003 amendments to chapter 41, Texas Disposal's argument is not persuasive because the 2003 amendments did not significantly change the existing statute. Rather, the amendments merely altered the format of the definitions by removing the list of excluded damages from the definition of economic damages and including them with an added definition of "non-economic damages"; by expanding the definition of "economic damages" to "compensatory damages intended to compensate a claimant for actual economic or pecuniary loss"; and by further enumerating non-economic damages. These modifications did not, however, change the rule that economic damages are damages awarded to compensate a claimant for a pecuniary loss, nor did they change the fact that the newly listed non-economic damages would have been non-economic damages under the pre–2003 statute to the extent that they did not compensate a claimant for non-pecuniary losses. *See Williamson Pointe Venture v. City of Austin*, 912 S.W.2d 340, 345 (Tex.App.-Austin 1995, no pet.) (noting that if later legislation differs significantly from existing law, that later legislation changes rather than clarifies existing law (citing *Tijerina v. City of Tyler*, 846 S.W.2d 825, 828 (Tex.1992)).

14 In 2003, the Legislature amended section 41.001 to modify the definition of "economic damages" and to add a definition for "noneconomic damages" that includes reputation damages:

> (4) "Economic damages" means compensatory damages intended to compensate a claimant for actual economic or pecuniary loss; the term does not include exemplary damages or noneconomic damages.
>
> ....
>
> (12) "Noneconomic damages" means damages awarded for the purpose of compensating a claimant for physical pain and suffering, mental or emotional pain or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, inconvenience, loss of enjoyment of life, *injury to reputation*, and all other nonpecuniary losses of any kind other than exemplary damages.

See Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 13.02, Tex. Gen. Laws at 887 (codified at Tex. Civ. Prac. & Rem.Code Ann. § 41.001(4), (12) (West 2008) (emphasis added).

***31** Finally, we note that under Texas Disposal's construction of chapter 41, the cap on exemplary damages

would apply differently, in effect, to individuals than it does to corporations. Corporations, to the extent that they could only suffer economic damages, could benefit from a higher statutory cap than would individuals suffering the same damages. Applying this construction to the facts of this case, individual suffering the same damages would be entitled to $1.6 million in exemplary damages, whereas Texas Disposal the corporation would be entitled to $10.9 million in exemplary damages. There is nothing in text of the statute, in the case law, or in chapter 41's legislative history that suggests that such an outcome was intended or is desirable.

We hold that the jury's award for injury to Texas Disposal's reputation is non-economic and thus, the district court correctly applied the statutory cap on exemplary damages. We overrule Texas Disposal's issue.

CONCLUSION

Having overruled each of the parties' issues, we affirm the district court's judgment.

4 "Subtitle D" refers to EPA-promulgated regulations providing minimum federal criteria with which all solid-waste landfills must comply. *See* 40 C.F.R. §§ 258.1–258.75 (2011).

3. "[Texas Disposal] does not use synthetic liners while 'other landfills in Central Texas and San Antonio in similar clay formations are using the full synthetic liner in addition to the clay soils.' "	"Other landfills in Central Texas and San Antonio in similar clay formations are using the full synthetic liner in addition to the clay soils."
4. "The impression or implication created by the Action Alert that the [Texas Disposal] facility is environmentally less protective than other landfills, including [Waste Management]'s Austin Community Landfill."	"The implication that the [Texas Disposal] facility is environmentally less protective than other area landfills, including [Waste Management]'s Austin Community landfill."
5. "The impression or implication created by the Action Alert that the [Texas Disposal] facility does not have a leachate collection system." [5]	"The implication that [Texas Disposal] does not have a leachate collection system."

B

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

JUDGMENT RENDERED MAY 18, 2012

NO. 03-10-00826-CV

**Appellant, Waste Management of Texas, Inc.// Cross-Appellant,
Texas Disposal Systems Landfill, Inc.**

v.

**Appellee, Texas Disposal Systems Landfill, Inc.// Cross-Appellee,
Waste Management of Texas, Inc.**

**APPEAL FROM 126TH DISTRICT COURT OF TRAVIS COUNTY
BEFORE CHIEF JUSTICE JONES, JUSTICES PEMBERTON AND ROSE
AFFIRMED -- OPINION BY JUSTICE ROSE**

THIS CAUSE came to be heard on the record of the court below, and the same being considered, it is the opinion of this Court that there was no error in the district court's judgment: **IT IS THEREFORE** considered, adjudged and ordered that the judgment of the district court is in all things affirmed. It is **FURTHER** ordered that each party shall pay the costs of the appeal incurred by that party, both in this Court and the court below; and that this decision be certified below for observance.

C

ORIGINAL

CAUSE NO. 97-12163

TEXAS DISPOSAL SYSTEMS LANDFILL, INC. Plaintiff,	§	IN THE DISTRICT COURT OF
vs.	§	TRAVIS COUNTY, TEXAS
WASTE MANAGEMENT OF TEXAS, INC., Defendant.	§	126th JUDICIAL DISTRICT

CHARGE OF THE COURT

LADIES AND GENTLEMEN OF THE JURY:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice, or sympathy play any part in your deliberations.

2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the Court, that is, the evidence seen and heard in this courtroom, together with the law as given you by the Court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.

3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win, and then try to answer the question accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

5. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. You may answer a question upon the vote of ten or more jurors. If you answer more than one question upon the vote of ten or more jurors, the same group of at least ten of you must agree upon the answers to each of those questions.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys, and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The presiding juror or any other juror who observes a violation of the Court's instructions shall immediately warn the one who is violating the instruction and caution the juror not to do so again.

When words are used in this charge in a sense that varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other meaning.

Answer "Yes" or "No" to all questions unless otherwise instructed. A "Yes" answer must be based on a preponderance of the evidence unless you are otherwise instructed. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No." The term "preponderance of the evidence" means the greater weight of credible evidence presented in this case. A preponderance of the evidence is not measured by the number of witnesses or by the number of documents admitted in evidence. For a fact to be proved by a preponderance of the evidence, you must find that the fact is more likely true than not true. Whenever a question requires other than a "Yes" or "No" answer, your answer must be based on a preponderance of the evidence unless you are otherwise instructed.

A fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when proved by documentary evidence or by witnesses who saw the act done or heard the words spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

Throughout this Charge, "**TDSL**" refers to the plaintiff, Texas Disposal Systems Landfill, Inc. and "**WMT**" refers to the defendant, Waste Management of Texas, Inc.

QUESTION NO. 1

Were the following implications and statements from the Action Alert false when made?

> "False" means that a statement or implication is neither literally true nor substantially true. A statement or implication is not "substantially true" if, in the mind of the ordinary person, the gist or sting of the statement or implication is more damaging to the person or entity affected by it than a literally true statement would have been.
>
> In deciding whether a statement or implication is false, you are to consider an ordinary person's perception of the statement or implication taken as a whole, and the statement or implication should be construed in light of the surrounding circumstances and based upon how a person of ordinary intelligence would understand the entire statement or implication.

Answer "Yes" or "No" for each implication and statement below.

The implication that TDSL does not have a leachate collection system.

Answer: YES

The implication that the TDSL facility is environmentally less protective than other area landfills, including WMT's Austin Community Landfill.

Answer: YES

The TDSL facility "applied for and received an exception to the EPA Subtitle D environmental rules."

Answer: YES

"Other landfills in Central Texas and San Antonio in similar clay formations are using the full synthetic liner in addition to the clay soils."

Answer: YES

QUESTION NO. 2

Was the following statement from the Action Alert, in quotes below, defamatory?

"There are no restrictions on the types of waste that may be disposed of in the TDS landfill, with the exception of hazardous waste."

> A defamatory statement is one that (1) tends to injure an entity's reputation or exposes an entity to public hatred, contempt, ridicule, or financial injury, or (2) tends to impeach an entity's honesty, integrity, virtue, or reputation.

Answer "Yes" or "No."

Answer: YES

If you answered "Yes" to Question No. 2, answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 3

Was the following statement from the Action Alert, in quotes below, false when made?

"There are no restrictions on the types of waste that may be disposed of in the TDS landfill, with the exception of hazardous waste."

> "False" means that a statement or implication is neither literally true nor substantially true. A statement or implication is not "substantially true" if, in the mind of the ordinary person, the gist or sting of the statement or implication is more damaging to the person or entity affected by it than a literally true statement would have been.
>
> In deciding whether a statement or implication is false, you are to consider an ordinary person's perception of the statement or implication taken as a whole, and the statement or implication should be construed in light of the surrounding circumstances and based upon how a person of ordinary intelligence would understand the entire statement or implication.

Answer "Yes" or "No."

Answer: Yes

If you answered "Yes" to any part of Question No. 1 and/or "Yes" to Question No.3, then answer the following question. Otherwise, do not answer the following question and proceed to the last page.

QUESTION NO. 4

Do you find by clear and convincing evidence that, with respect to the statements or implications below that you found to be false, WMT made the statement or implication knowing it was false or with reckless disregard of whether it was true or not?

"Clear and convincing evidence" is that measure or degree of proof that will produce in the mind of the jury a firm belief or conviction as to the truth of the allegations sought to be established.

In determining whether WMT knew that the Action Alert was false or acted with reckless disregard of whether it was true or not, consider only the conduct and knowledge of Don Martin, Al Erwin and any WMT employee who knowingly contributed to the publication of the Action Alert.

Answer "Yes" or "No" for each statement or implication regarding which you answered "Yes" in answer to Question No. 1 or "Yes" in answer to Question No.3. Otherwise, leave the answer regarding that statement or implication blank.

The implication that TDSL does not have a leachate collection system.

Answer: Yes

The implication that the TDSL facility is environmentally less protective than other area landfills, including WMT's Austin Community Landfill.

Answer: Yes

The TDSL facility "applied for and received an exception to the EPA Subtitle D environmental rules."

Answer: Yes

"Other landfills in Central Texas and San Antonio in similar clay formations are using the full synthetic liner in addition to the clay soils."

Answer: Yes

"There are no restrictions on the types of waste that may be disposed of in the TDSL landfill, with the exception of hazardous waste."

Answer: Yes

Answer the following question only if you answered "Yes" to any part of Question No. 4. Otherwise, do not answer the following question and proceed to the last page.

QUESTION NO. 5

What sum of money, if paid now in cash, would fairly and reasonably compensate TDSL for the following elements of damage, if any, proximately caused by the publication of the statements or implications regarding which you answered "Yes" to Question No. 4?

A publication "proximately causes" damage if, in a natural and continuous sequence, it produces the damage, the damage would not have happened without that publication, and the damage was foreseeable. Damage is foreseeable if a business using ordinary care would have been able to foresee that the publication might reasonably result in the damage or some similar damage. More than one thing may proximately cause damage.

For this question, consider the elements of damages listed below and none other. Consider each element separately. Do not include damages for one element in any other element. Do not include interest on any amount of damages you find.

Answer in dollars and cents, if any, with respect to the following:

1. TDSL's lost profits sustained in the past.

Answer: $ Ø

2. Reasonable and necessary expenses incurred by TDSL in defending against WMT's defamatory statements.

Answer: $ 450,592.03

Answer the following question if you answered "Yes" to any part of Question No. 4. Otherwise, do not answer the following question and proceed to the last page.

QUESTION NO. 6

With respect to each of the statements or implications below regarding which you answered "Yes" in answer to Question No. 4, does the statement or implication tend to affect an entity injuriously in its business, occupation, or office, or charge an entity with illegal or immoral conduct?

You are to consider an ordinary person's perception of the statement or implication in the context of the Action Alert as a whole, and in light of the surrounding circumstances.

Answer "Yes" or "No" as to each statement or implication regarding which you answered "Yes" in answer to Question No. 4. Otherwise, leave the answer regarding that statement or implication blank.

The implication that TDSL does not have a leachate collection system.

Answer: Yes

The implication that the TDSL facility is environmentally less protective than other area landfills, including WMT's Austin Community Landfill.

Answer: Yes

The TDSL facility "applied for and received an exception to the EPA Subtitle D environmental rules."

Answer: Yes

"Other landfills in Central Texas and San Antonio in similar clay formations are using the full synthetic liner in addition to the clay soils."

Answer: Yes

"There are no restrictions on the types of waste that may be disposed of in the TDS landfill, with the exception of hazardous waste."

Answer: Yes

Answer the following question only if you answered "Yes" to any part of Question No. 6. Otherwise, do not answer the following question.

QUESTION NO. 7

What sum of money, if paid now in cash, would fairly and reasonably compensate TDSL for damage to its reputation caused by the publication of the statements or implications regarding which you answered "Yes" to Question No. 4?

Do not include interest on any amount of damages you find.

Answer in dollars and cents:

Damage to reputation in the past.

With respect to the publication of statements and implications regarding which you answered "Yes" in answer to Question No. 6, damage to reputation may be presumed; no evidence is required of damages.

With respect to the publication of statements and implications, regarding which you answered "No" in your answer to Question No.6, there must be evidence of damage to reputation proximately caused by that publication. A publication "proximately causes" damage if, in a natural and continuous sequence, it produces the damage, the damage would not have happened without that publication, and the damage was foreseeable. Damage is foreseeable if a business using ordinary care would have been able to foresee that the publication might reasonably result in the damage or some similar damage. More than one thing may proximately cause damage.

Answer: $ 5,000,000 ^00

Answer the following question only if as to all parts of Question No. 6 you answered "No" or left the answer blank. Otherwise, do not answer the following question.

QUESTION NO. 8

What sum of money, if paid now in cash, would fairly and reasonably compensate TDSL for damage, if any, to its reputation, proximately caused by the publication of the statements or implications regarding which you answered "Yes" in answer to Question No. 4?

> A publication "proximately causes" damage if, in a natural and continuous sequence, it produces the damage, the damage would not have happened without that publication, and the damage was foreseeable. Damage is foreseeable if a business using ordinary care would have been able to foresee that the publication might reasonably result in the damage or some similar damage. More than one thing may proximately cause damage.
>
> Do not include interest on any amount of damages you find.

Answer in dollars and cents, if any:

Damage to reputation in the past.

Answer: $_____

If you answered "Yes" to any part of Question No. 4, then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 9

Do you find by clear and convincing evidence that WMT published the statements or implications you found to be false with malice?

"Clear and convincing evidence" means the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established.

"Malice" means:

(a) a specific intent by WMT to cause substantial injury to TDSL; or

(b) an act or omission by WMT,

(i) which when viewed objectively from the standpoint of WMT at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and

(ii) of which WMT has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

Answer "Yes" or "No."

Answer: Yes

If you answered "Yes" to Question No. 9, then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 10

What sum of money, if any, if paid now in cash, should be assessed against WMT and awarded to TDSL as exemplary damages for the conduct found in response to Question No. 4?

"Exemplary Damages" means an amount that you may, in your discretion, award as a penalty or by way of punishment.

Factors to consider in awarding exemplary damages, if any, are:

(a) The nature of the wrong.

(b) The character of the conduct involved.

(c) The degree of culpability of WMT.

(d) The situation and sensibilities of the parties concerned.

(e) The extent to which such conduct offends a public sense of justice and propriety.

(f) The net worth of WMT.

Answer in dollars and cents, if any.

Answer: $ 20,000,000 00

After you retire to the jury room, you will select your own presiding juror. Then you will deliberate upon your answers to the questions asked.

It is the duty of the presiding juror –

1. to preside during your deliberations,

2. to see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge,

3. to write out and hand to the bailiff any communications concerning the case that you desire to have delivered to this judge.

4. to vote on the questions,

5. to write your answers to the questions in the spaces provided, and

6. to certify to your verdict in the space provided for the presiding juror's signature or to obtain the signatures of all the jurors who agree with the verdict if your verdict is less than unanimous.

You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the courthouse, at your home, or elsewhere, please inform the judge of this fact.

When you have answered all the questions you are required to answer under the instruction of the judge and your presiding juror has placed your answers in the spaces provided and signed the verdict as presiding juror or obtained the signatures, you will inform the bailiff at the door of the jury room that you have reached a verdict, and then you will return into court with your verdict.

JUDGE PRESIDING

CERTIFICATE

We, the jury, have answered the above and foregoing questions as herein indicated, and herewith return same into court as our verdict.

(To be signed by the presiding juror, if unanimous.)

_____

PRESIDING JUROR

(To be signed by those rendering the verdict, if not unanimous.)

Robert Talbot

Charles Schmidt

Joe Canales

Sonia Combs

Jenna Holmes

Shirley Masterson

Diana Marshall

Christopher Murray

Kathleen Holt

Louis Williams

Tania Sanders

Jennifer Cantu

D

Notice sent: Final Interlocutory None
Disp Parties: All
Disp code: CVD / CLS 4611/4627
Redact pgs:
Judge SAY Clerk

CAUSE NO. D-1-GN-97-012163

TEXAS DISPOSAL SYSTEMS LANDFILL, INC. Plaintiff,	§	IN THE DISTRICT COURT OF
vs.	§	TRAVIS COUNTY, TEXAS
WASTE MANAGEMENT OF TEXAS, INC., Defendant.	§	126th JUDICIAL DISTRICT

Filed in The District Court of Travis County, Texas
DEC 09 2010
At 3:23 P M.
Amalia Rodriguez-Mendoza, Clerk

FINAL JUDGMENT

On October 25, 2010, this cause was called for trial on the merits. Plaintiff and Defendant appeared by their respective counsel of record and by their respective corporate representatives and announced ready. A jury having been demanded, 12 jurors and one alternate juror were empaneled. The Court denied the respective motions for directed verdict filed by Defendant and by Plaintiff at the close of Plaintiff's and Defendant's respective cases-in-chief. Following the close of evidence and closing arguments, the alternate juror was excused. All issues not previously resolved by partial summary judgment were submitted to the jury. The jury returned its verdict on November 5, 2010. The verdict is incorporated by reference. The jury having found defamation, falsity, actual malice, defamation *per se*, statutory malice, actual damages, and exemplary damages, it is

ORDERED, ADJUDGED and FINALLY DECREED that Plaintiff Texas Disposal Systems Landfill, Inc., have and recover from and against Defendant Waste

00181227S

148

Management of Texas, Inc. the amount of $7,101,776.09 (consisting of actual damages in the amount of $5,450,592.03, plus exemplary damages of $1,651,184.06); and it is

FURTHER ORDERED, ADJUDGED and FINALLY DECREED that Plaintiff Texas Disposal Systems Landfill, Inc., have and recover from and against Defendant Waste Management of Texas, Inc. prejudgment interest in the amount of $3,579,470.99 (for the time period from the filing of Plaintiff's original petition through December 9, 2010) plus $746.656 per diem for each day, if any, from December 9, 2010, through the date of this Final Judgment; and it is

FURTHER ORDERED, ADJUDGED and FINALLY DECREED that Plaintiff Texas Disposal Systems Landfill, Inc., have and recover its costs of Court from and against Defendant Waste Management of Texas, Inc., against whom all costs of Court are taxed; and it is

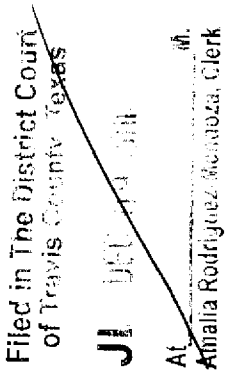
FURTHER ORDERED, ADJUDGED and FINALLY DECREED that Plaintiff Texas Disposal Systems Landfill, Inc., have and recover from and against Defendant Waste Management of Texas, Inc. post-judgment interest on the total of the foregoing at the rate of 5 percent per annum (with compounding as allowed at law) from the date of this Final Judgment until paid.

The Clerk shall issue such writs and processes as may be necessary or appropriate for the enforcement and collection of this Judgment and/or the costs of Court.

All relief not granted herein is DENIED. This is a final and appealable judgment, that disposes of all claims by and against all parties.

Signed this 9th day of December, 2010.

The Honorable Stephen Yelenosky
District Judge Presiding



APPROVED AS TO FORM ONLY:

John J. McKetta III
Attorney for Plaintiff

William W. Ogden
Attorney for Defendant

E

ACTION ALERT
Re San Antonio waste dumping in Travis County

The San Antonio City Council is currently considering a proposal to greatly increase the amount of their municipal waste they truck 70 miles to Travis County. The current proposal before the San Antonio City Council calls for:

1) Raising the guaranteed minimum from 50,000 tons to 100,000 tons per year.... for 30 years! This is the *minimum* amount that they are contracting to haul70 miles to Travis County, to the Texas Disposal System landfill near Creedmore.

2) PLUS the proposal calls for privatizing San Antonio's Starcrest Transfer Station with TDS taking over the operations. This would allow TDS to expand their own commercial waste collection business in San Antonio, Bexar County and the surrounding counties, as well as to solicit waste from other municipalities and other haulers for transfer to the Travis County landfill. In fact, it would be to the City's benefit to *encourage* such transfers since they would receive a royalty from TDS for every ton of waste processed through the city's transfer station. *The Starcrest facility is capable of handling up to 350,000 tons of waste per year for transfer to Travis County.*

Privatized Transfer Station: The City contract allows TDS to base their facilities and operations at the Starcrest site as well, facilitating TDS's further entry into the San Antonio and surrounding markets for commercial hauling. With the use of the transfer station to consolidate their waste hauling operations TDS may bring municipal solid waste, commercial waste, special waste, construction waste, roll-off containers, and sludge and liquid waste to Travis County and to bid on the disposal of waste from literally hundreds of other governmental entities, MUDs and cities in South Texas. There are no restrictions on the types of waste that may be disposed of at the TDS landfill, with the exception of hazardous waste. And the City has specifically placed no upper limit on the amount of waste that may be processed through the transfer station.

Traffic, Air Emissions, etc: An additional issued raised by the expanded hauling is that of traffic. The increase to a minimum of 100,000 tons of waste to be hauled from San Antonio to Austin represents a doubling of the truck traffic from the previous contract. This amount, however, will be further increased by TDS's ability to process as much as 350,000 tons a year of waste to the Travis County landfill through the Starcrest transfer station. This will result in a large increase in heavy truck traffic along IH-35 and through the cities in between Austin and San Antonio. There will, of course, be a commensurate increase in the amount of traffic air emissions -- at a time when Travis County is in danger of becoming a non-attainment zone by EPA air emission standards. Traffic volume and the potential for accidents will increase as well.

Landfill Liner and Leachate Collection: Unlike other landfills in the Travis County area, TDS's landfill applied for and received an exception to the EPA Subtitle D environmental rules that require a continuous synthetic liner at the landfill and a leachate collection system utilizing a leachate blanket to collect water that comes in contact with garbage (so that it cannot build up water pressure in a landfill). TDS requested and received state approval to use only existing clay soils as an approved "alternative liner" system, rather than use an expensive synthetic liner over the clay. Other landfills in Central Texas and San Antonio in similar clay formations are using the full synthetic liner in addition to the clay soils.

History: Texas Disposal Systems (TDS) operates a 341-acre type I municipal solid waste landfill at 7500 FM 1327, Bud TX 78610, just northwest of the Village of Creedmoor (in Travis County) 2.7 miles east of IH-35. The facility currently receives waste from 16 counties (Bastrop, Bexar, Blanco, Caldwell, Colorado, Comal, DeWitt, Fayette, Gonzales, Guadalupe, Hays, Kendall, Lavaca, Travis, Williamson and Wilson).

What Can you Do? Contact the San Antonio Mayor, City Council, and Public Works Director (P.O. Box 839966, San Antonio TX 78283-3966). Phone (210) 207-4077 Fax (210) 207-7027. And/or contact the San Antonio Express News with your concerns. Also contact Travis County officials to let them know of your environmental and traffic concerns.

ACTION ALERT

Re San Antonio waste dumping in Travis County

The San Antonio City Council is currently considering a proposal to greatly increase the amount of their municipal waste they truck 70 miles to Travis County. The current proposal before the San Antonio City Council calls for:

1) Raising the guaranteed minimum from 50,000 tons to 100,000 tons per year... for 30 years! This is the *minimum* amount that they are contracting to haul 70 miles to Travis County, to the Texas Disposal System landfill near Creedmoor.

2) PLUS the proposal calls for privatizing San Antonio's Starcrest Transfer Station with TDS taking over the operations. This would allow TDS to expand their own commercial waste collection business in San Antonio, Bexar County and the surrounding counties, as well as to solicit waste from other municipalities and other haulers for transfer to the Travis County landfill. In fact, it would be to the City's benefit to *encourage* such transfers since they would receive a royalty from TDS for every ton of waste processed through the city's transfer station. *The Starcrest facility is capable of handling up to 350,000 tons of waste per year for transfer to Travis County.*

Privatized Transfer Station: The City contract allows TDS to base their facilities and operations at the Starcrest site as well, facilitating TDS's further entry into the San Antonio and surrounding markets for commercial hauling. With the use of the transfer station to consolidate their waste hauling operations TDS may bring municipal solid waste, commercial waste, special waste, construction waste, roll-off containers, and sludge and liquid waste to Travis County and to bid on the disposal of waste from literally hundreds of other governmental entities, MUDs and cities in South Texas. There are no restrictions on the types of waste that may be disposed of at the TDS landfill, with the exception of hazardous waste. And the City has specifically placed no upper limit on the amount of waste that may be processed through the transfer station.

Traffic, Air Emissions, etc: An additional issued raised by the expanded hauling is that of traffic. The increase to a minimum of 100,000 tons of waste to be hauled from San Antonio to Austin represents a doubling of the truck traffic from the previous contract. This amount, however, will be further increased by TDS's ability to process as much as 350,000 tons a year of waste to the Travis County landfill through the Starcrest transfer station. This will result in a large increase in heavy truck traffic along IH-35 and through the cities in between Austin and San Antonio. There will, of course, be a commensurate increase in the amount of traffic air emissions -- at a time when Travis County is in danger of becoming a non-attainment zone by EPA air emission standards. Traffic volume and the potential for accidents will increase as well.

Landfill Liner and Leachate Collection: Unlike other landfills in the Travis County area, TDS's landfill applied for and received an exception to the EPA Subtitle D environmental rules that require a continuous synthetic liner at the landfill and a leachate collection system utilizing a leachate blanket to collect water that comes in contact with garbage (so that it cannot build up water pressure in a landfill). TDS requested and received state approval to use only existing clay soils as an approved "alternative liner" system, rather than use an expensive synthetic liner over the clay. Other landfills in Central Texas and San Antonio in similar clay formations are using the full synthetic liner in addition to the clay soils.

History: Texas Disposal Systems (TDS) operates a 341-acre type I municipal solid waste landfill at 7500 FM 1327, Bud TX 78610, just northwest of the Village of Creedmoor (in Travis County) 2.7 miles east of IH-35. The facility currently receives waste from 16 counties (Bastrop, Bexar, Blanco, Caldwell, Colorado, Comal, DeWitt, Fayette, Gonzales, Guadalupe, Hays, Kendall, Lavaca, Travis, Williamson and Wilson).

What Can you Do? Contact the San Antonio Mayor, City Council, and Public Works Director (P.O. Box 839966, San Antonio TX 78283-3966). Phone (210) 207-4077 Fax (210) 207-7027. And/or contact the San Antonio Express News with your concerns. Also contact Travis County officials to let them know of your environmental and traffic concerns.