No. 12-0522

IN THE SUPREME COURT OF TEXAS

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

v.

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

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

TEXAS DISPOSAL SYSTEMS LANDFILL, INC.'S MOTION FOR REHEARING

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May 27, 2014

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I. The Court's Application of its Holding -- that Reputation Damages Are General, Non-Economic Damages that Do Not Need to Be Proven With "Mathematical Precision" – Contradicts the Court's Application of its Holding in *Bentley v. Bunton*.

The Court properly recognizes that general, non-economic damages "cannot be determined by mathematical precision; by their nature, they can be determined only by the exercise of sound judgment." Slip op. at 18 (quoting *Bentley v. Bunton*, 94 S.W.3d 561, 605 (Tex. 2002)). The Court also holds that reputation damages are non-economic, even when sustained by a for-profit corporation. *Id.* at 20-21.

However, in applying the law to the facts of this case, the Court's Opinion contradicts (i) its own well-reasoned discussion of general non-economic damages and (ii) its previous holding in *Bentley v. Bunton*. Rather than evaluating whether the nature of Texas Disposal's evidence would allow a jury to exercise its sound judgment and award reputation damages (either in the amount actually awarded or in any other amount) as in *Bentley v. Bunton*, the Court's Opinion rejects the award of *any* reputation damages due to alleged lack of evidence "*quantifying* TDS's injury to its reputation." Slip op. at 29 (emphasis added).

The Court's Opinion effectively eliminates the ability of a for-profit corporation to recover general reputation damages other than nominal damages. Its insistence on "quantification" is the functional equivalent of requiring proof of

special economic harm proximately caused by false and defamatory speech. Such a requirement is contrary to the Court's observations that reputational harm is capable only of "inexact measurement," slip op. at 30; that "under presumption of damages applicable to libel *per se*, damages are within the jury's discretion," *Salinas v. Salinas*, 365 S.W.3d 318, 321 (Tex. 2012) (quotation omitted); that "juries be given a measure of discretion in finding damages," *Bentley v. Bunton*, 94 S.W.3d at 606 (quoting *Saenz v. Fidelity & Guaranty Ins. Underwriters*, 925 S.W.2d 607, 614 (Tex. 1996)); and that non-economic damages like reputational harm "can be determined only by the exercise of sound judgment," *id.* at 605.

Under the Court's Opinion – which requires corporate defamation plaintiffs to submit evidence that "quantifies" general non-economic reputation damages – there would no longer be any meaningful difference between defamation and business disparagement actions. As the Court recognizes, these torts are intended to protect different interests:

> [A] defamation claim allows a plaintiff to recover that which would not be recoverable under business disparagement – namely, for a noneconomic injury such as injury to reputation – because disparagement only seeks to protect the plaintiff's economic interests while defamation seeks to protect the plaintiff's reputation.

Slip op. at 20. However, the Court's insistence here that reputation damage be "quantified" transforms general non-economic damages (which should be available in defamation) into the functional equivalent of special economic damages (as

required in business disparagement). In essence, the Court's Opinion allows corporate defamation plaintiffs to recover only economic damages, whether termed as special damages in a disparagement case, or "non-economic" but "quantifiable" reputation damages in a libel case.

Although the Court's Opinion appears to leave open the theoretical possibility of a corporate defamation plaintiff recovering actual non-economic reputation damages, in reality it is difficult, if not impossible, to imagine evidence that would satisfy the new standard articulated by the Court, other than that considered by the Court to be economic special-damage evidence.

Texas Disposal does not challenge this Court's established precedent that there must be "some evidence" to support the amount of a jury's damage award. *See, e.g.*, *Bentley v. Bunton*, 94 S.W.3d at 606. But here, for the first time, the Court has moved past the "some evidence" standard, and instead requires evidence that concretely quantifies non-economic damages. That is a step too far when reviewing reputational harm.

Texas Disposal respectfully moves for rehearing and asks the Court to reconsider the evidence and the application of law to the facts of this case, and affirm the jury's award of $5 million in reputation damages. In the alternative, Texas Disposal asks the Court to confirm that the record supports the award of reputation damages in an amount other than nominal damages, and to suitably

instruct the Court of Appeals on remand consistent with this Court's precedent, including its handling of an award of excessive non-economic damages in *Bentley v. Bunton*.

II. Sufficient Evidence Supports the Jury's Award of $5 Million in Reputation Damages.

A. Evidence established damage to Texas Disposal's reputation.

In *Bentley v. Bunton*, the plaintiff, Judge Bentley, "acknowledged at trial that he had not incurred any monetary loss as a result of Bunton's and Gates's conduct." *Bentley v. Bunton*, 94 S.W.3d at 575. Nonetheless, this Court held that "the jury could readily have found that Bentley's reputation was in fact injured" by the defamatory statements at issue, *id.* at 604, and that the reputation damages awarded by the jury were "well within a range that the evidence supports." *Id.* at 607.

The Court's opinion in *Bentley* cites the following evidence that may be considered relevant to reputational damage:

- Judge Bentley's testimony that "my name means something to me," *id.* at 576.
- The accusations of corruption against him went "to the very heart of what my whole life is about," *id.*

- "Everywhere he went, he said, people would say that they had heard him called corrupt, although 'most of them are well-meaning and a lot of them said it was joking,'" *id.*[1]

This evidence was found sufficient by this Court to support the jury's award of reputation damages to Judge Bentley, in the amount of $150,000. None of this evidence "quantifies" the non-economic reputational harm to Judge Bentley, and such a quantification would be impossible, given his testimony that he suffered no monetary loss. Had this Court applied to Judge Bentley the new standard it has applied to Texas Disposal, then the Court would have reversed the award of $150,000 to Judge Bentley for reputation damages. That would not have been the appropriate result in Judge Bentley's case, and it is not the appropriate result in this case.

Texas Disposal presented considerably more evidence of damage to reputation than did Judge Bentley:

- Texas Disposal's chairman, chief executive officer, and principal owner Bob Gregory testified that Texas Disposal's environmental reputation was crucial, particularly in the Austin market, and that before Waste

[1] Judge Bentley also offered testimony about how the defendants' false statements had caused him an extreme amount of worry and affected his family, but such testimony speaks to his mental anguish, not damage to his reputation; he received a substantial award of mental anguish damages in addition to reputation damages.

Management distributed the false Action Alert, Texas Disposal's reputation was exemplary.[2]

- When Gregory first saw the Action Alert, he was "extremely upset" and "shocked" because it attacked a highly valuable asset of Texas Disposal's – its environmental integrity – and asked environmental leaders to take action against Texas Disposal.[3]
- Three Austin environmental leaders testified that when they first read the Action Alert, it negatively affected their opinion of TDSL's environmental reputation.[4]
- Gregory testified that Texas Disposal's reputation was "priceless," that he had "no doubt" Texas Disposal's business would have grown more but for the effects of the Action Alert, and that he believed "the value of our business could be worth easily $10 million more" had the Action Alert not been distributed.[5]

In addition to this testimony, Texas Disposal introduced two other types of evidence relevant to reputation damage: (1) the time and expense incurred by

[2] RR3 at 126-27.

[3] RR3 at 125-27.

[4] RR4 at 184 (George Cofer); RR5 at 52, 58 (former Austin City Council member Brigid Shea); RR4 at 227-30 (environmental engineer Dr. Lauren Ross).

[5] RR3 at 155, 158.

Texas Disposal specifically counteracting the effects of Waste Management's false Action Alert; and (2) lost profits from a decrease in Texas Disposal's base business. This evidence is discussed immediately below.

B. Evidence of time and expense incurred in countering the defamation, and of lost profits, are indicators of the magnitude of reputation damage suffered by Texas Disposal.

Time and expense. This evidence consisted of two categories: actual out-of-pocket costs paid to third parties such as consultants and lobbyists (amounting to a little more than $450,000), and the value of time spent by Texas Disposal employees (just under $725,000).[6] In discussing this evidence, the Court noted that the jury awarded Texas Disposal its out-of-pocket costs as special economic damages, and observed that the second category of damages also was evidence of "special damages," not general reputation damages. Slip op. at 29.

These damages were, in fact, submitted to the jury as special economic damages. But they also serve to indicate the magnitude of damage to Texas Disposal's reputation. Evidence shows that Texas Disposal devoted approximately $1.175 million in expenses and time to counteract the Action Alert's damage to its reputation. The jury was provided with sufficient evidence to conclude that Texas Disposal, as an economically rational entity, would not devote more resources to counteracting reputational harm than the amount of harm it believed it had actually

[6] RR13 PX4.

suffered. Thus, the jury could have concluded that Texas Disposal's reputation was harmed at least in an amount no less than $1.175 million on this evidence alone. (This is not an argument for any double recovery of mitigation expenses; but the mitigation evidence is demonstrable evidence – and certainly legally sufficient evidence – of reputational damages.)

The Court's treatment of the $725,000 in time spent by Texas Disposal employees in countering the defamation is instructive of how the Court's ruling essentially eliminates the possibility of a corporation recovering non-economic general reputation damages. Under the Court's Opinion, evidence of a quantifiable harm is relevant only to economic special damages and cannot be used to justify any amount of non-economic reputation damages, but evidence that does not "quantify" reputation damage also cannot support the award of those damages. For practical purposes, the Court's Opinion leaves no room for any type of evidence on reputational harm.

Lost profit. Texas Disposal also submitted evidence showing that its "base business" – revenue generated by customers other than the cities of Austin and San Antonio, which were involved in the battle against Waste Management where the Action Alert played a major role – did not grow as expected in the aftermath of the Action Alert. Specifically, the evidence demonstrated that the Austin and San Antonio waste disposal markets grew during the period for which Texas Disposal

sought damages (1997 through 2000), but that Texas Disposal's share declined or remained flat.[7] Texas Disposal quantified this by showing that it would have expected no less than an additional $1.99 million in profit had its base business merely kept pace with the region's growth.[8] Texas Disposal attributed the adverse impact to the Action Alert and the diversion of effort to redress the Action Alert.[9]

This "base business" evidence, like the evidence of remedial expenses discussed above, is an indication of the magnitude of Texas Disposal's reputational harm. The Court's Opinion, though, again dismisses this evidence as relevant only to special damages. Under that analysis, corporate defamation plaintiffs are trapped in a classic Catch-22: they must have "quantifiable" evidence of non-economic reputational harm, but any evidence that actually quantifies harm is disregarded as evidence only of economic special damages that cannot support the award of any non-economic reputation damages. In practice, the notion that there can be such a thing as "quantifiable" non-economic reputation damages appears to be nothing more than a chimera.

The relevance of the time-and-expense and base-business evidence to reputational harm is that both are indicators (not measures) of the magnitude of

[7] RR16 PX304.

[8] RR12 PX4.1.

[9] RR3 179-81.

that harm. This evidence supports the jury's award of $5 million in reputation damages, by showing that the Action Alert caused Texas Disposal to incur millions of dollars in expenses, time, and lost business opportunity. This, in turn, is an indication that Texas Disposal considered its reputation to be worth many millions, and that the Action Alert caused damage to that reputation that is reasonably measured in millions. The jury heard the evidence, considered it carefully, and awarded Texas Disposal only half of the amount requested. The evidence amply supports the jury's award.

C. Under the applicable standard of review, the jury's award of reputation damages is supported by evidence and cannot be considered "disguised disapproval" of Waste Management's actions.

This Court in *Bentley v. Bunton* cautioned that appellate review of non-economic damages in defamation cases is necessary to ensure that those damages did not amount to "disguised disapproval of the defendant" rather than compensation for harm. *Bentley*, 94 S.W.3d at 605. That concern was especially acute because the jury awarded Judge Bentley $7 million in mental anguish damages against Bunton, compared to just $1 million in punitive damages. *Id.* at 576. This was a strong indication that the jury intended to punish Bunton through the award of mental anguish damages, rather than through assessing large punitive damages (where punishment of the defendant is an allowable purpose).

Here, there should be no such concern. Had the jury wished to award actual damages in "disguised disapproval" or punishment of Waste Management rather than as compensation for actual harm, it had ample opportunities, all of which it declined. Texas Disposal asked for $10 million in reputation damages; the jury awarded half. Texas Disposal asked for more than $1.1 million in remediation damages; the jury awarded less than 40 percent. Texas Disposal asked for millions in lost profit; the jury awarded none. Significantly, the jury showed disapproval only in awarding damages in which disapproval is a proper motivation: $20 million in exemplary damages. There simply is no indication whatsoever of "disguised disapproval."

Appellate legal-sufficiency review requires the reviewing court to view the evidence in the light most favorable to the judgment and to indulge every reasonable inference that supports the trial court's findings. *See* Slip Op. at 21-22. A legal-sufficiency challenge will succeed only if there is *no* evidence, or no more than a scintilla of evidence, to support the challenged element of the judgment. *Id.* Here, when viewing the evidence in the light most favorable to the judgment and indulging all reasonable inferences in its favor, a reasonable and fair-minded jury had before it evidence of the magnitude of Texas Disposal's harm, and that evidence provided the jury with latitude to exercise its sound judgment in

determining that $5 million was fair and reasonable compensation for damage to Texas Disposal's reputation.[10]

Texas Disposal thus respectfully requests that the Court grant this Motion for Rehearing and hold that the evidence was legally sufficient to support the award of $5 million in reputation damages.

III. In the Alternative, the Evidence Was Legally Sufficient to Support the Award of Some Reputation Damages, and the Issue Should Be Remanded to the Court of Appeals.

In reviewing a damage award that is challenged on legal-sufficiency grounds, the Court will consider whether the evidence supports the existence of *some amount* of the challenged element, as well as whether the evidence supports the *specific amount* awarded in the judgment. The Court acknowledges this, slip op. at 27-28. However, the substance of the Court's analysis is whether the evidence is legally sufficient to support the amount of reputation damages awarded, and little if any attention is given to the other relevant question: whether the evidence supports an award of reputation damages in *some* amount, even if less

[10] *Bentley v. Bunton*, 94 S.W.3d at 605-06 (a jury "necessarily" has "latitude" to exercise award non-economic damages in an amount that, in its "sound judgment," is "fair and reasonable" compensation, because these damages "cannot be determined by mathematical precision").

than the $5 million awarded by the jury, entered by the trial court in the judgment, and affirmed by the Court of Appeals.[11]

The evidence discussed above is far more than a scintilla of evidence that Texas Disposal's reputation was harmed in *some* amount. Witnesses testified that after reading the Action Alert their opinion of Texas Disposal's reputation was lowered, and Texas Disposal assessed the damage to its reputation to be severe enough to devote well over a million dollars to combatting the defamation. This evidence is more than sufficient to establish the existence of reputational harm.

In many cases, this Court has found the evidence legally sufficient to support some amount of damage, but not sufficient to support the amount awarded. In such cases, it is typical for the Court to remand to the Court of Appeals for consideration of whether a remittitur should be suggested. This is precisely the action taken by the Court when it found that Judge Bentley suffered mental anguish, but that the evidence was legally insufficient to support the awarded amount of $7 million. *Bentley v. Bunton*, 94 S.W.3d at 606-08. *See also ERI Consulting Engineers, Inc. v. Swinnea*, 318 S.W.3d 867, 877-78 (Tex. 2010) ("ERI proved lost profit damages; its entitlement to recover them survives the trial court's error in awarding too much. Accordingly, the appropriate remedy is to remand the

[11] The Court's Opinion does state that the evidence does "not reveal any quantity of damages to TDS's reputation," slip op. at 29, but the discussion is in the context of evaluating whether the evidence supports the award of $5 million.

case to the court of appeals to consider the possibility for remittitur on lost profit damages."); *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. National Development & Research Corp.*, 299 S.W.3d 106, 124 (Tex. 2009) ("when there is some evidence of damages, but not enough to support the full amount, it is inappropriate to render judgment" reversing the award of all such damages; Supreme Court remanded to the Court of Appeals to consider remittitur); *Aquaplex, Inc. v. Rancho La Valencia, Inc.*, 297 S.W.3d 768, 777 (Tex. 2009) ("We hold that some evidence supported an award of damages for fraud under the MSA, just not at the level awarded by the trial court," remanding to the Court of Appeals to consider remittitur or a new trial on damages); *Guevara v. Ferrer*, 247 S.W.3d 662, 670 (Tex. 2007) ("[W]hen there is evidence to support some damages [though not the amount initially awarded] it is not appropriate to render judgment …. We believe the proper course in this instance is to remand to the court of appeals to consider remittitur.").

Texas Disposal presented evidence that is legally sufficient to support the award of $5 million in reputation damages. Even if the Court continues to disagree, the evidence of *some* substantial reputational harm is overwhelming, and the appropriate result would be a remand to the Court of Appeals for consideration of remittitur.

CONCLUSION AND PRAYER

Texas Disposal Systems Landfill, Inc. prays that this Court grant its Motion for Rehearing and affirm the Court of Appeals in all respects, including the award of $5 million in reputation damages. In the alternative, Texas Disposal Systems Landfill, Inc. prays that this Court grant its Motion for Rehearing and remand this case to the Court of Appeals for consideration of remittitur. Texas Disposal Systems Landfill, Inc. further prays for all other relief to which it may show itself justly entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to TEX. R. APP. P. 9.4(*i*)(3), I certify that the foregoing document complies with the word count limitations set out in TEX. R. APP. P. 9.4(*i*) in that it contains 3,173 words, excluding any parts exempted by TEX. R. APP. P. 9.4(*i*)(1). In making this Certificate of Compliance, I am relying on the word count provided by the software used to prepare the document. This is a computer-generated document created in Microsoft Word, using 14-point Times New Roman typeface for all text, except for footnotes which are in 12-point Times New Roman typeface.

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