No. 12-0522

IN THE SUPREME COURT OF TEXAS

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

v.

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

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

TEXAS DISPOSAL SYSTEMS LANDFILL, INC.'S RESPONSE TO WASTE MANAGEMENT'S BRIEF ON THE MERITS

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ABBREVIATIONS AND RECORD CITATIONS

The following abbreviations and notations are used in this Brief:

Apdx. tab __	References to the Appendix to this Response Brief.
RR1 __, RR2 __, etc.	References to the 21 volumes of the Reporter's Record, followed by page number (*e.g.* "RR7 132" refers to page 132 of volume 7).
PTX__, DTX__	References to Plaintiff's Trial Exhibits and Defendant's Trial Exhibits. Citations to trial exhibits also include reference to the volume of the Reporter's Record containing the cited exhibit.
TDSL II	References to the unpublished May 18, 2012 Court of Appeals decision in this case (2012 WL 1810215 (Tex. App. – Austin 2012, pet. filed) (Apdx. tab 3). Page citations are to Westlaw star pagination.
TDSL I	References to the first Court of Appeals decision in this matter, *Texas Disposal Systems Landfill, Inc. v. Waste Management Holdings, Inc.*, 219 S.W.3d 563 (Tex. App. – Austin 2007, pet. denied).
CR __	References to the Clerk's Record (consisting of 6,609 pages) that states on the first page that it was delivered to the Court of Appeals on April 29, 2011, and is stamped as "filed" on May 4, 2011.

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RESPONSE TO PETITIONER'S STATEMENT OF THE CASE

While Petitioner's Statement of the Case is mostly technically accurate, its presentation may be confusing or misleading.

This case has been through two jury trials. Petitioner's Statement of the Case fails to indicate that in the first trial, the jury found that Waste Management made false, defamatory statements with actual malice, but assessed no damages. The Court of Appeals reversed the original judgment and remanded for retrial, due to the first trial court's error in failing to instruct the jury on defamation *per se* and presumed damages. *Texas Disposal Systems Landfill, Inc. v. Waste Management Holdings, Inc.*, 219 S.W.3d 563 (Tex. App. – Austin 2007, pet. denied). Petitioner's Statement of the Case indicates a "First opinion" in that first appeal, but that opinion was withdrawn on motion for rehearing; thus, the initial opinion is irrelevant. This Court denied both Waste Management's and Texas Disposal's petitions for review after the first appeal.

Petitioner's Statement also misstates the amount of exemplary damages awarded by the jury in the second trial; the verdict was for $20 million in such damages, not $10 million. Petitioner correctly states the amount to which the trial court reduced those damages (to $1,651,184.06).

After the second jury trial, the Court of Appeals affirmed judgment for Texas Disposal. *Waste Management of Texas, Inc. v. Texas Disposal Systems*

Landfill, Inc., 2012 WL 1810215 (Tex. App. – Austin 2012, pet. filed) (not reported in S.W.3d). Both parties have filed petitions for review.

RESPONSE TO PETITIONER'S STATEMENT OF JURISDICTION

Respondent Texas Disposal Systems Landfill, Inc. contends that there is no issue raised in Waste Management's Brief on the Merits over which this Court should exercise jurisdiction. The Court of Appeals' holdings on those issues do not conflict with any holdings of this Court or the U.S. Supreme Court; the holdings are consistent with Section 73.001 of the Texas Civil Practice and Remedies Code, as well as long-standing principles of Texas law; and the Court of Appeals committed no legal error on the issues presented in Waste Management's Brief.

RESPONSE TO PETITIONER'S ISSUES PRESENTED

Petitioner Waste Management of Texas, Inc. has framed its "Issues Presented" in a manner that includes argumentative phrasing, rather than the concise statements contemplated under Rule 53.2(f), Tex. R. App. P. Texas Disposal submits that the issues presented by Waste Management are more accurately and neutrally restated as follows:

Issue I: Is there some evidence to support the jury's award of $5 million in reputation damages?

Issue II: Did the Court of Appeals properly review the jury's award of reputation damages?

Issue III: Was the jury properly charged on presumed damages?

Issue IV: Was the issue of defamation *per se* properly submitted to the jury?

Issue V: Can a corporation recover reputation damages in a case of defamation *per se*?

Issue VI: Did the court of appeals properly review and affirm that Waste Management's statements were not substantially true and were not non-factual opinion?

Issue VII: Was there evidence of statutory malice necessary to support an award of exemplary damages?

Issue VIII: Was there evidence that Waste Management's false statements caused damage?

Issue IX: Was there evidence to support the award of damages for expenses incurred by Texas Disposal in attempting to remedy Waste Management's false statements?

Issue X: Did the trial court abuse its discretion by excluding from evidence as hearsay certain writings by third parties?

STATEMENT OF FACTS

The Court of Appeals' statement of facts is correct. The "clarifications" provided in Petitioner's Statement of Facts are incomplete and in some cases inaccurate. Many of the legal issues raised by Waste Management require extensive review of the facts; Texas Disposal thus presents here a detailed review of relevant facts as established at trial.

A. The Parties.

Texas Disposal Systems Landfill, Inc. ("Texas Disposal" or "TDSL") owns, operates, and holds the permit for a landfill complex in Southeast Travis County, near Creedmoor. The facility also includes recycling, composting, and ranching operations, as well as a pavilion that hosts various charitable fundraising events. The landfill began operating in 1991, under the first permit ever issued in Texas for an integrated landfill operation with disposal, recycling, and composting services.[1] No environmental groups opposed Texas Disposal's application for its permit. In fact, many groups supported the application, including the Sierra Club, Ecology Action, Citizens for Responsible Waste Management, the Austin Solid Waste Advisory Commission, and the League of Women Voters, as well as the City of Austin.[2]

[1] RR3 68.

[2] *Id.* 65-67.

Waste Management of Texas, Inc. ("Waste Management") competes with Texas Disposal. It owns and/or operates several landfills in the Austin/San Antonio area, including the Austin Community Landfill east of Austin off Highway 290, the Williamson County Landfill north of Hutto, the Mesquite Creek Landfill (formerly the Comal County Landfill) near New Braunfels, and the Covel Gardens Landfill in San Antonio.[3]

B. The Early 1997 Competition.

As of January 1997, Texas Disposal and Waste Management were competing for long-term waste disposal contracts with the cities of Austin and San Antonio. Since 1993, Texas Disposal had a contract with San Antonio under which some of the City's municipal solid waste was taken to the Starcrest Transfer Station on the north side of town near the airport, where the waste was transferred to larger vehicles and hauled by the City to Texas Disposal's landfill.[4] From mid-1995, San Antonio was in exclusive negotiations with Texas Disposal to expand and extend their relationship. The parties anticipated that TDSL would take over operations of Starcrest and would haul the waste to TDSL, and that more waste would go to Texas Disposal.[5] The parties collaborated on drafting a proposed

[3] *Id.* 79-82.

[4] *Id.* 106-08.

[5] *Id.* 116-18.

contract. In December 1996, the San Antonio City Council passed an ordinance directing City staff to execute a deal with Texas Disposal, with the draft contract attached (four minor points remained to be finalized).[6] The anticipated time frame for finalizing the contract was February 1997.[7]

Meanwhile, in Austin, the City was accepting requests for proposal (RFPs) from landfills for disposal of municipal solid waste for the next 30 years, due to the impending shutdown of the City's landfill (required by federal law before the opening of the new airport). RFP responses were due on January 24, 1997.[8] Those landfills submitting proposals were prohibited from lobbying City officials and were required to make certain representations, including that they were qualified under Subtitle D federal environmental protection regulations to receive municipal solid waste.[9] Both Texas Disposal and Waste Management responded to the Austin RFP.

[6] *Id.* 116; RR14, PTX 113.

[7] RR3 122.

[8] *Id.*

[9] *See* RR14, PTX 103.

C. The Drafting and Distribution of the Action Alert.

On January 30, 1997 – while TDSL and San Antonio were close to finalizing the Starcrest contract, and immediately after TDSL and Waste Management responded to the Austin RFP – Waste Management consultant Don Martin caused a document known as the "Action Alert" to be faxed to key Austin environmental and community leaders.[10] Martin was acquainted with environmental activist George Cofer, who frequently sent out items of interest by telecopy to a list of leaders he kept.[11] Martin provided the Action Alert to Cofer and asked him to distribute it.[12] The Action Alert was Plaintiff's Trial Exhibit 1, and a copy is included at Tab 6 of TDSL's Appendix in this Court.

The Action Alert gave no indication that it originated with Waste Management.[13] It called for citizens and public officials of Austin to contact the City of San Antonio, its City Council members, and others in San Antonio to discourage that city from sending its municipal solid waste to TDSL's landfill.[14] It did so by attacking various aspects of TDSL's environmental integrity, including

[10] RR4 182-83.

[11] *Id.* 182.

[12] *Id.*

[13] Apdx. tab 6; RR5 162.

[14] Apdx. tab 6.

its landfill liner and leachate collection system, and claimed that TDSL had received an "exception" to the federal Subtitle D environmental rules.[15]

Don Martin testified that one purpose of the Action Alert was to prevent the anticipated contract between Texas Disposal and the City of San Antonio from being executed; Martin knew that many millions of dollars were at stake.[16] He further testified that the Action Alert was intended to have an effect in Austin as well, particularly in light of the pending RFP for the 30-year Austin contract.[17]

Martin was the Action Alert's primary author. In sworn interrogatory responses (when he was still a party to the lawsuit), Martin testified that the statements in the Action Alert "were carefully drafted with input and review" from six persons affiliated with Waste Management:

- **Larry Cohn**, an engineer who was Waste Management's division president and general manager in San Antonio;[18]
- **Loren Alexander**, a Waste Management marketing vice president for the region running from Waco to San Antonio, whom Martin characterized as his "primary contact at that point," and who supervised and directed Waste Management's public relations consultants such as Martin;[19]

[15] *Id.*

[16] RR5 95-96.

[17] *Id.* 87, 129-30, 135-36.

[18] RR5 83, 150-51; RR6 150.

[19] RR5 84, 150; RR7 162-63.

- **Al Erwin**, a consultant who had a long-standing relationship with Martin (with whom he shared an office) and for whom Waste Management constituted about 90 percent of his work;[20]

- **Bob Drenth**, a Waste Management regional vice president with authority over half of Texas, including Austin and San Antonio, to whom Loren Alexander reported;[21]

- **Jim Nelson**, who was the manager of Waste Management's Austin Community Landfill;[22] and

- **Brent Ryan**, a lawyer who was assisting with the proposed expansion of Waste Management's Austin Community Landfill.[23]

In late January of 1997,[24] Martin and Cohn discussed the pending Starcrest contract between Texas Disposal and San Antonio, as well as the Austin RFP process, via telephone.[25] According to Martin, Cohn requested that Martin distribute, in Austin and as quickly as possible, information regarding the Starcrest proposal and other matters involving Texas Disposal in light of the San Antonio City Council's green light for the Starcrest contract.[26] Martin testified that Loren Alexander also participated in the call; Cohn testified he did not believe he had

[20] RR5 76, 151; RR6 94.

[21] RR5 151; RR7 9, 162-63.

[22] RR5 85-86.

[23] RR5 87, 151.

[24] RR14, PTX 138.

[25] RR5 79-81; RR6 160.

[26] RR5 93.

ever talked to Alexander about matters related to the Action Alert.[27] Al Erwin testified that he was present for part of this conference call.[28] Cohn followed up the phone call by providing a package of materials to Martin.[29]

Martin testified at the 2010 trial that it would have been his practice to have sent a draft of the Action Alert to Waste Management representatives for review and approval before it was distributed. Although he could not recall specifically all the persons who reviewed it, he did "recall specifically sharing it with Loren Alexander," and that it would "make sense" that Larry Cohn also had reviewed it.[30] Martin testified that he was not sure how many people from Waste Management reviewed the Action Alert, but was sure that "some people" did.[31]

However, both Cohn and Alexander testified they had *not* seen the Action Alert before its distribution.[32] At the first trial in 2003, Martin – after hearing Alexander's testimony denying that he reviewed the Action Alert – testified that Alexander did *not* review it, contrary to both his earlier interrogatory answers and

[27] RR5 79; RR6 161.

[28] RR6 98-99.

[29] RR5 102.

[30] RR5 147.

[31] RR5 154.

[32] RR6 163; RR7 165.

his later 2010 trial testimony.[33] Martin's interrogatory responses also listed Bob Drenth, Jim Nelson, and Al Erwin as people who had provided "input and review" of the Action Alert. At the 2010 trial, Drenth and Erwin denied having reviewed the Action Alert,[34] and Martin testified that he could not recall talking to Nelson about the Action Alert.[35]

Martin testified that he alone made the decision to distribute the Action Alert to Austin environmental and community leaders through his acquaintance, environmental activist George Cofer.[36] Cofer testified that Martin told him "that the environmental community, in his opinion, ought to know about" the Action Alert's allegations against Texas Disposal, and that he (Cofer) did not feel he needed to research those allegations because he trusted Martin.[37] As of January 1997, Cofer had a standing practice of sending fax alerts or updates several times a week to groups of people, including a group of people he described as "environmental leaders …. people who were involved on a day-to-day basis in

[33] RR5 149.

[34] RR6 96; RR7 15.

[35] RR5 85-86.

[36] RR5 88.

[37] RR4 182-83.

environmental policy making."[38] Martin told Cofer that he wanted the Action Alert distributed "as soon as possible."[39] Cofer complied with Martin's request, transmitting the Action Alert to about 60 Austin environmental leaders on January 30, 1997. He testified that he believed he also sent the document to his "elected officials" list, which included Austin City Council members.[40]

D. The Action Alert's Content.

Testimony at trial focused on the following passages in the Action Alert, all or portions of which were found to be false, defamatory, and made with actual malice:

> There are no restrictions on the types of waste that may be disposed of at the TDS landfill, with the exception of hazardous waste.
> ….
>
> **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.[41]

[38] RR4 180.

[39] RR4 183.

[40] RR4 181.

[41] PTX 1, Apdx. tab 6.

E. The Action Alert's Impact.

Three Austin environmental leaders testified that Waste Management's Action Alert negatively affected their opinion of TDSL's environmental reputation. George Cofer said the allegations "caused me, personally, a lot of concerns."[42] Former Austin City Council member and high-profile environmental activist Brigid Shea – who was on Cofer's fax list – testified that upon receiving the document, she "took a poor impression of TDS," and that if she had not independently learned other facts about Texas Disposal after the Action Alert, "I would think poorly of them."[43] Environmental engineer Dr. Lauren Ross had studied the original TDSL permit application in the late 1980s and recommended that it be endorsed by the League of Women Voters. When Dr. Ross – who was also on Cofer's fax list – received and read the Action Alert, "I was concerned."[44] She further testified:

> We had advocated for this landfill. And in reading this Action Alert, and particularly the piece on the landfill liner and leachate collection, it sounded like – and I think maybe I even used this term at some point, sounded like there was some corners that were being cut and that maybe it wasn't really as protective as it should be.[45]

[42] RR4 184.

[43] RR5 52, 58.

[44] RR4 227.

[45] RR4 228.

Dr. Ross testified that the Action Alert's "paragraph on the landfill liner leachate collection" caused her to question Texas Disposal's compliance with rules and regulations.[46]

TDSL's chairman, chief executive officer, and principal owner Bob Gregory testified that when he first saw the Action Alert, "I was extremely upset. I was shocked. I had all kind of emotions."[47] He testified that the Action Alert had been aimed at the very influential Austin environmental community (a group that had never opposed TDSL) and asked them to take action against TDSL.[48] Gregory testified that he had seen the environmental community derail various projects in Austin. "They're my friends," he said, "[b]ut I take it very seriously. If something like that started moving against us, we could be toast."[49]

Although Gregory anticipated that the Starcrest contract with the City of San Antonio would be completed by February of 1997, "[t]hings came to a stop" after the Action Alert was distributed.[50] "[T]here were many issues that were raised[,] [i]nstead of the – in addition to the four points" of negotiation identified by the San

[46] RR4 230.

[47] RR3 125.

[48] RR3 126-27.

[49] RR3 129.

[50] RR3 147.

Antonio City Council in the December 1996 ordinance, Gregory testified.[51] TDSL consultant Jerry Arredondo testified that he saw a copy of the Action Alert on the desk of a San Antonio City Council staff member, and was concerned that it would cause a delay in executing the Starcrest contract.[52] He advised Gregory that TDSL should take steps to counteract the Action Alert by giving "correct information" to Council and staff members.[53] TDSL lawyer David Armbrust testified that he was concerned with the potential negative impact the Action Alert might have on TDSL in both Austin and San Antonio, and that the Starcrest contract was delayed because new issues kept being raised by the City of San Antonio after the Action Alert was distributed.[54] Former Waste Management regional vice president Bob Drenth testified that he heard discussions about Action Alert with members of the San Antonio City Council.[55]

Rather than being finalized in February 1997, as originally anticipated, the Starcrest privatization contract between Texas Disposal and the City of San

[51] RR3 147.

[52] RR10 8-10.

[53] RR10 13.

[54] RR10 78, 80.

[55] RR7 17.

Antonio was not consummated until January 1998.[56] Although RFP responses to the City of Austin contract were submitted in January 1997 – just before the Action Alert was distributed – Texas Disposal did not enter into a short-term Austin contract until 1999, and was not successful in obtaining a share of the 30-year contract until May 2000.[57] Bob Gregory attributed "virtually all" of the San Antonio delay to the Action Alert.[58]

Gregory testified as to the costs incurred by TDSL in attempting to counter the effects of the Action Alert. He described how TDSL had paid $450,000 to outside consultants who "worked directly to counteract the effects of the Action Alert in San Antonio and in Austin."[59] He also calculated that TDSL incurred additional carrying costs for equipment of $304,900, lost profits of $491,707 on the San Antonio contract and $229,351 on the Austin contract, and devoted staff time worth $724,277 in combating the Action Alert.[60]

[56] RR3 149.

[57] RR3 149.

[58] RR3 150.

[59] RR3 159.

[60] RR13, PTX 4.

Armbrust – the TDSL lawyer who worked on both the San Antonio and Austin contracts – when asked whether he believed the Action Alert damaged TDSL's reputation, testified:

> In my mind there was no question it damaged TDSL's reputation. I can't measure the damages, but when I saw the list of people it went to, that list of people are very, very influential in this community in terms of environmental awareness, political awareness.[61]

In addition to the calculated damages set forth above, Bob Gregory testified about damage to TDSL's reputation from the Action Alert. "It is not an easy matter to value your reputation. It's priceless," he testified.[62] He testified that he had "no doubt" TDSL'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.[63]

F. The Trial Testimony About the Action Alert.

Multiple witnesses testified that the Action Alert was false, in multiple respects.

1. "Exception to the EPA Subtitle D environmental rules." The Action Alert included the following statement:

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[61] RR10 83.

[62] RR3 155.

[63] RR3 158.

> 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 ….

Every witness to address the issue agreed that TDSL actually *complied* with the EPA's Subtitle D environmental rules.[64]

Martin testified that he relied on information from Waste Management for his understanding of the EPA Subtitle D environmental rules,[65] and that his purpose in characterizing the TDSL landfill as an "exception" was to convey the idea that TDSL had a "loophole" around those rules – even though he knew that TDSL actually complied with Subtitle D.[66] He agreed it would be false for people to understand from the Action Alert that TDSL did not comply with Subtitle D.[67] Martin further conceded that he had previously testified that his intent was to convey that TDSL did not comply with Subtitle D.[68]

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[64] RR5 174 (author Don Martin); RR6 107 (consultant Al Erwin); RR6 154-55 (former division president Larry Cohn); RR7 25 (former regional president Bob Drenth); RR7 170 (former marketing vice president Loren Alexander); RR8 152 (retained landfill expert Dr. Rudolph Bonaparte).

[65] RR5 153.

[66] RR5 171.

[67] RR5 174, 176.

[68] RR5 176, 242-43.

Erwin testified that he was the original source of the term "exception" in the Action Alert, and that he knew TDSL was actually approved under Subtitle D.[69]

Witnesses testified that Subtitle D, which became effective in 1993, had two basic methods for compliance: first, a "performance design," under which a landfill could gain approval by showing that it would meet specified groundwater protection standards, regardless of the type of design; and second, a "composite design," under which a landfill could gain approval by using a specified design employing a synthetic liner, recompacted clay, and a system to collect and remove "leachate" (water that had come in contact with waste).[70] Neither method was an "exception"; compliance with either constituted compliance with EPA rules. TDSL achieved Subtitle D compliance using the first option, a performance design, by proving through testing that a combination of native soils, recompacted clay liners, and a leachate collection system was sufficiently protective of the environment.[71] Waste Management eventually used synthetic liners in portions of its Central Texas landfills built after Subtitle D became effective, some of which

[69] RR6 102-03, 107.

[70] RR3 100-05; RR7 115-18.

[71] RR7 119. Waste Management's allegations that TDSL's performance design relied "solely on clay in the soil" and was "unproven," WM Br. at 1, are incorrect, as is the characterization of TDSL's landfill as "new" in 1997; at that point, it had been operating for six years.

met the second option (composite design) and some of which were approved as performance designs.[72]

Waste Management consultant Al Erwin agreed that Subtitle D approval under a performance design had equal validity with approval under a composite design, and that neither is an "exception" to Subtitle D.[73]

The "exception" statement in the Action Alert was found defamatory as a matter of law by the trial court in 2003 before the first trial, and the ruling was not challenged by Waste Management in the first appeal.[74] The jury in the second trial found the statement false, and that it was made with actual malice.[75]

2. "Other landfills in Central Texas and San Antonio in similar clay formations are using the full synthetic liner in addition to the clay soils." Former Waste Management marketing vice president Loren Alexander – identified by Martin as a source of information for the Action Alert, who also reviewed the

[72] RR7 120-22, 124-25.

[73] RR6 107.

[74] CR at 3970; *TDSL I*, 219 S.W.3d at 577 n.16.

[75] Apdx. tab 2. In the first trial, the jury was not asked about specific statements, but rather whether the Action Alert as a whole was false and made with actual malice; the jury answered "yes" to both.

document – testified that "full synthetic liner" means "a synthetic liner that's covering the entire bottom of the landfill."[76]

The undisputed evidence showed that in January 1997, Waste Management's landfills in Austin, Williamson County, and Comal County did *not* have "full synthetic liners" in the areas that were receiving waste. The Austin Community Landfill had approximately 100 acres eligible to receive waste, of which only 4.9 acres had synthetic liners.[77] The Williamson County Landfill (owned by the County but managed by Waste Management) had *no* synthetic liners.[78] Nor did the Comal County Landfill have a "full synthetic liner" at that time.[79] Only the Covel Gardens landfill had synthetic lining in all its sections.[80] Former Waste Management regional vice president Bob Drenth testified that the Action Alert's "full synthetic liner" allegation was not true.[81]

The "full synthetic liner" statement in the Action Alert was found defamatory as a matter of law by the trial court in 2003 before the first trial, and

[76] RR7 168.

[77] RR7 111, 179.

[78] RR7 110, 178-79.

[79] RR6 156-57; RR7 99-100.

[80] RR7 99.

[81] RR7 23.

the ruling was not challenged by Waste Management in the first appeal.[82] The jury in the second trial found the statement to be false and made with actual malice.[83]

3. "There are no restrictions on the types of waste that may be disposed of at the TDS landfill, with the exception of hazardous waste." TDSL's Bob Gregory testified that this statement was false, because the landfill was restricted from taking various types of waste in addition to the restriction on hazardous waste.[84] Those additional restrictions include Class I nonhazardous industrial waste, automobile batteries, whole tires, contaminated soils, non-solidified liquid waste, and used oil.[85] Former Waste Management engineer Larry Cohn agreed that there were restrictions at TDSL in addition to the prohibition on hazardous waste.[86]

Bob Drenth, the former Waste Management regional vice president, testified that this statement tended to affect the reputation or credibility of a landfill, by creating an impression that the landfill accepted waste that it actually was

[82] CR at 3970; *TDSL I*, 219 S.W.3d at 577 n.16.

[83] Apdx. tab 2.

[84] RR4 132-33.

[85] RR4 133-34.

[86] RR6 167-68.

prohibited from taking, and thus creating a disadvantage for TDSL in competing for long-term municipal contracts.[87]

Action Alert author Don Martin testified that he intended to portray that TDSL took "everything else in the world" other than hazardous waste, although he was familiar with the other restrictions applicable to municipal solid waste landfills and knew that the restrictions on TDSL were the same as on Waste Management's Central Texas landfills.[88]

The jury found the "no restrictions" statement false and defamatory, and that it was made with actual malice.[89]

4. The implication that TDSL does not have a leachate collection system. The Action Alert alleged that TDSL was 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." Former Waste Management official Bob Drenth admitted that the Action Alert implies TDSL had no leachate collection system.[90] Before the first trial, the trial court found this implication to

[87] RR7 20.

[88] RR5 245-46.

[89] Apdx. tab 2.

[90] RR7 24.

be defamatory; Waste Management did not challenge this ruling in the first appeal.[91]

TDSL does, in fact, have a leachate collection system. Drenth testified that the implication in the Action Alert was false.[92] Former Waste Management engineer Larry Cohn testified that it would be false to state that TDSL had no leachate collection system.[93] Hydrogeologist Dr. Robert Kier described how TDSL's system collected leachate from the entire landfill.[94] Engineer Pierce Chandler gave detailed testimony, corroborated with engineering drawings and photos, about how he designed and oversaw the construction of TDSL's leachate collection system.[95]

Although several of Martin's sources testified that they knew in 1997 TDSL had a leachate collection system, Martin testified in his deposition (which was read at trial) that numerous Waste Management representatives told him that TDSL had

[91] CR 3971; *TDSL I*, 219 S.W.3d at 577 n.16.

[92] RR7 25.

[93] RR6 155.

[94] RR7 99.

[95] RR7 198; RR16, PTX 250, 284, 285.

no leachate collection system, including marketing vice president Loren Alexander, engineer Charles Fiedler, and lawyer Brent Ryan.[96]

The jury found the "no leachate collection system" implication to be false, and to have been made with actual malice.[97]

5. The implication that the TDSL facility is environmentally less protective than other area landfills, including Waste Management's Austin Community Landfill. By unfavorably stating that TDSL was "[u]nlike other landfills in the Travis County area" and stating that "[o]ther landfills in Central Texas and San Antonio" had attributes that TDSL allegedly did not have, the Action Alert implied that TDSL was environmentally inferior to other area landfills. Before the first trial, the trial court found that this implication was defamatory; Waste Management did not challenge the finding in the first appeal.[98] Action Alert author Don Martin testified that his intent was to communicate the impression that TDSL was environmentally inferior.[99]

Waste Management consultant Al Erwin testified that he knew that EPA approval under the "performance standard" (which TDSL used to gain Subtitle D

[96] RR5 113-16.

[97] Apdx. tab 2.

[98] CR 3970; *TDSL I*, 219 S.W.3d at 577 n.16.

[99] RR5 189.

approval) had equal validity to approval under a design using a synthetic liner.[100] Hydrogeologist Dr. Robert Kier testified that as of the date of the Action Alert, TDSL was much more environmentally protective than the then-active portions of Waste Management's area landfills, with the possible exception of the San Antonio Covel Gardens landfill.[101] Waste Management's own retained expert, Dr. Rudolph Bonaparte, expressed no opinion on the comparative environmental protectiveness of the TDSL and Waste Management landfills as of the time of the Action Alert; he did no investigation of the geological conditions at the TDSL site and offered no opinion on the status of area Waste Management landfills.[102] Dr. Bonaparte did not take issue with Dr. Kier's characterization of the protective geological conditions at TDSL, and acknowledged that TDSL complied with Subtitle D.[103]

Martin testified that he possessed, at the time he wrote the Action Alert, a document indicating that TDSL used a site selection process sensitive to public and environmental safety and land use compatibility; that he assumed the document was truthful; but that he did not include that information in the Action Alert.[104]

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[100] RR6 107.

[101] RR7 129.

[102] RR8 112-14, 128.

[103] RR8 112, 114, 128, 152.

[104] RR5 155-56.

The jury found the "environmentally inferior" implication to be false, and to have been made with actual malice.[105]

6. Waste Management's motivation and reaction to the Action Alert. Don Martin testified that when he was drafting the Action Alert, he knew that many millions of dollars were at stake with the San Antonio Starcrest contract, and that one of his purposes was to keep Texas Disposal from obtaining that contract.[106] Bob Gregory testified that the Starcrest contract's value to Waste Management would have been in the neighborhood of $77 million.[107]

Waste Management San Antonio lobbyist, lawyer and consultant Bill Kaufman had a bonus plan that paid him if he was able to stop San Antonio waste from going to any landfill outside of Bexar County.[108] The only non-Bexar County landfill being used by San Antonio was TDSL.[109] Kaufman was to be paid this bonus simply for diverting waste from TDSL – even if the waste did not go to a Waste Management landfill instead. That is, Kaufman would get a bonus even if the waste went to a Bexar County landfill owned by a Waste Management

[105] Apdx. tab 2.

[106] RR5 95-96.

[107] RR3 120.

[108] RR14, PTX 97.

[109] RR6 158-59.

competitor.[110] Thus, the only purpose of the incentive bonus agreement (signed by Larry Cohn on behalf of Waste Management) was to deny business to TDSL.[111]

According to former Waste Management regional vice president Bob Drenth, he learned about the Action Alert only after it was distributed, when he was called by engineer Larry Cohn, who was then division president and general manager for Waste Management in San Antonio.[112] (Martin, in interrogatory responses, contended that Drenth had provided "input and review" for the Action Alert.)[113] Drenth testified that Cohn told him "we had really stirred it up and stirred up a hornet's nest and that it wasn't going to be good."[114] Drenth testified that he was not happy with the content of the Action Alert, characterized it as containing "half truths," and agreed that it included false statements and implications.[115] He also testified regarding Larry Cohn's attitude toward Bob Gregory: "hatred is the wrong term, but a competitive nature that went above and

[110] *Id.*

[111] RR6 159; RR7 29.

[112] RR7 16.

[113] RR5 150-52.

[114] RR7 16.

[115] RR7 18, 25.

beyond."[116] Drenth knew of the bonus plan under which Cohn agreed that Bill Kaufman would be paid for diverting waste away from TDSL.[117]

Texas Disposal's Bob Gregory wrote to Drenth shortly after the Action Alert, asking Waste Management to retract and correct the false statements.[118] Gregory testified that he never received any response from Drenth or Waste Management.[119]

Drenth acknowledged receiving Gregory's request for a retraction and correction.[120] Drenth conferred with his superiors and Waste Management's legal counsel in determining whether and how to respond; he was instructed not to reply, retract, apologize, or correct the Action Alert's statements, even though he knew them to be false.[121]

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[116] RR7 13.

[117] RR7 30.

[118] RR3 143; RR14 PTX 145.

[119] RR3 145-46.

[120] RR7 25-26.

[121] RR7 25-26.

SUMMARY OF THE ARGUMENT

Waste Management seeks new rules of law that would greatly restrict the ability of Texas businesses to seek recourse for maliciously false attacks on their environmental integrity, or other aspects of their business practices and ethics. This case has been tried twice to two different juries, which both found that Waste Management made false statements about Texas Disposal's business with constitutional actual malice. These findings were upheld by two Court of Appeals panels, and this Court denied review from the first appeal. No grounds justify the grant of Waste Management's Petition, let alone reversal on any point raised by that Petition.

The damage instruction was proper, the award was supported by evidence, and the appellate review was appropriate. Long-standing Texas law allows for a presumption of damages in cases of defamation *per se*. This Court recently confirmed that principle in *Hancock v. Variyam*. Here, extensive evidence proved damage to Texas Disposal's reputation. The charge properly instructed the jury that it could presume reputational harm, and restricted the jury to award such damages caused by the Action Alert's statements found to be defamatory *per se*, false, and made with actual malice. The Court of Appeals properly applied the standard of review set forth by this Court in *Bentley v. Bunton* in affirming the award of reputation damages.

The evidence of falsity and actual malice was overwhelming. As a public figure, Texas Disposal was required to prove that Waste Management's statements were false and made with actual malice (knowledge of falsity or reckless disregard of the truth). The evidence of falsity is overwhelming; for example, even Waste Management's own witnesses admitted that Texas Disposal is not an "exception" to federal environmental rules, as the Action Alert falsely asserted. Two juries found Waste Management's statements to be false, and found actual malice by clear and convincing evidence; the Court of Appeals upheld these findings. Extensive evidence supports the actual malice finding; for example, Waste Management representatives knew that Texas Disposal complied with federal environmental rules, but knowingly and falsely asserted that it was an "exception" to those rules.

The trial court properly excluded hearsay documents drafted years before the defamatory statements at issue. Waste Management sought to introduce four memoranda written by TNRCC staff engineers three years before the Action Alert. The memoranda were never seen by the Action Alert's authors, or anyone else outside the TNRCC and Texas Disposal. The documents did not set forth the activities of the agency or facts gathered pursuant to law; they contained only the personal opinions of the authors, and thus were not admissible under Tex. R. Evid. 803(8). The memoranda also were irrelevant and their exclusion was

harmless. The trial court gave Waste Management the chance to qualify the memoranda's authors as experts and elicit testimony from them, but Waste Management did not even try – further evidence that the authors were not qualified to opine on the matters in the memoranda.

The jury was properly charged regarding causation, Texas Disposal presented evidence of causation, and there was no issue of alleged "alternative causes" of harm to Texas Disposal's reputation. The jury charge on reputation damages properly included a causation element, even though defamatory *per se* statements are presumed to cause reputational harm. Texas Disposal was not required to negate any alleged alternative causes of harm to its environmental reputation because there was no evidence of any plausible alternative causes. The out-of-pocket damages awarded to Texas Disposal were amply supported; in fact, Texas Disposal's evidence would have justified an even larger out-of-pocket damages figure.

Texas Disposal presented sufficient evidence of statutory malice to support the award of exemplary damages. Texas Disposal proved statutory malice and thus was entitled to punitive damages. Waste Management had the specific intent to injure Texas Disposal, and did so through the wrongful means of knowingly false statements. Waste Management's conduct was not simply vigorous business competition. Waste Management intended to inflict severe

financial injury on Texas Disposal – even if the result was not increased revenue to Waste Management.

Corporations are not restricted to actions for business disparagement. Texas law has long held that corporations can sue for defamation, seeking redress for harm to their business reputation. Waste Management's argument that corporations have no cause of action for defamation, but instead should be restricted to suing for business disparagement, has been explicitly rejected.

ARGUMENT AND AUTHORITIES

I. Waste Management Primarily Raises Issues that Have Been Decided Against It in Two Trials and Two Appeals, and Asks this Court to Make Rulings Contrary to Long-Established Law. [General point in response to Waste Management's Issues]

This case has been tried twice and appealed twice. After the first appeal, Waste Management sought review in this Court on many of the same issues it now raises; this Court denied review. Further, Waste Management seeks rulings that are contrary to long-established law. For example:

- Waste Management argues that the jury was not properly instructed regarding presumed damages, but the instruction given by the trial court was substantively the same as the one found proper by the Court of Appeals in the first appeal, from which this Court denied review. *TDSL I* at 582; CR 6420.

- Waste Management argues that defamation *per se* is always an issue of law and that the jury was improperly asked whether Waste Management's statements were defamatory *per se*; this is contrary to not only both opinions from the Court of Appeals, *TDSL I* at 582, *TDSL II* at * 4-6, but also this Court's recent ruling in *Hancock v. Variyam*, --- S.W.3d ---, 2013 WL 2150468 (Tex., May 17, 2013).

- Waste Management argues that for-profit corporations have no cause of action for libel under Texas law and are instead restricted to business disparagement claims, but Texas (and other jurisdictions) has long recognized that

corporations can sue for libel. The contention that corporations can only bring business disparagement actions under Texas law has explicitly been rejected.

- Waste Management argues that there was insufficient evidence that it acted with constitutional "actual malice" – knowledge of falsity or awareness of probable falsity. Waste Management raised this same issue in the first appeal; the Court of Appeals upheld the jury verdict, *TDSL I* at 574-79, based on virtually the same evidence that was presented in the second trial, and this Court denied review.

The second trial was conducted in strict compliance with the first Court of Appeals opinion (as required by the law of the case doctrine) from which this Court denied review. The relief requested by Waste Management on several of its points is a remand for a *third* jury trial, which likely would not be held until almost 20 years after the 1997 events at issue. Such relief would be inconsistent with law of the case principles, seriously undermining the interests of uniformity, finality, efficiency, and economy that the doctrine is meant to promote. *See, e.g., Briscoe v. Goodmark Corp.*, 102 S.W.3d 714, 716 (Tex. 2003).

II. The Trial Court Correctly Applied Clear, Established Texas Law in Charging the Jury on Presumed Damages, and the Court of Appeals Correctly Applied the Law in Upholding the Damage Award. [Response to Waste Management Issue I[122]]

A. Damages are presumed in defamation *per se* cases, and that presumption is constitutionally proper upon a showing of actual malice.

A showing of defamation *per se* entitles a plaintiff to a presumption of general damages, including damage to reputation. *Hancock v. Variyam*, --- S.W.3d ---, 2013 WL 2150468 at *2 (Tex., May 17, 2013) (citing, *inter alia*, *TDSL I*, 219 S.W.3d at 580). In *Hancock v. Variyam*, the Court discussed the underpinnings and developments in the law of presumed damages, including the U.S. Supreme Court's holding that presumed damages can be awarded consistent with the First Amendment upon a finding of constitutional actual malice – knowledge of falsity, or reckless disregard as to truth or falsity. *Hancock* at *3 (discussing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)).

> [T]he Constitution only allows juries to presume the existence of general damages in defamation *per se* cases where: (1) the speech is not public, or (2) the plaintiff proves actual malice.

Id. at 4. Here, Texas Disposal proved actual malice. See Section III, below. The jury instruction on presumed damages – which only allowed the presumption if the

[122] Responses to "Waste Management Issues" refers to the Roman numeral headings in Waste Management's merits brief, not the issues as numbered in Waste Management's Issues Presented.

jury first found actual malice by clear and convincing evidence, Apdx. tab 2 at 14 – was proper.

B. The award of reputation damages was supported by evidence and the Court of Appeals properly reviewed and affirmed that award.

Waste Management argues that when a defamation action is brought by a public figure over speech on a matter of public concern, a plaintiff "must meet a higher burden" than a private figure in order to be entitled to a presumption of damages. WM Br. at 10-12. Although this suggests that the "higher burden" should be something other than actual malice, Waste Management does not actually argue for a higher burden on *fault*, but rather argues that jury awards of general damages in defamation *per se* cases must be reviewed on appeal for evidentiary support. *Id.* at 12-24. Specifically, Waste Management argues for application of the appellate review standard adopted by the plurality in *Bentley v. Bunton*, 94 S.W.3d 561 (Tex. 2002). WM Br. at 12-13. Properly interpreted, the *Bentley* standard of review is appropriate, and the Court of Appeals correctly found that Texas Disposal's evidence satisfied that standard.

After affirming that presumed damages are available in cases of defamation *per se*, the *Bentley* plurality simply held that the amount of damages awarded must have some support in the evidence. *Bentley*, 94 S.W.3d at 604-05. *See also Hancock v. Variyam*, 2013 WL 2150468 at *4 ("Awards of presumed actual

damages are subject to appellate review for evidentiary support," citing *Bentley* plurality).

The presumption of damages is still operative and meaningful, even in light of *Bentley*-style appellate review. After deciding *Bentley*, this Court reaffirmed 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) (citing and quoting *Adolph Coors Co. v. Rodriguez*, 780 S.W.2d 477, 488 (Tex. App. – Corpus Christi 1989, writ denied)). This Court in *Salinas* also cited the first Court of Appeals decision in this case with approval, for the proposition that "in cases of defamation *per se*, 'the amount of actual general damages remains a question for the jury.'" *Id.* (citing and quoting *TDSL I*, 219 S.W.3d at 584).

Appellate review of general damage awards in defamation *per se* cases thus must give effect to the jury's discretion while also guarding against large, unsupported damage awards that are actually due to "disguised disapproval of the defendant." *Bentley*, 94 S.W.3d at 605. *Bentley* strikes this balance by requiring that the record contain "*some evidence* to justify the amount awarded." *Id.* at 606 (emphasis added) (quoting *Saenz v. Fidelity & Guaranty Insurance Underwriters*, 925 S.W.2d 607, 614 (Tex. 1996)). Thus, under *Bentley*, as long as there is evidence to support the jury's assessment of damages, that assessment will be upheld on appeal.

Here, the Court of Appeals properly interpreted and applied *Bentley*-style review and correctly held that the award of general reputation damages was supported by evidence. *TDSL II* at *12-14. The Court of Appeals detailed the evidence supporting the award, including Texas Disposal CEO and principal owner Bob Gregory's estimate that his company suffered $10 million in reputation damages due to the decreased value of its business, which was supported by his explanation of the "priceless" nature of having a good environmental reputation in Austin and specific examples of negative impacts from having a bad environmental reputation. Gregory also testified that some members of the Austin environmental community "turned a cold shoulder" to Texas Disposal, seeing the landfill as no different than other area landfills (after previously viewing Texas Disposal as exceptionally environmentally conscious). Other evidence included the value of contracts put at risk by Waste Management's maliciously false "Action Alert," the substantial sums devoted by Texas Disposal to countering Waste Management's false statements, testimony of Austin environmentalists regarding the importance of environmental reputation and the effect of the Action Alert, and Waste Management's stated purpose of the Action Alert – to impugn Texas Disposal's environmental integrity with the hopes of obtaining the multi-million-dollar Austin and San Antonio contracts for itself. *TDSL II* at *13.

Waste Management attacks the Court of Appeals' analysis as "wholly inadequate," WM Br. at 23, yet fails to provide anything more than *pro forma* rebuttal. Texas Disposal presented evidence regarding its pre-Action Alert reputation, the particular importance of having a good environmental reputation in Austin, the negative reaction of environmental leaders to TDSL due to Waste Management's false Action Alert, and the impact of the Action Alert on the value of its business, all of which were cited by the Court of Appeals, but none of which are addressed by Waste Management's brief.

Waste Management only addresses two pieces of evidence. WM Br. at 24. First, it discusses the testimony regarding actions TDSL was required to take to counteract or remedy damages to its reputation caused by the Action Alert, claiming that considering this to be evidence of reputation damage is "double recovery" because the jury awarded special economic damages for remedial expenses. Waste Management misunderstands the relevance of this testimony to general reputation damages. Texas Disposal's out-of-pocket remedial expense is not a *measure* of reputational harm, but rather is *evidence* of the existence of substantial reputational harm – substantial enough that it warranted the investment of a six-figure sum in an attempt to remediate some of the damage. Waste Management also claims that evidence regarding the Action Alert putting TDSL's San Antonio and Austin contracts at risk is "hypothetical," but again the Court of

Appeals did not consider such evidence to be a measure of damages. The fact that those contracts were put at risk – delayed by many months – is evidence that the Action Alert did cause real and extensive damage to Texas Disposal's reputation.

C. Damage to the reputation of a business is not "psychic harm" and is properly redressed by a presumption of general damages in defamation *per se* cases.

Damage to reputation is presumed in defamation *per se* cases in part because reputation damage is uniquely difficult, if not impossible, to quantify. This is consistent with "the experience and judgment of history 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, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760 (1985) (quoting Prosser, Law of Torts § 112 at 765 (4th ed. 1971)).

Damages that are difficult to quantify nevertheless still may exist. For example, Texas law recognizes that business goodwill is an actual, existing asset, "defined as a business's reputation, patronage, and other intangible assets," *Marsh USA v. Cook*, 354 S.W.3d 764, 777 (Tex. 2011). But the law also acknowledges that goodwill is "not easily assigned a dollar value," *Graham v. Mary Kay, Inc.*, 25 S.W.3d 749, 753 (Tex. App. – Houston [14th Dist.] 2000, pet. denied). In fact, loss of goodwill is often considered as functionally immeasurable and irreparable

for purposes of injunctive relief. *See, e.g., Intercontinental Terminals Co. v. Vopak North America, Inc.*, 354 S.W.3d 887, 895-96 (Tex. App. – Houston [1st Dist.] 2011, no pet.) (citing and discussing cases). While reputation and goodwill are not synonymous, they are both examples of intangible interests that are difficult to measure but indisputably exist.

Waste Management's repeated attempts to cast damage to Texas Disposal's business reputation as some sort of "psychic harm" unworthy of protection, *see, e.g.*, WM Br. at 14-18, is unavailing. This characterization is based on inapt comparisons with mental anguish damages such as depression, anxiety, distress and sleeplessness. *See, e.g., id.* at 17. In fact, no Texas case characterizes reputation harm as "psychic."[123] Rather, "psychic injury" generally refers to mental or psychological harm such as emotional distress, not damage to relational interests like reputation. *See, e.g.*, *Twyman v. Twyman*, 855 S.W.2d 619, 622 (Tex. 1993); Peter A. Bell, "The Bell Tolls: Toward Full Tort Recovery for Psychic Injury," 26 U. Fla. L. Rev. 333, 334 n.1 (1984).

Reputation damages are a different type of general damage than mental anguish damages. Only natural people experience mental anguish, *see, e.g.*,

[123] Waste Management apparently adopted its argument that presumed damages are designed to remediate "psychic harm" from a 1975 student-written note that explicitly acknowledges the theory "does not comport" with "the historical development of the common law rules of defamation." Fred T. Magaziner, Note, "Corporate Defamation and Product Disparagement: Narrowing the Analogy to Personal Defamation," 75 COLUM. L. REV. 963, 979 n.97 (1975). The note's characterization certainly "does not comport" with established Texas law.

Huddleston v. Pace, 790 S.W.2d 47, 52 (Tex. App. – San Antonio 1990, writ denied). But Texas law has long held that a business has a protectable interest in its reputation. *Newspapers, Inc. v. Matthews*, 339 S.W.2d 890, 893 (Tex. 1960) ("a corporation or a partnership may be libeled"; "libelous writings … may tend to injure the reputation of [a business] owner" and recover of reputational damages "will be for defamation of the owner, whether the owner be an individual, partnership or a corporation"); *General Motors Acceptance Corp. v. Howard*, 487 S.W.2d 708, 712 (Tex. 1972) ("Petitioners also contend that the corporation … cannot have a cause of action for libel under this Court's holding in *Newspapers, Inc. v. Matthews* …. It did not hold that a corporation cannot be libeled. On the contrary, the opinion (at p. 893) specifically recognized that a corporation, as distinguished from a business, may be libeled.").

> *A corporation for profit has a business reputation* and may therefore be defamed in this respect. Thus a corporation may maintain an action for defamatory words that discredit it and tend to cause loss to it in the conduct of its business, *without proof of special harm resulting to it*.

RESTATEMENT (SECOND) OF TORTS § 561 cmt. b (emphases added). "[T]he notion that corporations should be denied presumed damages derives from a mistaken belief that the presumed damages rule is designed solely to compensate for noneconomic injuries." Norman Redlich, "The Publicly Held Corporation as Defamation Plaintiff," 39 St. Louis U. L.J. 1167, 1174 (1995).

Waste Management uses a quote from *Prosser & Keeton on Torts* to imply that the treatise would deny to corporations the availability of reputation damages. WM Br. at 17-18. But Waste Management omits the directly following sentence, which affirms the right of corporations to sue for defamation:

> But [a corporation] has prestige and standing in the business in which it is engaged, and language which casts an aspersion upon its honesty, credit, efficiency or other business character may be actionable.

Keeton et al., Prosser & Keeton on Torts § 111 at 779 (5th ed. 1984).

These authorities are consistent with the long line of cases holding that presumed reputation damages are available to corporate plaintiffs in cases of defamation *per se*. *See, e.g.*, *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119 (7th Cir. 1987) (upholding award of $1 million in *per se* reputation damages to corporate plaintiff), *cert. denied*, 485 U.S. 993 (1988); *Blaine Larsen Processing, Inc. v. Hapco Farms, Inc.*, 2000 WL 35539979 (D. Idaho 2000) (not reported in F.Supp.2d) (upholding award of $5 million in *per se* reputation damages to corporate plaintiff); *Ruder & Finn, Inc. v. Seaboard Surety Co.*, 422 N.E.2d 518, 522 (N.Y. App. 1981) ("Where a statement impugns the basic integrity or creditworthiness of a business, an action for defamation lies and injury is conclusively presumed."); *Bay Tobacco, LLC v. Bell Quality Tobacco Products, LLC*, 261 F.Supp.2d 483, 501 (E.D. Va. 2003) ("A corporation may be defamed *per se* …. Virginia law presumes that the plaintiff suffered actual damage to its

reputation and, therefore, the complainant does not have to present proof of such damages."); *Heritage Optical Center, Inc. v. Levine*, 359 N.W.2d 210, 213 (Mich. App. 1984) (recognizing that while a corporation does not have a "personal" reputation it does have a business reputation and can be libeled *per se*); *Diplomat Elec., Inc. v. Westinghouse Elec. Supply Co.*, 378 F.2d 377, 384 (5th Cir. 1967) (statement was defamatory *per se* of plaintiff corporation and "no special damage was required to be shown"). Notably, the U.S. Supreme Court upheld the award of presumed damages to a corporate plaintiff in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

D. Presumed damages are not limited to nominal damages under Texas law.

Waste Management incorrectly asserts that "this Court has recently indicated that Texas permits the presumption of only nominal damages." WM Br. at 19. This Court's statement in *Salinas v. Salinas* that "the law does not presume *any particular amount* of damages beyond nominal damages," *Salinas v. Salinas*, 365 S.W.3d 318, 320 (Tex. 2012) (emphasis added), simply means that (1) the jury retains discretion to determine an appropriate amount of presumed damages (subject to appropriate review), and (2) at a *minimum*, the law presumes nominal damages.

Waste Management argues that in cases of defamation *per se*, any damages beyond nominal damages are subject to the standards of proof applicable in typical

tort cases. WM Br. at 19-23. Such a rule would eviscerate the long-established Texas standards regarding presumed damages, and is directly contrary to this Court's recent pronouncements. Just last year, in *Salinas*, this Court reaffirmed that "under presumption of damages applicable to libel *per se*, damages 'are within the jury's discretion …'" *Salinas v. Salinas*, 365 S.W.3d at 321 (citation omitted). Waste Management's argument would divest the jury of its discretion.

Under *Salinas*, *Bentley*, and *Hancock*, the jury retains discretion to set an amount of presumed general reputation damages in defamation *per se* cases, subject to appellate review to ensure that the damage award is supported by some evidence.

III. Texas Disposal Proved that the Action Alert's Statements were False and Defamatory *Per Se*, and Presented Clear and Convincing Evidence that Waste Management Acted with Actual Malice. [Response to Waste Management Issues II and III]

A. The jury was properly asked to determine defamation *per se.*

Waste Management contends that a determination of defamation *per se* is always a question of law for the court, never a fact issue for the jury. WM Br. at 26-28. This argument is conclusively foreclosed by this Court's recent opinion in *Hancock v. Variyam*, which confirmed that defamation *per se* can be a jury issue. *Hancock v. Variyam*, --- S.W.3d ---, 2013 WL 2150468 *5 (Tex., May 17, 2013). *Accord West Texas Utilities Co. v. Wills*, 164 S.W.2d 405, 412 (Tex. Civ. App. – Austin 1942, no writ). Waste Management has argued at every level of this case

that defamation *per se* is never a jury issue, but has not cited a single Texas case so holding, or provided any compelling rationale for such a new rule.

B. The findings of falsity and actual malice are amply supported by evidence related to each specific statement submitted to the jury.

The issues of falsity and actual malice are closely intertwined, as is the evidence regarding these elements. Texas Disposal will address these issues in the context of each statement.

1. "Exception to the EPA Subtitle D environmental rules." The Action Alert included the following statement:

> 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 ….

Falsity. Every witness to address the issue agreed that TDSL actually *complied* with the EPA's Subtitle D environmental rules. This included Action Alert author Don Martin;[124] Waste Management consultant Al Erwin, who provided information for the Action Alert;[125] former Waste Management engineer and division president Larry Cohn, who provided information to Martin and (according to Martin) reviewed the Action Alert;[126] former Waste Management

[124] RR5 174.

[125] RR6 107.

[126] RR6 154-55.

regional vice president Bob Drenth, who according to Martin was a source of information for the Action Alert;[127] former Waste Management marketing vice president Loren Alexander, who Martin said was a source of information and reviewed the Action Alert;[128] and Waste Management's own retained landfill expert, Dr. Rudolph Bonaparte.[129] Plainly, the TDSL facility was not an "exception to the EPA Subtitle D environmental rules."

The EPA Subtitle D rules, which became effective in 1993, have two basic methods for compliance: (1) a "performance design," under which a landfill could gain approval by showing that it would meet specified groundwater protection standards, regardless of the type of design; and (2) a "composite design," under which a landfill could gain approval by using a specified design employing a synthetic liner, recompacted clay, and a system to collect and remove "leachate" (water that had come in contact with waste).[130] Compliance with either method was compliance with the EPA rules. Neither method was an "exception." TDSL achieved Subtitle D compliance using the first option, a performance design, by proving that a combination of TDSL's site-specific native soils, recompacted clay

[127] RR7 25.

[128] RR7 170.

[129] RR8 152.

[130] RR3 100-05; RR7 115-18; RR13 PX 30.

liners, and a leachate collection system was sufficiently protective of the environment.[131]

The Action Alert falsely stated that the EPA rules "require" both a "continuous synthetic liner" and "a leachate collection system utilizing a leachate blanket." The performance design, under which Texas Disposal received approval, required neither. The Action Alert further falsely stated that the TDSL facility was an "exception" to the EPA rules, a plain allegation of noncompliance.

Waste Management attempts to defend the "exception" statement by imposing an irrational and unreasonable reading on the Action Alert – a reading it argued to the jury and that the jury obviously rejected. It maintains that "exception" really means "alternative," and that the Action Alert was meant only to convey that Texas Disposal used a different and less common method – the performance design – of complying with Subtitle D. WM Br. at 30. But that is not at all what the Action Alert said, and not at all what primary author Don Martin intended. Martin testified that he wanted to convey that TDSL had a "loophole" around those environmental rules.[132] Waste Management could have stated in a truthful way that Texas Disposal's design differs from that of some other landfills; a true discussion would be a legitimate way to debate the merits of differing

[131] RR7 119.

[132] RR5 at 171.

landfill designs. But Waste Management instead chose to characterize TDSL falsely, as the jury properly found.

Actual malice. In evaluating Waste Management's actual malice, the Court first disregards denials of malice that the jury must have disbelieved, because the jury is the sole determinant of witness credibility. *Bentley v. Bunton*, 94 S.W.3d 561, 599 (Tex. 2002). Because the jury found actual malice, it disbelieved the denials of malice from Waste Management employees and consultants, such as Don Martin and Al Erwin, and those denials must be disregarded.

Martin provided positive evidence of actual malice. Martin's various sworn testimony – interrogatory answers, deposition, and trial testimony – frequently varied in material ways. While these variances by themselves do not prove actual malice, they do provide circumstantial evidence: "the jury could infer that Martin was willing to alter his testimony to protect himself and/or his long-time associates at Waste Management." *TDSL I* at 579 n.17. At the second trial, Martin continued to contradict not only his sworn interrogatory answers and deposition, but even contradicted his testimony from the first trial.

Martin relied on information from Waste Management for his understanding of the EPA Subtitle D environmental rules.[133] Even though he knew that TDSL actually complied with the rules, he intentionally sought to characterize Texas

[133] RR5 153.

Disposal as having a "loophole" around the those rules.[134] He knew it would be false to state that TDSL was not in compliance with Subtitle D.[135] Martin admitted that he previously testified his intent was to convey that TDSL did not comply with Subtitle D (although he again changed his testimony at the second trial and denied that this was his intent).[136]

Martin's colleague, longtime Waste Management consultant Al Erwin, also knew that the "exception" statement was false; he admitted that he was the original source of the term "exception" in the Action Alert, and that he knew TDSL was actually approved under Subtitle D.[137] Erwin knew that approval under a performance design had equal validity with approval under a composite design, and that neither is an "exception."[138]

Martin swore in interrogatory answers that the Action Alert was reviewed and approved by several Waste Management employees, including Larry Cohn, Loren Alexander, and Bob Drenth.[139] All three of those Waste Management

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[134] *Id.* 171.

[135] *Id.* 174, 176.

[136] RR5 176, 242-43.

[137] RR6 102-03, 107.

[138] *Id.* 107.

[139] RR5 150-51.

officials knew that Texas Disposal was not an "exception" to Subtitle D, providing additional evidence of knowing falsity.[140]

Contrary to Waste Management's strained argument, whether Texas Disposal was an "exception" to Subtitle D or instead actually complied with the law is not "full of ambiguities [that] require[] considerable expert explanation." WM Br. at 28. The "exception" allegation is not an opinion, not mere hyperbole, and not ambiguous; it is a factual assertion that is plainly false. Witness after witness from Waste Management – including those that drafted and approved the "exception" statement – admitted that Texas Disposal complied with the EPA Subtitle D environmental rules, and that those rules do not require a synthetic liner or "blanket" leachate collection system. The evidence of actual malice is not only clear and convincing, it is overwhelming.

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

Falsity. This statement was plainly intended to convey the false message that there was only one restriction on the waste Texas Disposal could accept, and that it could thus take various other types of waste that would create environmental danger. Don Martin consciously chose to write this statement as portraying that

[140] RR6 154-55; RR7 25; RR7 170.

TDSL took "everything else in the world" other than hazardous waste.[141]

But in addition to being restricted from taking hazardous waste as defined under environmental laws, Texas Disposal also was restricted from accepting many other types of waste: Class I nonhazardous industrial waste, automobile batteries, whole tires, contaminated soils, non-solidified liquid waste (including bulk liquids as innocuous as milk), and used oil.[142]

Waste Management defends this statement simply by alleging that it is "exactly the same as the sign posted at the entrance to the TDSL facility."[143] Plainly, this is wrong. The sign does not say "there are no restrictions on the type of waste that may be disposed of at the TDS landfill, with the exception of hazardous waste," or anything like it. The sign actually says:[144]

> NO HAZARDOUS WASTE ACCEPTED
>
> Non-Hazardous special waste drums sludges and liquids
> will also be refused or returned at haulers expense
> unless previously approved by management in writing

The sign indicates – unlike the Action Alert – that there are restrictions in addition to that on hazardous waste, and that TDSL does not take "everything else in the

[141] RR5 245-46.

[142] RR4 133-34.

[143] WM Br. at 32.

[144] RR20, DX 80.

world" other than hazardous waste.

Actual malice. Don Martin admitted that he knew municipal solid waste landfills had restrictions in addition to those prohibiting hazardous waste, and that he knew the restrictions were the same for Texas Disposal as for the area's Waste Management landfills.[145] He still chose to write and distribute the false "no restrictions" statement. Martin said he submitted the Action Alert for review and approval to Bob Drenth, who testified that the "no restrictions" statement was false.[146] The restrictions applicable to Texas Disposal were not ambiguous and the statement was not hyperbole. It was a false assertion that both Martin and Drenth knew was false, but approved for distribution anyway. That is actual malice.

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

Falsity. The undisputed evidence conclusively proved that this allegation was false. "Full synthetic liner" means "a synthetic liner that's covering the entire bottom of the landfill," in the words of Waste Management's regional marketing vice president Loren Alexander.[147] But as of the date of the Action Alert, Waste

[145] RR5 245-46.

[146] RR7 19-20.

[147] RR7 168.

Management's landfills in Austin, Williamson County, and Comal County did *not* have "full synthetic liners" in the areas that were receiving waste.[148]

Waste Management characterizes this statement as one that other landfills "are using synthetic liners." WM Br. at 32. Waste Management does not use the actual phrase from the Action Alert – "full synthetic liner" – and the omission of the word "full" is material. Nor does the Action Alert confine its allegations regarding the alleged use of "full synthetic liners" to "post-Subtitle D cells" that might be built in the future, as Waste Management suggests. WM Br. at 32. These are not "items of secondary importance"; they are directly relevant to the false and defamatory nature of the statement.

The Action Alert was carefully crafted to give the false message that the Texas Disposal landfill was environmentally unsafe because it did not comply with federal law requiring synthetic liners, whereas other area landfills (including Waste Management's) "are using" (present tense) "the ***full*** synthetic liner" (emphasis added). Waste Management chose to include materially false statements with the goal of impugning Texas Disposal's environmental integrity to convince cities not to enter contracts with Texas Disposal.

Actual malice. Don Martin testified that the Action Alert was reviewed and approved by former Waste Management regional vice president Bob Drenth;

[148] RR7 99-100, 110-11.

Drenth testified that the "full synthetic liner" allegation was not true.[149] The Action Alert was reviewed and approved by a Waste Management official who knew its "full synthetic liner" allegation was false, which constitutes actual malice. Martin further testified that he assumed Waste Management was aware of its landfills' liner status when he submitted the Action Alert to various company officials for their review and approval.[150] Al Erwin also knew that Waste Management's Austin and Williamson County landfills did not have "full synthetic liners" at the time of the Action Alert.[151]

There is no evidence supporting the notion that the false "full synthetic liner" statement was a misinterpretation of an ambiguous statement or mere hyperbole. The liner status of other area landfills was a verifiable *fact* and was intentionally misstated by Waste Management in an effort to intentionally defame Texas Disposal.

4. The implication that TDSL does not have a leachate collection system. This Court has explicitly recognized that a defamation action can rest on implication or impression. "[A] plaintiff can bring a claim for defamation when discrete facts, literally or substantially true, are published in such a way that they

[149] RR7 23.

[150] RR5 243.

[151] RR6 108, 143.

create a substantially false and defamatory impression." *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 115 (Tex. 2000). Here, Waste Management created a false impression not through use of literally or substantially true statements, but through use of misrepresentation of both federal law and the facts regarding Texas Disposal's landfill.

Falsity. Leachate is water that has come in contact with solid waste.[152] A leachate collection system is a structured method for removing accumulated leachate from a landfill, to prevent the leachate from migrating into (and possibly contaminating) the groundwater.[153] The Action Alert created the false implication that the TDSL facility has no leachate collection system, by falsely stating that the landfill was an "exception" to EPA rules that allegedly "require … a leachate collection system utilizing a leachate blanket to collect water that comes in contact with garbage."

The Texas Disposal landfill has a leachate collection system. Its designer, engineer Pierce Chandler, testified at length regarding its design and construction, and displayed engineering drawings and photos to support his testimony.[154] Hydrogeologist Dr. Robert Kier described how the landfill's leachate collection

[152] RR7 91.

[153] *Id.* 97-98.

[154] RR7 198; RR16, PTX 250, 284, 285.

system collected leachate from the entire landfill.[155] Officials involved in reviewing and approving the Action Alert for Waste Management acknowledged that Texas Disposal has a leachate collection system, including former regional vice president Bob Drenth[156] and division president Larry Cohn.[157]

Waste Management argues that this statement is true because "TDS does not have a continuous leachate blanket system." WM Br. at 33. The words of the Action Alert, however, are not the same as those in Waste Management's brief. Rather, the Action Alert falsely claimed that Texas Disposal is an exception to federal rules that require a blanket leachate collection system (when in fact the rules do not require any particular type of leachate collection system). The Action Alert fails to disclose that TDSL actually *does* have a Subtitle D-compliant leachate collection system. An allegation that Texas Disposal lacks *any* leachate collection system is significantly more damaging than a statement that Texas Disposal has a *unique* leachate collection system.

Actual malice. Larry Cohn and Bob Drenth reviewed and approved the Action Alert, per Don Martin's sworn testimony. Both of those Waste Management representatives testified they knew that Texas Disposal had a leachate

[155] RR7 99.

[156] RR7 25.

[157] RR6 155.

collection system and that it would be false to state or imply otherwise. Thus, there is clear and convincing evidence that Waste Management's representatives approved the distribution of a statement they knew to be false – the definition of actual malice. In addition, in one version of his sworn testimony, Don Martin admitted that numerous Waste Management representatives told him that TDSL had no leachate collection system, including marketing vice president Loren Alexander, engineer Charles Fiedler, and lawyer Brent Ryan.[158]

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

Falsity. The Action Alert set up a comparison between Texas Disposal and other area landfills, by unfavorably stating that TDSL was "[u]nlike other landfills in the Travis County area," stating that "[o]ther landfills in Central Texas and San Antonio" had attributes that TDSL allegedly did not have, and alleging that Texas Disposal had an "exception" to EPA environmental rules. Don Martin testified that his intent was to communicate the impression that TDSL was environmentally inferior to other area landfills.[159] As shown above, Waste Management's specific

[158] RR5 113-16.

[159] RR5 189.

allegations regarding TDSL were false, as was the ultimate implication of environmental inferiority.

Hydrogeologist Dr. Robert Kier testified that as of the date of the Action Alert, TDSL was much more environmentally protective than the then-active portions of Waste Management's area landfills, with the possible exception of the San Antonio Covel Gardens landfill.[160] Waste Management's own retained expert, Dr. Rudolph Bonaparte, expressed no opinion on the comparative environmental protectiveness of the TDSL and Waste Management landfills as of the time of the Action Alert; he did no investigation of the geological conditions at the TDSL site and offered no opinion on the status of area Waste Management landfills.[161] Dr. Bonaparte did not take issue with Dr. Kier's characterization of the protective geological conditions at the TDSL site, and acknowledged that TDSL complied with Subtitle D.[162] Thus, Texas Disposal offered evidence to show that the implication of inferiority was false, and that evidence was not rebutted by Waste Management's landfill expert.[163]

[160] RR7 129.

[161] RR8 112-14, 128.

[162] RR8 112, 114, 128, 152.

[163] *See also* RR15, PX 217 (Texas Department of Health findings regarding the environmentally protective nature of the TDSL facility).

Waste Management does not argue the truth of this implication. Instead, it maintains that the implication does not exist, and that if it does exist, it is opinion and thus not actionable as defamation. WM Br. at 34-35. But Don Martin testified that his specific intent in drafting and distributing the Action Alert was to communicate the impression that the Texas Disposal landfill was environmentally inferior to other area landfills.[164] This is borne out by the evidence; the Action Alert's purpose, particularly the paragraph addressing liners and leachate collection systems, was to compare TDSL – unfavorably and inaccurately – with the area's other landfills.[165]

This false statement of comparative environmental protection is not a nonactionable opinion. Statements that are inherently nonverifiable because they do not include or imply assertions of fact cannot be the basis of defamation suits. But that general proposition is not applicable here, because the Action Alert's implication of environmental inferiority is based on multiple false statements of fact (the other statements at issue in this case) and is itself verifiable. *See*, *e.g.*, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-19 (1990) (when a speaker discloses the facts on which the alleged opinion is based, "if those facts are either

[164] RR5 189.

[165] *See also* RR9 121-22 (former Travis County Judge Bill Aleshire acknowledging that the Action Alert set up a comparison between TDSL and other area landfills and reflected negatively on the environmental properties of the TDSL site).

incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact" and thus be actionable as defamation); *Bentley v. Bunton*, 94 S.W.3d 561, 581 (Tex. 2002) (in determining whether a statement or implication is nonactionable opinion, court is to consider "the entire context in which it is made" to determine if it reasonably can be interpreted as stating verifiable facts). None of the cases cited by Waste Management involved alleged opinions that were based on false disclosed facts. Indeed, Waste Management's "opinion" argument is based upon the erroneous premise that "all of the statements in the Action Alert fall well within the parameters of Texas precedent on substantial truth," WM Br. at 35, which is not accurate. Further, Waste Management consultant Al Erwin conceded that Subtitle D's "performance" standard (under which Texas Disposal received approval) and its "design" standard (the method used by Waste Management) were of equal validity.[166]

Actual malice. The falsity of the allegations purportedly supporting the implication of environmental inferiority, coupled with Waste Management's knowledge that Texas Disposal complied with Subtitle D in a manner that was at least equally environmentally sound as the method Waste Management planned to use, is sufficient to uphold the jury's finding of actual malice. *See TDSL I* at 578-79. Two juries have heard essentially the same evidence, both found actual malice

[166] RR6 107.

by clear and convincing evidence, and two Court of Appeals panels have upheld those findings after independent appellate review.

C. Substantial additional evidence also supports the jury's finding of actual malice by clear and convincing evidence.

Ill will toward Texas Disposal. While actual malice is not synonymous with ill will, and while ill will alone cannot support a finding of actual malice under the clear and convincing evidence standard, ill will toward the plaintiff is some evidence that is probative of actual malice. *Bentley v. Bunton*, 94 S.W.3d at 602. Former Waste Management regional vice president Bob Drenth testified that former division president Larry Cohn – a primary source of information for the Action Alert – had a particularly strong attitude toward Texas Disposal and its chief executive, Bob Gregory: "hatred is the wrong term," Drenth testified, "but a competitive nature that went above and beyond."[167]

In addition, Waste Management gave one of its lobbyists a very unusual incentive plan. Under the plan, the lobbyist could earn bonuses if the City of San Antonio diverted waste away from Texas Disposal to another landfill – even if the landfill was owned by another Waste Management competitor (and thus did not benefit Waste Management).[168] Larry Cohn testified that the only purpose of this

[167] RR7 13.

[168] RR6 158-59; RR14, PX 97.

arrangement was to deny business to Texas Disposal.[169]

Intentional omission of favorable facts and refusal to contact Texas Disposal. Martin admitted that he was aware of facts that contradicted the Action Alert's portrayal of Texas Disposal's facility as environmentally inferior but chose not to include those facts. For example, his notes mentioned "low permeability clay," which in his deposition he characterized as a "counterargument" in favor of Texas Disposal, because its facility is located in a protective location where clay prevents migration of contaminants into surrounding groundwater.[170] However, the Action Alert contained no mention of the low permeability clays at the TDSL site.

Martin also possessed a document, which he assumed was truthful, indicating that Texas Disposal "used a site selection process sensitive to public and environmental safety, land use compatibility and so on";[171] that information was not included in the Action Alert. Further, he knew that a reporter had tried, but failed, to find negative information about Texas Disposal,[172] but he proceeded to draft and distribute without even contacting Texas Disposal first for comment.

[169] RR6 159.

[170] RR5 105-11. As with much of his deposition testimony, Martin directly contradicted this at trial.

[171] *Id.* 155-56.

[172] *Id.* 159.

Selective omission of facts to create a false picture or impression, and failure to investigate claims, can be some evidence of actual malice. *Huckabee v. Time Warner Entertainment Co.*, 19 S.W.3d 413, 425-26 (Tex. 2000).

IV. The Trial Court Did Not Abuse its Discretion by Excluding Hearsay Documents Drafted by TNRCC Employees Years Before the Action Alert. [Response to Waste Management Issues II.C, III.D, and IV.A&C]

Waste Management's extensive complaints about the trial court's exclusion of what Waste Management calls "the TNRCC evidence" are without merit when considered in light of all the facts.

At issue are four internal memoranda written by TNRCC engineers in 1994, three years before the Action Alert.[173] They do not set forth facts gathered by the agency; rather, they are opinions of the individual authors related to aspects of an earlier proposed TDSL design, before the final design that received Subtitle D approval from the agency. The memos did not set forth the opinions of the TNRCC – just those of their authors, as they admitted.[174] These memos were never seen by any person connected with the drafting and distribution of the Action Alert; Waste Management's trial counsel specifically acknowledged this.[175] In

[173] RR17, DX 13, 14,18 and 22; RR7 43.

[174] RR7 53-54.

[175] RR7 56.

fact, there was no evidence that the four memos were seen by *anyone* outside the TNRCC (other than TDSL).

Waste Management sought to admit the memos into evidence because the authors had opinions critical of Texas Disposal's preliminary, non-final design. The trial court properly held them to be hearsay. The memos do not fall within the scope of Rule 803(8), Texas Rules of Evidence. They are not reports or statements of the TNRCC and do not set forth the activities of the agency, or facts gathered under agency authority. They are simply the opinions of individual TNRCC employees who were not authorized to speak for the agency. Waste Management apparently contends that any document containing opinions is admissible evidence – without regard to the soundness of the opinions or the qualifications of the author – if the author worked for the government. WM Br. at 35-36. No support is offered for this startling proposition.

The trial court did not exclude evidence of what Waste Management consultants Al Erwin and Don Martin actually heard from TNRCC employees. Indeed, both Erwin and former TNRCC engineer Ron Bond testified to the jury about their conversations.[176] To the extent that the memos repeated what Erwin and Martin said in their testimony, the memos were cumulative and their exclusion could not have caused the rendition of an improper judgment. Tex. R. App. P.

[176] RR6 at 120-25, 130-32; RR9 at 9-11.

44.1. To the extent that the memos addressed different topics, they were irrelevant in addition to being hearsay.

The attempt to introduce the memos was a classic case of Waste Management trying to get something in through the back door that could not come in through the front. Waste Management characterizes the authors of the memos as "agency experts," WM Br. at 43, but that characterization is not accurate. The trial court properly held that if Waste Management wanted the jury to hear the opinions of the TNRCC engineers, it had to prove that they were, indeed, experts:

> [W]hat I think is appropriate for the jury to hear is qualified experts testifying live as to – and what they may testify live to if they're competent experts may be some of the same concerns expressed in here [in the excluded memos], but that's how the evidence would come in if it comes in ….[177]

Waste Management did not even try to qualify two of the three authors as experts – understandably so, as one author in his deposition could not even explain how he reached the conclusions in his memo that Waste Management sought to admit.[178] The trial court allowed the third author (Ron Bond) to testify at trial, so there was no harm in excluding his writings.

The trial court was well within its discretion in excluding the four memoranda. There is no reversible error, or indeed error of any type.

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[177] RR7 59.

[178] RR7 64-65.

V. Sufficient Evidence Supported Causation. [Response to Waste Management Issue IV.A-B, D]

A. There was no evidence of any "alternate causes" of damage to Texas Disposal's reputation.

Waste Management argues that Texas Disposal had the burden to prove that there was no possible cause of damage to its environmental reputation other than the Action Alert. WM Br. at 34-37. It relies on a 43-year-old case establishing standards for medical expert testimony that has never been cited (let alone applied) in a defamation case, and that requires proof of probable alternate causes. Waste Management is wrong, for numerous reasons.

The case relied upon by Waste Management, *Lenger v. Physician's Gen. Hosp., Inc.*, 455 S.W.2d 703 (Tex. 1970), simply and narrowly holds that when a medical expert cannot say with reasonable probability whether the plaintiff's medical condition was caused by the defendant's negligence or another cause the expert admits was possible, the expert's opinion is insufficient to establish causation. This rule applies only "[w]here the proof discloses that a given result may have occurred by reason of more than one proximate cause." *Id.* at 706.

Here, there is no evidence of alternate causes. Waste Management refers to "pre-existing criticisms by the engineering staff" of the TNRCC, WM Br. at 47. This allegation does not stand up to even the slightest scrutiny. The record contains no evidence that *anyone* outside the TNRCC, TDSL, or Waste

Management *ever* was aware of the inaccurate TNRCC staff criticisms of earlier proposed TDSL designs made in internal memoranda in 1994 (which are discussed in more detail above), three years before the Action Alert.

Waste Management alleges that requiring evidence that a purported event was a possible alternate cause is to "reverse the burden" of proof on causation, WM Br. at 46, but that is absolutely wrong. Even if a *Lenger*-type analysis applied – which it does not – a plaintiff is never required to disprove all conceivable causes of damage, but rather only those that have been shown to be *plausible* and that could be negated. *See, e.g., Transcontinental Ins. Co. v. Crump,* 330 S.W.3d 211, 218 (Tex. 2010). Waste Management utterly failed to show that any internal memoranda from TNRCC engineers in 1994 could have been the cause of damage to Texas Disposal in 1997.

Waste Management's reference to published criticism by then-Travis County Judge Bill Aleshire of San Antonio's plan to send waste to the TDSL landfill, WM Br. at 47-48, suffers from a similar infirmity. Indeed, Aleshire's criticism had nothing to do with Texas Disposal's environmental integrity.[179] No evidence linked Aleshire's statements to any possible reputational harm.

Waste Management alleges that there was no evidence "that any party's impression of TDS was actually diminished by the Action Alert." WM Br. at 48.

[179] RR9 120; RR4 137-39.

This is incorrect. Three Austin environmental leaders testified that the claims in the Action Alert negatively affected their opinions of Texas Disposal.[180] By the time of trial, TDSL's remedial efforts had been successful and these leaders no longer had their negative impressions, but that is irrelevant; Texas Disposal sought only damages incurred in the years immediately following the 1997 Action Alert.

B. Evidence supports the jury's award of remediation damages.

Waste Management wrongly contends that Texas Disposal's evidence of remediation damages – expenses it incurred to counteract the damaging effect of the Action Alert's false statements – related only to "ordinary expenses" of its business. WM Br. at 48-49.

Texas Disposal presented evidence of two types of remediation damages: (1) actual out-of-pocket expenses paid to outside consultants specifically in response to the Action Alert, which amounted to $450,592.03;[181] and (2) value of estimated time spent by TDSL employees in response to the Action Alert, which amounted to an additional $724,277.00.[182] The first category of expenses was supported by actual invoices. The second category (which was supported by testimonial

[180] RR4 184, 227-30; RR5 52, 28.

[181] Waste Management alleges that "several" of these expenses "occurred before the Action Alert was even issued," WM Br. at 49, but cites only to the entirety of PX4 – an exhibit with hundreds of pages of backup documents such as invoices – without citing any specific expenses. Waste Management's argument is wrong and insufficiently specific to preserve any complaint.

[182] RR14, PX4, pages 1, 4 (summaries).

evidence) is that complained of by Waste Management. Although evidence would support $1,174,869.03 in remediation damages, the jury awarded only $450,592.03 – the exact amount paid to outside consultants under the first category of remediation damages. These were not "ordinary expenses." Waste Management's complaints about the time value estimates for Texas Disposal employees are thus irrelevant.

C. The presumed damages instruction was proper and included a causation element.

Waste Management contends that the jury was "invited … to assess TDS's supposed injury without reference to Waste Management's statements." WM Br. at 51. This is demonstrably wrong. Jury Question 7 asked:

> 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 [regarding actual malice]?[183]

Not only were Waste Management's statements explicitly referenced; the reputation damages question also contained an explicit causation requirement.

Fundamentally, Waste Management's causation argument is simply another attack on the concept of presumed damages in defamation *per se* cases. In addition to the causation element included in the reputation damages question and the evidence supporting the jury's answer, the judgment is supported by the

[183] CR 53 (emphasis added).

presumption of damages. "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." *Bentley v. Bunton*, 94 S.W.3d 561, 604 (Tex. 2002). *See also Musser v. Smith*, 690 S.W.2d 56, 59 (Tex. App. – Houston [14th Dist.] 1985) ("It is *presumed* that words that affect one's business *cause damage*") (emphases added), *aff'd*, 723 S.W.2d 653 (Tex. 1987). Waste Management's causation argument, aside from being erroneous, makes no sense when applied to the reputation damages awarded in this case.

Waste Management contends that in this case there was "no proof, no standards, no actual injury, and no meaningful guidelines for appellate review." WM Br. at 53. This is wrong on all counts. As explained herein, Texas Disposal produced proof of actual injury; the jury was charged in accordance with accepted legal standards; and this Court has set forth the guidelines for appellate review, application of which result in affirmance of the trial court's judgment on all issues raised by Waste Management.

VI. The Evidence of Statutory Malice is Sufficient Because Waste Management Specifically Intended to Cause Substantial Harm to Texas Disposal. [Response to Waste Management Issue V]

A plaintiff may recover punitive damages if it proves, by clear and convincing evidence, "malice" as defined in Chapter 41 of the Civil Practice & Remedies Code. The statute in effect in 1997, when this case was filed, provided

for two ways to prove malice: (1) "a specific intent by the defendant to cause substantial injury to the claimant," a standard analogous to common law malice, or (2) a standard analogous to common law gross negligence, which essentially is awareness of an extreme degree of risk and reckless disregard of that risk. Tex. Civ. Prac. & Rem. Code § 41.001(7) (West 1997).

The evidence demonstrated that Waste Management had the specific intent to cause substantial injury to Texas Disposal. Numerous witnesses admitted that the Action Alert's purpose was to prevent Texas Disposal from consummating an already-authorized contract with the City of San Antonio and to prevent it from obtaining a contract with the City of Austin. Don Martin knew that the San Antonio contract had already been negotiated and authorized by the City Council, and could be signed at any time.[184] He was asked by Waste Management to take steps "as soon as possible" to prevent the consummation of the contract and knew many millions of dollars were at stake.[185] He admitted that telling the cities of Austin and San Antonio that TDSL did not comply with the EPA's Subtitle D would send a (false) message that TDSL was ineligible to bid on the contracts.[186] He caused it to be distributed in a manner by which it appeared to come from

[184] RR5 92-93.

[185] *Id.* 93, 96.

[186] *Id.* 177.

Austin environmentalist George Cofer rather than from Waste Management, which gave the document more credibility in the eyes of its intended audience: Austin environmental, political, and business leaders.[187] Bob Drenth, former Waste Management regional vice president, admitted that the Action Alert was part of an ongoing effort to stop San Antonio from doing business with Texas Disposal.[188] Both Drenth and regional manager Larry Cohn testified that one consultant would receive a bonus strictly for harming Texas Disposal, even if Waste Management received no financial benefit.[189] Cohn, according to Drenth, had an extreme dislike of TDSL and Bob Gregory.[190] And, of course, the evidence is overwhelming that the Action Alert contained allegations that Waste Management knew to be false.

In arguing that there is not sufficient evidence of malice, Waste Management contends that the Action Alert was just "being selfish in business" and "mere business competition." WM Br. at 55. But as the jury found, it went far beyond legitimate marketplace competition. Rather, there is substantial evidence of *malice* – a *specific intent* to seriously harm TDSL. Waste Management clearly had a specific intent to cause harm *through the use of knowingly false speech*. It

[187] *See, e.g.*, RR5 52-53.

[188] RR7 13.

[189] RR7 28-30; RR6 158-59.

[190] RR7 13.

did not simply consciously ignore an extreme risk of serious harm; it *intentionally* attempted to inflict such harm. This is not just "competitive" or merely "unethical." It is extreme conduct fully deserving of punishment through exemplary damages.

VII. Corporations Can Maintain Defamation Suits; They are Not Restricted to Business Disparagement Actions. [Response to Waste Management's Issue VI]

Waste Management argues that damages to a corporation's reputation can be redressed only through a business disparagement action, not in a defamation lawsuit. WM Br. at 59-61. This exact argument has been unequivocally rejected by the U.S. Court of Appeals for the Fifth Circuit, applying Texas law. *Snead v. Redland Aggregates, Ltd.*, 998 F.2d 1325, 1328 n.3 (5th Cir. 1993). Waste Management does not attempt to distinguish *Snead* or argue that its holding is erroneous; in fact, Waste Management chooses not even to cite *Snead* in its discussion of business disparagement.

Instead, Waste Management cites two business disparagement cases, neither of which holds or asserts that corporations cannot sue for libel. WM Br. at 58, citing *Forbes, Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 170 (Tex. 2003), and *Hurlbut v. Gulf Atlantic Life Ins. Co.*, 749 S.W.2d 762, 766 (Tex. 1987). There is not a single Texas case holding that corporations seeking to recover for damages to their reputations are restricted to business disparagement suits. Texas

corporations have long been able to bring defamation actions to redress harm to business reputation. *See, e.g., Newspapers, Inc. v. Matthews*, 339 S.W.2d 890, 893 (Tex. 1960).

CONCLUSION AND PRAYER

Texas Disposal Systems Landfill, Inc. prays that this Court deny the Petition for Review of Waste Management of Texas, Inc. In the alternative, should the Court grant the Petition for Review, Texas Disposal prays that this Court uphold the judgment of the Court of Appeals on all issues raised in Waste Management's Petition for Review.

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TEXAS DISPOSAL SYSTEMS LANDFILL, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on the following counsel for Defendants *via* electronic service, with courtesy copies *via* email, on the 27th day of June, 2013:

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/s/ James A. Hemphill
James A. Hemphill

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 14,984 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.

/s/James A. Hemphill
James A. Hemphill

INDEX TO APPENDIX

DC BK10348 PG1051

Notice sent: Final Interlocutory None
Disp Parties: All
Disp code: CVD / CLS 4611/462
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

EXHIBIT 1

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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

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

Not Reported in S.W.3d, 2012 WL 1810215 (Tex.App.-Austin)
(Cite as: 2012 WL 1810215 (Tex.App.-Austin))

H

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.
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.

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.[FN1] *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).[FN2] 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.

FN1. 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.

FN2. 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.) [FN3] 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.

FN3. 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."
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	"The implication that the [Texas Disposal] facility is environmentally less protective than other area landfills, includ-

FN4. "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).

less protective than other landfills, including [Waste Management]'s Austin Community Landfill."	ing [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."
	tions).

FN5. "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, Defini-

6. "The Action Alert taken as a whole."	
"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."	[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."
"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.[FN6] 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.

> FN6. 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" sec-

tions 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 word-smithing, 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 spe-

cialized 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 recov-

ery 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), [FN7] 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.

> FN7. 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.[FN8] 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.

> FN8. *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 in-

curred 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,[FN9] 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.[FN10]

> FN9. 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.
>
> FN10. 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.[FN11] 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.

> FN11. 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 publica-

tion 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.[FN12] 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)).

FN12. 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 de-

termined 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.[FN13]

> FN13. 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 con-

cludes, 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.[FN14] 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)).

> FN14. 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.

Tex.App.-Austin,2012.
Waste Management of Texas, Inc. v. Texas Disposal Systems Landfill, Inc.
Not Reported in S.W.3d, 2012 WL 1810215 (Tex.App.-Austin)

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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.

VERNON'S TEXAS STATUTES AND CODES ANNOTATED
CIVIL PRACTICE AND REMEDIES CODE
TITLE 2. TRIAL, JUDGMENT, AND APPEAL
SUBTITLE C. JUDGMENTS
CHAPTER 41. EXEMPLARY DAMAGES

[This version was in effect on October 24, 1997]

§ 41.001. Definitions

In this chapter:

(1) "Claimant" means a party, including a plaintiff, counterclaimant, cross-claimant, or third-party plaintiff, seeking recovery of exemplary damages. In a cause of action in which a party seeks recovery of exemplary damages related to injury to another person, damage to the property of another person, death of another person, or other harm to another person, "claimant" includes both that other person and the party seeking recovery of exemplary damages.

(2) "Clear and convincing" means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.

(3) "Defendant" means a party, including a counterdefendant, cross-defendant, or third-party defendant, from whom a claimant seeks relief with respect to exemplary damages.

(4) "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.

(5) "Exemplary damages" means any damages awarded as a penalty or by way of punishment. "Exemplary damages" includes punitive damages.

(6) "Fraud" means fraud other than constructive fraud.

(7) "Malice" means:

(A) a specific intent by the defendant to cause substantial injury 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.

* * *

§ 41.008. Limitation on Amount of Recovery

(a) In an action in which a claimant seeks recovery of exemplary damages, the trier of fact shall determine the amount of economic damages separately from the amount of other compensatory 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.

(c) Subsection (b) does not apply to a cause of action against a defendant from whom a plaintiff seeks recovery of exemplary damages based on conduct described as a felony in the following sections of the Penal Code if, except for Sections 49.07 and 49.08, the conduct was committed knowingly or intentionally:

(1) Section 19.02 (murder);

(2) Section 19.03 (capital murder);

(3) Section 20.04 (aggravated kidnapping);

(4) Section 22.02 (aggravated assault);

(5) Section 22.011 (sexual assault);

(6) Section 22.021 (aggravated sexual assault);

(7) Section 22.04 (injury to a child, elderly individual, or disabled individual);

(8) Section 32.21 (forgery);

(9) Section 32.43 (commercial bribery);

(10) Section 32.45 (misapplication of fiduciary property or property of financial institution);

(11) Section 32.46 (securing execution of document by deception);

(12) Section 32.47 (fraudulent destruction, removal, or concealment of writing);

(13) Chapter 31 (theft) the punishment level for which is a felony of the third degree or higher;

(14) Section 49.07 (intoxication assault); or

(15) Section 49.08 (intoxication manslaughter).

(d) In this section, "intentionally" and "knowingly" have the same meanings assigned those terms in Sections 6.03(a) and (b), Penal Code.

(e) The provisions of Subsections (a) and (b) may not be made known to a jury by any means, including voir dire, introduction into evidence, argument, or instruction.

* * *

Added by Acts 1987, 70th Leg., 1st C.S., ch. 2, § 2.12, eff. Sept. 2, 1987. Amended by Acts 1995, 74th Leg., ch. 19, § 1, eff. Sept. 1, 1995.

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.

PLAINTIFF'S EXHIBIT 1

EXHIBIT 6