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 REPLY IN SUPPORT OF ITS BRIEF ON THE MERITS

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July 12, 2013

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ARGUMENT AND AUTHORITIES IN REPLY

I. Waste Management's Argument is Premised on a Fundamentally Mistaken Characterization of Damage to a Corporation's Reputation.

In arguing that damage to a for-profit corporation's reputation is not "economic," Waste Management characterizes reputation damages as those that compensate for "psychic injuries" (WM Response at 18) and for "personal, subjective, emotional harms" (*id.* at 3). This characterization underlies Waste Management's entire argument, and is simply and demonstrably wrong in the present context: damages awarded to compensate for harm to the reputation of a for-profit corporation.

A. Texas law explicitly recognizes the right of a corporation to sue for defamation when its business reputation is damaged.

A continuing theme of Waste Management's argument in this case – not only relating to the exemplary damages cap issue, but also to the liability issues raised in its own Petition for Review – is that for-profit corporations have no cause of action for defamation, but instead are restricted to recovering only "special damages" via actions for business disparagement. *See, e.g.*, WM Response at 8 ("TDSL abandoned its business disparagement claim, instead seeking the kind of lost reputation damages recoverable by individuals, but not by corporations."). This has never been Texas law. For generations, Texas corporations have had the right to maintain libel suits. *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 recovery 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.").

This Court has just reaffirmed the long-standing law enabling corporations to recover for damage to business reputation. "Our precedent makes clear that corporations may sue to recover damages resulting from defamation." *Neely v. Wilson*, --- S.W.3d ---, 2013 WL 3240040 at *15 (Tex., June 28, 2013). This forecloses one of Waste Management's central arguments.

Accompanying the erroneous contention that corporations cannot sue for defamation is Waste Management's claim that economic damages, as that term is used in the here-applicable exemplary damages cap statute, are limited to "monetary loss 'that has been realized or liquidated, as in the case of specific loss of sales.'" WM Response at 7, quoting *Newsom v. Brod*, 89 S.W.3d 732, 735 (Tex. App. – Houston [1st Dist.] 2002, no pet.). The quoted case has nothing to do with what constitutes "economic damages" under the exemplary damages cap.

Rather, *Newsom v. Brod* was fundamentally a business disparagement case. The plaintiff filed suit one day short of two years after the allegedly false statements about him were made. Limitations for a defamation claim is one year, Tex. Civ. Prac. & Rem. Code § 16.002(a), so it was clear that the plaintiff could not maintain a defamation suit. The plaintiff argued that his claim was for business disparagement, which has a two-year limitations period. The trial court disagreed and the Court of Appeals affirmed, noting that one difference between defamation and business disparagement was that the latter required proof of "special damages." 89 S.W.3d at 735. The *Newsom* court discussed monetary loss "that has been realized or liquidated, as in the case of specific loss of sales" in the context of defining "special damages" in business disparagement cases – not in any context of exemplary damages, or in any definition of "economic damages."

Waste Management's reliance on *Newsom* (and on another business disparagement case, *Hurlbut v. Gulf Atlantic Life Ins. Co.*, 749 S.W.2d 762, 767 (Tex. 1987), WM Response at 7) is a vestige of its failed argument that corporations have no libel cause of action and must rely on business disparagement suits, in which recoverable damages are limited to "special damages" such as specifically provable lost sales. While special damages are indeed economic, there are other types of economic damages beyond the narrow category of special damages. For example, while consequential damages can be economic in nature,

they are excluded from the "special damages" recoverable in business disparagement actions. Restatement (Second) of Torts 633 cmnt. i.[1]

Special damages, while economic in nature, are a narrow subset of economic damages. As Texas Disposal showed in its opening brief, damages to the reputation of a for-profit corporation are "economic" under the pre-2003 exemplary damages cap statute.

B. Damage to a corporation's business reputation is not "emotional," "personal," or "psychic" harm.

Hand-in-hand with its erroneous contention that corporations cannot sue for defamation, Waste Management argues that damages for injured reputation are intended only to remedy harm that is "emotional" (WM Response at 3), "personal" (*id.* at 8), or "psychic" (*id.* at 18) – harms that for-profit corporations cannot suffer. This is directly contrary to the above-cited precedent from this Court – reaffirmed in *Neely v. Wilson* – that for-profit corporations and similar business associations can maintain causes of action for defamation, which of course have as their central purpose compensation for damage to reputation. (The mistaken notion that reputation damages are only for "psychic" or "emotional" harm is also central to Waste Management's arguments in its own Petition for Review; Texas Disposal addresses this further at pages 38-42 of its merits response brief.)

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[1] The tort known in Texas as "business disparagement" is called "injurious falsehood" in the Restatement and many other jurisdictions. *Hurlbut v. Gulf Atlantic Life Ins. Co.*, 749 S.W.2d 762, 766 (Tex. 1987).

Waste Management attempts to rely on cases observing that harm to an *individual's* reputation may be considered noneconomic. WM Response at 8, citing *First Valley Bank of Los Fresnos v. Martin*, 55 S.W.3d 172 (Tex. App. – Corpus Christi 2001), *rev'd on other grounds*, 144 S.W.3d 466 (Tex. 2004), and *Bentley v. Bunton*, 94 S.W.3d 561 (Tex. 2002). These cases are inapposite. *First Valley Bank* raised no issue of business reputation. The plaintiff in that malicious prosecution case was an individual who suffered "the stigma associated with having a felony indictment on his record." *Id.* at 190.[2] There, the damage was to personal, noneconomic reputation, but the case says nothing about the ability of a corporation to recover economic damages for harm to its business reputation. In *Bentley*, the jury awarded the plaintiff, an individual, $7 million in mental anguish damages and $150,000 "in damages to his character and reputation." The majority of this Court observed that "[n]on-economic damages like these cannot be determined by mathematical precision." *Id.* That passing characterization had nothing to do with whether the damages to "character and reputation" were "economic" for purposes of the exemplary damages cap; that issue was simply not addressed. Rather, the comment was made in the context of whether the evidence supported the award of $7 million in mental anguish damages. A majority held that it did not, and remanded for a potential remittitur. *Id.* at 607.

[2] This Court reversed and rendered, finding no liability and thus not reaching any damages issues.

The fact that this Court's language in *Bentley* was not related to the exemplary damages cap is emphasized by examination of the exemplary damages award of $1 million in that case (which, like the instant case, was governed by the pre-2003 cap). If all the damages were "non-economic," then the maximum amount of exemplary damages would have been $750,000. The Court, however, observed that $1 million in exemplary damages were not excessive. *Id.* at 607. Neither this Court, nor the Court of Appeals on remand, suggested that the exemplary damages exceeded the statutory cap.

Unlike *Bentley* and *First Valley Bank*, the damages in this case were sustained by a for-profit corporation that presented evidence of economic damages. Its reputation damages are properly considered economic under the applicable statute.

Waste Management cites the U.S. Supreme Court's decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), as support for its contention that "[p]resumed damages are intended to compensate for personal losses that do not have economic or pecuniary value." WM Response at 9. But *Gertz* says nothing of the sort, nor does any other case cited by Waste Management. *Gertz* simply points out that "actual injury" can extend beyond out-of-pocket loss to encompass damage to reputation and mental anguish. It neither holds nor implies that a corporation whose reputation has been damaged has suffered only "noneconomic" damage.

Waste Management maintains that a "less restrictive statutory cap on exemplary damages" should not apply to a corporation's reputational harm than to

an individual's harm; in fact, it has (inaccurately) restated the issue presented in this case in such terms. WM Brief at 1. The key issue is not individual vs. corporation; it is economic vs. non-economic – a distinction specifically made by the Legislature when it established different exemplary damages caps for economic and non-economic harms. Certainly this may result in harm to corporations being treated differently for purposes of the cap than harm to individuals, because a wide array of non-economic harms are available to individuals that corporations cannot sustain, such as mental anguish. But an individual who can show that his *business* reputation has been harmed has suffered economic damage (under the pre-2003 statute) and would be entitled to the same application of the cap as a corporation whose business reputation sustained damage.

C. Multiple safeguards prevent potential "abuse" through large exemplary damage awards.

Waste Management raises the specter of "abuse" if this Court considers the reputation damages sustained by Texas Disposal to be "economic" under the pre-2003 cap statute. WM Response at 10. Waste Management claims that Texas Disposal's argument allows "essentially unreviewable" presumed reputational damage that may result in punishment via doubled exemplary damages. This hyperbolic argument has numerous flaws. First, Texas Disposal does not claim that presumed reputation damages are "essentially unreviewable" (this issue is discussed at length at pages 34-38 of Texas Disposal's merits response brief).

Second, the First Amendment places a heavy burden upon a plaintiff – proof of constitutional "actual malice" (knowledge of falsity, or reckless disregard of truth), by clear and convincing evidence – to recover either presumed or punitive damages in cases such as this. Findings of actual malice are subject to independent appellate review, providing a substantial safeguard against "abusive" awards of presumed and punitive damages. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Third, Texas law requires statutory malice for the award of any exemplary damages – yet another safeguard. Tex. Civ. Prac. & Rem. Code § 41.003. Finally, if a plaintiff can meet these heavy burdens (as Texas Disposal has here), the Legislature specifically allowed for exemplary damages of up to twice the economic damages (though now, Waste Management's feared "abuse" cannot happen when reputation damages are awarded, due to the Legislature's 2003 amendment of the statute to specifically define those damages as noneconomic). Waste Management's imagined parade of horribles will never take place.

D. The pre-2003 statutory list of noneconomic damages was not exhaustive, but included only those types of subjective damages that only individuals may recover.

In its merits brief, Texas Disposal demonstrated that the examples of noneconomic damages listed in the pre-2003 exemplary damages cap statute[3] are

[3] While the statute did not define "noneconomic damages" *per se*, it specifically excluded certain types of damages from its definition of "economic damages" – thus, the listed excluded damages are examples of noneconomic damages for purposes of the pre-2003 statute.

of the type that are highly subjective damages suffered by individuals, such as physical pain and loss of companionship, whereas damage to a for-profit corporation's reputation is economic practically by definition. TDSL Merits Brief at 14-16. In response, Waste Management mistakenly characterizes Texas Disposal as arguing that the statute's list of noneconomic damages is "exclusive" and "exhaustive." WM Response at 10-11. That is not the case. While the statute's list of noneconomic damages is illustrative rather than exhaustive, it is apparent that the *type* of damages that are specifically noneconomic are different in kind from reputational damage to a for-profit corporation. The types of damages specifically made noneconomic in the applicable statute are those that are inherently personal and which corporations simply cannot suffer.

Nor does Waste Management effectively deal with the principle of statutory interpretation that legislative amendment of a statute's wording in circumstances such as these is intended to be a change in the statute's substance rather than a mere clarification of the statute's language. *See* TDSL Merits Brief at 18-20. Waste Management argues that the amendment of the statute to specifically classify "injury to reputation" as noneconomic was not a substantive change, WM Response at 12-14. But as shown by Texas Disposal and never effectively rebutted by Waste Management, including a *corporation*'s reputational damages in the list of "noneconomic" damages was, in fact, a substantive change, because before the

amendment, the only *types* of damages recognized as noneconomic were subjective damages that only an individual can sustain.

In light of the applicable statutory language and the subsequent amendment, Texas Disposal's reputation damages are economic damages.

CONCLUSION AND PRAYER

Texas Disposal Systems Landfill, Inc. prays that this Court grant its Petition for Review and reform the judgment to award Texas Disposal $10,901,184.06 in exemplary damages – two times Texas Disposal's economic damages. The judgment of the trial court and Court of Appeals should be affirmed in all other respects. Texas Disposal Systems Landfill, Inc. thus prays this Court for this relief, and for all other relief to which it may show itself justly entitled.

Respectfully submitted,
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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

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