Texas Disposal Systems Landfill, Inc.
vs.
Waste Management of Texas, Inc.

Supreme Court of Texas 12-0522

December 3, 2013 Texas Supreme Court Oral Arguments
For petitioner: Robert (Randy) Roach
For respondent: John (Mike) McKetta, III

Chief Justice Hecht: The Court has two matters on its submissions schedule this morning. First is 12-0522, Waste Management of Texas against Texas Disposal Systems Landfill from Travis County and the Third Court of Appeals District. The second is 12-957 in re Ford Motor Company, a petition for writ of mandamus to the District Court of Hidalgo County. The Court has allotted 20 minutes for each side in both cases and will take a brief recess between the arguments. The arguments are being webcast this morning and will be available on the Court's website later today. The Court is ready to hear argument in12-522 Waste Management against Texas Disposal Systems.

Clerk: May it please the Court, Mr. Roach will present argument for the petitioner. Petitioner has reserved five minutes for rebuttal.

Randy Roach: This defamation *per se* case presents a bookend to this Court's recent decision in Hancock in two different respects. First, because Hancock dealt with private speech, this case deals with public speech. Second, Hancock dealt with a private individual who claimed to have been defamed. This is a corporation. Now, there is briefing in this case both from the outstanding media Amici filed recently and from our own briefing, suggest that there are broad, large issues this case, this court, could deal with. Defamation *per se* for corporations, maybe even defamation *per se* could be dispensed with, or at least presumed damages for corporations could be dispensed with. Those are the large issues and they're teed up. There's also a small set of issues and frankly it would use the template of Hancock to resolve this case on two arguments. One is that there is no defamation *per se* here in two different respects. And two, there is no causation of any damage; neither the five million reputation damage, nor the 450 thousand remediation damage. So what I would propose to do is to first talk about defamation *per se* and specifically to start off with footnote 11 in Hancock, reservation of the extrinsic evidence ambiguity issue, because that's what we have here. We have a statement that is not unambiguously defamatory *per se*. It took four experts bringing extrinsic evidence to explain why the language of this one page action alert should be ignored and why different interpretations of the language should be used. And that's the way the case was submitted by the

trial court to the jury. Implications about what this language means and not the language itself, but truncations of sentences and most importantly, not the action alert itself as a whole, but those statements and those implications in isolation. Were they false? Were they defamatory per se? The second reason – and Texas law and the law of the rest of the country, generally speaking, has been that defamation per se should be unambiguously injurious on its face, and if it's not unambiguously injurious, it's defamation, it's not defamation per se. Now the Amicus brief does an outstanding job of explaining how libel per se and slander per se have been convoluted, merged together into one tort: defamation per se and how wrong that is. Talking about the Ecclesiastical Courts and how the King's Courts stole slander per se for printing presses and the four different types of slander per se, one of which at issue here, slander for occupation, business or profession, but how that became merged into defamation per se because libel per se, which it what this is, this is a piece of libel, had always been, it has to be unambiguously injurious on its face. Now maybe it's both, but the Amicus brief points out this is an opportunity for the Court to decide what Texas law is going to be and it's clear that other states who have looked at this issue recently have trended in one direction and it has been to limit defamation per se and I think this Court's opinion in Hancock shows why and that is because if we don't limit defamation per se then any defamatory statement about a business, occupation or a profession could be defamatory per se. It un-limits it and with defamatory per se we have the worst constitutional problem – First Amendment problem presented – and that is we could have general damages as we have here without any proof. So.

Chief Justice Hecht: The troubling thing here is, though, is that it was so deliberate. Its very purpose was to injure it seems like, otherwise why would you put it out? You're not touting your competitor, you're trying to hurt him, keep him from getting business, so it seems that if it's not injurious it's only because the publisher messed up.

Randy Roach: I think it's only because of the spin that TDS puts on – and the trial court – put on this document. So I think there's two answers. One is, does this document appear to intentionally injure anybody and then the second question is the testimony from the disgruntled former Waste Management employee that is really the basis for that kind of malice and stuff, how does that fit into the picture?

Justice Lehrmann: But didn't two juries find actual malice?

Randy Roach: Absolutely, absolutely. And again, this is the hometown waste disposal company which was being lionized throughout, from opening argument and all the evidence, the Pavilion, how TDS brought the environmental community into the process of designing this landfill and 20 million dollars in punitive damages and 5 million in reputation damages, non-economic damages, I think all goes to point out that Gertz First Amendment problem materialized here.

You had the local favorite get rewarded by the local jury and the out-of-town, unpopular party, the multinational, got penalized and punished by 20 million and 5 million dollar awards.

Justice Green: In contrast with the situation that happened here, what is an example, do you think would be a *per se* defamation?

Randy Roach: I think there's lots of ways that individuals can be defamed *per se.*

Justice Green: Right, I'm talking about in this context.

Randy Roach: In a corporate context.

Justice Green: Right.

Randy Roach: I have a real – I think the Amicus is right. I don't think a corporation can prove the kind of damages that would be necessary to prove defamation *per se*, but conceptually, a corporation charged with, um–

Justice Green: A crime.

Randy Roach: Being insolvent, or a crime. Say this corporation is the next best thing to Lehman Brothers, they are insolvent, no one will loan them any money, okay? They don't pay their bills and that's why it's happened. So, conceptually, you could frame a defamatory *per se* case against a corporation. The question is: is that here? And the question is: does that make any sense? Because corporations do not experience the kind of damage, the presumed damages provide, and that's the only distinction here between defamation disparagement, defamation *per se* is you get general, non-economic reputation and mental anguish damages when corporations aren't people, don't have personalities, don't have brains, don't have feelings.

Chief Justice Hecht: So if it was a sole proprietorship, it would be different?

Randy Roach: Sole proprietorship, you know, where the individual –

Chief Justice Hecht: Partnership.

Randy Roach: Okay, well, I think, I was thinking about that. While a partnership is a legal entity, the partnership and its individual partners suing as plaintiffs, the individual partners I think would be, but if you're a legal entity as opposed to a human being you can't experience the kinds of damages that defamation *per se* uniquely provides.

Justice Brown: A big issue at the other Supreme Court right now is what kind of rights corporations have. Free speech rights, rights to religious expressions. If we're going to treat corporations as people, shouldn't we just treat them as people?

Randy Roach: Well, we don't treat corporations as people for all purposes. We treat corporations as people for some purposes. For example, the recent FTC versus ATT case on privacy rights. The US Supreme Court ruled that corporations do not have a privacy right that they can sue on. A corporation can't be jailed. A corporation can be fined. So we treat corporations as people for some purposes, limited, fictive, where necessary, but we don't treat corporations as people for all purposes and this is one of those situations where we shouldn't because defamation *per se* gives plaintiff's a huge leg up that they don't need. The tort of disparagement that this Court wrote on in Hulbert is the right cause of action for plaintiff's to bring.

Chief Justice Hecht: Well, but, it seems to me that in this day of free-wheeling speech on the internet where people are, businesses are marketing ways to cure your reputation, losing business because all these people have maligned your business, not the product, just the business, and it seems to me that to encourage that - by removing this one remedy - would make it even a worse situation.

Randy Roach: Speech is obviously – public speech – is obviously something that the Constitution protects. The market place is changing, but the question, I think, becomes whether or not the market place needs – the litigation market place – needs defamation *per se*. Now, there are two issues with respect to causation. If this Court finds that this is not defamation *per se* either because it's ambiguous and requires extrinsic evidence or because it doesn't allege the kind of character, quality, fitness that is required a la Hancock then there is one issue that – well, there's two causation issues – the most important causation issue I think is the 450 thousand dollars because I can get a ruling because I think this Court would have to affirm unless there's a causation problem on the 450 thousand and there is a causation problem, a big one. There's the one that we've briefed and that concerns multiple causes. Okay? TDS denies, and will continue to deny to you that the TNRCC presented a separate, independent problem that TDS was dealing with, but prior to the action alert the TNRCC had decided at the staff engineer level, not at the Commissioner level, that this landfill design was defective and should not be approved. It was rejected, that was known, that was discussed, that was something that TDS was dealing with. All of the consultants that go into the 450 thousand dollar damage, part of, for plaintiff's, for, as well as the salaries, the 80% salaries they allocated to fighting the action alert. All those things had to be done in connection with the TNRCC problem. And they didn't, just like the action alert suggests, but far worse. They actually said this is rejected, it's not safe, it's not adequate. Now that's just at the engineer level, but that created the problem that TDS was responding to. You also had two other causes. You had the Austin American Statesman article featuring Travis

County Judge Bill Aleshire complaining both, like the actual article does, about increased traffic, about increased waste taking up Travis County's limited landfill capacity. But his testimony in the record if you look at it would also say, "I had a problem and I talked to Bob Gregory about it" and it was "you are circumventing our regional landfill planning. We have to plan it as a region and you've done this unilaterally without telling us about it, without coordinating with us about it and that's a huge problem" and TDS was responding to that article. Then there's the San Antonio newspaper article saying "we are grossly overspending on a per ton basis on this contract with TDS" and Mr. Gregory admitted in his testimony that he knew about that article and was reacting to it. This Court in Hancock said you have an equal entrance problem when you have the ability to allocate damages to multiple different causes. That's exactly what you have here. In their brief Texas Disposal Systems denies the existence of any alternative causes. When you can't rule them out, you deny they exist. So they didn't rule them out. They didn't allocate any of the $450,000 or the $720,000 from the salaries to action alert, this much; to the TNRCC response, this much; newspaper article one or newspaper article two; that never happened so you have no proof of causation in this record. It was their obligation to do it. With respect to the five million dollar reputation damage - their brief makes clear they have only one basis for supporting the five million dollars and it's not based on a general, non-economic damage basis like, you know, the corporation lost self-esteem, the corporation felt like its integrity was less. No testimony about that. It's purely economic special damage evidence and it is Bob Gregory's testimony that if, but for the action alert, he thinks that the value of the company would have been ten million dollars more. That is special economic damage, it goes to the lost profits question which the jury said zero to, and it goes to the remediation, possibly, but it can't go to general damage because it's not general damage testimony. We know what general damage testimony is on mental anguish. That's: I was humiliated, I was depressed, I was sick, I went to a doctor, I took meds and I couldn't go to work. With reputation, what is that proof? Okay? For an individual, Potter Stewart in Rosenblatt versus Baer says individuals have self-worth, self-esteem –

Chief Justice Hecht: But why in this case wasn't it what he said before, trying to put a number on it, which everybody tries to do, you know, would you suffer like this for a dollar a day? Add it up. But he said the lost esteem in the community, the idea that they weren't being environmentally sound when they had tried so hard to be all these things, why isn't that like mental anguish damage?

Randy Roach: Number one, because it's not proved. The best answer to that is because – this Court in Hancock says the key is whether or not it was believed. You can't have causation unless you have testimony saying the recipients of the communication believed the communication and we don't have that here.

Justice Lehrmann: Well, what about the testimony that the base business growth slowed in the years following the action alert?

Randy Roach: Is special damage evidence. Exclusively. It's about economic harm. General presumed damages, reputation, has to be, by definition, general, non-economic, non-pecuniary. Okay? So evidence that goes to a different question that can't go to this question of non-pecuniary evidence can't be evidence that supports those findings.

Chief Justice Hecht: Thank you, Mr. Roach. Any other questions? We'll hear argument from respondent.

Clerk: May it please the Court, Mr. McKetta will present argument for the respondent.

Mike McKetta: I want to start in a case that challenges not only broad principles, but sufficiency of evidence on actual malice, on punitive damages, on reputational damages. There ought to be at least a small amount of attention today to how egregious the conduct was and it was almost completely skated in the preceding 15 minutes. This was a case where two competitors were chasing after two large contracts. The evidence is that the San Antonio contract was 77 million dollars value to Waste Management. The City of Austin contract, a 30 year contract, huge value, and the evidence is that Waste Management knew from City Council meeting that the contract to TDSL was expected to be issued in early February, 1997. And in late January 1997, Waste Management, including regional vice-presidents, division presidents, six personnel from Waste Management collaborated with a PR guy, Don Martin, with the agenda: do this as fast as possible. And it was done. On January 30th, an anonymous communication sent to environmental activists urging them to take steps, and let's put in context why that matters. First, this was the only landfill you'll ever hear about where the Sierra Club and other environmental activists were active in encouraging its permitting. What an extraordinary reputation in an area in Central Texas where that's a big to-do in the political climate. That reputation was destroyed. We heard testimony –

Justice Guzman: Since you're on that point, the last point that Mr. Roach closed with, was the causation evidence and whether the recipients of the communication – whether your proved that the recipients of the communication believed that and so since you're on those points will you talk about that now?

Mike McKetta: Very pertinent, Justice Guzman. The testimony that we cited in our briefing were environmental activists Lauren Ross, an engineer, Bridgette Shea, a, to some circles, notorious, to some circles, sainted, environmental activist active in politics, and George Cofer, whose father had been a judge, but he was a very environmental activist. In addition, the evidentiary record shows that copies of the action alert were found on desks of San Antonio

council members. Terry Arredando testified about that. There was testimony that one staff member in San Antonio actually communicated with a counterpart in the City of Austin about the action alert.

Justice Guzman: But it's an anonymous communication and there are anonymous communications that show up all over the place. So the question is: did you prove that they believed that the contents of that anonymous communication or that it carried that weight to change their opinion?

Mike McKetta: That's what Bridgette Shea, Lauren Ross and George Cofer said. Is it truthful? It's what each of them said. They were both cross-examined, each of them said, "I thought that I had been duped. I used to think this was an environmentally sound group, I no longer think that, I think they cut corners." You see the context is –

Justice Guzman: But to support damages, though, for the corporation so you're talking about a very specific group of, in your words "environmental activists" but do you have to have sort of a broader group of the population believing these communications or is it enough to support the award of damages?

Mike McKetta: The testimony, both from an attorney who was representing TDSL in the negotiations and from Mr. Gregory and others addressing it, that all of the delay in the San Antonio contract, which had been on the verge of granting, was attributed to this. That the delay in the City of Austin was attributed to that. Is that evidence binding in this Court? It was evidence the jury had to consider on the source. The testimony was that 1.1 million dollars devoted to trying to restore reputation solely because of the action alert. The jury awarded about 40 or 45% of that portion of the evidence. But the context that's so critical is that each competitor for the city contracts had to certify compliance with EPA Rule, Subtitle D and this alert was saying TDSL is not in compliance. They got an exception to the rule – that was false. That the rule requires certain things – that was false. That TDSL did not have required things – that was false. It was to the reputation and to the competitive efforts with intent from Waste Management completely and what I would suggest – Justice Guzman, you're about to ask me a question.

Justice Guzman: Whenever. Okay.

Mike McKetta: I'll talk all day, but I'll stop for your questions.

Justice Guzman: That was asked to the action alert, but what about the TNRCC because we're talking about what was going on at the time.

Mike McKetta: Thank you for asking that. The suggestion that some of these expenses in 1997 were for TNRCC is just completely false. The TNRCC permitting had been obtained in 1994. That suggestion was just an exuberance – not an intentional falsehood – but the TNRCC memos at issue, the evidence was that the five documents all addressed designs before the final design and final modeling data were submitted to the TNRCC. That is, those criticisms were of something that was not built. The trial judge said, even so these are hearsay, they didn't qualify as evidence hearsay exceptions, but said to Waste Management, you may bring those people in if you wish to qualify them as experts. There's no evidence that any of those memoranda, those five, were ever seen by anybody outside the TNRCC except Waste Management and TDSL, no need to say did those influence reputation, no evidence that they could have. As to the articles that are talked about we're told that there was no addressing whether Bill Aleshire's article and a San Antonio article could have been a source of reputational problems. Mr. Gregory, 4 transcript, 137 to 139, squarely addresses those and says quite consistently with the text of these articles, these did not affect are reputation at all. These were public policy choices, these were not reputational – are we a good player or a bad player – so those were addressed whether they needed to be or not negated.

Justice Lehrmann: Can I ask you about the exemplary damages because they were in such a large amount and isn't that reflective, perhaps, the jury was punishing? And what is your answer to that?

Mike McKetta: Thank you, Justice Lehrmann. I think that under the punitive damage question, they were punishing. I think they were doing exactly what they were supposed to be doing. The evidence was of a, we're told we're attacking out-of-country, out-of-state. It was only Waste Management Texas was the only entity against whom damages were assessed, against whom net worth was shown. The net worth showed that they were more than 100 times greater, that the regional vice-president came into the courtroom bragging that this lawsuit was BS, knew that it was false, had tried to get permission upstairs to at least apologize or retract or respond and upstairs told him he could not retract, could not apologize, knew that the information was false. And let's just talk for a moment – now that's the 20 million is what they awarded, not what is permitted under either version of the cap – the old or the new cap – but let's take a look at commerce. When we're promoting commerce and Governor Perry wishes to attract companies to Texas, as we ought. What is there more important to a company trusting in commerce: whether there are laws that are applied or whether they're free to do as people in Russia are free to do? And the importance of this cause of action for commerce to protect against not accidental negligent oversight comments, but cold-blooded intentional collaborative efforts to kill and destroy, what better message can there be for commerce than that this Court, as well as the legislature that has addressed libel over the years and refined what kinds of rules we'll have on libel, is going to make sure that in the rare case, the very rare case, where actual malice is proven, that there's a remedy.

Justice Green: Is it a matter of the fact that is was done covertly? The way it was done covertly?

Mike McKetta: Covertly?

Justice Green: I mean, what if the President of Waste Management or some high profile lobbying firm was hired to help gain the contract and go talk to, like I'm sure lobbyists do, go to the City Councilman and talk to them and whisper in their ear say, you know, there's this exception that they claim to, you know, whatever, all those kinds of things that were done sort of out in the open?

Mike McKetta: I think that the First Amendment has the right to address ones government. That is an entirely different protection that companies have when they go to an agency or a city and talk. They still can't talk with actual malice, known falsity, but lots of people all day long go and they nudge and they elbow and they tout how I'm better than somebody else is and the covertness is not a an essential element of the showing of actual malice but it certainly goes into the showing of both the actual malice and the –

Justice Green: Would you have a claim had this all been done openly?

Mike McKetta: Well, not if they'd used false – known to be false – things. If they had said, we're better. Yes, both sides comply with the rules, but here's why our design is better. Those are wide open and those would not have been this lawsuit. No one could ever show actual malice if they were not intentionally saying falsehoods that they knew to be false. Justice Lehrmann, I wanted to take a step further because an important part of your task in reviewing the reputational award is whether the jury was driven by passion and anger against Waste Management or was trying to find a sense of what was fair and reasonable – that's the jury charge straight out of Bentley against Bunton – fair and reasonable. We wish they had awarded what we had invited. They awarded half that. We wish on the mitigation damages that they'd awarded what we'd invited; they gave about 40 or 45%, that is the answers to other questions do not suggest that this was a jury, wish ever I could find one, that I had in the palm of my hand. The evidence does not suggest that this was hostile against an out-of-stater. And they were not an out of-stater. They are Waste Management Texas.

Justice Willett: Mr. McKetta, can you flesh out your earlier mention – you earlier kind of mentioned evidence that you believe helped quantify, put a price tag on damage to TDS's reputation. You mention, of course, that there were some activists who felt they'd been duped, they thought less of TDS, but beyond that, beyond Mr. Gregory's testimony, what evidence put a figure, a hard, cold quantified figure on the reputation damage?

Mike McKetta: Let me mention three exhibits that were introduced without objection. Exhibit 4 – it showed 2.2 million dollars. Exhibit 4.1 – it showed 1.99 million dollars different. Exhibit 304 – it showed, and got a concession from Waste Management's expert. The point that Justice Lehrmann asked earlier today - that the base business. Mr. Gregory testified that the base business they had to turn their attention away from, the thousands on non-city contracts, and it was flat and dwindling instead of growing even at the low level of the city of Austin market growth.

Justice Willett: Mr. Roach says those are special damages, akin to lost profits and they're not - they're completely different from general loss of reputation damages.

Mike McKetta: But what they are, your Honor, what they are, are indicators in quantifiable ways that give credence to Mr. Gregory's estimate. Suppose you showed that from your business plan, you're not just a million nine-nine shy, this base business, that's just keeping up with the growth of the city of Austin's own size. If you can show from your business plan that you have been distracted and harmed and stamping out to restore that he believes the company would have been worth more than 10 million additional by that time. Capitalize a million nine-nine and you get vastly more numbers than this jury awarded or than Mr. Gregory said. That is not to say please award those in lieu of the reputational, but those are big indicators available for a jury and available for this Court to determine whether the reputation here was the reputation order of magnitude of Judge Bascom Bentley, who had $150 reputational damages, still has his job. That was non-economic. I'm really focused on this phrase that the evidence here was purely economic. That is my pivot over to the punitive damage question. If the corporate reputation damages under the old exemplary damage statute are economic, as I heard my friend saying, he's critical that we shouldn't get them, but they are not excluded from the doubling.

Justice Willet: Are those three exhibits the sum total of the evidence to quantify the reputation damage?

Mike McKetta: No, your Honor, but they are important…Volume 3, Transcript 150 to 179 is a lot of the testimony. Volume 4, Transcript 129, talks about the base business and their expert witness, Volume 9, Transcript variously from page 81 to 102 concedes there would have been ore growth but for these problems, concedes that a city of San Antonio contract would have given greater profits if it had been achieved promptly instead of after substantial delay, so there is both oral as well as written instances of those. I want to take a moment if I may –

Chief Justice Hecht: Let me ask you, though, the fact that these cases are few and far between, and this one itself is fairly unusual, makes me wonder whether we haven't just gotten used to all of these comment about businesses. You know, you want to go to dinner some night and you get

on the internet and you look at the reviews and the guy says, well the food was cold and the service was terrible and I hated the whole thing. And, you know, you see one of those reviews and you think to yourself, I'll probably go someplace else and you wouldn't have to prove actual malice in a case like that because there's no public interest other than maybe culinary or gastronomical or something, but it's hard to see how this tort, if it really were extended, I mean if people really did bring these kinds of suits wouldn't be fairly far reaching. How is it counted in at all?

Mike McKetta: I think that actual malice…

Chief Justice Hecht: …in this case because it's environmental. In a case that didn't involve those concerns, there wouldn't be actual malice.

Mike McKetta: For defamation, but for *per se* it would still meet actual malice so that actual malice – when there are special damages alleged and proven – actual malice is irrelevant in the private, private case you're positing, would still be important here, but in the *per se* case it's an enormous threshold and filter against claims that are not worthy, that are stretching kit claims and the rare meritorious case that exists ought not be thrown away out of a concern that actual malice will not be a necessary element in those cases. In those cases, if a restaurant could show – without actual malice showing – a specific lost sale, private-private gives that special damage. But for a *per se* recovery that restaurant couldn't do a thing without showing an intended falsity of knowledge or as in the Bunton-Bentley case, a reckless disregard for truth or falsity. Here it was a knowing falsity. I wanted to make a comment about the very attractive briefing from my friend, Tom Leatherbury that we got three business days ago. You'll want to read it. You'll find a 1993 Missouri case cited, I think, eight times as the trendsetter urged for this Court to follow. It's called the Nazeri case and if you then ask some of your briefing clerks to Shepardize it you'll find how other jurisdictions have dealt with Nazeri. In 2013, the Supreme Court of Iowa in the Bierman case, it's at 826 N.W. 2d 436, it cites Nezari in a footnote as one of six jurisdictions that have decided not to have *per se* defamation. In fact, all six appear in Amicus briefing. In the text, it cites 26 cases, plus Iowa after that makes 27, that say no *per se* still forms an important part of our jurisprudence and that is a wonderful compilation showing more than 80% of the jurisdictions believe there is continuing value in *per se* and most of the cases that have parted from *per se*, including the Nazeri case in 1993, are more than 20 years old. In fact, the footnote says nobody could say there is a trend to drop *per se*. The use of *per se* plays an important role, and it's an important role not just in private litigants, but here in commerce. It's an important role that there be cause of action available on the unusual, beyond the pale conduct that was intended to and did go to the heart of the reputation –

Justice Guzman: This document though, did you have to resort to extrinsic evidence, though, to prove the defamatory nature of it in a *per se* context? And I know you're out of time, I would just be as brief as you can.

Mike McKetta: I'm so grateful to you for asking. On March 2003, there was a partial summary judgment finding defamation of these items. Partial summary judgment. We had to have evidence to show it's false, to show its impact, but the partial summary judgment was not attacked in appeal number one, was not attacked in appeal number two, was not attacked in this. So, but now, I want to say a step further without meaning to intrude on time the restatement, Section 569 Comment B, rejects the idea that *per se* has to be shown within the four corners, separate from the fact that here it was found on partial summary judgment unchallenged. The Restatement does not advocate that it must be bound within the four corners. Thank you for indulging my time.

Chief Justice Hecht: Thank you, Mr. McKetta. Any other questions? Roach, I think you have five minutes.

Randy Roach: Thank you, Chief.

Justice Willett: Mr. Roach, how would a defendant prove reputation damage in a case like this and quantify those damages?

Randy Roach: How would a defendant prove or disprove damages?

Justice Willett: I'm sorry, I'm sorry. Plaintiff. How would a plaintiff saying they were defamed, how would they prove those damages and put a price tag, quantify them?

Randy Roach: Our position is that a corporation cannot general reputation damage any more than they can prove mental anguish. It cannot be done because they are not person, they have no psyche that could be either mentally anguished or have their self-esteem or self-worth diminished reputationally.

Justice Boyd: But they can prove disparagement damages?

Randy Roach: They can prove disparagement but, because, it, yes.

Justice Boyd: And what's the distinction in the evidence?

Randy Roach: The distinction is that the allegation and the evidence goes to a product, not the actor. It goes to – and this is in 623A, the disparagement part of the Restatement – makes it

clear: this goes to property; an allegation as to property, title, chattel, etcetera is what disparagement is all about. It's your economic interest in that property. Defamation *per se* for a corporation, when clearly the language is all written as persons and the concept is all persons it's only because a lot of cases, although few and far between, merged and allowed corporations to being defamation *per se* cases when that wasn't challenged. This case challenges that.

Justice Willett: For the sake of argument, assuming we disagree and believe a corporation can, under appropriate circumstances, assert and prove reputation damages, how might a corporation do that? How might they quantify that?

Randy Roach: Again, I don't believe – I know that you have the legal right under the current system to try to prove. I don't believe that can be proved any more than they can prove we were sleepless, we were depressed, because corporations aren't people. It's not even a group of people. It's a legal entity. It doesn't have feelings and it doesn't have a reputational diminishment. Yes, they have reputations, the corporation's reputation, like Johnson & Johnson and Tylenol – it can be diminished. But the only quantification for it is in lost sales, lost good will – exactly the question that the jury was asked and the jury said zero to. All the evidence that they now use to justify the five million dollar and the 450,000 with special damage proof where the jury said zero. Why? No causation.

Chief Justice Hecht: But you do think that if the plaintiff were solely owned, like Dell at one time. And it can be a big business and be solely owned, they could recover reputation damages or not?

Randy Roach: I think only an individual – now if you say a sole-proprietorship is an individual, then fine. If you say a sole-proprietorship is an entity, then I'd say not fine. You heard a big pitch, well – ambiguity. TDS has always said the action alert is ambiguous. The trial court said the action alert is ambiguous. The First Court of Appeals opinion says the action alert is ambiguous. Ambiguous means two reasonable alternatives. It takes extrinsic evidence to convince a jury of one of those two.

Justice Willett: Ambiguous to whom? Certainly not to those "environmental activists", as they were described, who received it. It wasn't ambiguous.

Randy Roach: It was to them, too. Both Shea and Ross, both of those people went to work for TDS. They didn't think TDS was a bad player. They had a momentary – one of them says, "I had a concern." The other one says, "I had low impression." Okay. They were fleeting, there was no testimony that it lasted. Okay. There was no testimony that they were believed. Concern is exactly what free speech on public issues of concern is all about. We asked at the very bottom of the action alert: express your concerns. We wanted to provoke people to be

concerned, and to research, and to look at this, okay? It is the other testimony saying "no-no, this alleges all kinds of terrible things. This alleges that we were out of compliance with the EPA rules. This alleges that we were dumping radioactive waste. It's not on the face of the document. It comes only from other people. If you looked at only one person's testimony is this case, it would be Ron Bond, who was the TNRCC director who was in charge of the permit applications and he was the main source for the two writers – Martin and Erwin – they denied in their testimony, said we had no ill will, no malice, we didn't think it was false, we thought it was all true. They relied on Bond and Bond says all the right things about how legitimate the action alert language is.

Chief Justice Hecht: Any other questions? Thank you, Mr. Roach. Case is submitted and the Court will take a brief recess.