

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

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

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Issue Presented

Did the Legislature intend courts to apply a less restrictive statutory cap on exemplary damages when the award is based on a corporation's presumed reputation damage?

Summary of the Argument

The court of appeals correctly affirmed the trial court's application of the exemplary damage cap to the jury's mixed award of economic and noneconomic damages. The statutory cap on exemplary damages limits an exemplary damage award to twice the award for economic damages plus the amount of any noneconomic damages awarded (not to exceed \$750,000). Former TEX. CIV. PRAC. & REM. CODE § 41.008(b) (as amended by Acts 1995, 74th Leg., ch. 19, § 1, eff. Sept. 1, 1995). For purposes of calculating the cap, TDSL asks this Court to label \$5 million in presumed reputation damages—which the trial court told the jury did not need evidentiary proof—as economic damages. If the \$5 million in presumed reputation damages are economic, the punitive damage cap here for reputation damages is \$10 million; if the presumed reputation damages are noneconomic, the cap is \$750,000.

As Waste Management has argued in its Petition and Brief on the Merits, economic damages—in the form of lost profits, rehabilitative expenses, and diminished value of the corporation—are the *only* damages a corporate entity's reputation can sustain. Here, TDSL asked the jury to compensate it for some of those types of economic damages, and the jury responded with \$0 in lost profits and \$450,592.03 for expenses associated with the alleged defamatory statements. But TDSL sought and obtained another type of recovery as well. Lacking

evidence of actual economic harm resulting from damage to its reputation, TDSL also pursued a claim for “presumed damages” for defamation per se. In response to a separate damages question that included an instruction that “damage to reputation may be presumed; no evidence is required of damages,” the jury awarded \$5 million for “reputation damage in the past.”

Although presumed damages for defamation per se have traditionally been reserved to compensate persons for “personal, subjective, emotional harms” that are difficult to prove, TDSL argues that these presumed damages are nevertheless economic. Thus, for purposes of its defamation per se claim, TDSL claims that it is entitled to \$5 million of unquantifiable presumed damages, but for purposes of the exemplary damages cap, TDSL argues that those same damages are economic. The Legislature could not have intended the less restrictive economic damages cap on exemplary damages to apply to a presumed award that is unsupported by evidence.

Statement of Facts

Waste Management disagrees with TDSL's characterization of the many of the facts it argues in its Statement of Facts. However, many of those facts are not relevant to the single issue raised in TDSL's Brief on the Merits—whether the jury's \$5 million award for “damage to reputation in the past” constitutes economic or noneconomic damages for purposes of calculating the statutory cap for exemplary damages. Because TDSL's cross-petition raises only a single, pure question of law, and because Waste Management has recited the facts of the case here in its own appeal to this Court, Waste Management will not unnecessarily repeat its recitation of the facts of the case.

Argument

I. The trial court and the court of appeals properly applied the lower noneconomic damages cap to the jury’s award of \$5 million for presumed reputation damage.

TDSL’s cross-petition raises a single question of law: does the jury’s award of \$5 million in presumed “damage to reputation in the past”—exclusive of lost profits and other expenses incurred by TDSL—constitute “economic” or “noneconomic” damages for purposes of calculating the exemplary damages cap? *See* Former TEX. CIV. PRAC. & REM. CODE § 41.008(b) (as amended by Acts 1995, 74th Leg., ch. 19, § 1, eff. Sept. 1, 1995). Section 41.008(b) of the Texas Civil Practice and Remedies Code provides the formula for calculating the cap:

(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.

Thus, if the \$5 million in presumed damages are economic, the punitive damage cap would allow TDSL \$10 million in exemplary damages; if those presumed damages are noneconomic, the exemplary damage cap would limit TDSL to

\$750,000 in punitive damages.¹ *See id.*

The governing definition of “economic damages,” which has since been amended to explicitly exclude injury to reputation,² provides that:

“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.

Former TEX. CIV. PRAC. & REM. CODE § 41.001(4) (as amended by Acts 1995, 74th Leg., ch. 19, § 1, eff. Sept. 1, 1995). Based on this definition and TDSL’s presentation of its case, the trial court and the court of appeals properly capped TDSL’s recovery by concluding that presumed “damage to reputation in the past” was a noneconomic damage award.

¹ This brief only addresses the cap as applied to the \$5 million in “damage to reputation in the past.” In its Brief on the Merits, Waste Management shows that no legally sufficient evidence supports the remediation damages award of \$450,592.03 or the jury’s statutory malice finding, which was a necessary predicate for any exemplary damages. However, if the Court disagrees, Waste Management does not challenge the court of appeals’ calculation of exemplary damages cap as to the remediation damages (2 X \$450,592.03 = \$901,184.06).

² The court of appeals correctly observed that “this issue likely presents a question of first and last impression for this Court” because the Legislature amended chapter 41 in 2003 to include “injury to reputation” in the list of specific examples of “noneconomic damages.” *Waste Mgmt. of Tex., Inc. v. Texas Disposal Sys. Landfill, Inc.*, No. 03-10-00826-CV, 2012 WL 1810215, at *26 (Tex. App.—Austin May 18, 2012, pet. filed); *see* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 13.02, 2003 Tex. Gen. Laws 847, 887 (codified at TEX. CIV. PRAC. & REM. CODE § 41.001(12)).

A. Lost reputation damages are noneconomic damages because they do not compensate for a pecuniary loss.

1. A “pecuniary loss” is a monetary loss.

TDSL argues that “[b]y choosing to define ‘economic damages’ as compensatory damage for ‘pecuniary loss,’ the Legislature intentionally chose to use a term that had been interpreted broadly by Texas courts” TDSL Br. 14. However, Texas courts have never interpreted “pecuniary loss” broadly enough to encompass the presumed lost reputation damages awarded to TDSL.

This Court has emphasized the monetary nature of a pecuniary loss because “[t]he ordinary meaning of ‘pecuniary’ is ‘of or pertaining to money.’” *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 531 (Tex. 2002). To be pecuniary, a loss “must first be monetary in nature.” *Id.* A pecuniary loss cannot be general, but must be a monetary loss “that has been realized or liquidated, as in the case of specific loss of sales.” *Newsom v. Brod*, 89 S.W.3d 732, 735 (Tex. App.—Houston [1st Dist.] 2002, no pet.). For example, there is “no evidence of the direct, pecuniary loss” when “[n]o evidence was offered of damages resulting from loss of business expected from any particular customer or prospective customer to whom disparaging statements were made by defendants.” *Hurlbut v. Gulf Atlantic Life Ins. Co.*, 749 S.W.2d 762, 767 (Tex. 1987).

For the same reasons, lost reputation damages sought through a defamation

claim do not compensate for a pecuniary loss. “The action for defamation is to protect the personal reputation of the injured party, whereas the action for injurious falsehood or business disparagement is to protect the economic interests of the injured party against pecuniary loss.” *Id.* at 766. TDSL abandoned its business disparagement claim, instead seeking the kind of lost reputation damages recoverable by individuals, but not by corporations.

Not surprisingly, TDSL struggled to prove its lost reputation damages. Mr. Gregory admitted that lost reputation is not susceptible to monetary evaluation. 3 RR 155, 157 (“It is not an easy matter to value your reputation. It’s priceless, as the MasterCard ad would say.”); *see also* 5 RR 67-68 (“I don’t know how you can place a price on somebody’s reputation. And I don’t know how you can measure that either.”). Because lost reputation damages are not susceptible to monetary evaluation, this Court and others have refused to categorize lost reputation damages as economic damages. *See, e.g., Bentley v. Bunton*, 94 S.W.3d 561, 605 (Tex. 2002) (referring to damages to character and reputation as noneconomic); *Newsom*, 89 S.W.3d at 735; *First Valley Bank of Los Fresnos v. Martin*, 55 S.W.3d 172, 194 (Tex. App.—Corpus Christi 2001), *rev’d on other grounds*, 144 S.W.3d 466 (Tex. 2004) (holding damage to reputation was noneconomic).

2. “Pecuniary loss” does not encompass presumed damages for defamation per se.

The jury awarded TDSL \$5 million in presumed “damage to reputation in the past” on TDSL’s defamation per se claim. The jury’s answer followed an instruction that “damage to reputation may be presumed; no evidence is required of damages.” CR 53. TDSL argues that these presumed damages—which need not be supported by evidence, according to TDSL—justify the application of the damages cap applicable only to economic damages. TDSL Br. 25.

Presumed damages are intended to compensate for personal losses that do not have economic or pecuniary value. *See Gertz v. Welch*, 418 U.S. 323, 350 (1974) (“[A]ctual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.”). In the defamation context, “the loss of something having economic or pecuniary value” is considered “special harm.” *See* RESTATEMENT (2D) TORTS §§575 cmt. b, 621 cmt. a. Defamation per se, by contrast, creates liability when “no special harm results.” *Id.* § 570; *see also Bentley*, 94 S.W.3d at 604; *Leyendecker & Assocs., Inc. v. Wechter*, 683 S.W.2d 369, 374 (Tex. 1984); *Downing v. Burns*, 348 S.W.3d 415, 425 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (“[E]conomic damages are not general

damages which can be presumed to flow from defamation per se.”). Presumed damages for defamation per se are not economic damages.

Holding otherwise would essentially triple the opportunity for abuse of the “largely uncontrolled discretion of juries to award damages where there is no loss,” potentially “inhibit[ting] the vigorous exercise of First Amendment freedoms.” *Gertz*, 418 U.S. at 349. Under TDSL’s proposed rule, a jury may (1) presume damage to reputation, (2) award an essentially unreviewable amount for that presumed damage to reputation,³ and then upon a finding of statutory malice, (3) punish the speaker double that presumed amount in exemplary damages. This is not how the Legislature intended its cap on noneconomic damages to be applied.

B. TDSL’s interpretation disregards the substance of a definition in favor of an assumption that a list of examples in the statute is exclusive.

1. A nonexclusive, partial listing of examples of nonpecuniary damages does not transform all omitted types of damage measures into economic damages.

TDSL argues that because reputation damages are not explicitly excluded from the statute’s definition of economic damages, as some examples of noneconomic damages are, reputation damages are economic damages for

³ For a discussion of the court of appeals’ inadequate review of TDSL’s legally insufficient evidence of the \$5 million award for reputation damages, see section I.B.3. of Waste Management’s Brief on the Merits, pp. 23-25.

purposes of calculating the statutory cap. *See* TDSL Br. 9-10, 18-20 (“The language of the definitional statute shows the Legislature’s intent to exclude only a particular, narrowly defined category of damages”). TDSL’s argument assumes that the Texas Legislature intended the list of excluded damages to be (1) exhaustive and (2) controlling over the definition of “pecuniary.” The court of appeals correctly rejected this argument, concluding that “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.” *Waste Mgmt. of Tex., Inc. v. Texas Disposal Sys. Landfill, Inc.*, No. 03-10-00826-CV, 2012 WL 1810215, at *28 (Tex. App.—Austin May 18, 2012, pet. filed) (citing TEX. GOV’T CODE § 311.005(13) (“‘[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”)); *compare* former TEX. CIV. PRAC. & REM. CODE § 41.001(4) *with* TEX. CIV. PRAC. & REM. CODE § 41.001(11). If the list was exhaustive, as TDSL’s argument requires, then “loss of enjoyment of life” would similarly have been pecuniary prior to 2003, even though it is not monetary in nature. Instead, the list merely enumerated selected examples of nonpecuniary losses.

The partial list cannot be read to trump the Legislature’s definition:

“‘Economic damages’ means compensatory damages for pecuniary loss.” *See* former TEX. CIV. PRAC. & REM. CODE § 41.001(4). As this Court has explained: “Language in a statute is presumed to have been selected and used with care, and every word or phrase in a statute is presumed to have been intentionally used with a meaning and purpose.” *State v. K.E.W.*, 315 S.W.3d 16, 21 (Tex. 2010). By selecting the word “pecuniary,” the Legislature is presumed to have intended that economic damages be limited to those that are monetary in nature. *See St. Joseph Hosp.*, 94 S.W.3d at 531. Because lost reputation cannot be considered an economic damage without ignoring that definition, TDSL’s reading of the statute cannot be correct.

2. The Legislature’s inclusion of additional examples of noneconomic damages in the 2003 amendments to Chapter 41 does not mean that all measures not listed in the 1995 version were economic damages.

TDSL argues that, under the version of the Texas Civil Practice and Remedies Code applicable to this case, lost reputation damages must have been economic damages because of the Legislature’s subsequent amendments in 2003. *See* TDSL Br. 18 (“The 2003 amendment worked a substantive change to the statute, and for the *first time* included ‘injury to reputation’ in the category of ‘noneconomic damages.’”). A presumption that the law changes—rather than clarifies—exists only when “the later legislation differs significantly from existing

law.” *Williamson Pointe Venture v. City of Austin*, 912 S.W.2d 340, 345 (Tex. App.—Austin 1995, no pet.).

The 2003 amendments made no significant change in the definition of “economic damages”; the prior definition was “compensatory damages for pecuniary loss,” while the subsequent definition is “compensatory damages intended to compensate a claimant for actual economic or pecuniary loss; the term does not include exemplary damages or noneconomic damages.” *Compare* former TEX. CIV. PRAC. & REM. CODE § 41.001(4) *with* TEX. CIV. PRAC. & REM. CODE § 41.001(4). The term “pecuniary loss” has thus maintained the same meaning it had under the common law. *See St. Joseph Hosp.*, 94 S.W.3d at 531.

The 2003 Legislature added a separate definition of noneconomic damages:

Prior to 2003	As amended in 2003
[T]he term [economic damages] does not include exemplary damages or damages for	“Noneconomic damages” means damages awarded for the purpose of compensating a claimant for
physical pain and	physical pain and suffering,
mental anguish,	mental or emotional pain or anguish,
loss of consortium,	loss of consortium,
disfigurement,	disfigurement,
physical impairment,	physical impairment,
or loss of companionship and society.	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.

Compare former TEX. CIV. PRAC. & REM. CODE § 41.001(4) *with* TEX. CIV. PRAC. & REM. CODE § 41.001(12). While the list was made more thorough and its non-exhaustive nature made express, its substance did not significantly change. *See* TEX. CIV. PRAC. & REM. CODE § 41.001(11) (including the phrase “all other nonpecuniary losses of any kind” to forestall the argument made by TDSL).

C. The larger exemplary damages cap for economic damages should be applied only to the \$450,492.03 in pecuniary losses that the jury awarded TDSL.

At trial, TDSL presented evidence of “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.” *Waste Mgmt. of Tex., Inc.*, 2012 WL 1810215, at *28.⁴ From this evidence, TDSL argued to the jury that the publication of the Action Alert caused \$1,025,958.00 in lost profits and \$1,174,869.03 in other expenses. In response to Question No. 5, the jury awarded \$0 for lost profits and \$450,492.03 for other remediation expenses proximately caused by the publication of the Action Alert. CR 51. This question did not include any other elements of damages; it did

⁴ At trial, TDSL claimed the following lost profits and expenses: \$450,592.03 in consultant and attorney expenses, \$747,277.00 for the value of TDSL employees’ time, \$721,058.00 for estimated lost profits, and \$304,900.61 for equipment carrying costs and depreciations expenses. *Waste Mgmt. of Tex., Inc.*, 2012 WL 1810215, at *28.

not ask the jury for an amount for damages to TDSL's reputation.

In Question No. 7, after instructing the jury that "damage to reputation may be presumed; no evidence is required of damages," the jury was charged to provide a dollar amount for "damage to reputation in the past." CR 53. This is how TDSL summarized the "evidence" on damage to its reputation in final argument:

Question 7 then asks you about damage to reputation. And on Question 7, it asks you for that hard-to-quantify reputation. When somebody has spent years building it and then has this attack and then has to spend years to try to restore it, what is the value you'd rather have than having that injury. That is your question to answer.

I asked Mr. Gregory, If they look to you for guidance, what number would you say? He said the number 10 million dollars, and told you his reasons why. He told you things he did to try to restore reputation. He built Pavilion and other improvements to bring charities, people, folks out to his landsite—no dollars to him for that—to try to get more and more people to know that you can be downwind from a landfill and find a pleasant experience.

Because this is a remarkable place. His reputation that he has worked to restore, you decide what is the cost of that reputation, what is the damage.

11 RR 36-37.

The jury awarded \$5 million.

The court of appeals concluded that the type of damage TDSL sought and

that the jury awarded in response to Question No. 7 was “for the nonmonetary—i.e., non-economic—injury to its reputation.” *Waste Mgmt. of Tex., Inc.*, 2012 WL 1810215, at *29. The court of appeals explained:

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., noneconomic 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.

Id. Thus, this Court can resolve TDSL’s cross-petition by deciding whether corporations can, in fact, suffer non-pecuniary damage to reputation—that is, damage that cannot be quantified in future lost profits or value of the corporation’s stock, for example. Here, the only arguable “evidence” TDSL presented did not demonstrate a pecuniary, economic damage to its reputation. The jury compensated TDSL for the pecuniary losses it determined the evidence showed that TDSL suffered and then awarded TDSL \$5 million for reputation damage without regard to evidence showing a pecuniary loss. To the extent TDSL is entitled to compensation for reputation damage at all, its loss was noneconomic.

The court of appeals applied a more realistic and accurate definition of “pecuniary” based on the plain language of the punitive damage statute—“whether

the award compensates Texas Disposal for a monetary loss or, by negative implication, a non-monetary loss.” *Waste Mgmt. of Tex., Inc.*, 2012 WL 1810215, at *29 n.13. TDSL argues that the court of appeals’ definition is too narrow because it would exclude future lost profits because they are not direct or readily measurable. TDSL Br. 17. To the contrary, Texas law not only recognizes that lost profits *can* be measured, but *requires* them to be:

The amount of the loss must be shown by competent evidence with reasonable certainty. What constitutes reasonably certain evidence of lost profits is a fact intensive determination. As a minimum, opinions or estimates of lost profits must be based on objective facts, figures, or data from which the amount of lost profits can be ascertained.

Holt Atherton Indus., Inc. v. Heine, 835 S.W.2d 80, 84 (Tex. 1992) (citations omitted); *see also Tex. Instruments, Inc. v. Teletron Energy Mgmt., Inc.*, 877 S.W.2d 276, 279 (Tex. 1994). Had TDSL been able to prove damages caused by lost reputation with the certainty required of lost profits, then the court of appeals likely would have considered the damages pecuniary. Instead, TDSL presented no evidence other than the unsupported belief of owner Bob Gregory that his company’s value could have been \$10 million greater if the Action Alert had never issued.⁵

⁵ TDSL refers to an exhibit prepared by Mr. Gregory, summarizing TDSL’s damages: “It included out-of-pocket damages for sums paid to outside consultants who were hired to counteract the negative effects of Waste Management’s Action

Conclusion & Prayer

Both the punitive-damage and defamation questions in this case can be resolved by this Court's recognition that corporations cannot recover for the same psychic injuries that only people can suffer. Thus, corporations should not be able to recover general damages for defamation per se. Instead, because corporations suffer only economic damages, they should be able—and required—to prove their damages by competent evidence with reasonable certainty.

The issue raised in TDSL's cross-petition should be moot, because corporations cannot suffer noneconomic, psychic damages and thus the lower punitive damage should not apply to a corporate defendant. If this Court decides to permit corporations to recover noneconomic damages, then the court of appeals correctly held that those corporate noneconomic damages should be capped in the same manner as personal noneconomic damages.

Alert; carrying costs for equipment incurred due to the delay in the San Antonio Starcrest contract caused by the Action Alert; and the value of time spent by Texas Disposal's staff in combating the Action Alert." TDSL Br. 21. TDSL also described Gregory's testimony that "the company's 'base business'—revenue from clients other than the cities of San Antonio and Austin—decreased or did not keep pace with market growth after the Action Alert." *Id.* However, that evidence did not go to lost reputation—it went to expenses (for which the jury awarded \$450,000) and lost profits (for which the jury awarded \$0). TDSL also identified as evidence of pecuniary reputation damage Gregory's testimony that but for the Action Alert, "the value of our business could be worth easily \$10 million more." *Id.*

Accordingly, Waste Management urges this Court to grant review, affirm the court of appeals' judgment on the issue raised in TDLS's cross-petition, and award Waste Management the relief requested in its Brief on the Merits.

Respectfully submitted,

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

On June 26, 2013, a copy of this Response was served on counsel for all
parties by electronic service.

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