No. 09-0199

In the Supreme Court of Texas

CONEX INTERNATIONAL CORPORATION

Petitioner,

v.

FLUOR ENTERPRISES, INC. F/K/A FLUOR DANIEL, INC.
AND LESLIE ANTALFFY

Respondents.

On Petition for Review from the
Ninth Court of Appeals
09-07-00100-CV

CONEX'S BRIEF ON THE MERITS AS PETITIONER

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STATEMENT OF THE CASE

Nature of the case:	This is a commercial and business-torts dispute. Conex sued Fluor and its project manager, Les Antalffy, for tortious interference and business disparagement after Fluor became involved in a 2001 turnaround construction project at the Atofina Refinery in Port Arthur.
Trial Court:	60th Judicial District Court, Jefferson County; (Honorable Gary Sanderson, presiding)
Trial Court's Disposition:	Rendered judgment for Conex, on the verdict. The jury deliberated for approximately three days, and it returned a verdict for Conex, finding: Liability: (1) Fluor and Antalffy intentionally interfered with the contract between Conex and Fina, causing damage to Conex; (2) Fluor and Antalffy disparaged Conex's business; (3) Fluor and Antalffy intentionally interfered with prospective business relations between Conex and Fina and such conduct was independently tortious because of fraud and business disparagement; and (4) by clear and convincing evidence, the injury to Conex resulted from a specific intent to cause substantial injury to Conex on the part of Fluor. Damages: (1) $1.8 million in past contract damages; (2) $8.5 million in past lost profits; (3) $8.5 million in future lost profits; and (4) $50 million for lost profits related to the Atofina Deep Conversion Project. In addition to these actual damages, the jury awarded a total of $30 million in punitive damages. CR 496-519; Tab A.
Court of Appeals Opinion:	Ninth Court of Appeals, Beaumont; (McKeithen, C.J., and Kreger, J., author – majority) (Gaultney, J., dissenting) *Fluor Enters., Inc. v. Conex Int'l Corp.*, 273 S.W.3d 426 (Tex. App.—Beaumont 2008, pet. filed) (No. 09-07-100-CV); Tab B.

Court of Appeals' Disposition:	Reversed and remanded for a new trial, on factual sufficiency grounds. Charles Kreger, J., joined by McKeithen, C.J., held: (1) the evidence was factually insufficient to establish liability on the business disparagement claim; (2) the evidence was factually insufficient to establish liability on the tortious interference claim; and (3) there was at least some evidence of causation and of Conex's actual damages. Consequently, remand for a new trial was required. 273 S.W.3d at 447-488. David Gaultney, J., dissenting, concluded: (1) the evidence was legally and factually sufficient to support the business disparagement claim, and (2) the evidence was legally and factually sufficient to support the $1.8 million award of contract damages.
Parties on Appeal:	*Respondents/Appellants:* Fluor Enterprises, Inc. f/k/a Fluor Daniel, Inc. and Leslie Antalffy *Petitioner/Appellee:* Conex International Corp.

STATEMENT OF JURISDICTION

The Court has jurisdiction because this case involves legal errors of such importance to the jurisprudence of the state that they require correction by this Court. *See* TEX. GOV'T CODE ANN. § 22.001(a)(6) (Vernon 2004).

The Supreme Court also has jurisdiction because the justices of the court of appeals disagreed on a question of law material to the decision. *See* TEX. GOV'T CODE ANN. § 22.001(a)(1) (Vernon 2004).

ISSUES PRESENTED

1. Did the court of appeals correctly apply the factual sufficiency standard of review?
2. Did the court of appeals properly review the evidence as measured by the standards set forth in the trial court's charge to the jury?
3. Does the record support the jury's verdict?
4. Has the court of appeals erred in remanding this case for a new trial when the record fully supports the verdict?

STATEMENT OF FACTS

Conex International Corporation. Conex is a licensed refinery-construction company headquartered in Beaumont. It does business in several states, including Louisiana, Oklahoma, Mississippi, Tennessee, New Mexico, Utah, California, Washington, Texas, and Hawaii. RR 4:118. It has worked in Canada. *Id.* at 32-33. Beginning operations in 1984, RR 19:30, by 1988 it was a $35 million-a-year company. *Id.* From 2004 to 2005, its revenue doubled to $120 million. *Id.*; RR 20:53. In 2006, its revenues were $150 million. RR 19:15. Conex has no debt, and its payroll approaches $40 million per year. RR 29:90. It employs more people in a given year than any of the refiners, and it has 12,000 people on its hiring list. RR 19:32. Its customers include Atofina, Motiva, Huntsman, ExxonMobil, and Valero, RR 5:98. Conex routinely performs construction work for all these major and mid-major oil companies, including refinery turnarounds. A turnaround is a planned shut-down of a plant, involving as many as 200,000 man-hours of work, that has to be completed in a few weeks. RR 4:74. Conex has *never* failed to finish a turnaround successfully. RR 4:75.

Conex's founder is John Duplissey, whose life reads like a Horatio Alger story. After an honorable discharge from the Army, he got a job at the petrochemical plant that would become the Atofina refinery. RR 19:16-17. Duplissey worked as an errand boy, then a timekeeper, and he began watching refinery workers do their jobs. RR 19:17-20. A student of the workers and their tasks, he kept records of various activities and how long they took, and he "basically built a manual of [labor/man-hour] estimating units." *Id.* Those records are still in use at Conex today. *Id.*

Fluor Enterprises, Inc. Fluor Enterprises is a national engineering and construction company. Fluor claims to provide "the entire package of work for an owner." RR 27:9. Its competitors include companies that do all sorts of work, including construction. RR 27:10-11; 23:14-15. While it denied being a competitor of Conex, Fluor admitted that it does turnarounds and refinery construction work, just as Conex does. RR 17:77; 23:14-15. Fluor also has a wholly-owned construction subsidiary called P2S. RR 27:22. The vice president of Fluor admitted that P2S and Conex would be competitors of each other. RR 27:24. After disparaging Conex, Fluor was hired to oversee construction of a new coker and hydrocracking unit at the Fina refinery with a contract price of over $1 billion. RR 27:15-16.

Conex's Relationship with Fina. The first job Conex obtained after its founding was at Fina's Port Arthur refinery. RR 19:30. Until 2001, Conex and Fina enjoyed a longstanding 20-year relationship, with Conex performing an average of 65 to 75 percent of the contractor work at the refinery. RR 5:95, 97. Fina praised Conex's reputation and its work, including Conex's efforts during the February 2000 turnaround:

> I would like to express our appreciation for the job that Conex performed during our turnarounds. The job went extremely smooth . . . . Your experienced supervision has always given Conex an edge on your competitors . . . .
>
> *Our plant manager stated that he thought that this was the best turnaround he had ever been associated with in his career.* The turnaround completed within the schedule and budget constraints and we appreciate your efforts to make that possible. We are looking forward to working with your group in the future.

PX4 (emphasis added). On July 6, 2001, shortly before work began on the 2001 turnaround, and after Conex signed the construction contract for that work, Fina wrote to Conex stating "I have taken the liberty of recommending Conex to several of our neighboring petrochemical sites . . . ." PX5. Fina's home office in France confirmed, on September 18, 2001, that Conex had a good reputation in the industry. PX44; RR 13:19.

The Conex-Fina relationship was a good one, but it admittedly experienced the ups and downs typical of fast-paced construction work. For example, at one point, there was a minor safety infraction by one Conex employee, and Fina's John Carrens ordered as many as 50 Conex employees out of the plant without pay to "teach" them a lesson. RR 20:73. Conex's John Duplissey did not like having Conex employees sent home without pay, and he went to the refinery to talk to Carrens. RR 20: 74. He said, "If you want to teach somebody a lesson . . . . [j]ust charge me $1,000 or $10,000. I'll bite my lip and I'll take it. But don't you take food out of [my] employees' mouths." *Id.* Later, Duplissey apologized for saying that Carrens' unilateral stand-down order, was "stupid." *Id.* Even so, Carrens put Conex on the bid list for the next turnaround and expansion work even after these words tested the relationship. RR 20:75. To John Duplissey, the spat had ended and Conex and Fina continued working together.

Fluor Shows Up and Spoils the Relationship. John Duplissey explained how the relationship with Fina changed for the worse when Fluor showed up on the 2001 turnaround. The next time Fina and Conex disagreed, there was another party involved—a third party named Fluor. RR 20:5. As John Duplissey explained:

> That customer [Fina] was taken away from me. It would be about like [having] my wife taken away from me by some third party just because her and I had a little spat . . . . But I've never had a third party come between us and tell her that I was a big, dumb idiot and that she'd do a lot better if she allowed that guy into her life instead of me. I never had that problem [before]. I had that problem on this [2001 turnaround] job.

RR 20:5. He further explained, "I've got to get . . . my reputation back." *Id.*

The 2001 Turnaround and Post Weld Heat Treatment. On June 14, 2001, Conex's President signed a contract for $13,843,888.00 to perform the 2001 turnaround at the Atofina refinery. PX9 at 2. The contract involved a combination of new construction and turnaround work to upgrade the fluid catalyst cracking unit, the FCCU. PX9 at TOT 0203. The contract required welding work and mentioned general standards for stress-relieving the welds, called post-weld heat treatment (PWHT), although "there were no detailed procedures for post weld heat treat." RR 17:22. After a series of clarifying emails initiated by Conex, RR 4:128-3; PX 61, Fina's lead engineer, John Walls, agreed the standards for PWHT incorporated into the contract permitted local, or spot, stress relief. RR 17:22; PX10 at TOT 152-53. The Conex clarification in the contract specified spot stress relief. RR 4:152-53; PX 9. Such spot stress relief was standard in the industry and had been used by Conex safely and successfully at the Port Arthur refinery for many years: "This was a straightforward application of conventional post weld heat treatment." RR 6:32; *see also* RR 6:68, 83-84; 7:18. Consequently, the agreed-upon price for PWHT work—bid by Conex and accepted by Fina—was only $63,000. RR 4:94. After Fluor interjected itself, the price tag for stress-relieving work skyrocketed from $63,000 to almost $2.1 million. RR 5:120; 4:94, 129.

Fluor's Post Weld Heat Treatment Procedures. Fluor was hired during the 2001 turnaround to provide one piece of engineering advice—about welding a newly manufactured reactor head to its old shell. RR 23:60-61. Before meeting with Fluor, Fina had no concerns at all about any of Conex's PWHT procedures, and Fina never had criticized any PWHT procedure used by Conex. RR 5:34. However, once it was at the Fina plant, Fluor "cautioned" Fina that *all* heat-treatments of *all* welded attachments on the reactor and the tower needed to be evaluated under WRC-452 and verified by finite element analysis, and Fluor made itself "available" to do this work. PX15; RR 23:63-64.

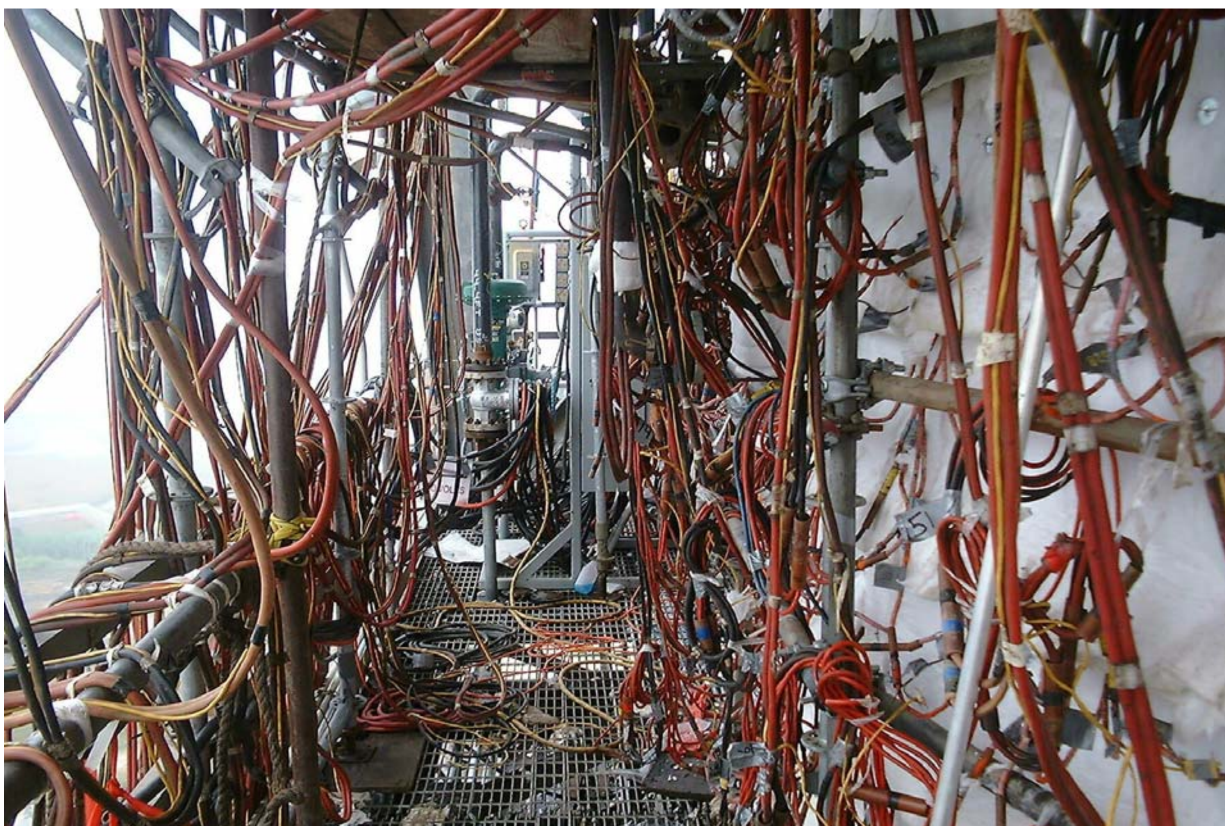
The first day of work on the 2001 turnaround was September 17, RR 4:83, and the job was supposed to last 22 days. RR 4:151. On the third day, Fina held a meeting to discuss certain welding procedures. PX15. Representatives from Fluor were there. RR 23:60-64. Fluor's representatives handed over a document they called "the recognized document in the industry . . . ." *Id.* But Fluor's document was merely an excerpt from a draft Welding Research Council paper called WRC-452. It was only a draft, faxed by the authors to Fluor before its publication. *Id.*; RR 13:31. Fluor represented that the paper "recommended practices for local heating of welds in pressure vessels." *Id.* Fina accepted Fluor's representations and instituted PWHT procedures using the draft of WRC-452. Upon handing down those procedures, Fina's John Walls wrote that he was issuing "the Fluor guidelines." PX16. He was Fluor's "messenger boy." RR 5:115. His notes and emails state: "Send Plan to Fluor for final review;" "Fluor confirmed PWHT requirement/suitability;" "Fluor advised;" "Fluor to confirm same criteria for [reactor]—quick look says yes;" and "Fluor to review PWHT'd clips . . . ." PX43; RR 10:106.

Fluor's PWHT Procedures Become "Insane." A Fluor engineer named George Miller became involved in developing the PWHT procedures imposed on Conex. Miller claimed to have developed the procedures from computer evaluations known as finite element analysis (FEA). RR 25:27-29, 36. But Miller confessed his FEA was drastically wrong, because the time factor was incorrect. "In that analysis, the time dependency was minutes. I input the thermal conductivity in hours. So, the conductivity was off by a factor of 60, from minutes to hours." RR 25:43. This meant the model for PWHT was off by as much as 212 percent. RR 8:94-95. "[I]t is 60 times wrong." RR 8:92. There were other significant problems with Miller's analysis, but Fluor did not admit any error to Fina. RR 8:88. Fina's John Carrens was never told. RR 13:66, 68.

According to Miller, he "extrapolated" from his incorrect FEA on one vessel's welds to a different vessel. RR 6:70-71; 9:15-16; 25:55-56; 28:71-73, 80. This resulted in "spot" PWHT sites so large they overlapped each other. RR 12:51-52. Miller smoothed out the overlapping circles so that when drawn, the configuration looked like a "racetrack." *Id.*; PX8's Tab C. Fluor's racetrack design, used to PWHT just four small nozzles on each side of the vessel, RR 4:122, became giant: some 20 feet (244 inches) tall, wrapping around the 68-foot circumference of the vessel. *Id.*; RR 4:126. By Fluor's calculations, almost 1400 square feet of surface area needed to be heated at once, significantly multiplying the resources needed. *Id.* Although WRC-452 itself says you cannot use the analysis from one FEA and apply it to another weld, RR 9:16, Miller admitted that he did no calculations and no analysis specifically for the racetracks. RR 6:70-71; 9:15-16; 25:55-56; 28:71-73, 80.

Fluor's racetrack PWHT design was not typical. It is not how nozzles are welded and stress-relieved in a spot PWHT configuration. RR 4:122-23. Consequently, Fina's John Walls found it necessary to explain the immensity of the job to his management. Speaking of eight small nozzles on a single vessel, Walls reported that "the scope of this Pt Arthur FCCU field PWHT is world scale in Fluor's opinion." PX24; RR 17:52. Despite its numerous prior turnarounds, Fina had never had a PWHT job of this size before, and in all its years working there, Conex never had a job like this one. RR 4:112. Stating the obvious, Conex's President said he had "never seen anything like this before in [his] life." RR 4:111. Nothing before the 2001 turnaround or since looked remotely close. RR 4:118. Conex was never asked, before this job, to provide documentation of procedures regarding PWHT. RR 4:84. Such a procedure had never been used at any of Conex's other customers (including Motiva, Valero, and Huntsman), and the procedure called for by Fluor was labeled "insane." RR 5:124; 7:80. There were so many cables that the scaffolds started to collapse and had to be strengthened. RR 5:124-25. It was a tangled mess, shown in Plaintiff's trial exhibit 66 on the next page, and Conex became the scapegoat for this unprecedented work.

What followed was a fight about whether this PWHT work was within the contract's scope, and whether Conex's alleged incompetence led to doing such a large and extensive heat treatment. Fluor's procedure called the racetracks a "local" or spot PWHT. RR 10:113-14. When Fina treated the racetracks as locals, RR 4:127-28, Fina did not want to pay for the costs associated with the racetracks. RR 10:111.



55 R-101 North Nozzles [PX66; Tab E]

Fluor Maligns Conex's Work. Conex was not aware of the draft WRC-452, the supposed "recognized document in the industry" according to Fluor. PX15; RR 4:132. After the September 19 PWHT meeting, Fina lumped Conex together with contractors who "just slap up the high temp bands and call it done without checking it out." PX15. Later, on October 22, Fluor again tore into Conex's work and wrote in emails to Fina that Conex's original PWHT had been performed "in such a fashion that it created very high residual stresses in a concentrated area." PX37. Fluor's George Miller, the math wiz and source of the botched FEA, cited two alleged "problems" with Conex's PWHT procedure. *Id.* He told Fluor he had "found that there were very high residual stresses," which Fluor's Terry Phillips allegedly confirmed "would likely lead to loss of creep life." *Id.*

On October 24, in the wake of the comments about Conex causing supposed "residual stresses" and problems with "loss of creep life," Fina's Walls turned to Fluor's Miller for an explanation of the "PWHT guidelines" with the intent "to make sure my management understands why we are doing this [world-scale $2.1 million procedure.]" PX24. Miller responded to Fina with the purported "science" in PWHT. PX24-25. Miller's comments included references to constructors who should be expected to "keep up with the technical requirements and developments." *Id.* Such contractors were criticized because they "may have ignored the evaluation requirement because it was difficult to do." *Id.* If not evaluated, the contractor might "create a problem," and could "walk away" as Conex had done after the PWHT on the AE nozzle, and think it "did a successful job when you actually didn't." *Id.* When asked whether any of these comments about Conex's procedures for PWHT was misquoted, Les Antalffy emphatically endorsed them, writing back that John Walls's email "hit the nail on the head. Your response was exactly correct." PX26.

Fluor's Disparaging Statements Are False. Fluor's George Miller convinced Fina that Fluor had done "a FEA and found that there were very high residual stresses [caused by Conex], primarily concentrated in a small area . . . ." PX37. Fluor made this accusation even though standard hardness tests had been performed following Conex's PWHT procedures, and those tests demonstrated good results with proper stress relief. RR 20:71; 8:45; 12:62. Fluor ignored these test results when disparaging Conex to Fina even though Fluor's director of metallurgy and Fluor's lead corporate welding engineer admitted that these hardness tests were a proper way to determine "whether the heat treat

has been done right or not" and that these hardness tests were utilized by Fluor to approve PWHT procedures performed by subcontractors for Fluor. RR 17:78, 85.

Contrary to Terry Phillips' statement that Conex's work would "likely" lead to a potentially catastrophic loss of creep life, and therefore jeopardize the refinery, neither he nor any Fluor personnel did anything to confirm or investigate that allegation. RR 6:47, 51-52; 17:86-87. Phillips left town "before we really finished knowing what the results of some of the possibilities we suggested . . . were," and he took no action to confirm the damaging allegations made against Conex's stress-relief work. 17:86-87. In short, Fluor's allegations were baseless; it had done nothing to know whether Conex's procedure had caused "loss of creep life." *Id.* Nonetheless, Fluor's project manager, Antalffy, reiterated to Fina that these comments were "exactly correct." PX26.

Conex's experts debunked Fluor's assertion that its analytical errors were innocent mistakes. "That's misrepresentation. It's not an error. It's not a mistake." RR 9:36-37. Despite Fluor's assertions that Conex's PWHT had caused "loss of creep life" and "high residual stresses," there never were any residual stresses. "So, for somebody to say that Conex was going to do something that would create a future risk of cracking when they were following the code procedures is not correct; and it's just saying something that's not true." RR 6:38-39, 88. The whole idea that Conex would have caused creep or that the vessel would crack because of Conex's PWHT is "nonsense." RR 6:47-48. Creep is not caused by residual welding stress. RR 6:52. Moreover, an authorized code inspector was called to look at Conex's procedures. He determined they were within all tolerances specified by applicable codes, and the reactor has been running safely ever since. RR

5:30-31. The Conex PWHT procedures met code requirements and passed inspection. RR 12:62; 8:44-45; 20:71. It was unnecessary, in any way shape or form, for Fluor to insist that Conex apply WRC-452 in its PWHT procedures for Fina. RR 6:32. In fact, Fluor did not follow WRC-452 in giving advice to Fina. RR 6:37. Until Fluor showed up, there was no concern or criticism of any Conex PWHT procedure. RR 5:34-35.

Fluor's Statements Cause Fina to Lose Confidence in Conex. Fluor's litany of misrepresentations about Conex's construction work had its intended effect on Fina. Fina's John Carrens' understood Fluor's remarks to mean "there could be a high potential for catastrophic loss if there is a failure due to inadequate repairs." RR 13:8. Assuming Fluor's lies to be true, Carrens testified that he did not want contractors like that to work at the refinery—Carrens will not hire a contractor that "use[es] procedures which create very high residual stresses in [a] highly concentrated configuration." RR 14:5. Carrens relied on the correctness of Fluor's engineering analysis and said he "would like to know if there were errors made, but [he had] not been notified [of Fluor's admitted errors]." RR 13:68. According to Carrens, "as we consulted with Fluor," the Conex PWHT procedures were "not adequate." RR 14:10. Carrens agreed that words in the emails about failing to check work imply a lack of safety. RR 13:8-9. Fluor's statements were intended to show Fina that it was not getting the backup it needed from Conex to show repairs were adequate. *Id.* at 11-12. Yet as Conex told its PWHT subcontractor, AmeriTek, Conex *did* guarantee its work for Fina, as it had been doing "for the last 20 years." RR 10:114. One factor in Fina's refusal to hire Conex again was Conex's requested change orders, seeking what Carrens deemed was "excessive" payment for

extra PWHT work. RR 14:84-86. Although not the "sole factor," the "stress relieving issues" are a factor in Conex's failure to secure more work from Fina. RR 14:86. Fluor never told Fina's Carrens anything about the serious miscalculations in Fluor's evaluations of Conex's work, or that "what [Fluor] did is just absurd." RR 6:37; 13:66, 68.

Compared to its historical averages, Conex now gets very little of Fina's work. Instead of about 65 to 75 percent of the work, Conex today obtains around nine percent. RR 5:95. In getting that much work, Conex is invited to bid on only about half as many Fina jobs. RR 11:13. This decrease in Conex's work at Fina has not happened at other customer's refineries. RR 5:98; *see also* PX18, 21a. Fina is the only customer with a drop-off in work given to Conex since 2001. Work at other refineries has "been trending up." RR 11:85; 20:17 ("Our work is increasing in the other plants."). Conex does 95 percent of Motiva's work, and 50 percent of Valero's work. RR 5:98. Conex is working on a refinery expansion at the Motiva plant worth about $1 billion. RR 11:80; 20:22.

Conex Quantifies Its Lost Fina Work. Conex was an established business making a profit when Fluor disparaged Conex and interfered with its contract. RR 19:15, 30. It had been a profitable company for nearly two decades, and it had been working profitably for Fina since at least 1988. RR 5:95, 97; 19:30. Even after Fluor defamed Conex and interfered with Conex's relationship with Fina, Conex continued to be a profitable company. RR 20:46-50. John Duplissey, Conex's founder, and Jimmy Duplissey, Conex's President, produced the company's business records that detailed Conex's work at the Fina plant between 1991 and 2001—the decade preceding Fluor's tortious conduct. *See* RR 5:86-87, 91-92; PX18, 28; RR 20:10, 12. All revenues

received and the total costs associated with every contract were identified, together with every corresponding profit margin. *Id.* Even without the additional Fina work, Conex does "more than enough work already to pay the overhead." RR 20:50. Conex is "already paying [its] overhead and making profit." *Id.*

John Duplissey explained that between 1994 and 2001, Conex's average annual revenues on Fina work were $7.5 million, with average annual costs of $5.85 million, and average annual profits of about $1.65 million. RR 20:14-15; PX28. Following Fluor's disparagement and interference, in the period from 2001 through 2006, Conex's average annual revenues from Fina dropped to only $1.1 million, with annual profits averaging $300,000. RR 20:16-18. The math was simple. On average, Conex's lost profits on Fina work totaled $1.35 million per year. RR 20:19-20.

After Maligning Conex, Fluor Wins the DCP Refinery-Expansion Project. Instead of using Conex as its preferred contractor, Fina awarded Fluor "the contract to engineer, procure, and *construct*" the Deep Conversion Project (DCP). RR 11:21 (emphasis added). John Carrens explained that "TOTAL, as well as all other oil companies, know that the lighter, sweeter crude is not available and that if you want to stay in business you will have to make some investments somewhere." RR 15:55-56. The DCP in Jefferson County "is [a project] that will allow you to process heavier crudes and less expensive crudes." RR 15:56. Without it, the Port Arthur refinery cannot refine heavy crude. *Id*. Fina is the only local refinery now lacking the ability to refine heavy crude. RR 21:48. Motiva and Valero are both adding capacity to increase their ability to refine heavy crude. *Id*.

Before winning the DCP project for itself, Fluor advised Fina to take Conex off the invitee list for the DCP information meeting. RR 15:23; 18:46-47, 50-51. After Fluor blackballed Conex, Fina removed Conex from—but retained Fluor's P2S construction subsidiary on—the list of companies invited to an informational meeting on the DCP. RR 18:24-36; PX42, 48. Fluor took advantage of the 2001 turnaround as a perfect time to get rid of Conex. RR 5:43-44. Since the 2001 turnaround, Conex has bid on, but has not won contracts on any jobs engineered by Fluor at the Port Arthur refinery. RR 5:44; 5:107.

According to the press, "[Fina] will move forward with a $2.2 billion upgrade of its Port Arthur refinery despite an industry downturn . . . ." Brett Clanton, *Total Work Barrels Forward*, HOUSTON CHRONICLE, January 28, 2009 at D-1. Fina has publicly announced its intention to proceed with the DCP. PX82. Fina's project manager at the Port Arthur refinery, John Carrens, now works "full time" and "exclusively" on the DCP. RR 14:18, 24. In addition to Carrens, there are another 12 high-ranking Fina employees who are working full-time on the DCP in Jefferson County. RR 14:24. Additionally, 100 Fluor employees are working full-time on the DCP. A separate office complex devoted to the DCP has been constructed at the Port Arthur refinery. RR 15:26-27. Key Port Arthur refinery employees have transferred from their old positions to work full-time on the DCP. *See* RR 15:26-29. Their old positions have been filled. *Id.*

It is reasonably certain that TOTAL is going forward with the DCP, and it is also reasonably certain that Conex would have earned profits on DCP work. Conex has worked in every refinery in Jefferson County, and it continues to work in every refinery

save one—the Fina refinery. RR 19:35-36. Conex has done more capital work in the Jefferson County area than anyone else. RR 19:37. Just since 1993, Conex and its principals have been involved in the construction of 12 refinery units, "building them from the grassroots up or taking over units that . . . somebody else couldn't finish." RR 19:37. Moreover, Conex is working right now on Motiva's similar expansion project to add a second coker unit. RR 20:21. Conex's portion of the Motiva work amounts to over $1 billion. RR 11:80, 20:21-22. Conex has 200 people on the job right now and will grow to approximately 1000 people on the job over the course of four years. RR 20:40.

John Duplissey estimated the available construction work on the DCP would total only $425 million and that Conex's portion would amount to roughly $260 million. RR 20:28. That is only about a fourth the size of Conex's work on the similar Motiva expansion. *See* RR 20:21-22. Conex's profit on the DCP—over the course of four or five years—would be "somewhere in the neighborhood of $73 million." RR 20:29. Conex has the capacity to earn profits of $73 million on contracts of $260 million. RR 20:31. In 2006 alone, Conex's gross revenues were over $150 million. RR 19:15. Fluor's economist admitted Conex "is an extremely well run company." RR 30:71.

Justice Gaultney's Assessment of the Facts. Justice Gaultney characterized "[t]he Conex version of events, accepted by the jury, [as] straightforward." 273 S.W.3d at 449. He summarized the email statements that both maligned Conex and falsely accused it of doing work that would ruin plant equipment, causing a loss of design life. *Id*. Justice Gaultney realized that these "false statements" went far beyond simple mistakes; they were malicious. "Fluor had no privilege to maliciously make false

statements disparaging Conex . . . . Fluor crossed a line in maliciously and falsely attributing the need for the extra work to incompetence by Conex." *Id*. Justice Gaultney would have affirmed this much of the jury's verdict, because "[o]n this record, a reasonable jury could conclude that Fluor proceeded with reckless disregard for the truth in maligning Conex." *Id*. Further, Justice Gaultney did not have any trouble understanding the complicated record. Justice Gaultney, unlike Fluor, acknowledges that "[t]he jury heard the context in which statements were made, and the statements cannot be fully understood outside the somewhat complex circumstances." *Id*. at 450. Justice Gaultney's understanding of these facts speaks volumes about how the jury's liability finding is right.[1]

SUMMARY OF THE ARGUMENT

On the record presented, there is ample evidence of Fluor's business disparagement and tortious interference. Fluor destroyed Conex's longstanding and profitable business relationship with Fina as the preferred construction contractor at the Port Arthur Refinery. This is a model case of unfair competition, tried under mainstream legal theories approved by this Court, and the trial record shows how such claims can be proved. Conex's proof can be viewed in a setting that relates to a single customer (Fina); a discreet location (the Port Arthur refinery); and a 20-plus-year history of profitability that was abruptly halted.

[1] He only failed to go far enough—*first,* lost profits are economic losses and "specific damages" in a disparagement context, and *second*, fraud was pleaded as a basis to recover damages for interference with prospective business relations.

It is hard to understand why the justices on the court of appeals remanded the case for a new trial, even while the majority and dissenting justices reached consensus that the record supports the jury verdict. "The evidence is conflicting, and the jury is the judge of witness credibility. On this record, a reasonable jury could conclude that Fluor proceeded with reckless disregard for the truth in maligning Conex." *Fluor Enters., Inc. v. Conex Int'l Corp.*, 273 S.W.3d 426, 449 (Tex. App.—Beaumont 2008, pet. filed) (Gaultney, J., dissenting). "As to Fluor, there is some evidence in the record from which the jury could find that Fluor disparaged Conex in statements five through eight, and that Fluor acted with malice, . . . [but the evidence] is too weak to support the judgment . . . ." *See id.* at 440 (Kreger, J.). In short, there is evidence supporting the jury's verdict, which recognizes Fluor's motivation to take work away from Conex. The reversal of the verdict is not only incorrect—it is mystifying.

As Fluor itself argued in its unsolicited response filed at the petition phase, there is no sense in having another trial. Conex is entitled to have the jury's verdict affirmed. Yet, Conex faces a second two-month trial, likely to be followed by another round of appeals and years more of delay. In these uncertain economic times, an enviable local success story headquartered in Texas should not be subjected to a second expensive trial when the case already has been fully litigated and the record plainly reveals that Fluor disparaged Conex and intentionally interfered with Conex's contractual relations. Justice Gaultney agreed that Conex proved its disparagement case; the only question left open in his mind and in Fluor's contorted argument is how much damages that maligning conduct caused. The court of appeals' judgment should be reversed.

ARGUMENT

I. The Court of Appeals Improperly Reviewed the Record and Erred in Its Factual Sufficiency Review.

The jury's verdict is supported by sufficient evidence, and the court of appeals erred in concluding otherwise. While this Court must balance the right to trial by jury with its own fact-jurisdiction limits, *see Herbert v. Herbert*, 754 S.W.2d 141, 142 (Tex. 1988), an obligation exists to ensure the courts of appeals correctly apply the standards governing their review of the record. *See Dow Chem. Co. v. Francis,* 46 S.W.3d 237, 242 (Tex. 2001). Upon proper assignment of error, the court of appeals must consider the factual sufficiency of the evidence to support the jury's verdict. *In re King's Estate*, 150 Tex. 662, 665, 244 S.W.2d 660, 661 (1951). Yet it is equally well-settled that "the jury is the sole judge of the credibility of witnesses and the weight to be given to their testimony." *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003). Consequently, "[i]t is a familiar principle that in conducting a factual sufficiency review, a court must not merely substitute its judgment for that of the jury." *Id.* But the court of appeals did just that by ignoring the record and not paying attention to the standards of review.

The court of appeals can set aside a verdict on factual sufficiency grounds "only if the verdict is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust." *Dow Chem.*, 46 S.W.3d at 242; *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986). Moreover, "the court of appeals must 'detail the evidence relevant to the issue' and 'state in what regard the contrary evidence greatly outweighs the evidence in support of the verdict.'" *Dow Chem.*, 46 S.W.3d at 242.

The court of appeals failed to do any of this. The court failed to detail all of the evidence supporting the jury's findings. And the court of appeals failed to state in what regard the contrary evidence greatly outweighs the evidence in support of the verdict. Instead of conducting a proper factual sufficiency review, the majority overstepped its bounds, reweighed the evidence, and substituted its verdict for that of the jury.

More should be required before overturning a jury verdict. Although they were written in regard to new trial motions, the words of this Court's recent *Las Colinas* opinion apply to this case as well:

> [W]e believe that such a vague explanation in setting aside a jury verdict does not enhance respect for the judiciary or the rule of law, detracts from transparency we strive to achieve in our legal system, and does not sufficiently respect the reasonable expectations of parties and the public when a lawsuit is tried to a jury . . . . [T]he parties and public are entitled to an understandable, reasonably specific explanation why their expectations are frustrated by a jury verdict being disregarded or set aside, the trial process being nullified, and the case having to be retried.

In re Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P., 52 TEX. SUP. CT. J. 1016, ** (Tex. July 3, 2009). A court of appeals must do a better job of explaining itself when abolishing a jury verdict. Consequently, the court of appeals should be reversed.

A. The court of appeals ignored the jury charge as a guide in reviewing the evidence.

In the lower court, Fluor made a point of insisting that the jury charge precluded the result reached by the jury. Fluor argued that Conex was "stuck with the charge the court submitted." *See* Fluor Reply Br. 3. Yet Fluor too is "stuck with the charge the court submitted." The court of appeals did nothing to acknowledge the charge.

To overturn the disparagement verdict, Fluor had to overcome proof supporting each and every one of eight different statements—any one of which alone is a basis of liability for business disparagement. CR 500-501. But more than this, just *one* statement will support the verdict on tortious interference. CR 503-504. The record supports both disparagement and tortious interference under the legal standards in the jury charge. Conex alleged two separate and independent torts as support for its tortious interference claim: fraud and disparagement. Again, sufficient proof of either one of them should result in affirming the verdict of tortious interference.

B. Under the standards set forth in Question 2 of the jury charge, the record supports Fluor's liability for business disparagement.

The jury determined that Fluor's statements were defamatory by following a charge instruction. The instruction states:

> A statement is disparaging if it is defamatory. A statement is defamatory if the words tend to injure a person's reputation, exposing the person to public hatred, ridicule, or financial injury. A statement must be considered as a whole in light of surrounding circumstances based upon how a person of ordinary intelligence would perceive the entire statement. A statement although literally or substantially true, may be published in such a way that it creates a substantially false and defamatory impression by omitting material facts or juxtaposing facts in a misleading way.

CR 500. Based on this instruction, and the controlling case law, the jury's liability verdict should have been upheld because the statements are defamatory.

1. Fluor published false, disparaging statements about Conex.

"A business disparagement claim is similar in many respects to a defamation action. The two torts differ in that defamation actions chiefly serve to protect the personal reputation of an injured party, while a business disparagement claim protects

economic interests." *Forbes, Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 170 (Tex. 2003) (citing *Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762, 766 (Tex. 1987)). Defamation is an attack on "a person's reputation." TEX. CIV. PRAC. & REM. CODE ANN. § 73.001 (Vernon 2005); *Texas Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.*, 219 S.W.3d 563, 580-81 (Tex. App.—Austin 2007, pet. denied). A false statement is defamatory *per se* "if it injures a person in his office, profession, or occupation." *Texas Disposal Sys.*, 219 S.W.3d at 581; *Knox v. Taylor*, 992 S.W.2d 40, 50 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

Fluor's statements—and their context—"should be viewed 'not so much by [their] effect when subjected to the critical analysis of a mind trained in the law, but by the natural probable effect on the mind of the average reader.'" *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 114 (Tex. 2000). Moreover, courts are to "refrain from a hairsplitting analysis . . . to find an innocent meaning." *Id.* at 119. What the statements mean is a question for the jury: "[W]hen a publication is ambiguous or of a doubtful import, the jury must determine its meaning." *Id.* at 114.

In reviewing the statements that follow, we address only those statements (five through eight) the court of appeals deemed to have support in the evidence. Each one of the four statements was included in an October 22, 2001 email:

- **Statement 5** (from the 10/22/01 email), the "evaluation," that "Conex's procedure consisted of an 8 [inch] wide heat band with 2 [feet] of 2 [inch] thick insulation inside and outside, with a soak temp of 1350F for two hours, and heat/cool rates of 400F/hr. This created two problems – 1) it exceeded the documented extra PWHT time for the new nozzle (we had 1.5 hours at 1250F left per the test coupon – coupon no longer available) and 2) the impact of the procedure on the metal was unevaluated." PX37.

- **Statement 6** (from the same email), reporting as fact that George Miller "did a FEA and found that there were very high residual stresses, primarily concentrated in a small area just at and above the nozzle to elbow weld." *Id*.

- **Statement 7** (from the same email), quoting a Fluor employee: "Terry [Phillips] reviewed the issue and advised that the residual stresses would likely lead to loss of creep life." *Id*.

- **Statement 8** (from the same email), quoting two Fluor employees, that there were "residual stresses created by the first PWHT" performed by Conex. *Id.*

While finding "there is some evidence in the record from which the jury could find that Fluor disparaged Conex in statements five through eight, and that Fluor acted with malice," the court of appeals dismissively determined "the evidence supporting the jury's findings on those elements of Conex's business disparagement claim against Fluor is too weak to support the judgment and the verdict is clearly wrong and unjust." *Fluor Enters., Inc. v. Conex Int'l Corp*., 273 S.W.3d 426, 440 (Tex. App.—Beaumont 2008, pet. filed). The court of appeals' holding on factual sufficiency as to statements five through eight is incorrect and should be reversed. The record is replete with evidence that cannot be termed "weak." Such subjective terms have no place in proper factual-sufficiency review.

a. The words injure Conex's reputation, exposing it to public hatred, ridicule, or financial injury.

First, the statements made by Fluor tend to injure Conex's reputation for competence, exposing Conex to ridicule and financial injury. CR 500. Each statement attacks Conex's job performance, and its reputation to its customer, Fina. The email states as fact that Conex heat treated a weld "in the field," and it was done "in such a fashion that it created very high residual stresses in a concentrated area." PX37. It refers

specifically to "Conex's procedure," which the email states "created two problems." *Id*. After naming Fluor's George Miller as the source, the email references a finite element analysis accusing Conex's procedure of causing "very high residual stresses." *Id*. A Fluor metallurgist, Terry Phillips, allegedly "reviewed the issue and advised that the residual stresses would likely lead to loss of creep life." *Id*. Another (second) stress relief procedure, at a different temperature, would be needed to "relieve the residual stresses created by the first PWHT" performed by Conex. *Id*. In short, there remained "a strong concern about the highly concentrated configuration of the high residual stresses . . ." *Id*.

A statement is defamatory if it is "injurious to reputation." *Bentley v. Bunton*, 94 S.W.3d 561, 587 (Tex. 2002). In keeping with Texas law, the jury was instructed that "[a] statement is defamatory if the words tend to injure a person's reputation, exposing the person to public hatred, contempt, ridicule, or financial injury." CR 500. Whether the statement is capable of a defamatory meaning must be judged in light of this "reasonable person" standard. *Bentley*, 94 S.W.3d at 579. The jury's "perception of the statements" as defamatory should be given appropriate deference. "[W]hen a publication is ambiguous or of doubtful import, the jury must determine its meaning." *Turner v. KTRK Television*, *Inc*., 38 S.W.3d 103, 114 (Tex.2000).

As documented in the October 22 email, Fluor had already accused Conex of doing an improper PWHT on October 3, which supposedly caused residual stresses and a probable loss of creep life. PX37. Simply put, Conex was being accused of a lack of

knowledge and expertise that would damage Fina's equipment. It is difficult to imagine more disparaging remarks about a contractor in a petrochemical refinery.

Fina's John Carrens understood the import and context of these disparaging statements: He testified: "[A]s we consulted with Fluor," Conex's procedure was "not adequate." RR 14:10. Carrens' testimony also explains just how disparaging Fluor's remarks were: "there could be a high potential for catastrophic loss if there is a failure due to inadequate repairs." RR 13:8. Fluor's project manager, Antalffy, reiterated that all of these comments were "exactly correct." PX26.

Fluor cannot escape liability by claiming itself free to accuse Conex as "incompetent." Texas defamation law expressly rejects Fluor's argument. *Bentley*, 94 S.W.3d at 579-83. In *Bentley*, the defendant argued that calling the plaintiff "corrupt" was merely a statement of opinion; and the defendant identified lots of cases that hold that calling someone "corrupt" is a statement of opinion, not a statement of fact. *Id.* at 581-82 & n. 50-51. This Court rejected the defendant's absolutist approach and refused to hold that calling someone "corrupt" is always a protected statement of opinion. As the court explained: "While the word [corrupt] may be merely epithetic in the context of amorphous criticism, it may also be used as a statement of fact that can be proved true or false." *Id.* at 581-82. Thus, whether accusations are statements of fact or statements of opinion depends "on their verifiability and the context in which they were made." *Id.* at 583. Fluor's statements are false and defamatory in context.

Fluor made very specific, factual, and false allegations about the quality, professionalism, and competence of Conex's work. Fluor's statements that "there were

residual stresses created by the first PWHT performed by Conex" and that "Terry (Phillips) reviewed the issue and advised that the residual stresses would likely lead to loss of creep life" are not amorphous, abstract, or unverifiable. To the contrary, Fluor insisted that its statements were based on its investigation, computer modeling, and the metallurgical analysis. *See* PX37; *see also Bentley*, 94 S.W.3d at 585 ("The clear import of Bunton's statements on 'Q & A' was that Bentley was corrupt as a matter of verifiable fact, as Bunton continued to assert at trial."). These are not opinions, and "George and Les" never advised that there should be any correction made, or that they were misquoted. The "science" of PWHT is not a matter of opinion, but fact.

b. Considered as a whole in light of surrounding circumstances based on how a person of ordinary intelligence would perceive them, the statements hurt Conex's business.

Second, the statements "must be considered as a whole in light of surrounding circumstances based upon how a person of ordinary intelligence would perceive the entire statement." CR 500; *Forbes, Inc.*, 124 S.W.3d at 175. *Turner*, 38 S.W.3d at 114. The jury was not precluded from considering statements five through eight "in light of surrounding circumstances." *See* CR 500. To the contrary, the jury was instructed that it "must" consider the statements "in light of surrounding circumstances . . . ." *Id.* The defamatory effect of the statements should not be determined "based on an examination of each individual sentence . . . to see if each statement standing alone is defamatory," but on the whole context. *Wood v. Dawkins*, 85 S.W.3d 312, 317 (Tex. App.—Amarillo 2002, pet. denied). "It is well settled that the meaning of a publication, and thus whether

it is false and defamatory, depends on a reasonable person's perception of the entirety of a publication and not merely on individual statements." *Bentley*, 94 S.W.3d at 579.

The "surrounding circumstances" the jury was free to consider included Fluor's earlier statements "that the heat treat company . . . . has the responsibility to assure [Fina] that the spot [PWHT] procedure has been adequately investigated to insure proper thermal gradients are attained," PX15, that "you can't just slap up the high temp bands and call it done without checking it out," PX15, that "if not done properly, you can easily damage a piece of equipment by PWHTing it," PX24, that "Fluor is running into this issue more and more and they are trying to warn clients . . . of the consequences [of] improper PWHT procedures," PX22, that "[t]ypical defects with improper PWHT might include high local residual stresses (just what the PWHT is supposed to eliminate)" and that "the expectation is that . . . the constructors that use [heat-treat companies] would keep up with the technical requirements and developments in that industry and have the expertise to implement them [but u]unfortunately that is not always the case." PX24.

Fluor painted the picture of a world filled with dire consequences created by incompetent contractors utilizing substandard PWHT procedures. Fluor then painted Conex into that picture, falsely accusing Conex's already-performed PWHT on a refinery vessel of creating "very high residual stresses" that "would likely lead to loss of creep life." PX37; Tab D.

In analyzing the circumstances surrounding Fluor's statements, the jury was also free to consider just how grossly erroneous Fluor's purported "finite element analysis" was. The jury was free to consider that Conex's PWHT application had passed the

standard hardness test that Fluor itself utilized on construction projects. And the jury was free to consider that Fluor's metallurgist did nothing at all to support his accusation that "the residual stresses would likely lead to loss of creep life." Fluor's statements to Fina omitted these material facts, but the jury was free to consider them in determining the statements were defamatory. CR 500.

The "context" of Fluor's statements includes potential explosive conflagration at an oil refinery. "High residual stress" and concentrated problem areas on a reactor's metal shell could lead to an explosion. Fina would not allow somebody to do work unless the work is checked and done the right way. RR 13:9. If people don't work safely, it can lead to a high likelihood that people can get seriously injured and even killed. RR 13:8. The disparaging nature of Fluor's accusation that Conex failed to check its work and its supposed difficulty with PWHT procedures becomes apparent—it stands in stark contrast to Conex's accustomed posture as a commended and competent contractor. PX4. In Fina's mind, it made Conex an unsafe contractor. RR 13:9.

c. The statements are false or create a substantially false and defamatory impression by omitting material facts or juxtaposing facts in a misleading way.

Each statement is also false. Falsity need only be proved by a preponderance of the evidence. *Bentley*, 94 S.W.3d at 587. "If the evidence is disputed, falsity must be determined by the finder of fact." *Id.* There is ample evidence of falsity, and at trial, Fluor never defended the statements as true.

Fluor does not even try to say the statements are correct because Fluor made them with no supporting data. Fluor did no analysis to support its allegation that Conex's PWHT procedure had caused a "loss of creep life." RR 17:85-87. It did nothing to "confirm that there was a loss." *Id*. To say the statements are simply untrue is far too kind. Further, the only data Fluor had to support its statements that Conex's PWHT had "created very high residual stresses in a concentrated area" was George Miller's FEA, and it was not simply mistaken. "We're not talking about errors of 10, 15, 20 percent. You know, we're talking about huge errors. The thing is off by over a hundred percent." RR 6:77. Thus, the statements are not *just* "false." They are false by an order of magnitude that makes the statements laughable. Indeed, "[h]ow the hell can you do an analysis that doesn't even start with the stresses you're trying to get rid of? So, what Fluor did is just absurd." RR 6:37.

Fluor's statements are false in representing that Conex had caused "residual stresses" that could "lead to loss of creep life." Any such allegation is "just preposterous." *Compare* PX37 *with* RR 6:38. "So, for somebody to say that Conex was going to do something that would create a future risk of cracking when they were following the code procedures is not correct; and it's just saying something that's not true." RR 6:38-39, 88. The whole idea that Conex would have caused creep or that the vessel would crack because of this PWHT is "nonsense." RR 6:47-48. Creep is not caused by residual welding stress. RR 6:52. Actually, the statements in these emails "are the owner getting his information from Fluor, and it shows that he was misled." RR 6:89.

Conex *did* keep up with technical requirements, and its PWHT process never injured the plant. RR 20:71; 8:45; 12:62; 17:85. Fluor's PWHT did not take Conex's procedures into account, because Fluor had never evaluated them. RR 17:40-41. Conex's procedures were industry-standard, appropriate, and non-injurious. "This was a straightforward application of conventional post weld heat treatment." RR 6:32; *see also* RR 5:34; 6:68, 83-84; 7:18. "[T]he code tells you exactly what to do. It says you heat up at this rate, you cool down at this rate, you hold it at this temperature for this long, which is what Conex wanted to do, follow the code." RR 6:46. Fluor's procedure was "actually more dangerous" than Conex's. RR 6:68.

Even if substantially true, statements can be made in such a way that they "create[] a substantially false and defamatory impression by omitting material facts or juxtaposing facts in a misleading way." CR 500. Thus, a publication can be defamatory by omitting or juxtaposing facts, "even though each individual statement considered alone" might not be defamatory. *Wood*, 85 S.W.3d at 317; *see also Turner*, 38 S.W.3d at 114; *Huckabee v. Time Warner*, 19 S.W.3d 413, 426 (Tex. 2000). Even if "each individual statement considered alone" is true, juxtaposed facts can still create a defamatory meaning. *Entravision Commc'ns Corp. v. Belalcazar*, 99 S.W.3d 393, 398 (Tex. App.—Corpus Christi 2003, pet. denied).

In the email chain, the most remarkable juxtaposition is between Conex and other contractors. Conex is compared to others who "just slap up the high temp bands and call it done without checking it out." PX15. Conex is compared to other "vendors" who "may have ignored" evaluation requirements for PWHT "because it was difficult to do."

PX25; PX26; Tab D. Not only is Conex itself "juxtaposed" with other contractors "in a misleading way," but its procedures are directly criticized. While Conex's procedure is said to have caused serious problems, "residual stress," and "loss of creep life" for its customer, appropriate procedures are supposed to include finite element analysis and the use of "recognized documents" like WRC 452. PX15, 25. A good contractor is supposed to "keep up with the technical requirements in that industry," and "have the expertise to implement them." PX25. Notably, this "unfortunately . . . is not always the case," PX25, and Conex's procedure was subjected to one of the "recognized" technical requirements, called finite element analysis, and it was alleged to be lacking. *Id.* Juxtaposing these facts, Conex is portrayed by Fluor as woefully incompetent. The statements expose Conex to ridicule, injuring Conex in its profession.

2. Fluor made the defamatory statements to Fina with actual malice, knowing them to be false or with reckless disregard for their truth or falsity.

First, Fluor made the defamatory statements. According to John Walls of Fina, Fluor represented "there were 'residual stresses created by the first PWHT' performed by Conex," it had "reviewed the issue," and the "residual stresses would likely lead to loss of creep life." PX37. John Walls states that after obtaining information from Conex about the procedures used in stress relieving the [AE nozzle] weld, he "sent the details to Fluor (George) for evaluation." PX37. In the same e-mail Walls reports that "George did a FEA and found that there were very high residual stresses. . . ." *Id.* Walls likewise reports that "George requested that the Fluor metallurgist (Terry Phillips) get involved." *Id.* According to Walls, "Terry reviewed the issue and advised that the residual stresses

would likely lead to loss of creep life." *Id.* And according to Walls, "Terry recommended that we do a re-cook at the 1100F code minimum since we were attempting only to relieve the residual stresses created by the first PWHT. . . ." *Id.* Thus, John Walls' email compiles a series of statements made by Fluor personnel.

Moreover, Fluor never denied making the statements. Fluor's Les Antalffy, George Miller, and Terry Phillips were all copied on the e-mail. PX37. During trial, both Miller and Phillips had the opportunity to deny their statements, but they did not. RR 18:84-87; 25:81-82. Although the statements are contained in Walls' email, they are most certainly Fluor's statements.

Second, Fluor's statements were made with malice, as defined in the jury charge. CR 500 (element b). In a business disparagement case, a defendant is liable "if he [knew] of the falsity or acted with reckless disregard concerning it, or if he acted with ill will or intended to interfere in the economic interest of the plaintiff in an unprivileged fashion." *Forbes, Inc.*, 124 S.W.3d at 170; *Hurlbut*, 749 S.W.2d at 766; RESTATEMENT (SECOND) OF TORTS § 623A, cmt. g (1977). Proof of "actual malice" requires nothing more than proof that a defendant made a statement "with knowledge that it was false or with reckless disregard of whether it was true or not." *Forbes*, 124 S.W.3d at 171; *Huckabee*, 19 S.W.3d at 420 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964)).

The case law recognizes several methods of proof. For example, reckless disregard means that a defendant "in fact entertained serious doubts as to the truth of" his statements. *Knox v. Taylor*, 992 S.W.2d 40, 55 (Tex. App.—Houston [14th Dist.] 1999,

no pet.); *see also Casso v. Brand*, 776 S.W.2d 551, 558 (Tex. 1989). "Whether the defendant had serious doubts regarding the truth of the defamatory statement may be proved by circumstantial evidence." *Bentley*, 94 S.W.3d at 596; *Knox*, 992 S.W.2d at 55. Among the factors to consider are the "care and motive" of the person making the statement. *Id.* In evaluating the evidence, "inherently improbable assertions and statements made on information that is obviously dubious may show actual malice." *Id. Accord Prudential Ins. Co. of Am. v. Fin. Review Servs., Inc.*, 29 S.W.3d 74, 82-83 (Tex. 2000) (making a "baseless" accusation constitutes disparagement).

Fluor's disparaging statement that "Fluor metallurgist (Terry Phillips) . . . reviewed the issue and advised that the residual stresses would likely lead to loss of creep life" was made without any investigation, basis, or confirmation. Fluor's metallurgist was held out as the expert source for that accusation. PX37. But at trial, Phillips conceded that neither he nor anyone else at Fluor had done anything to calculate, investigate, or confirm Fluor's disparaging statement that the "residual stresses" "created" by Conex's PWHT "would likely lead to loss of creep life." *See* RR 17:83-87. Before lobbing this accusation at Conex, Fluor did no calculations at all. RR 17:85-87. It did nothing to "confirm that there was a loss." *Id.* This was reckless.

A failure to attempt any verification of information in a memo, such that purposeful avoidance of the truth is shown, will establish actual malice. *Texas Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.*, 219 S.W.3d 563, 578-79 (Tex. App.—Austin 2007, pet. denied); *Harte-Hanks Commc'n Inc. v. Connaughton*, 491 U.S. 657,

692 (1989). One who "deliberately ignore[s]" those "who could have shown [him] that his charges were wrong" is guilty of malice. *Bentley*, 94 S.W.3d at 601.

At trial Fluor's metallurgist conceded it was likely that Conex's PWHT procedure had relieved the residual stresses caused by the weld if "the Big 10 Hardness Test and the Brinell Hardness Test shows that the softness of the metal is within code." RR 17:85. Fluor's "lead corporate welding engineer," Charles Patrick, likewise agreed that these hardness tests "tell[] you whether the heat treat has been done right or not." RR 17: 76, 78. Patrick also testified that when Fluor was in Conex's role, performing PWHT through a subcontractor, the documents Fluor retained to prove the propriety and correctness of its work were "a copy of the procedure from the subcontractor and the hardness reports." RR 17:78. Despite its knowledge of the validity of hardness tests, Fluor deliberately ignored the results of the hardness tests performed following Conex's PWHT procedures. Contrary to Fluor's unfounded accusations, those tests demonstrated good results with proper stress relief. RR 20:71.

Fluor also "deliberately ignored" the results of its own FEA. When Fluor tried to perform an FEA of the head-to-shell weld, the result was that Fluor's own PWHT methodology appeared to cause excessive heat stresses. Fluor had established a maximum stress threshold of 38,000 psi. RR 9:35-36. When Fluor graphed the PWHT work, it showed a maximum stress of 55,000 psi. RR 9:37-38. But rather than admit this defect, Fluor lied:

> So, selectively, they said, "Well, let's go get another plot that is less than a 38,000; and it's called equivalent stress." But when I reviewed it, I picked on it that it's misrepresentation. In the text of the report they call it stress intensity; but when they put it up there and compare it, they call it equivalent stress. *That's misrepresentation. It's not an error. It's not a mistake.*

RR 9:36-37 (emphasis added). *See also* RR 9:38-39. "When you represent the stress result and you don't represent the highest distress in your report, that is not an error. It's purposely done." RR 10:9. "I see errors. And I see misrepresentation, which really they are not errors, they're just put there to make things acceptable and look good. And that is wrong." RR 9:45. Fluor cannot excuse its deliberate and reckless failures to verify information before it cast its fiery aspersions in a refinery setting.

Fina hired Fluor to evaluate welding procedures for the mis-sized reactor head—not to check anything about PWHT. RR 14:8. Fluor "volunteered" to check on PWHT. RR 25:24. But Fluor did not do a finite element analysis on the procedures submitted by Conex for its spot welds. RR 17:40-41. Moreover, on the work Fluor *did* perform, it made gross and reckless errors. A finite element analysis requires careful effort and substantial time. RR 6:47. George Miller's hurried FEA reflected a complete lack of care in which he used both the wrong conductivity values and the wrong heat transfer coefficients. RR 8:87, 8:93. The result was not simply incorrect: "I would say the errors were profound . . . so far wrong. We're not talking about errors of 10, 15, 20 percent. You know, we're talking about huge errors. The thing is off by over a hundred percent." RR 6:77. Fluor also accused Conex of creating serious problems at the plant. In its October 22, 2001 e-mail, Fluor states that Conex had caused "loss of creep life." PX37.

Fluor did not verify the information in its finite element analysis. As Conex's finite element analysis expert put it: "I have seen lots of analyses done and I have found mistakes . . . in fact, maybe one mistake, sometimes two, but not so many errors and mistakes it looks like—like nobody paid attention, it was just dump it in and get it out." RR 8:95. Lack of time is not a reasonable engineering excuse. "If there is not enough time, they shouldn't do it." RR 9:7. "No engineer should put product like that out without being checked, verified." *Id.*

In short, Fluor and its engineers and metallurgists made serious accusations about Conex's work at the plant, yet it backed up none of those assertions. Fluor made misrepresentations without support, and it purposefully avoided the truth. *See Harte-Hanks Commc'n Inc. v. Connaughton*, 491 U.S. 657, 692 (1989). A defendant who "deliberately ignore[s]" those "who could have shown [him] that his charges were wrong" commits actual malice. *Bentley*, 94 S.W.3d at 601.

Fluor supplied false information about the need to evaluate the heat treating performed by Conex after hardness tests demonstrated good results. Fluor criticized "constructors" and "vendors" who "ignored the evaluation requirement," and even warned of dire consequences "if not done properly." PX26. Fluor must have known these statements would "create a substantially false and defamatory impression," *see* CR 500, because Fluor did not do any finite element analysis on Conex's proposed spot procedure, nor on Fluor's own racetrack-shaped spot, and Fluor did not compare them to any database of previous comparable evaluations. RR 6:70-71; 8:11-16; 9:15-16; 25:55-56; 28:71-73, 80. Yet, even without this analysis, and contrary to valid hardness tests,

Fluor made disparaging remarks about Conex's procedures, and foisted upon Conex Fluor's much more expensive racetrack procedure. The case law and the evidence support liability for reckless disregard of the truth.

As Dr. O'Donnell testified, "Atofina was being misled and scared unnecessarily by Fluor." RR 7:32. "They have Fina convinced that Conex was gonna do something bad and that thank God they came along and saved it. That's absolutely wrong. That's absolutely not true." RR 7:82. Such statements constitute legal malice in the disparagement context, as set forth in the charge. CR 500.

3. The statements played a substantial part in inducing Fina not to deal with Conex and resulted in special damages in the form of lost trade.

The last element of business disparagement is proof that "the defendant's publication of the statement played a substantial part in inducing others not to deal with the plaintiff and resulted in special damages in the form of the loss of trade or other dealings." CR 500; *Hurlbut*, 749 S.W.2d at 767. This is addressed in the statement of facts, showing the loss of construction-contract work. *See* above at pp. 12 - 15.

C. Under the standards in Questions 1 and 3 of the jury charge, the record supports Fluor's liability for tortious interference.

1. Fluor is liable for interference with the existing contract between Conex and Fina.

For over a hundred years, Texas law has embraced a cause of action for tortious interference with an existing contract—based on the principle that a contract is a property right that should be protected. *See Raymond v. Yarrington,* 96 Tex. 443, 449-51, 73 S.W. 800, 803 (1903); *Texas Disposal Sys. Landfill, Inc.*, 219 S.W.3d at 588.

The elements of a tortious interference claim are (1) an existing contract subject to interference; (2) an act of interference that is willful and intentional; (3) that proximately caused the plaintiff's injury; and (4) actual damages or loss. *Prudential Ins. Co.*, 29 S.W.3d at 81; *ACS Investors, Inc. v. McLaughlin*, 943 S.W.2d 426, 430 (Tex. 1997). The tort of interference with contract embraces all intentional invasions of contractual relations, including any act interfering with the performance of a contract, regardless of whether breach of contract is induced. *Samedan Oil Corp. v. Intrastate Gas Gathering, Inc.*, 78 S.W.3d 425, 446 (Tex. App.—Tyler 2001, pet. granted, judgm't vacated w.r.m.); *Tippett v. Hart*, 497 S.W.2d 606, 611 (Tex. Civ. App.—Amarillo 1973, writ ref'd n.r.e.). When intentional acts serve to frustrate the purpose of another's contract with a third party, thereby causing damage, such acts constitute the requisite interference. *Samedan Oil Corp.*, 78 S.W.3d at 447; *Hughes v. Houston Nw. Med. Ctr., Inc.*, 680 S.W.2d 838, 842 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Interference includes any act which retards, makes more difficult, or prevents performance. *Seelbach v. Clubb*, 7 S.W.3d 749, 757 (Tex. App.—Texarkana 1999, pet. denied). Interference can include conduct that makes performance of the contract more burdensome or more difficult, or of less value to the one entitled to performance. *See UAW Local 119 v. Johnson Controls, Inc.*, 813 S.W.2d 558, 568 (Tex. App.—Dallas 1991, writ denied).

Question 1 of the charge instructed the jury in keeping with these case-law precedents. CR 499. However, in its analysis of the record, the court of appeals was far too dismissive of the facts that support the jury's finding of tortious interference.

Moreover, the court of appeals contradicts itself in reviewing the evidence supporting the verdict. When first discussing the impetus that led to Fina's contract breach, the court of appeals wrote "There is evidence in the record that by submitting a finite element analysis that called for extensive post weld heat treatment, Fluor employee Miller induced Atofina to require Conex to perform work that was not included in the description of the work contained in the 2001 Turnaround contract." *Fluor Enters., Inc. v. Conex Int'l Corp.*, 273 S.W.3d 426, 444 (Tex.App.—Beaumont 2008, pet. filed). To emphasize this, the court of appeals writes later " [t]he fact that the emails were prepared and revised with Miller's assistance provides some evidence from which the jury could find Fluor realized its participation in the drafting of the emails was substantially certain to induce a breach of the contract. Thus, the jury's finding is supported by legally sufficient evidence on the issue of Fluor's intent." *Id.* However, in dismissive fashion, the court of appeals concludes its review with this statement: "That evidence is too weak, however, to support the verdict in the face of Fluor's factual sufficiency challenge." *Id.*

Appellate review of factual sufficiency demands better and less contradictory analysis of trial records. Fluor was not justified in making the written comments it made or endorsed to Fina about Conex's work. As shown by the various emails and other conduct at issue, its actions were intentional. Even after being given the chance to distance himself, Antalffy ratified misstatements about Conex's work, saying those comments were "exactly correct" and "hit the nail on the head." PX26. Miller and Antalffy were asked whether they had been misquoted, or if they had anything to add to the October 24 email. PX25. They did not, and Antalffy emphatically endorsed the

comments. But those comments about spot PWHT never took into account Conex's procedures, because Fluor had not evaluated them. RR 17:40-41. And Fluor deliberately ignored the hardness test results that proved Conex's PWHT procedure had successfully relieved residual stresses. RR 17:78, 85; 20:71.

The court of appeals failed to acknowledge Fluor's statements in the context of the tortious interference claims. For example, and by no means as a limitation, Dr. O'Donnell testified that WRC-452 was little more than a research paper—not an industry "standard." RR 7:58. In fact, two letters are in evidence that confirm ASME's and NBIC's view that the WRC standard is not "recognized" as a code section, is not applicable to Conex's work, and should not govern evaluations of this work. PX71-72; RR 7:59. Fluor urged WRC-452 as a cutting-edge technical "requirement" when it was no such thing. PX15, 25. Fluor did not utilize it when it was the contractor overseeing PWHT. RR 17:78. None of Conex's other customers, Huntsman, Valero, or Motiva, ever asked that WRC-452 be used at their refineries. RR 5:114. None of those refiners ever called it "science." *Id.*

Moreover, Conex's procedures for testing welds were better and less expensive. When the motive is considered for Fluor's putting forth different standards, its conduct is reprehensible—nothing more than an attempt to make Conex look bad and damage its longstanding relationship with Fina. The value of that relationship became well-known to Fluor when it was hired to engineer the Deep Conversion Project, which Antalffy estimated to have a value of $1.5 billion. RR 23:40. Now, after stepping between Conex and Fina, Fluor has been awarded the DCP construction work instead of Conex.

2. Likewise, the liability findings for interference with prospective business relations are supported by the record.

An action for interference with business relations is based upon the right to be free from interference while contract negotiations have a reasonable probability of success. *Barker v. Brown*, 772 S.W.2d 507, 511 (Tex. App.—Beaumont 1989, no writ). The elements of a claim for tortious interference with prospective business relations are (1) a reasonable probability that the parties would enter into a contractual relationship; (2) an independently tortious or unlawful act by the defendant that prevents the relationship from occurring; (3) the defendant consciously desires to prevent the relationship from occurring or knows that the interference was certain or substantially certain to occur as a result of his conduct; and (4) the plaintiff suffers actual harm or damage as a result of the interference. *Ash v. Hack Branch Distrib. Co.*, 54 S.W.3d 401, 414-15 (Tex. App.—Waco 2001, pet. denied). To satisfy the second prong, the plaintiff must prove the defendant's conduct would be actionable under an independent tort, but need not prove all the elements of the independent tort. *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 726 (Tex. 2001).

The record supports the jury's finding of intentional interference. CR 502-04. First, the jury refused to find that the interference was in good faith, by answering Question 4 "No." CR 505. Second, Fluor was and still is a competitor of Conex, and it was hired to "construct" the DCP instead of Conex. RR 17:77; 23:14-15; 27:9-11; CR 245-46. Third, the evidence shows that Fluor bad-mouthed Conex and misrepresented its procedures and work to Fina, Conex's oldest customer. PX37.

Moreover, there is historical evidence of many contracts. *See* pp. 12 - 15 above. And that historical information proves the likelihood of future work. Fluor's conduct in placing Conex on its watch list, and forwarding that list to Fina, furthers the damage. Conex was not invited to informational sessions and the luncheon about the DCP. PX42. Fluor's conduct in disparaging Conex and placing it on the watch list already is having the desired restrictive effect on Conex's prospects for more business with Fina.

There is likewise proof of fraud. A plaintiff may recover from a defendant who makes fraudulent statements about the plaintiff to a third party, even without proving that the third party was actually defrauded. *Cmty. Initiatives, Inc. v. Chase Bank*, 153 S.W.3d 270, 283-84 (Tex. App.—El Paso 2004, no pet.). "By independently tortious we do not mean that the plaintiff must be able to prove an independent tort. Rather, we mean that the plaintiff must prove that the defendant's conduct would be actionable under a recognized tort." *Sturges,* 52 S.W.3d at 726.

Fluor never filed a special exception to Conex's live trial pleading which alleged fraud as an independent tort, forming one of the elements of Conex's tortious interference claim with prospective business relations. In the absence of special exceptions, a court construes a pleading broadly in favor of the pleader. *Prudential Ins. Co.*, 29 S.W.3d at 81; *Roark v. Allen*, 633 S.W.2d 804, 809 (Tex. 1982). The Fifth Amended Petition stated "Defendants made . . . false representations with the express purpose of disparaging Conex and interfering with its contractual relations, *both existing and prospective*, with Fina." CR 2:225 at ¶ 42. After incorporating this paragraph by reference, Conex sued for interference "with its existing and prospective contractual relations with Fina." CR

2:230. Conex pleaded reliance as well. *Id.* ¶ 56. "Given a liberal construction, [Conex's] pleadings allege that [Fluor] interfered by conduct constituting [fraud], a means which is tortious in itself." *Prudential Ins. Co.*, 29 S.W.3d at 81; *Allied Capital Corp. v. Cravens*, 67 S.W.3d 486, 492 (Tex. App.—Corpus Christi 2002, no pet.).

II. Fluor's Disparaging and Fraudulent Statements Cannot Be Excused as Mere Opinions or as Justified Competition.

The jury's liability verdict should have been sustained because (a) there is ample evidence of disparagement (Question 2), and (b) the evidence to support fraud is independently sufficient to make a case of tortious interference (Questions 1 and 3). Either liability ground is enough to make Conex's liability case. For Conex to prove its case at trial, it was required to introduce sufficient evidence proving just one of the eight statements under the liability standards set out in the charge on either of the alternative liability theories for tortious interference (business disparagement or fraud).

The defendant has the burden of proof on a justification defense. *Texas Beef Cattle Co. v. Green*, 921 S.W.2d 203, 211 (Tex. 1996). For prospective business relations, "[j]ustification and privilege are defenses . . . only to the extent that they are defenses to the independent tortiousness of the defendants' conduct. Otherwise, the plaintiff need not prove that the defendant's conduct was not justified or privileged, nor can a defendant assert such defenses." *Sturges*, 52 S.W.3d at 727. The record does not support any "right" to commit fraud or to disparage Conex. Because Conex proved "methods of interference that are tortious in themselves, the issue of privilege or justification never arises." *Prudential Ins. Co.*, 29 S.W.3d at 81.

As discussed above, Fluor's statements are actionable as disparagement. Fluor's statements are also fraudulent. "Whether a statement is an actionable statement of 'fact' or merely one of 'opinion' often depends on the circumstances in which a statement is made." *Transport Ins. Co. v. Faircloth*, 898 S.W.2d 269, 276 (Tex. 1995). Relevant circumstances include "the statement's specificity, the speaker's knowledge, the comparative levels of the speaker's and the hearer's knowledge, and whether the statement relates to the present or the future." *Id.* Under Texas law, opinions may be actionable when: (1) "intertwined" with "direct representations of present facts;" (2) "the speaker has knowledge of its falsity;" (3) "based on past or present facts;" or (4) the speaker has "special knowledge of facts that will occur or exist in the future." *Trenholm v. Ratcliff*, 646 S.W.2d 927, 930-31 (Tex.1983). "When a speaker purports to have special knowledge of the facts, or does have superior knowledge of the facts—for example, when the facts underlying the opinion are not equally available to both parties—a party may maintain a fraud action." *Paul v. Capital Res. Mgmt., Inc.*, 987 S.W.2d 214, 219 (Tex. App.—Austin 1999, pet. denied); *accord Matis v. Golden*, 228 S.W.3d 301, 307 (Tex. App.—Waco 2007, no pet.). Given these liability standards, Fluor's statements are fraudulent.

Put simply, whether as fraud or disparagement, the answer to the fact-vs.-opinion inquiry depends on the record. This Court considers all the evidence in the light most favorable to the prevailing party, "crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not." *City of Keller v. Wilson*, 168 S.W.3d 802, 807 (Tex. 2005). *See Associated Indem. Corp. v. CAT*

Contracting, Inc., 964 S.W.2d 276, 285-86 (Tex. 1998). Indeed, in answering Question 4 "no," and thus failing to find that Fluor had "an objectively well-grounded and justifiable belief in the right to engage in the conduct that constitutes interference," CR 505, the jury foreclosed Fluor's argument that its conduct was based upon proper motives or was justified as a mere opinion. The record supports the findings that Fluor's conduct was motivated not by good faith, but by an intention to get work that Conex had done historically as Fina's preferred contractor and to start the fight over $2 million-plus in "extras" to poison the relationship Conex had with Fina. Fluor's motive in disparaging Conex's work and perpetrating a fraud was anything but pure.

Fluor sought at every turn to go beyond its original engagement from Fina to give advice about the mis-manufactured head-to-shell weld. Fluor was not hired to satisfy Fina that Conex's PWHT work was correct, but to provide advice about welding the mis-sized reactor head to its shell. RR 23:60-61. Fluor then "volunteered" and "cautioned" Fina that all heat-treatments of all welded attachments on the reactor and the tower needed to be evaluated under WRC-452, and Fluor made itself "available" to do this work if required. PX15; RR 23:63-64; 25:24. Thus, turning from advice on a discreet project towards expanded economic opportunity, Fluor sought more work for itself. Fluor's work was so slow in 2001 that layoffs resulted in the metallurgy department having only two employees, Terry Phillips and John Zlatich. RR 17:84. Fluor had a financial incentive to "find" problems with Conex's PWHT procedures, even though no such problems actually existed, because more problems with Conex's work meant more work for Fluor. George Miller's erroneous elastic FEA of the top nozzle generated more

work for Fluor in the form of a more tedious FEA. "Note that he did an elastic analysis first, which indicated significant problems, so he did the more tedious elastic/plastic analysis of the basis of his assessment." PX37. Once that was done, George Miller's erroneous elastic/plastic FEA of the top nozzle in turn generated more work for Fluor. "At this point (10/9/01 AM), George requested that the Fluor metallurgist (Terry Phillips) get involved." PX37. Phillips' baseless remarks to Fina that Conex's PWHT "would likely lead to loss of creep life," resulted in even more work. Phillips told Fina it had two options, both of which called for Fluor to do more calculations. Phillips' final recommendation for solving this false crisis created even more work for Fluor in the form of another FEA. "Terry recommended that we opt for the 1100F re PWHT solution." PX37. But it was a "solution" for a non-existent problem, because Phillips did not even know whether Conex's procedure had caused a "loss of creep life." RR 17:86-87.

Fluor admitted at trial that it competes with Conex. It pleaded that its conduct was justified because Fluor was a "competitor[]" of Conex. CR2:246. Fluor does construction turnaround work itself, RR 17:77; 23:14-15, and Fluor owns a construction subsidiary called P2S. RR 27:22. The vice president of Fluor admitted that P2S and Conex would be competitors of each other. RR 27:24. Fina has awarded Fluor "the contract to engineer, procure, and construct" the Deep Conversion Project. RR 11:21. Conex lost future work when Fluor advised Fina to take Conex off the invitee list for the DCP information meeting. RR 15:23; 18:46-47, 50-51. After Fluor blackballed Conex on, Fina removed Conex from—but retained P2S on—the list of invitees to an informational meeting on the $1.5 billion DCP. RR 18:24-36; PX42, 48.

Fluor's comments to Fina about Conex are more than benign opinions; they were calculated to make Fina trust Fluor—and not Conex—to "get this done right." PX25. The transgression is not that Fluor competed with Conex, but that its tactics went too far, leading Fluor to build up its client's trust by falsely disparaging Conex in the eyes of its longstanding customer. Fluor's competitive strategy was a dishonest and malicious one. It demeaned Conex by reporting as engineering "fact" things that were untrue. No doubt the strategy worked, not only on the 2001 turnaround, but by winning Fluor future construction work. This future work includes the $1.5 billion Deep Conversion Project. In addition, Fluor eliminated its only viable local competition in construction work.

By disparaging Conex and committing fraud as well, Fluor went far beyond making an innocent mistake. It is guilty of more than mere negligence by omission. Fluor made statements that were defamatory, that it knew to be false, and which it made recklessly or with malice. Fluor's statements to Fina were "unverified," "fabricated . . . product[s] of his imagination." *See Bentley*, 94 S.W.3d at 596 (quoting *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968)). Fluor should not be heard to complain that it was just giving advice or simply doing its job. Fluor made itself liable for disparagement and tortious interference when it published Miller's and Phillips' false statements (and others) to Conex's client without any effort to determine whether they were true. Such recklessness, even by an engineering company, is actionable.

III. The Court of Appeals Failed to Follow this Court's Guidance for Proper Factual Sufficiency Review.

Proper factual sufficiency review requires the court of appeals to "detail the evidence relevant to the issue in consideration and clearly state why the jury's finding is factually insufficient or is so against the great weight and preponderance as to be manifestly unjust; why it shocks the conscience; or clearly demonstrates bias." *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986). As part and parcel of this requirement, the court of appeals must set out and address the relevant evidence that supports the jury's answer to the issue in question. *Jaffe Aircraft Corp. v. Carr*, 867 S.W.2d 27, 28 (Tex. 1993); *Cropper v. Caterpillar Tractor Co.*, 754 S.W.2d 646, 652-53 (Tex. 1988). Further, the court of appeals must "state in what regard the contrary evidence greatly outweighs the evidence in support of the verdict." *Golden Eagle Archery*, 116 S.W.3d at 761 (quoting *Pool*, 715 S.W.2d at 635).

While this Court lacks jurisdiction to determine the factual sufficiency of the evidence supporting the jury's findings, "this Court has a responsibility to assure that the intermediate appellate courts properly follow applicable legal standards." *Jaffe Aircraft*, 867 S.W.2d at 29. Fluor challenged the legal and factual sufficiency of the evidence to support every element of every jury finding, and it raised over *thirty* issues in the court of appeals, so it is perhaps understandable that the court of appeals grew weary. But the court of appeals does not explain in what regard the contrary evidence "greatly outweighs" the evidence in support of the verdict. *Pool*, 715 S.W.2d at 635; *Golden Eagle Archery*, 116 S.W.3d at 761.

Rather than detailing and explaining why the evidence is insufficient to support the verdict, the lower court's majority opinion merely states that the evidence is "too weak." The majority does away with the disparagement finding in these words:

> As to Fluor, there is some evidence in the record from which the jury could find that Fluor disparaged Conex in statements five through eight, and that Fluor acted with malice, but the evidence supporting the jury's findings on those elements of Conex's business disparagement claim against Fluor is too weak to support the judgment and the verdict is clearly wrong and unjust. *See Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986).

Fluor Enters., 273 S.W.3d at 440. Such a dismissive conclusion is no explanation.

In addressing statements five through eight, the court of appeals acknowledged some evidence that Fluor made the statements with actual malice. 273 S.W.3d at 440. In reaching that conclusion, however, the court of appeals addressed only some of the evidence regarding Fluor's reported FEA. But in so doing, the court of appeals misunderstood the technical facts. Fluor's FEA—regardless of how deficient it was—had nothing to do with Fluor's disparaging statement that "Fluor metallurgist (Terry Phillips) . . . reviewed the issue and advised that the residual stresses would likely lead to loss of creep life." That statement was made without any investigation, basis, or confirmation. Regardless of how one might view the evidence regarding Fluor's FEA, Fluor never contended that its FEA demonstrated that "the residual stresses would likely lead to loss of creep life." Fluor's metallurgist was held out as the expert source for that accusation. PX37. But at trial, Phillips conceded that neither he nor anyone else at Fluor had done anything to calculate, investigate, or confirm Fluor's disparaging statement that

the "residual stresses" "created" by Conex's PWHT "would likely lead to loss of creep life." *See* RR 17:83-87. Terry Phillips testified:

> Q. Did you ever come to any kind of conclusion that there was a loss of creep life of any degree, consequence or significance?
>
> A. Not that I recall. I don't recall having done that.
>
> Q. Did anybody ever indicate to you in any way that there was a potential of a loss of creep life after the first post weld heat treatment procedure and before any kind of second procedure was done on that nozzle?
>
> A. You mean confirm that there was a loss?
>
> Q. Yes, sir.
>
> A. I don't think that it was confirmed.

RR 17:86. Phillips likewise conceded that it was "likely" Conex's PWHT procedure had relieved residual welding stresses, not increased them, if the Big 10 and Brinell hardness tests showed that the softness of the metal was within code. RR 17:85. Fluor's lead welding engineer agreed that hardness tests are the appropriate way to determine "whether the heat treat has been done right or not." RR 17:78. Yet Fluor deliberately ignored the hardness tests which proved that Conex's PWHT procedures had successfully reduced residual stresses. RR 20:71. The court of appeals never addressed this evidence and never identified any contrary evidence. There is no evidence that greatly outweighs Phillips' and Patrick's testimony that Fluor had *no* basis for its accusation that residual stresses caused by Conex's work would likely lead to loss of creep life. This evidence required the court of appeals to affirm. This Court should reverse the court of appeals and remand for further consideration in light of "the long-established precedents in this state demonstrating respect for jury verdicts." *Herbert*, 754 S.W.2d at 144.

After holding that legally but not factually sufficient evidence supported the jury's liability findings against Fluor, the court of appeals proceeded to "address the remaining issues only to the extent they would entitle Fluor to the rendition of a take-nothing judgment." *Fluor Enters., Inc. v. Conex Int'l Corp.*, 273 S.W.3d 426, 445 (Tex. App.—Beaumont 2008, pet. filed). The court of appeals then addressed and overruled each of Fluor's remaining rendition points, including those attacking causation and damages. *Id.* at 445-49. The court of appeals held that at least some evidence supported each of the remaining elements of Conex's causes of action against Fluor. *Id.* The court of appeals did not address any of Fluor's remaining remand arguments.

Should this Court agree the court of appeals got the factual sufficiency review wrong, and it failed to consider relevant and important evidence of liability, there will be a remand of the case to the court of appeals. Even though Fluor's additional arguments are without merit, Fluor will nonetheless have the opportunity to have them considered by the court of appeals upon remand from this Court. Alternatively, upon retrial, Fluor will again be able to urge its failed defense on the jury.

PRAYER

The court of appeals' judgment should be reversed and the jury's verdict and the trial court's judgment should be affirmed. Alternatively, the case should be remanded to the court of appeals. Conex International Corporation prays for any other relief to which it may be entitled.

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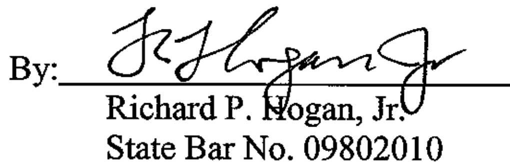
By: 
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument was served in accordance with Rule 9.5 of the Texas Rules of Appellate Procedure.

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