IN THE SUPREME COURT OF TEXAS

NO. 08-0148

REGAL FINANCE COMPANY, LTD. AND REGAL FINANCE COMPANY II, LTD., PETITIONERS,

v.

TEX STAR MOTORS, INC., RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

Argued September 9, 2009

JUSTICE MEDINA delivered the opinion of the Court in which CHIEF JUSTICE JEFFERSON, JUSTICE HECHT, JUSTICE WAINWRIGHT, JUSTICE GREEN, JUSTICE WILLETT, JUSTICE GUZMAN, and JUSTICE LEHRMANN joined.

JUSTICE JOHNSON filed a dissenting opinion.

Under Article 9 of the Uniform Commercial Code, a secured creditor may repossess collateral after a default, dispose of it, and then sue for any deficiency that remains after the proceeds from the collateral are applied to the debt. A secured creditor that seeks to recover a deficiency, however, must prove that it acted in a "commercially reasonable" manner in disposing of collateral. In this case, the secured creditor proved that to the satisfaction of the jury, who awarded it a deficiency judgment. The court of appeals, however, set the verdict aside, finding no evidence of commercial reasonableness. 246 S.W.3d 745, 751–52 & n.9.

The court concluded that the jury instructions on commercial reasonableness here required proof of a particular industry standard, regardless of whether Article 9 required such proof. *Id.* Because the secured creditor failed to produce any evidence of this standard, the court further concluded there was no evidence of commercial reasonableness and therefore no basis for a deficiency judgment against the debtor. *Id.* We, however, disagree that the jury charge altered the standard for commercial reasonableness under Article 9. We further conclude that evidence of commercial reasonableness here is legally sufficient to support the jury's verdict. Accordingly, we reverse the court of appeals' judgment and remand the case to that court for its further consideration.

I

In 1996, Tex Star Motors, a used-car dealer, signed a Retail Installment Contract Purchase and Sales Agreement ("PSA") with Regal Finance Company, Ltd. and, in 1999, another PSA (collectively, the "PSAs") with Regal Finance Company II, Ltd. (collectively, "Regal"). The PSAs obligated Tex Star to offer each secured automobile installment note it generated through consumer sales to Regal, which could then purchase the note at its discretion. Under these agreements, Tex Star sold the notes to Regal with "full recourse," meaning Regal could require Tex Star to repurchase any non-performing loans. The PSAs also created a dealer-reserve fund, titled the "Holdback Reserve[,]" capitalized by Regal withholding $750 from the amount it paid Tex Star when purchasing each note. While maintained by Regal, the Holdback Reserve belonged to Tex Star. Its primary purpose was to finance Tex Star's note-repurchase obligations if any loans became non-performing. In practice, Regal paid Tex Star $2,000 from the Holdback Reserve when Tex Star

repurchased a non-performing note. After payment of all notes purchased from Tex Star, Regal was to return any remaining amount in the dealer reserve to Tex Star.

As its business with Tex Star expanded, Regal outgrew its existing lending relationships with smaller banks. In 1999, Regal obtained a three-year, $25,000,000 revolving line of credit with Bank One. The Bank One loan agreement required Regal to maintain a dealer-reserve fund that equaled 5% of the principal balances of Regal's outstanding notes.

Regal and Tex Star never agreed in writing who would be responsible for keeping the dealer-reserve fund compliant with the Bank One loan agreement. Regal's manager testified that Tex Star orally agreed to maintain the dealer-reserve fund because it meant more financing for Tex Star without any additional personal liability for Tex Star's owners. Tex Star denied the existence of any oral agreement. Nevertheless over the next two and a half years, Tex Star deposited a total sum of $975,000 to maintain the dealer reserve at the level dictated by the Bank One loan agreement.[1]

By 2002, Bank One had decided to exit sub-prime auto lending and notified Regal that it would not renew its credit line. Regal, in turn, informed Tex Star that it would not be buying Tex Star's automobile notes for at least a year while it procured alternate financing. Around the same time, Regal sought $386,000 from Tex Star to bring the dealer-reserve fund into compliance with the Bank One loan agreement.

Tex Star's attorney advised that neither the PSAs nor the Bank One loan agreement obligated Tex Star to maintain the reserve levels mandated by the Bank One loan agreement. Heeding this

[1] This was in addition to the PSA-mandated $750 Regal withheld when purchasing the notes from Tex Star.

advice, Tex Star refused to fund the $386,000. Tex Star did, however, continue to repurchase non-performing notes from Regal over the next few months, but Regal quit paying Tex Star $2,000 per note from the Holdback Reserve.

In November 2002, Tex Star notified Regal it was suspending performance under the PSAs and would no longer collect notes, or repossess and sell vehicles, on Regal's behalf. Rather than hire another company to provide these services, Regal decided to handle these matters itself.

In early December 2002, Regal established a location to service its notes' portfolio and handle repossessions. Within three days of opening this location, Regal accepted 100 repossessed vehicles from Tex Star, followed by 2,400 loan files over the next two weeks. Having little expertise in the used-car business, Regal hired James Wright, an automobile sales professional who had bought and sold several thousand used vehicles over a 29-year period. Regal required Wright to evaluate and liquidate the repossessed vehicles.

II

After selling 906 repossessed vehicles for less than the outstanding loan balances, Regal sued Tex Star for the deficiency. Tex Star filed a counterclaim, seeking the funds held in the dealer-reserve fund, monies allegedly owed under the PSAs for notes it repurchased, and statutory damages for Regal's alleged failure to provide notice and to conduct the vehicle sales in good faith and in a commercially reasonable manner.

The case was tried to a jury, which found that Tex Star failed to comply with the PSAs and was liable for some, but not all, of the deficiencies Regal sought. In answering the damages question, the jury was instructed to consider only the loans relating to vehicles that Regal sold in

good faith and in a commercially reasonable manner. Jury instructions also provided additional information on the meaning of these terms.

Finding Regal sold some vehicles in good faith and in a commercially reasonable manner, the jury awarded Regal $4,000,000 in deficiency damages. The jury also found that Tex Star had agreed to maintain the dealer-reserve fund at the level required by the Bank One loan agreement and that $975,000 in that fund belonged to Tex Star. The trial court rendered judgment on the verdict, in part, awarding Regal $4,136,000 in damages plus attorney's fees and interest. The court further denied all Tex Star's claims, including its claim to monies held in the dealer-reserve fund. Regarding the $975,000 from that fund awarded to Tex Star by the jury, the trial court rendered judgment notwithstanding the verdict.

The court of appeals reversed the trial court's judgment, vacating the deficiency judgment in Regal's favor and awarding Tex Star the $975,000 held by Regal in the dealer-reserve fund. 246 S.W.3d at 755–56. In setting aside Regal's favorable verdict, the court concluded there was no evidence of commercial reasonableness in the vehicles' dispositions, at least when measured against the jury instructions. *Id*. at 752.

III

Article 9 of the Uniform Commercial Code requires that a secured creditor act in good faith and in a commercially reasonable manner, and, in most cases, provide reasonable notification when disposing of repossessed collateral. *See* TEX. BUS. & COM. CODE § 9.625 cmt. 2. A secured creditor must prove it disposed of the collateral in a commercially reasonable manner before it may recover any deficiency. *See id.* § 9.610; *see also Greathouse v. Charter Nat'l Bank-Sw.*, 851 S.W.2d 173,

176 (Tex. 1992). Every aspect of a collateral disposition must be commercially reasonable, "including the method, manner, time, place, and other terms." TEX. BUS. & COM. CODE § 9.610(b). Article 9 provides several examples of commercially reasonable dispositions, commonly referred to as safe harbors. These safe harbors include:

> (1) dispositions "made in the usual manner on any recognized market;"
>
> (2) dispositions made "at the price current in any recognized market at the time of the disposition[s];"
>
> (3) dispositions made "in conformity with reasonable commercial practice among dealers in the type of property that was the subject of the disposition[s]."

Id. § 9.627(b)(1)–(3). However, a comment to Article 9 explains that these safe harbors are not the exclusive means of proving commercial reasonableness. *Id.*§ 9.627 cmt. 3; *Havins v. First Nat'l Bank of Paducah*, 919 S.W.2d 177, 181 (Tex. App.—Amarillo 1996, no writ) (citing a substantively similar section 9.507 before it was recodified as section 9.627).

A

The trial court instructed the jury on the meaning of good faith and commercial reasonableness in the following instructions contained in Question 6 of the jury charge:

> In answering this question, consider only Loans relating to vehicles that [Regal] sold in good faith and in a commercially reasonable manner. Good faith means honesty in fact and the observance of reasonable commercial standards of fair dealing.
>
> Every aspect of the disposition, including method, manner, time, place and other terms must be commercially reasonable. A sale is commercially reasonable *if* it conforms to reasonable commercial practices among dealers in the type of property that was the subject of the sale.
>
> The fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or in a different method from that

> selected by [Regal] is not of itself sufficient to preclude [Regal] from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner.

(emphasis added). The instruction's second paragraph appears to track the language of Article 9, specifically sections 9.610(b) and 9.627(b)(3).[2]

The court of appeals concluded that the above instruction required Regal to prove its sales conformed to a reasonable dealer standard, or in the words of the instruction, "conform[ed] to reasonable commercial practices among dealers in the type of property that was the subject of the sale." By reading the "if" in the instruction's second paragraph to mean "only if," the court converted one of Article 9's safe harbor provisions into a mandatory condition of proof. *See id.* § 9.627(b)(3). And, because there was no evidence that Regal's sales conformed to this reasonable dealer standard, the court reversed and rendered. 246 S.W.3d at 751–52.

Regal complains that the court's understanding of the instruction on commercial reasonableness is mistaken. More specifically, Regal submits the court has failed to interpret the word "if" in the context of the instruction. Regal further complains that this misinterpretation led the court to alter Regal's burden of proof, contrary both to the requirements of Article 9 and the plain meaning of the instruction itself. We agree.

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[2] Section 9.610(b) reads, "Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable." TEX. BUS. & COM. CODE § 9.610(b). Section 9.627(b)(3), one of the safe harbor provisions, states, "A disposition of collateral is made in a commercially reasonable manner if the disposition is made . . . in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition." *Id.* § 9.627(b)(3).

The word "if" can hold different meanings in different contexts. It ordinarily describes a non-mandatory condition.[3] The clearest expression of a mandatory condition is to say "only if".[4] In some contexts, where only one option exists to satisfy the condition, "if" can present a mandatory condition without being preceded by the word "only".[5] It is more common, however, for the word to introduce a non-exclusive condition, like the following example:

> The Texas Supreme Court has jurisdiction over an interlocutory appeal "if" there is a dissent in the court of appeals.

This sentence read in isolation would only grant jurisdiction if there were a dissent in the court of appeals. However, in the context of the Texas Government Code, the Court has jurisdiction if a court of appeals justice dissented, but the Court would also have jurisdiction if other statutory conditions exist, even without a dissent. Based on this context, the sentence cannot accurately be read in isolation without sacrificing the balance of the statute's meaning.

In the context of the this jury charge, "if" cannot mean "only if" without sacrificing the meaning of other parts of the instruction. The instruction's second paragraph begins with a general

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[3] *See, e.g.*, COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 1370–71 (1971); WEBSTER'S II NEW COLLEGE DICTIONARY 549 (1995).

[4] *See* BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 414 (2d ed. 1995) (stating the phrases "if, and only if" and "if, but only if" are unnecessary way of saying "only if," but not stating those phrases are another way of saying "if"). The Webster's II New College Dictionary defines "if" different ways, but when it gives an example for the mandatory "on condition that" definition it uses "if" preceded by the word "only[.]" WEBSTER'S II NEW COLLEGE DICTIONARY 549 (1995).

[5] The court of appeals quotes a litany of one sentence pattern jury charges to illustrate this point. 246 S.W.3d at 751 n.4. In this limited, single sentence context, "if" creates a mandatory condition. The jury instruction in this case exists in no such vacuum and needs to be read in context.

description of commercial reasonableness.[6] The next sentence supplies a specific method for proving commercial reasonableness.[7] The following paragraph implies that other disposition methods outside those practices among dealers may still be commercially reasonable.[8] If the second sentence provided the exclusive method of proving commercial reasonableness, the preceding sentence and the following paragraph would be superfluous.

We have said that a jury charge submitting liability under a statute should track the statutory language as closely as possible. *Spencer v. Eagle Star Ins. Co. of Am.*, 876 S.W.2d 154, 157 (Tex. 1994)(citing *Brown v. Am. Transfer & Storage Co.*, 601 S.W.2d 931, 937 (Tex. 1980)). The language may be slightly altered to conform the issue to the evidence presented in the case, *Brown*, 601 S.W.2d at 937, but a court should not burden a jury with surplus instructions, *Acord v. Gen. Motors Corp.*, 669 S.W.2d 111, 116 (Tex. 1984).

The instruction here closely tracked the language of sections 9.610(b) and 9.627(b)(3). This is not to say that the instruction perfectly conveyed Article 9's requirements. Qualifying the second sentence as a non-exclusive method of proving commercial reasonableness would have clarified its purpose. But read in context, the first sentence conveys the general rule, the second sentence offers

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[6] "Every aspect of the disposition, including method, manner, time, place and other terms must be commercially reasonable."

[7] "A sale is commercially reasonable if it conforms to reasonable commercial practices among dealers in the type of property that was the subject of the sale."

[8] "The fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or in a different method from that selected by [Regal] is not of itself sufficient to preclude [Regal] from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner."

an alternative method to prove commercial reasonableness, and the following paragraph allows that other commercially reasonable methods may be used.

The dissent characterizes our analysis as a departure from the well-established rule that evidential sufficiency be measured against the jury charge. To the contrary, we agree that the evidence must be measured against the charge. We simply disagree about what the charge requires. The dissent reads the second sentence's mention of reasonable commercial practices among dealers as an exclusive definition, providing the only method by which the jury could measure commercial reasonableness. In the context of the instruction, however, we read it as merely an example of one method for determining commercial reasonableness. Although the second sentence, in isolation, lacks qualifying language, the preceding sentence and concluding paragraph inform that the dealer standard is not the exclusive means of establishing commercial reasonableness.

We conclude then that the court of appeals erred in reading the jury instruction on commercial reasonableness to require evidence of a reasonable dealer standard. At a minimum, however, the instruction required some evidence of the method, manner, time, place, and other terms of sale from which the jury might find commercial reasonableness.

B

Although commercial reasonableness is not precisely defined in Article 9, courts have considered a number of non-exclusive factors when addressing the term, such as: (1) whether the secured party endeavored to obtain the best price possible; (2) whether the collateral was sold in bulk or piecemeal; (3) whether it was sold via private or public sale; (4) whether it was available for inspection before the sale; (5) whether it was sold at a propitious time; (6) whether the expenses

incurred during the sale were reasonable and necessary; (7) whether the sale was advertised; (8) whether multiple bids were received; (9) what state the collateral was in; and (10) where the sale was conducted. *See, e.g.*, *Havins*, 919 S.W.2d at 181 (citing *Pruske v. Nat'l Bank of Commerce of San Antonio*, 533 S.W.2d 931, 937 n.1 (Tex. Civ. App.—San Antonio 1976, no writ)). As these factors imply, commercial reasonableness is a fact-based inquiry that requires a balance of Article 9's two competing policies: (1) protecting debtors against creditor dishonesty and (2) minimizing interference in honest dispositions. *Pruske*, 533 S.W.2d at 937 (citing William E. Hogan, *The Secured Party in Default Proceedings Under the UCC*, 47 MINN. L. REV. 205, 219–20 (1962)). The inquiry's ultimate purpose, however, is to ensure the creditor realizes a satisfactory price. 4 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 34–11(b) (6th ed. 2010). But, a satisfactory price is not necessarily the highest price, and it is recognized that secured creditors frequently sell in the low end of wholesale markets. *Id.* § 34–11(c).

At trial, several witnesses testified about Regal's dispositions of the repossessed vehicles. However, James Wright, the individual hired by Regal to evaluate and dispose of the vehicles, provided most testimony regarding the method and manner of disposition. Wright testified he would inspect each car, fill out a condition report, and use this information to produce a separate report that included the vehicle's features and an estimated value. He would compare this report to the vehicles, ensuring the vehicles had the same features, then attempt to solicit at least two bids from wholesalers.[9] Wright testified that most sales were made privately to a small number of trusted

[9] Another experienced buyer and seller of used vehicles opined that this sealed bid method was an appropriate way to sell repossessed vehicles.

automobile wholesalers.[10] He justified this practice by describing that the generally poor condition and high mileage of the vehicles limited the price that could be obtained by selling to non-wholesalers. Wright also testified that Regal, as a finance company, did not have the facilities, nor the license to sell the vehicles retail. Wright further testified Regal auctioned a small number of vehicles to test that method's effectiveness, but discontinued utilizing auctions when it determined the practice to be expensive and ineffective, garnering lower prices than private sales. Wright also testified that the pure volume of repossessed vehicles and the need to timely dispose of the collateral meant that some procedures, notably receiving at least two bids on each vehicle, were not always followed. However, Wright emphasized his substantial experience selling automobiles when attesting that Regal strove to achieve the highest selling price, under the circumstances, on all 906 dispositions.

Additionally, Regal entered the 906 loan files as evidence of the time, place, and other terms of each disposition. Not all loan files were complete, but a complete file would contain the loan note, a certificate of title (copy), a loan payment record, a repossession affidavit, a vehicle condition report, an NADA form estimating value, and any bids tendered for the vehicles. Copies of various negotiable instruments containing the date, time, price, and identifying the collateral's buyer were also entered into evidence.

In rebuttal, Tex Star emphasized other evidence suggesting that Regal could have obtained a superior price for the vehicles it sold and that Regal did not sell all the vehicles in a commercially

[10] Notably, Tex Star was one of the buyers, bidding on 109 vehicles, but submitting the highest bid only twenty times.

reasonable manner. Specifically, Tex Star introduced evidence that some wholesaler buyers resold Regal's repossessed vehicles at a profit through subsequent auctions. Tex Star also presented a wholesaler, John Thorpe, Jr., as a witness. Thorpe testified he unsuccessfully bid on some of Regal's vehicles, then subsequently paid the winning wholesalers the same amount as his original bids. Further, Tex Star disputed Regal's account of its unsuccessful auctions by comparing information in the loan files to the auction results. On cross examination, Wright admitted not receiving at least two bids on every vehicle and that the 906 loan files were not always complete. Additionally, testimony showed the vehicles were not publicly advertised for sale and other evidence revealed a large average deficiency per sale.

Legally sufficient evidence is that which "would enable reasonable and fair-minded people to reach the verdict under review." *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). When reviewing whether evidence is legally sufficient to support a verdict, we "must view the evidence in the light favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not." *Id.* at 807. Evidence is legally insufficient "when (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact." *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997). Evidence that is "'so weak as to do no more than create a mere surmise or suspicion' that the fact exists" is less than a scintilla. *Kroger Tex., Ltd. P'ship v. Suberu*, 216 S.W.3d 788, 793 (Tex. 2006) (quoting *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex.

2004)). For evidence to conclusively establish the opposite of a vital fact, the evidence must be the type that could not lead reasonable people to different conclusions. *City of Keller*, 168 S.W.3d at 815-16.

Regal's testimony on the method and manner of its sales coupled with the loan files evidencing time, place, and other terms creates more than a suspicion or surmise that at least a portion of Regal's sales were commercially reasonable. Tex Star challenges and contradicts much of Regal's evidence, but its substance is not such as to prevent reasonable people from drawing different conclusions. Because the conflicting evidence created a fact issue upon which reasonable minds could differ, we must reject Tex Star's legal sufficiency challenge.

In the court of appeals, Tex Star also challenged the factual sufficiency of the evidence. The court of appeals, however, did not reach the issue, having determined there to be no evidence of commercial reasonableness under its erroneous view of the charge. Because a review of the evidence for factual sufficiency is a power committed exclusively to the court of appeals, we must remand the issue to that court. *See* TEX. CONST. art. V, § 6(a); *see also Bic Pen Corp. v. Carter,* 251 S.W.3d 500, 509 (Tex. 2008). We merely hold that there is some evidence of commercial reasonableness in this record and that the jury instruction did not negate its existence. The other issues in the case are remanded to the court of appeals.

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The judgment of the court of appeals is reversed and the cause is remanded to that court for its further consideration.

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David M. Medina
Justice

OPINION DELIVERED: August 20, 2010