

IN THE SUPREME COURT OF TEXAS

No. 08-0074

THOMAS O. BENNETT, JR., AND JAMES B. BONHAM CORPORATION, PETITIONERS,

v.

RANDY REYNOLDS, RESPONDENT

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

Argued December 15, 2009

JUSTICE JOHNSON, concurring.

The jury found that Randy Reynolds suffered actual damages of \$5,327.11 for the loss of thirteen cattle. Bennett admittedly intended to sell the cattle, although he maintained they were his and denied intending to injure Reynolds, much less to seriously or substantially harm him. The jury found that Bennett's conversion of the cattle was done with malice even though his actions in rounding up and selling them were peaceable, no one was hurt, and no one was threatened when the deed was accomplished. The parties seem to agree that the jury based its \$1,250,000 exemplary damages award to a large degree on actions Bennett took separately from his actions in converting the cattle, although Reynolds only claimed, and the jury only awarded, actual damages because of the conversion. As opposed to justifying the exemplary damages by referencing actions showing

Bennett intended to cause Reynolds substantial injury by his actions in converting the cattle, Reynolds references actions by Bennett that were not directly related to the conversion as “reprehensible” actions that justify the large award.

As applicable to this case, former section 41.003(a) of the Texas Civil Practice and Remedies Code allows recovery of exemplary damages if “the harm with respect to which the claimant seeks recovery of exemplary damages results from” malice. Act of April 11, 1995, 74th Leg., R.S., ch. 19, § 1, 1995 Tex. Gen. Laws 108, 110. The trial court charged the jury to find whether “the harm to [Reynolds] resulted from malice by Defendant Bennett,” and defined “malice” according to the statute as:

(a) a specific intent by Defendant Bennett to cause substantial injury to Plaintiff; or

(b) an act or omission by Defendant Bennett;

(i) which, when viewed objectively from the standpoint of Defendant Bennett at the time of its occurrence, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and

(ii) of which Defendant Bennett had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others.

Evidentiary support for a finding of malice under subpart (a) of the definition must be by evidence that the harm to Reynolds—the conversion of his cattle—resulted from a specific intent by Bennett to cause Reynolds not just injury, but *substantial* injury. A finding of malice under subpart (b) of the definition, which corresponds to the definition of gross negligence, requires evidence that Bennett’s actions were likely to cause “serious injury” to Reynolds. *See Smith v. O’Donnell*, 288

S.W.3d 417, 423 (Tex. 2009) (“‘Extreme risk’ is not a remote possibility of injury or even a high probability of minor harm, but rather the likelihood of serious injury to the plaintiff.”); *Universal Servs. Co., Inc. v. Ung*, 904 S.W.2d 638, 641 (Tex. 1995) (“Objectively, the defendant’s conduct must create ‘an extreme degree of risk.’ . . . [T]he defendant’s conduct must create the ‘likelihood of serious injury’ to the plaintiff.”); *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 22 (Tex. 1994) (“Only if the defendant’s act or omission is unjustifiable and likely to cause serious harm can it be grossly negligent.”).

For two reasons, I address only part (a) of the jury charge that defined malice as a specific intent to cause substantial injury to the plaintiff. First, the Court addresses only that part of the malice definition. Second, it is not clear that part (b) of the definition even applies in intentional tort cases. *See Dillard Dep’t Stores, Inc. v. Silva*, 148 S.W.3d 370, 373 (Tex. 2004) (noting that a question exists about whether subsection (b) of the malice definition applies in an intentional tort setting).¹

The Court cites *Barr v. City of Sinton*, 295 S.W.3d 287, 301 (Tex. 2009) for the proposition that the term “substantial” has two basic components: real vs. perceived and significant vs. trivial. ___ S.W.3d at ___. In *Barr*, the Court was construing the Texas Religious Freedom Restoration Act (TRFRA) that provides a governmental entity may not “substantially burden a person’s free exercise of religion [unless it] demonstrates that the application of the burden to the person . . . is in furtherance of a compelling governmental interest [and] is the least restrictive means of furthering

¹ As the Court notes, Chapter 41 has been amended and now distinguishes between “malice” and “gross negligence.” ___ S.W.3d ___ n.12; *see* TEX. CIV. PRAC. & REM. CODE §§ 41.001(7), (11), 41.003.

that interest.” 295 S.W.3d at 289. The Court noted that the terms “substantially” and “substantial” were not defined in the TRFRA, nor were they seemingly defined elsewhere in Texas statutes. *Id.* at 301. Referencing the ordinary meaning of “substantial” as found in Webster’s Third International Dictionary, the Court noted the two basic components of “substantial.” The Court also noted that as defined, the “real vs. merely perceived, and significant vs. trivial” limitations “leave a broad range of things covered.” *Id.* The Court declined to craft a bright-line rule to apply in every context to determine when a person’s free exercise of religion has been substantially burdened; rather, the Court concluded that each case requires a fact-specific inquiry and the question of substantial burden is to be determined from the perspective of the person whose exercise of religion is in question. *Id.* at 301-02.

As to whether Bennett’s intent was to cause “substantial” injury, it seems appropriate for the analysis to be similar to the analysis applied in *Barr*. The determination should not be according to a bright-line rule, but should be focused on and entail a fact-specific analysis of Bennett’s knowledge and intent in regard to Reynolds’s situation at the time of the conversion. For example, stealing cattle has traditionally been considered a serious matter in Texas. It might be classified as a substantial, significant injury without further analysis, especially in light of the fact that it is a criminal offense. *See* TEX. PENAL CODE § 31.03(e)(5)(A). But in considering the statutory definition of malice, it is hard to see how Bennett could have specifically intended to cause Reynolds substantial injury if, for example, Reynolds owned, or if Bennett believed Reynolds owned, a thousand cattle at the time Bennett converted thirteen of them. On the other hand, if (1) Reynolds owned only twenty cattle, (2) those cattle comprised a large part of Reynolds’s net worth, and (3)

Bennett knew it when he converted thirteen head of them, it would be easier to infer that Bennett specifically intended to cause substantial injury to Reynolds.

As to the magnitude of the injury Bennett intended to cause and the jury's finding that he converted the cattle with malice, two evidentiary factors stand out and in my view comprise legally sufficient evidence that Bennett had a specific intent to cause Reynolds substantial injury by converting his cattle. First, as the Court notes, under the Penal Code, the theft of thirteen cattle is a third degree felony. *See id.* While Bennett was not convicted for theft of the cattle, the penal provision nevertheless reflects the seriousness of taking thirteen head of cattle that belong to someone else. That weighs more in favor of the conversion being a significant injury than the conversion being a lesser injury. Second, there is evidence that before Bennett converted the cattle he was told by Reynolds that Reynolds could not afford to pay approximately \$4,500 as a share of the cost for replacing the fence between the Bonham ranch and the land where Reynolds kept his cattle. Evidence that Reynolds made such a statement about his financial condition supports an inference that Bennett knew the loss of over \$5,000 worth of cattle would be a significant injury to Reynolds and that Bennett intended to cause such an injury.

I join the Court's judgment and opinion, except for the analysis as to the legal sufficiency of the evidence to support the jury's finding that Bennett converted Reynolds's cattle with malice. For the reasons expressed above, however, I agree the evidence is legally sufficient to support the finding and concur in the Court's conclusion as to that issue.

Phil Johnson
Justice

OPINION DELIVERED: June 25, 2010