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 JOHNSON, dissenting.

The Court concludes there is some evidence to support the jury's findings of damages based on Regal's disposal of repossessed vehicles in a commercially reasonable manner, even though there is no evidence the dispositions conformed to standards in the one jury instruction setting out how sales could be commercially reasonable. The Court's holding effectively approves the jury's having decided on its own what the standards are for commercially reasonable dispositions of repossessed automobiles. It then remands the case for the court of appeals to measure the factual sufficiency of the evidence against that unknown standard.

The Court's analysis is flawed in two major ways. First, the Court does not adhere to the rule that sufficiency of the evidence must be measured against definitions as they are given in the jury charge, even if the definitions are incomplete or incorrect. Second, lay jurors are not presumed to

know the meaning of legal terms such as "commercially reasonable." So even assuming it would have been proper for the jury to determine whether Regal's sales of vehicles were commercially reasonable using a standard other than the definition given in the charge, the only way the jury would have known another standard would have been through evidence such as properly qualified expert testimony regarding the other standard. There was no such evidence. Accordingly, I disagree with the Court's conclusion that there is legally sufficient evidence Regal's sales were commercially reasonable and thus disagree with its holding that there is legally sufficient evidence of Regal's damages to the extent those damages were based on commercially reasonable sales.

I. The Jury Charge Defined "Commercially Reasonable"

The jury charge contained standard instructions, including the instruction that "[w]hen words are used in this charge in a sense that varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other meaning." *See* TEX. R. CIV. P. 226a. A trial court must submit "such instructions and definitions as shall be proper to enable the jury to render a verdict." TEX. R. CIV. P. 277. Jury charges are directed to lay jurors untrained in the law, thus charge language is evaluated from the perspective of such a juror. *See Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 862 (Tex. 2009); *Galveston, H. & S.A. Ry. Co. v. Washington*, 63 S.W. 534, 538 (Tex. 1901).

Neither of the parties nor the Court maintains that laypersons have a common understanding of the legal term "commercially reasonable" as it is used in the Uniform Commercial Code (UCC). Thus, the term is one that should have been defined in the charge. *See Tex. & P. Ry. Co. v. Mercer*, 90 S.W.2d 557, 560 (Tex. 1936) (explaining that "proximate cause" is a legal phrase requiring

definition); *Magnolia Petroleum Co. v. Long*, 86 S.W.2d 450, 455 (Tex. 1935); *Reliable Consultants, Inc. v. Jaquez*, 25 S.W.3d 336, 344 (Tex. App.—Austin 2000, pet. denied); *Mayes v. Stewart*, 11 S.W.3d 440, 455 (Tex. App.—Houston [1st Dist.] 2000, pet. denied) ("While the trial court must explain legal or technical terms, its discretion in determining the sufficiency of such explanations is broad."); *Johnson v. Whitehurst*, 652 S.W.2d 441, 447 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) ("The only requirement to be observed is that the trial court must give definitions of legal and other technical terms.").

The issue arises from Question 6 of the charge which submitted Regal's alleged damages. The question began by asking what sum of money, if any, would fairly and reasonably compensate Regal for its damages. The question had four parts with separate elements of damages submitted in each part. Parts (a) and (b) and their accompanying instructions are the parts relevant to the Court's decision. In those parts, the jury was instructed to find Regal's damages measured by

> a. The difference, if any, between the unpaid balance on all Loans that Tex Star has not guaranteed and the amount received by [Regal] upon the sale of the vehicles that served as collateral for such Loans.
>
> 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 the 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.
>
> . . . .
>
> b. The difference, if any, between the unpaid balance on all Loans that Tex Star has not guaranteed and the amount received by [Regal] upon the sale of the vehicles that served as collateral for such Loans. For purposes of this question, consider only Loans relating to vehicles that [Regal] sold *in good faith and in a commercially reasonable manner as those terms are defined in the preceding paragraphs*, and after giving reasonable notice to Tex Star.

(emphasis added).

In regard to the second paragraph of instructions to (a) the Court says "read in context, the first sentence ["Every aspect of the disposition, including the method, manner, time, place and other terms must be commercially reasonable"] conveys the general rule, the second sentence ["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"] offers an alternative method to prove commercial reasonableness, and the following paragraph ["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"] allows that other commercially reasonable methods may be used." ___ S.W.3d ___. But under this record, the second sentence does not merely set out an *alternative* method by which the jury could determine whether the sales were commercially reasonable, as the Court says it does; it gives the only method in the charge for evaluating whether Regal's sales were commercially reasonable and therefore defined the term. Thus, for purposes of this case, the second sentence told the jury what the term "commercially reasonable" means, and it can hardly be disputed that lay persons understand that what a word or term means is a definition of the term. *See also* BLACK'S

LAW DICTIONARY 455 (8th ed. 2004) ("define" means to state or explain explicitly, to fix or establish, to set forth the meaning of a word or phrase; "definition" means the meaning of a word as explicitly stated in a drafted document); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 327 (11th ed. 2003) ("definition" is a statement expressing the essential nature of something or a statement of the meaning of a word or word group or a sign or symbol). As a definition of the term, the second sentence set forth the only standard in the charge by which the jury could evaluate whether Regal's sales were commercially reasonable and still follow the charge, regardless of whether the definition was a complete statement of the law. Therefore, the sufficiency of the evidence of a commercially reasonable sale must be measured against the definition in the charge. *Romero v. KPH Consol., Inc.*, 166 S.W.3d 212, 221 (Tex. 2005) ("The sufficiency of the evidence must be measured by the jury charge when, as here, there has been no objection to it."); *City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 71 (Tex. 2000) ("Since neither party objected to this instruction, we are bound to review the evidence in light of this definition."); *Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex. 2000) ("[I]t is the court's charge, not some other unidentified law, that measures the sufficiency of the evidence when the opposing party fails to object to the charge.").

The text of Question 6 supports the conclusion that it defines the term "commercially reasonable" as used in the charge. Although the term could have been defined in different ways pursuant to the UCC and cases cited by the Court, it was not;[1] it was defined in one way. The trial

[1] For example, Tex Star submitted a proposed instruction setting out numerous factors the jury could consider in determining if Regal's disposition methods were commercially reasonable. The proposed instruction included language allowing reasonable commercial practices among dealers in the type of property that was the subject of the sale to be considered as a factor. The trial court refused the instruction.

court did not include words qualifying the definition as one of several alternative ways Regal could have proven its sales were commercially reasonable. *See* TEX. BUS. & COMM. CODE § 9.627(b)(3). Further, the structure of the sentence militates in favor of using the definition as a complete definition, and against the jury's considering the definition as one of several alternatives. The foregoing is also consistent with the specific language in (b) that refers to definitions of "good faith" and "commercially reasonable" in (a). The instruction in (b) inquired about damages Regal incurred due to unpaid balances on "Loans relating to vehicles that [Regal] sold in good faith and in a commercially reasonable manner, *as those terms are defined* in the preceding paragraphs." (emphasis added).

And, contrary to the Court's statement, the third paragraph of (a) does not imply to the jury that there are other methods of determining whether dispositions of collateral are commercially reasonable or offer any guidance for what would comprise a commercially reasonable sale. It neither adds to nor detracts from the definition of "commercially reasonable" in the preceding paragraph. Rather, the third paragraph merely emphasizes that the process of a disposition is what must be commercially reasonable, and that the end result—the price received for the collateral—should not by itself dictate a finding that a disposition did not conform to commercially reasonable methods.

Further supporting the conclusion that the sentence "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" defines "commercially reasonable" as opposed to merely offering the jury an alternative method to make its findings is the fact that the structure of the sentence is consistent with that of other definitions throughout the charge. The charge contained a separate "Definitions"

section and also included definitions in connection with individual jury questions, although they were not always labeled as definitions. Several examples illustrate the point. In the "Definitions" section, "apparent authority" was among the words and phrases defined. The definition did not contain language such as "When the term 'apparent authority' is used, it means . . ." or "'Apparent authority' is defined as . . ." but it nevertheless clearly was a definition both because of its being in the "Definitions" section and because it substantively would be understood by a lay jury as defining the term:

> Apparent authority exists if a party (1) knowingly permits another to hold himself out as having authority or, (2) through lack of ordinary care, bestows on another such indications of authority that lead a reasonably prudent person to rely on the apparent existence of authority to his detriment. Only the acts of the party sought to be charged with responsibility for the conduct of another may be considered in determining whether apparent authority exists.

See BLACK'S LAW DICTIONARY 455 (8th ed. 2004); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 327 (11th ed. 2003).

Next, Question 1 inquired whether Regal and Tex Star agreed Tex Star would maintain a dealer reserve account, and the jury was instructed that it could consider "any earlier course of dealing" between Regal and Tex Star. The immediately following instruction set out the essential legal nature of the term "course of dealing" and could only be construed as a definition even though it was not identified as such:

> A course of dealing is a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

And in Question 3 the jury was asked: "Did Regal partly perform?" An accompanying instruction did not specify that it was defining "partial performance" but it manifestly did so because it set out the meaning of the term:

> Partial performance occurs when—
>
> a. a party takes actions that can only be explained as reliance on an oral promise;
> b. the party acting in reliance on the contract has suffered a substantial detriment for which it has no adequate remedy; and
> c. failure to enforce the oral promise would award an unearned benefit to the other party.

In Question 9 inquiring whether Tex Star and its principals committed fraud, "fraud" was defined by an instruction that was not specifically identified as a definition:

> Fraud occurs when—
>
> a. a party makes a material misrepresentation,
> b. the misrepresentation is made with knowledge of its falsity or made recklessly without any knowledge of the truth and as a positive assertion,
> c. the misrepresentation is made with the intention that it should be acted on by the other party, and
> d. the other party justifiably relies on the misrepresentation and thereby suffers injury.

The foregoing demonstrate that within the charge there were three structural concepts relevant to the issues on this appeal. First, whether a jury instruction was a definition depended on the instruction's context and substance rather than on whether the instruction was labeled as a definition. Second, definitions in the charge typically did not include language limiting the meaning of the word or term defined to the enumerated elements and no other elements. Third, the trial court's general instruction that the jury was bound to accept and apply the definitions given in the

charge required the jury to make its findings according to the substance and essential elements set out by the definitions in the charge even though the large majority of instructions that defined terms did not limit the definitions to the words used in defining the terms by including language such as "only if" or "if but only if."

Citing Texas Business and Commerce Code section 9.627(b)(1)-(3) and comment 3, the Court says "Article Nine provides several examples of commercially reasonable dispositions, commonly referred to as safe harbors," then lists three examples from the statute. ___ S.W.3d ___. The Court further notes that "a comment to Article Nine explains that these safe harbors are not the exclusive means of proving commercial reasonableness." ___ S.W.3d ___ The Court also lists ten factors, noting "[a]lthough commercial reasonableness is not precisely defined in Article Nine, courts have considered a number of non-exclusive factors when addressing the term." ___ S.W.3d ___. The Court recites evidence of several different methods that Regal used to sell the vehicles, such as soliciting bids from wholesalers, private sales to a small number of trusted wholesalers, and auction, and concludes that Regal's evidence on the method and manner of its sales, together with the loan files and their contents, creates more than a suspicion or surmise that at least a portion of Regal's sales were commercially reasonable. The problem is, the jury did not have (1) the benefit of the Court's knowledge of the UCC; (2) access to the appellate opinions the Court cites; or (3) knowledge of the various factors the Court says could be considered when the jury was determining whether Regal's sales were commercially reasonable, because the information was not included in the charge and there was no evidence such as expert testimony that those factors should be considered and if so, how. Even if some of the jurors had the benefit of the Court's knowledge of the UCC and the

appellate opinions the Court cites, unless the charge instructed the jury that such law or particular aspects of it was applicable or the law was injected into the trial through evidence, the jury could not use it in making its decisions. That is because the jury was bound and limited by the charge language and, in matters beyond the common knowledge and understanding of lay jurors, by the charge and evidence admitted at trial, such as testimony from experts. *See, e.g.*, *Mack Trucks v. Tamez*, 206 S.W.3d 572, 583 (Tex. 2006); *FFE Transp. Servs. v. Fulgham*, 154 S.W.3d 84, 89 (Tex. 2004).

The three paragraphs of instructions and definitions in (a), when read as a lay jury would read them, seamlessly and in a logical manner told the jury what evidence was required for Regal to have proven its damages. Paragraph two of (a) begins by instructing the jury to consider only loans relating to vehicles Regal sold (1) in good faith and (2) in a commercially reasonable manner. That paragraph, by the next sentence, defines "good faith" as "honesty in fact and the observance of reasonable commercial standards of fair dealing." The next paragraph then defines "commercially reasonable manner" by telling the jury that in order for a disposition to be in a commercially reasonable manner, every aspect of the disposition must be commercially reasonable. The following sentence defines "commercially reasonable": "A sale is commercially reasonable if it conforms to reasonable commercial practices among dealers in the same type of property that was the subject of the sale." But nowhere did the charge tell the jury what factors or elements would be considered reasonable among dealers in repossessed automobiles or otherwise constitute commercial reasonableness. Because the trial court did not tell the jury what those factors or elements were, the only way the lay jury would have known what they were would have been from evidence such as testimony by someone with expertise in the subject. Without being instructed as to factors or

elements of a commercially reasonable sale or having expert evidence of them, the jury could only speculate as to what the factors were and how to tell if the evidence met legal requirements.

The Court says that by the court of appeals' reading of the second sentence of the second paragraph—"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 court of appeals converted one of UCC Article 9's safe harbor provisions into a mandatory condition of proof. The Court reasons that "if" cannot mean "only if" because then the first sentence of the second paragraph and the third paragraph of (a) would be superfluous. Respectfully, I disagree with the Court's reasoning. First, reading the "if" to be "only if" merely reinforces the fact that the sentence is a definition. Second, reading "if" in such manner simply does not make the first sentence of the second paragraph and the third paragraph of (a) superfluous. Rather, as is noted above, such a reading makes the instruction and definitions under (a) a clear, understandable, and logical set of instructions by which the jury could measure the evidence. Third, if there was an erroneous conversion of a safe harbor provision into a mandatory condition of proof, it was done by the trial court in its charge, in a question on which Regal had the burden of proof, and without objection from Regal. Regal, however, maintains in this Court that the instructions under (a) are legally correct.

The real difficulty here is that Regal did not have a qualified expert witness testify as to what were reasonable commercial practices among dealers in the same type of property that Regal was liquidating, or that Regal's actions conformed to such practices. The jury and the parties were bound by the charge. This Court should be also.

Contrary to the Court's characterization of the court of appeals' opinion, the court of appeals adhered to the record before it, the jury charge as given, and well-established principles in reaching its result. The court of appeals' analysis that the third paragraph defines "commercially reasonable" fits with the surrounding instructions in (a) and is logical:

> [T]he charge submitted in this case states that a sale is commercially reasonable if it conforms to the dealer standard. The plain meaning of this language does not suggest that the dealer standard is either a safe harbor or an otherwise optional standard, or that any other factors may even be considered, let alone balanced, but instead that a sale is commercially reasonable if (and thus, only if) the dealer standard is met. Regal's contention would thus not only render the *definition* submitted in the charge meaningless, it would authorize a reviewing court to measure the sufficiency of evidence against a different standard than was submitted to the jury . . . .

246 S.W.3d at 750-51 (emphasis added).

In sum, under this record I would hold that the instruction that a commercially reasonable disposition was one that conformed to reasonable commercial practices among dealers in the type of property involved in the sale was a definition. The jury was bound to use that definition. Because there was no evidence that Regal's sales were commercially reasonable as defined by the charge, I would affirm the court of appeals' judgment on that issue.

II. Evidence to Prove Another Standard for Commercial Reasonableness

Even if the Court is correct and the charge did not define "commercially reasonable" sales but only provided an alternative way in which they could be proven, then evidence such as testimony from an expert would have been necessary for the jury to know if Regal's sales were commercially

reasonable.[2] That is because, as previously noted, the issue involves matters beyond jurors' common understanding and there is no other standard expressed in the charge. *See Mack Trucks*, 206 S.W.3d at 583; *Fulgham*, 154 S.W.3d at 89; *Turbines, Inc. v. Dardis*, 1 S.W.3d 726, 738 (Tex. App.—Amarillo 1999, pet. denied). Because the jury was allowed to determine Regal's sales were commercially reasonable in the absence of evidence from which it could properly tell whether "Every aspect of [each] disposition, including the method, manner, time, place and other terms" conformed to reasonable commercial practices among dealers in repossessed vehicles, and in the further absence of evidence establishing either another standard for commercially reasonable sales or from which it could properly tell how to determine if Regal's sales were commercially reasonable, then the jury's finding can only have been based on some unknown standard at which it arrived by speculation.

The evidence showed how James Wright disposed of the automobiles for Regal, that Wright had used those sales methods for many years, that he had previously sold a great number of vehicles using some or all of the methods, and that some of the general methods he used, such as auction or private sale, were acceptable to other witnesses. But more was required. There must have been evidence that Wright's general methods were commercially reasonable and also that "[e]very aspect of [each] disposition, including the method, manner, time, place and other terms" was commercially reasonable. There was no way for the jury to know if his methods and every aspect of them were commercially reasonable because it was not given standards by which it could tell if they were.

[2] I agree with the court of appeals that sales might be proven commercially reasonable under some combinations of facts and jury charge language absent expert witness testimony. 246 S.W.3d at 752 n.9. Such a combination of facts and charge language is not present here.

Accordingly, I would hold that the evidence is legally insufficient to support a finding that Regal's sales were commercially reasonable, even apart from the lack of evidence to support a finding that Regal's sales were commercially reasonable under the definition in the charge.

III. Conclusion

I would affirm the judgment of the court of appeals as to damages Regal claims based on the jury's answers to Questions 6(a) and 6(b) and consider the remainder of the issues presented by the parties.

_____

Phil Johnson
Justice

OPINION DELIVERED: August 20, 2010