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Supreme Court of Texas
Thomas O. Bennett, Jr., and James B. Bonham Corporation, Petitioners,
v.
Randy Reynolds, Respondent
No. 08-0074
December 15, 2009

Oral Argument

Appearances: Susan S. Vance, Alexander Dubose & Townsend LLP, Austin, TX, for petitioners.

David E. Keltner, Kelly Hart & Hallman, Fort Worth, TX, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Justice Nathan L. Hecht, Justice Harriet O'Neill, Justice Dale Wainwright, Justice David M. Medina, Justice Paul W. Green, Justice Phil Johnson, Justice Don R. Willett, Justice Eva Guzman.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is now ready to hear argument in 08-0074, Thomas O. Bennett vs. Randy Reynolds.

MARSHALL: May it please the Court, Ms. Vance will present argument for the Petitioners. The Petitioners have reserved five minutes for rebuttal.

ORAL ARGUMENT OF SUSAN S. VANCE ON BEHALF OF THE PETITIONER

ATTORNEY SUSAN S. VANCE: Good morning, may it please the Court. The principle issue in this appeal is whether the act of selling \$5,000 worth of stray cattle is sufficiently wanton and malicious to warrant punitive damages under the statute. Under this Court's jurisprudence it is not. We are asking the Court to hold the line firmly drawn in *Moriel* reserving punitive damages for only the most extraordinary misconduct. Although we believe that the Court can and should decide this case at the threshold, if punitive damages are warranted, there

are two other additional issues. First, whether punitive damages can be imputed to the landowner corporation, and secondly whether the \$1.25 million dollars in punitive damages, which is 235-to-1 ratio is constitutionally excessive in this case. As we have pointed out in our briefing, national commentators have commented on the aberrance of this award as an outlier. We believe allowing this case to stand completely destroys the line, differentiating ordinary run of the mill misconduct for which punitive damages are not warranted and extraordinarily heinous conduct for which punitive damages are intended.

JUSTICE DAVID M. MEDINA: Are you familiar with Cooper vs. Letterman? Have you seen that?

ATTORNEY SUSAN S. VANCE: Yes, sir.

JUSTICE DAVID M. MEDINA: That seems to be right on point with your issue here in trying to measure the punitive damages versus the actual award that was rendered here which was less than \$6,000. So that's the way I read the case, with that in mind, do we send this back down for further consideration or is there something we can resolve here?

ATTORNEY SUSAN S. VANCE: Pardon me, Judge, I didn't hear the last part of your question.

JUSTICE DAVID M. MEDINA: Well, with the Cooper v. Letterman holding and the analysis that was implied there in actual damages versus punitive damages, I believe the Court, the Supreme Court sent that back to the Ninth Circuit for analysis. Is that what we should do here or is it something we can resolve?

ATTORNEY SUSAN S. VANCE: Under this Court's holding in Tony Gullo, the Court has indicated that the proper procedure is to remand to the court of appeals to suggest a proper constitutionally accepted award [inaudible], and we believe that that's the appropriate procedure, also in line with what the United States Supreme Court has suggested is correct.

JUSTICE HARRIET O'NEILL: You would agree that this is pretty reprehensible conduct, I mean if you favor the jury's verdict. What sort of ratio do you think would be applicable? I mean what happens when you have really reprehensible conduct that only produces economic harm?

ATTORNEY SUSAN S. VANCE: Well, Judge O'Neill, we would not agree that truly reprehensible conduct is at issue here. What's at issue here is Mr. Bennett selling cows that were not his. And there is one very important issue that the parties both agree on and that the court of appeals acknowledges, Mr. Bennett did not set to steal or sell --

JUSTICE HARRIET O'NEILL: Well, not to reargue the evidence. I mean if we presume, as the court of appeals seemed to find, that there was intentional cattle theft and witness tampering and potential even threats of witnesses, then presuming that's true, it seems like the court of appeals looked at the fact that it could be thwarting the judicial system entirely, that sort of witness tampering and that sort of activity and was particularly reprehensible. So just presume that that was true.

ATTORNEY SUSAN S. VANCE: If all of those things were true, Judge O'Neill, there would still not be reprehensible conduct in this case that was punishable by punitive damages. The court of appeals made the mistake of considering conduct, dissimilar conduct, that was very far a field from the tortious conversion conduct that was at issue and for which Mr. Bennett was on trial in this case, in both its maliciousness analysis and reprehensibility analysis which overlapped somewhat, and that is not permissible under the United State Supreme Court's jurisprudence nor this Court's jurisprudence. There are two broad categories with some overlap that the court of appeals considered and certainly apparently affected the jury, which are litigation misconduct and what the court of appeals characterized as "cover-up conduct." And to begin, as we've briefed the Court, litigation misconduct is not correctly addressed or redressed by punitive damages. There are vehicles for that, there are sanctions and controls in place. None of them were invoked or implemented here.

CHIEF JUSTICE WALLACE B. JEFFERSON: Let me just be sure I understand on punitive damages. If I have got a ranch and there's a neighboring ranch, and if I were intentionally to go and steal cattle from my neighbor's ranch and sell it and profit from it and the jury finds that to be so, you're saying that is not a case in which punitive damages would be recoverable?

ATTORNEY SUSAN S. VANCE: Well, Chief, that conduct certainly constitutes theft and should be punished criminally. In this case we know that Mr. Bennett was criminally acquitted for this activity.

CHIEF JUSTICE WALLACE B. JEFFERSON: No, but I'm just saying, just assume my facts that I intentionally go and steal cattle and sell it, whether I'm prosecuted criminally or not, if the jury found that I had that intent and went and stole that cattle and sold it for a profit, you're saying that is not a case in which punitive damages would be recoverable if found by a jury?

ATTORNEY SUSAN S. VANCE: I think the answer to that is possibly if there were other conduct involved. This Court's standard for punitive damages, warranted punitive damages at all, are either a specific intent to substantially harm the claimant, or an extreme degree of risk, malice and gross negligence.

CHIEF JUSTICE WALLACE B. JEFFERSON: But if that were the only conduct involved in the case, I steal intentionally my neighbor's cattle and sell it for profit, is that a case for punitive damages if a jury found that?

ATTORNEY SUSAN S. VANCE: If that were all, I think no, because it's an economic harm that can be economically compensated. There's no death or injury involved, there's no financial ruin involved. Of course there are other factors to consider, certainly the position of the parties, whether they were financially vulnerable, if stealing the entire herd was going to bankrupt the neighbor, then that might be another consideration.

JUSTICE DAVID M. MEDINA: But aren't punitive damages meant to punish this type of conduct? The purpose of punitive damages are meant to punish to a degree and deter.

JUSTICE DAVID M. MEDINA: Yes, so how do we dissuade someone from stealing cattle in the future? I think they used to hang people here in Texas for doing that, so what's wrong with some punitive damages?

ATTORNEY SUSAN S. VANCE: Well, that's absolutely correct, and clearly livestock is an interest that's near and dear to the heart of Texans, but there are criminal penalties for that which are assessed only after trial and conviction with the proper procedural safeguards in place.

JUSTICE DALE WAINWRIGHT: Well, Counsel, the jury found that defendant Bennett committed theft, "Un-lawfully appropriated property with the intent to deprive." The jury found by clear and convincing evidence that that conduct was attended with by malice and that it was conversion. Still no basis for punitives just on those three findings if they stand?

ATTORNEY SUSAN S. VANCE: We would still say no, and for this --

JUSTICE DALE WAINWRIGHT: Plus theft and conversion?

ATTORNEY SUSAN S. VANCE: We would still say no for this reason, that Mr. Bennett was criminally acquitted for this conduct, that the \$5,000 plus dollars that were awarded to Mr. Reynolds fully compensated him for the economic only harm. There was no threat to the general public, there was no threat Mr. Reynolds' safety, and this is just not that type of misconduct that this Court and the United States Supreme Court reserves for a substantial or even any punitive award.

JUSTICE EVA GUZMAN: Counsel, in the context of ranchers, and often when their livelihood depends on their livestock and selling that, and considering the fact that there were apparently some misrepresentations in the beginning about whether or not he had taken the cattle, if you presume that some punitives are appropriate and you back out the litigation misconduct that you contend is not an appropriate component of that award, what is a ratio, assuming that punitive damages were appropriate?

ATTORNEY SUSAN S. VANCE: Judge Guzman, we've had a little bit of difficulty, of course the United States Supreme Court suggests that we need to compare these punitive penalties to other comparable civil penalties or awards in other cases. We find no directly comparable civil penalty. There is a provision in the Code for fine to a corporation that is found criminally culpable, and of course you cannot imprison a corporation, so if theft of a corporation is at issue, the maximum fine there is \$20,000. We have found a case that we have cited here, Cass vs. Stephens which was reduced from -- it's a conversion case -- reduced from a 25-to-1 to 3-to-1 ratio on remand from the Supreme Court.

JUSTICE DAVID M. MEDINA: But criminal culpability is not necessary to assess punitive damages.

ATTORNEY SUSAN S. VANCE: That's correct, Judge Medina. The enumerated lists are all penal code violations, or the majority of them are, so criminal conduct is cap-exempting requirement.

JUSTICE HARRIET O'NEILL: Well, I mean there's also imprisonment, and I think cattle theft was punishable by, wasn't it, ten years in prison up to, and a fine. So how do you put a value on the time in prison?

ATTORNEY SUSAN S. VANCE: Judge O'Neill that's exactly why the United States Supreme Court says that's an improper comparator in awarding punitive damages. You cannot, and that's why they have reinforced that civil penalties are the appropriate comparator, and that is the overarching mistake that the court of appeals made and that really infected this case, was comparing the appropriate amount of punitive damages to a prison sentence for conduct that Mr. Bennett was acquitted for. And further than that, it was ramped up by Mr. Reynolds suggesting that a ten-year prison sentence for Mr. Bennett was equivalent to a life sentence. The language in Mr. Reynold's response to the Motion for Remittitur states exactly expressly that, "This is the last hope for the Court to assess punishment for the criminal conduct that Mr. Bennett escaped." And punitive damages cannot be used in place of the criminal process.

CHIEF JUSTICE WALLACE B. JEFFERSON: Ms. Vance, I want to give you an opportunity to explain why the liability findings against the corporation under alter ego theories or ABC principles is inappropriate in this case. Was there really a difference between Bennett and the corporation, were corporate formalities kept? It seems to me the jury heard evidence that they were not.

ATTORNEY SUSAN S. VANCE: That's correct, Chief, and it doesn't matter. Even if, as the jury found Mr. Bennett and the corporation were as one, the doctrine of disregarding the corporate entity is for the purpose of ensuring that the corporation is not used as an inequitable shield for assets either in front of or behind an individual defendant. So even a finding that Mr. Bennett and the corporation are one and the same does not warrant imputing liability to the corporation here. The corporation was formed many years ago. It was not formed for the purposes of hiding assets that were part of this judgment, it was not formed to perpetrate a sham on Mr. Reynolds, and if you look at all the cases that we have cited where either the corporation or --

JUSTICE DON R. WILLETT: What does the record show about the purpose of the corporation?

ATTORNEY SUSAN S. VANCE: The purpose of the corporation was to develop property. It was a property holding corporation held by Mr. Bennett's daughters. Mr. Bennett was the president and CEO, he was allowed to run cattle and live on the corporation and he transacted business for the corporation.

JUSTICE DON R. WILLETT: The corporation owned the equipment that was used for cattle, they owned the fences, they owned the cattle guards, they paid employees who ran the cattle on the property. What is the corporation's argument that running the cattle was not in the interest of the corporation or the scope of Bennett's employment as president of the corporation?

ATTORNEY SUSAN S. VANCE: Well, there's no evidence whatsoever that the corporation benefited in any way from the running of the cattle. The fact that they owned the equipment or the land was not material to this inquiry. It was absolutely undisputed that they owned no cattle and were not in the cattle business, but further than that, Judge Willett, even showing that an agent is acting for a corporation or even is the corporation, it still must be shown that the underlying misconduct was in the scope of employment. And although the court of appeals invented this cow-policing idea to make it appear that Mr. Bennett was in the scope of the corporation's business by keeping trespassing cattle off the property, there was no evidence of that whatsoever. There's no nexus shown between the actions underlying this lawsuit and Mr. Bennett's responsibilities for the corporation.

JUSTICE DALE WAINWRIGHT: Was Mr. Bennett a vice principal of the corporation?

ATTORNEY SUSAN S. VANCE: There was no jury finding on that, Judge, but there was the disjunctive question of the four mechanisms by which liability could be imputed, one of which was vice principal. I don't think that it was necessarily argued below that the vice principal finding was wrongfully omitted, but even inferring, if we may, that he was a vice principal, it's still not enough. Just because he was a vice principal, that doesn't mean that all acts or all misconduct is directly imputed to the corporation. You still must show a nexus between the conduct at issue and the corporation's business.

JUSTICE DALE WAINWRIGHT: You said you don't know if that was necessarily argued below. Was it or was it not?

ATTORNEY SUSAN S. VANCE: It was not directly preserved and it was not addressed by the court of appeals.

JUSTICE DALE WAINWRIGHT: Was it preserved or not? I'm not sure what you mean by "directly preserved."

ATTORNEY SUSAN S. VANCE: I see that I'm out of time, may I continue?

JUSTICE DALE WAINWRIGHT: Yes.

ATTORNEY SUSAN S. VANCE: The motion for new trial and the briefing in the court of appeals was not a model of clarity. There were references to the incorrectness of charging the jury on corporate liability, but they were fairly broad.

JUSTICE DALE WAINWRIGHT: Yes or no?

ATTORNEY SUSAN S. VANCE: I'd have to say no.

JUSTICE DALE WAINWRIGHT: Okay, thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Ms. Vance. The Court is now ready to hear argument from the Respondent.

MARSHALL: May it please the Court, Mr. Keltner will present argument for the Respondents.

ORAL ARGUMENT OF DAVID E. KELTNER ON BEHALF OF THE RESPONDENT

ATTORNEY DAVID E. KELTNER: If it please the Court, the malice argument made by the Petitioner is predicated on the idea that Moriel says to have malice, you have to have grievous physical injury, financial ruin or death. That is not what Moriel says, although those words are in Moriel, Justice Cornyn was speaking to the difference between bad faith damages which have been confused with punitive damages and here's what he says. "...would ordinarily result in extraordinary harm not ordinarily associated with breach of contract or bad faith denial of the claim such as death, grievous physical injury or financial ruin." Now it could be other things because he used the words "such as."

Interestingly, the statute is what we have to apply. Chapter 41, which was in existence at that time, does not use the term "grievous bodily injury, financial ruin or death." It does even use the -- it uses the term, I'm sorry, "substantial injury," and it uses the term "potential harm." That's exactly what was submitted here, so --

JUSTICE EVA GUZMAN: Mr. Keltner.

ATTORNEY DAVID E. KELTNER: I'm sorry.

JUSTICE EVA GUZMAN: Mr. Keltner. When we have the type of ratio that we have at issue here, and looking prospectively at other cases, when you're pushing the damages to their Constitutional limit in a case like this, what does that do to our review of other cases where you have this type of ratio?

ATTORNEY DAVID E. KELTNER: Well, Your Honor, we agree that the issue and ratio has got to be something that concerns the Court, and when you see this ratio it was obviously something the Court wanted to look at. I would tell you that I think there are two things that the Court must review in that regard to make sure that it doesn't have an impact on other cases. First off, remember there are two Constitutional issues here. One, and the one on the three guideposts that we have in Gore was determined by the United States Supreme Court to be a fair notice requirement, and that was what the Court was looking at. Later in the case Cooper Industries that Justice Medina talked about, we discussed a Constitutional taking as well. Let's talk about the fair notice, is their fair notice here? Yes, in this statute look at the notice that is provided. In the statute itself it says, "The gloves are off, if you commit something that the jury finds to be a criminal offense." So the notice provision in one respect is taken care of. But still, the ratio is one about is this just too high a ration for Constitutional concerns, is it unusual punishment? As you know, Scalia and Thomas would say no. But the truth of the matter is this, when you look at this and consider the potential harm, and we have a significant disagreement with our friends on the Petitioner's side about this, the potential harm indicates the grounds from which you can judge the ratio. And let me tell you, I think the Petitioner makes two mistakes here that are terribly important about, one, this charge, and two, the facts in this case. There wasn't just one conversion here, there were a series of acts, and if the Court will look at Question 2, you will see it is not tied to the original taking of the cattle. It is tied to what conversion generally is, no objection that the charge didn't

appropriately charge conversion, and let me tell you what they were. First, it was boxing up the cattle or trailering the cattle and sending them. Second thing, let's take Mr. Bennett at his word, Mr. Bennett says, "Look, I intended to send those off, but if it was determined that those weren't my cattle." I don't know who was going to determine it, but if it was determined it wasn't, he was going to have the money and quote "make it right." Return the money. He testified to that over a dozen times in this trial. What happens? The evidence is undisputed that when Mr. Reynolds, when Randy Reynolds brings up the issue of his missing cattle at the courthouse after the trial over the fence, what happens? Mr. Bennett accuses Mr. Reynolds of stealing his cattle.

JUSTICE NATHAN L. HECHT: Was that over in an afternoon? I haven't looked at the record, but it looked like from the briefs that that was all over in an afternoon. Each one of them took a deputy with him and they drove out to each one of their ranches and they looked around and nothing was found.

ATTORNEY DAVID E. KELTNER: That's exactly right, Your Honor. I would argue that it goes further and there's more conversion, but that's right. That issue was over relatively quickly and the record is exactly as you suspect it to be.

JUSTICE NATHAN L. HECHT: So there's talk about threat of criminal prosecution against Reynolds, but the threat was that afternoon?

ATTORNEY DAVID E. KELTNER: No, sir, and let me explain why. And you raise a good question though. The threat was directly made at that period of time, it continued. After that, in a period of months, Mr. Bennett did several other things. First off, the first thing he tried to do is register -- well, let me take it in chronological order, it will be easier. The next thing he did was go out and get witnesses and he offered to pay them to help prove that Reynolds had stolen the cattle.

JUSTICE NATHAN L. HECHT: To come up with evidence, right?

ATTORNEY DAVID E. KELTNER: Sir?

JUSTICE NATHAN L. HECHT: To come up with evidence?

ATTORNEY DAVID E. KELTNER: Yes, sir.

JUSTICE NATHAN L. HECHT: Well, what's the difference between that and hiring a private investigator?

ATTORNEY DAVID E. KELTNER: In one respect, not a whole lot, but this was a fact witness to give testimony about it.

JUSTICE NATHAN L. HECHT: But he testified he was just supposed to give up any evidence that he had and he didn't have any and he didn't take the money.

ATTORNEY DAVID E. KELTNER: That's right. That's right.

JUSTICE NATHAN L. HECHT: Well --

ATTORNEY DAVID E. KELTNER: But I think the jury could draw an inference from that issue as well. There was more that related to the criminal trial as well.

JUSTICE NATHAN L. HECHT: But if you hired a private investigator, he would take the money.

ATTORNEY DAVID E. KELTNER: Yes, sir.

JUSTICE NATHAN L. HECHT: Even though he found nothing.

ATTORNEY DAVID E. KELTNER: And I'm not --

JUSTICE NATHAN L. HECHT: This fellow didn't have anything, and he didn't take the money.

ATTORNEY DAVID E. KELTNER: True enough. True enough. I think though that when you deal with somebody, not a private investigator, trying to find out the facts of the case and have someone come in and testify, and Mr. Bennett on cross-examination testifies what he intended to do. He wasn't giving money for nothing, it was only if the man would testify and Mr. Reynolds was actually convicted. Different than what a private detective could ever do under the statutes that guide them. You're not entitled to get paid that way.

JUSTICE NATHAN L. HECHT: Well, but people give rewards all the time for information leading to the arrest and conviction of X.

ATTORNEY DAVID E. KELTNER: True enough, but there's more. There is more.

JUSTICE NATHAN L. HECHT: Okay.

JUSTICE EVA GUZMAN: Mr. Keltner --

ATTORNEY DAVID E. KELTNER: And there's a lot more. And the next thing that happens is their intimidation of witnesses, happens in the criminal trial --

JUSTICE EVA GUZMAN: Mr. Keltner, I have a question, before you move on on that other issue.

ATTORNEY DAVID E. KELTNER: Yes.

JUSTICE EVA GUZMAN: Is that litigation misconduct though as characterized by opposing counsel and not something that we would look at when we are looking at reprehensibility of this conduct?

ATTORNEY DAVID E. KELTNER: No. It didn't have anything to do with this litigation; it had only to do with the criminal trial and putting Mr. Reynolds in jail. It is completely different issue as is the rest of the things, like changing the brand. When he learned that the Texas Southwestern Cattle Raisers Association had pictures that Mr. Grant had taken, he attempted to change the brand at the courthouse and make it his own brand. Fortunately refused by the county clerk. Additionally you had issues on where threats were made about people testifying. Mr.

Grant explicitly, before this lawsuit is filed, is told, "Deny it all to the end. Nine times out of ten, we'll get off."

JUSTICE EVA GUZMAN: But does that go to how reprehensible this conduct is, or is that discovery abuse, litigation misconduct for which punitive damages are not assessed?

ATTORNEY DAVID E. KELTNER: I think it goes to two things. I think, one, it goes to the issue of malice and what he knew and what intent was, because at the same time he was still converting the property. Remember, at the time that he gets that pictures that Ranger Andrews from the Southwestern Cattle Raisers Association shows him, he's got the picture showing them that they have Reynolds brand. He's still holding the \$5300 that he said, "I'm going to make it right and give it back." Does he continued to convert it or does he give it?

JUSTICE PHIL JOHNSON: Can you convert money?

ATTORNEY DAVID E. KELTNER: Yes.

JUSTICE PHIL JOHNSON: Okay, so he sold the cattle and he kept the money, so till the end of his life he's still converting?

ATTORNEY DAVID E. KELTNER: Yes, sir.

JUSTICE PHIL JOHNSON: And then he can be punished for anything bad that he does to the other party while he's holding that money then is your position?

ATTORNEY DAVID E. KELTNER: I think I would not take it that far. I would say that if you are continuing to converting, and remember, this is his defense, his issue is I didn't covert when I took it because I was going to give the money back if I determined they weren't mine, or I learned they weren't. During that period of time, yes, I think we can hold him liable for the other things he did. Remember, in a criminal enterprise, especially in an issue like this where there is cattle theft and it's not a murder crime or kidnapping or something like that, the key is to get away with it, you've got to hide your tracks, you've got to cover your tracks of what you've done, it's the only way you come out. The criminal enterprise isn't completed until the end of the situation. That's what they want you to ignore. TXO, the Supreme Court considered this very thing. They have suggested to you in their opening brief that TXO was no longer good law. We disagree. In BMW vs. Gore, TXO is cited 13 times, written by the same justice. In every case regarding punitive damage that is significant, say Cooper Industries which doesn't deal with an issue that TXO was dealing with, TXO is cited with approval. And here's what it says, and remember it's directly on point to what we have here. There the issue was slander against title. You know the facts, but here's basically what there were. What had happened is there had been a lease taken by TXO, TXO subsequently learned that they might have an argument that the lease is no good and they could get out of it and maybe renegotiate the royalty. They had what was termed a phenomenal royalty of 22 percent. To do that, they took a position that actually the mineral title had been conveyed away from the donor previously. The Court found that to be baloney, and in fact in a matter of contract construction that that wasn't true. Here are the things that were submitted to the jury: It

was only slander of title. The only damages you could get under slander of title at that period of time was the amount of attorney's fees to defend the title, and that's what they got \$19,000. And the issue was, okay, are we going to judge the \$10 million award, punitive award, against those \$19,000 and if we do, certainly it has Constitutional problems, or do we look at the potential harm? And in TXO they looked at the potential harm. And in fact, according to the dissenting justices, they looked at it just from evidence in the record and calculated it to be between \$5 and \$8 million that could have happened to whom? The plaintiff. And that's the important thing. And they said, so that is a ratio of 1-to-2 and they sustain that issue. This case is exactly the same. TXO, although the Court has been invited on four times to change TXO, the Supreme Court has not done that and they have considered potential harm again. To whom? To the plaintiff. That is the crucial issue.

JUSTICE NATHAN L. HECHT: But it looks to me, just following that along because I think we do have to deal with that, that the complaint here is that there was a threat of criminal prosecution against Reynolds which was investigated in a few hours and was over. There was an offer to Hibler [Ph.] to produce evidence that you didn't have and he didn't take the money. There was some talk about threats against people which never happened, and some talk about trying to get people to change their testimony which never happened. How do we assess the potential harm in that?

ATTORNEY DAVID E. KELTNER: I think you do it the same way the United States Supreme Court did in TXO. You determine if the scheme had been successful what would the damage to the plaintiff be? And that's what they did. In TXO, just like here, it was not possible to recover anything more in a slander of title case than the attorney's fees. Here it was only possible to recover one thing in a conversion case and that is the value of the title. But the damage --

JUSTICE NATHAN L. HECHT: But if the --

ATTORNEY DAVID E. KELTNER: Excuse me, I'm sorry.

JUSTICE NATHAN L. HECHT: But here, if he had suborned perjury, physically assaulted witnesses, bribed Hibler and maliciously prosecuted Reynolds, the sky would be the limit I would think.

ATTORNEY DAVID E. KELTNER: I agree. I think, and the damage --

JUSTICE NATHAN L. HECHT: But if none of those things did happen, then how do we discount it I guess?

ATTORNEY DAVID E. KELTNER: Well, Your Honor, it is if the scheme worked. That's what TXO decided and BMW confirms as well. That is it if the scheme worked, if it played out, you look at the likely harm to the plaintiff. I will admit that the other side has a point in what they talk about in the Phillip Morris case regarding the harm to other people. The same issue was true in Campbell where the United States Supreme Court found that I think it was the Utah Supreme Court had given extraterritorial effect to other conduct and conduct happening between the defendant and other people. In Phillip Morris the same was true, and the Supreme Court cautioned, "Hey, let's not do that. You

can't do that, that's not fair. You've got to consider only the potential harm to the plaintiff." That's what the jury did here, we believe in assessing punitive damages. Justice Pemberton in his opinion says precisely that, and we think that is entirely appropriate.

JUSTICE PHIL JOHNSON: So when did the conversion occur?

ATTORNEY DAVID E. KELTNER: It happened over a period of time. The first conversion --

JUSTICE PHIL JOHNSON: So when did the cause of action accrue for conversion?

ATTORNEY DAVID E. KELTNER: Your Honor, the cause of action would have, I think, accrued originally when the cattle were trailered up and taken to the Jordan Auction in San Saba. I think it continued to occur though when -- and the jury could have believed that or could have not believed that. They could have believed under this charge in Question 2, which wasn't limited in that period of time, that the conversion occurred when on the number of times when Mr. Bennett learned that the cattle were actually not his, and there was convincing evidence of that.

JUSTICE PHIL JOHNSON: When did that occur?

ATTORNEY DAVID E. KELTNER: It happened at least three times. It happened once originally when they trailered the cattle. The second time when Reynolds tells him, "I think my cattle are on your place." He certainly had reason to believe it. The third time it happened, and it's hard to deny, when the Texas Southwestern Cattle Association ranger goes to the sheriff and has pictures of the brands and is able to check in with the Jordan Cattle Auction to say, and through previous sales and the like, "Those were Reynolds cattle," and he still kept the money.

JUSTICE HARRIET O'NEILL: Let me ask you about that. Those were Bennett's cattle, and it doesn't seem to be disputed that the cattle operation was Bennett's personally and not the corporations.

ATTORNEY DAVID E. KELTNER: Your Honor, I don't want to make too big a point of this because the majority of the evidence is certainly that way. It is disputed though, and there are several things that happened in this case. In the fence litigation, Bennett claimed that he had title to the ranch itself and the cattle operation was his. So that would mean that all of them were those cattle -- I mean were the corporation's cattle, but he testified later, and we don't have any evidence to dispute it, that the cattle actually belonged to him. They certainly were sold on his account, but they were rounded up by corporation employees, put in a trailer by corporation employees.

JUSTICE HARRIET O'NEILL: But does that really matter? I mean when we look at, I mean let's say he was a vice principal, but he has to have still sold them in furtherance of the corporate purpose, and to me the court of appeals' opinion is very weak on that point, that the corporate purpose is to keep other cattle out of the corporate property. But that doesn't then translate into, "I can sell the cattle and it becomes the corporation's money."

ATTORNEY DAVID E. KELTNER: Your Honor is correct. And the truth of the matter is, when you look at that one part, remember what the court of appeals was looking at. They did not consider the alter ego theory at all, as you know. That was something that they did not write on. They didn't address that particular issue, but they decided it on an agency theory. And the way agency was charged in this case was for all of the actions, and there is no error of preserved as to that, none at all. The objection there is, it is, quote, "a misstatement of the law" or "there's no evidence to support it."

JUSTICE DAVID M. MEDINA: You make this conversion analysis seem to be like an insurance analysis on when an event occurs. And in the words of the Honorable Justice Willett, it seems like it occurs when it happens, not when someone happens upon it. And so how can there be three different conversions? Isn't there just one act that we have to look to?

ATTORNEY DAVID E. KELTNER: No, sir, and let me tell you why. In this case, it is important, this is a factually-intense case and the facts make this case very unusual. The truth of the matter is Bennett's defense raised this issue and that's why the charge had to be broad. He said, "I didn't convert when I took those cattle. I didn't convert at all because it was my intention to give the money back." Well, take him at his word and the jury well could have. There was three other occasions in which he had direct evidence that the cattle weren't his and he didn't return the money.

JUSTICE NATHAN L. HECHT: What do you think would be an excessive award?

JUSTICE DAVID M. MEDINA: He doesn't want to bet against himself.

ATTORNEY DAVID E. KELTNER: More than a million dollars, Your Honor. You expected me to say this. Here's what I would say. Obviously the Court, just as in Tony Gullo, has to look at the amount of the award regardless of the waiver of the cap. We have struggled with this idea; I think that an award significantly above what we had would be problematic. I know that this amount has to concern the Court and I know you have to do your job in looking at the ratio to show that the State of Texas is serious in enforcing the United States Constitution. In looking at that, it is hard to say but for intentional criminal conduct on evidence they no longer dispute, looking at the potential harm, and remember the evidence of the potential harm came, one, from a two-year minimum to a ten-year maximum of possibility of harm, and also from Mr. Bennett himself, who testified remember in his malicious prosecution counterclaim, that the value of the award and the harm would have been done for putting him in jail under the same statute --

JUSTICE HARRIET O'NEILL: Well, wouldn't he have a malicious prosecution claim for that?

ATTORNEY DAVID E. KELTNER: Do we?

JUSTICE HARRIET O'NEILL: Sure.

ATTORNEY DAVID E. KELTNER: No, ma'am. And they point that out to you, that's their argument. They argue that --

JUSTICE HARRIET O'NEILL: But if there's a remedy, if there's a cause of action that would remedy it, do we subsume that within a punitive damages award?

ATTORNEY DAVID E. KELTNER: Your Honor, I think the answer to that, I'm going to come at it another way and answer indirectly. I think the answer to your question is you have to look to see if the scheme and likely harm, what that would be, and that applies to the amount that the ratio applies to. So in answer to Justice Hecht's question, if the ratio is applied in a 2-to-1 or a 1-to-1 is applied per defendant, I think that would be appropriate in this case.

JUSTICE HARRIET O'NEILL: But I guess what my question is, if we were looking at a malicious prosecution claim --

ATTORNEY DAVID E. KELTNER: Yes.

JUSTICE HARRIET O'NEILL: And that would include the potential harm from the malicious prosecution, it doesn't seem to me the evidence would support this kind of an award for malicious prosecution, and if that's the case, why would it support a punitive damages award of this amount?

ATTORNEY DAVID E. KELTNER: Let me explain I think why. First off, in this case it wouldn't because remember there wasn't a prosecution in this case, so the issue there is we couldn't bring a malicious prosecution claim as a result of that. The issue is when you're dealing with malicious conduct, no matter the cause of action, just like in TXO, remember slander of title, all they could get under TXO was the attorney's fees. Did the Court consider that? No, they looked at a breach of contract that did not occur or the Court didn't let occur to be able to calculate the harm upon which the ratio was calculated.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Mr. Keltner.

ATTORNEY DAVID E. KELTNER: Thank you, Your Honor.

REBUTTAL ARGUMENT OF SUSAN S. VANCE ON BEHALF OF PETITIONER

ATTORNEY SUSAN S. VANCE: I'd like to begin where Mr. Keltner began and left off with TXO certainly.

JUSTICE HARRIET O'NEILL: First of all, let me ask you did you waive an agency theory?

ATTORNEY SUSAN S. VANCE: I beg your pardon?

JUSTICE HARRIET O'NEILL: I understood that the jury found, one of the bases for the jury findings of the corporate liability would be that he was acting as an agent of the corporation, and has that argument been waived here that he was not an agent of the corporation in selling the cattle?

ATTORNEY SUSAN S. VANCE: I think even if it has, Justice O'Neill, it doesn't matter because again there's no nexus shown. I don't think the Court necessarily needs to decide that. The Court could address that without deciding that issue. I think it was perhaps arguably not preserved. I will point out that there was vehement objection both in the Motion for New Trial and below that the jury was improperly charged altogether on corporate liability. TXO, clearly the seminal potential harm case, but this is not a potential harm case. There was no scheme alleged to do anything to Mr. Reynolds. As we pointed out earlier, the parties agree that Mr. Bennett did not set out to steal his cows. He did not plot to steal the rest of the herd; he did not plot to entice other cows to wonder up onto the ranch. There was a single finite act of selling cows that were on his property.

JUSTICE PHIL JOHNSON: So when do you say the conversion occurred?

ATTORNEY SUSAN S. VANCE: The conversion occurred when Mr. Bennett put the cattle into the trailer and trucked them off to be sold.

JUSTICE PHIL JOHNSON: Not when he kept the money and not when the cattle raisers investigators came to him? That's not the conversion under your view?

ATTORNEY SUSAN S. VANCE: Justice Johnson, to me that points out one of the most disturbingly broad characteristics of the rule that our opponents propose, which is that if you do not lay down in litigation and concede that the other side is correct, that you will be subject to a 235-to-1 potential punitive damage award. I think that this Court's decision has to be informed by policy and what are we trying to deter. If that's the rule, then every time a litigant loses and they didn't concede at the moment that they were shown some evidence that their position may be wrong, they'd be subject to an enormous punitive damages award. That's an inappropriate use of punitive damages. The conversion occurred when it did, which was in October of 2000. And I would point out just while we're on that topic, that the report of the mutually missing cattle was about a month after that. The discovery by Mr. Reynolds that perhaps the cattle that had been sold in October of 2000, and the revelation of those photos and so forth to Mr. Bennett didn't happen for another year, so that criminal report was a dust-up in the afternoon. Clearly there are hard feelings on both sides of this, but it was over, there was no criminal prosecution, the system worked and that was it. That's the trouble with the TXO analysis here. There was no scheme and the input for potential harm is the theoretical harm that would have happened to Mr. Reynolds if that report to law enforcement had resulted in a wrongful conviction, and the measure of that harm is based on what Mr. Bennett thought was a fair award to him for his mental anguishes damages, which Mr. Reynolds also did not plead or prove.

JUSTICE EVA GUZMAN: Well, isn't this pretty serious and egregious to accuse someone of a crime you know they didn't commit and to ruin their reputation, so to speak, especially in a ranching community where stealing cattle is a pretty serious offense?

ATTORNEY SUSAN S. VANCE: I would certainly agree with that, Justice Guzman, and in fact Mr. Bennett's counterclaims were based on exactly that in this suit. Now the jury did not find for him, but it was not a

meritless claim, the Motion for Directed Verdict on his claim was denied and it was allowed to go to the jury. And so certainly, yes, that's true, but there was no evidence that this was a frivolous complaint, it did not go past that. Mr. Bennett made that complaint based on the same source of information that Mr. Reynolds had about missing cows which was Larry Grant, who is basically the spider in the middle of this web. The TXO potential harm was a scheme. There was a quiet title on an ill-gotten quitclaim deed, and if they had succeeded the damage would have been huge. But I would point out that TXO certainly predates the refinements made in State Farm and Gore, and the Supreme Court has shown an ever increasing -- or ever decreasing tolerance for large ratios of this kind. But again, the two critical mistakes, they are imputing potential harm to Reynolds on a theoretical threat and valuing that based on what Mr. Bennett thought his claims were worth. I wanted to just briefly touch on, and I see I just only have a moment, that cover up, that inquiry should be directed to the hazard imposed by the underlying conduct. There was no hazard here that more cow selling was going to occur or harm anyone, and that may go to intent, but intent is not before the Court, we're not contesting that here. And the hugely broad amount of conduct that has been brought in to put the finger on the scale for both malice and reprehensibility does not comport with the Supreme Court's punitive damage jurisprudence nor this Court's. It's not intended to be a catalogue of the entire relationship between Mr. Bennett and Mr. Reynolds, and serious line-drawing needs to be done. How far back to we go? How far forward do we go? How far a field do we go? And the answer is it's the conduct that underlies the lawsuit. That's all that was charged here, it's all that was pleaded, it's all that was proven. All of the other evidence that was here was dissimilar conduct, it was not before the Court, it was not pleaded or proven. As the litigation misconduct has other remedies, as the Court recognizes, this was an inappropriate vehicle to try to punish those wrongs. I see that I've exceeded my time. Are there other questions?

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Ms. Vance. Are there any questions? Then the cause is submitted and the Court will take a brief recess.

MARSHALL: All rise.

[End of proceedings.]

Thomas O. Bennett, Jr., and James B. Bonham Corporation, Petitioners,
v. Randy Reynolds, Respondent.
2009 WL 5113426 (Tex.) (Oral Argument)

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