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HULL STATE BANK V. JONES

JOHNSTON: May it please the court. This case involves an issue of conversion and the damages arising from the conversion of a truck, truck and trailer by Hull State Bank. Hull is a small farming and ranching community in East Texas with about 1,000 people. And as most of the justices know, that area had a tremendous downturn in their economy, the result of that many banks in the area were placed under supervision. That happened to Hull State Bank in the 86-87 era. And during that period Mr. Jones had been farming and doing his banking with Hull State Bank and he had lost an amount of over $225,000 over a 7 year period. The bank was under supervision, the bank was prohibited from extending any further credit to Mr. Jones. It was told that they had to either have Mr. Jones move his line of business, his notes, or there would have to be some liquidation of his assets. Mr. Jones had lost money continually. He owed the bank over $180,000 as of Nov. 1987. And at that point in time he approached the bank, he had moved to Dilly, Texas to be in a truck farming business, he approached the bank and offered to sell his home and some land, which the bank declined to take because that would have been illegal, it was his homestead. As an alternative he offered to sell his farm equipment. So at that point in time in Nov. 1987, the bank agreed with Mr. Jones to allow him to have his farm equipment liquidated, sold, and they would forgive him of about $100,000 in debt which he owed on the farm debt. It was $98,000 and some change. So at that point in time the fair market value of the farm equipment was about $14,000. And that is important because one of the things that the court will review is the Tannenbaum decision, and the Adcock decision.

This is not a case where the bank unilaterally and without the agreement of Mr. Jones sold the equipment. As a matter of fact Mr. Jones in his pleadings judicially admitted that he had agreed that the bank could sell his farm equipment. The jury found unanimously that in Nov. 1987, the bank and Mr. Jones had agreed to sell his farm equipment and apply it to the debt. In reliance on that agreement the bank in fact did sell the equipment and applied it to the debt.

The complaint of Jones was well that he wasn't given notice of the sale. It is our position under the Uniform Commercial Code that under 9.504 if there is an agreement between the parties to sell the collateral and apply it to the note there is no default that then requires a notice. It's our position that when you have an agreed sale as we had in this case as judicially admitted by the defendant, and as found by the jury, that there is no need to give them notice of the sale because they have already agreed to it.

In this situation at that point in time Mr. Jones owed the bank about $146,000 as of the time that the notes went in default. And I think that default is a key issue, because it's our position that there could be no award of mental anguish damages, there could be no conversion if Mr. Jones was in default on the notes or in default of the Nov. 1987 agreement when the bank took possession of the truck, truck and trailer. And that's what the judgment was entered on. The court entered a judgment on the conversion claim of Mr. Jones saying the bank converted a truck, truck and trailer when they repossessed the truck, truck and trailer in May 1988.

It's significant to know that Mr. Jones on April 26, 1988, well prior to May, 1988, unequivocally and it was undisputed at trial, that Mr. Jones told the bank that he would not pay on any of his notes and he was going to sue the bank if they didn't release the title to the truck, truck and trailer.

HECHT: Is that evidence that the bank felt insecure?

JOHNSTON: I believe it is your honor. And that was the testimony of Mr. Zabranek, the bank's attorney that sent demand letters that were denied or ignored by Mr. Jones.

HECHT: The focus has been on the 2 big notes and foreclosure and whether notice was given, and whether the debt was discharged. But why isn't that statement if it was made enough evidence to give the bank reason to foreclose on the other 3 notes?

JOHNSTON: We believe that it was your honor because Mr. Jones unequivocally told...the bank people testified that 2 bank officers said that Mr. Jones told them that he wasn't going to pay on any of the notes, including the 3 notes that the court in Liberty found were not in default. And the jury found repudiation in this court and in the Holly case ruled recently that when there is a repudiation of a contract, that is a breach of the contract, that is suspends performance by the other party. It's our position that when the jury found that Jones failed to comply with the Nov. 1987 agreement, which included the requirement that the truck, truck and trailer notes be renewed, and the reduction in principal and interest be paid current.

Now it's also the bank's position that on or before May 29, 1988, that was the date that the truck, truck and trailer were repossessed they in good faith believed the prospect of payment or performance was impaired. So it's our position that there can be no conversion. There's long standing law in Texas that if there is a default there can't be no conversion when a bank, and it's undisputed that they had notes, they had security agreements on the truck, truck and trailer, those were entered into evidence without any objection. And I think this court has ruled in the Stanley Boot case in 1992, that once the notes are admitted into evidence with no objection, the bank is entitled to collect on the notes. It was also undisputed that Mr. Jones refused to pay the truck, truck and trailer note and said he wasn't going to make any payments prior to the repossession.

It's also our position that the trial court was wrong. The jury unanimously found that there was $146,000 owed to the bank. Even if the court wanted to under Tannenbaum say that the large farm note and the FMHA notes were discharged, there was still 3 other notes. Even if the court was right that by failure to give notice on the sale of the farm equipment, that could only have discharged the large farm note and the FMHA note. The TC disregarded the jury's findings that the other 3 notes were in default. Without a motion, there was no motion for entry of judgment notwithstanding the verdict, there was no motion filed by the plaintiff to disregard any jury findings. But the court on its own motion disregarded questions 10, 19, and 20, in order to come up with a net recovery to Mr. Jones.

It's also our position on the mental anguish damages that there was no finding of malice. The jury did found a conversion. However, the conversion issue should have been conditionally submitted. And in that the question should have been: Was Mr. Jones in default on these 3 notes? If he was, the bank could not have converted. However just a conversion issue was submitted without any predicate on a default.

HECHT: On the mental anguish damages you're not arguing that there's no insufficient evidence to support the award I take it? That's not in your brief?

JOHNSTON: That's correct. I'm not sure that the level of his frustration and loss of sleep and that sort of thing meets the level that is necessary in order to be awarded...

HECHT: But you haven't argued it in the brief?

JOHNSTON: That's correct your honor.

HECHT: And what you have argued is that you can't get it in a case like this?

JOHNSTON: Well there was no malice finding by the jury. And it's our contention that with respect to the only theory on which the judgment was entered conversion, that there could not be any conversion as a matter of law because the 3 notes were in default.

HECHT: Did you raise the complaint that you can't get it in a case like this without a malice finding in the TC?

JOHNSTON: We did your honor.

HECHT: Where?

JOHNSTON: We made that objection in the charge conference on the statement of facts pages 2482-2484, and 2489-2491. And also I would add that counsel for the Jones' stipulated during the presentation of the evidence, that the mental anguish proof was being put on only on the issue of punitive damages. It's our position that they stipulated to that and they're bound by it.

HECHT: Did you raise it in any post-trial motions?

JOHNSTON: We did your honor. Both in Beaumont and all the way up.

OWEN: You said you raised the issue on mental anguish damages. Did you do it in post-trial motions at the TC?

JOHNSTON: We did. We filed a motion with the court to disregard that finding. We've pointed that out in our brief that we timely objected to the mental anguish being submitted at the charge conference. There was no pleading on it. It should not have been submitted as actual damages and we also objected that it was not recoverable unless there was a finding of malice as a predicate.

OWEN: When did you first raise that?

JOHNSTON: I believe we even raised that before we went to trial. I know that we objected during the trial to the evidence on that, and that's why the stipulation came about, and Mr. Morefield stipulated they were only putting that on for the purposes of punitive damages, and that we objected at the charge conference.

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RESPONDENT

IZEN: Your honors this was a case with many issues. It involved DTPA, good faith and fair dealing. It had mental anguish as part of conversion. We submitted a wrongful coercion claim that we obtained a jury verdict on.

PHILLIPS: How many issues were there in this case?

IZEN: 49 issues. The CA tracked the issues in the middle of its opinion. They analyzed how the issues were decided. Now with 49 issues what do you do? Did the TC disregard anything here? I'm going to be arguing beyond what I think was granted before this court. The assignment of error here that writ was granted on is only No. 3. Number 3 as it's stated does say as Judge Hecht has pointed out that you can't get mental anguish in a case like this. It didn't raise the sufficiency that the CA didn't apply

the right sufficiency rules, which is all you rule on here. You don't reexamine the facts except to make sure that the CA examined them in the proper legal manner.

HECHT: Do you agree that that issue was raised in the TC?

IZEN: Probably so at some point in all of these arguments. We had about 200-300 pages of arguments over how the charge would be submitted and also the motions for new trial and all the rest of the things. What I'm trying to say is we get to the CA, the other side is supposed to assign proper error to this court by the writ of error and you as I understand it grant writ of error restricted to specific points.

PHILLIPS: Well we have the whole case before us.

IZEN: You granted on writ of error No. 3. In light of that comment I will respond to the argument that jury issues were totally disregarded by the TC. That's not true. The jury issues were reconciled.

HECHT: Let me ask you first the CA states in its opinion on April 26, 1988: Jones told the bank that he would not make any future payments on the notes and demanded release on all indebtedness. That's true I take it?

IZEN: I believe that is true.

HECHT: Why didn't that give the bank as a matter of law reason to feel insecure about the repayment of the 3 vehicle notes?

IZEN: I came to argue mental anguish and I would like Mr. Morefield to be able to respond to that. But I will say this that the jury found there was successive demands made. I will let Mr. Morefield explain that, but there are 2 sets of notes or security. There is the notes for the farm equipment that the man actually did rice farming with, that there was an agreement that that debt would be forgiven in Nov. 1987. There's a letter agreement to that effect. Then there is the foreclosure where the bank demands all of the money that it was owed before it agreed to forgive the rice farming indebtedness. And they make those demands before the May, 1988, date that they pick up the equipment. The jury found there were excessive demands made. They made more demand than what they were entitled to make. The jury also found that there was a fear and good faith on the part of Hull State bank about their security. But we didn't have a finding as to when there was a fear about the security. That could have been before Nov., 1987 when they made the agreement to forgive the farm indebtedness, and it could have been after as you're pointing to.

HECHT: Well then I'm going to ask you why wasn't it on April 26 when Mr. Jones made the statement that the CA said he made?

IZEN: The answer to that is the jury was asked: On or before May, 1988, were they in fear of their security? And we obtained a jury verdict to the fact that's seemingly inconsistent that there was excessive demands made, and the only way you can reconcile those is to hold which the courts did. You have to save each part of the jury verdict that you can, that's the rules, that they were not in conflict, and that any fear they had, therefore where I interpret it was before that Nov., 1987 agreement or at least in such a situation that the jury issues and answers did not conflict.

HECHT: Well it looks like if the debtor writes the bank and says I'm not going to pay you anymore, that as a matter of law that means that the bank ought to feel sort of insecure about its collection?

IZEN: There was no argument that as a matter of law that excuses the submission of a jury issue on that. I came basically to concentrate on mental anguish, because I thought this was an examination of the mental anguish.

We obtained a knowing finding on deceptive trade practices. And I think it's the Beaston(?) case, which was reversed by this court from the Austin CA. They held in the insurance code I believe that you had to have a knowing finding. This is not a case where we don't have a knowing finding of conduct to support mental anguish. So the next question then is do we have a quantum of evidence to support mental anguish? Are we required to produce physical manifestation evidence, or is there required to be some physical proof of mental anguish? The CA tracked the proof of mental anguish, the award what it was based on. The gentlemen's hair turned gray. And I also point out that they had another business besides the rice farming business. It was a business with these pick-up trucks that he had, the truck, the truck and the trailer as Mr. Johnston has referred to. Essentially they interfered with his business and put him out of business. The CA of Tyler after having the benefit of your opinion in your latest case, which was Parker on mental anguish, this Tyler case came out July 7, 1995, they point out to a distinction of mental anguish about the physical proof requirement being dispensed with when there's proof of an intentional tort that interferes with someone's business. And that is the Adaline Likes v. City of Tyler, 12-9300273-CV.

As far as mental anguish is concerned in this case, there is both the physical evidence - the man's hair turning gray, and the other evidence that we enlisted from the wife to support that. But also the legal argument that mental anguish can lie in this case without such proof, because of that business exception, which the Tyler CA refers to and which was recognized in Brown & Root Inc. v. Cities Municipalities, 721 S.W.2d 881. That's a Houston CA 1st District case.

I'm going to let Mr. Morefield respond here to your question further about the issue of matter of law of fear of their security which would excuse the picking up the equipment as a matter of law.

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MOREFIELD: Justice Hecht in answer I believe to your question with regard to Hull State Bank's insecurity and why as a matter of law Hull State Bank would not be insecure in May, 1988, when that statement was made, I think the answer is in 2 parts. Number one, a couple of months before this repossession Mr. Jones had purchased an extension of time on each of these notes. He had paid valuable consideration and none of the notes, the truck, truck nor the trailer note were a monthly paid type obligation. They were a lump sum obligation due sometime in the future. The notes were actually called prior to their stated maturity for which Jones had paid valuable consideration. But when we get to the jury charge and the answer to the jury questions, and I believe what Mr. Izen was referring to is that we had what appeared to be a conflict in the jury answers. And as this court is aware a trial judge has a duty to reconcile apparently conflicting jury answers because it's presumed that a jury does not intend to return a verdict of that nature that's fairly in conflict.

The issues that were submitted by Hull State Bank inquired as to Jones' performance on all of these notes: the FMHA note, the large farm note, as well as what we've come accustomed to call the truck, truck and trailer note. In the brief specifically the issue on insecurity paraphrasing it, jury question No. 20 inquired into whether Hull State Bank on or before May 29, 1988, believed that the prospect of payment or performance was impaired under any of the notes or security agreements? Of course the jury had before it not just the truck, truck and trailer note that forms the basis of this conversion cause of action, the jury award, but also the FMHA note, and the large farm note, which our position is because of the equipment that secured those 2 notes was sold without regard to the notice requirements of disposition under §9.504, they were extinguished at that time. So default could not be

predicated upon nonpayment of those notes. The jury could very well have said and considered: Yes, the prospect of payment under the FMHA note was impaired, or prospect of payment under the large farm note was impaired at any time during this long history of Jones with Hull State Bank. In stark contrast to that Jones obtained specific findings from the jury. Paraphrasing again the jury answers to jury questions No. 28 and 32: that on or before May 29, 1988, Hull State Bank called the notes on Jones' truck, truck and trailer and repossessed the items for the purpose of wrongfully coercing Jones into paying the balances due on the notes held by Hull State Bank, and not because such notes were in default. Jury question No. 28 likewise finds specifically that the notes were not in default, the specific truck, truck and trailer notes on that particular day.

GONZALEZ: But the jury also found that the bank was in good faith when it believed that it's security was impaired?

MOREFIELD: To what point in time? I think that's my point.

GONZALEZ: Question no. 20 did not specify time. It just had the global question: the bank in good faith believed the prospect the payment was impaired?

MOREFIELD: I know that's my point. The jury could very well have considered Hull State Bank's mental process at a time prior to the repossession, or under the FMHA note, or under the large farm note...

HECHT: The two big notes were gone on April 26?

MOREFIELD: But they were before the jury though.

HECHT: I understand that. But the 2 big notes were gone on April 26 when Mr. Jones told the bank I'm not going to pay anymore?

MOREFIELD: That is correct.

HECHT: It looks to me like if you were a bank and your debtor said I'm not going to pay anymore, you would feel a little insecure about your payment sort of as a matter of law unless you thought he was joking. Usually that's not very funny.

HIGHTOWER: Counsel doesn't that amount to a repudiation of the note?

MOREFIELD: The truck, truck and trailer notes?

HIGHTOWER: Yes.

MOREFIELD: I don't know based on the record which in this particular statement which notes this statement referred to, whether the truck, truck and trailers notes, whether it was the FMHA note, whether it was the large farm note.

HIGHTOWER: Wouldn't it be reasonable for the banker to assume that it applied to all of the notes when he said he wasn't going to pay them anymore?

MOREFIELD: Well perhaps so. But I think also it would be the petitioner in this case his obligation to obtain a specific jury finding to that effect. The bank did not obtain a specific jury finding to that effect. In fact the TC in reconciling the specific with the general as is required to do, the specific certainly governs and rules and controls over the general and we have specific jury findings that under these

3 particular notes on the date of repossession those notes were not in default.

HECHT: Just to follow-up a moment on Judge Hightower's question. It is true on April 26 the 2 big notes had already been foreclosed on hadn't they? And your position is they were discharged?

MOREFIELD: As a matter of law, yes in the principles of 9.504.

HECHT: So the statement made on April 26 had to refer to the other 3 notes?

MOREFIELD: Jones did not know as a matter of law that Tannenbaum and 9.504 and unlawful disposition of collateral had that result. And we were not able to instruct the jury to that effect, nor advise the jury by evidence or argument or otherwise. So when the jury is answering these jury questions they are naturally considering Jones' performance under all obligations from the beginning of his relationship with Hull State Bank up and to the day of that trial. I think the court had a duty to reconcile these findings and certainly it is my understanding that the law is on these specific jury findings that the specific does control over the general.

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REBUTTAL

JOHNSTON: I would like to clear up a couple of points on the opinion by the CA in Beaumont. The CA in Beaumont states in 2 places in their opinion that the bank apparently relied upon the default in the FMHA note, the large note, is a basis for repossessing of the truck, truck and trailer. That is simply inaccurate because the testimony by everyone, the bank's lawyer Zeke Zabranek, 2 of the bank officers that testified said that at the point in time that Mr. Jones came in on April 26 and said I am not going to pay any of my notes, and that was Jones, it's undisputed testimony that Jones said I am not going to pay any of my notes, at that point int time they became insecure. And that was why on May 20, Zeke Zabranek wrote him a letter and said: Mr. Jones you're default on your note. What are you going to do about it? He didn't reply, didn't call, didn't go by the bank, didn't do anything. He sent him another letter on May 31: Mr. Jones you still haven't replied to my letter. You are in default on the truck, truck and trailer and we are going to go by and we have the right to repossess it. If you don't come take care of the note we are going to repossess the note. And this is a man that owed the bank $180,000. Even if you take off the $100,000 that they were willing to forgive him in November, he still owed $80,000. And he's saying I'm not going to pay on my notes, and I'm going to sue you if you don't release all of my titles to the truck, truck and trailer.

GONZALEZ: What was the basis of his request for release of the titles?

JOHNSTON: He had made the agreement in November for the farm equipment to be sold. Pursuant to that agreement he came in and renewed the notes, which was part of the condition under that, then by the time the farm equipment was sold and he goes down here and he renews some of these notes pursuant to the November 1987 agreement, sometime in there I think he gets mad about something. I don't know what. And he decides that now 4-5 months later he's not going to live up to that November, 1987 agreement. The testimony was that he changed his mind when he went to see Mr. Morefield and Mr. Izen his lawyers, that's the point in time that his attitude changed when he went to get legal advice about what his position was.

The other fallacy of their argument, and it's very important, we pled and the jury found that Jones repudiated the Nov. 1987 agreement with Hull State Bank. The jury found that Jones failed to comply with the 1987 agreement. The key part of the 1987 agreement was Mr. Jones we will forgive you of $100,000 in debt, we will sell the farm equipment and apply that to the note, but you have

to pay off the truck, truck and trailer note. When the jury found that he was in default of the Nov. 1987 agreement they found that he had repudiated his agreement to pay the truck, truck and trailer note. And that's why there can be no conversion as a matter of law because he was in default to the bank under the Uniform Commercial Code. They had the absolute right under their notes and security agreements and the UCC to go pick up the truck, truck and trailer.