IN THE SUPREME COURT OF TEXAS

No. 15-0146

WAL-MART STORES, INCORPORATED, APPELLANT,

v.

DORIS FORTE, O.D., ON BEHALF OF HERSELF AND ALL OTHER SIMILARLY SITUATED PERSONS; BRIDGET LEESANG, O.D.; DAVID WIGGINS, O.D.; AND JOHN BOLDAN, O.D., APPELLEES

ON CERTIFIED QUESTIONS FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JUSTICE BOYD, joined in Part I by JUSTICE LEHRMANN and JUSTICE DEVINE, dissenting.

I would not answer the certified questions in this case because they are based on the premise that the Texas Optometry Act authorizes private persons to sue for civil penalties. The State, as *amicus curiae*, argues that the Act does not create a private right of action for civil penalties, and although the parties have not briefed the issue, it seems to me that the State is correct. Although the Court appears to share my doubts about the questions' premise, it chooses to assume the premise is correct, answers the questions as if it were, and concludes that "civil penalties" are "damages" and "exemplary damages" under Chapter 41 of the Texas Civil Practice & Remedies Code.

I disagree with the Court's decision to answer the questions as if their premise were correct. If the premise is incorrect, as it appears to be, answering the questions without first addressing the premise will only cause confusion and a waste of judicial and other resources. I would ask the

parties to brief the premise and decide that issue first. At a minimum, I would advise the Fifth Circuit and the parties of our concerns about the premise and decline to answer the questions. I also disagree with the Court's answers to the certified questions, which seem to result more from the assumption that the premise is correct than from the relevant statutory language. Based on the statutory language, I conclude that civil penalties awarded under the Optometry Act are not "damages" or "exemplary damages" under Chapter 41. I write briefly to explain both reasons for my dissent.

I.
The Questions

The Optometry Act makes it unlawful for a manufacturer, wholesaler, or retailer of ophthalmic goods to "directly or indirectly . . . control or attempt to control the professional judgment, manner of practice, or practice of an optometrist." TEX. OCC. CODE § 351.408(c)(1). "A person injured as a result of a violation" of that prohibition "is entitled to the remedies in Sections 351.602(c)(2), 351.603(b), and 351.604(3)." *Id.* § 351.605. The three remedies are:

- "A person may institute an action in a district court . . . for injunctive relief or damages plus court costs and reasonable attorney's fees," *id.* § 351.602(c);
- "The attorney general or [Texas Optometry Board] may institute an action . . . for injunctive relief and a civil penalty not to exceed $1,000 for each day of a violation plus court costs and reasonable attorney's fees;" *id.* § 351.603(b); and
- "A violation . . . is actionable under" the Texas Deceptive Trade Practices-Consumer Protection Act, *id.* § 351.604.

In this case, the Optometrists successfully sued Wal-Mart for civil penalties under section 351.603(b) and did not seek any actual damages. On appeal, Wal-Mart argues that the civil penalties are "exemplary damages" under Chapter 41 of the Civil Practice and Remedies Code, and the Optometrists cannot recover them because "exemplary damages may be awarded only if

damages other than nominal damages are awarded." TEX. CIV. PRAC. & REM. CODE § 41.004(a). In two certified questions, the United States Court of Appeals for the Fifth Circuit asks us whether civil penalties awarded under the Optometry Act are "damages" under Chapter 41, and if so, whether they are "'exemplary damages' such that [section] 41.004(a) precludes their recovery in any case where a plaintiff does not receive damages other than nominal damages." *Forte v. Wal-Mart Stores, Inc.*, 780 F.3d 272, 283 (5th Cir. 2015). As usual, the Fifth Circuit "disclaim[s] any intention or desire that the Supreme Court of Texas confine its reply to the precise form or scope of the questions certified." *Id.*

This Court has constitutional authority to answer "questions of state law certified from a federal appellate court." TEX. CONST. art. V, § 3–c(a); *see* TEX. R. APP. P. 58.1. When a federal circuit court certifies questions to us, "the questions certified do not limit our answers," but we aim to "provide answers solely as to the status of Texas law on the questions asked." *Interstate Contracting Corp. v. City of Dallas*, 135 S.W.3d 605, 620 (Tex. 2004). "Any response other than that necessary to answer the question authorized by the Constitution or the enabling rules would be dicta." *Rose v. Doctors Hosp.*, 801 S.W.2d 841, 844 (Tex. 1990). We may, however, "decline to answer the questions." TEX. R. APP. P. 58.1. In this case, I would decline to answer the questions because they appear to be based on a faulty premise.

The premise is that the Optometrists can sue for civil penalties under the Optometry Act. Although the parties have not briefed that issue, the Act's plain language and our precedents indicate that the premise is incorrect. "Generally, a statutory penalty or fine is not payable to a private litigant." *Brown v. De La Cruz*, 156 S.W.3d 560, 564 (Tex. 2004). Some statutes expressly state that a private individual may file suit to recover a civil penalty. *See, e.g.*, TEX. GOV'T CODE

§ 82.0651(b)(4) (providing that a client who prevails in a barratry action shall recover from the attorney "a penalty in the amount of $10,000"); TEX. PROP. CODE §§ 92.0081(h) (providing that a "tenant may . . . recover from the landlord a civil penalty of one month's rent plus $1,000"), 92.334(b) ("[A] landlord . . . may recover from [a] tenant a civil penalty of one month's rent plus $500."). All of those statutes that I could find, however, provide for a one-time penalty rather than a per-day or per-violation penalty, like the Optometry Act. *Compare* TEX. OCC. CODE § 1801.154(a)(2) ("A [violator] is subject to a penalty of not less than $100 or more than $500."), *with id.* § 351.603(b) ("The attorney general or board may institute an action . . . for . . . a civil penalty not to exceed $1,000 for *each day* of a violation . . . ." (emphasis added)). Any "statute providing for a daily penalty unrelated to actual losses must be strictly construed, and may be asserted in a private cause of action only if the statute clearly so provides." *Brown*, 156 S.W.3d at 565.

When a statute that provides for a civil penalty is silent as to who may file suit to recover it, we have "strictly construed" the statute to permit a claim only by "the Attorney General or some other governmental entity or representative." *Id.* at 563–65 (holding statute that provided that a "seller who violates Subsection (a) *is subject to a penalty*" did not create a private cause of action). Even when a statute provided that one-half of a penalty "may be recovered by and for the use of any person" aggrieved by the violation, we concluded that only the government could sue for the penalty because the statute did not expressly state that the aggrieved person could bring the claim. *Agey v. Am. Liberty Pipe Line Co.*, 172 S.W.2d 972, 974 (Tex. 1943).

The Optometry Act is not silent as to who may sue for civil penalties; it expressly provides that the "attorney general or board may institute an action . . . for . . . a civil penalty." TEX. OCC.

CODE § 351.603(b). Although the Act provides that a "person injured as a result of a violation . . . is entitled to" that remedy, *id.* § 351.605, the remedy that section 351.603(b) provides is a suit by the attorney general or the Optometry Board, not a private cause of action by the injured person. By contrast, the Act expressly provides that an injured person "may institute an action . . . for injunctive relief or damages," *id.* § 351.602(c), and that a violation "is actionable under" the DTPA, *id.* § 351.604, which expressly allows a "consumer [to] maintain an action," TEX. BUS. & COM. CODE §17.50(a), and defines a consumer as "an individual." *Id.* § 17.45(3). But the Act does not "clearly provide" that a private person may sue for a civil penalty. It thus appears that the certified questions' premise is wrong.

When this Court receives a certified question that is based on a faulty premise, we routinely decline to answer the question. *See, e.g.*, *Doody v. Ameriquest Mortg. Co.*, 49 S.W.3d 342, 343 (Tex. 2001) (declining to answer second certified question because the Court's answer to first question negated the basis for the second); *Lucas v. United States*, 757 S.W.2d 687, 687 (Tex. 1988) (declining to answer second question because answer to first question made answering second question "unnecessary"). Even here, the Fifth Circuit's second question (whether civil penalties are exemplary damages) is conditioned on a "yes" answer to the first question (whether civil penalties are damages), and if we were to answer the first certified question "no," we would not answer the second. Although the Fifth Circuit does not ask the threshold question on which its two questions depend (whether the Optometrists can sue for civil penalties), the principle is the same. If the certified questions are based on a faulty premise, answering them is "unnecessary" and the Court should respectfully decline the Fifth Circuit's request.

The Court elects to assume the premise is correct and answer the questions, following the

course the Court took when it faced a "similar predicament" in *Shamrock Refining and Marketing Co. v. Mendez*, 844 S.W.2d 198 (Tex. 1992). *Ante* at ___. In that case, the plaintiff prevailed on a claim for "'false light' invasion of privacy," and the court of appeals affirmed. *Shamrock Ref.*, 844 S.W.2d at 198. In this Court, the defendant argued that the trial court erred by failing to instruct the jury that the claim required proof that the defendant acted with malice. *Id.* at 199. This Court had never recognized the false-light cause of action in Texas, however, and several non-parties filed *amicus curiae* briefs urging us to reject the claim. *Id.* at 200 & n.1. We chose instead to "assum[e] the availability of this cause of action," and held that, if it exists, it requires proof of malice. *Id.* at 200. Because the Court had "not yet either recognized or disapproved the tort," we remanded the case "for a new trial in the interest of justice, giving [the plaintiff] an opportunity to prove actual malice and [the defendant] an opportunity to object to the theory of recovery in its entirety." *Id.*

A mere twenty months later, however, the Court "join[ed] those jurisdictions that do not recognize the false light invasion of privacy action." *Cain v. Hearst Corp.*, 878 S.W.2d 577, 579 (Tex. 1994). In the short time that passed between *Shamrock Refining* and *Cain*, the courts and parties in those cases, along with those involved in at least eight other cases, continued to litigate and appeal false-light claims.[1] They no doubt expended significant time and resources in the process. All of that waste could have been avoided if the Court had solicited briefing and decided

[1] *See Groves v. Gabriel*, 874 S.W.2d 660, 661 (Tex. 1994); *City of Alamo v. Garcia*, 878 S.W.2d 664, 665 (Tex. App.—Corpus Christi 1994, no writ); *Shaheen v. Motion Indus., Inc.*, 880 S.W.2d 88, 93 (Tex. App.—Corpus Christi 1994, writ denied); *Closs v. Goose Creek Consol. Indep. Sch. Dist.*, 874 S.W.2d 859, 878 (Tex. App.—Texarkana 1994, no writ); *Maewal v. Adventist Health Sys./Sunbelt, Inc.*, 868 S.W.2d 886, 888 (Tex. App.—Fort Worth 1993, writ denied); *Reeves v. W. Co. of N. Am.*, 867 S.W.2d 385, 396 (Tex. App.—San Antonio 1993, writ denied); *Mitre v. La Plaza Mall*, 857 S.W.2d 752, 755 (Tex. App.—Corpus Christi 1993, writ denied); *Schauer v. Mem'l Care Sys.*, 856 S.W.2d 437, 443 (Tex. App.—Houston [1st Dist.] 1993, no writ).

the issue in *Shamrock Refining*. I believe that would be the "best course" to take here.

The Court concludes that approach "would be difficult when the matter is outside the questions certified to us," *ante* at ___, but the Fifth Circuit expressly "disclaim[s] any intention or desire" that we "confine [our] reply to the precise . . . scope of the questions certified." *Forte*, 780 F.3d at 283. I expect the Fifth Circuit and the parties would prefer to have an answer to the threshold question before they expend additional resources litigating and deciding questions that will likely prove to be irrelevant. At a minimum, I would explain our concerns about the premise and "decline to answer the [certified] questions," just as our rules permit. TEX. R. APP. P. 58.1.

II.
The Answers

Because the Court elects to address the certified questions, I write briefly to explain my disagreement with its answers. The Court concludes that civil penalties awarded under the Optometry Act are "damages" and "exemplary damages" under Chapter 41. *Ante* at ___. As the Court notes, Chapter 41 expressly defines "economic damages," "exemplary damages," "compensatory damages," "future damages," and "noneconomic damages." TEX. CIV. PRAC. & REM. CODE §§ 41.001(4), (5), (8), (9), (12). But it does not define "damages," and it "does not refer to civil penalties." *Ante* at ___.

In the absence of a statutory definition, we must seek to determine a term's plain or ordinary meaning. *Beeman v. Livingston*, 468 S.W.3d 534, 539 (Tex. 2015). We may do that by relying on "a wide variety of sources, including dictionary definitions, treatises and commentaries, our own prior constructions of the word in other contexts, the use and definitions of the word in other statutes and ordinances, and the use of the words in our rules of evidence and procedure." *Jaster v. Comet II Constr., Inc.*, 438 S.W.3d 556, 563 (Tex. 2014) (plurality op.). But as the Court

notes, these sources provide little, if any, guidance here. Because the term "damages" is so broad and used in so many different contexts, dictionary definitions are "of little help," *ante* at ___, and our prior discussions of the term "do not determine the proper interpretation of Chapter 41," *ante* at ___. I agree.

Finding no guidance in our usual sources, the Court bases its answers on Chapter 41's "object" and "purpose," which "[u]nquestionably" is "to restrict and structure the recovery of exemplary damages." *Ante* at ___. I agree that is what Chapter 41 does, but that does not answer the question of whether civil penalties are exemplary damages. To say that civil penalties are exemplary damages under Chapter 41 because Chapter 41 restricts awards of exemplary damages simply begs the question.

Similarly, the Court notes that Chapter 41 expressly states that it does not apply to actions brought under four other statutes, and "[t]he Texas Optometry Act is not one of them." *Ante* at ___. The Court concludes it cannot read the Optometry Act in as an "exception" that would impair Chapter 41's purpose. *Ante* at ___. But if civil penalties are not exemplary damages, there is no need for any exception. The question here is not whether Chapter 41 applies to actions under the Optometry Act; the question is whether it restricts a recovery of "civil penalties" under the Optometry Act. The Act permits an action for civil penalties and separately permits an action for damages, but it does not permit a claim for "exemplary damages." If civil penalties are not exemplary damages, then no exception is necessary at all. Again, the Court's reasoning simply begs the question.

Ultimately, I find the Optometrists' arguments convincing. First, in the absence of any guidance in the language of Chapter 41, I find guidance in the fact that the Optometry Act

unambiguously treats "damages" and "civil penalties" as two distinct forms of relief. *Compare* TEX. OCC. CODE § 351.602(c) (permitting "[a] person" to recover "damages plus court costs and reasonable attorney's fees"), *with id.* § 351.603(b) (permitting the attorney general or board to sue for "a civil penalty"). And the Optometrists identify numerous other Texas statutes that allow recovery of both damages and civil penalties and, like the Optometry Act, treat them as two distinct remedies.[2]

The Court rejects this argument because "the issue is not whether [damages and civil penalties] are different" but "whether Chapter 41 applies to both." *Ante* at ___. But whether Chapter 41 applies to both depends on whether they are different. Chapter 41 addresses "damages" and "exemplary damages," but never mentions civil penalties. If they are the same, Chapter 41 applies to both. If they are different, Chapter 41 applies to a claim for damages but not to a claim for civil penalties. Chapter 41 is unclear, but the Optometry Act and numerous other statutes

[2] *See, e.g.*, TEX. GOV'T CODE § 82.0651(d) (permitting a barratry plaintiff to recover "actual damages" and "a penalty in the amount of $10,000"); TEX. OCC. CODE § 1801.154(a) (providing a commission merchant may be liable for "actual damages" and a "penalty of not less than $100 or more than $500"); TEX. PROP. CODE §§ 27.007 (providing contractor who fails to provide required notice may be liable for "a civil penalty of $500 in addition to" damages), 92.0081(h) (permitting a tenant to recover "a civil penalty of one month's rent plus $1,000" and "actual damages"), 92.0131(f) (permitting tenant to recover "a civil penalty in the amount of $100 plus any towing or storage costs"), 92.015(c) (permitting a tenant to recover "a civil penalty in an amount equal to one month's rent" and "actual damages"), 92.016(e) (permitting a tenant to recover "actual damages" and "a civil penalty equal in amount to the amount of one month's rent plus $500"), 92.0161(f) (same), 92.017(h) (permitting recovery of "actual damages" and "a civil penalty in an amount equal to the amount of one month's rent plus $500"), 92.0562(g)(5) (permitting a tenant to recover "a civil penalty of one month's rent plus $2,000" and "actual damages"), 92.0563(a) (permitting a tenant to recover "actual damages" and "a civil of one month's rent plus $500"), 92.164(a)(4) (permitting a tenant to recover "actual damages" and "a civil penalty of one month's rent plus $500"), 92.165(3) (same), 92.260 (permitting a tenant to recover "damages" and "a civil penalty of one month's rent plus $100"), 92.333 (permitting a tenant to recover "actual damages" and "a civil penalty of one month's rent plus $500"), 94.158(g)(5) (permitting tenant to recover "actual damages" and "a civil penalty of one month's rent plus $2,000"), 94.159(a) (permitting a tenant to recover "actual damages" and "a civil penalty of one month's rent plus $500"), 94.160(a) (permitting a landlord to recover "actual damages" and "a civil penalty of one month's rent plus $500"), 94.254 (permitting a tenant to recover "actual damages" and "a civil penalty of one month's rent plus $500"), 94.301 (permitting a tenant to recover "actual damages" and "a civil penalty in an amount equal to two months' rent and $500"); TEX. TRANSP. CODE §§ 5.004(b) (providing common carrier may be liable for "damages" and "a penalty of not less than $5 or more than $500"), 5.008(b) (same).

clearly treat them as different. I would conclude that Chapter 41 does not apply to civil penalties because nothing in that statute indicates or suggests that the term "damages" means something different from what it means in all of the statutes that clearly distinguish between damages and civil penalties.

Second, I find guidance in the fact that the Optometry Act permits only the "attorney general or board" to sue for civil penalties. TEX. OCC. CODE § 351.603(b). If civil penalties are exemplary damages under Chapter 41, then, as the Court agrees, the attorney general and board "could rarely, if ever, recover" civil penalties because they would rarely, if ever, recover anything other than nominal damages. *Ante* at ___. The Court concludes this argument is "flawed" because "the application of Chapter 41 would destroy" the government's "enforcement powers under the Act" and "the imposition of sanction by the government is limited by institutional constraints not present when the claimant is a private person." *Ante* at ___. The Court thus appears to believe that Chapter 41 applies when a private party seeks a civil penalty (or "exemplary damages") but not when the government seeks a civil penalty (or "exemplary damages"). Nothing in the language of Chapter 41 supports that belief, and the Legislature easily could have excluded claims by the government if that had been its intent. Rather than rely on the absurdity doctrine or a canon of construction to rewrite Chapter 41 so that it does not apply to government enforcement actions, the more logical result is to conclude that, consistent with the Optometry Act and numerous other statutes, civil penalties are distinct from damages and exemplary damages under Chapter 41.

Finally, I find guidance in the Optometrists' argument that applying Chapter 41 to a claim for civil penalties under the Optometry Act would require applying it to all claims for civil penalties. The Court avoids this argument by reasoning that the question of "whether Chapter 41

applies to any of these other statutes depends on the analysis we have followed here." *Ante* at ___. But it fails to identify any explanation or example of how that analysis could produce a different result when applied to the other statutes that treat damages and civil penalties as distinct remedies. *See supra* note 2 and accompanying text. The purpose of civil penalties is always the same, and the question in each application would simply be whether "civil penalties" are "damages" or "exemplary damages" under Chapter 41. The Court provides no reason why the answer would ever be different, and I can think of none.

All of this is not to suggest that the answers in this case are easy. If they were, the Fifth Circuit would have answered them without requesting our help. We must construe Chapter 41 as written, but at least for the questions presented here, it was not written very well. In the end, I would conclude that civil penalties are not damages or exemplary damages under Chapter 41.

III.
Conclusion

Because the certified questions in this case appear to be based on a faulty premise, I would decline to answer them and would either request briefing on the premise and decide that preliminary issue or advise the Fifth Circuit and parties of our concerns and decline to answer the questions. The Court elects to assume that the premise is correct and proceeds to provide answers that I conclude are incorrect. Therefore, I respectfully dissent.

_____
Jeffrey S. Boyd
Justice

OPINION DELIVERED: May 20, 2016