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## THE BASSETT BULLETIN™

### SUPREME COURT ADDS TO THE “CONSTITUTIONAL FENCE AROUND EXEMPLARY DAMAGES”

The Texas Supreme Court recently delivered an opinion in *Bennett v. Reynolds*, Dkt. 08-0074, 53 S.Ct.J. 883 (Tex. June 25, 2009) reversing a punitive damage award in the amount of 1.25 million dollars, on a case of cattle theft valued at \$5,327.1, sending the case back to the lower courts to reconsider the amount of damages.

This opinion does several things. It makes it clear that even where a tortious act falls into the felony-theft exception to the punitive damage cap – and cattle rustling does count as a third-degree felony in Texas – there are still limits, found in the United States Constitution, to the amount of punitive damages a court can award. What those limits may be are necessarily ill defined, though four times the actual damages are a rough guideline.

In upholding the award of *some* punitive damages, though not all, the Court clarifies the kinds of evidence relevant to the jury’s consideration of the intentions of wrong doer.

### FACTS OF CASE

In *Bennett*, a jury found that the defendants' actions — theft of cattle — constituted a crime, triggering the felony-theft exception to the exemplary-damages cap found in Texas Civil Practice & Remedies Code §41.008(c)(13).

The case concerns a longtime feud between cattle-raising neighbors Randy Reynolds and Thomas O. Bennett, Jr. in San Saba County. In 2002, Reynolds sued Bennett and his corporate landowner, the James B. Bonham Corp., of which Bennett served as president, alleging they had sold 13 head of Reynolds' cattle that had strayed onto the corporation's land.

The feud went back at least to back to a 1996 quarrel over construction costs for a new barbed-wire fence. Following a trial in small claims court the two began accusing one another of stealing cattle.

In 2000 Reynolds reported several cattle missing to the Texas and Southwestern Cattle Raisers Association. Around that time, Bennett ordered two Bonham Corporation ranch hands to help him round up and load thirteen head of cattle, which netted \$5,327.11. At the time, both ranch hands raised concerns with Bennett that the cattle were not his.

One of the ranch hands told Reynolds he suspected Bennett had auctioned some of Reynolds’s cattle. While driving to the auction, the ranch hand purchased a disposable camera and took photographs of the cattle, some of which bore a brand registered to Reynolds.

Bennett was then indicted for cattle theft in 2002 — a charge he was acquitted of a year later.

In the civil trial, the jury sided with Reynolds, finding: Bennett and the corporation converted Reynolds' cattle; they did so with malice; and they committed felony theft. The jury assessed \$5,327.11 in compensatory damages (the cost of the stolen cattle) plus punitive damages of \$250,000 against Bennett and \$1 million against the corporation. The defendants appealed, but the 3rd Court of Appeals found that the punitive damages were justified. The defendants then appealed to the Supreme Court.

## THE SUPREME COURT'S DECISION

The *Bennett* opinion relies on several U.S. Supreme Court decisions concerning whether punitive damages awards violate constitutional due-process constraints, chiefly *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), and *Philip Morris USA v. Williams*, 549 U.S. 346 (2007). The lesson of the first two cases is that a reviewing court looks at the "enormity" and "reprehensibility" of a defendant's conduct, taking into account the ratio of punitive to actual damages, in deciding whether an award of punitive passes constitutional muster.

And though, under *Philip Morris USA*, the trial court should not look at conduct of the defendant outside the specific issues involved – or injuries to other than the plaintiff – it *may* take into account actions in the aftermath of the wrongful conduct, including conduct during the litigation to the extent it is part of a scheme to cover up the wrong doing. This indicated the intentions necessary to establish malice in Bennett – or perhaps gross negligence in future cases.

Reynolds accused Bennett of "bribing a witness and urging him to lie," "threatening a witness" and "photograph tampering," among other things.

All of this, along with the felonious conduct that constituted the tort, satisfied *State Farm's* requirement for reprehensible conduct.

The court also found that Bonham Corp. could be held liable for exemplary damages for Bennett's alleged conduct, because he was the corporation's "vice principal" and had the authority to manage the relevant business – ranching in this case.

But the Court said that *State Farm's* admonition that any punitive/actual damage award above 4:1 "might be close to the line of constitutional impropriety."

This is so precisely, if somewhat paradoxically, because the actual damages of over \$5,000 are *substantial* enough that they do not trigger the *BMW v. Gore* exception for enormity of conduct. Truly heinous conduct that results in trivial economic damage may well support a ratio of punitive to actual damage far in excess of the roughly 4:1 guideline the U.S. Supreme Court used.

"In sum," the Court said, "Bennett's wrongdoing is blameworthy enough to warrant exemplary damages, but under federal law a more modest punishment for his reprehensible conduct could have satisfied the state's legitimate objectives...."

## WHAT DOES THIS MEAN?

In the ordinary case, though little about an award of punitive damages is ordinary, damages are capped in Texas, by statute, at the greater of \$200,000 *or* twice the economic damages plus noneconomic damages, up to \$750,000. That cap is lifted under a number of circumstances including conduct found to be felony theft by the *civil* jury. Other less obvious factors lifting the cap include intoxication manslaughter, fraudulent destruction of writing, and injury to a child, elder or disabled person. More obvious cases include murder, rape, and bribery. But even in these cases there is now clearly a constitutional limit to punitive damages. That limit may or may not be four times actual damages, but four-times-actual is the benchmark that only exceptional cases will be allowed to exceed.

Another result of *Bennett* is that the culpable defendant's behavior *after the fact*, perhaps even during the subsequent litigation, may well be admissible and will likely be fully discoverable if that behavior indicates intent to cover up earlier misdeeds. Thus if a defendant has done something potentially subject to punitive damages, the attempt to cover it up can only exacerbate the risk of a punitive damage finding.



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