CAUSE NO. 08-08056

MARCELA AND JOSE BUSTAMANTE, AS NEXT FRIENDS OF DANIELLA BUSTAMANTE,	§	IN THE DISTRICT COURT
Plaintiffs,	§	
vs.	§	
JORGE FABIO LLAMAS-SOFORO, M.D.; JORGE FABIO LLAMAS-SOFORO, M.D., P.A., D/B/A EL PASO EYE CARE CENTER, ENRIQUE N. PONTE, JR., M.D., PEDIATRIX MEDICAL SERVICES, INC., AND PEDIATRIX MEDICAL GROUP, INC.,	§	OF DALLAS COUNTY, TEXAS
Defendants.	§	101st JUDICIAL DISTRICT

PLAINTIFFS' TRIAL BRIEF ON PUNITIVE DAMAGES EVIDENCE

COME NOW PLAINTIFFS, Marcella and Jose Bustamante, as Next Friends of Daniella Bustamante, and file this Trial Brief on Punitive Damages Evidence. In support thereof, Plaintiffs respectfully show the Court:

I.

Exemplary or punitive damages are evaluated using the Kraus factors. Alamo Nat'l Bank v. Kraus, 616 S.W.2d 908 (Tex. 1981). Those factors include the nature of the wrong, the character of the conduct, the degree of culpability, the situation and sensibilities of the parties, the public sense of justice & propriety, and the Defendant's net worth. In addition, the jury may also consider the

frequency of wrongs committed. O'Connor's Texas Causes of Action, Ch. 46-B, at page 1298 (attached along with cases cited therein).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

A true and complete copy of the foregoing document was faxed, mailed or served to all counsel of record on November 8, 2011.

James E. Girards

§5.3 Fraud. A plaintiff can recover exemplary damages for harm that results from fraud. Tex. Civ. Prac. & Rem. Code §41.003(a)(1). To be entitled to exemplary damages in a fraud case, the plaintiff must prove actual fraud. *See* Tex. Civ. Prac. & Rem. Code §41.001(6) (for purposes of exemplary damages, fraud does not include constructive fraud).

1. Actual fraud. Actual fraud involves dishonesty of purpose or intent to deceive. ***Archer v. Griffith***, 390 S.W.2d 735, 740 (Tex.1964). Actual fraud encompasses intentional breaches of duty designed to injure or to take undue and unconscientious advantage of another. ***Vela v. Marywood***, 17 S.W.3d 750, 761 (Tex.App.—Austin 2000), *pet. denied*, 53 S.W.3d 684 (Tex.2001). Generally, actual fraud involves a material misrepresentation, made either intentionally or recklessly, that was intended to be acted on, that was in fact relied on, and that caused injury. See "Common-Law Fraud," ch. 12-A, p. 273. However, actual fraud may also include breaches of fiduciary duty. *See* ***Chien v. Chen***, 759 S.W.2d 484, 494-95 (Tex.App.—Austin 1988, no writ) (if parties have fiduciary relationship, law imputes to the relationship higher duties, and breach of those duties may constitute fraud); *see, e.g.*, ***Hawthorne v. Guenther***, 917 S.W.2d 924, 936 (Tex.App.—Beaumont 1996, writ denied) (award of exemplary damages was supported by finding that partner's breach of fiduciary duty was willful and intentional); ***NRC, Inc. v. Huddleston***, 886 S.W.2d 526, 533 (Tex.App.—Austin 1994, no writ) (upholding judgment awarding exemplary damages for breach of fiduciary duty). See "Fiduciary Duty," ch. 11, p. 257.

2. Not constructive fraud. Under the Damages Act, "fraud" does not include constructive fraud as a basis for recovering exemplary damages. Tex. Civ. Prac. & Rem. Code §41.001(6); ***Fairfield Ins. Co. v. Stephens Martin Paving, LP***, 246 S.W.3d 653, 667 (Tex.2008). Constructive fraud is the breach of some legal or equitable duty that the law declares fraudulent, irrespective of moral guilt, because it tends to deceive others, violate confidences, or injure public interests. ***Archer***, 390 S.W.2d at 740. In constructive fraud, the actor's intent is irrelevant. *See* ***Vela***, 17 S.W.3d at 761.

§6. PROVING AGGRAVATED CONDUCT

§6.1 Burden of proof. The plaintiff must prove the aggravated conduct by clear and convincing evidence. Tex. Civ. Prac. & Rem. Code §41.003(a), (b); ***Bennett v. Reynolds***, 315 S.W.3d 867, 871 (Tex.2010); ***Columbia Med. Ctr. v. Hogue***, 271 S.W.3d 238, 248 (Tex.2008); ***Lockett v. H.B. Zachry Co.***, 285 S.W.3d 63, 77 (Tex.App.—Houston [1st Dist.] 2009, no pet.). Clear and convincing evidence is the measure or degree of proof that will produce in the mind of the fact-finder a firm belief or conviction about the truth of the allegations. Tex. Civ. Prac. & Rem. Code §41.001(2); ***State v. Addington***, 588 S.W.2d 569, 570 (Tex.1979); ***Lockett***, 285 S.W.3d at 77; ***EMC Mortg. Corp. v. Jones***, 252 S.W.3d 857, 873 (Tex.App.—Dallas 2008, no pet.). This burden cannot be shifted to the defendant or satisfied by evidence of ordinary negligence, bad faith, or deceptive trade practices. Tex. Civ. Prac. & Rem. Code §41.003(b).

§6.2 Aggravated conduct. To recover exemplary damages, the plaintiff must prove to the satisfaction of the jury (or the judge as fact-finder) that it should award exemplary damages against the defendant. *See* Tex. Civ. Prac. & Rem. Code §§41.003(b), 41.010(b). In making this decision, the fact-finder must consider the statutory purpose of exemplary damages—that is, to punish the defendant. *Id.* §41.010(a); *see id.* §41.001(5).

NOTE

When the defendant causes harm to nonparties to the litigation, the jury can consider evidence of that harm only as it relates to the reprehensibility of the defendant's actions. See "Reprehensibility analysis," §7.2.1, p. 1301. The jury cannot consider evidence of harm to nonparties as a separate basis to punish the defendant for injuries to parties not before the court. See ***Philip Morris USA v. Williams****, 549 U.S. 346, 353 (2007). To allow the jury to do so would violate the Due Process Clause. Id.*

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1. Section 41.011 factors. To prove it is entitled to exemplary damages, the plaintiff should address several factors listed in the Damages Act (i.e., the §41.011(a) factors). The first five factors in the list are sometimes called the "***Kraus*** factors" after the case that established the factors. *See, e.g.*, ***Bennett v. Reynolds***, 242 S.W.3d 866,

901 (Tex.App.—Austin 2007) ("jury was instructed ... to consider each of the ***Kraus*** factors"), *remanded on other grounds*, 315 S.W.3d 867 (Tex.2010); ***Baribeau v. Gustafson***, 107 S.W.3d 52, 63 (Tex.App.—San Antonio 2003, pet. denied) ("jury was properly instructed on the ***Kraus*** factors"). The §41.011(a) factors often overlap and do not apply in every case. ***Foley v. Parlier***, 68 S.W.3d 870, 881 (Tex.App.—Fort Worth 2002, no pet.); ***Gray v. Allen***, 41 S.W.3d 330, 332 (Tex.App.—Fort Worth 2001, no pet.); *see* ***Alamo Nat'l Bank v. Kraus***, 616 S.W.2d 908, 910 (Tex.1981). The factors are the following:

(1) Nature of wrong. The jury should consider the nature of the wrong. Tex. Civ. Prac. & Rem. Code §41.011(a)(1); ***Fairfield Ins. Co. v. Stephens Martin Paving, LP***, 246 S.W.3d 653, 667-68 (Tex.2008); ***Kraus***, 616 S.W.2d at 910; ***Khorshid, Inc. v. Christian***, 257 S.W.3d 748, 767 (Tex.App.—Dallas 2008, no pet.).

(2) Character of conduct. The jury should consider the character of the conduct involved. Tex. Civ. Prac. & Rem. Code §41.011(a)(2); ***Fairfield Ins.***, 246 S.W.3d at 667-68; ***Kraus***, 616 S.W.2d at 910; ***Khorshid, Inc.***, 257 S.W.3d at 767; *see, e.g.*, ***Brosseau v. Ranzau***, 81 S.W.3d 381, 396 (Tex.App.—Beaumont 2002, pet. denied) (in suit for breach of fiduciary duty, jury found that D's conduct was deceitful); ***Durban v. Guajardo***, 79 S.W.3d 198, 210 (Tex.App.—Dallas 2002, no pet.) (in assault suit, jury found that D's conduct was unprovoked, vicious, and violent).

(3) Degree of culpability. The jury should consider the degree of the wrongdoer's culpability. Tex. Civ. Prac. & Rem. Code §41.011(a)(3); ***Fairfield Ins.***, 246 S.W.3d at 667-68; ***Kraus***, 616 S.W.2d at 910; ***Khorshid, Inc.***, 257 S.W.3d at 767; *see, e.g.*, ***Brosseau***, 81 S.W.3d at 396-97 (in suit for breach of fiduciary duty, jury considered evidence of D's conduct, which went "beyond self-dealing"); ***Durban***, 79 S.W.3d at 210 (in assault suit, jury rejected argument that D acted in self-defense and found D completely culpable).

(4) Situation & sensibilities of parties. The jury should consider the situation and sensibilities of the parties. Tex. Civ. Prac. & Rem. Code §41.011(a)(4); ***Fairfield Ins.***, 246 S.W.3d at 667-68; ***Kraus***, 616 S.W.2d at 910; ***Khorshid, Inc.***, 257 S.W.3d at 767; *see, e.g.*, ***Durban***, 79 S.W.3d at 210 (in assault suit, jury considered factors such as relative physical size of parties, emotional state of P at time of assault, and whether situation was easily escapable). When assessing the situation and sensibilities of the parties, the jury may consider whether the defendant showed remorse, as well as any mitigating explanations for the defendant's behavior. ***Brosseau***, 81 S.W.3d at 397.

(5) Public sense of justice & propriety. The jury should consider the extent to which the conduct offends a public sense of justice and propriety. Tex. Civ. Prac. & Rem. Code §41.011(a)(5); ***Fairfield Ins.***, 246 S.W.3d at 667-68; ***Kraus***, 616 S.W.2d at 910; ***Khorshid, Inc.***, 257 S.W.3d at 767; *see* ***Brosseau***, 81 S.W.3d at 397 (evidence of outright intentional harm to plaintiff may be sufficient to support finding of injustice). For example, a doctor who, in anticipation of litigation, alters a patient's medical records to make the doctor appear less culpable offends the public sense of justice and propriety. ***Baribeau***, 107 S.W.3d at 63.

(6) Defendant's net worth. The jury should consider the defendant's net worth. Tex. Civ. Prac. & Rem. Code §41.011(a)(6); ***Fairfield Ins.***, 246 S.W.3d at 667-68; ***Transportation Ins. Co. v. Moriel***, 879 S.W.2d 10, 29 (Tex.1994); ***Lunsford v. Morris***, 746 S.W.2d 471, 472-73 (Tex.1988), *disapproved on other grounds*, ***Walker v. Packer***, 827 S.W.2d 833 (Tex.1992); ***In re Islamorada Fish Co.***, 319 S.W.3d 908, 912 (Tex.App.—Dallas 2010, orig. proceeding). Evidence of the defendant's net worth is not a necessary factor, but it is relevant because the amount of exemplary damages necessary to punish and deter the defendant's wrongful conduct depends on the defendant's financial strength. ***Durban***, 79 S.W.3d at 210-11. Only the defendant's current net worth is relevant. *E.g.*, ***In re Jacobs***, 300 S.W.3d 35, 44-45 (Tex.App.—Houston [14th Dist.] 2009, orig. proceeding) (order requiring Ds to produce two years' worth of financial information was overly broad). A plaintiff seeking production of information on the defendant's net worth must allege facts showing that the defendant is liable for exemplary damages but does not need to satisfy any evidentiary prerequisite (e.g., a prima facie showing of aggravated conduct). *Id.* at 40-41, 43; *see* ***Lunsford***, 746 S.W.2d at 473.

2. **Other factors.** Some courts have allowed other factors, not mentioned in §41.011(a), to be submitted to the jury. These factors include the following:

(1) Frequency. The frequency of the wrongs committed. ***Sturges v. Wal-Mart Stores***, 39 S.W.3d 608, 614 (Tex.App.—Beaumont 1998), *rev'd on other grounds*, 52 S.W.3d 711 (Tex.2001); ***Nationwide Mut. Ins. Co. v. Crowe***, 857 S.W.2d 644, 652 (Tex.App.—Houston [14th Dist.] 1993), *writ granted w.r.m.*, 863 S.W.2d 462 (Tex.1993); ***Fidelity Nat. Title Ins. Co. v. Heart of Tex. Title Co.***, No. 03-98-00473-CV (Tex.App.—Austin 2000, pet. denied) (no pub.; 1-6-00).

(2) Attorney fees & actual damages. The plaintiff's attorney fees and other damages. ***Fidelity Nat. Title***, No. 03-98-00473-CV (no pub.).

(3) Deterrent effect. The size of the award needed to deter similar wrongs in the future. ***Crowe***, 857 S.W.2d at 652.

3. Defendant's evidence in mitigation. The defendant is entitled to offer evidence in mitigation of the amount of exemplary damages. See "Mitigation," §8.3, p. 1303.

§7. CAPPING EXEMPLARY DAMAGES

An award of exemplary damages cannot be unreasonably excessive. *See* ***Philip Morris USA v. Williams***, 549 U.S. 346, 353 (2007); ***State Farm Mut. Auto. Ins. Co. v. Campbell***, 538 U.S. 408, 416 (2003); ***BMW v. Gore***, 517 U.S. 559, 568 (1996); ***Transportation Ins. Co. v. Moriel***, 879 S.W.2d 10, 16-17 (Tex.1994). Accordingly, exemplary damages can be capped by either the Damages Act or the due-process cap. *See* ***Baribeau v. Gustafson***, 107 S.W.3d 52, 63 (Tex.App.—San Antonio 2003, pet. denied) (D challenged exemplary-damages award under Damages Act and Due Process Clause).

§7.1 Damages Act cap. An award of exemplary damages can be capped under the Damages Act. *See* Tex. Civ. Prac. & Rem. Code §41.008(b).

NOTE

Although the Texas Supreme Court has not addressed the issue, three courts of appeals have found the Damages Act cap to be constitutional under the open-courts and separation-of-powers provisions of the Texas Constitution. See ***Hall v. Diamond Shamrock Ref. Co.***, *82 S.W.3d 5, 21-22 (Tex.App.—San Antonio 2001) (open courts), rev'd on other grounds, 168 S.W.3d 164 (Tex.2005);* ***Waste Disposal Ctr., Inc. v. Larson***, *74 S.W.3d 578, 587-90 (Tex.App.—Corpus Christi 2002, pet. denied) (open courts and separation of powers);* ***Seminole Pipeline Co. v. Broad Leaf Partners***, *979 S.W.2d 730, 758 (Tex.App.—Houston [14th Dist.] 1998, no pet.) (open courts); see also Tex. Const. art. 1, §13 (open courts), art. 2, §1 (separation of powers).*

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1. Calculating cap. The award of exemplary damages is limited to the greater of the following: (1) twice the amount of economic damages, plus any noneconomic damages (up to $750,000) found by the jury, or (2) $200,000. Tex. Civ. Prac. & Rem. Code §§41.008(b), 41.010(b); ***Bennett v. Reynolds***, 315 S.W.3d 867, 882 (Tex.2010); ***Wackenhut Corr. Corp. v. de la Rosa***, 305 S.W.3d 594, 650 (Tex.App.—Corpus Christi 2009, no pet.); *see, e.g.*, ***Tranum v. Broadway***, 283 S.W.3d 403, 425 (Tex.App.—Waco 2008, pet. denied) (exemplary-damages award reduced to $325,000, the amount of noneconomic damages; no economic damages were awarded). To properly calculate the Damages Act cap, the jury must determine the amount of economic damages separately from the amount of noneconomic damages. Tex. Civ. Prac. & Rem. Code §41.008(a); *see* ***Hall***, 82 S.W.3d at 24 (separate findings of economic and noneconomic damages are necessary because formula in §41.008(b) is based on those findings).

(1) Economic damages. Economic damages are compensatory damages for actual economic or pecuniary loss. Tex. Civ. Prac. & Rem. Code §41.001(4). Economic damages do not include exemplary damages. *Id.* The Damages Act does not list which damages are economic damages. Typical economic damages include the following:

(a) In personal-injury suits, medical expenses and loss of earning capacity. *See* Texas Pattern Jury Charges—General Negligence & Intentional Personal Torts (2008), PJC 8.2 & cmt.

NATIONWIDE MUT v. CROWE, 857 S.W.2d 644 (Tex.App.-Hous. (14 Dist.) 1993)

857 S.W.2d 644

NATIONWIDE MUTUAL INSURANCE COMPANY, Appellant, v. Bessie CROWE,

Individually and as Next Friend of John Louis Crowe, Appellees.

No. A14-92-01270-CV.

Court of Appeals of Texas, Houston, Fourteenth District.

May 27, 1993.

Opinion Overruling Motion for Rehearing June 24, 1993.

Case Number: A14-92-01270-CV
12/17/1993 Mandate issued
12/17/1993 Created for Data Conversion -- an event inserted to correspond
to the mandate date of a process
11/09/1993 Court approved judgment sent to attys of record
11/03/1993 Application for Writ of Error - Disposed
Granted
11/03/1993 Application for Writ of Error - Disposed
Granted
11/03/1993 Application for Writ of Error - Disposed
case granted upon jt mo/parties to dismiss/settle.
11/03/1993 Writ of error issued to Court of Appeals.
11/03/1993 Joint motion to dismiss application disposed
Granted
11/03/1993 Joint motion disposed of.
Granted
10/12/1993 Joint motion for anything.
09/13/1993 Reply filed
08/24/1993 Case forwarded to Court
08/12/1993 MET to file reply disposed of
Granted
08/04/1993 Application for Writ of Error - Filed

Appeal from 11th District Court, Harris County, Mark Davidson, J.

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[EDITORS' NOTE: THIS PAGE CONTAINS HEADNOTES. HEADNOTES ARE NOT AN OFFICIAL PRODUCT OF THE COURT, THEREFORE THEY ARE NOT DISPLAYED.]

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Jeffery Lee Hoffman, Cynthia Keely Timms, Houston, for appellant.

Robert B. Langston, Houston, for appellees.

Before J. CURTISS BROWN, C.J., and ELLIS and LEE, JJ.

OPINION

J. CURTISS BROWN, Chief Justice.

This is a bad faith insurance case. Appellees, Bessie Crowe and her minor son, John Louis, filed this suit alleging that appellant, Nationwide Mutual Insurance Company (Nationwide) was

negligent and breached its duty of good faith and fair dealing in failing to pay workers compensation death benefits. A jury found in favor of appellees and awarded each appellee $10,000.00 in actual damages. The jury also found that Nationwide acted with conscious indifference to the rights of appellees and awarded each appellee $500,000.00 in punitive damages. Nationwide appeals, raising nine points of error. We affirm.

John Wayne Crowe worked as a plumber for Chaparral Plumbing. On October 22, 1988, Mr. Crowe suffered a heart attack while installing a water heater at a job site. He was taken to Spring Branch Hospital where he underwent emergency heart surgery and died that day. Mr. Crowe was survived by his wife, Bessie, and his son, John Louis. Nationwide's adjustor, Deborah Tanksley, learned of Mr. Crowe's death on October 25, 1988, when she contacted the policy holder, Chaparral. Nationwide received the Employer's First Report of Injury or Illness (E-1) no later than October 31, 1988. On January 12, 1989, seventy-three days after receiving the E-1, Nationwide formally denied appellees' claim for workers compensation death benefits. Nationwide's denial was based solely on Mr. Crowe's death certificate. The notice of controversion stated that there was no evidence that Mr. Crowe's death was in the course of his employment and that Nationwide was continuing its investigation.

In its first point of error, Nationwide contends there is no evidence to support the submission of jury question two regarding proximate cause. Nationwide's point of error is moot and not a proper subject for appeal because no judgment was rendered on the jury's answer to question two. Jury questions one and two asked whether Nationwide was negligent in timely failing to either pay benefits or controvert the claim and whether that negligence proximately caused appellees' mental anguish. *See* TEX.REV.CIV.STAT.ANN. art. 8306 § 18a(a) (Vernon Supp. 1990), *repealed by* Act of January 1, 1991, 71st Leg., 2nd C.S., ch. 1, § 16.01(7), 1991 Tex.Gen.Laws 1, 114. The jury found in favor of appellees on both questions. In their Motion To Disregard Certain Findings On Jury Questions & Amended Motion For Judgment On The Verdict, appellees requested

the trial court to disregard the jury's answers to questions one and two and to enter judgment on the jury's findings with respect to the breach of good faith and fair dealing. The trial court's final judgment recites that appellees' motion was granted and awards recovery to appellees only on the bad faith and exemplary damages findings in questions three, four, five, six, and eight. Thus, Nationwide's complaint about question two does not support grounds for reversal of the judgment. *See Ponton v. Munro,* **818 S.W.2d 865**, 867 (Tex.App. — Corpus Christi 1991, no writ). We overrule point of error one.

In its second point of error, Nationwide contends that the trial court erred in overruling its motion for directed verdict because there was no breach of the duty of good faith and fair dealing as a matter of law. Texas law recognizes the duty of an insurer to deal fairly and in good faith with its insured in the processing and payment of claims. *Arnold v. Nat'l County Mutual Fire Ins. Co.,* **725 S.W.2d 165**, 167 (Tex. 1987). That duty applies in the workers compensation context. *Aranda v. Ins. Co. of North America,* **748 S.W.2d 210**, 212-13 (Tex. 1988). A workers compensation claimant who asserts that a carrier has breached the duty of good faith and fair dealing by refusing to pay or delaying payment of a claim must establish: (1) the absence of a reasonable basis for denying or delaying payment of the benefits of the policy, or in other words, that a reasonable insurer under similar

circumstances would not have delayed or denied the claimant's benefits, *and* (2) that the carrier actually knew, or based on its duty to investigate, should have known that there was not a reasonable basis for denying the claim or delaying payment of the claim. *See Id.* at 213 (emphasis in original). A carrier maintains the right to deny invalid or questionable claims and is not subject to liability for an erroneous denial of a claim. *Id.* Whether there is a reasonable basis for denial is judged by the facts before the insurer at the time the claim is denied. *Viles v. Security Nat'l Ins. Co.*, **788 S.W.2d 566**, 567 (Tex. 1990).

Nationwide first contends that the Industrial Accident Board's (IAB) denial of appellees' claim based on the hearing examiner's finding that Mr. Crowe's death was not in the course of employment conclusively establishes that Nationwide's denial was reasonable. In support of its contention, Nationwide points out that the trial court "expressly found" in admitting the Award of the Board that the information presented to the IAB was "virtually identical" to the information upon which Nationwide based its denial. While the trial court stated that the hearing examiner's files and Nationwide's files were "substantially identical" as of the time of the denial, it also stated that the hearing examiner's findings as contained in the Award of the Board was only "some evidence" of whether the denial was reasonable. There is nothing in the record to reflect what was contained in the IAB's file or what the hearing examiner considered in denying appellees' claim. In the absence of such evidence, we cannot say that the trial court incorrectly concluded that the IAB's findings were not conclusive. Moreover, the hearing examiner's determination was made post-denial and, thus, its probative value, if any, was limited. *See Id.*

Nationwide also contends that the death certificate was a reasonable basis for denying appellees' claim as a matter of law. A dispute about whether there was any reasonable basis to support the denial of a claim is an issue for the jury. *See State Farm Lloyds v. Polasek*, **847 S.W.2d 279**, 284 (Tex.App. — San Antonio 1992, n.w.h.)[fn1] ; *see also Nat'l Union Fire Ins. v.*

Dominguez, **793 S.W.2d 66**, 70 (Tex.App. — El Paso 1990, writ granted). Here, there is conflicting evidence about whether the death certificate alone was a reasonable basis for denying appellees' claim. The death certificate listed the *immediate* cause of death as: (1) cardiogenic shock due to, or as a consequence of, (2) massive myocardial infarction due to, or as a consequence of, (3) severe coronary artery disease. Nationwide's own district claims manager, Steven Dansevich, testified that it was not proper procedure in most cases to deny a claim solely on the basis of information in a death certificate. Appellees' experts testified that the death certificate standing alone was not a reasonable basis for denying the claim. Nationwide's expert and Ms. Tanksley's supervisor both testified to the contrary. Nationwide points out that the death certificate did not specify whether Mr. Crowe suffered an "injury at work" even though there was a space provided for such a designation. Nationwide contends that the omission meant that Mr. Crowe's treating physicians determined that his death was not work-related. Even if the death certificate had specified an "injury at work," it would not have shed additional light on facts already known to Ms. Tanksley or on the critical issue of whether Mr. Crowe's on-the-job activities might have been a contributing cause of his death. That determination required at least some investigation. At the time of denial, Ms. Tanksley knew that: (1) Mr. Crowe suffered a heart attack on the job while installing a water heater in an attic; (2) he left a wife and a young child; (3) he was taken to Spring Branch Hospital where

he died after emergency surgery; (4) Dr. Levine and Dr. Mandviwala were treating physicians; and (5) there were two friends or relatives, Oscar Calhoun and Haddie Smith, who witnessed the incident. Ms. Tanksley did not investigate any of these facts or sources of information. A directed verdict is improper if there is any evidence of probative value which raises a material fact issue. *Qantel Business Sys. v. Custom Controls,* **761 S.W.2d 302**, 303 (Tex. 1988). There was more than enough evidence to support submission of the bad faith issue to the jury and the trial court properly overruled Nationwide's motion for directed verdict. We overrule point of error two.

In its third, fourth, and fifth points of error, Nationwide contends that the evidence is legally and factually insufficient to support the jury's finding that Nationwide acted with conscious indifference. Exemplary damages are recoverable against an insurance company for a breach of its duty of good faith and fair dealing under the same principles allowing recovery of those damages in other tort actions. *Arnold,* **725 S.W.2d 168** (*citing Trenholm v. Ratcliff,* **646 S.W.2d 927**, 933 (Tex. 1983)).

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A breach of the duty of good faith and fair dealing in itself is insufficient to support a finding of exemplary damages. *Nat'l Fire Ins. v. Valero Energy Corp.,* **777 S.W.2d 501**, 511 (Tex.App. — Corpus Christi 1989, writ denied). To award exemplary damages, the jury must find that the insurance company acted with conscious indifference. *Aetna Casualty and Sur. Co. v. Joseph,* **769 S.W.2d 603**, 607 (Tex.App. — Dallas 1989, no writ). That is, the jury must find that the insurance company acted with "that entire want of care which would raise a belief that the act or omission complained of was the result of a conscious indifference to the rights or welfare of the person affected by it." *See Burk Royalty Co. v. Walls,* **616 S.W.2d 911**, 920 (Tex. 1981). In reviewing the jury's finding, we must use the same standard of review applicable to other fact issues. *See State Farm Mutual Ins. Co. v. Zubiate,* **808 S.W.2d 590**, 599 (Tex.App. — El Paso 1991, writ denied).

When both legal and factual sufficiency points are raised we must first examine the legal sufficiency. *Glover v. Texas Gen. Indem. Co.,* **619 S.W.2d 400**, 401 (Tex. 1981). In reviewing a "no evidence point," we are to consider only the evidence and inferences that tend to support the jury's findings and disregard all evidence and inferences to the contrary. *Sherman v. First Nat'l Bank,* **760 S.W.2d 240**, 242 (Tex. 1988). If there is any evidence of probative value to support the jury's findings, we must uphold the findings and overrule the points of error. *In re King's Estate,* **150 Tex. 662**, **244 S.W.2d 660**, 661 (1951). If the findings are supported by legally sufficient evidence, we must then weigh and consider all the evidence, both in support of, and contrary to, the challenged findings. *Id.* The jury's findings must be upheld unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust or erroneous. *Pool v. Ford Motor Co.,* **715 S.W.2d 629**, 635 (Tex. 1986). We may not substitute our judgment for that of the jury simply because we may disagree with the jury's findings. *Herbert v. Herbert,* **754 S.W.2d 141**, 142 (Tex. 1988).

Nationwide contends that it made some effort at investigation based on faulty information received from Mr. Crowe's employer and appellees' attorney. Nationwide notes that while that investigation might have been more thorough and timely, it does not establish conscious indifference. This is not a case of "failure to pursue every lead." *See Polasek,* 847 S.W.2d 288. Here, there was little, if any, attempt at

investigation by Nationwide. Ms. Tanksley twice attempted to contact Mrs. Crowe shortly after her husband's death. Three days after Mr. Crowe's death, Ms. Tanksley dictated a letter to be sent to Mrs. Crowe at the address listed on the E-1. Although that address was incorrect, the letter was not dated until approximately one month later. Five days after Mr. Crowe's death, Ms. Tanksley attempted to contact Mrs. Crowe by telephone. She called Mrs. Crowe's aunt from the number correctly listed on the E-1 and left a message. When Mrs. Crowe returned the call from a pay phone, Ms. Tanksley told her that she was too busy and that she would call back. When Ms. Tanksley did not call back after several minutes, Mrs. Crowe left. No such call from Mrs. Crowe is noted in Ms. Tanksley's log even though she testified such a call would have been documented. In any event, Ms. Tanksley made no further effort to contact Mrs. Crowe. She testified that this was because Mrs. Crowe was represented by counsel. Mrs. Crowe, however, did not obtain the services of an attorney until mid-December. Also, Ms. Tanksley did not take any action on appellees' claim during the entire month of November. In early December, Ms. Tanksley obtained the addresses of witnesses from the employer. It is not clear from the record whether this information differed from information on the E-1. Her log notes reflect that when she finally dictated a letter to one witness, Mr. Calhoun, she had already decided to deny the claim. That letter was also returned because of an incorrect address. Ms. Tanksley did not further attempt to contact any witnesses.

Ms. Tanksley also never attempted to obtain medical records or contact the hospital correctly identified on the E-1. Yet, it

is undisputed that medical records were the most important piece of information for determining the compensability of claims and that acquisition of medical records was standard practice in adjusting claims. Nationwide presented evidence from the custodian of records for Spring Branch Hospital that an authorization from the patient or executor of the estate is required to obtain medical records. However, the custodian testified that the hospital releases medical records if an E-1 is filed with the business office. At any rate, Ms. Tanksley did not attempt to obtain an authorization or file an E-1.

In late December, appellees' attorney, Glenn Devlin, sent several documents to Ms. Tanksley, including a Letter of Representation, Notice of Claim, Statement of Beneficiary, and Mr. Crowe's death certificate. The Statement of Beneficiary for the first time described that Mr. Crowe was taken ill while "straining to lift a hot water heater up into an attic" and named one of Mr. Crowe's treating physicians, Dr. Levine. The death certificate was signed by another treating physician, Dr. Minhas S. Mandviwala. Ms. Tanksley did not obtain a report from Dr. Levine, Dr. Mandviwala or any other treating physician even though it was conceded by Nationwide's own employees that additional medical reports were necessary. Ms. Tanksley had handled more than 1,000 claims. Yet, Ms. Tanksley testified by deposition that it never occurred to her to get a medical opinion and never occurred to her that an "injury" includes "aggravation of a pre-existing condition." That testimony contradicts in part evidence at trial that Ms. Tanksley attempted to contact a "rehab" nurse on the day she decided to deny the claim regarding referral of the file to a doctor.

On January 11, 1989, Ms. Tanksley made up her mind to deny the claim based solely on the death certificate. Her log entry for that day states: "based on # 2 and 3 may have something to go on as far as controverting." The notice of controversion was filed with the IAB on January 12, 1989, seventy-three days after Nationwide received the notice of injury. It is

undisputed that at the time of the denial, Nationwide violated the twenty-day rule of former article 8306, § 18a. Ms. Tanksley admitted not only that she violated the twenty-day rule in this case but may have violated it in other cases. Tom Stanley, an experienced workers compensation attorney, testified that under workers compensation law, Nationwide could have initiated payment of the claim within twenty days and later discontinued payments if it discovered that the injury was not compensable. According to Mr. Stanley, Nationwide caused harm to appellees by depriving them of income for fifty-three days. Both Mr. Stanley and Mr. Dansevich testified that a reasonable insurer would have adequately investigated this claim by the end of seventy-three days. George Black, a claims consultant with twenty-five years' experience, testified that the delay in this case was "protracted" and "illegal."

Nationwide asserts that there is no evidence that its actions were intentionally wrongful or motivated by ill will and a desire to injure appellees. *See Auto Ins. Co. of Hartford. v. Davila,* **805 S.W.2d 897**, 909 (Tex.App. — Corpus Christi 1991, writ denied). Ms. Tanksley testified that she was not aware that appellees would become destitute by her actions. She also testified that she did not intend to cheat Mrs. Crowe out of benefits or to make it difficult for her to obtain benefits. Yet, despite evidence that she violated the law and did not follow proper procedure for adjusting claims, Ms. Tanksley denied that she made any mistakes in handling appellees' claim and stated she would not do anything differently. Glenn Devlin also testified that Ms. Tanksley told him before denying the claim that Nationwide was not going to pay the claim but was going to give Mrs. Crowe "maximum litigation." Indeed, Ms. Tanksley's log notes for October 25, 1989, reflect that she initially set reserves at "$1,000.00 comp and $3,000.00 medical." According to expert testimony, the reserves reflected the estimated value of the claim. Mr. Black testified that the reserves in this case were not reasonably set and concluded that the adjustor thought the claim was "worthless." Mr. Stanley

testified that the reserves reflected that Nationwide did not initially view the claim as compensable. Stanley emphasized, however, that the log notes stated that there was insufficient information to set reserves and that the reserves would be adjusted accordingly. There is no evidence that the reserves were ever adjusted. In addition, this is the third trial for Mrs. Crowe. Mr. Stanley testified that Nationwide's conduct represented a conscious disregard for the Crowe family's well-being. Mr. Black testified that a reasonable insurance company would have determined the hardship placed on the family in a death case and that Nationwide's failure to do so in this case showed its conscious indifference to the rights of Mrs. Crowe and her son. The jury could reasonably have concluded that Nationwide simply never intended to pay appellees' claim and acted with an entire want of care. Having thoroughly reviewed the record, we find sufficient evidence to support the jury's finding that Nationwide acted with conscious indifference to the rights and welfare of appellees. We overrule points of error three, four, and five.

In its sixth and seventh points of error, Nationwide contends that the jury's award of exemplary damages to each appellee is unsupported by the evidence and excessive. An award of punitive damages rests upon the jury's discretion and will not be set aside as excessive unless the amount is so large as to indicate that it is the result of passion and prejudice, or that the evidence was disregarded. *Aetna Casualty and Sur. Co. v. Joseph,* **769 S.W.2d 603**, 607 (Tex.App. — Dallas 1989, no writ). To determine whether an award of exemplary damages is reasonable, we must consider the following

factors:

(1) the nature of the wrong;
(2) the character of
the conduct involved;
(3) the degree of
culpability of the wrongdoer;
(4) the situation
and sensibilities of the party concerned;
(5) the
extent to which conduct offends a public sense of
justice and propriety;
(6) the frequency of the
wrongs committed; and
(7) the size of the award
needed to deter similar wrongs in the future.

Alamo Nat'l Bank v. Kraus, **616 S.W.2d 908**, 910 (Tex. 1981); *Zubiate,* 808 S.W.2d at 604.

These factors were included in the instructions to the jury. The jury was also instructed that it could award exemplary damages against Nationwide "as punishment and as a warning and example to others situated like it, from committing like offenses and wrongs in the future." Both parties have provided us with an extensive analysis of the *Alamo* factors as they apply to the facts of this case. In particular, they focus on the size of the award. The jury heard evidence of Nationwide's net worth and net profits for the preceding year. The jury also heard evidence regarding the relative impact of various punitive damage awards. The size of the award, while constituting only 3/100 of 1% of Nationwide's net worth, comprised a ratio of exemplary to actual damages of 50:1. As such, Nationwide contends that the award violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *Pacific Mut. Life Ins. Co. v. Haslip,* **499 U.S. 1**, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). In *Haslip,* the Supreme Court reviewed whether certain procedural safeguards and substantive standards imposed by Alabama common law adequately limited jury discretion in assessing punitive damages for purposes of the Due Process Clause. 499 U.S. at ____, 111 S.Ct. at 1044-45. Neither *Haslip* nor Texas law provides that an award comprising a certain ratio of punitive to actual damages is *per se* excessive and unconstitutional. *See Joseph,* 769 S.W.2d at 607. Texas procedure for awarding punitive damages comports with the common law method approved in *Haslip. Gen. Motors Corp. v. Saenz,* **829 S.W.2d 230**, 241 (Tex.App. — Corpus Christi 1991, writ granted). That procedure, as outlined in *Saenz,* was followed in the instant case. *See Id.; see also Texas Employer's Ins. Ass'n v. Puckett,* **822 S.W.2d 133**, 142 (Tex.App. — Houston [1st Dist.] 1991, writ denied). We find that the jury's award of exemplary damages

does not violate Nationwide's due process rights. Guided by the *Alamo* factors, we also conclude that the award was not excessive or unjust. We overrule points of error six and seven.

In its eighth point of error, Nationwide contends that the jury's award of exemplary damages is excessive as a matter of law. Nationwide asserts that section **41.007** of the Civil Practice and Remedies Code limits the amount of exemplary damages that can be awarded in a bad faith suit. That section states in pertinent part that "exemplary damages awarded against a defendant may not exceed four times the amount of actual damages or $200,000.00, whichever is greater." TEX.CIV.PRAC. & REM.CODE ANN. § **41.007** (Vernon Supp. 1993).

Nationwide presented this argument to the trial court in its Motion for New Trial, Remittitur, or for Reformation of the Judgment and, thus, preserved error for review.

Nonetheless, Nationwide's argument is unconvincing. Nationwide acknowledges that chapter 41 regarding exemplary damages applies only to "negligence, strict liability, and breach of warranty" actions. *See* Act of September 1, 1987, 70th Leg., 1st C.S., ch. 2, § 2.12, 1987 Tex.Gen.Laws 37, 44-46 (current version at TEX.CIV.PRAC. & REM.CODE ANN. §§ **41.002**(a), 33.001 (Vernon Supp. 1993)). Citing certain language from *Arnold* and *Aranda,* Nationwide argues that the duty of good faith and fair dealing arose historically from common law negligence cases and that the standard of care for breach of that duty is a negligence standard of reasonableness. Because a bad faith claim is "really" a negligence suit and because chapter 41 does not specifically exclude bad faith causes of action, Nationwide reasons that the cap on exemplary damages in chapter 41 applies. *Id.* at § 41.002(b). Nationwide's argument that "bad faith" is an action in negligence has been squarely rejected in *Brotherhood's Relief and Compensation Fund v. Cawthorn,* **815 S.W.2d 254** (Tex.App. — El Paso 1991, writ denied). There, an employee sued his job protection plan for refusing to pay benefits when he was fired for violating company work rules. In reversing a judgment awarding benefits, the court held that the trial court erred in "applying a negligence theory to a case involving contractual rights between the Brotherhood and one of its members." 815 S.W.2d at 258-59. In so holding, the court analyzed the recent Texas Supreme Court decisions, including *Arnold* and *Aranda,* and concluded that the decision to deny or pay benefits does not involve negligence, i.e., the failure to exercise ordinary care, but only the issue of good faith and fair dealing. *Id.* We find no fault with the El Paso's court reasoning. Because this is a bad faith case and not a negligence case, chapter 41 is inapplicable. Our conclusion that chapter 41 does not apply is supported by the Legislature's subsequent enactment of a statutory cap on exemplary damages specifically for bad faith causes of action. Act of January 1, 1991, 71st Leg., 2nd C.S., Ch. 1, § 10.42, 1991 Tex.Gen.Laws 1, 78 (current version at TEX.REV.CIV.STAT.ANN. art. 8308-10.42 (Vernon Supp. 1993)). We overrule Nationwide's eighth point of error.

In its ninth point of error, Nationwide contends that appellees have no standing to assert a claim for breach of the duty of good faith and fair dealing. Because Nationwide did not challenge appellees' standing in the trial court, it waived error. *Texas Indus. Traffic League v. R.R. Comm'n,* **633 S.W.2d 821**, 823 (Tex. 1982); *see Integrated Title Data Sys. v. Dulaney,* **800 S.W.2d 336**, 339 (Tex.App. — El Paso 1990, no writ); *see also City of Fort Worth v. Groves,* **746 S.W.2d 907**, 913 (Tex.App. — Fort Worth 1988, no writ). We overrule point of error nine and, accordingly, affirm the judgment of the trial court.

OPINION ON REHEARING

In our original opinion, we cited TEX.REV.CIV.STAT.ANN. art. 8308-10.42 (Vernon Supp. 1993), to show that the Legislature did not intend to apply the cap on punitive damages set forth in chapter 41 of the Civil Practice & Remedies Code to bad faith cases. Although not raised in its brief, on motion for rehearing, Nationwide

contends that article 8308-10.42 should apply to the instant case. Article 8308-10.42 is part of the revamped Texas Worker's Compensation Act (the Act) enacted by the Legislature on January 1, 1991. Act of January 1, 1991, 71st Leg., 2nd

C.S., Ch. 1, § 17.18, 1989 Tex.Spec.Laws 1, 122. The change in law made by the Act "applies only to an injury for which the date of injury is on or after the effective date of [the] Act." *Id.* § 17.18(c). Article 8308-10.42 became effective on June 1, 1991. *Id.* § 17.19. Although the trial of this cause was in June 1992, the dates of Mr. Crowe's injury and denial of Mrs. Crowe's claim occurred before the effective date of article 8308-10.42 and therefore, that section is inapplicable.

Nationwide also contends that the Crowes did not have standing to pursue this bad faith case because they were not parties to the "special relationship" created by the contract between employee, employer, and insurance carrier described in *Aranda.* Nationwide points out that its complaint was preserved in its Motion For New Trial, Remittitur or For Reformation of the Judgment. We express doubts about the propriety of raising a lack of standing complaint for the first time on a Motion for New Trial. However, even if error was preserved, we find that Nationwide's argument is without merit. In support of its argument, Nationwide cites *Transportation Ins. Co. v. Archer,* **832 S.W.2d 403** (Tex.App. — Fort Worth 1992, writ denied). In *Archer,* an injured employee *and* his spouse sued the insurance carrier for breach of the duty of good faith and fair dealing in the handling of the employee's worker's compensation claim. 832 S.W.2d at 404. The court held that the spouse had no independent cause of action against the carrier for breach of the duty of good faith and fair dealing in connection with the carrier's handling of her husband's claim. 832 S.W.2d at 405-6.

We agree with the Crowes that *Archer* is distinguishable because it involved an employee who was alive and capable of pursuing his own claim. One must have a legal right which has been breached to have standing to seek redress for an injury. *Develop-Cepts, Inc. v. City of Galveston,* **668 S.W.2d 790**, 794 (Tex.App. — Houston [14th Dist.] 1984, no writ). Here, the Crowes are recognized beneficiaries who have a right to claim benefits under worker's compensation law. TEX.REV.CIV.STAT.ANN. art. 8306 § 8(a) (repealed 1991). In attempting to exercise that right, the Crowes alleged that Nationwide did not treat them fairly and acted in bad faith. Hence, we find that the Crowes had standing to bring this action. Accordingly, we overrule Nationwide's motion for rehearing.

[fn1] In *Polasek,* the plaintiffs sued to recover proceeds under an insurance policy when their video rental business was destroyed by fire. The insurance company denied the claim because there was undisputed evidence that the fire was caused by arson. At trial, the issue was whether plaintiffs, or someone else, committed arson and whether the insurance company denied the claim in bad faith. The San Antonio Court of Appeals upheld the plaintiffs' recovery under the insurance contract, finding sufficient evidence that the plaintiffs did not set the fire. 847 S.W.2d at 283. The court, however, reversed the plaintiffs' recovery under their bad faith cause of action, finding as a matter of law that the undisputed evidence of arson was a reasonable basis for denying the claim. *Id.* at 288. In so holding, the court reviewed authorities that have applied the legal sufficiency test to a bad faith finding. The court noted the cases that have relieved insurers from bad faith claims where a "bona fide controversy existed" and concluded that a plaintiff must show that there is no reasonable basis for denying a claim rather than "some evidence" of unreasonableness. *Id.* at 285-86. The court explained:

We recognize that under *Aranda* and

> *Arnold* the basis for denying the claim must be reasonable. But this does not authorize the trier of fact to second guess the insurer about reasonableness. And it does not authorize the trier [sic] to decide whether the insurer acted reasonably. It means that the basis for denying or delaying payment must have some substance to it; it cannot be fanciful or flimsy. Not just any asserted basis will suffice.

Id. 847 S.W.2d at 287.

As we have noted, *Aranda* specifically states that the first element of the test requires an "*objective* determination of whether a reasonable insurer under similar circumstances would have delayed or denied the claimant's benefits." 748 S.W.2d at 213 (emphasis added). We disapprove of the San Antonio court's holding to the extent that it implies that anything less than an *objectively* reasonable basis is required to deny a claim. Moreover, an "on-the-job" heart attack case in the context of workers compensation presents a far different situation than a case involving the intentional act of arson. In the former case, there is almost always going to be a "bona fide controversy" because a pre-existing heart disease is usually present. *See Blair v. INA of Texas*, **686 S.W.2d 627**, 629 (Tex.App. — Corpus Christi 1985, writ ref'd n.r.e.). Such a pre-existing condition will not preclude compensation. *Id.* Hence, there is the need for investigation before denying such claims.

STURGES v. WAL-MART STORES, 39 S.W.3d 608 (Tex.App.-Beau. [9th Dist.] 1998)

39 S.W.3d 608

HARRY W. STURGES, III, et al, Appellant v. WAL-MART STORES, INC., et al,

Appellee

No. 09-96-315 CV

Court of Appeals of Texas, Ninth District, Beaumont.

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On Appeal from the 136th District Court, Jefferson County, Texas, Trial Cause No. D-136,975

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Morris C. Gore, Dallas, Carl Parker, Parker & Park, LLP, Port Arthur, for appellant.

J. Preston Wrotenbery, Kevin D. Jewell, Magenheim, Bateman, Robinson, Wrotenbery & Helfand, P.L.L.C., Houston for appellee.

Before Walker, C.J., Burgess and Stover, JJ.

OPINION

BURGESS, Justice

Harry W. Sturges, III, Dick Ford, Bruce Whitehead, and J.D. Martin, III, individually and on behalf of Gulf Coast Investment Group, brought suit against Wal-Mart for breach of contract and tortious interference with prospective business relations. A jury awarded them $1,000,000 in actual damages, and $500,000 in exemplary damages in a bifurcated trial. Sturges, et al, appeal the exemplary damage award and bring two points of error. Wal-Mart cross appeals bringing nine cross points.

This case involves a dispute concerning commercial property, referred to as "tract 2". In 1982, Wal-Mart owned tract 2, which was adjacent to tract 1, the property where the Wal-Mart Store in Nederland, Texas was located. In 1984, Whitehead as trustee, purchased tract 2 on behalf of Texas Southwest-Gulf Coast Partnership. In connection with the purchase of tract 2, and as part of the consideration of the sale, Texas Southwest executed a document reflecting restrictions on the property, entitled Easements With Covenants and Restrictions Affecting Land (the 1984 ECR). The 1984 ECR confirmed an agreement to develop a commercial shopping center containing a supermarket on tract 2.

In conversations with Whitehead, Wal-Mart representatives enthusiastically supported the development of a supermarket on

tract 2. Subsequent to the 1984 ECR, Texas Southwest withdrew from the partnership and any ownership interest in tract 2. In 1987 or 1988, Gulf Coast discovered that Wal-Mart had encroached on tract 2. During that time, Gulf Coast located

a potential purchaser for a portion of tract 2. In 1988, Gulf Coast and Wal-Mart entered into and executed a document modifying the 1984 ECR (the 1988 ECR). As a part of the consideration for the 1988 ECR, the encroachment was conveyed to Wal-Mart and certain modifications were made enabling Gulf Coast to sell a portion of the property to a fast food restaurant. The 1988 ECR specifically canceled the provisions of the 1984 ECR and by reference ratified and affirmed and made a part of the 1988 ECR, a 1982 ECR that had been executed by Wal-Mart.

The 1988 ECR incorporated the 1982 ECR which provided that consent to future amendments of the ECR would not be unreasonably withheld. Appellants contend the 1988 ECR evidenced an agreement between Gulf Coast and Wal-Mart to act reasonably regarding any future requested modifications to the 1988 ECR.

Prior to the execution of the 1988 ECR, Whitehead expressed a concern to Wal-Mart that conveyance of the encroachment would interfere with the development of tract 2. Wal-Mart assured Whitehead that they would cooperate in the development of tract 2, including reasonable modifications to the 1988 ECR, to allow commercial development of tract 2, if Gulf Coast would convey the encroachment property to Wal-Mart (the 1988 Agreement). Whitehead, acting on behalf of appellants, relied upon such representations and agreement in conveying the encroachment property to Wal-Mart and executing the 1988 ECR.

During this time frame, Gulf Coast continued its efforts for development of a supermarket on tract 2 pursuant to Whitehead's agreement with Wal-Mart. In December 1987, Gulf Coast reached an agreement with its lender, Bank One, for the partners of Gulf Coast to each sign deficiency notes and to allow Bank One to foreclose on tract 2. The other two partners of Gulf Coast dropped out of the partnership but Whitehead and Martin, as the sole remaining partners of Gulf Coast, continued their efforts to market and develop tract 2.

Whitehead and Martin, individually and on behalf of Gulf Coast, or as successors in interest of Gulf Coast, entered an agreement whereby Ford and Sturges would participate in the marketing and development of tract 2. In January of 1990, Sturges reached an agreement with Fleming Foods of Texas, Inc, (Fleming) under which the appellants would construct and lease to Fleming a supermarket on tract 2. A letter of intent evidenced the agreement between Fleming and Sturges, acting on behalf of appellants and signed January 31, 1990. Although tract 2 had been foreclosed upon by Bank One, the appellants had in place on that date a written agreement to repurchase tract 2.

Fleming furnished a lease form and would have executed a definitive lease agreement, provided that Wal-Mart approved requested revisions to the 1988/82 ECR. These modifications dealt primarily with a minor variation in the ratio of parking spaces to square footage of the Fleming supermarket, and approval of a new site plan which provided for a larger supermarket and eliminated the other retail space on tract 2. Pursuant to the 1988/82 ECR, Sturges, acting on behalf of appellants (including Whitehead and Martin on behalf of Gulf Coast), contacted the appropriate officials of Wal-Mart and requested the changes necessary to consummate the Fleming lease. Wal-Mart personnel were supportive of a supermarket on tract 2. Appellants' plans were enthusiastically received at both the local and corporate level of Wal-Mart. On January 8, 1990, Sturges sent a site plan to Delee Wood, property manager of Wal-Mart, for the purpose of obtaining approval of the changes necessary to accommodate the Fleming

lease. Shortly thereafter, Wood represented to Sturges that she had obtained approval from the necessary people at Wal-Mart for the requested changes in the 1988 ECR and that Sturges should submit documentation

for execution by Wal-Mart to memorialize the revisions.

Around July of 1989, the Wal-Mart property division began efforts to purchase tract 2. In approximately November of 1989, Tom Hudson, acting as real estate agent for Wal-Mart, contacted Bank One and was informed by Bank One that tract 2 was already under contract. In early January of 1990, Hudson informed officials of Wal-Mart that if the ECR modification requested by the appellants were withheld it would in all probability "kill" the sale of tract 2 from Bank One to appellants, and the lease arrangement involving the Appellants and Fleming. Wal-Mart never revealed to appellants their efforts to reacquire tract 2 but instead encouraged appellants to proceed with their plans for development of a supermarket on tract 2.

Prior to the time appellants and Fleming could finalize their lease arrangement, Wal-mart, or its agents, informed Fleming that they wanted to acquire tract 2 for expansion; and that if they did not obtain this land on which to expand, Wal-Mart would move its store. Wal-Mart then refused to approve modification of the parking ratio set forth in the 1988/82 ECR, or to approve a new site plan for the 1988/82 ECR, allowing for a larger supermarket and eliminating the other retail space on tract 2. Appellants were then unable to consummate their transaction with Fleming. They then brought suit against Wal-Mart for breach of contract and tortious interference with prospective business relations.

In their first point of error, appellants allege the trial court erred in refusing to grant their motion for new trial based on the trial court's refusal to admit evidence of prior judgments and litigation against Wal-Mart during the exemplary damages portion of the trial.

Evidentiary rulings are committed to the trial court's sound discretion. *Owens-Corning Fiberglas Corporation v. Malone,* 41 Tex. Sup.Ct. J. 877, 882 (June 5, 1998). A trial court abuses it discretion when it rules without regard for any guiding rules or principles. *Id.* Trial courts may exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *Id.* We must uphold the trial court's evidentiary ruling if there is any legitimate basis for the ruling. *Id.* We will not reverse a trial court for an erroneous evidentiary ruling unless the error probably caused the rendition of an improper judgment. Tex.R.App.P. 81(b)(1).

At trial, appellants offered evidence of five other lawsuits wherein Wal-Mart interfered with contractual relationships. Appellants attached certified copies of the pleadings and judgments from these five lawsuits to their appendix in support of their motion for new trial on exemplary damages. The trial court excluded that evidence and prohibited appellants from asking any questions regarding the five lawsuits.

The general rule in Texas is that prior acts or transactions by one of the parties with other persons are irrelevant, immaterial and highly prejudicial, and in violation of the rule that *res inter alios* acts are incompetent evidence, particularly in a civil case. *Texas Cookie Co. v. Hendricks & Peralta, Inc.*, **747 S.W.2d 873**, 881 (Tex.App.-Corpus Christi 1988, writ denied); *Texas Farm Bureau Mutual Insurance Co. v. Baker*, **596 S.W.2d 639**, 642 (Tex.Civ.App.-Tyler 1980, writ ref'd n.r.e.). An exception to the general rule states that:

when the intent with which an act is done is material, other

> similar acts of the party whose conduct is drawn in question may be shown, provided they are so connected with the transaction under consideration in point of time that they may all be regarded as parts of a system, scheme or plan.

Hendricks, 747 S.W.2d at 881 (quoting *Baker*, 596 S.W.2d at 642). Thus, only

where "intent," and not merely the occurrence of the act itself, is sought to be proved by similar acts are they admissible. *Id.* "Other acts" evidence is admissible both to show willful intent in support of exemplary damages, and to show a plan or scheme. *Johnson v. J. Hiram Moore, Ltd.*, **763 S.W.2d 496**, 500 (Tex.App.-Austin 1988, writ denied).

In awarding exemplary damages, the jury may consider a number of factors including (1) the nature of the wrong; (2) the frequency of the wrongs committed; (3) the character of the conduct involved; (4) the degree of the wrongdoer's culpability; (5) the situation and sensibilities of the parties involved; (6) the extent to which such conduct offends a sense of public justice and propriety, and (7) the amount needed to deter similar acts in the future. *Alamo Nat'l Bank v. Kraus*, **616 S.W.2d 908**, 910 (Tex. 1981); *Campbell v. Salazar*, **960 S.W.2d 719**, 729 (Tex App.-El Paso 1997, writ denied).

In the present case, appellants attempted to offer the evidence of prior lawsuits against Wal-Mart in an effort to show "a pattern of conduct on the part of Wal-Mart." Each of the offered lawsuits involved an incident in which Wal-Mart interfered with an existing or prospective contract. In particular, appellants offered (1) a memorandum of decision finding Wal-Mart liable to K-Mart in a lawsuit in which Wal-Mart purchased a store that was already under lease to K-Mart; (2) two lawsuits involving Wal-Mart's acquisition of real property for store location already subject to existing or prospective contract rights; (3) a judgment against Wal-Mart for interfering with a contractual relationship between a contractor and sub-contractor on a Wal-Mart store; (4) an $800,000 judgment in a case in which it was alleged that Wal-mart interfered with the contractual relationship between one of its vendors and a manufacturer of clothing.

Exclusion of the evidence made it appear that Wal-Mart's interference with appellants was an isolated incident. In fact, Wal-Mart's counsel argued to the jury "This is one isolated event,. . . ." Had the jury been aware that Wal-Mart had engaged in similar acts on at least five prior occasions, the jury probably would have returned a much higher exemplary damage verdict. The excluded prior lawsuit documents evidenced the frequency of similar wrongs Wal-Mart committed; the character of the conduct involved; the degree of Wal-Mart's culpability; the extent to which Wal-Mart's conduct offends a sense of public justice and propriety, and the amount needed to deter similar acts in the future. In addition, the prior lawsuits appellants sought to introduce were evidence of a course of conduct showing Wal-Mart's intent to interfere with prospective business relations. We find the trial court incorrectly excluded the above mentioned evidence of prior lawsuits and that the error caused the rendition of an improper judgment concerning punitive damages. *See* Tex.R.App.P. 81(b)(1). Point of error one is sustained. We need not address appellants' second point of error.

In its first cross point, Wal-Mart alleges that the appellants have no standing or capacity to recover under a tortious interference claim because they did not have an agreement or prospective agreement with Fleming Foods. Wal-Mart asserts that appellants' tortious interference claim is based on Wal-Mart's supposed interference with the "letter of intent" with Fleming. The letter of intent, sent by Sturges to L.G. Callaway of Fleming Foods of Texas Inc, stated:

> The Proposed agreement: 1. Will be in the form of a lease between Nederland Partners, Inc., comprised of James D. Martin, III, . . . Bruce H. Whitehead . . . and Harry W. Sturges, III . . . as Lessor; and Fleming Foods of Texas, Inc. as Lessee.

Wal-Mart alleges that because there is no evidence that "Nederland Partners, Inc." was ever formed, that appellants in their individual capacities had no

standing to sue for interference with the prospective lease with Fleming. To establish standing, a person must show a personal stake in the controversy. *In Interest of B.I.V.*, **923 S.W.2d 573**, 574 (Tex. 1996); *Hunt v. Bass*, **664 S.W.2d 323**, 324 (Tex. 1984).

Standing consists of some interest peculiar to the person individually and not as a member of the general public. *Hunt*, 664 S.W.2d at 324. One has standing to sue if: (1) he has sustained, or is in immediate danger of sustaining, some direct injury as a result of the wrongful act of which he complains; (2) he has a direct relationship between the alleged injury and claim sought to be adjudicated; (3) he has a personal stake in the controversy; (4) the challenged action has caused him some injury in fact; or (5) he is an appropriate party to assert the public's interest in the matter as well as his own interest. *Marburger v. Seminole Pipeline Co.*, **957 S.W.2d 82**, 89 (Tex.App.-Houston [14th Dist.] 1997, writ denied); *Rodgers v. RAB Investments, Ltd.*, **816 S.W.2d 543**, 546, (Tex.App.-Dallas 1991, no writ).

Sturges, Martin and Whitehead entered into a letter of intent with Fleming. The letter of intent reflects that the three men were to form Nederland Partners, Inc, to build and own the supermarket, and lease it to Fleming. Whitehead testified that Nederland Partners, Inc. was a corporation that appellants contemplated forming but never formed, and the principals were to be Martin, Ford, Sturges and Whitehead. All were interested parties who would have profited from the prospective lease. Whitehead also testified that Sturges and Ford participated in profits and losses of the new investment entity. At the time Sturges entered into the letter of intent with Fleming and the contract with Bank One, he was acting on behalf of himself as well as Whitehead, Martin and Ford. Callaway, as the representative of Fleming, was aware that Sturges, Whitehead and Martin had an interest in the transaction.

The record reflects that appellants were directly involved with the building of a supermarket, and all sustained direct economic injury as a result of the wrongful act of Wal-Mart. All had a personal stake in the outcome of the transaction. Consequently we find appellants had standing to sue. Wal-Mart's cross-point one is overruled.

In their second cross point, Wal-Mart alleges there is no evidence or insufficient evidence to support an affirmative finding to jury question six[fn1]. In support of this argument they allege that Wal-Mart did not intentionally prevent appellants from contracting with Fleming for the purpose of harming appellants, and there was no reasonable probability that appellants would have entered into a lease with Fleming.

In passing on a "no evidence" point we may consider only the evidence and the inferences therefrom which tend to support the jury's verdict and disregard all the evidence and inferences to the contrary which are against the verdict and the findings of the jury. *Garza v. Alviar*, **395 S.W.2d 821**, 823 (Tex. 1965). When reversal is sought on the ground of insufficiency of evidence to support a jury finding, we must consider and weigh all the evidence and we must reverse only if the verdict is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Dyson v. Olin Corp.*, **692 S.W.2d 456**, 457 (Tex. 1985); *In*

re King's Estate, **150 Tex. 662**, **244 S.W.2d 660**, 661 (1951).
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Wal-Mart argues there was no evidence or insufficient evidence to show that it intentionally prevented appellants from contracting with Fleming. In response, appellants urge that Hudson's call to Callaway, Fleming's manager of store development of the Houston area, resulted in Fleming's cancellation of its proposed business transaction with appellants. The evidence at trial indicated that Hudson, Fuller, Watson and Wood conspired to destroy the transaction with Fleming. Hudson phoned Callaway in the early part of 1990. Hudson indicated to Callaway that he was representing Wal-Mart and gave him an ultimatum not to build the store. Hudson said that if the supermarket were built, Wal-Mart would relocate and close the existing store. Callaway, relying on that information, called Sturges and told him the deal was off. Anthony Fuller, the director of Wal-Mart Realty Company, acted as Wal-Mart's designated corporate representative at trial. He testified regarding Hudson's call to Callaway, that "whatever [Hudson] said, he did on behalf of Wal-Mart." Hudson stated at trial that Fuller and Watson instructed him to call Fleming.

In a letter by Hudson dated January 3, 1990, to Wal-Mart's real estate manager Sandra Watson, Hudson told Watson that appellants would "drop [their] contract" to purchase tract 2 from Bank One, if Wal-Mart denied appellants' request for ECR revisions. Wal-Mart did in fact deny the request for ECR revisions.

Delee Wood, property manager at Wal-Mart, testified by deposition that she maintained a file regarding both tracts of land and that she shredded the file after she wrote Sturges and told him that Wal-Mart would not amend the ECR agreement. Evidence from other Wal-Mart witnesses indicate that Wood's shredding of the file was not done in the ordinary course of business, but rather was an intentional destruction of evidence. The jury was entitled to presume that Wood's file contained notes of conversations with Fuller that would support a finding that Wal-Mart intended to harm appellants.

Wal-Mart's exultation in the success of its plan to destroy appellants' transaction is evidenced by a thank you note by Watson to Fuller, thanking Fuller for his help in destroying appellants' prospective agreement with Fleming.

Wal-Mart also argues that there was no evidence or insufficient evidence to support the jury's finding that there was reasonable probability that appellants would have entered into a lease with Fleming. Callaway described appellants' transaction with Fleming. He identified preliminary surveys and a site plan that had been developed particularly for the configuration of appellants' tract. Callaway and Sturges began negotiation of lease terms after preparation of a detailed floor plan and a preliminary construction budget.

Callaway testified that a comparison of Fleming's lease agreement and the letter of intent between appellants and Fleming reveal that all of the material terms of the transaction between appellants and Fleming had been discussed and agreed upon. Callaway had also conferred with Fleming's home office in Oklahoma City and obtained approval of the lease terms before including them in the letter of intent. According to Callaway, the only thing necessary to finalize the transaction was Wal-Mart's approval of the requested ECR revisions, and the execution of the lease by Fleming's Oklahoma City office. In Callaway's opinion, Fleming's home office would have executed the lease.

The above evidence amounts to more than a scintilla of evidence supporting the jury's finding to question six. In addition, we do not find the jury's answer to be against the

overwhelming weight of the evidence as to be clearly wrong and unjust. Cross point two is overruled.

In their third cross point, Wal-Mart alleges there is no evidence or factually insufficient evidence to support the jury's answer to jury question seven because the

appellants failed to meet their burden to show that Wal-Mart acted without justification.[fn2] Wal-Mart argues that with respect to a tortious interference with prospective business relations case, it is the plaintiff's burden to prove the defendant lacked justification for its conduct. Wal-Mart alleges that appellants failed to meet this burden of proof. Appellants argue justification is an affirmative defense which Wal-Mart has the burden to prove.

The plaintiff has the burden of proving lack of justification or excuse in a tortious interference with prospective business relationship cause of action. *Hill v. Heritage Resources, Inc.*, **964 S.W.2d 89**, 109 (Tex.App.-El Paso 1997, writ filed); *Tarleton State Univ. v. Rosiere*, **867 S.W.2d 948**, 952 (Tex.App.-Eastland 1993, writ dism'd by agr.). However, other than the difference in burden of proof, justification involves the same type of proof as in a tortious interference with contract cause of action. A superior financial interest, for example, is recognized as justification or excuse. *Gillum v. Republic Health Corp.*, **778 S.W.2d 558**, 566 (Tex.App.-Dallas 1989, no writ). Also, it must be demonstrated that the plaintiff suffered some actual damage or harm. The measure of such damages is, however, different from tortious interference with contract as the damages are not strictly based upon contract rules. *Hill*, 964 S.W.2d at 111.

Wal-Mart urges that its rights in the subject matter are superior to appellants' rights and that this reason is enough to overcome appellants' attempt to prove lack of justification. Wal-Mart asserts that appellants had no ownership interest in tract 2 and no rights under the ECR agreements. The record, however, reflects appellants had a written contract with Bank One to purchase tract 2. Hudson, acting on Wal-Mart's behalf, had previously approached the bank about purchasing tract 2 and had been rebuffed.

Wal-Mart also argues appellants failed to demonstrate a lack of justification because Wal-Mart possessed valid contractual rights under the ECR agreements and appellants did not. The record reveals, however, that Wal-Mart's interference with appellants' contract was not based on rights under the ECR agreements. Fuller never attempted to justify the phone call to Hudson as being based on any exercise of rights under the ECR agreements. He testified that Wal-Mart's desire to purchase tract 2 had absolutely nothing to do with his decision to deny appellants' requested ECR amendments. There is no testimony from Fuller basing his direction to Hudson to contact Fleming on any alleged right of Wal-Mart under the 1988 ECR or 1982 ECR, and Wal-Mart has cited no such testimony in its brief. Fuller testified that after he denied appellants' ECR request, he asked Watson to come down, and that he and Watson subsequently instructed Hudson to contact Fleming. Fuller's deposition suggests that as of February 1990, he to that time he had no idea what Wal-Mart's rights or obligations were under the 1988 or 1982 ECR agreements.

Wal-Mart alternatively argues appellants failed to show Wal-Mart did not exercise a mistaken belief of its rights in good faith. Good faith is generally a fact issue to be determined by the trier of fact. *Sterner v. Marathon Oil Co.*, **767 S.W.2d 686**, 691 (Tex. 1989). As discussed above, the evidence at trial indicated that Hudson, Fuller, Watson and Wood conspired to destroy appellants' transaction with Fleming and were not acting in good faith.

We find there was more than a scintilla of evidence to support the jury's answer to

question seven. Additionally, we do not find the jury's answer to question seven to be so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cross point three is overruled.

In cross point four, Wal-Mart alleges there is no evidence, or insufficient evidence, to support the jury's finding of lost profits resulting from Wal-Mart's tortious interference.

Wal-Mart urges that appellants did not meet their burden to present sufficient competent evidence of reasonably certain lost profits.

Recovery for lost profits does not require that the loss be susceptible of exact calculation. *Holt Atherton Indus. Inc. v. Heine*, **835 S.W.2d 80**, 84 (Tex. 1992). By their nature, profits are more or less conjectural or speculative. *Pace Corp. v. Jackson*, **155 Tex. 179**, **284 S.W.2d 340**, 348 (1955). Nevertheless, a party must prove lost profits by competent evidence with "reasonable certainty." *Holt Atherton*, 835 S.W.2d at 84.

In the present case, the letter of intent sets out the terms of the lease. It includes all the terms necessary to complete Fleming's standard form for a "build and lease agreement," and Callaway's testimony reflects that he obtained approval from Fleming's home office for each term and provision. The primary term of the Fleming lease was to be twenty five years, with rent of $29,786.83 per month for three years and then escalating to $30,886.91 per month during the final twenty-two years. The total rent to be received was $9,226,470.12, with Fleming paying the taxes, insurance and maintenance. The evidence presented at trial, which included the expert testimony of Steve Eppes, a certified public accountant, reflects that after subtracting the estimated costs of acquiring the land and constructing the supermarket, and the other anticipated costs to appellants, and discounting the rent to be received to present value, appellants' profit from the lease would have been more than $2,000,000. Appellants had a contract to purchase the land, and a construction company had already estimated the construction costs, and prepared a preliminary construction budget. Thus, both the revenue and the estimated costs were established with reasonable certainty. The evidence more than adequately supported the jury's damage award of $1,000,000 for profits appellants would have earned under the Fleming lease. Wal-Mart's fourth cross point is overruled.

In its fifth cross point, Wal-Mart asserts the evidence is factually and legally insufficient to support punitive damages. It argues appellants failed to show malicious conduct on the part of a Wal-Mart vice principal.

Conduct willfully committed with ill will, evil motive, or gross indifference or reckless disregard for the rights of others is malicious and will also support an award of exemplary damages. *Missouri Pacific R. Co. v. Lemon*, **861 S.W.2d 501**, 517 (Tex.App.-Houston [14th Dist.] 1993, writ dism'd by agr.). Malice may be established by direct or circumstantial evidence, and a plaintiff need not prove the defendant acted with personal spite, but may simply prove the defendant committed negligent acts in reckless disregard of another's rights and with indifference as to whether that party would be injured. *Id.*

A plaintiff must establish the agent who acted with malice was acting within the scope of employment and was something more than a mere servant, i.e., is employed in a managerial capacity or is a vice principal of the corporation; or the acts of the agent were previously authorized, or subsequently adopted or ratified by the corporation; or the employee was unfit and the corporation was

reckless in employing him. *See Purvis v. Prattco, Inc.*, **595 S.W.2d 103**, 104 (Tex. 1980); *Fisher v. Carrousel Motor Hotel, Inc.*, **424 S.W.2d 627**, 630 (Tex. 1967). A vice principal of a corporation includes corporate officers, those who have authority to employ,

direct, and discharge servants of the master, those engaged in the performance of non-delegable or absolute duties of the master, or those to whom the master has confided the management of the whole or a department or division of the business. *Missouri Pacific R. Co.*, 861 S.W.2d at 518.

As outlined above, the evidence at trial indicated that Hudson, Fuller, Watson and Wood conspired to destroy appellants' transaction with Fleming. Tom Hudson was a commercial real estate agent representing Wal-Mart. Anthony Fuller was the director of Wal-Mart Realty Company and acted as Wal-Mart's designated corporate representative at trial. Fuller testified that Hudson acted on behalf of Wal-Mart. Sandra Watson was Wal-Mart's real estate manager and Delee Wood was a property manager at Wal-Mart. The testimony presented at trial, indicating that these four individuals conspired to destroy appellants' transaction with Fleming, was certainly evidence of ill will, evil motive, or gross indifference or reckless disregard for the rights of others. Consequently, we find the evidence was legally and factually sufficient to support an exemplary damage award. Wal-Mart's fifth cross point is overruled.

In cross points six through nine, Wal-Mart challenges the breach of contract findings by the jury. We need not address these points because appellants, in the suit below, elected their remedy only on the tortious interference finding. Additionally, we do not address Wal-Mart's conditional cross point as it is conditioned on this court rendering in favor of Wal-Mart.

We affirm the judgment as to actual damages and reverse and remand this suit as to the exemplary damage issue only. *See Maeberry v. Gayle*, **955 S.W.2d 875** (Tex.App.-Corpus Christi 1997, no writ) (reversal and render of fiduciary duty claim warranted remand of exemplary damages only); *Newman v. Tropical Vision, Inc.*, **891 S.W.2d 713**, 721 (Tex.App.-San Antonio 1994, writ denied) (finding gross negligence and exemplary damages can be determined upon a limited remand of a proceeding); *McElroy v. Fitts*, **876 S.W.2d 190**, 199 (Tex.App.-El Paso 1994, writ dism'd by agr.) (the part of judgment awarding exemplary damages was reversed and remanded for retrial) *Olin Corp. v. Dyson*, **678 S.W.2d 650**, 659 (Tex.App.-Houston [14th Dist.] 1984), *rev'd on other grounds*, **692 S.W.2d 456** (1985) (suit remanded on issues of gross negligence and punitive damages). The judgment of the trial court is affirmed in part, and reversed and remanded in part in accordance with this opinion.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART

[fn1] Jury Question six reads: "Did Wal-Mart wrongfully interfere with Plaintiffs' prospective contractual agreement to lease the property to Fleming?

Wrongful interference occurred if a. there was a reasonable probability that Plaintiffs would have entered into the contractual relations, and b. Wal-Mart intentionally prevented the contractual relations from occurring with the purpose of harming plaintiffs."

[fn2] Question 7: "Was Wal-Mart's intentional interference with Plaintiffs' prospective lease agreement with Fleming justified?

An interference is "justified" if a party possesses an

interest in the subject matter equal or superior to that of the other party, or if it results from the good faith exercise of a party's rights, or the good faith exercise of a party's mistaken belief of its rights."

Texas Case Law

WAL-MART STORES v. STURGES, 52 S.W.3d 711 (Tex. 2001)

Wal-Mart Stores, Inc., et al., Petitioners

v. Harry W. Sturges, III, et al., Respondents

No. 98-1107

Supreme Court of Texas.

Opinion Argued: January 19, 2000

Opinion Delivered: March 8, 2001.

Rehearing Overruled September 20, 2001

On Petition for Review from the Court of Appeals for the Ninth District of Texas

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Kevin D. Jewell, J. Preston Wrotenbery, Magenheim Bateman Robinson Wrotenbery & Helfand, P.L.L.C., Houston, for Petitioner.

Carl A. Parker, Parker & Parks, Port Arthur, Morris C. Gore, Dallas, for Respondent.

Justice HECHT delivered the opinion of the Court, in which Chief Justice PHILLIPS, Justice ENOCH, Justice OWEN, and Justice ABBOTT joined, and in Parts I, IV and V of which Justice HANKINSON and Justice O'NEILL joined.

Texas, like most states, has long recognized a tort cause of action for interference

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with a prospective contractual or business relation even though the core concept of liability — what conduct is prohibited — has never been clearly defined. Texas courts have variously stated that a defendant may be liable for conduct that is "wrongful", "malicious", "improper", of "no useful purpose", "below the behavior of fair men similarly situated", or done "with the purpose of harming the plaintiff", but not for conduct that is "competitive", "privileged", or "justified", even if intended to harm the plaintiff. Repetition of these abstractions in the case law has not imbued them with content or made them more useful, and tensions among them, which exist not only in Texas law but American law generally, have for decades been the subject of considerable critical commentary.

This case affords us the opportunity to bring a measure of clarity to this body of law. From the history of the tort in Texas and elsewhere, and from the scholarly efforts to analyze its boundaries, we conclude that to establish liability for interference with a prospective contractual or business relation the plaintiff must prove that it was harmed by the defendant's conduct that was either independently tortious or unlawful. By "independently tortious" we mean conduct that would violate some other recognized tort duty. We must explain this at greater

length, but by way of example, a defendant who threatened a customer with bodily harm if he did business with the plaintiff would be liable for interference because his conduct toward the customer — assault — was independently tortious, while a defendant who competed legally for the customer's business would not be liable for interference. Thus defined, an action for interference with a prospective contractual or business relation provides a remedy for injurious conduct that other tort actions might not reach (in the example above, the plaintiff could not sue for assault), but only for conduct that is already recognized to be wrongful under the common law or by statute.

Because the defendant's conduct in this case was not independently tortious or unlawful, and because the defendant did not breach its contract, we reverse the court of appeals' judgment[fn1] and render judgment for the defendant.

I

Plaintiff Harry W. Sturges, III contracted for himself and plaintiffs Dick Ford, Bruce Whitehead, and J. D. Martin, III to purchase from Bank One, Texas a vacant parcel of commercial property in Nederland, Texas, referred to as Tract 2. The contract, dated December 29, 1989, gave purchasers the right to terminate if within sixty days they were unable to lease the property and "to secure the written approval of Wal-Mart Corporation to the intended use of the Property, in accordance with the right so given to Wal-Mart pursuant to certain restrictions on the Property." The right referred to was the right to approve modifications in a site plan for the property that Wal-Mart Stores, Inc. and Wal-Mart Properties, Inc. (collectively, "Wal-Mart") held under two recorded instruments, each entitled "Easements with Covenants and Restrictions Affecting Land" ("ECRs"), one filed in 1982 and the other in 1988. The purpose of the ECRs was to assure the commercial development of Tract 2 and an adjacent tract, Tract 1, according to a prescribed plan.

The 1982 ECR was between Wal-Mart, which owned Tract 2 at the time, and the State Teachers Retirement System of Ohio ("OTR"), which owned Tract 1, having

acquired it from Wal-Mart under a sale and leaseback agreement. OTR leased Tract 1 to Wal-Mart to use for a store. In 1984, Wal-Mart sold Tract 2 to a joint venture that included a partnership, Gulf Coast Investment Group. Gulf Coast later acquired Tract 2 from the joint venture. The 1988 ECR, made by Gulf Coast, OTR, and Wal-Mart, modified the site plan for the tracts and otherwise incorporated the terms of the 1982 ECR.

Gulf Coast's efforts to develop Tract 2 failed, and in 1989 Bank One acquired the property by foreclosure. Two of Gulf Coast's partners, plaintiffs Whitehead and Martin, along with two other investors, plaintiffs Sturges and Ford, continued to look for a way to develop the property. When Sturges learned that Fleming Foods of Texas, Inc. was interested in building a food store in the area, he contracted with Bank One to purchase Tract 2 for the plaintiffs in hopes of leasing the property to Fleming Foods.

As soon as the agreement with Bank One was executed, Sturges contacted Wal-Mart to request a modification of the 1982/1988 ECRs to permit construction on Tract 2 of a food store to Fleming's specifications. A modification was necessary in part because Fleming wanted to construct a 51,000-square-foot store, and the site plan permitted only a 36,000-square-foot structure. A manager in Wal-Mart's property management

department, DeLee Wood, told Sturges to submit a revised site plan, and though she did not have authority to approve the modification herself, she indicated to Sturges that Wal-Mart would approve it. About the same time, Sturges obtained from Fleming a non-binding memorandum of understanding that it would lease Tract 2.

Unbeknownst to Wood, a manager in another Wal-Mart department, Sandra Watson, had been evaluating the possibilities for expanding stores at various locations, including the Nederland store. If a store could not be expanded, Watson's assignment was to consider relocating the store. In July 1989 Watson hired a realtor, Tom Hudson, to help Wal-Mart acquire Tract 2 for purposes of expansion. When Hudson learned of Sturges's contract with Bank One, he suggested to Watson that Wal-Mart could thwart Sturges's efforts to purchase the property by refusing to approve the requested modification of the 1982/1988 ECRs. At the time, neither Watson nor Hudson knew of Wood's conversations with Sturges.

When Wood's and Watson's conflicting activities came to the attention of the head of Wal-Mart's property management department, Tony Fuller, he agreed with Watson that Wal-Mart should try to acquire Tract 2 and told Wood to deny Sturges's request to modify the ECR, which she did in a letter to Sturges without explanation. Fuller then instructed Hudson to contact Fleming and communicate Wal-Mart's desire to expand onto Tract 2. Hudson complied, telling L. G. Callaway, Fleming's manager of store development who had been working on the deal with Sturges, that if Wal-Mart could not acquire Tract 2, it would close its store on Tract 1 and relocate. Since Fleming was not interested in Tract 2 without a Wal-Mart store next door, Callaway took Hudson's call to be an ultimatum not to move forward on the proposed lease with Sturges. Consequently, Fleming canceled its letter of intent with Sturges, and the plaintiffs opted out of their contract with Bank One. Several months later, Wal-Mart purchased Tract 2 and expanded its store.

The plaintiffs sued Wal-Mart for tortiously interfering with their prospective lease with Fleming and for breaching the 1982/1988 ECRs by unreasonably refusing to approve the requested site plan modification.
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The plaintiffs' actual damages claim under both theories was the same — the profits the plaintiffs would have made on the Fleming lease. The jury found Wal-Mart liable on both theories. Concerning the plaintiffs' interference claim, the district court submitted to the jury two questions with accompanying instructions as follows:

Did Wal-Mart wrongfully interfere with Plaintiffs' prospective contractual agreement to lease the property to Fleming?

Wrongful interference occurred if (a) there was a reasonable probability that Plaintiffs would have entered into the contractual relation, and (b) Wal-Mart intentionally prevented the contractual relation from occurring with the purpose of harming Plaintiffs.

Was Wal-Mart's intentional interference with Plaintiffs' prospective lease agreement with Fleming justified?

An interference is "justified" if a party possesses an interest in the subject matter equal or superior to that of the other party, or if it results from the good faith exercise of a party's rights, or the good faith exercise of a party's mistaken belief of its rights.

The jury answered "yes" to the first question and "no" to the second. Wal-Mart offered no objection to this part of the jury charge that is

relevant to our consideration of the case. The jury assessed $1 million actual damages on the contract claim and on the interference claim, assessed $500,000 punitive damages on the interference claim, and found that reasonable attorney fees for each side were $145,000. At the plaintiffs' election, the trial court rendered judgment on the interference claim, awarding actual and punitive damages but not attorney fees.

All parties appealed. The court of appeals affirmed the award of actual damages but remanded for a retrial of punitive damages, holding that the trial court had improperly excluded evidence offered by the plaintiffs during the punitive damages phase of the trial.[fn2]

We granted Wal-Mart's petition for review.[fn3]

II

Wal-Mart argues that there is no evidence to support the jury's verdict that it wrongfully interfered with the plaintiffs' prospective lease with Fleming or that it was not justified in acting as it did. Our analysis of these arguments is complicated because it must be made in light of the jury charge that the district court gave without objection,[fn4] even though, as we conclude, the charge's statement of the law was not entirely correct.[fn5] We will focus on Wal-Mart's argument that there is no evidence of wrongful interference: that is, in the language of the jury charge, no evidence that Wal-Mart acted "with the purpose of harming Plaintiffs." To resolve this issue, we must understand what kind of conduct is legally harmful and constitutes tortious interference. Whenever two competitors vie for the same business advantage, as Wal-Mart and Sturges did over the acquisition of Tract 2, one's

success over the other can almost always be said to harm the other. Wal-Mart's evidentiary challenge here raises the question of what harm must be proved to constitute tortious interference. To answer this question, we look to the historical development of the interference torts in other jurisdictions and in Texas and survey every Texas case involving a claim of intentional interference with prospective relations. We then analyze the evidence in this case.

A

The origins of civil liability for interference have been traced to Roman law that permitted a man to sue for violence done to members of his household.[fn6] The common law also recognized such liability as early as the fourteenth century and extended it to include driving away a business's customers or a church's donors.[fn7] But a common-law cause of action was strictly limited to cases in which actual violence or other such improper means were used.[fn8] For centuries the common law continued to allow civil actions for interference with one's customers or other prospective business relationships, but as the *Restatement (Second) of Torts* summarizes, "in all of them the actor's conduct was characterized by violence, fraud or defamation, and was tortious in character."[fn9]

The common law departed from this requirement in 1853 in the English case of *Lumley v. Gye*,[fn10] which held that liability could be imposed for interference with a contract if the defendant acted "wrongfully and maliciously", even if the defendant's conduct was not tortious or illegal.[fn11] In that case, Gye induced an opera singer to sing for him instead of Lumley, for whom she had contracted to perform, not with

threats of violence but by offering her a higher fee.[fn12] Forty years later in *Temperton v. Russell*,[fn13] the English court reaffirmed its decision in *Lumley*, holding that trade union officials could be liable to a building materials supplier for threatening his customers with labor disturbances if they continued to purchase supplies from him.[fn14] The court announced that the rule in *Lumley* would apply not only to interference with all contracts, regardless of the subject matter,[fn15] but to interference with prospective or potential relations as well.[fn16]

Temperton's treatment of interference with prospective relations as simply another aspect of interference with contract was a mistake. It is one thing for *A* and *B* to compete for *C*'s business, and quite another
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for *A* to persuade or force *C* to break his contract with *B*. Tortious interference with contract contemplates that competition may be lawful and yet limited by promises already made. Absent any such promises, competitors should be free to use any lawful means to obtain advantage. As one commentator has observed:

[A]lthough one who interferes with the stability of a contractual relationship may be seen as an interloper and possibly a tortfeasor, one who interferes merely with a "prospective business advantage" may be essentially a competitor. In an economic system founded upon the principle of free competition, competitors should not be liable in tort for seeking a legitimate business advantage.[fn17]

Lumley's holding that unlawful conduct was not a prerequisite for liability for tortious interference with contract was understandable; *Temperton*'s extension of the same rule to situations involving only prospective relations was not.

The use of "malice" to denote the touchstone of liability for tortious interference with contract was not well explained in *Lumley* and the cases that followed. "Malice" appeared at first to signify malevolence, although it soon became apparent that that definition would not work.[fn18] As we have explained in a similar context, lawful conduct is not made tortious by the actor's ill will towards another,[fn19] nor does an actor's lack of ill will make his tortious conduct any less so. "Malice" obviously meant that character of conduct that would not justify inducing a breach of contract, but that was an obviously circular definition (a person is not justified in inducing a breach of contract if he acts with malice, that is, if he acts in such a way that does not justify inducing a breach of contract). Exactly what conduct was culpable, and therefore "malicious", went undefined.

As clumsy as the idea of "malice" was in describing liability for tortious interference with contract, it made no sense at all in trying to describe liability for tortious interference with prospective advantage. Competitors could quite naturally be expected, well within the bounds of law, to try to achieve the best for themselves and, consequently, harm to each other. In a society built around business competition, interference with prospective business relations has never been thought to be wrongful in and of itself.[fn20] That some liability factor was essential has never been in doubt. If that factor was not unlawful conduct, discarded by *Lumley* for tortious interference with contract, then it was not clear what it should be.

These two problems — the misassociation of the two torts and the confusion regarding their standards of liability — may have been due to, and were certainly exacerbated by, the concept of a prima facie

tort that was being advanced about the same time. As explained by Justice Holmes: "It has been considered that, prima facie, the intentional infliction of temporal damages is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape."[fn21] In
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other words, intentionally inflicting harm is tortious unless justified. Consistent with this idea, and with the association of the two interference torts,[fn22] the 1939 *Restatement of Torts* defined tortious interference as simply this:

> [O]ne who, without a privilege to do so, induces or otherwise purposely causes a third person not to (a) perform a contract with another, or (b) enter into or continue a business relation with another is liable to the other for the harm caused thereby.[fn23]

In determining the existence of a privilege, the *Restatement* called for consideration of

> (a) the nature of the actor's conduct, (b) the nature of the expectancy with which his conduct interferes, (c) the relations between the parties, (d) the interest sought to be advanced by the actor and (e) the social interests in protecting the expectancy on the one hand and the actor's freedom of action on the other hand.[fn24]

The *Restatement* also stated a privilege for competition when, among other things, "the actor does not employ improper means".[fn25]

The *Restatement*'s broad statements did almost nothing to define the parameters of tortious conduct.[fn26] What was it about the nature of an actor's conduct, or of the expectancy at issue, or of any of the other considerations that should or should not result in liability in specific circumstances? Were the considerations the same for interference with a contract and interference with a prospective business relation? When were means of competition "improper"? The *Restatement*'s provisions gave no more guidance than the concept of prima facie tort. Not surprisingly, when the second *Restatement* was published forty years later, it commented:

> [T]here is no clearcut distinction between the requirements for a prima facie case and the requirements for a recognized privilege. Initial liability depends upon the interplay of several factors and is not reducible to a single rule; and privileges, too, are not clearly established but depend upon a consideration of much the same factors. Moreover, there is considerable disagreement on who has the burden of pleading and proving certain matters, such for example, as the existence and effect of competition for prospective business.

This has occurred for two reasons. First, the law in this area has not fully congealed but is still in a formative stage. The several forms of the [interference] tort . . . are often not distinguished by the courts, and cases have been cited among them somewhat indiscriminately. This has produced a blurring of the significance of the factors involved in determining liability. . . .

The second reason grows out of use of the term "malicious" in [*Lumley v. Gye*] and other early cases. It soon came to be realized that the term was not being

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used in a literal sense, requiring ill will toward the plaintiff as a requirement for imposing liability. Many courts came to call this "legal malice," and to hold that in this sense the requirement means that the infliction of the harm must be intentional and "without justification." "Justification" is a broader and looser term than "privilege," and the consequence has been that its meaning has not been very clear.[fn27]

Having recognized these problems, the *Restatement* did little to solve them. Concluding that "it has seemed desirable to make use of a single word that will indicate for this tort the balancing process expressed by the two terms, `culpable and not justified,'"[fn28] the *Restatement* chose "improper" as a word "neutral enough to acquire a specialized meaning of its own" for purposes of defining the interference torts.[fn29] The *Restatement* separated interference with contract and interference with prospective business relations, previously combined as one, but it used the same new standard — "improper" — to define liability for each. Hence, section 766B states with respect to intentional interference with prospective contractual relations:

> One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation.[fn30]

The *Restatement* then states that whether conduct was "improper" for both interference torts should be determined from consideration of the same broad factors:

> In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors: (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference, and (g) the relations between the parties.[fn31]

The second *Restatement*, like the first, provided that lawful competition was not tortious interference with a prospective business relation although it might be tortious interference with any contract not terminable at will.[fn32]

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Thus, the second *Restatement* abandoned the confusing and overlapping

notions of "malice", "privilege", and "justification", but it made little more than a formal distinction between the two interference torts, setting the liability standard for both at "improper" conduct, and it continued the idea that the considerations for determining what was improper were, except for lawful competition, similar for both torts. Commentators since have criticized the *Restatement* as overstating case law. Professor Perlman's analysis of the cases

> suggests that the interference tort [with prospective relations] should be limited to cases in which the defendant's acts are independently unlawful and that if improper motivation is to give rise to liability, it should be based only on objective indicia of activity producing social loss. In most cases, tort law will provide the standard for judging the unlawfulness of the means. At the same time, those courts that have emphasized unlawful means have recognized that sources other than traditional tort law also might define the lawfulness of the defendant's behavior. Incorporation of such sources seems right.[fn33]

Likewise, Professor Keeton summarized:

> violence or intimidation, defamation, injurious falsehood or other fraud, violation of the criminal law, and the institution or threat of groundless civil suits or criminal prosecutions in bad faith, all have been held to result in liability, and there is some authority which limits liability to such cases.[fn34]

Two recent cases of note have echoed the same idea after surveying existing case law. In *Della Penna v. Toyota Motor Sales, Inc.*, a car manufacturer required dealers not to sell its vehicles for resale outside the United States in order to protect its dealership network. An exporter sued the manufacturer for tortious interference with his business prospects. The Supreme Court of California rejected the claim as a matter of law, concluding that the manufacturer's conduct was not actionable. Abandoning notions of "malice" and "justification", the court held

> that a plaintiff seeking to recover for an alleged interference with prospective contractual or economic relations must plead and prove as part of its case-in-chief that the defendant not only knowingly interfered with the plaintiff's expectancy, but engaged in conduct that was wrongful by some legal measure other than the fact of interference itself.[fn35]

The "legal measures" identified by the court were existing tort law and statutes.

Similarly, in *Speakers of Sport, Inc. v. Proserv, Inc.*,[fn36] the Seventh Circuit concluded that under Illinois law, actionable interference requires conduct that is independently tortious by nature. In that case, one sports agency sued another for interference in obtaining Texas Rangers' catcher Ivan Rodriguez as a client by promising him more than it could deliver. The plaintiff agency sought damages

alleging that the defendant agency's conduct was unfair, unethical, and deceitful. The court rejected the argument that actionable interference could be based on conduct that was not independently tortious or

otherwise unlawful. As Judge Posner explained in the court's opinion, no other workable basis exists for distinguishing between tortious interference and lawful competition:

> It can be argued . . . that competition can be tortious even if it does not involve an actionable fraud . . . or other independently tortious act, such as defamation, or trademark or patent infringement, or a theft of a trade secret; that competitors should not be allowed to use "unfair" tactics; and that a promise known by the promisor when made to be unfulfillable is such a tactic, especially when used on a relatively unsophisticated, albeit very well to do, baseball player. Considerable support for this view can be found in the case law. . . . But the Illinois courts have not as yet embraced the doctrine, and we are not alone in thinking it pernicious. *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, **11 Cal.4th 376**, **902 P.2d 740**, 760-763 (Cal. 1995) (concurring opinion). . . . We agree with Professor Perlman that the tort of interference with business relationships should be confined to cases in which the defendant employed unlawful means to stiff a competitor, and we are reassured by the conclusion of his careful analysis that the case law is generally consistent with this position as a matter of outcomes as distinct from articulation.**[fn37]**

Expressly endorsing the legal commentary critical of the development of the law of tortious interference, *Della Penna* and *Speakers of Sport* demonstrate the importance of decoupling interference with contract from interference with prospective relations, and of grounding liability for the latter in conduct that is independently tortious by nature or otherwise unlawful.

B

The development of tortious interference law has not fared any better in Texas. This Court first recognized the tort of interference with prospective business relations in 1891, two years before the English case of *Temperton v. Russell*. In *Delz v. Winfree*,**[fn38]** a butcher sued two cattle dealers alleging that they had conspired between themselves and with another butcher to refuse to sell him live animals or slaughtered meat "without justifiable cause, and unlawfully, and with the malicious intent to molest, obstruct, hinder, and prevent plaintiff from carrying on his said business".**[fn39]** We held that the plaintiff's pleadings stated a cause of action. We stated that while one person could refuse to do business with another "whether the refusal is based upon reason, or is the result of whim, caprice, prejudice, or malice", a person could not induce a third person not to do business with the other without "some legitimate right or interest of his own".**[fn40]** We explained further

> that a person has no right to be protected against competition, but he has a right to be free from malicious and wanton interference, disturbance, or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right, by

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> contract or otherwise, is interfered with. But if it come

> from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing.[fn41]

We did not define what would constitute "wanton or malicious" conduct. On remand, the defendants proved that they had agreed not to sell to the plaintiff, or to anyone else, who was indebted to either of them, and that they had never attempted to induce others not to sell to the plaintiff.[fn42] The trial court rendered judgment on a verdict favorable to the defendants, and the court of civil appeals affirmed.[fn43]

Thirteen years later, in *Brown v. American Freehold Land Mortgage Co.*,[fn44] we again held that the plaintiff had pleaded a cause of action for tortious interference. There the plaintiffs claimed to have lost business because the defendant, a competitor, had falsely stated that the plaintiffs were neglectful, irresponsible, and insolvent. Without defining the elements of an interference tort, we stated that if the plaintiffs' allegations proved true, the defendant would be liable for having engaged in "a malicious pursuit . . . by means wholly without justification in law or morals".[fn45] At the trial that followed, the plaintiffs offered evidence that the defendant had made derogatory statements about their business, and the trial court rendered judgment on a verdict in the plaintiffs' favor, which was affirmed.[fn46]

Our next case involving allegations of tortious interference with business relations came ninety-two years later. In *Calvillo v. Gonzalez*,[fn47] the plaintiff, an anesthesiologist, complained that the defendant, another anesthesiologist who had contracted with a hospital to furnish it anesthesiologists "from time to time . . . in [his] sole discretion", refused to schedule the plaintiff to work at the hospital.[fn48] The trial court granted summary judgment for the defendant on all the plaintiff's claims, but the court of appeals reversed and remanded the plaintiff's claim for tortious interference with prospective business relations, indicating that the defendant might not have been justified to act as he did if he was motivated by personal acrimony toward the plaintiff.[fn49] We reversed and rendered judgment for the defendant, holding that since he had the legal right to act as he did, his good faith or personal motivations were irrelevant.[fn50]

Most recently, in *Prudential Insurance Co. of America v. Financial Review Services, Inc.*,[fn51] we acknowledged that "[w]e have never enumerated the elements of a cause of action for tortious interference with prospective contracts" but concluded that it was not necessary to do so to reach a decision in that case.[fn52] There, the plaintiff had contracted with hospitals to audit

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their records to determine whether all services and supplies furnished to patients had been billed, and to invoice insurers for previously unbilled items.[fn53] When the defendant health insurer complained to its insureds and to the hospitals that the plaintiff was overbilling, the hospitals terminated their agreements with the plaintiff.[fn54] The plaintiff sued the insurer for intentional interference with the plaintiff's contracts with the hospitals and appeared to allege interference with prospective contracts as well.[fn55] We concluded that the plaintiff had adduced evidence that the defendant had falsely disparaged the plaintiff's business that precluded summary

judgment for the defendant.[fn56]

Thus, although this Court's decisions clearly recognize a cause of action for tortious interference with prospective business relations,[fn57] none attempts to state the elements of tortious interference with prospective business relations or to define precisely what conduct is culpable. The courts of appeals, in a number of cases, have not been entirely in agreement on these issues. Most have stated that to recover for tortious interference with prospective business relations a plaintiff must prove that the defendant acted intentionally and maliciously, without privilege or justification, for the purpose of harming the plaintiff.[fn58] Several courts have omitted the requirement that the defendant act with the purpose of harming the plaintiff,[fn59] and a few cases state that a defendant may be liable if he acts with malice and without serving any useful purpose of his own.[fn60] A

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number of cases emphasize that the plaintiff must prove that the defendant acted with malice,[fn61] and one case indicates proof of malice and intent is all that is required.[fn62] But three cases indicate that proof of intentional conduct without justification is sufficient,[fn63] and three cases mention only that the defendant must be shown to have acted intentionally.[fn64]

Most courts have held that to be "malicious" an act of tortious interference with a prospective business relation must be wrongful or unlawful, and intentionally done without just cause or excuse.[fn65] An actor's personal motivation in doing what he has a legal right to do is irrelevant.[fn66] However, no Texas court has attempted to define what conduct is "wrongful." An actor is often said to have been justified if he had the legal right to do what he did or if he had a colorable right that he exercised in good faith.[fn67] Thus, justification and malice overlap to at least some extent: a lawful act is justified and not malicious. To complicate matters further, privilege and justification are sometimes used synonymously[fn68] and sometimes not.[fn69] Only a few cases involving claims for interference with contract have suggested that the factors listed in section 767 of the *Restatement (Second) of Torts* are helpful in determining whether conduct is

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privileged.[fn70] Although the burden of proving a lack of justification or privilege in a tortious interference with contract case is on the defendant,[fn71] most courts have placed that burden on the plaintiff in a tortious interference with prospective business relations case.[fn72]

In attempting to derive from the case law a clearer understanding of what is actionable, it is of some benefit, as Judge Posner and Professor Perlman have observed, to look past the language of opinions and consider the conduct for which defendants have actually been held liable. There are only a few Texas cases in which the plaintiff has recovered. Four involved instances in which the defendant made false statements concerning the plaintiff's business.[fn73] Two involved conduct that appears to have been unlawful.[fn74] In one case, the proprietor of a boarding house and saloon recovered damages against a railroad that threatened to terminate any employee who visited the plaintiff's establishment.[fn75] The basis for the railroad's threats is not clear from the case. When a defendant's motives were competitive, similar threats were held not to be actionable. Thus, in one case a store owner was held not to be liable for threatening to terminate any employee who traded with its competitor,[fn76] and in another case a beer manufacturer was held not to be liable for threatening to terminate the lease of any saloon that sold a competing product.[fn77] Finally, in two federal cases

the defendants were held liable for structuring a
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real estate transaction to avoid payment of a broker's commission.[fn78] In neither case had the plaintiffs contracted for payment of a commission. Neither case cited an earlier Texas court decision holding that a broker was not liable for inducing a seller to use his services rather than another broker's as long as the seller had not contracted to pay a commission.

It appears that in most Texas cases in which plaintiffs have actually recovered damages for tortious interference with prospective business relations, the defendants' conduct was either independently tortious — in the four cases noted, defamatory or fraudulent — or in violation of state law. For the same reasons accepted by the Supreme Court of California in *Della Penna*, and by the Seventh Circuit in *Speakers of Sport*, and advanced by Professor Perlman and other legal commentators, we see no need for a definition of tortious interference with prospective business relations that would encompass other conduct. The historical limitation of the tort to unlawful conduct — "the actor's conduct was characterized by violence, fraud or defamation, and was tortious in character"[fn79] — provides a viable definition and preserves the tort's utility of filling a gap in affording compensation in situations where a wrong has been done. The concepts of malice, justification, and privilege have not only proved to be overlapping and confusing, they provide no meaningful description of culpable conduct, as the *Restatement (Second) of Torts* concluded more than twenty years ago.

We therefore hold that to recover for tortious interference with a prospective business relation a plaintiff must prove that the defendant's conduct was independently tortious or wrongful. By independently tortious we do not mean that the plaintiff must be able to prove an independent tort. Rather, we mean only that the plaintiff must prove that the defendant's conduct would be actionable under a recognized tort. Thus, for example, a plaintiff may recover for tortious interference from a defendant who makes fraudulent statements about the plaintiff to a third person without proving that the third person was actually defrauded. If, on the other hand, the defendant's statements are not intended to deceive, as in *Speakers of Sport*, then they are not actionable. Likewise, a plaintiff may recover for tortious interference from a defendant who threatens a person with physical harm if he does business with the plaintiff. The plaintiff need prove only that the defendant's conduct toward the prospective customer would constitute assault. Also, a plaintiff could recover for tortious interference by showing an illegal boycott, although a plaintiff could not recover against a defendant whose persuasion of others not to deal with the plaintiff was lawful. Conduct that is merely "sharp" or unfair is not actionable and cannot be the basis for an action for tortious interference with prospective relations, and we disapprove of cases that suggest the contrary.[fn80] These examples are not exhaustive, but they illustrate what conduct can constitute tortious interference with prospective relations.

The concepts of justification and privilege are subsumed in the plaintiff's
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proof, except insofar as they may be defenses to the wrongfulness of the alleged conduct. For example, a statement made against the plaintiff, though defamatory, may be protected by a complete or qualified privilege.[fn81] Justification and privilege are defenses in a claim for tortious interference with prospective relations only to the extent that they are defenses to the independent tortiousness of the defendant's conduct. Otherwise, the plaintiff need not prove that the

defendant's conduct was not justified or privileged, nor can a defendant assert such defenses.

In reaching this conclusion we treat tortious interference with prospective business relations differently than tortious interference with contract. It makes sense to require a defendant who induces a breach of contract to show some justification or privilege for depriving another of benefits to which the agreement entitled him. But when two parties are competing for interests to which neither is entitled, then neither can be said to be more justified or privileged in his pursuit. If the conduct of each is lawful, neither should be heard to complain that mere unfairness is actionable. Justification and privilege are not useful concepts in assessing interference with prospective relations, as they are in assessing interference with an existing contract.

III

With this understanding of what conduct is prohibited by the tort of interference with prospective contractual or business relations and what conduct is not prohibited, we return to the evidence of this case. As we have already noted, we must assess Wal-Mart's argument that no evidence supports a finding of wrongful interference with the plaintiffs' prospective agreement with Fleming Foods in light of the jury charge to which Wal-Mart did not object, even though the charge does not correctly state the law. We must therefore consider whether the plaintiffs offered any evidence from which the jury could find, as the trial court instructed them, that Wal-Mart acted "with the purpose of harming Plaintiffs". As we have shown, however, harm that results only from lawful competition is not compensable by the interference tort. We must look to see whether there is evidence of harm from some independently tortious or unlawful activity by Wal-Mart.

The plaintiffs tell us that their interference claim is based on the telephone conversation between Hudson, Wal-Mart's relator, and Callaway, Fleming's manager of store development. Specifically, the plaintiffs complain of Hudson's "ultimatum" to Callaway that if Wal-Mart were not able to acquire Tract 2 for expansion, it would relocate its store. The plaintiffs contend that Hudson's statement was false and therefore fraudulent. To be fraudulent a statement must be material and false, the speaker must have known it was false or acted recklessly without regard to its falsity, the speaker must have intended that the statement be acted on, and hearer must have relied on it.[fn82] The plaintiffs do not dispute that Wal-Mart had undertaken to identify stores which could not be expanded and to relocate them, that it attempted to acquire Tract 2 as an alternative to relocating the Nederland store, and that as Hudson told Callaway, if Wal-Mart could not acquire Tract 2 it would relocate. The only evidence the plaintiffs cite in

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support of their contention is that at the time Hudson called Callaway Wal-Mart had not begun efforts to relocate; that as a general matter Wal-Mart preferred to expand rather than relocate; and that there was room on Tract 1 for some expansion of the store. The fact that Wal-Mart had not begun to relocate its store when Hudson talked with Callaway is no evidence that his statement was false. The plaintiffs point to no evidence that Wal-Mart's general preference for expansion over relocation, or the possibilities for some expansion on Tract 1, would have made it decide not to relocate. Indeed, if Tract 1 had been adequate for Wal-Mart's intended expansion, it would not have needed to acquire Tract 2.

Thus, no evidence supports the plaintiffs' contention that Hudson's statement to Callaway was fraudulent or that Hudson intended to deceive

Callaway, and the plaintiffs do not contend that Wal-Mart's conduct was otherwise illegal or tortious. The record contains no evidence to indicate that Wal-Mart intended the plaintiffs any harm other than what they would necessarily suffer by Wal-Mart's successful acquisition of Tract 2, which they were both pursuing, by entirely lawful means. We therefore conclude that there is no evidence to support a judgment for the plaintiffs on their interference claim.

IV

We must next consider whether the plaintiffs can recover on their breach of contract claim. The plaintiffs allege that Wal-Mart unreasonably refused to consent to Sturges's proposed modification in the site plan in violation of its obligation under the 1982 ECR. Specifically, the plaintiffs contend that Wal-Mart violated the following provision of the 1982 ECR:

> This Agreement (including exhibits) may be modified or cancelled only by Wal-Mart . . . as long as it or its affiliate has any interest as either owner or lessee of Tract 1 or 2 together with the written consent of OTR, so long as it has an interest as an owner in Tract 1. Such consents shall not be unreasonably withheld.

The plaintiffs argue that the use of the plural "consents" in the last sentence quoted means that neither Wal-Mart nor OTR could unreasonably withhold consent to a modification. The trial judge held that the provision was ambiguous, and the jury agreed with the plaintiffs' interpretation.

If a written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and it can be construed as a matter of law.[fn83] An ambiguity does not arise simply because the parties advance conflicting interpretations of the contract; for an ambiguity to exist, both interpretations must be reasonable.[fn84] The plaintiffs' interpretation of the 1982 ECR is not reasonable. By the plain language of the provision, Wal-Mart *alone* could modify the ECR as long as it owned or leased Tract 1 or Tract 2, and OTR's consent was required as long as it owned an interest in Tract 1. It would make no sense for Wal-Mart, which drafted the 1982 ECR, to require its consent to its own proposed modification or cancellation. The most plausible explanation for the use of the plural "consents" is that Wal-Mart

contemplated the possibility that it might propose more than one modification.

We therefore conclude as a matter of law that Wal-Mart did not breach the 1982 ECR.

V

Finally, Wal-Mart argues that it is entitled to attorney fees if it prevails on the plaintiffs' breach-of-contract claim. Wal-Mart's claim is based on the following provision in the 1982 ECR:

> In the event of a breach or threatened breach of this Agreement, only all record owners of Tract 1 as a group, or all record owners of Tract 2 as a group, or Wal-Mart . . . so long as it . . . has an interest as

> owner or lessee of either Tract 1 or 2, shall be entitled to institute proceedings. . . . The unsuccessful party in any action shall pay to the prevailing party a reasonable sum for attorney's fees.

Neither Wal-Mart, nor the owners of Tract 1, nor the owners of Tract 2 instituted this proceeding; the plaintiffs did. Therefore, the provision by its plain terms does not apply so as to entitle Wal-Mart to recover attorney fees.

* * * * *

For the reasons we have explained, we reverse the judgment of the court of appeals and render judgment that the plaintiffs take nothing.

Justice O'Neill issued an opinion concurring in part and concurring in the judgment, in which Justice Hankinson joined.

Justice Baker did not participate in the decision.

[fn1] **39 S.W.2d 608** (Tex.App.-Beaumont 1998).

[fn2] *Id.*

[fn3] 43 Tex. Sup.Ct. J. 94 (Nov. 12, 1999).

[fn4] *See City of Fort Worth v. Zimlich*, **29 S.W.3d 62**, 71 (Tex. 2000) (stating that when no objection was made to a jury instruction, evidence to support a finding based on the instruction should be assessed "in light of" the instruction given); *Larson v. Cook Consultants, Inc.*, **690 S.W.2d 567**, 568 (Tex. 1985) (same).

[fn5] *See also Diamond Shamrock Ref. & Mktg. Co. v. Mendez*, **844 S.W.2d 198**, 200 (Tex. 1992) (analyzing the proof of a false light invasion of privacy even though the Court had not recognized such a tort).

[fn6] *See* W. Page Keeton et al., Prosser & Keeton on the Law of Torts § 129, at 979-980 (5th ed. 1984); Francis Bowes Sayre, *Inducing Breach of Contract*, 36 Harv. L. Rev. 663, 663-664 (1923).

[fn7] *See* Keeton, *supra* note 6, § 130, at 1005.

[fn8] *See id.*; Sayre, *supra* note 6, at 665.

[fn9] *See* Restatement (Second) of Torts § 766B, cmt. b (1979).

[fn10] 2 El. & Bl. 216, 118 Eng. Rep. 749 (Q.B. 1853).

[fn11] *See* Sayre, *supra* note 6, at 667-669; Harvey S. Perlman,

Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine, 49 U. Chi. L. Rev. 61, 63-64 (1982).

[fn12] *See* Sayre, *supra* note 6, at 667-669; Perlman, *supra* note 11, at 63-64.

[fn13] 1 Q.B. 715 (1893).

[fn14] *See* Sayre, *supra* note 6, at 670.

[fn15] *Id.*

[fn16] *See* Keeton, *supra* note 6, § 130, at 1005; Restatement (Second) of Torts § 766B, cmt. b (1979).

[fn17] Gary Myers, *The Differing Treatment of Efficiency and Competition in Antitrust and Tortious Interference Law*, 77 Minn. L. Rev. 1097, 1121-1122 (1993).

[fn18] *See* Sayre, *supra* note 6, at 672-674.

[fn19] *Texas Beef Cattle Co. v. Green*, **921 S.W.2d 203**, 211 (Tex. 1996).

[fn20] *See* Dan B. Dobbs, *Tortious Interference with Contractual Relationships*, 34 Ark. L. Rev. 335, 344 (1980).

[fn21] *Aikens v. Wisconsin*, **195 U.S. 194**, 204 (1904) (citations omitted).

[fn22] *See* Dobbs, *supra* note 20, at 344-345.

[fn23] Restatement of Torts § 766 (1939).

[fn24] *Id.* § 767.

[fn25] *Id.* § 768 (stating in part: "One is privileged purposely to cause a third person not to enter into or continue a business relation with a competitor of the actor if (a) the relation concerns a matter involved in the competition between the actor and the competitor, and (b) the actor does not employ improper means, and (c) the actor does not intend thereby to create or continue an illegal restraint of competition, and (d) the actor's purpose is at least in part to advance his interest in his competition with the other.").

[fn26] *See* Keeton, *supra* note 6, § 130, at 1010-1011; Dobbs, *supra* note 20, at 344-345.

[fn27] Restatement (Second) of Torts intro. to ch. 37, at 5 (1979).

[fn28] *Id.* at 6.

[fn29] *Id.*

[fn30] *Id.* § 766B.

[fn31] *Id.* § 767.

[fn32] "Competition as Proper or Improper Interference

"(1) One who intentionally causes a third person not to enter into a prospective contractual relation with another who is his competitor or not to continue an existing contract terminable at will does not interfere improperly with the other's relation if

"(a) the relation concerns a matter involved in the competition between the actor and the other and

"(b) the actor does not employ wrongful means and

"(c) his action does not create or continue an unlawful restraint of trade and

"(d) his purpose is at least in part to advance his interest in competing with the other.

"(2) The fact that one is a competitor of another for the business of a third person does not prevent his causing a breach of an existing contract with the other from being an improper interference if the contract is not terminable at will." *Id.* § 768.

[fn33] Perlman, *supra* note 11, at 97-98 (citations omitted).

[fn34] Keeton, *supra* note 6, § 130, at 1009 (citations omitted).

[fn35] **902 P.2d 740**, 751 (Cal. 1995).

[fn36] **178 F.3d 862** (7th Cir. 1999).

[fn37] *Id.* at 867 (citations omitted).

[fn38] **16 S.W. 111** (Tex. 1891).

[fn39] *Id.* at 111.

[fn40] *Id.* at 112.

[fn41] *Id.* at 112 (quoting *Walker v. Cronin*, 107 Mass. 555, 562 (1871)). *Accord*, *Olive v. Van Patten*, **25 S.W. 428** (Tex.Civ.App. 1894, no writ).

[fn42] *Delz v. Winfree*, **25 S.W. 50** (Tex.Civ.App. 1894, no writ).

[fn43] *Id.*

[fn44] **80 S.W. 985** (Tex. 1904).

[fn45] *Id.* at 988.

[fn46] *American Freehold Land Mortgage Co. v. Brown*, **118 S.W. 1106** (Tex.Civ.App. 1909, writ ref'd).

[fn47] **922 S.W.2d 928** (Tex. 1996) (per curiam).

[fn48] *Id.* at 929.

[fn49] *Id.*

[fn50] *Id.* at 929-930.

[fn51] **29 S.W.3d 74** (Tex. 2000).

[fn52] *Id.* at 78.

[fn53] *Id.* at 76.

[fn54] *Id.*

[fn55] *Id.* at 78.

[fn56] *Id.* at 80-83.

[fn57] *See also Juliette Fowler Homes, Inc. v. Welch Assocs., Inc.*, **793 S.W.2d 660**, 665-666 (Tex. 1990) (see cases cited); *Sterner v. Marathon Oil Co.*, **767 S.W.2d 686**, 689 (Tex. 1989).

[fn58] *Milam v. National Ins. Crime Bureau*, **989 S.W.2d 126**, 131 (Tex.App.-San Antonio 1999, no pet.); *Robles v. Consolidated Graphics, Inc.*, **965 S.W.2d 552**, 561 (Tex.App.-Houston [14th Dist.] 1997, no pet.); *Garner v. Corpus Christi Nat'l Bank*, **944 S.W.2d 469**, 477 (Tex.App.-Corpus Christi 1997, writ denied); *Winston v. American Med. Int'l, Inc.*, **930 S.W.2d 945**, 953 (Tex.App.-Houston [1st Dist.] 1996, writ denied); *Tarleton State Univ. v. Rosiere*, **867 S.W.2d 948**, 952 (Tex.App.-Eastland 1993, writ dism'd by agr.); *Coastal Corp. v. Atlantic Richfield Co.*, **852 S.W.2d 714**, 719-720 (Tex.App.-Corpus Christi 1993, no writ); *Browning-Ferris, Inc. v. Reyna*, **852 S.W.2d 540**, 548 (Tex.App.-San Antonio 1992), *rev'd on other grounds*, **865 S.W.2d 925** (Tex. 1993); *American Med. Intern., Inc. v. Giurintano*, **821 S.W.2d 331**, 337 (Tex.App.-Houston [14th Dist.] 1991, no writ); *Exxon Corp. v. Allsup*, **808 S.W.2d 648**, 659 (Tex.App.-Corpus Christi 1991, writ denied); *Gillum v. Republic Health Corp.*, **778 S.W.2d 558**, 565-566 (Tex.App.-Dallas 1989, no writ); *Levine v. First Nat. Bank of Eagle Pass*, **706 S.W.2d 749**, 751 (Tex.App.-San Antonio), *rev'd on other grounds*, **721 S.W.2d 287** (Tex. 1986); *Lone Star Steel Co. v. Wahl*, **636 S.W.2d 217**, 222 (Tex.App.-Texarkana 1982, no writ); *Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Discount Ctrs., Inc.*, **200 F.3d 307**, 316 (5th Cir. 2000); *C.E. Servs., Inc. v. Control Data Corp.*, **759 F.2d 1241**, 1249 (5th Cir. 1985); *Leonard Duckworth, Inc. v. Michael L. Field & Co.*, **516 F.2d 952**, 956 (5th Cir. 1975).

[fn59] *Bradford v. Vento*, **997 S.W.2d 713**, 730-731 (Tex.App.-Corpus Christi 1999, pet. granted) (No. 99-0966); *Hill v. Heritage Resources, Inc.*, **964 S.W.2d 89**, 124 (Tex.App.-El Paso 1997, pet. denied); *Texas Oil Co. v. Tenneco Inc.*, **917 S.W.2d 826**, 831 (Tex.App.-Houston [14 Dist.] 1994), *rev'd on other grounds sub nom. Morgan Stanley & Co., Inc. v. Texas Oil Co.*, **958 S.W.2d 178** (Tex. 1997); *Gonzalez v. San Jacinto Methodist Hosp.*, **905 S.W.2d 416**, 421 (Tex.App.-El Paso 1995), *rev'd on other grounds sub nom. Calvillo v. Gonzalez*, **922 S.W.2d 928** (Tex. 1996).

[fn60] *State Nat'l Bank v. Farah Mfg. Co.*, **678 S.W.2d 661**, 688 (Tex.App.-El Paso 1984, writ dism'd by agr.); *Morris v. Jordan Financial Corp.*, **564 S.W.2d 180**, 184 (Tex.Civ.App.-Tyler 1978, writ ref'd n.r.e.); *Davis v. Lewis*, **487 S.W.2d 411**, 414 (Tex.Civ.App.-Amarillo 1972, no writ).

[fn61] *Bray v. Squires*, **702 S.W.2d 266**, 272 (Tex.App.-Houston [1st Dist.] 1985, no writ) (interference with a business relationship is actionable only if illegal action and malice combine to produce an injury)(citing *State Nat'l Bank v. Farah Mfg. Co.*, 678 S.W.2d at 688-891); *Harshberger v. Reliable-Aire, Inc.*, **619 S.W.2d 478**, 481 (Tex.Civ.App.-Corpus Christi 1981, writ dism'd w.o.j.) (venue case)(citing *Davis v. Lewis*, 487 S.W.2d at 414); *Light v. Transport Ins. Co.*, **469 S.W.2d 433**, 439 (Tex.Civ.App.-Tyler 1971, writ ref'd n.r.e.); *Martin v. Phillips Petroleum Co.*, **455 S.W.2d 429**, 435-436 (Tex.Civ.App.-Houston [14th Dist.] 1970, no writ); *Hampton v. Sharp*, **447 S.W.2d 754**, 758 (Tex.Civ.App.-Houston [1 Dist.] 1969, writ ref'd n.r.e.).

[fn62] *RRR Farms, Ltd. v. American Horse Protection Ass'n*, **957 S.W.2d 121**, 131, n. 6 (Tex.App.-Houston [14 Dist.] 1997, writ denied) (defining "malice" in this type of action as "the intentional doing of a wrongful act without just cause or excuse").

[fn63] *Santa Fe Energy Operating Partners, L.P. v. Carrillo*, **948 S.W.2d 780**, 784, n. 2 (Tex.App.-San Antonio 1997, writ denied) (noting that these elements were submitted without objection); *Herider Farms-El Paso, Inc. v. Criswell*, **519 S.W.2d 473**, 476 (Tex.Civ.App.-El Paso 1975, writ ref'd n.r.e.); *Cooper v. Steen*, **318 S.W.2d 750**, 753 (Tex.Civ.App.-Dallas 1958, no writ).

[fn64] *Vireo v. Cates*, **953 S.W.2d 489**, 499 (Tex.App.-Austin 1999, pet. denied); *Weakly v. East*, **900 S.W.2d 755**, 759 (Tex.App.-Corpus Christi 1995, writ denied); *Caller-Times Pub. Co., Inc. v. Triad Communications, Inc.*, **855 S.W.2d 18**, 21 (Tex.App.-Corpus Christi 1993, no writ).

[fn65] *RRR Farms*, 957 S.W.2d at 131 n. 6; *Bray*, 702 S.W.2d at 272; *State Nat'l Bank*, 678 S.W.2d at 689; *Lone Star Steel v. Wahl*, **636 S.W.2d 217**, 222 (Tex App.-Texarkana 1982, no writ).

[fn66] *Calvillo v. Gonzalez*, **922 S.W.2d 928**, 929 (Tex. 1996) (per curiam).

[fn67] *See, e.g., Santa Fe Energy*, 948 S.W.2d at 784 (citing *Texas Beef Cattle Co. v. Green*, **921 S.W.2d 203**, 211 (Tex. 1996) (defining justification for purposes of tortious interference with contract)).

[fn68] *See, e.g., Caller-Times Pub. Co.*, 855 S.W.2d at 21; *Morris v. Jordan Financial Corp.*, **564 S.W.2d 180**, 184 (Tex.Civ.App.-Tyler 1978, writ ref'd n.r.e.).

[fn69] *See, e.g., Hill v. Heritage Resources, Inc.*, **964 S.W.2d 89**, 123-124 (Tex.App.-El Paso 1997, pet. denied).

[fn70] *Hopkins v. Highlands Ins. Co.*, **838 S.W.2d 819**, 824 (Tex.App.-El Paso 1992, no writ); *Maynard v. Caballero*, **752 S.W.2d 719**, 721 (Tex.App.-El Paso 1988, writ denied); *Boyles v. Thompson*, **585 S.W.2d 821**, 832 (Tex.Civ.App.-Fort Worth 1979, no writ).

[fn71] *Sterner v. Marathon Oil Co.*, **767 S.W.2d 686**, 689-690 (Tex. 1989).

[fn72] *See supra* notes 58-59, 63. *But see Prudential Ins. Co. of Am. v. Financial Review Servs., Inc.*, **29 S.W.3d 74**, 80 (Tex. 2000); *Robles v. Consolidated Graphics, Inc.*, **965 S.W.2d 552**, 561 n. 11 (Tex.App.-Houston [14th Dist.] 1997, pet. denied); *Edwards Transports, Inc. v. Circle S*

Transports, Inc., **856 S.W.2d 783**, 787 (Tex.App.-Amarillo 1993, no writ); *supra* note 64.

[fn73] *Bradford v. Vento*, **997 S.W.2d 713**, 732 (Tex.App.-Corpus Christi 1999, pet. granted) (No. 99-0966) (involving defendant who falsely told police that the plaintiff did not own store premises); *Edwards Transports*, 856 S.W.2d at 788 (involving defendant who falsely told the plaintiff's customer that the plaintiff had accused the customer of having an improper relationship with the defendant); *State Nat'l Bank v. Farah Mfg. Co.*, **678 S.W.2d 661** (Tex.App.-El Paso 1984, dism'd by agr.) (involving defendants who made false statements to a creditor to dissuade it from hiring a particular person as CEO); *American Freehold Land Mortgage Co. v. Brown*, **118 S.W. 1106** (Tex.Civ.App. 1909, writ ref'd) (involving defendant who falsely told the plaintiff's customer that the plaintiff was neglectful, irresponsible, and insolvent).

[fn74] *Light v. Transport Insurance Co.*, **469 S.W.2d 433** (Tex.Civ.App.-Tyler 1971, writ ref'd n.r.e.) (involving an insurer who took one of an agent's customers by writing insurance in violation of state law); *Griffin v. Palatine Ins. Co.*, 235 S.W. 202, 204 (Tex. Comm'n App. 1921, jdgmt adopted) (involving a group boycott by several fire insurance companies to prevent a retail grocer from obtaining insurance because he had refused to settle a claim), *jdgmt set aside*, 238 S.W. 637 (Tex. 1922). *Cf. Sheehan v. Levy*, 238 S.W. 900 (Tex. Comm'n App. 1922, jdgmt adopted) (holding that labor union that legally required members not to work for a non-member was not liable for tortious interference).

[fn75] *International & G.N. Ry. v. Greenwood*, **21 S.W. 559** (Tex.Civ.App. 1893, no writ).

[fn76] *Robison v. Texas Pine Land Ass'n*, **40 S.W. 843** (Tex.Civ.App. 1897, no writ).

[fn77] *Celli & Del Papa v. Galveston Brewing Co.*, 227 S.W. 941 (Tex. Com'n App. 1921, jdgmt adopted).

[fn78] *Verkin v. Melroy*, **699 F.2d 729** (5th Cir. 1983); *Leonard Duckworth, Inc. v. Michael L. Field & Co.*, **516 F.2d 952** (5th Cir. 1975).

[fn79] *See* Restatement (Second) of Torts § 766B, cmt b (1979).

[fn80] *See, e.g., Light v. Transport Ins. Co.*, **469 S.W.2d 433**, 439 (Tex.Civ.App.-Tyler 1971, writ ref'd n.r.e.); *C.E. Servs., Inc. v. Control Data Corp.*, **759 F.2d 1241**, 1249 (5th Cir. 1985); *Leonard Duckworth, Inc. v. Michael L. Field & Co.*, **516 F.2d 952**, 958 (5th Cir. 1975).

[fn81] *See, e.g., Prudential Ins. Co. of Am. v. Financial Review Servs., Inc.*, **29 S.W.3d 74**, 82 (Tex. 2000).

[fn82] *See, e.g., Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, **962 S.W.2d 507**, 524 (Tex. 1998).

[fn83] *Lenape Resources Corp. v. Tennessee Gas Pipeline Co.*, **925 S.W.2d 565**, 574 (Tex. 1996); *Coker v. Coker*, **650 S.W.2d 391**, 393 (Tex. 1983).

[fn84] *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, **940 S.W.2d 587**, 589 (Tex. 1996).

Justice O'NEILL filed a concurring opinion joined by Justice HANKINSON.

Wal-Mart requests a no-evidence review of the jury's tortious interference finding. But the Court strays beyond measuring the evidence against the charge that was given, as we are required to do here, and expounds on what the law should be. While I understand the Court's eagerness to clarify the law in this admittedly unsettled area, I would not do so in dicta but would await the proper case. Thus, I cannot join Parts II or III of the Court's opinion.

I agree, however, that no evidence supports the plaintiffs' tortious interference claim as defined in the charge. For these reasons, I concur in the Court's judgment but not its analysis.

I

The tortious interference question was submitted and answered as follows:

Question 6

> Did Wal-Mart wrongfully interfere with Plaintiffs' prospective contractual agreement to lease the property to Fleming?
>
> Wrongful Interference occurred if —
>
> a. there was a reasonable probability that Plaintiffs would have entered into the contractual relations, and
>
> b. Wal-Mart intentionally prevented the contractual relations from occurring with the purpose of harming Plaintiffs.
>
> ANSWER: Yes.

With one exception not relevant here, neither party objected to this question or proposed any additional instructions. It is well-established that "it is the court's charge, not some other unidentified law, that measures the sufficiency of the evidence when the opposing party fails to

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object to the charge." *Osterberg v. Peca*, **12 S.W.3d 31**, 55 (Tex. 2000) (citing Tex.R.Civ.P. 272, 274, 278, 279; *Larson v. Cook Consultants, Inc.*, **690 S.W.2d 567**, 568 (Tex. 1985); *Allen v. American Nat'l Ins. Co.*,

380 S.W.2d 604, 609 (Tex. 1964). It is our task to analyze the evidence in light of the charge, without digressing into advisory explanations of what we might prefer the charge to have said. The Court acknowledges as much, making its general discourse on tortious interference law wholly advisory.

II

Wal-Mart argues that no evidence supports the jury's finding on the plaintiffs' tortious interference claim. To prove tortious interference, the court's charge required the plaintiffs to show that (1) there was a reasonable probability that they would have entered into the supermarket lease with Fleming, (2) Wal-Mart intentionally prevented the contract from occurring, and (3) Wal-Mart did so with the purpose of harming the plaintiffs. More than a scintilla of evidence supports the jury's finding on the first two elements, but not the third. *See Orozco v. Sander*, 824 S.W.2d 555, 556 (Tex. 1992).

Wal-Mart claims that its purpose was not to harm anyone, but only to compete with the Sturges group to acquire Tract 2. It argues vigorously that liability for tortious interference cannot rest simply on one business's acting to best its competitors. I agree; Texas law encourages economic competition and does not generally subject businesses to tort liability for tough but honest practices. *See English v. Fischer*, 660 S.W.2d 521, 522 (Tex. 1983). But at the same time, Texas law prohibits fraud and misrepresentation. *See Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 46 (Tex. 1998); *see also* Restatement (Second) of Torts §§ 767 cmt. c, 768 cmt. e, 772(a) (1979). The right to compete would not entitle Wal-Mart to make fraudulent representations, a means of interference that is tortious in itself. *See Prudential Ins. Co. v. Financial Review Serv., Inc.*, 29 S.W.3d 74, 81 (Tex. 2000).

To distinguish lawful competition from tortious interference, the Sturges group bore the burden of proving that Wal-Mart's purpose was to harm them by tortious means, in this case fraud or misrepresentation. To do so, the Sturges group had to present more than a scintilla of evidence that Wal-Mart's representation that it would move if it could not acquire Tract 2 was false. I agree with the Court that the Sturges group failed to meet its burden as set out in the charge, and would reverse the court of appeals' judgment on this basis.

I also agree with the Court that Wal-Mart did not breach any contract with the plaintiffs and that Wal-Mart may not recover attorney's fees. Accordingly, I join parts I, IV, and V of the Court's opinion, and I concur in the Court's judgment.