No. 15-0146

In the Supreme Court of Texas

WAL-MART STORES, INC.,

Defendant - Appellant,

v.

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

Plaintiffs - Appellees.

On Certified Questions from the
United States Court of Appeals for the Fifth Circuit (No. 12-40854)

BRIEF FOR THE STATE OF TEXAS AS AMICUS CURIAE IN SUPPORT OF DEFENDANT-APPELLANT

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Table of Contents

INDEX OF AUTHORITIES

Page(s)

Cases:

Statutes:

Other authorities:

To the Honorable Supreme Court of Texas:

The Fifth Circuit has asked whether the jury award in this case is subject to the restrictions on exemplary damages in Chapter 41 of the Civil Practice and Remedies Code. In the State's view, those restrictions apply because the jury award here has the traditional hallmarks of exemplary damages: this is a suit by private plaintiffs as opposed to the sovereign, and the monetary award serves to punish rather than compensate a private plaintiff for a loss.

In contrast, Chapter 41's restrictions do not apply when the sovereign seeks civil penalties for violations of its laws. Neither party has disagreed with that proposition, and for good reason. Applying Chapter 41 to governmental penalty actions would contravene legislative intent and nullify a wide range of statutes—some enacted at the same time or after Chapter 41—that allow governmental actors to seek civil penalties. *E.g.*, *Norra v. Harris County*, No. 14-05-01211-CV, 2008 WL 564061, at *1 (Tex. App.—Houston [14th Dist.] Mar. 4, 2008, no pet.) (mem. op. per Guzman, J.) (concerning such a governmental penalty action against the owner of a mobile-home park who raised Chapter 41 as a defense after stipulating to over 15,000 violations of drinking- and waste-water standards). Accordingly, this Court should reject the Fifth Circuit's suggestion in its initial opinion—which the Fifth Circuit withdrew on motion for rehearing—that Chapter 41 might apply to governmental penalty actions. *See Forte v. Wal-Mart Stores, Inc.*, 763 F.3d 421, 429 (5th Cir. 2014), *vacated and superseded on reh'g*, 780 F.3d 272 (5th Cir. 2015).

This brief provides the State's views on Chapter 41's reach, but the Court may choose not to decide that issue. The issue would be implicated in this case only if the Texas Optometry Act entitles a private party, as opposed to a governmental entity, to sue for civil penalties. But it does not. The Act entitles only the Attorney General and the Optometry Board to institute actions for civil penalties. The Court should make clear that private parties are not entitled to sue for a civil penalty under the Act.

Interest of Amicus Curiae

The State has an interest in seeing that its statutes, including the Texas Optometry Act and Chapter 41 of the Civil Practice and Remedies Code, are interpreted consistent with the Legislature's design and this Court's precedents. That interest includes the State's interest in ensuring that Chapter 41, a tort-reform statute targeting private lawsuits, does not diminish the ability of governmental actors to recover statutory penalties and fines.

No fee has been paid for the preparation of this brief.

Summary of the Argument

1. The Court should first consider a threshold issue to the certified questions: whether the Texas Optometry Act authorizes a private plaintiff to sue for a civil penalty at all. The answer is no. As this Court explained in *Brown v. De La Cruz*, "a statute providing for a daily penalty unrelated to actual losses must be strictly construed, and may be asserted in a private cause of action only if the statute clearly so provides." 156 S.W.3d 560, 565 (Tex.

2004). That reflects a proper presumption that statutory civil penalties are a mechanism for the State, in its sovereign capacity, to enforce its legal code.

The Optometry Act does not meet *Brown*'s clear-statement threshold. It contains no text—much less clear text—authorizing private parties to initiate suits for civil penalties. The Act expressly addresses (in section 351.602) the actions that injured private parties may institute, and that authorization extends only to actions for injunctive relief, damages, court costs, and attorney's fees. In contrast, when the Act addresses authority to bring civil-penalty actions (in section 351.603), it gives that authority only to the Attorney General and the Optometry Board. The Act then uses different language in section 351.605, which states that private plaintiffs are in certain cases entitled to the remedies in three cross-referenced sections; section 351.605 says nothing about instituting any actions. In whatever respect a private plaintiff may be entitled to a state-pursued civil penalty (which would normally be added to the public fisc), the Optometry Act distinguishes that remedial issue from the issue of which plaintiffs may sue for a civil penalty in the first place. Private parties are entitled to sue for damages and injunctive relief if they can show injury that would justify such relief. They are not entitled to sue for civil penalties—much less clearly so.

2. If the Court assumes for sake of analysis that a private party may sue under the Optometry Act for civil penalties on top of compensatory damages and injunctive relief, the Court should hold that Chapter 41's restrictions apply to such a punitive recovery. In so holding, however, the Court should make

clear that penalty actions brought by the State, in its sovereign capacity, are not subject to Chapter 41.

a. Chapter 41 applies to actions pursuing "damages" but does not define that term, which is not used with uniform scope across the law. Legal writers sometimes use the term narrowly to refer to money awards corresponding to a plaintiff's loss and sometimes use it more broadly, as to encompass money awards corresponding to a defendant's gain or simply to any monetary award recovered by a plaintiff. In short, the term "damages," standing alone, does not convey uniformly understood bounds in all usages. Rather, understanding that term requires attention to context. Accordingly, labels assigned to recoveries by other statutes not considering Chapter 41's animating purposes are not determinative. Rather, sensitivity to the nature of a particular action and whether it poses the concerns underlying Chapter 41 is required.

b. Application of those principles shows that a sovereign's suit seeking civil penalties for a violation of law is distinct in several relevant respects from a private party's suit seeking penalties beyond actual damages. The former actions are not within Chapter 41's scope, whereas the latter actions are.

Suits by governmental entities to recover civil penalties for violations of law are not actions for "damages" within the meaning of Chapter 41. As an initial matter, generally worded statutes like Chapter 41 do not apply to governmental actors unless that result was clearly intended, and all indications contradict such an intention here. Chapter 41 is part of a tort-reform initiative aimed at recoveries sought by private plaintiffs. As a class, private lawsuits

involve economic incentives that pose the problems animating Chapter 41. But law-enforcement suits by governmental entities have different characteristics that do not pose those same concerns.

Indeed, applying Chapter 41 to governmental penalty actions would yield the absurd result of nullifying a wide array of governmental penalty statutes that aid in law enforcement and do not require proof of a defendant's mental state or contemplate or provide for the government quantifying some private party's loss. Such a result would also frustrate the strong public interest in deterring violations of law with civil penalties. In addition to frustrating the public interest in penalizing violators of laws that protect consumers, public health, and the environment, such a conclusion would expose the State to sanctions for not maintaining federally mandated penalty schemes. For all of those reasons, any decision regarding Chapter 41's scope should make clear that it does not apply to penalty actions instituted by governmental actors.

c. In contrast, Chapter 41 would apply to the optometrists' private action for civil penalties (assuming for argument's sake that such an action is viable). Private actions like this one seek the functional equivalent of punitive damages. A jury's monetary award to a private plaintiff falls within one usage of the term "damages." And a punitive award to a private plaintiff, exceeding any compensatory damages, falls within a natural usage of the term "exemplary damages." While there are many reasons that the Legislature did not intend for Chapter 41 to apply to governmental actions for civil penalties,

those reasons are inapplicable in the context of private litigation that may result in windfalls through punitive awards separate from damages that compensate for actual loss.

ARGUMENT

I. The Optometry Act Does Not Authorize Private Penalty Actions.

The questions certified by the Fifth Circuit ask categorically whether "an action for a 'civil penalty' under the Texas Optometry Act" or for "civil penalties awarded under [the Act]" seek "damages" or "exemplary damages" within the meaning of Chapter 41 of the Civil Practice and Remedies Code. *Forte*, 780 F.3d at 283. The Fifth Circuit, however, disclaimed "any intention or desire" that this Court confine its reply to the form or scope of the certified questions. *Id.*

In addressing the certified questions, this Court should first address the predicate question of *who* may bring an action for civil penalties under the Optometry Act. And the Act does not authorize private parties to bring actions for civil penalties.

A. The Texas Optometry Act was passed in 1969 and regulates many aspects of the practice and business of optometry. *See* Tex. Occ. Code ch. 351; *see also Friedman v. Rogers*, 440 U.S. 1, 3-4 (1979) (describing the original Act). Among other things, the Act prohibits retailers of ophthalmic goods (such as glasses) from controlling or attempting to control an optometrist's professional judgment or practice. Tex. Occ. Code § 351.408(a). That prohibition

includes setting or attempting to influence an optometrist's office hours. *Id.* § 351.408(b)(1). This section, 351.408, is the prohibition underlying plaintiffs' suit here.

Private parties and governmental actors are authorized to pursue different types of lawsuits under the Optometry Act. A private party is authorized by section 351.602 to "institute an action" for damages or injunctive relief, plus court costs and attorney's fees:

> A person may institute an action in a district court in the county in which the violation is alleged to have occurred for injunctive relief or damages plus court costs and reasonable attorney's fees if the person is injured by another person who violates . . . Section 351.408.

Id. § 351.602(c); *see id.* § 351.002(5) ("person" includes private parties but not governmental parties). No text in the Optometry Act authorizes a private party to institute an action for anything else.

In contrast, governmental plaintiffs may sue for an injunction or a civil or criminal penalty. Specifically, under section 351.603, the Attorney General or Optometry Board may "institute an action" for an injunction and a per-day civil penalty:

> The attorney general or board may institute an action against a manufacturer, wholesaler, or retailer of ophthalmic goods in a district court in the county in which a violation of Section 351.408 is alleged to have occurred for injunctive relief and a civil penalty not to exceed $1,000 for each day of a violation plus court costs and reasonable attorney's fees.

Id. § 351.603(b); *see also id.* § 351.603(a) (similar provision with higher daily penalty for other violations); *id.* § 351.602(a) (providing that an injunctive action may be in the Board's name). And because a violation of the Optometry Act is an offense, *id.* § 351.606(a), the State may sue for a per-day criminal penalty:

> An offense under Subsection (a) is a misdemeanor punishable by: (1) a fine of not less than $100 or more than $1,000; (2) confinement in county jail for a term of not less than two months or more than six months; or (3) both the fine and confinement.

Id. § 351.606(b); *see id.* § 351.606(c) (fines are per day); Tex. Code Crim. Proc. arts. 2.01, 2.02 (district and county attorneys' power to prosecute).

In short, only private parties have a right to sue for damages, and only governmental parties have a right to sue for civil and criminal penalties. Confirming the different treatment of different plaintiffs, the Act requires that a private plaintiff be "injured" by the violation, *id.* § 351.602(b), (c), but does not impose an "injury" requirement on a governmental plaintiff (beyond showing a statutory violation), *see id.* §§ 351.602(a), 351.603.

B. "[A] statute providing for a daily penalty unrelated to actual losses must be strictly construed, and may be asserted in a private cause of action only if the statute clearly so provides." *Brown v. De La Cruz*, 156 S.W.3d 560, 565 (Tex. 2004). The Optometry Act does not pass that clear-statement test. The Act's provision authorizing private suits (section 351.602) notably *omits*

authority to bring an action for civil penalties. Instead, actions for civil penalties are authorized only in the Optometry Act's provision authorizing governmental suits (section 351.603).

Nonetheless, four optometrists instituted this action for civil penalties. They rely on section 351.605 of the Optometry Act, which deals not with authority to "institute an action" (like sections 351.602 and 351.603) but rather with remedial matters. Section 351.605, captioned "Lessee Entitled to Remedies," provides in full:

> A person injured as a result of a violation of Section 351.408, including an optometrist who is a lessee of a manufacturer, wholesaler, or retailer, is entitled to the remedies in Sections 351.602(c)(2), 351.603(b), and 351.604(3).

Tex. Occ. Code § 351.605. The first cited section—351.408—is the prohibition on control of optometrists' practice or professional judgment.

The sense in which a person is "entitled to" these "remedies" is not clear from the face of the statute. The only unifying feature of the cross-referenced provisions is that each specifically concerns the control prohibition of section 351.408, a protection also emphasized elsewhere by the Act. *See* Tex. Occ. Code § 351.408(a). Accordingly, section 351.605 may serve simply to emphasize or ensure that lessees are within the class of optometrists protected by section 351.408. The three cross-referenced provisions yield no further clarity about section 351.605:

- The first cross-referenced provision, section 351.602(c)(2), is the one that authorizes a private party injured by a violation of section 351.408 to institute an action for injunctive relief, damages, court costs, and attorney's fees. Hence, this first cross-reference appears to do no substantive remedial work. It appears to simply confirm that section-351.602(c)(2) remedies are available in private suits authorized by section 351.602(c)(2), including suits by lessees.

- The second cross-referenced provision, section 351.603(b), is the one authorizing the government to institute an action for a civil penalty for a violation of section 351.408. In making the cross-reference, section 351.605 at most speaks to a private party's "entitle[ment]" to that government-sought remedy, not to a private party's authority to itself sue for that remedy.[1] It is unclear if this cross-reference envisions the government-sought penalty being paid to a private party once obtained or, alternatively, if this cross-reference also does no substantive remedial work (like the first and third cross-reference). *See Brown*, 156 S.W.3d at 565 (penalty statute "must be strictly construed" when invoked by a private party).

- The third cross-referenced provision, section 351.604(3), makes a violation of section 351.408's control prohibition "actionable under" the

[1] In *Agey v. American Liberty Pipe Line Co.*, 172 S.W.2d 972, 974 (Tex. 1943), this Court addressed a statute permitting "a person whose rights [under an oil-purchasing regulation] have been violated to recover one-half of the penalty" sued for by the State. The Court held that this statute, while it allowed a private party to recover half of the State's civil penalty, did not authorize a private party "to institute and prosecute such a suit in the name of the State without the joinder of the Attorney General or some district or county attorney." *Id.* The Court reasoned: "If the Legislature had intended by this Act to authorize an individual to file a suit on behalf of himself and on behalf of the State, without the joinder of the Attorney General or some district or county attorney, it could have expressed such intention in clear language. This it did not do." *Id.* Hence, there is precedent for a statute entitling a private party to (part of) a remedy recovered by the State, while not authorizing a private party to itself sue for that remedy. The statute in *Agey* did, however, clearly entitle the private party to receive part of the penalty sought by the State. In contrast, here section 351.605's statutory cross-reference to 351.603 is not a clear statement authorizing a private party to receive a penalty sought by the State. *See Brown*, 156 S.W.3d at 565.

> Deceptive Trade Practices Act. But the cited section 351.604 *itself* allows a person to pursue Deceptive Trade Practices Act remedies for a violation of the control prohibition (for example, up to three times economic damages and mental-anguish damages in certain cases). *See* Tex. Bus. & Com. Code § 17.50(b). So, again, it appears that this cross-reference performs no substantive remedial work and simply rounds out the citation of all provisions that concern section 351.408, ensuring that they all protect optometrists who are lessees.

The State is aware of no other provisions of Texas law structured this way. The small number of Texas statutes that do allow private parties to seek recoveries labeled as "penalties" do so expressly. *E.g.*, Tex. Prop. Code §§ 92.0081(h)(2) (providing that, if a landlord engages in prohibited conduct, "the tenant may . . . recover from the landlord a civil penalty of one month's rent plus $1,000"), 92.334(b) (describing circumstances in which a "landlord . . . may recover from [a] tenant a civil penalty of one month's rent plus $500"); Tex. Gov't Code § 82.0651(b)(4) (mandating that an attorney's "client who prevails in [a barratry] action . . . shall recover from [the attorney] . . . a penalty in the amount of $10,000").

Because a statutory penalty unrelated to actual losses can be asserted in a private suit "only if the statute clearly so provides," *Brown*, 156 S.W.3d at 565, private plaintiffs are not entitled to bring actions for civil penalties under the Optometry Act. The Act does not authorize a private penalty suit in the clear terms required by *Brown* and used by other statutes. To the contrary, authority to initiate penalty actions is expressly granted to certain governmental actors but omitted from the Act's grant of authority to bring private suits. When the

Legislature uses different language in different places, omitting key concepts, the difference is presumed to have substantive effect. *See, e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004).

In short, the Legislature authorized only state actors to seek civil penalties under the Optometry Act, and that is consistent with the typical design of civil-penalty statutes. *See Brown*, 156 S.W.3d at 564 ("Virtually all other statutes that imposed a daily penalty in 1995 when [the provision at issue] was enacted authorized collection only by the Attorney General or some other governmental entity or representative."). That conclusion does not leave private plaintiffs without a remedy. They can always seek injunctive relief or damages under section 351.602. But the power to pursue punishment is entrusted to the State.

That is a sound design, given that the State's sovereign nature and law-enforcement responsibilities place it in a position to consider the public interest and tailor its actions according to the seriousness of individual violations. In contrast, private parties are not charged with representing the public interest and have a personal financial incentive to seek a monetary penalty for any violation, no matter how minor, negligent, invited, or unlikely to recur. Statutory penalties are thus properly presumed to be a mechanism for the State, as sovereign, to enforce its legal code. *See id.* at 565; *see also Mo., K. & T. Ry. v. State*, 100 S.W. 766, 767 (Tex. 1907) (explaining that "the more severe the penalty, and the more disastrous the consequence to the person subjected to

the provisions of the statute, the more rigid will be the construction of its provisions in favor of such person and against the enforcement of such law").

C. The optometrists here brought an action only for civil penalties under the Optometry Act, not for injunctive relief or damages. *Forte*, 780 F.3d at 279. As explained, however, the State has exclusive authority to seek civil penalties under the Optometry Act.

Thus, it may be appropriate for the Court to decline to rule at all on Chapter 41's scope. *See, e.g.*, *Flores v. Millennium Interests, Ltd.*, 185 S.W.3d 427, 429 (Tex. 2005). The Fifth Circuit believed the Chapter 41 issues to be "determinative" and thus certifiable under Texas Rule of Appellate Procedure 58.1. *Forte*, 780 F.3d at 283. But the optometrists' inability to maintain this action is a legal defect that would allow the Fifth Circuit to overlook any forfeiture or waiver. *See id.* at 276, 283 (stating that "'a well-settled discretionary exception to the waiver rule exists where a disputed issue concerns a pure question of law'" (quoting *New Orleans Depot Servs., Inc. v. Dir., Office of Worker's Comp. Programs*, 718 F.3d 384, 387 (5th Cir. 2013) (en banc), with internal quotation marks omitted).

II. If the Court Rules on Chapter 41's Scope, It Should Hold that Chapter 41 Applies to This Private Action, But Not a Governmental Penalty Action.

If the Court addresses Chapter 41's scope, the Court should hold that the Legislature intended the tort-reform statute to restrict punitive awards like the one sought here, but not to limit the State's recovery of civil penalties in its

law-enforcement capacity. Given the lack of any definition of "damages" in Chapter 41, this case calls for careful attention to the purposes of the statutory scheme and its interrelationship with other statutes. *See, e.g.*, *Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 441 (Tex. 2012) (comparing the purposes, policies, procedural requirements, and remedies of the Texas Insurance Code and the Texas Workers' Compensation Act to determine whether the Legislature intended to effectively provide two different remedies to injured workers); *City of Waco v. Lopez*, 259 S.W.3d 147, 155-56 (Tex. 2008) (considering the relationship between the Texas Whistleblower Act and the Texas Commission on Human Rights Act). That examination confirms that the Legislature did not intend Chapter 41 to restrict the sovereign's suits for civil penalties, while it did intend Chapter 41 to restrict a private plaintiff's recovery of a punitive award that goes beyond actual loss.

A. Whether a suit seeks "damages" within Chapter 41's meaning requires analysis of the nature of the action and is not determined simply by labels assigned by other statutes.

Chapter 41 applies to any action in which a claimant seeks "damages" related to a cause of action. Tex. Civ. Prac. & Rem. Code § 41.002(a). The statute creates a general maximum amount of damages that may be awarded in those actions, *id.* § 41.002(b), and it does so by using "compensatory damages" as a baseline. *See id.* § 41.001(4), (8), (12) (defining types of compensatory damages). The existence and amount of compensatory damages limit the

recovery of damages that are punitive and not compensatory in nature, which the statute calls "exemplary damages." *Id.* § 41.001(5). First, exemplary damages may not be recovered at all without recovering other (non-nominal) damages. *Id.* § 41.004(a). Second, the amount of exemplary damages is generally capped based on the amount of compensatory damages. *Id.* § 41.008(b).

Although Chapter 41 contains many definitions, *id.* § 41.001(1)-(13), it does not define the threshold term "damages." That omission indicates that the Legislature intended the term to be applied functionally, with attention to the purposes of Chapter 41, not based on labels assigned by unrelated statutes. Indeed, courts and commentators do not universally use the term "damages" to convey the exact same bounds in all usages.[2] The fact that both sides here can appeal to language in judicial opinions suggesting different definitions of

[2] This can be observed in numerous contexts. *See, e.g.*, *Kozar v. Chesapeake & O. Ry. Co.*, 449 F.2d 1238, 1240 (6th Cir. 1971) ("Damages are simply a measure of injury, and to say that at common law there was . . . a "punitive damages remedy" is a misuse of the legal terminology."); Douglas Laycock, *How Remedies Became a Field: A History*, 27 Rev. Litig. 161, 164 (2008) (treating "damages" as separate from equitable and restitutionary relief: "The law of remedies thus includes compensatory damages, injunctions, restitution of unjust enrichment, declaratory judgments, punitive damages, and a great variety of more specialized remedies ranging from replevin to ne exeat."); George S. Mahaffey Jr., *A Product of Compromise*, 28 U. Dayton L. Rev. 1, 2 (2002) (stating that, under the Real Estate Settlement Procedures Act, "a clear-cut definition for the term 'actual damages' has proven elusive under various theories of statutory interpretation"); Sam Doyle & David Wright, *Restitutionary Damages—the Unnecessary Remedy?*, 25 Melb. U. L. Rev. 1, 14 (2001) ("The argument would be that common law damages already include awards which are non-compensatory, such that the term 'damages' in the common law is nothing more than a synonym for a monetary award in favour of a successful plaintiff."); Ryan S. Fehlig, *CERCLA Response Costs and CGL Policies*, 63 Mo. L. Rev. 767, 767 (1998) ("this debate has centered around whether environmental cleanup costs (or response costs), as a form of equitable relief, are encompassed by the term 'damages' as contained in CGL policies").

"damages" illustrates the fallacy of adopting a given usage without proper attention to context and the purposes of Chapter 41.

The optometrists commit that fallacy in arguing that the State previously took the blanket position that every recovery under a civil-penalty statute, including a private party's recovery, does not qualify as "damages" subject to Chapter 41. *See* Pet. for Reh'g En Banc ("Pls.' Reh'g Pet.") 3, *Forte v. Wal-Mart Stores, Inc.*, No. 12-40854 (5th Cir. Sept. 11, 2014) (discussing the State's brief in *Norra v. Harris County*). That argument overlooks the context of *Norra*, which involved penalties sought by governmental actors. *See* 2008 WL 564061, at *1; *see also State v. Emeritus Corp.*, No. 13-13-00529-CV, 2015 WL 1456436, at *11 (Tex. App.—Corpus Christi Mar. 26, 2015, pet. filed) (concluding that "the term 'damages' in the [Texas Medical Liability Act] does not include civil penalties sought by *the State* rather than *a private litigant*") (emphases added). For that reason, the State in *Norra* had no need to address—and did not address—whether penalties sought by private plaintiffs can qualify as "damages" or "exemplary damages" subject to Chapter 41. That question requires a different analysis, as explained below.

B. Chapter 41 does not apply to governmental penalty actions.

The object of Chapter 41 is tort reform, restricting private parties' use of the court system to obtain runaway jury awards of monetary punishment that are disproportionate to plaintiffs' actual losses. That concern is not present when the sovereign sues to enforce the law through civil penalties, and the

object of the statute does not support an interpretation applying it to governmental penalty actions. The consequences of a holding to the contrary confirm the implausibility of such a legislative intent.

1. In 1987, the Legislature found that the "serious liability insurance crisis" existing in the State was "having adverse effects on the availability and affordability of various types of liability insurance and the economic development and growth of this state and the well-being of its citizens." Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 1.01(a)(2), 1987 Tex. Gen. Laws 37 ("S.B. 5," attached as Appendix B to Wal-Mart's opening brief). As a class, private parties seeking monetary recoveries from defendants have little or no incentive to adjust their demands based on the public interest. Those private parties are not charged with representing the public and have no history or experience in moderating punishment to accommodate societal and law-enforcement goals. Private suits frequently involve only a jury as a check on the amount of a punitive award, and juries typically have broad latitude in awarding punitive damages. *See, e.g.*, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 565 & n.8 (1996) (comparing the $4 million punitive-damages award in the case before the Court with a $0 award in a similar case).

The resulting impact on commercial, professional, and governmental liability insurance is what led the Legislature to restrict private exemplary-damages awards through Chapter 41. *See* S.B. 5, §§ 1.01(a)(1)-(2), (b), 2.12; *id.* § 1.01(a)(4) (finding that "[a] lack of predictability in this state's justice sys-

tem constitutes a significant contributing cause of the current liability insurance crisis"); *id.* § 1.01(a)(5) (describing the "public policy problems" that compelled "meaningful tort reform measures" intended to "restore and maintain reasonable predictability in the civil justice system of Texas").

Far from being part of the problem, governmental entities were among the law's intended beneficiaries. The first two entries on the Legislature's list of "persons and entities and activities that are being adversely affected by the liability insurance crisis" were "cities and their governmental and proprietary functions" and "counties, school districts, and other governmental units, and the educational and human services they provide." *Id.* § 1.01(a)(3)(A), (B); *see id.* § 1.01(a)(3)(C)-(F) (listing other intended beneficiaries of the law, including "physicians and health care providers," "charities and other nonprofit organizations," "day care centers," and "businesses and industries"); *see also* Tex. Gov't Code § 311.023(2)-(3) (providing that, when interpreting statutes, courts may consider the "circumstances under which the statute was enacted" and "legislative history").

The legislative history contains no indication that government-sought penalties contributed in any way to the crisis addressed by Chapter 41. The Legislature explained that the statute's provisions were "applicable to actions for personal injury, property damage, or death and other civil actions based on tortious conduct"—actions associated with private plaintiffs. *Id.* § 1.01(b). And, although Wal-Mart notes that Senate Bill 5 "explicitly made [Texas Civil Practice and Remedies Code] Chapter 9 applicable to governmental entities,"

Wal-Mart Br. 20, the provision that did so sets out a single list of claimants and defendants. S.B. 5, § 2.01 (creating Civ. Prac. & Rem. Code § 9.002(b)). Especially when read in conjunction with subsections 1.01(a)(3)(A) and (B) of Senate Bill 5, that action does not suggest an intent to burden, rather than benefit, governmental claimants. In any event, as Wal-Mart rightly notes, Chapter 9 could not expand the scope of Chapter 41. *See* Wal-Mart Br. 20.

2. When construing a statute, this Court considers the "object sought to be obtained" by the statute as well as the "consequences of a particular construction." Tex. Gov't Code § 311.023(1), (5); *see Tex. Adjutant General's Office v. Ngakoue*, 408 S.W.3d 350, 354 (Tex. 2013); *State v. Hodges*, 92 S.W.3d 489, 494 (Tex. 2002). Moreover, the Court presumes that the Legislature means to achieve just and reasonable results and to favor the public interest over private interests. Tex. Gov't Code § 311.021(3), (5). Even seemingly clear statutory text is not determinative of legislative intent when enforcing it would yield an absurd result. *Ruttiger*, 381 S.W.3d at 452.

Additionally, "[s]tatutory provisions which are written in such general language that they are reasonably susceptible to being construed as applicable both to the government and to private parties are subject to a rule of construction which exempts the government from their operation in the absence of other particular indicia supporting a contrary result in particular instances." 3 N. Singer, *Sutherland on Statutory Construction* § 62:1, pp. 377-78 (7th ed. 2008) ("*Sutherland*"). This "general rule applies with special force to statutes by which prerogatives, rights, titles, or interests of the government would

be divested or diminished," and "[i]f there is doubt as to the construction of the statute, the doubt should be resolved in favor of the government." 82 C.J.S. Statutes § 389, pp. 483, 484 (2009).

In applying this rule, the Third Court of Appeals has confirmed that "ordinary legislation is intended merely to regulate the acts and rights of individuals," not governmental actors. *R.R. Comm'n v. United States*, 290 S.W.2d 699, 702 (Tex. Civ. App.—Austin 1956), *aff'd*, 317 S.W.2d 927 (Tex. 1958). The State is thus "ordinarily not within the purview of a statute unless the intention to include it is clearly manifest." *Allied Fin. Co. v. State*, 387 S.W.2d 435, 438 (Tex. Civ. App.—Austin 1965, writ ref'd n.r.e.); *see* 3 *Sutherland* § 62:4, p. 402 (reading statutes such as Texas Government Code § 311.021(5), a provision of the Code Construction Act confirming that the "public interest is favored over any private interest," to imply an intent that courts adhere to this rule).

Of course, the State generally "must observe" and will be "bound by the same rules of procedure that bind all other litigants." *Tex. Co. v. State*, 281 S.W.2d 83, 90 (Tex. 1955) (quoted in *Tex. Dep't of Corr. v. Herring*, 513 S.W.2d 6, 7 (Tex. 1974)); *see, e.g.*, *State v. Kroner*, 2 Tex. 492, 493-94 (1847). But some statutes need not include governmental parties to achieve their purpose and impose substantive restrictions (or arguably substantive restrictions, such as a statute of limitations, *State v. Durham*, 860 S.W.2d 63, 67 (Tex. 1993); *Brown v. Sneed*, 14 S.W. 248, 251 (Tex. 1890); *see Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 152 (2d Cir. 2013)). As to those statutes,

governmental parties stand on a different footing. *Allied*, 387 S.W.2d at 438 (addressing a statute that, had the court applied it to the State, would have nullified the State's liens on cars subject to a writ of attachment); *R.R. Comm'n*, 290 S.W.2d at 702 (explaining that the United States was not bound by transportation rates set by the State); *see* 3A *Sutherland* § 67:2, p. 119 (noting that "[w]hile the government and its subdivisions, under the rule of sovereign immunity, are not bound by the general language of a burdensome statute unless expressly included, the sovereign and its subdivisions are usually bound by general statutes regulating procedure") (footnote omitted).

The same is true under federal law, which can also guide the Court's analysis. As the U.S. Supreme Court explained in *Nardone v. United States*, "[t]he canon that the general words of a statute do not include the government or affect its rights unless the construction be clear and indisputable upon the text of the act" applies "where an act, if not so limited, would [1] deprive the sovereign of a recognized or established prerogative title or interest" or "[2] work obvious absurdity as, for example, the application of a speed law to a policeman pursuing a criminal or the driver of a fire engine responding to an alarm." 302 U.S. 379, 383, 384 (1937); *see also, e.g.*, *United States v. United Mine Workers*, 330 U.S. 258, 270 (1947) (refusing to "construe the general term 'employer' to include the United States, where there [wa]s no express reference to the United States and no evident affirmative grounds for believing that Congress intended to withhold an otherwise available remedy from the Government as well as from a specified class of private persons"); *United States v.*

Herron, 87 U.S. 251, 255, 260 (1873) (concluding that the term "creditor" in a statute "describing the rights, duties, and obligations of creditors" did not include the United States).

3. Numerous Texas statutes, several of which were enacted the same year as Chapter 41 or later, authorize penalty actions by governmental actors without any need to prove compensatory damages, *see* Tex. Civ. Prac. & Rem. Code § 41.004(a), or educate triers of fact about the punitive-damages factors of section 41.011(a). *E.g.*, Tex. Agric. Code § 18.054; Tex. Gov't Code §§ 554.008, 2252.125; Tex. Occ. Code § 351.603. If the Court equated government-sought penalties sought under these statutes with Chapter 41 exemplary damages, all of these laws would be rendered useless acts. That result would unreasonably deprive the sovereign of substantial interests, to the point of absurdity. *See* Tex. Gov't Code § 311.021(3), (5); *Nardone*, 302 U.S. at 383, 384; 3 *Sutherland* § 62:1, p. 382 (explaining that "the rule exempting the sovereign from the operation of the general provisions of a statute is premised on a policy of preserving for the public the efficient, unimpaired functioning of government").

There would be significant negative consequences to the State if Chapter 41 applied to governmental penalty actions that do not seek damages awards. *See* Tex. Civ. Prac. & Rem. Code § 41.004(a) ("exemplary damages may [generally] be awarded only if damages other than nominal damages are awarded"). As the Fifth Circuit recognized, "statutory civil penalties are tai-

lored to aid the State in its law enforcement role." *Forte*, 780 F.3d at 283 (citing *State v. Harrington*, 407 S.W.2d 467, 474 (Tex. 1966)). If the State could not recover civil penalties without also recovering compensatory damages, it would be unable to enforce laws penalizing unlawful publication of social-security numbers, Tex. Bus. & Com. Code §§ 501.002(b), 501.053; misuse of protected health information for financial gain, Tex. Health & Safety Code § 181.201(b); conduct that threatens serious harm to a child in a facility regulated by the State, Tex. Hum. Res. Code § 42.075(a); and hundreds of other statutes. *See* Pls.' Reh'g Pet. 12-13 n.2.

And governmental actors are typically the only parties who can enforce those statutory penalties. *See Brown*, 156 S.W.3d at 564 & n.23; *compare* Pls.' Reh'g Pet. 12-13 n.2 (noting that "at least 200 Texas statutes provide for civil penalties on behalf of the State and/or its administrative agencies"), *with id.* at 12, 13 n.3 (identifying only seven Texas statutes that purportedly "permit private litigants to recover civil penalties"). The State is aware of fewer than three dozen Texas statutes that clearly authorize private parties (mostly landlords and tenants) to seek penalties. *E.g.*, Tex. Gov't Code § 82.0651(b)(4); Tex. Prop. Code §§ 27.007(b), 92.0131(f), 92.015(c)(1), 92.016(e), 92.058(a), 92.334(b), 94.159(a)(3). In short, a broad spectrum of penalties may be pursued only by the State and could go without effective enforcement if Chapter 41 applies to governmental penalty actions.

In addition, the State could become subject to sanctions by the federal government, including revocation of highway funds. The federal Clean Air

Act, for instance, requires a State's air-pollution-control agency to have adequate authority to "recover civil penalties in a maximum amount of not less than $10,000 per day for each violation" of a permit and authorizes the federal government to impose the sanctions described in 42 U.S.C. § 7509(b) for not meeting that or other requirements. 42 U.S.C. § 7661a(b)(5)(E), (i).

Moreover, because Chapter 41 is not expressly limited to the civil context, the impact could be even broader. It would be absurd to conclude (to pick just one example) that police officers cannot impose criminal fines for not wearing seat belts, Tex. Transp. Code § 545.413, without first establishing injury and successfully proving damages.

Finally, even if the State could avoid section 41.004(a) in some scenarios, Chapter 41 would still frustrate the strong governmental interests behind penalty provisions. Chapter 41 generally requires private plaintiffs seeking exemplary damages to show fraud, malice, or gross negligence, and it provides a list of factors for the trier of fact to consider when determining the amount of exemplary damages. Tex. Civ. Prac. & Rem. Code §§ 41.003, 41.011(a); *see Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 16 (Tex. 1994) (explaining that exemplary damages punish defendants for "outrageous, malicious, or otherwise morally culpable conduct"). But "ordinarily, . . . a civil penalty statute makes no provision for knowledge or intent, and thus does not include culpability as an element." *State v. Houdaille Indus., Inc.*, 632 S.W.2d 723, 729 (Tex. 1982); *see, e.g.*, Tex. Occ. Code § 351.603; Tex. Water Code § 7.102.

For all of these reasons, if the Court reaches the question of Chapter 41's applicability, it should make clear that Chapter 41 does not apply to suits by governmental actors seeking penalties.

C. If the Optometry Act authorizes the private penalty action here, Chapter 41 applies.

Private suits for punitive awards seek a recovery within a natural usage of the word "damages." Confirming that usage of the term "damages" to describe a penalty pursued not by the State but by a private party, this Court has suggested that a statute authorizing the government to seek a "penalty" could be viewed as authorizing an award of "damages" if the statute could be invoked by a private plaintiff alone. *See Agey*, 172 S.W.2d at 974 (stating that the private plaintiff "did not sue for damages under th[e relevant statutory] section," which provided for recovery of a "penalty"); *see also Shaw v. Bush*, 61 S.W.2d 526, 529 (Tex. Civ. App.—Waco 1933, writ ref'd) (noting that rules governing actions by the government do not apply when the real party in interest is private).

According to the optometrists, the Optometry Act authorizes private parties to seek not only damages to make themselves whole and injunctive relief to prevent future violations (plus attorney's fees and court costs), but also an additional amount as a penalty against a defendant. Assuming *arguendo* that this type of relief may be sought by a private party without the State's involvement, it would be the type of private recovery that Chapter 41 was intended to limit—a punitive jury award unconstrained by a plaintiff's institutional role.

The reasons that Chapter 41 does not apply when the government seeks penalties, *see supra* Part II.B, are inapplicable when a private party seeks penalties under the Optometry Act. Accordingly, Chapter 41 would apply in such an action. Because a private party's recovery of such a penalty would qualify as "damages" within the meaning of Chapter 41 and would be "awarded as a penalty or by way of punishment but not for compensatory purposes," Tex. Civ. Prac. & Rem. Code § 41.001(5), it would qualify as "exemplary damages" under Chapter 41.[3]

The optometrists may reason that Chapter 41 is inapplicable here because the Optometry Act contains its own penalty cap. But as this case illustrates, a statutory penalty cap is not a mechanism for tying private penalties to actual harms caused or for addressing the unpredictability of jury verdicts not limited by a plaintiff's institutional characteristics. *See Forte*, 780 F.3d at 280 (noting the pre-remittitur jury award of $3,953,000 in penalties despite the optometrists' failure to prove any damages). That is particularly true when the penalty cap is on a per-day basis and a violation is characterized as continuing. The State's obligations to exercise prosecutorial discretion, tailor its requests for monetary relief to the extent and gravity of violations, and otherwise act in

[3] The few Texas statutes that, unlike the Optometry Act, (1) clearly authorize private parties to seek penalties and (2) do not separately authorize awards of compensatory damages, *e.g.*, Tex. Prop. Code § 92.334(b) (authorizing a landlord that a tenant sues in bad faith to seek "a civil penalty of one month's rent plus $500"), may require a different analysis. *See* Tex. Gov't Code §§ 311.021(3), 311.023(1), (5).

the public interest stands in stark contrast to a private party's incentive to maximize its recoverable penalty.

Finally, the State disagrees with the optometrists' argument that holding Chapter 41 applicable in a private penalty suit under the Optometry Act would yield an absurd result. The optometrists argue that is so because the Act "prohibits attempts and threats, which almost never result in damages." Pls.' Reh'g Pet. 11 (citing Tex. Occ. Code § 351.408(b)(1)-(3), (c)(1)). Of course, if a private Optometry Act plaintiff is not "injured," he or she may not institute an action seeking damages or any other relief. *See* Tex. Occ. Code §§ 351.602(b), (c), 351.605. That does not mean, however, that the Act's prohibition on attempts and threats is unenforceable. If an optometrist is "injured" but cannot show damages, he or she may still pursue injunctive relief. *See id.* § 351.602(b), (c). And the State need not show an injury or damages in order to sue for a penalty.

PRAYER

The Court should hold that the Texas Optometry Act does not authorize private parties to sue for civil penalties. If the Court wishes to further clarify Texas law by addressing the applicability of Chapter 41, the Court should hold that Chapter 41 applies in any private penalty action under the Texas Optometry Act but does not apply in governmental penalty actions.

Respectfully submitted.

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Microsoft Word reports that this brief contains 7,296 words, exclusive of the portions not counted towards the word limit.

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Statutory Addendum

Tex. Occ. Code ch. 351, subch. M (§§ 351.601-351.608) **(Tab A)**

Tex. Civ. Prac. & Rem. Code ch. 41 (§§ 41.001-41.014) **(Tab B)**

TAB
A

Vernon's Texas Statutes and Codes Annotated Currentness
Occupations Code (Refs & Annos)
Title 3. Health Professions
Subtitle F. Professions Related to Eyes and Vision
Chapter 351. Optometrists and Therapeutic Optometrists (Refs & Annos)
Subchapter M. Other Penalties and Enforcement Provisions

§ 351.601. Monitoring License Holder

The board by rule shall develop a system for monitoring a license holder's compliance with the requirements of this chapter. Rules adopted under this section must include procedures to:

(1) monitor for compliance a license holder who is ordered by the board to perform certain acts; and

(2) identify and monitor each license holder who represents a risk to the public.

§ 351.602. Injunction; Damages

(a) The board may sue in the board's own name to enjoin a violation of this chapter. This remedy is in addition to any other action authorized by law.

(b) A person injured by another person who violates Section 351.251, 351.409, or 351.607 may institute an action in district court in Travis County or in the county in which the violation is alleged to have occurred for injunctive relief or damages plus court costs and reasonable attorney's fees.

(c) A person may institute an action in a district court in the county in which the violation is alleged to have occurred for injunctive relief or damages plus court costs and reasonable attorney's fees if the person is injured by another person who violates:

(1) Section 351.403; or

(2) Section 351.408.

§ 351.603. Enforcement by Attorney General or Board; Civil Penalty

(a) The attorney general or board may institute an action in a district court in the county in which a violation of Section 351.251, 351.403, 351.409, or 351.607 is alleged to have occurred for injunctive relief and a civil penalty not to exceed $10,000 for each violation plus court costs and reasonable attorney's fees.

(b) The attorney general or board may institute an action against a manufacturer, wholesaler, or retailer of ophthalmic goods in a district court in the county in which a violation of Section 351.408 is alleged to have occurred for injunctive relief and a civil penalty not to exceed $1,000 for each day of a violation plus court costs and reasonable attorney's fees.

§ 351.604. Deceptive Trade Practices

A violation of any of the following sections is actionable under Subchapter E, Chapter 17, Business & Commerce Code: [FN1]

(1) Section 351.251;

(2) Section 351.403;

(3) Section 351.408;

(4) Section 351.409; or

(5) Section 351.607.

[FN1] V.T.C.A., Bus. & C. Code § 17.41 et seq.

§ 351.605. Lessee Entitled to Remedies

A person injured as a result of a violation of Section 351.408, including an optometrist who is a lessee of a manufacturer, wholesaler, or retailer, is entitled to the remedies in Sections 351.602(c)(2), 351.603(b), and 351.604(3).

§ 351.606. General Criminal Penalty

(a) A person commits an offense if the person violates this chapter.

(b) An offense under Subsection (a) is a misdemeanor punishable by:

(1) a fine of not less than $100 or more than $1,000;

(2) confinement in county jail for a term of not less than two months or more than six months; or

(3) both the fine and confinement.

(c) A separate offense is committed each day a violation of this chapter occurs or continues.

§ 351.607. Dispensing Contact Lenses; Penalty

(a) A person commits an offense if the person dispenses a contact lens by mail or otherwise to a patient in this state without having a valid prescription signed by an optometrist, therapeutic optometrist, or licensed physician.

(b) An offense under Subsection (a) is a misdemeanor punishable by a fine of $1,000 for each lens dispensed. The fine is in addition to any other penalty imposed under this chapter.

§ 351.608. Cease and Desist Order

(a) If it appears to the board that a person is engaging in an act or practice that constitutes the practice of optometry or therapeutic optometry without a license or certificate under this chapter, the board, after notice and opportunity for a hearing, may issue a cease and desist or-

der prohibiting the person from engaging in the activity.

(b) Notwithstanding Section 351.551, the board may impose an administrative penalty under Subchapter L [FN1] against a person who violates an order issued under this section.

[FN1] V.T.C.A., Occupations Code § 351.551 et seq.

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TAB
B

Vernon's Texas Statutes and Codes Annotated Currentness
Civil Practice and Remedies Code (Refs & Annos)
Title 2. Trial, Judgment, and Appeal
Subtitle C. Judgments
Chapter 41. Damages (Refs & Annos)

§ 41.001. Definitions

In this chapter:

(1) "Claimant" means a party, including a plaintiff, counterclaimant, cross-claimant, or third-party plaintiff, seeking recovery of damages. In a cause of action in which a party seeks recovery of damages related to injury to another person, damage to the property of another person, death of another person, or other harm to another person, "claimant" includes both that other person and the party seeking recovery of damages.

(2) "Clear and convincing" means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.

(3) "Defendant" means a party, including a counterdefendant, cross-defendant, or third-party defendant, from whom a claimant seeks relief.

(4) "Economic damages" means compensatory damages intended to compensate a claimant for actual economic or pecuniary loss; the term does not include exemplary damages or noneconomic damages.

(5) "Exemplary damages" means any damages awarded as a penalty or by way of punishment but not for compensatory purposes. Exemplary damages are neither economic nor noneconomic damages. "Exemplary damages" includes punitive damages.

(6) "Fraud" means fraud other than constructive fraud.

(7) "Malice" means a specific intent by the defendant to cause substantial injury or harm to the claimant.

(8) "Compensatory damages" means economic and noneconomic damages. The term does not include exemplary damages.

(9) "Future damages" means damages that are incurred after the date of the judgment. Future damages do not include exemplary damages.

(10) "Future loss of earnings" means a pecuniary loss incurred after the date of the judgment, including:

(A) loss of income, wages, or earning capacity; and

(B) loss of inheritance.

(11) "Gross negligence" means an act or omission:

(A) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and

(B) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

(12) "Noneconomic damages" means damages awarded for the purpose of compensating a claimant for physical pain and suffering, mental or emotional pain or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, inconvenience, loss of enjoyment of life, injury to reputation, and all other nonpecuniary losses of any kind other than exemplary damages.

(13) "Periodic payments" means the payment of money or its equivalent to the recipient of fu-

ture damages at defined intervals.

§ 41.002. Applicability

(a) This chapter applies to any action in which a claimant seeks damages relating to a cause of action.

(b) This chapter establishes the maximum damages that may be awarded in an action subject to this chapter, including an action for which damages are awarded under another law of this state. This chapter does not apply to the extent another law establishes a lower maximum amount of damages for a particular claim.

(c) Except as provided by Subsections (b) and (d), in an action to which this chapter applies, the provisions of this chapter prevail over all other law to the extent of any conflict.

(d) Notwithstanding any provision to the contrary, this chapter does not apply to:

(1) Section 15.21, Business & Commerce Code (Texas Free Enterprise and Antitrust Act of 1983);

(2) an action brought under the Deceptive Trade Practices-Consumer Protection Act (Subchapter E, Chapter 17, Business & Commerce Code) [FN1] except as specifically provided in Section 17.50 of that Act;

(3) an action brought under Chapter 36, Human Resources Code; [FN2] or

(4) an action brought under Chapter 21, Insurance Code. [FN3]

[FN1] V.T.C.A., Bus. & Com. Code § 17.41 et seq.

[FN2] V.T.C.A., Human Resources Code § 36.001 et seq.

[FN3] V.T.C.A., Insurance Code art. 21.01 et seq.

§ 41.003. Standards for Recovery of Exemplary Damages

(a) Except as provided by Subsection (c), exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from:

(1) fraud;

(2) malice; or

(3) gross negligence.

(b) The claimant must prove by clear and convincing evidence the elements of exemplary damages as provided by this section. This burden of proof may not be shifted to the defendant or satisfied by evidence of ordinary negligence, bad faith, or a deceptive trade practice.

(c) If the claimant relies on a statute establishing a cause of action and authorizing exemplary damages in specified circumstances or in conjunction with a specified culpable mental state, exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the damages result from the specified circumstances or culpable mental state.

(d) Exemplary damages may be awarded only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages.

(e) In all cases where the issue of exemplary damages is submitted to the jury, the following instruction shall be included in the charge of the court:

"You are instructed that, in order for you to find exemplary damages, your answer to the question regarding the amount of such damages must be unanimous."

§ 41.004. Factors Precluding Recovery

(a) Except as provided by Subsection (b), exemplary damages may be awarded only if damages other than nominal damages are awarded.

(b) Exemplary damages may not be awarded to a claimant who elects to have his recovery multiplied under another statute.

§ 41.005. Harm Resulting from Criminal Act

(a) In an action arising from harm resulting from an assault, theft, or other criminal act, a court may not award exemplary damages against a defendant because of the criminal act of another.

(b) The exemption provided by Subsection (a) does not apply if:

(1) the criminal act was committed by an employee of the defendant;

(2) the defendant is criminally responsible as a party to the criminal act under the provisions of Chapter 7, Penal Code;

(3) the criminal act occurred at a location where, at the time of the criminal act, the defendant was maintaining a common nuisance under the provisions of Chapter 125, Civil Practice and Remedies Code, and had not made reasonable attempts to abate the nuisance; or

(4) the criminal act resulted from the defendant's intentional or knowing violation of a statutory duty under Subchapter D, Chapter 92, Property Code, [FN1] and the criminal act occurred after the statutory deadline for compliance with that duty.

(c) In an action arising out of a criminal act committed by an employee, the employer may be liable for punitive damages but only if:

(1) the principal authorized the doing and the manner of the act;

(2) the agent was unfit and the principal acted with malice in employing or retaining him;

(3) the agent was employed in a managerial capacity and was acting in the scope of employment; or

(4) the employer or a manager of the employer ratified or approved the act.

[FN1] V.T.C.A., Property Code § 92.151 et seq.

§ 41.006. Award Specific to Defendant

In any action in which there are two or more defendants, an award of exemplary damages must be specific as to a defendant, and each defendant is liable only for the amount of the award made against that defendant.

§ 41.007. Prejudgment Interest

Prejudgment interest may not be assessed or recovered on an award of exemplary damages.

§ 41.008. Limitation on Amount of Recovery

(a) In an action in which a claimant seeks recovery of damages, the trier of fact shall determine the amount of economic damages separately from the amount of other compensatory damages.

(b) Exemplary damages awarded against a defendant may not exceed an amount equal to the greater of:

(1)(A) two times the amount of economic damages; plus

(B) an amount equal to any noneconomic damages found by the jury, not to exceed $750,000; or

(2) $200,000.

(c) This section does not apply to a cause of action against a defendant from whom a plaintiff seeks recovery of exemplary damages based on conduct described as a felony in the following sections of the Penal Code if, except for Sections 49.07 and 49.08, the conduct was committed knowingly or intentionally:

(1) Section 19.02 (murder);

(2) Section 19.03 (capital murder);

(3) Section 20.04 (aggravated kidnapping);

(4) Section 22.02 (aggravated assault);

(5) Section 22.011 (sexual assault);

(6) Section 22.021 (aggravated sexual assault);

(7) Section 22.04 (injury to a child, elderly individual, or disabled individual, but not if the conduct occurred while providing health care as defined by Section 74.001);

(8) Section 32.21 (forgery);

(9) Section 32.43 (commercial bribery);

(10) Section 32.45 (misapplication of fiduciary property or property of financial institution);

(11) Section 32.46 (securing execution of document by deception);

(12) Section 32.47 (fraudulent destruction, removal, or concealment of writing);

(13) Chapter 31 (theft) the punishment level for which is a felony of the third degree or higher;

(14) Section 49.07 (intoxication assault);

(15) Section 49.08 (intoxication manslaughter);

(16) Section 21.02 (continuous sexual abuse of young child or children); or

(17) Chapter 20A (trafficking of persons).

(d) In this section, "intentionally" and "knowingly" have the same meanings assigned those terms in Sections 6.03(a) and (b), Penal Code.

(e) The provisions of this section may not be made known to a jury by any means, including voir dire, introduction into evidence, argument, or instruction.

(f) This section does not apply to a cause of action for damages arising from the manufacture of methamphetamine as described by Chapter 99.

§ 41.009. Bifurcated Trial

(a) On motion by a defendant, the court shall provide for a bifurcated trial under this section. A motion under this subsection shall be made prior to voir dire examination of the jury or at a time specified by a pretrial court order issued under Rule 166, Texas Rules of Civil Procedure.

(b) In an action with more than one defendant, the court shall provide for a bifurcated trial on motion of any defendant.

(c) In the first phase of a bifurcated trial, the trier of fact shall determine:

(1) liability for compensatory and exemplary damages; and

(2) the amount of compensatory damages.

(d) If liability for exemplary damages is established during the first phase of a bifurcated trial, the trier of fact shall, in the second phase of the trial, determine the amount of exemplary damages to be awarded, if any.

§ 41.010. Considerations in Making Award

(a) Before making an award of exemplary damages, the trier of fact shall consider the definition and purposes of exemplary damages as provided by Section 41.001.

(b) Subject to Section 41.008, the determination of whether to award exemplary damages and the amount of exemplary damages to be awarded is within the discretion of the trier of fact.

§ 41.0105. Evidence Relating to Amount of Economic Damages

In addition to any other limitation under law, recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant.

§ 41.011. Evidence Relating to Amount of Exemplary Damages

(a) In determining the amount of exemplary damages, the trier of fact shall consider evidence, if any, relating to:

(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 parties concerned;

(5) the extent to which such conduct offends a public sense of justice and propriety; and

(6) the net worth of the defendant.

(b) Evidence that is relevant only to the amount of exemplary damages that may be awarded is not admissible during the first phase of a bifurcated trial.

§ 41.012. Jury Instructions

In a trial to a jury, the court shall instruct the jury with regard to Sections 41.001, 41.003, 41.010, and 41.011.

§ 41.013. Judicial Review of Award

(a) Except as provided for in Subsection (b), an appellate court that reviews the evidence with respect to a finding by a trier of fact concerning liability for exemplary damages or with respect to the amount of exemplary damages awarded shall state, in a written opinion, the court's reasons for upholding or disturbing the finding or award. The written opinion shall address the evidence or lack of evidence with specificity, as it relates to the liability for or amount of exemplary damages, in light of the requirements of this chapter.

(b) This section does not apply to the supreme court with respect to its consideration of an application for writ of error.

§ 41.014. Interest on Damages Subject to Medicare Subrogation

(a) Subject to this section, postjudgment interest does not accrue on the unpaid balance of an award of damages to a plaintiff attributable to any portion of the award to which the United States has a subrogation right under 42 U.S.C. Section 1395y(b)(2)(B) before the defendant receives a recovery demand letter issued by the Centers for Medicare and Medicaid Services or a designated contractor under 42 C.F.R. Section 411.22.

(b) Postjudgment interest under this section does not accrue if the defendant pays the unpaid balance before the 31st day after the date the defendant receives the recovery demand letter.

(c) If the defendant appeals the award of damages, this section does not apply.

(d) This section does not prevent the accrual of postjudgment interest on any portion of an award to which the United States does not have a subrogation right under 42 U.S.C. Section 1395y(b)(2)(B).

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