Texans for Lawsuit Reform

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July 16, 2015

Hon. Blake Hawthorne, Clerk
Supreme Court of Texas
201 West 14th Street, Room 104
Austin, Texas 78701

RE: Texans for Lawsuit Reform *Amicus curiae* letter brief
No. 15-0146, Forte et al. v. Wal-Mart Stores, Incorporated

Dear Mr. Hawthorne:

Please accept this *amicus curiae* letter brief submitted by Texans for Lawsuit Reform pursuant to Texas Rule of Appellate Procedure 11 in support of Appellant Wal-Mart Stores, Incorporated. Please provide a copy of this brief to the Justices, in accordance with your custom.

* * *

Oliver Wendell Holmes, Sr. observed that "an ounce of history is worth a pound of logic." The certified questions before the Court in this case illustrate Holmes' point, because the history that inspired the controlling reform legislation is replicated in the facts of this case. The Legislature did its best in 1995 to outlaw runaway exemplary damage verdicts based on comparatively small, or nonexistent, losses. That history, combined with the language of the statute, should leave no doubt that plaintiffs' claims are the kind of abuses the Legislature intended to reform.

The historical background is recent enough to be well known to all. From at the least the 1980's through 1995, exemplary damages had evolved to the point that they had become a potent bludgeon for extracting unjustified settlements, even in cases involving comparatively trivial actual damages. Runaway exemplary damage verdicts were regularly reported, reinforcing the message to defendants in Texas and around the world that our state was not a place where defendants could count on a fair civil justice system.

The present case tracks the historic pattern the reform legislation was drawn to prevent: actual damages are not merely trivial, they are not even claimed, and the "civil penalty" awarded had no anchor in real damages but was obviously plucked out of thin air.

The principal question posed by the Fifth Circuit asks whether this is an action in which "a claimant seeks damages relating to a cause of action," under Civil Practice & Remedies Code Section 41.002(a), which would thereby subject it to the limitations of the exemplary damages reform law. Ample precedent demonstrates that this Court defines the term "damages" very broadly. We therefore submit as being virtually self-evident that the word "damages" in Texas means collection of money through a court judgment, however characterized, other than reimbursement for incidental sums such as court costs and attorney fees. In other words, plaintiffs are seeking damages no matter what label they claim applies.

The Fifth Circuit's second question asks whether the plaintiff can escape the coverage of the law by claiming their award is part of a different universe because it is a "civil penalty." However, the controlling language of Civil Practice and Remedies Code Section 41.001(5) drains all vitality out of such a claim: "'Exemplary damages' means any damages awarded *as a penalty* or by way of punishment . . ." (emphasis added). Because the plaintiff's recovery is statutorily defined as a civil "penalty," it falls squarely under the definition of exemplary damages under Section 41.001 and Chapter 41 controls. If, on the other hand, the award is characterized as some other form of damages, they are hooked by Section 41.002(a). Plaintiffs cannot find any valid means to escape the controlling language—and the clear intent—of this reform legislation.

Plaintiffs finally have attempted to distract the courts from the invalidity of their own position by claiming some potential adverse effect on enforcement of the law by the Attorney General. This makes no sense. When bringing suit for civil penalties, the Attorney General is not pursuing an "action in which a claimant seeks damages relating to a cause of action." Rather, when the Attorney General files suit, it is a proceeding initiated to enforce state law through injunctive relief and civil penalties. The Attorney General is not "a claimant," he does not pursue a "cause of action," a term used to refer to litigation between private litigants. This is consistent with the purpose of the legislation, in which Attorney General enforcement actions were never an issue.

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Texans for Lawsuit Reform (TLR) is a volunteer led organization founded in 1994 to help foster and maintain a system that achieves a fair, merits-based resolution of all civil disputes, in a quick and efficient manner, so as to encourage economic development and job creation in Texas for the benefit of all Texans. TLR has more than 16,000 individual supporters in 857 towns and cities, representing 1,266 different trades, businesses, and professions who support its mission. TLR has no direct or indirect interest in this matter. TLR's only interest is in avoiding the creation of unnecessary and costly litigation in the State of Texas. TLR has paid all fees incurred in preparing this brief, which was written by the undersigned without fee.

Respectfully submitted,

/s/ Hugh Rice Kelly
Hugh Rice Kelly
General Counsel for *Amicus Curiae*,
Texans for Lawsuit Reform

Certificate of Service

I hereby certify that on July 16, 2015, a true and correct copy of this document was served through the electronic filing service provider on all counsel of record in this case.

/s/ Hugh Rice Kelly
Hugh Rice Kelly