

IN THE SUPREME COURT OF TEXAS

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No. 98-1107
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WAL-MART STORES, INC., ET AL., PETITIONERS

v.

HARRY W. STURGES, III, ET AL., RESPONDENTS

=====
ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE NINTH DISTRICT OF TEXAS
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Argued on January 19, 2000

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 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.

Harriet O'Neill
Justice

OPINION DELIVERED: March 8, 2000.