

IN THE SUPREME COURT OF TEXAS

No. 01-1142

SOUTHWESTERN BELL TELEPHONE CO., PETITIONER,

v.

DAVID GARZA, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

Argued October 15, 2003

JUSTICE O'NEILL, concurring.

“[The Pirate’s] Code is more what you’d call
‘guidelines’ than actual rules.”

CAPTAIN BARBOSSA
PIRATES OF THE CARIBBEAN

The Court purports to recognize the constitutional limitation that the factual conclusivity clause imposes upon our jurisdiction, yet proceeds to weigh the evidence unfettered by any such constraint. Because the Court usurps the factual sufficiency review power that our Constitution reserves to the courts of appeals, I cannot join its opinion. I agree, however, that the judgment awarding punitive damages should be reversed in this case. Under the standard announced in *Continental Coffee Products Co. v. Cazarez*, 937 S.W.2d 444, 453 (Tex. 1996), I would hold that

Garza presented no evidence of actual malice apart from the statutory violation itself. Accordingly, I concur in the Court's judgment but not its evidentiary analysis.

I

The Court correctly notes that a higher threshold needs to be applied in determining whether there is some clear and convincing evidence to support a verdict. When applying this standard, however, the Court should not weigh conflicting evidence; instead, it should disregard any evidence “that a factfinder reasonably could have disbelieved.” *In re J.F.C.*, 96 S.W.3d 256, 268 (Tex. 2002). In this case, the Court does not disregard such evidence; instead, it weighs conflicting evidence and concludes that “[w]hile there are some indications” that Southwestern Bell acted with malice, “there are a great many others that it did not.” This weighing of the evidence is appropriate only in a review of factual sufficiency, and, under the Texas Constitution, only the courts of appeals may conduct such a review. TEX. CONST. art. V, § 6.

The Court's opinion describes how legal and factual sufficiency review developed in Texas, characterizing the distinction between the two as “perhaps more deeply engrained in Texas law than in that of any other jurisdiction.” To appreciate “[t]he hardiness of this distinction in our jurisprudence,” I believe that it is important to demonstrate the unique role that each type of review plays in practice, and how both types of review perform an important role in avoiding an unjust result. *See Clewis v. State*, 922 S.W.2d 126 (Tex. Crim. App. 1996). A footnote in the Court of Criminal Appeals' opinion in *Clewis* colorfully illustrates the difference between legal and factual sufficiency review in the context of a criminal trial. It compares the testimony of a paid informant — who testifies that the defendant committed the crime — against the testimony of forty nuns who

testify that the defendant could not have committed the crime and that the informant himself is guilty:

The prosecution's sole witness, a paid informant, testifies that he saw the defendant commit a crime. Twenty nuns testify that the defendant was with them at the time, far from the scene of the crime. Twenty more nuns testify that they saw the informant [and not the defendant] commit the crime.

Clewis, 922 S.W.2d at 133 n.12. With this testimony, the prosecution has provided sufficient evidence to avoid a directed verdict; as the *Clewis* court noted, "the informant's testimony, however incredible, is legally sufficient evidence." *Id.* Members of the jury may choose whether or not to believe the paid informant, just as they may choose whether or not to believe the nuns; consequently, it is a case where reasonable minds may differ.

If the jury chooses to believe the paid informant and thus convicts the defendant, then the court of appeals may conduct both a legal and a factual sufficiency analysis of that verdict. In a legal sufficiency analysis, the testimony of the forty nuns must be disregarded, however convincing it may be; the informant's testimony satisfies the prosecution's burden of production, and a legal sufficiency review will not weigh the countervailing evidence against that testimony. In a factual sufficiency analysis, however, the entire record is considered and the weight of the evidence can make a difference — the nuns' testimony may so outweigh the informant's testimony as to make a guilty verdict manifestly unjust.

II

When the burden of proof is heightened beyond a mere preponderance of the evidence — for example, when a fact must be proved either by clear and convincing evidence or beyond a

reasonable doubt — then the standard for legally sufficient evidence will be correspondingly heightened. *See J.F.C.*, 96 S.W.3d at 266. When clear and convincing evidence is required, we have held that the party with the burden of proof must introduce enough evidence “that a factfinder could reasonably form a firm belief or conviction about the truth of the matter.” *Id.* We based this standard on the United States Supreme Court’s analysis of the standard of review in criminal cases, where the burden of proof is beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (“[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986).

This heightened standard of review, however, does not abrogate the traditional distinction between factual and legal sufficiency review: as part of their jurisdiction over factual matters, the courts of appeals may weigh countervailing evidence in order to reverse a verdict that is manifestly unjust, but this Court may not. TEX. CONST. art. V, § 6; *see also Pool v. Ford Motor Co.*, 715 S.W.2d 629, 633-35 (Tex. 1986); *Lofton v. Tex. Brine Corp.*, 777 S.W.2d 384, 388 (Tex. 1989) (Hecht, J., dissenting) (noting that “Article V, section 6 of the Texas Constitution makes the court of appeals’ determination of the factual insufficiency of the evidence in a case ‘conclusive,’” and stating that this Court “has repeatedly acknowledged, as it must, that it has no authority to review that determination except to ascertain that it was lawfully made — that is, that the appeals court considered all the evidence and stated its reasons for judging the evidence insufficient to support a finding of fact.”).

We preserved this distinction in *J.F.C.* when we held that a legal sufficiency review — even in light of a heightened evidentiary burden — “should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible.” 96 S.W.3d at 266; *see also In re L.M.I.*, 119 S.W.3d 707, 712 (Tex. 2003) (“Even under the standard we articulated in *In re J.F.C.*, . . . reweighing of the evidence is improper.”). The Court’s opinion in this case, however, ignores this limitation and focuses instead on a different sentence in *J.F.C.* — that the Court should not disregard “undisputed facts that do not support the finding.” 96 S.W.3d at 266. The Court’s opinion stretches the definition of “undisputed evidence” to include any testimony that is not directly contradicted. The Court then weighs this “undisputed evidence” contrary to the verdict with the evidence supporting the verdict, and finds that the evidence supporting the jury’s finding of malice was outweighed by “a great many other” indications contrary to the malice finding. There are two significant problems with this analysis.

A

First, the Court’s opinion inaccurately characterizes certain evidence as “undisputed.” It is true that certain facts were uncontested, but the inferences arising from those facts were hotly disputed by the parties at trial. For example, the Court suggests that Garza’s “undisputed . . . lengthy record of safety violations” contributed to make the jury’s verdict unreasonable. I agree that it is undisputed that Garza had two prior safety warnings; however, the latest of these warnings occurred more than two years before Garza was disqualified from driving. In the intervening two years, the record reflects that Garza’s safety record improved to the point that his supervisor wrote a letter stating “[y]ou made a commitment to be safe on the job and you did a good job. Keep up

the good work.” Garza also introduced evidence that his most recent performance appraisal rated him “satisfactory” for safety. Thus, the question of what inference should be drawn from Garza’s safety record was directly disputed at trial, and the jury could reasonably have inferred that Garza’s record was not as poor as SWBT suggested.

The Court also suggests that SWBT actually aided Garza by conducting a “thorough and impartial” investigation. Again, this characterization was hotly disputed. Certainly, SWBT representatives testified that the investigation was both thorough and impartial. Garza, however, contended that SWBT manipulated the results of the investigation by (1) looking at incidents that occurred over a twenty-year period instead of the typical two-year time period in order to make Garza’s safety record appear worse; (2) including incidents in which Garza was not at fault; and (3) ignoring Garza’s exemplary safety record over the two years prior to the accident. Garza may not have provided evidence that every single aspect of the investigation lacked impartiality, but evidence need not be controverted by introducing directly contradictory evidence; instead, evidence may also be disputed by “circumstances in evidence tending to discredit or impeach” it. *Anchor Cas. Co. v. Bowers*, 393 S.W.2d 168, 169 (Tex. 1965); *see also Lofton v. Tex. Brine Corp.*, 777 S.W.2d 384, 388 (Tex. 1989) (Hecht, J., dissenting) (“The appeals court calls this evidence undisputed, and it was, in the sense that the Court can point to no directly conflicting evidence. This is not to say that the evidence was not vigorously challenged. . . . [D]iscrepancies in the witnesses’ testimony allowed the plaintiff to dispute the defendants’ position.”). Some parts of the investigation may indeed have been impartial, and may even have favored Garza. Nevertheless, Garza vigorously challenged the

evidence that SWBT's investigation as a whole was "thorough and impartial," and the jury could reasonably have inferred that it was not.

Even if selected facts were not directly controverted at trial, the inferences arising from those facts were hotly disputed. As a result, this evidence cannot be fairly characterized as "undisputed," and it should not have been included in the Court's legal sufficiency review. *See J.F.C.*, 96 S.W.3d at 266.

B

In addition to mischaracterizing the evidence that it terms "undisputed," the Court misstates the role that truly undisputed evidence should play in a legal sufficiency analysis and impermissibly expands the Court's scope of review. It is not clear from the Court's opinion that there is any difference between a factual sufficiency review and a legal sufficiency review in cases governed by the clear and convincing standard. But there is a difference, and that difference is whether countervailing evidence should be weighed as part of the court's review. *See J.F.C.*, 96 S.W.3d at 264-68. The question addressed by both reviews is the same: "whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true." *J.F.C.*, 96 S.W.3d at 266 (legal sufficiency); *see In re C.H.*, 89 S.W.3d 17, 25 (Tex. 2002) (factual sufficiency). In a legal sufficiency review, however, the reviewing court may not weigh the evidence; instead, it must disregard any evidence that the jury reasonably could have disbelieved. *See J.F.C.*, 96 S.W.3d at 266. In a factual sufficiency review, on the other hand, the reviewing court may weigh the disputed evidence to see if it is "so significant" that a factfinder could not reasonably have formed a firm belief or conviction. *Id.* Thus, while both types of review attempt to answer the same question, they

consider the evidence differently; the reviewing court takes a less deferential view of the evidence when performing a factual sufficiency review.

This is not to say, however, that undisputed evidence should not be included, or that it has no effect on the scope of review; indeed, undisputed evidence contrary to the verdict must be reviewed in order to determine whether the evidence supporting the verdict has been conclusively negated. See Powers & Ratliff, *Another Look at “No Evidence” and “Insufficient Evidence”*, 69 TEX. L. REV. 515, 523 (1991). In this situation, a court renders judgment as a matter of law, as a trial court would do in entering a judgment n.o.v. But if such evidence is not conclusive, it should not be weighed against countervailing evidence in a legal sufficiency review. See, e.g., *Holley v. Watts*, 629 S.W.2d 694, 696 (Tex. 1982); see also O’Connor, *Appealing Jury Findings*, 12 HOUS. L. REV. 65, 66-67, 79, 83 (1974); Calvert, *“No Evidence” and “Insufficient Evidence” Points of Error*, 38 TEX. L. REV. 361, 364 (1960).

In recent years, commentators have noted that the Court’s scope of review appears to be unclear; in some cases, the Court states that it reviews “all of the evidence” in a legal sufficiency review, while in others it reviews “only the evidence and inferences that tend to support the finding.” Hall, *Standards of Review in Texas*, 34 ST. MARY’S L. J. 1, 159-61 (2002). The United States Supreme Court has also observed this conundrum in its own jurisprudence, and has held that “[o]n closer examination, this conflict seems more semantic than real,” because the statement about looking only to the evidence supporting the verdict refers “to the evidence to which the trial court should give credence, not the evidence that the court should review.” *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). I believe that this distinction is an important one. Of course

this Court can review all the evidence; indeed, as noted above, it must do so in order to establish whether a fact has been conclusively proved. The Court’s opinion, however, does not merely review the entire record to see whether malice was conclusively negated; instead, the Court gives credence to evidence contrary to the verdict (*i.e.*, Garza’s purportedly poor safety record, SWBT’s purportedly impartial investigation, and various other “undisputed” facts), weighs this evidence against the evidence supporting the verdict, and decides that the evidence contrary to the verdict outweighs the evidence supporting it.

Although the Court’s opinion suggests that it is merely adopting the same scope of review used by federal courts, the United States Supreme Court has made it clear that in a legal sufficiency review, a court should not weigh the evidence contrary to the verdict against the evidence supporting the verdict. *Id.* (holding that, when reviewing legal sufficiency as part of a motion for judgment as a matter of law, “the court should review all of the evidence in the record” but that it also “must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or *weigh the evidence*”) (emphasis added); *Liberty Lobby, Inc.*, 477 U.S. at 255 (“Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.”).

Even in the criminal context, where the burden of proof is at the highest level, the Court of Criminal Appeals will not weigh evidence in a legal sufficiency review. Instead, that Court has held that “[d]irect evidence of ‘X’ fact is always legally sufficient to support a finding of ‘X’ fact.” *Goodman v. State*, 66 S.W.3d 283, 286 (Tex. Crim. App. 2001). In the *Clewis* “forty nuns” example,

the informant's testimony that he saw the defendant commit the crime is direct evidence and is legally sufficient to support the verdict. *See Clewis*, 922 S.W.2d at 132.

Even if the hypothetical were modified so that the undisputed evidence demonstrated that the weather was foggy at the time the informant claimed to witness the crime, that fact should not affect the legal sufficiency analysis. This fact, although undisputed, can make a difference in the appellate court's review only to the extent it makes the informant's purported eyewitness testimony less believable. If a reviewing court considers the evidence of foggy weather and relies on it to determine that no reasonable juror could have reached a "firm belief or conviction" that the informant indeed witnessed the crime, then that court would be weighing the evidence in a manner that we said in *J.F.C.* was impermissible in a legal sufficiency review. *J.F.C.*, 96 S.W.3d at 268 (holding that a legal sufficiency review should "not consider evidence that a factfinder reasonably could have disbelieved."). Just as a jury may disbelieve disputed evidence, it may also disbelieve certain inferences arising from even undisputed evidence. For example, while the jury could not have disbelieved the undisputed evidence of foggy weather, it could nevertheless have believed the informant's testimony that he could view the crime even through the fog; thus, the jury could have disregarded the potential inference that the fog blocked the informant's view. Consequently, the court conducting a legal sufficiency review must also disregard the potential inference that the foggy weather blocked the informant's view. Of course, the court of appeals would be free to consider the evidence of foggy weather — and any other evidence contrary to the verdict — in conducting a factual sufficiency review.

Just as the hypothetical jury could have disbelieved that the foggy weather blocked the informant's view, the jury in this case could have disbelieved that SWBT's actions were truly motivated by Garza's safety record and that SWBT's investigation was truly impartial. The jury could similarly have disregarded inferences arising from the other evidence cited by the Court; Garza challenged, at least indirectly, the conclusion that the disciplinary action was consistent with company policy and the conclusion that SWBT was sincere in offering him the opportunity to qualify for other jobs within the company. But the Court does not disregard these inferences, even though the jury could have disbelieved them. Instead, the Court's opinion in this case holds that, although the evidence included "some indications" of malice, that evidence was outweighed by "a great many other" indications contrary to the malice finding. ___ S.W.3d ___. Because the Court compares conflicting evidence and weighs the competing inferences drawn from that evidence, it exceeds the parameters of a legal sufficiency review and engages instead in a factual sufficiency review. This type of analysis is appropriate only in a factual sufficiency review.

III

Although I disagree with the manner in which the Court conducts its legal sufficiency review, I agree that the Court's result in this case is correct. Under the standard announced in *Cazarez*, 937 S.W.2d at 453, I would hold that Garza presented no evidence of actual malice apart from the statutory violation itself. In *Cazarez*, we considered the circumstances under which a plaintiff employee might recover punitive damages from an employer who wrongfully discriminated against the employee for filing a workers' compensation claim. *Id.* We acknowledged that such retaliation constituted an intentional tort, and that, for many intentional torts, punitive damages could

be based on malice implied from the defendant's intentional conduct. *Id.* However, we concluded that there was no indication that the Legislature intended to allow such implied malice to support punitive damages in cases involving retaliation for filing a workers' compensation claim. *Id.* (noting that, if exemplary damages were "implied from the employer's intentional wrongdoing" they would potentially be available "for every violation of the statute"). We therefore held that, in order to "ensure that only egregious violations of the statute will be subject to punitive awards," punitive damages could not be awarded without "evidence of ill-will, spite, or a specific intent to cause injury to the employee." *Id.* at 454.

Garza argues that he presented such evidence in this case. I disagree. Much of the evidence that he characterizes as showing "malice" actually goes to the threshold question of liability for retaliation; for example, Garza argues that the company distorted his safety record in order to fire him, that the company disciplined him but did not discipline Hernandez, that the discipline was not required under SWBT's policies, and that the company used his safety record as a pretext for firing him. Garza argues that this evidence demonstrates the company's ill-will toward him and its "specific intent to cause injury" to him. If we allowed evidence of the statutory violation to also serve as evidence of malice, however, then punitive damages would be available in every employment retaliation case. *See, e.g., Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928, 936 (11th Cir. 2000) ("Every act of retaliation . . . is inherently willful — the act is motivated by the employer's conscious desire to 'get back' at the employee for exercising her protected rights."). Such a result is inconsistent with our conclusion in *Cazarez* that the Legislature intended to limit punitive damages to "only egregious violations of the statute." *Cazarez*, 937 S.W.2d at 454.

Under the logic of *Cazarez*, evidence of malice must go beyond the level of ill-will or intent that is inherent in the statutory violation itself. Such a requirement is not unusual; the West Virginia Supreme Court has applied a similar requirement for punitive damages that evidence of malice be proven in addition to the statutory violation itself. *See Harless v. First Nat'l Bank*, 289 S.E.2d 692, 703, n.19 (W. Va. 1982) (allowing punitive damages only upon proof of the employer's wanton, willful or malicious conduct, and providing examples of such conduct "where the employer circulates false or malicious rumors about the employee before or after the discharge or engages in a concerted action of harassment to induce the employee to quit or actively interferes with the employee's ability to find other employment"). In this case, Garza presented evidence that SWBT retaliated against him for filing a workers' compensation claim, but none of that evidence demonstrates a level of ill-will beyond that which is inherent in the act of retaliation itself.

If we look only at the evidence going beyond the violation itself, then we are left with evidence that (1) Gonzalez implied that Garza was a bully, and stated that he was "fed up" with Garza, and (2) Garza was assigned janitorial work, which he felt was demeaning. These facts do not amount to legally sufficient evidence of "ill-will, spite, or a specific intent to cause injury to the employee." Gonzalez's statements certainly indicate a level of dissatisfaction with Garza, but those statements alone do not demonstrate ill-will or spite, and Garza does not allege that Gonzalez said anything more that would indicate such ill-will.

Garza cites this Court's opinion in *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605 (Tex. 1999), as support for his claim that his assignment to do janitorial work was some evidence of malice. In *Bruce*, however, there was evidence that the purpose of the janitorial assignment was

“not to clean, but to humiliate” and that the employee was “ridiculed by other employees” and required to “get on her hands and knees and clean” the carpet while her supervisor “stood over her yelling.” *Id.* at 614. In this case, by contrast, there was no evidence that the janitorial assignment was intended to humiliate Garza, that he was ridiculed, or that the purpose of the assignment was otherwise improper. Consequently, I agree with the Court’s conclusion that Garza failed to present legally sufficient proof of malice in this case.

IV

Because the Court impermissibly weighs conflicting evidence and thus performs a factual sufficiency review under the guise of legal sufficiency, I cannot join its opinion. However, because I conclude that Garza presented no clear and convincing evidence of “ill-will, spite, or a specific intent to cause injury,” apart from evidence of the statutory violation itself, I concur in the Court’s judgment reversing the award of punitive damages.

Harriet O’Neill
Justice

OPINION DELIVERED: December 31, 2004