

# IN THE SUPREME COURT OF TEXAS

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No. 15-0146

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WAL-MART STORES, INCORPORATED, APPELLANT,

v.

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

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ON CERTIFIED QUESTIONS FROM THE UNITED STATES  
COURT OF APPEALS FOR THE FIFTH CIRCUIT

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**Argued September 23, 2015**

CHIEF JUSTICE HECHT delivered the opinion of the Court, in which JUSTICE GREEN, JUSTICE JOHNSON, JUSTICE GUZMAN, and JUSTICE BROWN joined.

JUSTICE BOYD filed a dissenting opinion, in Part I of which JUSTICE LEHRMANN and JUSTICE DEVINE joined.

JUSTICE WILLETT did not participate in the decision.

The State of Texas as amicus curiae argues that the certified questions now before us from the United States Court of Appeals for the Fifth Circuit are premised on an incorrect understanding of Texas law. Our dilemma is whether to address the premise of the questions when the parties have not done so, or answer questions that are hypothetical if the State is right. We choose the latter course.

The Texas Optometry Act<sup>1</sup> prohibits commercial retailers of ophthalmic goods from attempting to control the practice of optometry.<sup>2</sup> Section 351.603(b) of the Act authorizes the Texas Optometry Board, which administers the Act,<sup>3</sup> and the Attorney General to sue a violator for “a civil penalty not to exceed \$1,000 for each day of a violation”.<sup>4</sup> Section 351.605 provides that “[a] person injured as a result of a violation . . . is entitled to the remedies in . . . Section 351.603(b)”.<sup>5</sup> The Fifth Circuit asks<sup>6</sup> whether such civil penalties, when sought by a private person, are exemplary damages limited by Chapter 41 of the Texas Civil Practice and Remedies Code.<sup>7</sup> While the certified questions assume, perhaps incorrectly, that the Act authorizes recovery of civil penalties by a private person, rather than only by the Board or the Attorney General, we nevertheless answer in the affirmative.

In 1992, Wal-Mart Stores, Inc. (“Wal-Mart”) began operating “Vision Centers” in its Texas retail stores, selling a variety of ophthalmic goods, such as spectacle lenses, frames, and contact lenses. Wal-Mart leased office space near the Vision Centers to optometrists. A typical lease required

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<sup>1</sup> TEX. OCC. CODE §§ 351.001–.608. The predecessor to the current Act was passed in 1969, codified as article 4552 of the Texas Revised Civil Statutes, and recodified as Chapter 351 of the Occupations Code in 1999. Act of May 21, 1969, 61st Leg., R.S., ch. 401, 1969 Tex. Gen. Laws 1298 (amended 1981, 1991, and 1999) (formerly codified at TEX. REV. CIV. STAT. ANN. arts. 4552-1.01 to 4552-6.04), *repealed and recodified*, Act of May 13, 1999, 76th Leg., ch. 388, §§ 1, 6, 1999 Tex. Gen. Laws 1431, 1720, 2440. The provisions now found in Sections 351.408, 351.603(b), and 351.605 were added in 1981 and have been in effect, substantially unchanged, at all times material to this case. Act of June 1, 1981, 67th Leg., R.S., ch. 758, § 2, 1981 Tex. Gen. Laws 2798, 2807 (formerly codified at TEX. REV. CIV. STAT. ANN. art. 4552-5.11).

<sup>2</sup> TEX. OCC. CODE § 351.408 (formerly codified as TEX. REV. CIV. STAT. ANN. art. 4452-5.11(a), (b), (c)).

<sup>3</sup> *Id.* §§ 351.051–.163 (describing the board, its membership, powers, and duties).

<sup>4</sup> *Id.* § 351.603(b).

<sup>5</sup> *Id.* § 351.605.

<sup>6</sup> *Forte v. Wal-Mart Stores, Inc.*, 780 F.3d 272, 283 (5th Cir. 2015).

<sup>7</sup> TEX. CIV. PRAC. & REM. CODE §§ 41.001–.014.

the optometrist to keep the office open at least 45 hours per week or pay \$200 per day in liquidated damages.

The Act provides that “[a] manufacturer, wholesaler, or retailer of ophthalmic goods may not directly or indirectly . . . control or attempt to control the professional judgment, manner of practice, or practice of an optometrist”.<sup>8</sup> This specifically includes “setting or attempting to influence the . . . office hours of an optometrist”.<sup>9</sup> The Attorney General and the Board may enforce this prohibition by a suit for injunctive relief, a civil penalty not to exceed \$1,000 per day, and attorney fees.<sup>10</sup> A person injured by a violation “is entitled to” the same relief<sup>11</sup> as well as damages.<sup>12</sup> A violation is also actionable under the Texas Deceptive Trade Practices-Consumer Protection Act<sup>13</sup> and is a misdemeanor punishable, for each day of violation, by a fine from \$100 to \$1,000,

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<sup>8</sup> TEX. OCC. CODE § 351.408(c)(1).

<sup>9</sup> *Id.* § 351.408(b)(1).

<sup>10</sup> *Id.* § 351.603(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.”).

<sup>11</sup> *Id.* § 351.605 (“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).”).

<sup>12</sup> *Id.* § 351.602(c)(2) (“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.”).

<sup>13</sup> *Id.* § 351.604(3) (“A violation of any of the following sections is actionable under Subchapter E, Chapter 17, Business & Commerce Code: . . . (3) Section 351.408 . . . .”); *see* TEX. BUS. & COM. CODE §§ 17.41–.63.

confinement in the county jail from two to six months, or both.<sup>14</sup> Suffice it to say that the Act is serious about preventing control of optometrists.

In 1995, the Board advised Wal-Mart that its minimum office-hour requirement violated the Act. Wal-Mart dropped the requirement and changed its lease form, allowing an optometrist lessee to insert daily hours of operation and providing that it would “retain no control whatsoever over the manner and means by which the [optometrist] performs his/her work.” In the Board’s view, these changes were not sufficient to comply with the Act. In 1998, the Board published a newsletter in which it opined that any commercial lease merely referencing an optometrist’s hours violated the Act. And in 2003, the Board notified Wal-Mart that it was violating the Act simply by informing optometrists that customers were requesting longer business hours.

In 2007, four Texas optometrists—Doris Forte, Bridget Leesang, David Wiggins, and John Boldan (“the Optometrists”)—all with post-1995 Wal-Mart leases, sued Wal-Mart in federal district court.<sup>15</sup> The Optometrists offered evidence that during lease negotiations, Wal-Mart had instructed them what hours they should include in the lease to obtain approval;<sup>16</sup> that they believed those hours were enforceable; and that they were pressured to work longer hours. But the Optometrists also testified that the hours they included in their leases were appropriate and acceptable to them.

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<sup>14</sup> TEX. OCC. CODE § 351.606 (“(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.”).

<sup>15</sup> The suit was filed on behalf of about 400 similarly situated optometrists, but the court refused to certify a class and required that four test-case plaintiffs be designated.

<sup>16</sup> While the suit was pending, Wal-Mart deleted the requirement that office hours be stated in its leases and notified all leasing optometrists that it would not enforce any provision related to operating hours.

Wal-Mart presented evidence that the office hours stated in leases were not enforced, could be changed by the Optometrists at any time, and allowed Wal-Mart to inform customers when optometrists would be available. There was no evidence that including office hours in the leases injured customers.

The district court instructed the jury that the Optometrists “do not claim that they have suffered any physical or economic damages [and] only seek to recover civil penalties.” The jury awarded the Optometrists \$3,953,000 in civil penalties—\$1,000 for every day the Optometrists had operated under the leases, the maximum penalty allowed by the Act. The court awarded the Optometrists \$763,854 in attorney fees. Post-verdict, the court ordered a remittitur, which the Optometrists accepted, reducing the civil penalty to \$400 per day, totaling \$1,396,400.

On appeal, Wal-Mart contended that its conduct did not violate the Act. The Fifth Circuit rejected this argument.<sup>17</sup> Wal-Mart also argued that the Optometrists’ suit was for “damages” within the meaning of Chapter 41 of the Civil Practice and Remedies Code,<sup>18</sup> that the penalties awarded the Optometrists were exemplary damages as defined by that statute,<sup>19</sup> and therefore that the penalties could not be awarded absent a recovery of “damages other than nominal damages”.<sup>20</sup> The Fifth

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<sup>17</sup> *Forte v. Wal-Mart Stores, Inc.*, 763 F.3d 421, 425–428 (5th Cir. 2014), *vacated*, 780 F.3d 272 (5th Cir. 2015).

<sup>18</sup> TEX. CIV. PRAC. & REM. CODE § 41.002(a).

<sup>19</sup> *Id.* § 41.001(5).

<sup>20</sup> *Id.* § 41.004(a).

Circuit agreed at first,<sup>21</sup> but on rehearing noted that we had not decided the issue,<sup>22</sup> and certified the following two questions to this Court:

1. Whether an action for a “civil penalty” under the Texas Optometry Act is an “action in which a claimant seeks damages relating to a cause of action” within the meaning of Chapter 41 of the Texas Civil Practice and Remedies Code. In other words, are civil penalties awarded under Tex. Occ. Code § 351.605 “damages” as that term is used in Tex. Civ. Prac. & Rem. Code § 41.002(a).
2. If civil penalties awarded under the Texas Optometry Act are “damages” as that term is used in Tex. Civ. Prac. & Rem. Code § 41.002(a), whether they are “exemplary damages” such that Tex. Civ. Prac. & Rem. Code § 41.004(a) precludes their recovery in any case where a plaintiff does not receive damages other than nominal damages.<sup>23</sup>

As usual, the Circuit added: “We disclaim any intention or desire that the Supreme Court of Texas confine its reply to the precise form or scope of the questions certified.”<sup>24</sup>

We accepted the certification.<sup>25</sup>

The State of Texas as amicus curiae argues that Section 351.605 of the Act does not authorize a private suit for penalties. The “remedies” in Section 351.603(b) to which an injured person “is entitled to” under Section 351.605 are not civil penalties, the State contends, but actions for civil penalties brought by the Attorney General or the Board. The State points to *Brown v. De La Cruz*,

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<sup>21</sup> *Forte*, 763 F.3d at 425–428.

<sup>22</sup> *Forte*, 780 F.3d at 281.

<sup>23</sup> *Id.* at 283.

<sup>24</sup> *Id.*

<sup>25</sup> 58 Tex. Sup. Ct. J. 427 (March 6, 2015). The Fifth Circuit held that Wal-Mart violated the Act. *Forte*, 780 F.3d at 277–278. The Chamber of Commerce of the United States and Texas Association of Business argue as amici curiae that this holding was incorrect. We express no view on that issue.

where we said that “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.”<sup>26</sup> Section 351.605, the State asserts, does not meet this high standard. The State advises that it is aware of no other Texas statute that allows a private suit for penalties using the “entitled to the remedies” cross-reference formulation of Section 351.605. The parties have not tackled the State’s argument in substance. Wal-Mart merely calls it “interesting” and the Optometrists bluntly dismiss it as wrong.

The State’s argument has force. If it is right, we need not consider the effect of Chapter 41 on the recovery of penalties, the subject of the certified questions. We might consider the Fifth Circuit’s disclaimer of precise limitation on the scope of the questions to allow us to reach the State’s argument, but the parties have not chosen to engage on this issue, and we are reluctant to do so without the benefit of their arguments. We are also reluctant to direct them to argue an issue they have elected not to raise. We might decline to answer the certified questions at all, but that would deprive the Fifth Circuit of the guidance it has sought and perversely suggest an end result contrary to the one we would reach. We faced a similar predicament in *Diamond Shamrock Refining and Marketing Co. v. Mendez*, where Diamond Shamrock argued that malice should be an element of false light invasion of privacy, a tort we had never recognized, but did not argue that the tort itself should not exist.<sup>27</sup> We determined that the best course was to assume the availability of the cause of action and address the issue raised.<sup>28</sup> We follow that course here.

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<sup>26</sup> 156 S.W.3d 560, 565 (Tex. 2004).

<sup>27</sup> 844 S.W.2d 198, 200 (Tex. 1992).

<sup>28</sup> *Id.* (deciding the “actual malice” issue in reversing and remanding the cause for a new trial).

Chapter 41 “applies to any action in which a claimant seeks damages relating to a cause of action”,<sup>29</sup> with four specified exceptions, to which we will return.<sup>30</sup> In the actions to which it applies, it “establishes the maximum damages that may be awarded”.<sup>31</sup> Chapter 41 does not define “damages” but uses the term broadly to include compensatory, economic, noneconomic, future, and exemplary damages, all of which are defined.<sup>32</sup> Exemplary damages are defined as follows:

“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.<sup>33</sup>

Thus, Chapter 41 applies to “any action” in which exemplary damages are sought. Indeed, most of Chapter 41 governs and limits the recovery of exemplary damages.

Chapter 41 does not refer to civil penalties. To determine whether they are damages, when neither is defined in the statute, we could look to the ordinary meanings of the words. Here, that is of little help. The Optometrists cite the definition of “damages” in the fifth edition of *Black’s Law Dictionary* as “[a] pecuniary compensation or indemnity” or “a compensation in money for a loss

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<sup>29</sup> TEX. CIV. PRAC. & REM. CODE § 41.002(a).

<sup>30</sup> *Id.* § 41.002(d). The exceptions are for actions under Section 15.21 of the Texas Business and Commerce Code (Texas Free Enterprise and Antitrust Act of 1983), Chapter 17 of the Texas Business and Commerce Code (Deceptive Trade Practices-Consumer Protection Act), Chapter 36 of the Texas Human Resources Code (Medicaid fraud), and Title 13 of the Insurance Code. There are other exceptions to the applicability of Chapter 41 and its provisions; e.g., this chapter does not apply “to the extent another law establishes a lower maximum amount of damages for a particular claim”, *id.* § 41.002(b), and its cap does not apply when exemplary damages are sought based on certain criminal conduct, *id.* § 41.008(b), (c), (d), (f).

<sup>31</sup> *Id.* § 41.002(b).

<sup>32</sup> *Id.* § 41.001(4), (5), (8), (9), (12).

<sup>33</sup> *Id.* § 41.001(5).



or damage”<sup>34</sup> and argue that damages must be compensatory.<sup>35</sup> But Chapter 41 defines non-compensatory, exemplary damages as “damages”. Wal-Mart, on the other hand, points to the definition of “civil penalties” in the sixth edition of *Black’s Law Dictionary* as “punishment for specific activities . . . usually in the form of fines or money damages.”<sup>36</sup> While these references certainly suggest that Chapter 41 damages *could* include civil penalties, they offer little guidance on whether such damages *do* include civil penalties.

We could also look to our own cases or other authorities. We have noted that civil penalties are different from compensatory damages<sup>37</sup> and even that not all compensatory recovery can be considered damages.<sup>38</sup> These observations do not determine the proper interpretation of Chapter 41. Wal-Mart and the Optometrists cite a number of cases that either equate or differentiate civil penalties and damages in various contexts.<sup>39</sup> Our inquiry is more specific.

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<sup>34</sup> BLACK’S LAW DICTIONARY 351 (5th ed. 1979).

<sup>35</sup> See *Geters v. Eagle Ins. Co.*, 834 S.W.2d 49, 50 (Tex. 1992) (per curiam) (“Damages” are “compensation in money imposed by law for loss or injury.”).

<sup>36</sup> BLACK’S LAW DICTIONARY 246 (6th ed. 1990).

<sup>37</sup> See *Agey v. Am. Liberty Pipe Line Co.*, 172 S.W.2d 972, 974 (Tex. 1943) (noting in passing that a claimant seeking statutory civil penalties “did not sue for damages”).

<sup>38</sup> *In re Longview Energy Co.*, 464 S.W.3d 353, 361 (Tex. 2015) (“Disgorgement is compensatory in the same sense attorney fees, interest, and costs are, but it is not damages.”); *In re Nalle Plastics Family Ltd. P’ship*, 406 S.W.3d 168, 173 (Tex. 2013) (“Not every amount, even if compensatory, can be considered damages.”).

<sup>39</sup> Wal-Mart cites a variety of federal cases that equate civil penalties and damages. See, e.g., *United States v. Ford Motor Co.*, 497 F.3d 1331, 1338 (Fed. Cir. 2007) (civil penalties are a “type[] of money damages”); *United States v. TDC Mgmt. Corp.*, 288 F.3d 421, 427 (D.C. Cir. 2002) (“the government recovered as damages a civil penalty”). The Optometrists cite the opposite: a variety of state and federal cases that distinguish civil penalties and damages. See, e.g., *Mem’l Hermann Hosp. Sys. v. Progressive Cty. Mut. Ins. Co.*, 355 S.W.3d 123, 127 (Tex. App.—Houston [1st Dist.] 2011, pet. denied) (“Section 11.004 also makes the county clerk liable for damages and civil penalties if it violates the specified recordation requirements.”); *United States ex rel. Bunk v. Gosselin World Wide Moving, N.V.*, 741 F.3d 390, 395 (4th Cir. 2013) (“Bunk possessed standing to sue for civil penalties while bypassing the prospect of a damages

In interpreting a statute, we may also consider the “object sought to be obtained” and the “circumstances under which the statute was enacted”.<sup>40</sup> Unquestionably, Chapter 41 was enacted to restrict and structure the recovery of exemplary damages. Among other things, it requires: proof by clear and convincing evidence of the elements for exemplary damages;<sup>41</sup> proof that the defendant acted with certain prerequisite culpable mental states;<sup>42</sup> consideration of evidence on certain prescribed factors;<sup>43</sup> specific jury questions and instructions;<sup>44</sup> a bifurcated trial;<sup>45</sup> a unanimous verdict;<sup>46</sup> and careful judicial review.<sup>47</sup> Chapter 41 limits the amount of exemplary damages relative to compensatory damages,<sup>48</sup> and, more importantly for our purposes here, precludes an award of exemplary damages unless other damages, besides nominal damages, are awarded.<sup>49</sup> And as noted

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award”).

<sup>40</sup> TEX. GOV'T CODE § 311.023(1)–(2).

<sup>41</sup> TEX. CIV. PRAC. & REM. CODE § 41.003(a)–(c).

<sup>42</sup> *Id.* §§ 41.003(a), (c), 41.005(b), 41.008(c)–(d).

<sup>43</sup> *Id.* § 41.011(a).

<sup>44</sup> *Id.* §§ 41.003(d), 41.008(a), 41.012.

<sup>45</sup> *Id.* § 41.009; *see also id.* § 41.011(b).

<sup>46</sup> *Id.* § 41.003(d).

<sup>47</sup> *Id.* § 41.013(a).

<sup>48</sup> *Id.* § 41.008(b).

<sup>49</sup> *Id.* § 41.004(a).

above, Chapter 41 excepts actions only under four specified statutes.<sup>50</sup> The Texas Optometry Act is not one of those statutes.

Given the breadth of Chapter 41, we cannot read in exceptions that would impair its purpose. The Optometrists argue civil penalties under the Act need not be governed by Chapter 41 because they are already limited to at most \$1,000 per day.<sup>51</sup> The jury in this case awarded the Optometrists the maximum penalties under the Act. The district court reduced the award by 60%. Why? Because the court thought it was too much. But what is too much, when neither the Optometrists nor their customers suffered injury against which to measure an appropriate sanction? It is this possibility of a wide, standardless range of permissible penalties that makes civil penalties much like exemplary damages when they were limited only by constitutional and common-law principles. This uncertainty, verging on arbitrariness, is precisely what Chapter 41 addresses.

The Optometrists argue that the Act provides for recovery of both damages<sup>52</sup> and civil penalties,<sup>53</sup> suggesting that the two are different. But the issue is not whether they are different. The issue is whether Chapter 41 applies to both. The Optometrists argue that applying Chapter 41 deprives the Act of force. But the Act allows for a private suit for damages as well as enforcement by the Attorney General and the Board. The Optometrists argue that Chapter 41's exception "to the

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<sup>50</sup> *Supra* note 30.

<sup>51</sup> TEX. OCC. CODE § 351.603(b).

<sup>52</sup> *Id.* § 351.602(c)(2).

<sup>53</sup> *Id.* § 351.605.

extent another law establishes a lower maximum amount of damages for a particular claim”<sup>54</sup> applies because civil penalties are capped at \$1,000 per day. But there is no limit on the number of days that a violation can occur, and thus no limit on the amount of civil penalties that a claimant can receive for a single violation.

The Optometrists argue that if Chapter 41 applies to their recovery of sanctions, then it also applies to the Attorney General’s or the Board’s imposition of sanctions. But this argument is flawed for at least two reasons. First, the Attorney General and the Board could rarely, if ever, recover damages, so the application of Chapter 41 would destroy their enforcement powers under the Act. And second, the imposition of sanctions by the government is limited by institutional constraints not present when the claimant is a private person.

The Optometrists argue that if Chapter 41 applies to civil penalties under the Act, it must apply to all civil penalties under all statutes. They identify 24 Texas statutes allowing for both damages and civil penalties, and seven others allowing for civil penalties without mentioning damages. But whether Chapter 41 applies to any of these other statutes depends on the analysis we have followed here, not simply on a statutory authorization of civil penalties.

The Optometrists concede that Chapter 41 damages include compensatory damages, statutory multiple damages, and statutory additional damages. The only private monetary recovery excluded in their view is civil penalties. We cannot find justification in the statute for this exception. We conclude that a private recovery of civil penalties under the Act is subject to Chapter 41.

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<sup>54</sup> TEX. CIV. PRAC. & REM. CODE § 41.002(b).

The Optometrists concede that if Chapter 41 damages include private civil penalties under the Act, it is difficult to argue that they are not “exemplary damages”—“damages awarded as a penalty or by way of punishment but not for compensatory purposes.”<sup>55</sup> We agree. Having determined that Chapter 41 applies, we easily conclude that civil penalties are exemplary damages for purposes of Section 41.004(a). The answer to the second certified question is yes. Because the Optometrists recovered no other damages, Chapter 41 bars recovery of the civil penalties as exemplary damages.

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With the reservations we have noted regarding the premise underlying the certified questions, we answer both yes.

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Nathan L. Hecht  
Chief Justice

Opinion delivered: May 20, 2016

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<sup>55</sup> *Id.* § 41.001(5).