

from Energen as a result of Energen allegedly trespassing on Plaintiff's private roads.¹ But this is simply *not* a punitive damages case. The legal standard for obtaining punitive damages is higher than mere intentional or willful conduct. Because there is no evidence (and certainly no clear and convincing evidence) of the type of conduct for which punitive damages may be awarded, Energen moves for summary judgment on that claim.

II. GROUNDS FOR SUMMARY JUDGMENT

2. Energen is entitled to partial summary judgment on Plaintiff's claim for punitive damages because Plaintiff has no evidence and no clear and convincing evidence that the harm for which Plaintiff seeks recovery of punitive damages against Energen resulted from fraud.

3. Energen is entitled to partial summary judgment on Plaintiff's claim for punitive damages because Plaintiff has no evidence and no clear and convincing evidence that the harm for which Plaintiff seeks recovery of punitive damages against Energen resulted from malice -- *i.e.*, that Energen had a specific intent to cause substantial injury or harm to Plaintiff.

4. Energen is entitled to partial summary judgment on Plaintiff's claim for punitive damages because Plaintiff has no evidence and no clear and convincing evidence that the harm for which Plaintiff seeks recovery of punitive damages against Energen resulted from gross negligence. Specifically, Plaintiff has no evidence and no clear and convincing evidence that:

(a) Energen committed an act or omission which, when viewed objectively from the standpoint of Energen at the time of its occurrence, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others;

¹ Plaintiff's Final Petition refers to "exemplary/punitive" damages. (*See, e.g.*, Plaintiff's Final Pet. ¶ 61) Although this Motion refers to "punitive" damages, it encompasses Plaintiff's claim for "exemplary/punitive" damages.

(b) and of which Energen had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others.

III. FACTUAL BACKGROUND

5. Plaintiff owns the surface estate to a 22,000-acre ranch in Ward County. (Plaintiff's Final Pet. ¶ 15) Plaintiff sued Energen for trespass, breach of contract, and other claims, alleging that Energen owes Plaintiff millions of dollars for driving over Plaintiff's private roads in order to access Energen's oil and gas wells. (*Id.* ¶¶ 49, 54, 57)

6. Regarding actual damages, Plaintiff claims it is entitled to recover from Energen the "fair market value of Energen's" alleged unlawful use of Plaintiff's roads, which Plaintiff alleges is \$4,022,400. (*Id.* ¶ 58) But Plaintiff also seeks to recover punitive damages from Energen as a result of "Energen's intentional and willful conduct" in driving over Plaintiff's private properties and roads. (*Id.* ¶ 61) Plaintiff also claims that Energen's invitees have left feces, soiled t-shirts, and toilet paper on Plaintiff's property. (*Id.* ¶ 45)

7. For the reasons discussed below, Plaintiff has no evidence and no clear and convincing evidence that is sufficient to satisfy the legal standards for the imposition of punitive damages. Summary judgment on this damages claim therefore is proper.

IV. ARGUMENT

A. No evidence summary judgment standard.

8. Under Texas Rule of Civil Procedure 166a(i), a party without the burden of proof may seek summary judgment on the ground that, after adequate time for discovery, there is no evidence to support one or more essential elements of the nonmovant's claim or defense. TEX. R. CIV. P. 166a(i); *see Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex.2009); *Harris v.*

Ebby Halliday Real Estate, Inc., 345 S.W.3d 756, 759 (Tex. App. -- El Paso 2011, no pet.). The Court is required to grant the motion unless the nonmovant produces evidence raising a genuine issue of material fact as to each challenged element. TEX. R. CIV. P. 166a(i); *Harris*, 345 S.W.3d at 759. The United States Supreme Court has ruled that, on summary judgment, the court should “bear in mind the actual quantum and quality of proof necessary to support liability,” here clear and convincing evidence of gross negligence and malice. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986) (“[I]n ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden.”)²

9. There has been an adequate time for discovery: this case has been pending for more than one year, extensive discovery (including written discovery and depositions) has already occurred, and the case is set for trial on January 13, 2014. Energen’s no-evidence motion for summary judgment therefore is ripe for determination.

B. Plaintiff has no evidence and no clear and convincing evidence of the type of conduct required to support an award of punitive damages.

10. The standards for recovering punitive damages are well established and are codified in Chapter 41 of the Civil Practice and Remedies Code. Section 41.003 provides in relevant part:

(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.

² See *Petri v. Kestrol Oil & Gas Properties, L.P.*, 878 F. Supp. 2d 744, 766-67 (S.D. Tex. 2012) (applying Texas substantive law and applying the “clear and convincing” evidentiary burden in ruling on a summary judgment motion against the plaintiff’s gross negligence claim).

- (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.³

TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(a)-(b). Summary judgment is proper because Plaintiff cannot raise a genuine issue of material fact that the harm about which Plaintiff complains resulted from fraud, malice, or gross negligence.

11. To begin with, Plaintiff does not even allege -- much less can it raise a genuine issue of material fact -- that, by allegedly trespassing on Plaintiff's private roads, Energen's conduct constituted fraud.⁴(Plaintiff's Final Pet. ¶ 61) Rather, Plaintiff alleges that Energen, "as a trespasser committing an intentional and willful tort, acted with conscious indifference, *malice*, and/or *gross negligence* toward Cowboy Country" *Id.* (emphasis added). Plaintiff, however, cannot raise a fact issue as to either malice or gross negligence.

1. Plaintiff has no evidence and no clear and convincing evidence of malice.

12. The Texas Civil Practice and Remedies Code defines "malice" as "a specific intent by the defendant to cause substantial injury or harm to the claimant." TEX. CIV. PRAC. &

³ In 1995, the Texas "Legislature passed . . . sweeping tort reform to the substantive and procedural law governing punitive damages. Chapter 41 was significantly rewritten to provide defendants dramatic protection from punitive-damage awards . . ." *In re Jacobs*, 300 S.W.3d 35, 49 (Tex. App. -- Houston [14th Dist.] 2009, orig. proceeding) (citations omitted) (Sullivan, J., concurring); see *Mobil Oil Co. v. Ellender*, 968 S.W.2d 917, 921 n.2 (Tex. 1998) (discussing 1995 legislative changes to Chapter 41). "In 2003, the Legislature further eroded a plaintiff's ability to recover punitive damages as a part of comprehensive tort-reform legislation." *In re Jacobs*, 300 S.W.3d at 50 (Sullivan, J., concurring); see *Seber v. Union Pacific R. Co.*, 350 S.W.3d 640, 655 n.9 (discussing 2003 legislative changes to Chapter 41). Accordingly, cases involving punitive damages that pre-date those changes and which employ different standards for imposing punitive damages are not relevant to this case. See, e.g., *Kinder Morgan N. Tex. Pipeline v. Justiss*, 202 S.W.3d 427 (Tex. App. -- Texarkana 2006, no pet.) (distinguishing a 1982 punitive damages case because the Texas Supreme Court had subsequently adopted a heightened standard of review for exemplary damages). For this reason (among others), Plaintiff's reliance on *Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 583-84 (Tex. 1963) is misplaced.

⁴ Plaintiff does not appear to assert fraud against Energen; however, to the extent Plaintiff claims it has done so, Energen is entitled to summary judgment on that claim for the reasons stated in this Motion.

REM. CODE ANN. § 41.001(7). In turn, “specific intent” means the actor desires to cause the consequences of his act, or he believes the consequences are substantially certain to result from it. *Seber v. Union Pac. R.R.*, 350 S.W.3d 640, 654 (Tex.App. – Houston [14th Dist.] 2011, no pet.) (affirming summary judgment against punitive damages claim). The Texas Supreme Court has recently confirmed that, in cases involving intentional torts (like the trespass claim here), the plaintiff’s evidence of malice must be more than the defendant’s mere intent to commit the tort, or else every intentional tort would warrant punitive damages. *Safeshred, Inc. v. Martinez*, 365 S.W.3d 655, 662 (Tex. 2012) (“in evaluating whether Safeshred officials specifically intended or were consciously indifferent to the prospect of substantial injury to Louis Martinez, the ‘substantial injury’ referred to in the charge must be something ‘independent and qualitatively different from the ... compensable harms associated with [the cause of action]’”) (citations omitted).

13. Plaintiff here has no evidence and no clear and convincing evidence that, by allegedly driving on Plaintiff’s private roads and leaving fecal matter on Plaintiff’s property, Energen had a specific intent to cause substantial injury or harm to Plaintiff. *See Shed, L.L.C. v. Edom Wash ‘N Dry, L.L.C.*, No. 12–07–00431–CV, 2009 WL 692609, at *8–9 (Tex.App. – Tyler Mar. 18, 2009, pet. denied) (mem.op.) (holding that proof of intent to unreasonably restrict an access easement is not proof of malice: “[w]hile blocking a more direct walking path and having a small opening in the fence for vehicular traffic might demonstrate an intent to cause injury, ... [t]he evidence remains that [the appellants] at all times provided [the appellee’s] occupants access for ingress and egress across [the appellee’s] property”); *see also Safeshred, Inc.*, 365 S.W.3d at 662 (holding that employer’s intent to fire employee for reporting safety violations was insufficient evidence of malice to support punitive damages).

2. Plaintiff has no evidence and no clear and convincing evidence of gross negligence.

14. Plaintiff also cannot meet its summary judgment burden by adducing clear and convincing evidence that Energen acted with gross negligence. In connection with punitive damages, “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.

TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(11) (A)-(B).

15. Plaintiff’s single allegation of gross negligence against Energen is in paragraph 61 of its Final Petition, where Plaintiff baldly claims that Energen acted with gross negligence in trespassing on Plaintiff’s private property. (Plaintiff’s Final Pet. ¶ 61) Trespass, however, is an *intentional* tort. *Redburn v. Garrett*, No. 13-12-00215-CV, 2013 WL 2149699, at *6 (Tex.App. - Corpus Christi May 16, 2013, pet. denied). Setting aside this fundamental defect in Plaintiff’s pleading, Plaintiff cannot raise a fact issue on either the objective or the subjective element of gross negligence.

16. As to the *objective* element of gross negligence, the Texas Supreme Court has made clear that “extreme risk” is not a remote possibility of injury or even a high probability of minor harm, but rather the likelihood of *serious injury* to the plaintiff.” *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 921 (Tex. 1998) (emphasis added); *see also Z.A.O. v. Yarbrough Drive Center, J.V.*, 50 S.W.3d 531, 543 (Tex. App. -- El Paso 2001, no pet.) (same and reversing punitive damage award due to the lack of “evidence of the type of extreme degree of danger

contemplated by the Legislature”). In other words, the “extreme degree of risk” prong of gross negligence, sufficient to support exemplary damages, is a function of the magnitude of injury and the probability of injury. *KPH Consolidation, Inc. v. Romero*, 102 S.W.3d 135, 144 (Tex.App. -- Houston [14th Dist.] 2003), *aff’d*, 166 S.W.3d 212 (Tex.2005). The harm to be anticipated from the conduct must be extraordinary harm such as “death, grievous physical injury, or financial ruin.” *Celanese Ltd. v. Chem. Waste Mgmt., Inc.*, 75 S.W.3d 593, 600 (Tex.App. -- Texarkana 2002, pet. denied). The type of conduct that Plaintiff alleges Energen committed here simply does not constitute an “extreme degree of risk,” and Plaintiff has no evidence and no clear and convincing evidence to raise a genuine issue of material fact on this objective component of gross negligence.

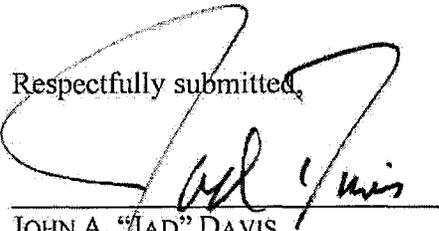
17. Plaintiff also cannot adduce any clear and convincing evidence of the *subjective* element of gross negligence -- *i.e.*, Energen’s subjective awareness of the purported “risk” involved. Under this element, “actual awareness means that the defendant knew about the *peril*, but its acts or omissions demonstrated that it did not care.” *Ellender*, 968 S.W.2d at 921 (emphasis added). Plaintiff has not even *alleged* that there was a “risk” of any “peril” when Energen allegedly trespassed on Plaintiff’s private roads. Plaintiff therefore cannot adduce sufficient evidence to raise a genuine issue of material as to the subjective element of gross negligence. *See, e.g., Agrium U.S., Inc. v. Clark*, 179 S.W.3d 765, 767-69 (Tex. App. -- Amarillo 2005, pet. denied) (focusing on the subjective element of gross negligence and reversing a jury award of punitive damages).

18. In sum, Plaintiff has no evidence and no clear and convincing evidence that Energen engaged in the type of conduct for which punitive damages may be legally imposed

under controlling Texas law -- fraud, gross negligence or malice. Summary judgment on Plaintiff's claim for punitive damages against Energen is therefore appropriate.

V. PRAYER

For the foregoing reasons, Defendant Energen Resources Corporation prays that the Court grant this no-evidence motion for partial summary judgment on Plaintiff's claim for punitive damages against Energen based on fraud, gross negligence, or malice, render judgment that Plaintiff take nothing on its claim for punitive damages against Energen, and grant Energen such other relief to which it may be entitled.

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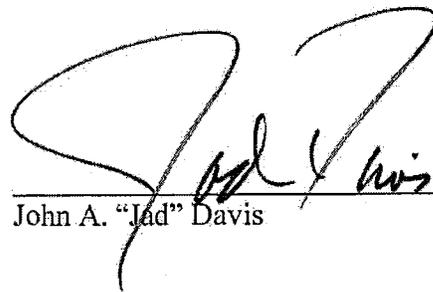
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