Tort—Creditor Harassment—Presenting a Fact Question to the Jury for Unreasonable Collection Efforts. *Whatley v. K-Mart Discount Stores*, 451 S.W.2d 568 (Tex. Civ. App.—Houston 1970, writ ref'd n.r.e.).

In July, 1966, Orletta Whatley of 5834 Northridge began receiving bills from a local K-Mart store addressed to *Ovella* Whatley of 5834 Ridgeway. The charge slips were made to *Ovella* Whatley of 3007 Los Palomas, Apartment 4. For eleven months, Mrs. Whatley received telephone calls from both local and national collection personnel and bills to collect the account. During this time, she had contacted the local store and had been continuously assured that the matter would be corrected. Ultimately, K-Mart discovered that the bills were in fact being charged by Hazel Baker of 5834 Ridgeway. Mrs. Whatley brought suit against K-Mart for unreasonable attempts to collect a debt which she did not owe.[1] She sought recovery of $25,000 actual damages and $10,000 exemplary damages. At the close of the evidence, the trial court refused to direct a verdict for K-Mart and submitted the case to the jury on eight special issues. The jury, unable to reach a verdict, was discharged, and the court granted K-Mart's renewed motion for a directed verdict. The motion alleged that:

> 1) there is no evidence that K-Mart breached any duty owed to the plaintiff or 2) no evidence that it committed any act or omission amounting to negligence as to the plaintiff and 3) no evidence that any alleged act or omission on its part was a proximate cause of any injuries or damages allegedly sustained by the plaintiff.[2]

The take-nothing judgment stated that the motion for directed verdict was granted but made no refrence to any specific grounds as the basis for the action. On appeal, the Houston Court of Civil Appeals held that the evidence, even when viewed in the light most favorable to the plaintiff, failed to raise a fact issue as to whether the collection efforts of the defendants were unreasonable or any fact issue as to a breach of K-Mart's duty to her. The court found that the contents of the bills were not harassing, insulting, rude or even impolite. They found that there was not a showing of a campaign of harassment or any unreasonable collection efforts. The court found that the evidence did not raise any fact issue in support of her claim of harassment or a calculated plan to cause her injury. The court noted that the Texas Supreme Court in *Ware*

1. Central Adjustment Bureau, a collection agency, was also a party defendant. The court granted its motion for a directed verdict. The court of appeals found there were not facts in the pleadings or evidence by which Central could have been liable to the plaintiff.

2. 451 S.W.2d at 570.

v. Paxton stated that "[it is] necessary that the lender carry on a campaign of harassment in order to entitle the borrowers to *actual* damages, much less *exemplary* damages."[3] The court stated that it found no such campaign in this case.

Texas has recognized the tort of unreasonable collection efforts.[4] When the creditor exceeds reasonable collection efforts in the collection of a debt owed him, the debtor or the non-debtor from whom the creditor attempts to recover the debt[5] may recover actual damages or both actual and exemplary damages depending on the nature of the collection efforts. These "unreasonable" efforts have been defined as such "efforts which a person of ordinary prudence in the exercise of ordinary care on his part would not have exercised under the same or similar circumstances."[6]

Exemplary damages may be recovered where the unreasonable collection efforts are "malicious or willful" as distinguished from being merely "unreasonable".[7] "Malice" has been defined as "ill will or bad or evil motive or such gross indifference of the rights of another as will amount to a willful or wanton act done intentionally and without just cause or excuse."[8] Exemplary damages may include compensation for inconvenience, reasonable attorney's fees and other losses too remote to be considered under actual damages.[9]

Which damages, if any, are awarded depends on the selection of the special issues for the particular case. A debtor may select issues which he cannot prove and thus defeat any recovery which could have been allowed under the facts of the case. To illustrate, a debtor may seek only actual damages but request a definition of unreasonable collection efforts which require proof of malice which is not necessary in a suit for

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3. 359 S.W.2d 897 (Tex. 1962).

4. Duty v. General Fin. Co., 154 Tex. 16, 273 S.W.2d 64 (1954), Wright v. E-Z Fin. Co., 267 S.W.2d 602 (Tex. Civ. App.—Dallas 1954, writ ref'd n.r.e.). For a discussion of the whole scope of the tort of unreasonable collection efforts, see 46 TEXAS L. REV. 950 (1968).

5. In the case of Moore v. Savage, 359 S.W.2d 95 (Tex. Civ. App.—Waco), writ ref'd n.r.e., 362 S.W.2d 298 (Tex. 1962) (per curiam), the non-debtor did recover. In that situation the employer of the debtor proved that she suffered physical and emotional illness as a result of the collection efforts directed toward her employee and, at times, at herself. The creditor made calls to the place of employment and demanded payment of the debtor or the employer.

6. Moore v. Savage, 359 S.W.2d 95 (Tex. Civ. App.—Waco), writ ref'd n.r.e., 362 S.W.2d 298 (Tex. 1962) (per curiam).

7. Dennis v. Dial Fin. & Thrift Co., 401 S.W.2d 803 (Tex. 1966); Ware v. Paxton, 359 S.W.2d 897 (Tex. 1962); Signature Indorsement Co. v. Wilson, 392 S.W.2d 484 (Tex. Civ. App.—Texarkana 1965, writ ref'd n.r.e.); Western Guar. Loan Co. v. Dean, 309 S.W.2d 857 (Tex. Civ. App.—Dallas 1957, writ ref'd n.r.e.).

8. Ware v. Paxton, 359 S.W.2d 897, 898 (Tex. 1962).

9. *Id.*

actual damages. Likewise, the suit may be for the recovery of actual and exemplary damages and the instruction may be so worded that if the debtor can prove only actual damages he can recover nothing. This is because there were no issues to allow recovery on the lesser degree of proof required for actual damages alone. To demonstrate, in the case of *Montgomery Ward & Co. v. Brewer*,[10] the case went to the jury with an instruction that required proof of malice or willfulness as a condition to any recovery.[11] The debtor did not ask that instructions also be included that would have provided him with only recovery of actual damages if he could not meet the burden for exemplary damages. He had to prove a willful or malicious course of harassment just to show "unreasonable collection efforts." A preferable method was used in the case of *Moore v. Savage*.[12] In that case the jury awarded both actual and exemplary damages, but the court entered judgment only for actual damages.[13] The court could do that under the charge because the debtor had chosen an instruction for actual damages which did not require any proof of the elements of exemplary damages. Recovery of exemplary damages was conditioned on the issues for actual damages as another ground of recovery. In *Moore*, the unreasonable collection efforts were defined in terms of ordinary prudent man standards while in *Brewer* they were in terms of an intentional harm.[14] As pointed out by the court of appeals in *Brewer*, the standard was such that evidence of negligence could not be considered. Facts which might have afforded recovery and which were considered in *Moore* could not be considered.[15]

These same problems can be seen in *Whatley*. Mrs. Whatley was

10. 416 S.W.2d 837 (Tex. Civ. App.—Waco 1967, writ ref'd n.r.e.).

11. The instruction given in the case was:

> by the term 'unreasonable collection efforts' is meant a course of harassment on the part of a creditor which is willful, wanton and malicious and is intended to inflict mental anguish and resulting bodily harm.

There, however, was not an objection to this instruction so its correctness was not before the court. *Id.* at 838.

12. 359 S.W.2d 95 (Tex. Civ. App.—Waco), writ ref'd n.r.e., 362 S.W.2d 298 (Tex. 1962) (per curiam).

13. The jury awarded $850.00 as exemplary damages but in answering the issues they found no malice or reckless disregard; therefore, there were no grounds under the instructions for recovery of the exemplary damages. It is for this reason that when the recovery sought is for actual as well as exemplary damages the issues must be complete in themselves—that is, there must be issues for actual damages that do not carry with them the heavy burden of proof of *Brewer*, and then issues relating to exemplary damages as well.

14. That is, they are willful, wanton and malicious and intended to inflict mental anguish and resulting bodily harm.

15. In *Brewer*, there was evidence of negligence in the repeated attempts to collect, indications of inefficiency, and a general indication of carelessness. The court of appeals stated that the acts indicated a highly inefficient and negligent organization.

seeking both actual and exemplary damages, and her special issues were only in terms of proof of exemplary damages, that is, intentional acts.[16] Under such circumstances, she could not recover actual damages without proof of grounds for exemplary damages. Such a conclusion eliminates the existence of an issue seeking damages for unreasonable collection efforts based on the reasonable man standard.[17] The courts concluding statement in the case shows that all the grounds were combined:

> K-Mart's security officer may have been slow in making known to its credit department what he had learned about the identity of the person who was causing the problem to both the plaintiff and to K-Mart, and K-Mart's collection efforts may have been inefficient, but the plaintiff has failed to show that they were unreasonable, willful, wanton, malicious or that they were intended to cause mental anguish or bodily harm to her.[18]

Since the special issues seemed to be a problem in *Whatley*, the following special issues are suggested as a guide in understanding the problem and attempting to avoid the result of *Whatley*.

ISSUE NO. 1

Do you find from a preponderance of the evidence that ____________, through its agents, servants, or employees made any unreasonable collection efforts against ____________, from on or about ____________?

"Unreasonable collection efforts" means efforts which a person of ordinary prudence in the exercise of ordinary care on his part would not have exercised under the same or similar circumstances.[19]

Answer "We do" or "We do not".

Answer ____________.

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16. Special issue number 2 was: Do you find from a preponderance of the evidence that after such notice, if any, was given, Defendant acted with reckless disregard to the health and welfare of Plaintiff?

17. The only issue relating to reasonable man was one inquiring whether Mrs. Whatley was negligent in failing to notify the police of the conduct of K-Mart.

18. 451 S.W.2d at 573.

19. Moore v. Savage, 359 S.W.2d 95 (Tex. Civ. App.—Waco), writ ref'd n.r.e., 362 S.W.2d 298 (Tex. 1962) (per curiam). This case upheld a recovery of actual damages using negligence as its basis and holding that willful and wanton conduct was not needed. Negligent conduct of the defendant which resulted in physical illness and mental or emotional pain was sufficient for recovery of actual damages. This case was followed by United Fin. & Thrift Corp. v. Bain, 400 S.W.2d 302 (Tex. 1966) (per curiam), and Employees Fin. Co. v. Lathram, 369 S.W.2d 927 (Tex. 1963), but in neither *Moore* nor the above cases was the definition of unreasonable collectin efforts based on negligence properly before the court so that it could be considered. The supreme court did state in *Moore* that it was more accurate to speak of unreasonable collection efforts rather than negligent collection efforts.

ISSUE NO. 2

Do you find from a preponderance of the evidence that such unreasonable collection efforts were a proximate cause of any physical illness or injury to ________________?

Answer "We do" or "We do not".

Answer ________________.

ISSUE NO. 3

What sum of money, if any, if paid now in cash do you find from a preponderance of the evidence would reasonably compensate ________________ for the mental or emotional pain, if any, physical illness, if any, and loss of compensation, if any, which you find from a preponderance of the evidence resulted from the occurence in question?[20]

Answer in dollars and cents, if any.

Answer ________________.

ISSUE NO. 4

Do you find from a preponderance of the evdence that the collection efforts, if any, made by ________________ against ________________ were made with a purpose of causing ________________ mental or emotional pain and suffering and loss of work?[21]

Answer "We do" or "We do not".

Answer ________________.

ISSUE NO. 5

Do you find from a preponderace of the evidence that the collection efforts, if any, of the ________________ were made with malice as that term is herein defined?

"Malice" means ill will or bad or evil motive or such gross indifference of the rights of another as will amount to willful or wanton acts done intentionally and without just cause or excuse.[22]

Answer "We do" or "We do not".

Answer ________________.

ISSUE NO. 6

Do you find from a preponderance of the evidence that such unreasonable collection efforts, if any, were made with reckless disregard of the health and of the welfare of ________________.[23]

Answer "We do" or "We do not".

Answer ________________.

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20. Advance Loan Serv. v. Mandik, 306 S.W.2d 754 (Tex. Civ. App.—Dallas 1957, no writ).

21. Allison v. Simmons, 306 S.W.2d 206 (Tex. Civ. App.—Waco 1957, writ ref'd n.r.e.).

22. Ware v. Paxton, 359 S.W.2d 897 (Tex. 1962). While at first reading it may appear that the issues on malice and reckless disregard conflict with the issue on unreasonable collection efforts, it will not if it is remembered that this is not an issue on negligence itself. This is the way the cases have defined unreasonable collection efforts. The only conflict would be if the jury answered special issue number 1, NO, and then answered special issue number 5, YES. A finding of unreasonable collection efforts would be required or the issue of malice would be useless.

23. Moore v. Savage, 359 S.W.2d 95 (Tex. Civ. App.—Waco), writ ref'd n.r.e., 362 S.W.2d 298 (Tex. 1962) (per curiam).

ISSUE NO. 7

What sum of money, if any, do you find from a preponderance of the evidence should be awarded plaintiff as exemplary damages for the malicious collection efforts, if any, of ________________?[24]

"Exemplary damages" means such damages as may be allowed where acts complained of are wantonly and maliciously done with intent to injury the complaining party or with a reckless disregard of the injurious consequences of his acts to others. Such damages may include compensation for inconvenience, reasonable attorney's fees and other losses too remote to be considered under actual damages.[25]

Answer in dollars and cents, if any.

Answer ________________.

When only actual damages are sought the first three issues submit the necessary elements for recovery. If the debtor is also seeking exemplary damages then the issues four through seven are needed. Note that these issues separate the two recoveries so that failure to prove the elements for recovery of exemplary damages will not preclude recovery of actual damages. Likewise the instruction for unreasonable collection efforts does not contain any elements of exemplary recovery. As stated in *Moore*, "[w]illful and malicious conduct are prerequisites to plaintiff's recovery of exemplary damages, but not to actual damages. Negligent conduct of defendant which results in physical illness and mental or emotional pain, supports an award of actual damages."[26]

Would *Whatley* have been decided differently if there had been an issue included in the terms of the reasonable man standard for unreasonable collection efforts? The court by holding that Mrs. Whatley failed to raise a fact issue as to whether the collection efforts were unreasonable and by stating that she failed to show "a calculated plan to bring pressure on her, to worry her, of libel, any damage to her reputation, security or right of privacy or any threats on the part of K-Mart,"[27] was requiring a campaign of harassment instead of a duty

24. Houston-American Life Ins. Co. v. Tate, 358 S.W.2d 645 (Tex. Civ. App.—Waco 1962, no writ). Another definition was used in the case of Allison v. Simmons, 306 S.W.2d 206 (Tex. Civ. App.—Waco 1957, writ ref'd n.r.e.), it was: "Compensation allowed by law in addition to actual damages by way of punishment, and as an example for the good of the public, and may also include compensation for inconvenience, reasonable attorney's fees, and other losses too remote to be considered under actual damages."

25. Ware v. Paxton, 359 S.W.2d 897 (Tex. 1962).

26. Moore v. Savage, 359 S.W.2d 95 (Tex. Civ. App.—Waco), writ ref'd n.r.e., 362 S.W.2d 298 (Tex. 1962) (per curiam).

27. 451 S.W.2d at 573.

measured in terms of a reasonable and prudent man. Such a requirement is consistent with the dictum in *Ware v. Paxton*:

> [We consider it] necessary that the lender carry on a campaign of harassment in order to entitle the borrowers to actual damages, much less exemplary damages.[28]

While this is a valid requirement it overlooks the benefit brought about by the decision in *Moore* that "[w]illful and malicious conduct are prerequisites to plaintiff's recovery of exemplary damages, but not to actual damages."[29] That court held that there could be recovery where the collection efforts were not willful and malicious. The test would be whether a man of ordinary prudence in the exercise of ordinary care would have exercised the same collection efforts. The evidence viewed in this light could have provided recovery in *Whatley*.

The argument could be made that *Ware* and the course of harassment required thereunder could equally apply in the situation for actual damages as indicated by the previous test. The court does not so limit itself however. It reviews the evidence by combining the requirement of a course of harassment and the malicious efforts and finds no campaign of harassment nor that the acts were unreasonable, willful, wanton, or malicious or intended to cause injury. The cases tend to lump the two together and actual damages are thus easily lost. The use of the *Moore* rule avoids this trap.

Since one of the issues was not based on the ground of a reasonable and prudent man and the issues were so worded that Mrs. Whatley ultimately was required to prove actual and exemplary damages together which she could not do, she lost. She could not show a willful or intentional course of conduct, however, this is not to say that she would not have shown negligent acts of the defendant which resulted in injury.

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28. 359 S.W.2d 897 (Tex. 1962).

29. 359 S.W.2d 95 (Tex. Civ. App.—Waco), writ ref'd n.r.e., 362 S.W.2d 298 (Tex. 1962) (per curiam).