DECEPTIVE TRADE PRACTICES AND WARRANTIES

AWARD OF DAMAGES FOR MENTAL ANGUISH UPHELD

CA Partners v. Spears, 274 S.W.3d 51 (Tex. App.—Houston [14th Dist.] 2008).

FACTS: In 2005, CA Partners ("CAP") foreclosed on a promissory note secured by a deed of trust on Spears's home. After the foreclosure, CAP tried to evict Spears from his home. However, the eviction proceedings were dismissed when Spears notified the court that the deed of trust incorrectly described Spear's property as being on another lot. CAP then filed suit, and sought reformation of the deed and judicial foreclosure. Spears counterclaimed, alleging, among other claims, violations of the Deceptive Trade Practices Act ("DTPA") and violations of the Fair Debt Collection Practices Act ("FDCPA"). Ultimately, the trial court found that CAP had violated the DTPA and FDCPA, and awarded Spears damages, including mental anguish. CAP appealed and argued that there was insufficient evidence to support mental anguish damages under the DTPA.
HOLDINGS: Reversed in part and affirmed in part (affirmed as to mental anguish claim).
REASONING: If he etablishes a "knowing" violation of the DTPA, a plaintiff may recover mental anguish damages upon a showing of either direct evidence of the nature, duration, and severity of his mental anguish, establishing a substantial disruption in his daily routine, or evidence of a high degree of mental pain and distress that is more than mere worry, anxiety, vexation, embarrassment, or anger. The court noted that several Texas courts have held that evidence of a claimant's physical and emotional state, coupled with an inability to eat and sleep, constitutes legally and factually sufficient evidence to support the award of mental anguish damages.

The court held that Spears's testimony was legally sufficient to show the nature, severity, and duration of his mental anguish. Spears had testified that he was "devastated" at the thought of being evicted as well as having a limited time to fight the eviction. Further, Spears established that his mental anguish began from the time the original eviction suit began and continued throughout the appeals process. Spears also testified that he was unable to eat or sleep, and that his mental anguish caused a substantial disruption in his life.

The court also held that Spear's testimony was factually sufficient to support the trial court's mental anguish award because CAP had not presented any evidence contradicting Spear's testimony. The court held that Spear's had presented evidence both legally and factually sufficient to support an award of mental anguish damages under the DTPA and upheld the award of damages for mental anguish.

COURT REJECTS DISAPPOINTED BUYER'S SUIT OF USED MERCEDES DESCRIBED AS "GORGEOUS"

Nigro v. Lee, 882 N.Y.S.2d 346 (N.Y. App. Div. 2009).

FACTS: Defendant Maxwell Lee sold his mother's 1995 Mercedes Benz through an eBay auction to Joseph Nigro. Lee's eBay advertisement described the car as "gorgeous" and also stated, "[t]he vehicle is [being] sold as it is and conditions are disclosed to the best of my knowledge." Nigro had an inspection performed on the car that revealed the car had been damaged in an accident and had been painted, the upholstery was stained, the undercoating was worn out and parts were rusted. He also received estimates for electrical and sensory repairs, throttle repairs, and a new catalytic converter. The court granted Lee's motion for summary judgment dismissing the complaint and denied Nigro's cross motion for summary judgment. Nigro appealed.
HOLDING: Affirmed.
REASONING: The court found that the trial court properly dismissed Nigro's cause of action for breach of warranty. While the ad did describe the car as "gorgeous," this generalized expression was merely the seller's opinion of the car and constituted no more than "puffery" which should not have been relied upon as an inducement to purchase the vehicle, particularly in light of the fact that this was a used car transaction.

The court also found that it was proper to dismiss Nigro's assertion that Lee fraudulently misrepresented that the car was gorgeous and virtually unblemished despite their knowledge that it had been used extensively, had been in an accident and was in need of significant repairs. In order to establish fraud, a party must establish that a material misrepresentation, known to be false, has been made with the intention of inducing its reliance on the misstatement, which cause it to reasonably rely on the misrepresentation, as a result of which it sustained damages.

Regarding the reliance element of fraud, the court noted that if the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations. The court noted that Nigro could have contacted Lee about the vehicle or its history, procured a vehicle history report, or hired a mechanic to inspect and/or examine the car before purchasing it. The court ruled that Nigro failed to prove that his reliance on Lee's representations was justifiable, and, therefore, his causes of action sounding in fraud were properly dismissed.

EVIDENCE INSUFFICIENT TO FIND DTPA VIOLATION BASED ON DECEPTION REGARDING "STRUCTURAL" REPAIRS

Robertson v. Odom, ____ SW.3d ____ (Tex. App.—Houston [14th Dist.] 2009).

FACTS: Chris Robertson purchased a townhome from Bradley Odom in 2003. Unknown to Robertson, the townhome previously suffered water damage from a rainstorm in 2002. After repairs were made to the damage and to the stucco exterior, Odom listed the townhome for sale, and filled out a "Seller's Disclosure Notice," as mandated by state law. In his "Seller's Disclosure Notice," Odom did not indicate that water damage occurred, and he represented that he was unaware of "Other Structural Repairs" to the property.

After purchasing the townhome, Robertson discovered that the stucco exterior on the townhome was faulty. Further investigation revealed that latent defects in the stucco were causing more water penetration into the townhome, causing further damage. Robertson asserted that the repairs to fix the water damage from the storm were structural in nature and should have been disclosed in the "Seller's Disclosure Notice."

Robertson filed suit against Odom alleging that Odom violated the Deceptive Trade Practices Act ("DTPA") because he acted deceptively in representing that no structural repairs had taken place to the townhome prior to the purchase. Odom moved for directed verdict on some of the claims based on the DTPA, which was granted by the trial judge. On the remaining issues, a jury found Odom did not violate the DTPA by not disclosing the rain damage to the townhome as a "structural" repair. Robertson appealed.

HOLDING: Affirmed.

REASONING: The court stated that Robertson's issues on appeal turn on whether Odom acted deceptively in failing to disclose previous "structural" repairs in his "Seller's Disclosure Notice" as a part of the sale of the townhome. The court reasoned that although the townhome underwent substantial repairs to the sheetrock and other components of the home, those repairs were not "structural" in nature as defined by the Texas Property Code.

The court first rejected Robertson's more expansive reading of the term "structural" from Webster's dictionary. In order to determine the definition of "structural" in the context of residential construction, the court looked to the plain and common meaning of the statute's words. This included looking elsewhere in the property code to ascertain how the word was used in similar contexts. Finding the definition of "structural" to mean the "load-bearing portion of the residence," the court found the repairs conducted as a result of the rain damage were not structural because they did not affect the load-bearing portion of the home. Since the repairs done to the townhome were not structural, the court reasoned that the repairs were not required to be listed in Odom's "Seller's Disclosure Notice." The court found that the evidence was factually insufficient to find a DTPA violation based on deception regarding "structural" repairs and affirmed the judgment of the trial court.

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INSURANCE

INSURER HAS NO DUTY TO DEFEND AND NO LIABILITY UNDER A POLICY UNLESS AND UNTIL THE INSURED COMPLIES WITH THE NOTICE-OF-SUIT CONDITIONS AND DEMANDS A DEFENSE

Jenkins v. State & County Mut. Fire Ins. Co., ____ S.W.3d ____ (Tex. App.—Forth Worth 2009).

FACTS: Garry Jenkins filed a suit to collect a default judgment under an automobile liability policy. Jenkins sued Mark, Deborah, Richard, and L & G Pipe for negligence. State and County Mutual Fire Insurance Company had issued a business auto policy to Deborah as named insured. The policy's "loss conditions" provided the insured must immediately send copies of any demand, notice, summons, or legal paper received concerning the claim or suit. All defendants, except Mark, forwarded the suit papers to State and County, and State and County defended them under the policy. Jenkins was unable to effect personal service on Mark. He obtained an order authorizing service on Mark by publication. Mark did not file an answer. Jenkins' counsel informed State and County and sent them copies of the suit papers. The trial court rendered a default judgment against Mark. A jury found that Mark was 100% responsible, and the trial court rendered a take-nothing judgment against the other defendants. Jenkins then sued State and County, seeking to collect the judgment. The trial court granted summary judgment for State and County. The appellate court reversed and remanded, holding that a genuine issue of material fact as to who owned the truck precluded summary judgment. On remand, the trial court granted State and County's summary judgment and denied Jenkins. Jenkins appealed.

HOLDING: Affirmed.

REASONING: The court relied on three Texas Supreme Court opinions: *Weaver v. Hartford Accident & Indem. Co.*, 570 S.W.2d 367 (Tex. 1978); *Nat'l Union Fire Ins. Co. v. Crocker*, 246 S.W.3d 603 (Tex. 2008); *Harwell v. State Farm Mut. Auto. Ins. Co.*, 896 S.W.2d 170 (Tex. 1995).

In *Weaver,* Busch did not forward suit papers to Hartford. The court held that because Busch had never forwarded the suit papers to Hartford or requested a defense, Hartford had no duty to defend him, and it affirmed the court of appeals' take-nothing judgment in favor of Hartford.

In *Harwell*, Leatherman's attorney notified State Farm of the suit in writing and discussed the case with State Farm's attorney, but Harwell never forwarded any suit papers to State Farm nor demanded a defense. The Texas Supreme Court held that until State Farm received notice of suit, it had no duty to undertake Hubbard's defense. The court also held that the failure to notify an insurer of a default judgment against its insured until after the judgment has become final and nonappealable prejudices the insurer as a matter of law.

In *Crocker*, the supreme court concluded that there is no duty to provide a defense absent a request for coverage. The court concluded that the rule from *Weaver, Harwell,* and *Crocker* was clear: an insurer has no duty to defend and no liability under a policy unless and until the insured in question complies with the notice-of-suit conditions and demands a defense. The court stated that this is true even when the insurer knows that the