

RECENT DEVELOPMENTS

DECEPTIVE TRADE PRACTICES AND WARRANTIES

DTPA UNCONSCIONABILITY DOES NOT REQUIRE RELIANCE

Bever Properties, L.L.C. v. Jerry Huffman Custom Builder, L.L.C., 355 S.W.3d 878 (Tex. App.—Dallas 2011).

FACTS: Jerry Huffman Custom Builders (“Huffman”) purchased real property for the purpose of developing an office condominium. Huffman sold condominium units to Drs. Kirwan and Cheung, and Bever Properties (“Bever”). Bever subsequently leased its unit to Dr. Taylor, a dentist. Bever and Taylor (together, “Appellants”) desired to construct prominent signage at the location of the unit for Taylor’s dental business. Multiple disputes arose between Appellants and Drs. Kirwan and Cheung, and between Appellants and the office condominium association, Plano Parkway Office Condominiums (“PPOC”) because of the planned signage.

Appellants filed suit against Huffman, Kirwan, Cheung, and PPOC (together, “Appellees”), alleging that Bever purchased the unit based, in part, upon assurances that prominent signage could be placed on the property. Appellants alleged that Appellees’ actions, representations, and failures to disclose information misled Appellants regarding signage and thwarted Appellants’ placement of the desired signage on the office condominium. After Appellants filed its case against PPOC, PPOC filed suit against Bever seeking an injunction to enjoin Appellants from violating use and occupancy restrictions and for attorney’s fees, and the two suits were consolidated. Appellees filed no-evidence and traditional motions for summary judgment on Appellants’ claims against them. The trial court granted the motion for summary judgment. On appeal, Bever contested the summary judgment granted to Huffman.

HOLDING: Reversed.

REASONING: Appellants claimed multiple violations of the Deceptive Trade Practices Act (“DTPA”) by Appellees, including that they engaged in an unconscionable action or course of action in violation of section 17.50(a)(3) of the business and commerce code. This section provides that a consumer may maintain an action where any unconscionable action or course of action by any person constitutes a producing cause of economic or mental anguish damages. Appellants asserted that Appellees’ motion for summary judgment failed to address the “distinct” claim that Appellees engage in an unconscionable action or course of action. The court agreed, finding that section 1750(a)(3) contains no reliance requirement. Because Appellees’ motions for summary judgment did not address Appellants’ distinct claims of violation of section 17.50(a)(3) of the business and commerce code, the court reversed the trial court’s summary judgment in favor of Appellees on Appellants’ claim of violation of this section.

HOME INSPECTOR PERFORMS PROFESSIONAL SERVICES AND IS EXEMPT FROM DTPA

Retherford v. Castro, ___ S.W.3d ___ (Tex. 2012).

FACTS: Wesley Retherford, a Texas Real Estate Commission-

licensed (“TREC”) professional real estate inspector, performed a home inspection on a residence owned by Frank and Terri Castro. Retherford completed the inspection and noted that the roof and attic were water damaged, as were two other rooms in the home. Retherford concluded that the water damage was not a serious issue, although he included photos in the inspection report. He also offered advice on how to fix ventilation problems in the attic, which he determined to be the cause of the water damage. Several months later, three inches of rain fell and water began running down the wall of the Castro residence in the area that the water damage was noted in the inspection report. Upon inspection, the Castros noticed clearly loose screws in their roof. The roof was repaired but not entirely replaced, and several hundred loose screws were found. The Castros enlisted the help of a second TREC-licensed professional home inspector, who found long-term water damage and determined that it was caused by the leaking roof, not ventilation issues.

The Castros sued Retherford for DTPA violations and negligent misrepresentations. The trial court only entered a judgment for DTPA violations, finding that Retherford represented that his services had characteristics, uses, and benefits which they did not have and that he represented that his services were of a particular standard or quality when they were not.

HOLDING: Reversed.

REASONING: The DTPA was designed to “protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection.” TEX. BUS. & COM. CODE ANN. § 17.44(A) (WEST 2011). However, an exemption from liability exists for those who render professional services when the essence of that service is based on providing advice, judgment, or opinion. A professional service is one that arises “out of acts particular to the individual’s specialized vocation.” *Nast v. State Farm Fire & Cas. Co.*, 82 S.W.3d 114, 122 (Tex. App.—San Antonio 2002). Professions included in the DTPA exemption are not statutorily defined or established with any certainty.

A real estate inspection may be performed by a professional inspector, defined as “a person who represents to the public that the person is trained and qualified to perform a real estate inspection and who accepts employment to perform a real estate inspection for a buyer or seller of real property.” TEX. OCC. CODE ANN. § 1102.001(8) (West 2004). The court found that a professional real estate inspector fit the following qualifications: (1) engages in work involving mental or intellectual rather than physical labor; (2) requires special education to be used on behalf of others; and (3) earns profits dependent mainly on those considerations. The court also determined that the contents of the inspection report constituted the inspector’s opinion as to the condition of the house, as it has been statutorily defined as such. § 1102.001(9). Further, the essence of an inspector’s service is providing that opinion. The court concluded that because the service provided by a professional real estate inspector is essentially an opinion and not a representation of fact, the DTPA professional services exemption applies.