DECEPTIVE TRADE PRACTICES AND WARRANTIES

CORPORATE AGENT INDIVIDUALLY LIABLE UNDER DTPA

DTPA DAMAGES MAY BE BASED ON COST OF REPAIRS OR DIMINUTION IN VALUE

DTPA MENTAL ANGUISH DAMAGE AWARD AFFIRMED

MBR & Assocs., Inc. v. Lile,____S.W.3d____(Tex. App.—Fort Worth 2012).

FACTS: Appellee, William Lile, hired Appellants, MBR Guaranteed Foundation Repair and Marion Brian Ramon, to repair the foundation of his home. MBR and Ramon represented that they: (1) employed master plumbers and engineers; (2) carried liability insurance to cover any potential property damage; and (3) would have a master plumber and engineer oversee the work.

During the repair work, MBR negligently lifted the foundation, causing severe damage to the property. At the time, no engineer or master plumber was supervising. A representative who falsely claimed to be a master plumber was sent to fix the damage. In his attempts to repair the damage, the representative further damaged the property and fixed nothing. Ramon informed Lile that the damage was not Ramon's fault and he would not use his insurance.

Lile sued for breach of contract, negligence, violations of the DTPA, fraud, and gross negligence. The trial court found for Lile on each cause of action and awarded damages against MBR and Ramon jointly and severally. MBR and Ramon appealed.
HOLDING: Affirmed.
REASONING: The court found a corporation did not insulate individuals operating it from personal liability when, *inter alia*, the individuals used the corporation as a mere tool, business conduit of another, for personal purposes, or undercapitalization. Ramon's testimony revealed that he considered himself and MBR to be "one and the same." The two entities shared the same phone number and office, MBR did not file separate tax returns, and Ramon's individual property was not kept separate from the corporation's. The court found ample evidence in the record indicating that Ramon was MBR's alter ego, and therefore affirmed the lower court's finding that Ramon was vicariously liable.

The court stated that for damages to property, if repair was feasible and did not cause economic waste, then a plaintiff could recover the cost of repair; otherwise a plaintiff would be entitled to the diminution in market value caused by the injury. The court stated, however, that a plaintiff does not have to prove both cost of repair and diminution in value; he is allowed to elect which damage model to plead or prove. The court explained that if a defendant disagreed with the application of a plaintiff's election for damages, the burden would be on the defendant to prove the other damage model was appropriate.

The court rejected MBR's argument that Lile could not recover mental anguish damages in a suit based solely on damage to real property. The court relied on *City of Tyler v Likes*, 962 S.W.2d 489 (Tex. 1997), which held "mental anguish based solely on negligent property damage is not compensable as a matter of law." *Likes* refused comment on whether mental anguish damages would have been permitted for gross negligent or intentional damages. This court found *Likes* allowed mental anguish damages for some knowing violations of statutes, like the DTPA. Likening mental anguish damages to emotional distress damages, the court held a claim of mental anguish, based solely on property damage, was contingent upon evidence of design to harm the plaintiff personally.

DTPA CLAIM IS HEALTHCARE LIABILITY CLAIM SUBJECT TO CHAPTER 74 OF THE CIVIL PRACTICE AND REMEDIES CODE

McAllen Hosps., L.P. v. Gomez,____S.W.3d____(Tex. App.—Corpus Christi 2013).

FACTS: Appellee, Arturo Gomez, was injured in an automobile collision and received treatment for his injuries at a nearby hospital. Over a year later Gomez received further treatment for his injuries at Appellant hospital, McAllen Medical Center. McAllen filed a hospital lien against Gomez for "reasonable and necessary" medical expenses incurred by McAllen in treating Gomez. Gomez brought a suit against McAllen alleging three causes of action: DTPA unconscionable action, declaratory judgment, and fraudulent-lien claim.

McAllen filed a motion to dismiss based upon Gomez's failure to file an expert report as required by Tex. Civ. P. Code §74.351. The court denied the motion and McAllen appealed.
HOLDING: Reversed in part.
REASONING: The standard of review for applicability of Chapter 74 of the Civil Practice and Remedies Code is *de novo* review. The court applied the requirements of a healthcare liability claim to each of the causes of action. Under Chapter 74, a healthcare liability claim requires three elements: (1) a physician or health care provider must have been a defendant; (2) the claim or claims at issue must have concerned treatment, lack of treatment, or a departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care; and (3) the defendant's act or omission complained of must have proximately caused the injury to the claimant.

The court held that the DTPA unconscionable action claim satisfied the first element because a hospital fit within the meaning of "healthcare provider." Next the court looked at the second element. Gomez's DTPA complaint was that the hospital billed an unreasonable amount. The court found billing to be part of administrative services; thus, satisfying the second element. The court also determined that the "injury" suffered by Gomez was within the scope of Chapter 74, because it included more than pure economic loss; the claim included damages for mental anguish. These injuries were all directly related to the hospital's billing that was in question and therefore, satisfying the third requirement. With all three requirements met, the court found that Chapter 74 applied and the lower court's denial of the motion to dismiss was in error.