DECEPTIVE TRADE PRACTICES AND WARRANTIES

MERE BREACH OF CONTRACT IS NOT A VIOLATION OF THE DECEPTIVE TRADE PRACTICES ACT

FAILURE TO COMPLETE WORK MAY CONSTITUTE A BREACH OF WARRANTY OF GOOD AND WORKMANLIKE PERFORMANCE

Continental Dredging Inc. v. De-Kaizered Inc., 120 S.W.3d 380 (Tex. App.—Texarkana 2003).

FACTS: De-Kaizered contracted with plaintiff, Continental Dredging Company ("Continental") to dredge to a uniform depth of 36 feet in front of its dock. De-Kaizered refused to pay Continental and Continental brought action against De-Kaizered for breach of contract and to seek payment for the work. De-Kaizered countersued for breach of warranty and violations of the Deceptive Trade Practices Act ("DTPA"), alleging that Continental did not dredge to 36 feet. The jury returned a verdict in favor of Continental on its breach of contract claim, and against Continental on the warranty and DTPA claims. Continental appealed the district courts monetary award, and De-Kaizered cross appealed. The court of appeals held that Continental's misrepresentations to the dock owner did not give rise to a claim under the DTPA, but that there was sufficient evidence to indicate that the company breached the implied warranty of good and workmanlike performance by not completing the work. The jury awarded Continental contract damages and awarded De-Kaizered monetary compensation for Continental's misrepresentations and for their breach of warranty. Continental appealed and De-Kaizered cross appealed.
HOLDING: Affirmed in part, reversed and rendered in part.
REASONING: Elements of a DTPA misrepresentation are: that the plaintiff is a consumer; that the defendant engaged in false, misleading, or deceptive acts; and that these acts constituted a producing cause of the consumer's damages. A mere breach of contract is not a violation of the DTPA. If the cause of action arises out of the failure to fulfill a promise, the injury is governed by contract law, not the DTPA. *Crawford v. Ace Sign, Inc.*, 917 S.W.2d 12, 14 (Tex.1996). When the injury is only the economic loss to the subject of a contract itself the action sounds in contract alone. Continental's representation that it had dredged to 36 feet occurred inside the bounds of the contract. As such, Continental's misrepresentations gave rise only to a breach of contract, not a DTPA violation for a false, misleading, or deceptive act. The court affirmed the contract damages and reversed the DTPA damages.

The Texas Supreme Court has defined "good and workmanlike manner" as the "quality of work performed by one who has the knowledge, training, or experience necessary for the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such work." *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 446 (Tex.1995). Texas courts have held that failure to complete work required to be performed under contract is a breach of the warranty of "good and workmanlike manner." *LaBella v. Charlie Thomas, Inc.*, 942 S.W.2d 127, 135 (Tex.App.–Amarillo 1997). There was ample support on the record to prove that Continental failed to dredge to a uniform depth of 36 feet. This evidence was sufficient to support the jury's verdict that Continental breached an implied warranty.

BREACH OF WARRANTY UNDER DECEPTIVE TRADE PRACTICES ACT REQUIRES AWARD OF ATTORNEYS' FEES

Elliott v. Kraft Foods of North Am., Inc., 118 S.W.3d 50 (Tex. App.—Houston [14th Dist.] 2003).

FACTS: Elliott sued Kraft Food North America ("Kraft"), alleging various causes of action arising from her biting onto a hard object in a cereal manufactured by Kraft. Elliott developed problems with her tooth, requiring surgery and other medical and dental treatment. The trial court awarded Elliott actual damages but no attorney's fees. Elliott appealed claiming that the trial court abused its discretion by failing to award her attorneys' fees for breach of an implied warranty under the Texas Deceptive Trade Practices Act ("DTPA"), because she presented conclusive evidence that Kraft breached an implied warranty of merchantability.
HOLDING: Reversed in part and remanded for determination of fees.
REASONING: To recover under the DTPA on a breach of warranty, a plaintiff must show; (1) consumer status; (2) the existence of the warranty; (3) breach of that warranty; and (4) that the breach was a producing cause of damages. Tex. Bus. & Com. Code Ann. § 17.50(a) (Vernon 2002). Consumer status is established by showing that the plaintiff sought or acquired the goods by purchase or lease and that the goods form the basis of the complaint. *See Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 351-52 (Tex. 1987). The serving of food to be consumed elsewhere is a sale of goods. An implied warranty of merchantability applies in every contract for goods, unless specifically bargained out of the agreement. An implied warranty of merchantability provides that the product is fit for its ordinary purposes. To show a breach of warranty, a plaintiff must demonstrate both that the goods are not fit and that "they suffer from a defect rendering them unfit because of a lack of something necessary for adequacy." *Church & Dwight Co., Inc. v. Huey*, 961 S.W.2d 560, 569 (Tex.App.—San Antonio). In addition, the plaintiff must prove that the goods were defective when they left the manufacturer's or seller's possession. A plaintiff alleging a claim under the DTPA is not required to prove the harm was foreseeable, only that it caused the injury and without it the injury would not have occurred. Plaintiffs who successfully prevail under §17.50 of the DTPA are entitled to reasonable and necessary attorneys' fees.

The trial court failed to file findings of fact and conclusions of law, thereby making it more difficult for the appeals court to determine if Elliot prevailed on her claim of breach of an implied warranty of merchantability. Finding a presumption that the trial court did not find such breach be-

cause it did not award attorney fees, the court found no evidence in the record to support the implied finding for Kraft on the issue. The court found conclusive evidence that the warranty existed and was breached by Kraft. Because Elliott presented conclusive evidence of consumer status as consumer under the DTPA, and the breach of an implied warranty was a producing cause of her damages, she was entitled to recover reasonable and necessary attorney fees. Tex. Bus. & Com. Code Ann. §17.50(b) (Vernon 2002). The trial court, therefore, abused its discretion by not awarding Elliott attorneys' fees.

TEXAS LAW PROVIDES IMPLIED WARRANTY OF SUITABILITY IN LEASE OF COMMERCIAL PROPERTY

"AS IS" CLAUSE DOES NOT WAIVE IMPLIED WARRANTY OF SUITABILITY

Lee v. Perez, 120 S.W.3d 463 (Tex. App.—Houston [14th Dist.] 2003).

FACTS: Perez leased two lots from Lee to operate a used car lot. The commercial lease he signed indicated that his use of the lot would be limited to the sale, financing, and insurance of automobiles. Two months later, a Houston city attorney sent Perez a letter informing him he was violating a deed restriction that limited the property to residential use and threatened a lawsuit if Perez did not shut down his business in fifteen days. Perez complied and sued Lee for breach of commercial lease. The trial court found that Lee breached the commercial lease with Perez, and awarded him $17,605 in actual damages. Lee appealed.
HOLDING: Affirmed.
REASONING: Texas law provides an implied warranty that a commercial lease is suitable for its intended commercial purpose despite the absence of an express warranty of suitability. *Davidow v. Inwood N. Porf'l Group-Phase I*, 747 S.W.2d 373, 377 (Tex. 1988). The deed to the lots contained a restriction limiting the property to residential use. Therefore, it rendered the lots unsuitable for the purpose set forth in the parties' lease. Lee argued that an implied warranty applies only to latent defects. The court, however, deferred to the trial court's implied conclusion that appellants did not inform Perez about the restriction. Lee also contended Perez was charged with constructive notice because the deed restrictions appear in the county real property records, but the court found that the records serve as constructive notice only to buyers. Otherwise, every prospective tenant would require a title opinion.

Lee also argued there was no implied warranty because a provision in the lease provided that the tenant accepted the property "as is." The court recognized that although such provisions may waive express or implied warranties, the "as is" clause in this lease did not waive an implied warranty of suitability. The clause is related to the physical condition of the property that a physical examination would reveal. The deed restriction here was not a "condition" of the premise. Lee was held to have violated an existing implied warranty of suitability.

DEFENDANT'S ATTORNEYS' FEES AWARDED BASED ON GROUNDLESS DECEPTIVE TRADE PRACTICES ACT CLAIM

Mosk v. Thomas, ____ S.W.3d ____ (Tex.App.—Houston [14th Dist.] 2003).

FACTS: Mosk gave Thomas a promissory note in a property settlement agreement when they divorced in 1997. Mosk and Thomas remarried in 1999, and divorced again in 2000. The second divorce settlement terminated the first promissory note in return for a second promissory note for $47,500, secured by a real property lien note in favor of Thomas. Thomas also executed a special warranty deed conveying her interest in the couple's real property to Mosk. The real property lien note and a third deed of trust, both executed only by Mosk, contained a proviso that required Thomas' permission for Mosk to transfer the lien to another item if he sold the property.

Mosk put the property up for sale and agreed to close with the buyer on a specific date. Mosk's attorney contacted Thomas and her attorney, demanding Thomas release Mosk from the lien on the property, but Thomas refused. When Mosk could not complete the property sale by the agreed closing date due to Thomas' refusal, the buyer sought recovery of damages. Mosk sued Thomas for breach of contract, fraud in a real estate transaction, indemnification against the buyer, Deceptive Trade Practices Act ("DTPA") violations, a declaratory judgment, and punitive damages. Thomas responded with a general denial and counterclaims for common law fraud, fraudulent misrepresentation, intentional infliction of emotional distress, breach of contract, and DTPA violations. The trial court denied Thomas' summary judgment motion and granted Mosk summary judgment on all of Thomas' claims except her DPTA cause of action. Ultimately, the trial court ruled that Mosk recover nothing from Thomas, and that Thomas recover attorneys' fees from Mosk. Mosk appealed.

Mosk's suit was groundless as a matter of law.

HOLDING: Affirmed.
REASONING: Thomas was entitled to attorneys' fees because Mosk's suit was groundless as a matter of law. Section 17.50(c) of the DTPA permits awarding the defendant's attorneys' fees if the court finds an action brought under the DPTA was groundless in law or fact, or was brought in bad faith. TEX. BUS. & COM. CODE ANN. (Vernon 2002). A suit is groundless when the totality of the tendered evidence fails to demonstrate an arguable basis in fact and law for the consumer's claim. *Selig v. BMW of N. Am., Inc.*, 832 S.W.2d 95, 103-04 (Tex.App.—Houston [14th Dist.] 1992).

Mosk's claim was groundless in law because he was not entitled to bring a DTPA claim, because he was not a "consumer." According to the DTPA, a "consumer" is an individual who seeks or acquires by purchase or lease, goods or services. § 17.45(4). Mosk had not acquired the property by virtue of a purchase or lease, but through a property settlement in a divorce proceeding. Mosk did not fit the statutory definition of a consumer, therefore Mosk's claim beneath the

DPTA was groundless in law, and Thomas could recover attorneys' fees.

KNOWING CONDUCT REQUIRES ACTUAL AWARENESS BY THE DEFENDANT THAT HIS CONDUCT IS UNFAIR OR DECEPTIVE

CONSUMER IS NOT ENTITLED TO RECOVERY OF ATTORNEYS' FEES WHERE A JURY AWARDS NO DAMAGES

Blue Star Operating Co. v. Tetra Technologies, Inc., 119 S.W. 3d 916 (Tex. App.—Dallas 2003).

FACTS: Plaintiff is in the business of oil and gas exploration. Plaintiff contracted with Tetra Technologies, Inc. ("Tetra") to provide fluid engineering and related services for the drilling of a well in Texas. Disputes arose between the parties regarding payment for fluid loss in the course of the drilling operations. Plaintiff brought suit against Tetra alleging, inter alia, violations of the Texas Deceptive Trade Practices Act ("DTPA"). Tetra counterclaimed for Plaintiff's failure to pay for all drilling fluids.

The jury found Plaintiff had agreed to be responsible for payment of all fluid lost at the well during drilling operations, and that Plaintiff had failed to comply with the agreement. The jury also found that under the DTPA Tetra had knowingly, but not intentionally, failed to perform services in a good and workmanlike manner and this was a producing cause of damages to Plaintiff. Plaintiff's damages, however, were held to be zero. The trial judge entered judgment for Tetra. Plaintiff then sought to amend its pleadings by adding an affirmative claim for common law breach of warranty. The trial court denied the amended pleading. Plaintiff appealed alleging the trial court erred by disallowing its post verdict amended pleadings because its common law warranty claim was identical to its DTPA claim. Plaintiff also claimed that the court erred in failing to award Plaintiff its attorneys' fees.

HOLDING: Affirmed.

REASONING: Plaintiff asserted that foreseeability is equivalent to the DTPA "knowingly" standard, that is, acting with actual awareness of conduct causing injury. The question of foreseeability asks whether the injury might reasonably have been contemplated as a result of the defendant's conduct. Under the DTPA, whether a defendant's conduct was "knowing" does not focus on whether the plaintiff's injury might reasonably have been anticipated. Instead, "knowing" conduct requires actual awareness by the defendant that his conduct is unfair or deceptive. *St. Paul Surplus Lines Ins. Co. v. Dal-Worth Tank Co.*, 974 S.W.2d 51, 53-54 (Tex. 1998). Plaintiff's amended pleading asserted new substantive matters that would have reshaped the nature of the trial. The trial court correctly disallowed the amended pleading.

Although the jury did find Tetra liable for failure to perform services in a good and workmanlike manner, and found that this failure was "knowing," it further found Plaintiff's damages for this conduct to be zero. A party is not entitled to a recovery of attorney's fees where a jury awards no damages. *Cooper v. Lyon Fin. Servs., Inc*, 65 S.W.3d 197, 209-210 (Tex. App.—Houston [14th Dist.] 2001). The trial court properly denied attorneys' fees.

STATE LAW BREACH OF WARRANTY CLAIM AGAINST MANUFACTURER OF HEAD LICE PRODUCT IS PREEMPTED BY FOOD AND DRUG ACT

Warner-Lambert Co. v. Mills, 117 S.W. 3d 488 (Tex. App.—Beaumont 2003).

FACTS: Mills sued Warner-Lambert ("Warner") for breach of an implied warranty of merchantability, alleging that Warner's nonprescription pediculicide product was ineffective to cure head lice. Mills presented no claim of personal injury, physical impairment, or property damage. Mills sought a class certification because the product was essentially the same across the country. The trial court certified the class. Warner filed an interlocutory appeal contending that the trial court lacked jurisdiction to certify the class because Federal law preempts Mills's state law cause of action.

HOLDING: Certification order vacated.

REASONING: If state law conflicts with Federal law, the state law is preempted and without effect. A federal law may preempt a state law expressly or impliedly. "The purpose of Congress is the ultimate touchstone" in every preemption case. *Retail Clerks Int'l Ass'n v. Shermerhorn*, 375 U.S. 96, 103 (1963).

The Food, Drug, and Cosmetic Act's ("FDCA") preemption provision provides that no state "may establish or continue in effect" any "requirement" that "relates to the regulation" of an over-the-counter drug "different from or in addition to, or that is not identical with a requirement" under FDCA. 21 U.S.C. §379(r). FDCA mandates that all proceedings for the enforcement of, or violations of FDCA, be brought in the name of the United States.

Federal Drug Administration ("FDA") regulations specify the active ingredients required in a nonprescription pediculicide product for it to be recognized as effective. *See* 21 C.F.F. §§330.10 & 358.601, 358.610 (2003). A new drug application to the FDA must include "substantial [scientific] evidence" that the drug is safe and effective. 21 U.S.C. §355(d). A new drug application must also include "specimens" of the labeling proposed for the drug. *Id.* §355(b)(1). If the FDA determines that the labeling of a new drug is false or misleading, the drug is deemed "misbranded," and the application will be refused. *Id.* §§352(a), 321(n), 355(d)(7). Mills's claim would attempt to prove the FDA specified ingredients were simply incorrect, and that the product should not contain those ingredients if it was to be sold in Texas to treat head lice. This litigation would impose a state requirement "different from or in addition to, or that is not identical with" a requirement under the FDCA. Mills's claim, as certified, conflicted with FDA's specific requirements for active ingredients and labeling of pediculicide drug products, and was thus preempted by the FDCA. Furthermore, the products liability exception to preemption is not available to plaintiffs disavowing any personal injury of physical impairment from use of the product.

PRIOR LAWSUIT BY SELLER AGAINST PREVIOUS OWNER DOES NOT HAVE TO BE DISCLOSED TO BUYER

Sherman v. Elkowitz, 130 S.W.3d 316 (Tex. App.—Houston [14th Dist.] 2004).

FACTS: Michael and Lori Sherman purchased a home from Patrick and Amy Shields in 1998. Richard Elkowitz, a realtor employed with Re/Max Westside Realtors ("Re/Max"), acted as the listing agent for the Shields and assisted them with the sale of the property to the Shermans. The notice issued by the Shields to the Shermans disclosed cracks in the driveway as a known defect in need of repair and treatment for termites in 1990. The Shermans had the property inspected before agreeing to purchase.

Some time after moving in, the Shermans discovered various defects in the property, and they eventually learned that, in 1994, the Shields had sued the previous owner for failing to disclose, allegedly, the same defects the Shermans discovered. Neither the alleged defects nor the previous lawsuit had been disclosed in the notice.

The Shermans brought suit against the Shields, Elkowitz, and Re/Max for statutory and common-law fraud, violations of numerous provisions of the Texas Deceptive Trade-Practices Consumer Protection Act, negligence, and gross negligence, claiming that the Shields and Elkowitz were required to disclose the alleged defects and the previous lawsuit. The trial court granted a directed verdict for Elkowitz and Re/Max, but refused to grant a directed verdict for the Shields. At the conclusion of the trial, the Shermans obtained a favorable judgment against the Shields. The Shermans appealed the directed verdict for Elkowitz and Re/Max.

HOLDING: Affirmed.

REASONING: Sellers of residential real property are required to give the purchaser written notice and disclosure of the seller's knowledge of the condition of the property. Tex. Prop. Code § 5.08(a). This notice must be in the form prescribed in the statute, or in a form that is "substantially similar." *Id.* § 5.08(b). Elkowitz provided the Shields with a three-page notice printed by the Texas Association of Realtors, and this notice appeared to be substantially similar to that prescribed by the statute. The only representation made by Elkowitz and Re/Max in the Notice was that they "had no reason to believe [the disclosure notice] to be false or inaccurate." *Kubinsky v. Van Zandt Realtors*, 811 S.W.2d 711, 714 (Tex. App.—Fort Worth 1991), held that listing realtors have no legal duty to inspect listed property for defects over and above asking the sellers if such defects exist. Although Elkowitz was named in the previous lawsuit as a person with knowledge of relevant facts, and although Amy Shields testified that Elkowitz told her that she did not need to disclose the previous lawsuit, there was no evidence that Elkowitz knew or was ever informed of the relevant specifics of the previous lawsuit.

Sellers of residential real property are required to give the purchaser written notice and disclosure of the seller's knowledge of the condition of the property.

As a matter of law, the previous lawsuit did not have to be disclosed in the notice because it was dismissed several years before the Shields put the property on the market. Although the notice required sellers to disclose their knowledge of "any lawsuits [or other legal proceedings] directly or indirectly affecting the Property," in the context of the entire notice, the question appeared to be directed to pending lawsuits. If the legislature intended for prior lawsuits to be listed, it could have included a phrase. . . . .

DEBT COLLECTION

SON OF DEBTOR IS NOT CONSUMER FOR PURPOSES OF FAIR DEBT COLLECTION PRACTICES ACT

CREDITORS OF CONSUMER ARE NOT SUBJECT TO FDCPA

Montgomery v. Huntington Bank, 346 F.3d 693 (6th Cir. 2003).

FACTS: In 1998, Montgomery's mother, Helen Smith, financed the purchase of a BMW by entering into a personal loan agreement with Huntington Bank. As collateral for the loan, Huntington Bank took a security interest in the car. Approximately one year later, Smith allegedly suffered an injury and was apparently unable to work. Despite Montgomery's repeated contention that his mother was covered by credit disability insurance that she had purchased as part of the personal loan agreement to protect her in the event of a disability, Huntington Bank sought to take possession of the BMW. Huntington Bank retained an agency, Silver Shadow, to repossess the vehicle pursuant to the terms of the loan agreement. In 2000, Silver Shadow repossessed Smith's vehicle, which was parked in Montgomery's garage. Montgomery asserted that, in the process of repossessing the car, Huntington Bank and Silver Shadow violated numerous Michigan laws, including unlawful breaking and entering, and that Silver Shadow damaged his driveway, two of his cars, and various other personal effects.

Montgomery filed suit in federal court, claiming that Huntington Bank violated various provisions of the Fair Debt Collection Practices Act ("FDCPA"). Huntington Bank moved to dismiss the complaint, arguing that Montgomery was not a "consumer" within the meaning of the statute and that Huntington Bank did not meet the statutory definition of a "debt collector" under the FDCPA. The district court granted the motions and dismissed the complaint. Montgomery appealed.