

IN THE SUPREME COURT OF TEXAS

No. 96-0986

B. MILLS LATHAM, LAW OFFICES OF B. MILLS LATHAM, P.C. AND LATHAM AND
MOSS, PETITIONERS

v.

ERNEST M. CASTILLO AND AUDONA A. CASTILLO, INDIVIDUALLY AND AS
REPRESENTATIVES OF THE ESTATE OF KAY CASTILLO, DECEASED, RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR TO THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

Argued on April 23, 1997

JUSTICE OWEN, joined by JUSTICE GONZALEZ, JUSTICE HECHT and JUSTICE ENOCH,
concurring in part and dissenting in part.

The unconscionability section of the DTPA is not a catchall provision or an open-ended supplement to the laundry list of specifically enumerated violations. Unconscionability is something more than a misrepresentation. The statute requires that the act or practice take advantage of the consumer “to a grossly unfair degree.” Until now this Court has equated unconscionability with grossly unfair, flagrant, and unmitigated conduct. It is not grossly unfair or unmitigated conduct when an attorney fails to pursue a meritless suit, even if the attorney represents to the client that suit had been filed when it had not. While such conduct is not to be condoned and would subject the attorney to disciplinary proceedings, it is not unconscionable within the meaning of the DTPA. Nor is there any evidence that the Castillos suffered actual damages as a result of Latham’s conduct.

Even assuming that mental anguish damages, standing alone, would suffice under the DTPA prior to its amendment in 1995 in a case such as this, there is no evidence that the Castillos' mental anguish was referable to Latham's misrepresentation as distinguished from the mental anguish they suffered from the deaths of their daughters and the fact that they blamed the hospital but had no proof that it was responsible. Accordingly, I dissent from that part of the Court's judgment that remands the unconscionability claims. I concur in Parts I, II B, and II C of the Court's opinion.

I

We indicated in *Willis v. Maverick*, 760 S.W.2d 642, 647 (Tex. 1988), that an attorney may be liable under the DTPA for unconscionable conduct, citing *DeBakey v. Staggs*, 612 S.W.2d 924 (Tex. 1981). However, we did not define in *Willis* or *DeBakey* what "unconscionable" meant in the context of a suit against an attorney for professional malfeasance. And in *DeBakey*, we reserved for future determination the "standard of care by which a legal malpractice claim is to be determined" in a DTPA case. 612 S.W.2d at 925.

The Court today places heavy reliance not on our decision in *Debakey*, but on that of the court of appeals in *DeBakey*, even though we expressly called into question the precedential value of the court of appeals' determination that the attorney's misfeasance rose to the level of unconscionability. *See id.* The holding today is contrary to prior decisions of this Court that have more narrowly defined what is meant by "unconscionable action" within the meaning of the DTPA.

We had the opportunity in *Chastain v. Koonce*, 700 S.W.2d 579, 583 (Tex. 1985), to consider what section 17.45(5) of the DTPA means when it says that an act or practice must “take[] advantage . . . to a grossly unfair degree” to be unconscionable. In *Chastain*, a jury had found that false statements and threats made by sellers of land to purchasers and to residents in the area were unconscionable. The court of appeals reversed, finding no evidence of unconscionable conduct. We agreed and held that evidence that a defendant “simply . . . took unfair advantage” is not enough. *Id.* at 582. The resulting unfairness must be “grossly unfair,” which means “glaringly noticeable, flagrant, complete and unmitigated.” *Id.* at 584.

In its decision in this case, the Court seems to equate “unconscionability” with “deception” when it says that Latham’s misrepresentation “is the difference between negligent conduct and deceptive conduct.” __ S.W.2d at __. But if every misrepresentation and deceptive act could also constitute an unconscionable act, then the laundry list violations in section 17.46(b), which include numerous specific representations and deceptive acts, would be redundant. *See* TEX. BUS. & COM. CODE § 17.46(b)(1)-(25).

More than a decade ago, we held that not every misrepresentation of fact, even an intentional one, constitutes unconscionable conduct. *See Chastain*, 700 S.W.2d at 582-83. We explained that “[a]lthough knowledge and intent may make an act unconscionable, there must be some other means of distinction as well.” *Id.* at 582. The test is whether the consumer was taken advantage of to a grossly unfair degree. *Id.* “This should be determined by examining the entire transaction and not by inquiring whether the defendant intended to take advantage of the consumer or acted with knowledge or conscious indifference.” *Id.* at 583. The misrepresentation in this case cannot be distinguished from those in *Chastain*, which we held were not unconscionable under the DTPA.

The transaction between the Castillos and Latham did not take advantage of the Castillos and was not grossly unfair. Latham certainly gained no advantage. There is no evidence that he was ever paid a fee or that the Castillos agreed to pay a fee other than one contingent on the success of the suit against the hospital. And how were the Castillos disadvantaged if their claims against the hospital had no merit? While Latham's conduct was wrong and unethical, it is not actionable under section 17.45(5) of the DTPA because it is not grossly unfair to represent that a suit that has no merit has been filed when it has not.

II

As alluded above, the Castillos have failed to offer any evidence that they were harmed by their attorney's misrepresentation. Harm is a prerequisite to recovery under the DTPA. The pre-1995 version of the DTPA, under which the Castillos sued, required a consumer to demonstrate that the unconscionable act was "a producing cause of actual damages."¹ The definition of "unconscionable" also embodies a requirement that a loss result from the conduct:

¹ Act of May 16, 1979, 66th Leg., R.S., ch. 603, § 4, 1979 Tex. Gen. Laws 1327, 1329 (amended 1995) (current version at TEX. BUS. & COM. CODE § 17.50(a)(1)(3)).

The DTPA was amended in 1995 and now provides:

(a) A consumer may maintain an action where any of the following constitute a producing cause of economic damages or damages for mental anguish:

* * *

(3) any unconscionable act or course of action by any person[.]

* * *

(b) In a suit filed under this section, each consumer who prevails may obtain:

(1) the amount of economic damages found by the trier of fact. If the trier of fact finds that the conduct of the defendant was committed knowingly, the consumer may also recover damages for mental anguish, as found by the trier of fact, and the trier of fact may award not more than three times the amount of economic damages

TEX. BUS. & COM. CODE § 17.50.

“‘Unconscionable action or course of action’ means an act or practice which, to a person’s *detriment* . . . takes advantage . . . to a grossly unfair degree.” Former TEX. BUS. & COM. CODE § 17.45(5) (emphasis added).² There is no evidence of actual damages in this case. There is no evidence that, had the suit been timely filed as Latham represented that it had, the Castillos would have recovered. The Castillos offered no evidence that their claims against the hospital had any merit at all. To the contrary, the Castillos testified that they had consulted numerous lawyers before they met with Latham and had been turned down by all of them. One of the attorneys they attempted to hire advised them in writing that the case had no merit.

The Castillos contend that the loss of a “day in court” was enough, and the Court implicitly accepts this argument when it observes that the Castillos “lost the opportunity to prosecute their claim against the hospital for Kay’s death.” __ S.W.2d at __. The ability to have one’s claim heard is a valuable right in our system of justice, but it does not follow that liability and damages should be imposed in every case in which a party is deprived of the opportunity to present a claim. If there is no evidence that a claim had merit, failing to file a suit on that claim does not fall within the types of conduct that the Legislature intended to reach under the DTPA. Even when there is a tangible, measurable loss, not all improper conduct falls within the ambit of the DTPA. For example, we have long recognized that “mere breach of contract, without more, does not constitute a ‘false, misleading or deceptive act.’” *Ashford Dev., Inc. v. USLIFE Real Estate Servs. Corp.*, 661 S.W. 2d 933, 935 (Tex. 1983); *see also Crawford v. Ace Sign, Inc.*, 917 S.W.2d 12, 14 (Tex. 1996) (holding misrepresentation that ad would be placed in yellow pages was mere breach of contract and not actionable under the DTPA).

² Act of May 10, 1977, 65th Leg., R.S., ch. 216, §1, 1977 Tex. Gen. Laws 600, 600 (amended 1995).

The “day-in-court” argument fails for an even more fundamental reason. The Castillos had the opportunity to prove in their suit against Latham that the hospital had committed professional malpractice or had otherwise breached a duty to Kay that resulted in injury to her and ultimately in her death. They had their day in court.

The Court’s failure to require the Castillos to prove that they lost a *meritorious* claim because of Latham’s representation is also at odds with overarching Legislative policy as expressed in other statutes. It seems incongruous to me that the Legislature intended to authorize the recovery of damages and potential treble damages under the DTPA for failing to file a suit that had no merit, even if the attorney falsely stated that suit had been filed. Legislative policy discourages the filing of meritless suits, particularly medical malpractice suits. For example, the Legislature requires a plaintiff asserting a medical malpractice claim to come forward within 180 days after suit is filed with an expert’s report that sets forth the standard of care, how that standard was breached, and causation. *See* TEX. REV. CIV. STAT. art. 4590i, § 13.01. The statute directs that the suit must be dismissed if a report is not filed, and the plaintiff is obligated to pay the other side’s attorney’s fees and court costs. *See id.* § 13.01(e). Although this statute was enacted after the events in this case took place and would not have been applied to the Castillos’ suit against the hospital, it demonstrates that the Legislature demands that there be some merit to a medical malpractice claim before it can be asserted. There is no indication that the Castillos’ claims against the hospital had any merit at all. Yet, the Court would allow the recovery of damages from Latham when the suit he failed to file bordered on frivolous.

III

Lacking any evidence of actual damages, the Court concludes that mental anguish damages alone will support a recovery under the pre-1995 version of the DTPA and that there is some evidence of compensable mental anguish damages. I agree with the Court that actual damages within the meaning of the DTPA means those available at common law. *See* __ S.W.2d at __; *see also Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931, 939 (Tex.), *cert. denied*, 449 U.S. 1015 (1980). But the mental anguish that the Castillos unquestionably suffered was not caused by Latham's misrepresentation, and accordingly, I would not reach the issue of whether, in this type of case, the Castillos could recover mental anguish for Latham's conduct absent a showing of actual damages. When the Castillos' testimony is considered in context, it can be seen that their mental anguish stemmed from the unfortunate deaths of their daughters and the Castillos' desire to hold the hospital accountable, not from Latham's misrepresentation.

The Court has blurred the distinct line between the modicum of anguish the Castillos suffered over what Latham said and did, which is not compensable under our decision in *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 444 (Tex. 1995), and the mental anguish damages caused by the deaths of their daughters that unquestionably would be recoverable in a suit against one who had caused those deaths or in a suit against one who, through legal malpractice, prevented the Castillos from recovering for their anguish. The emotions aroused by Latham's misrepresentation are of a wholly different character from the mental anguish caused by the loss of their twins. We held in *Parkway*:

When a challenge is made to the sufficiency of the evidence to go to the jury or to support the jury's finding, . . . [t]he reviewing court must distinguish between shades and degrees of emotion. These distinctions are critical under our substantive law because evidence of lesser reactions cannot support an award of mental anguish damages.

Under this admittedly nebulous definition and the traditional standard of review, it is nevertheless clear that an award of mental anguish damages will survive a legal sufficiency challenge when the plaintiffs have introduced direct evidence of the nature, duration, and severity of their mental anguish, thus establishing a substantial disruption in the plaintiffs' daily routine.

Id. at 444.

Latham's misrepresentation did not result in "a substantial disruption in the plaintiffs' daily routine." *Id.* Nor did the Castillos offer evidence of the "nature, duration, and severity of their anguish" from Latham's misrepresentation as required by *Parkway*. *Id.* We held in *Parkway* that testimony by the plaintiffs that the flooding of their home changed their lives, that the husband would become very quiet when he came home, and that he was very disturbed over the flooding did not surmount the evidentiary hurdle for legally sufficient proof of mental anguish damages. *Id.* at 445.

When the record in this case is consulted, it is beyond dispute that the only mental anguish that meets the *Parkway* standard was not caused by Latham. It was caused by the deaths of the Castillos' daughters and the nonexistence of any evidence that the hospital was responsible. Ernest Castillo testified:

Q When he told you that it was your fault, in effect, that the statute of limitations had gone by, how did that make you feel? What effect did that have on you?

A Well, it made me throw up.

Q Made you sick?

A Sick, nervous, mad.

Q Tell the jury how you felt about that, what it did to you.

A [I]t just hurt me a lot because I trusted in him and I—and if I had known, I would have looked for more lawyers. And he promised me he was going [to] do it, and I trusted him to do it. Because [of] what they had done to my daughters, I would have never stopped; what the doctors done, I would have never stopped.

* * *

Q Did it make you nervous?

A Made me nervous that I couldn't get my hands on Driscoll [Hospital]. He let them go, and they did do a lot of damage to my girls.

* * *

A I love my kids so much. What those doctors done, they shouldn't have done, and [Latham] knew it. I had told him, and he said he knew it, too. He said, "I'll help you, Ernest, I will help you," and I trusted him to help me, and he let it go.

Q. Did it break your heart?

A. Yes, sir. I lost two daughters.

Audona Castillo testified:

Q How did this make you feel, that is, what effect did this information have on you?

A I—my heart was broken. I was devastated, I felt physically ill. After—excuse me. After running around so many months in pursuit of a lawyer and trying to beat the statute of limitations and having confided in this man and him having promised me that he could handle it. And my daughter's death, and her disabilities, and the pain she suffered by being blind and—and all the other damages, the seizures, and her very short life of two years; and then he tells me that I don't have anything to hold on to. And it's not as if he could bring her back, but I needed some justice, at least, and I still feel the same way.

The Castillos were distraught because they wanted a court to determine that the hospital was responsible for the pain, suffering, and deaths of their children. But if Latham had filed suit, there is no evidence that a court would have found the hospital responsible or even that there was a fact question for the jury. There was no evidence that the Castillos' desire to establish the hospital's

culpability and to require it to respond in damages for negligence would have been satisfied. Further, even assuming that all the Castillos wanted was to prove that the hospital was at fault rather than to recover damages from the hospital, the Castillos had the opportunity in this suit against Latham to present the same case against the hospital that they would have presented had Latham filed suit. The Castillos have not shown that Latham's failure to file suit prevented them from vindicating their position that the hospital was to blame for their daughters' deaths.

In construing the DTPA to allow recovery for Latham's improper conduct, the Court has ignored well-established principles of law and the record in this case and has failed to effectuate the intent of the Legislature.

* * * * *

I agree with the Court that because the Castillos failed to prove any proper measure of damages under their claims for breach of contract and fraud, the court of appeals erred in remanding those claims. But I would hold that the trial court did not err in directing a verdict against the Castillos on all of their claims, including unconscionability, and accordingly, I would reverse the judgment of the court of appeals and render judgment that the Castillos take nothing.

Priscilla R. Owen
Justice

OPINION DELIVERED: June 23, 1998