

IN THE SUPREME COURT OF TEXAS

=====
No. 96-0986
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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
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Argued on April 23, 1997

JUSTICE SPECTOR delivered the opinion of the Court, in which CHIEF JUSTICE PHILLIPS,
JUSTICE BAKER, JUSTICE ABBOTT, and JUSTICE HANKINSON join.

JUSTICE OWEN filed a concurring and dissenting opinion, in which JUSTICE GONZALEZ,
JUSTICE HECHT, and JUSTICE ENOCH joined.

In this case, we consider whether an attorney's affirmative misrepresentations to his clients that cause the clients to lose their day in court can constitute unconscionable action under the Deceptive Trade Practices–Consumer Protection Act. The court of appeals answered in the affirmative. __ S.W.2d __. We affirm the court of appeals' remand of the DTPA claim, and we reverse and render judgment that the Castillos take nothing on their remaining claims.

I.

On January 3, 1986, Audona Castillo prematurely gave birth to twin daughters, Kay and Sara, at Taft Hospital. Born with birth defects, the girls were immediately transferred to Driscoll

Foundation Children's Hospital where both underwent surgery. Sara died approximately one week later. The Castillos then filed a medical malpractice suit against Driscoll Hospital on Sara's behalf and received a \$6,000,000 default judgment. Later, their attorney, Rene Rodriguez, settled the case for \$70,000.

Kay Castillo, the surviving twin, died on February 14, 1988. In December 1989, the Castillos hired B. Mills Latham to file a legal malpractice claim against Rodriguez for settling the default judgment and to pursue a medical malpractice claim against Driscoll Hospital for Kay's death. While Latham settled the legal malpractice claim against Rodriguez for \$400,000, the statute of limitations ran on the Castillos' medical malpractice claim on February 14, 1990 without suit being filed. The Castillos then sued Latham for legal malpractice because Latham failed to file the medical malpractice action for Kay's death within the two-year statute of limitations. The Castillos also sued Latham for unconscionable action under the DTPA because Latham affirmatively represented to them that he had filed and was actively prosecuting the medical malpractice claim. Finally, the Castillos alleged that Latham wrongfully misrepresented himself, breached the contract of employment, and was negligent.

After the Castillos presented their case to a jury, the trial court granted a directed verdict for Latham that the Castillos take nothing. The court of appeals reversed and remanded, holding that the Castillos had presented some evidence to prevent a directed verdict on their DTPA claim. The court of appeals also remanded the "remaining theories of recovery" — fraudulent misrepresentation and breach of contract — without discussion. __ S.W.2d at __. The court of appeals affirmed the directed verdict on the negligence claim, however, because the Castillos did not present evidence

that but for Latham’s negligence, the medical malpractice suit would have been successful.¹ *Id.* at —.

The central question before us is whether the Castillos have presented some evidence to support each element of their DTPA cause of action. We hold that they have done so.

II.

The trial court granted a directed verdict against the Castillos on all claims. Accordingly, we must view the evidence in the light most favorable to them and indulge every reasonable inference in their favor. *Harbin v. Seale*, 461 S.W.2d 591, 592 (Tex. 1970). If reasonable minds could differ on controlling facts, the trial court errs in refusing to submit the issues to the jury. *Collora v. Navarro*, 574 S.W.2d 65, 68 (Tex. 1978). We consider the DTPA claim first.²

A.

The Castillos alleged Latham’s conduct constituted an “unconscionable action or course of action” that violated the DTPA. TEX. BUS. & COM. CODE § 17.50(a)(3). Under section 17.45, “unconscionable action or course of action” means “an act or practice which, to a person’s detriment: (A) takes advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree; or (B) results in a gross disparity between the value received and consideration paid, in a transaction involving transfer of consideration.” *Id.* § 17.45(5). The Castillos have relied only

¹ The Castillos have not appealed the court of appeals’ disposition of the negligence cause of action and therefore, it is not before this Court.

² The Legislature amended the DTPA in 1995. Act of May 19, 1995, 74th Leg., R.S., ch. 414, 1995 Tex. Gen. Laws 2988. Unless otherwise noted, all DTPA references will be to the pre-amendment provisions applicable when this suit was filed.

Under the amendments effective September 1, 1995, lawyers may not be sued under the DTPA unless they engage in one of the following acts: (1) an express misrepresentation of a material fact that cannot be characterized as advice, judgment, or opinion; (2) a failure to disclose; (3) an unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion; or (4) breach of an express warranty that cannot be characterized as advice, judgment, or opinion. TEX. BUS. & COM. CODE § 17.49(c).

on subsection (A) in asserting that Latham's actions were unconscionable. To be actionable under subsection (A), the resulting unfairness must be "glaringly noticeable, flagrant, complete and unmitigated." *Chastain v. Koonce*, 700 S.W.2d 579, 584 (Tex. 1985).

The Legislature's stated public policy in enacting the DTPA is to "protect consumers against false, misleading, and deceptive business practices [and] unconscionable actions." TEX. BUS. & COM. CODE § 17.44. To achieve that goal, the Legislature has mandated that the Act shall be "liberally construed and applied." *Id.* Therefore, we must view Latham's actions with this legislative directive in mind.

Attorneys can be found to have engaged in unconscionable conduct by the way they represent their clients. *See, e.g., DeBakey v. Staggs*, 605 S.W.2d 631, 633 (Tex. Civ. App.--Houston [1st Dist.] 1980), *writ ref'd n.r.e. per curiam*, 612 S.W.2d 924 (Tex. 1981) (finding an attorney unconscionably took advantage of a client to a grossly unfair degree when the attorney knowingly failed to obtain in a timely manner a name change for the client's minor child). The Castillos assert that Latham acted unconscionably in representing that he was actively prosecuting their medical malpractice claim for Kay's death when in fact he was not.

The Castillos depended on Latham to file suit against the hospital for Kay's death. As Mrs. Castillo testified, "You trust in a professional because they know more than you." The record reveals, and Latham's attorney conceded at oral argument before this Court, that there is some evidence that Latham told the Castillos he had filed the medical malpractice claim when in fact he had not. Although he affirmatively represented to them that he was actively pursuing the claim, Latham never did file the suit and limitations ran. As a result, the Castillos lost the opportunity to prosecute their claim against the hospital for Kay's death.

Viewing Latham's actions in the light we must, his actions are similar to the attorney's conduct in *DeBakey*. Latham took advantage of the trust the Castillos placed in him as an attorney. Therefore, the Castillos have presented some evidence that they were taken advantage of to a grossly unfair degree.

Latham argues, however, that the Castillos' DTPA claim is essentially a dressed-up legal malpractice claim. Therefore, he asserts, the Castillos must prove that they would have won the medical malpractice case for Kay's death in order to recover. Because they did not present any evidence on this, Latham argues, the Castillos cannot recover. We disagree.

The legislative intent in enacting the DTPA was to provide plaintiffs a remedy where the common law fails. *See Woo v. Great Southwestern Acceptance Corp.*, 565 S.W.2d 290, 298 (Tex. Civ. App.--Waco 1978, writ ref'd n.r.e.). Section 17.43 states that the remedies provided by the Act "are *in addition* to any other procedures or remedies provided for in any other law." TEX. BUS. & COM. CODE § 17.43 (emphasis added). Moreover, the Legislature mandates that the DTPA is to be "liberally construed and applied to promote its underlying purposes." *Id.* § 17.44. Recasting the Castillos' DTPA claim as merely a legal malpractice claim would subvert the Legislature's clear purpose in enacting the DTPA — to deter deceptive business practices.

If the Castillos had only alleged that Latham negligently failed to timely file their claim, their claim would properly be one for legal malpractice. However, the Castillos alleged and presented some evidence that Latham affirmatively misrepresented to them that he had filed and was actively prosecuting their claim. It is the difference between negligent conduct and deceptive conduct. To recast this claim as one for legal malpractice is to ignore this distinction. The Legislature enacted the DTPA to curtail this type of deceptive conduct. Thus, the DTPA does not require and the

Castillos need not prove the “suit within a suit” element when suing an attorney under the DTPA. The Castillos have presented some evidence of unconscionable action.

It is not enough that the Castillos merely prove an unconscionable action or course of action by Latham, however. Latham’s unconscionable action must have been the producing cause of actual damages. TEX. BUS. & COM. CODE § 17.50(a). Latham argues that the Castillos cannot recover mental anguish damages under the DTPA without first proving an economic injury. We disagree.

Section 17.50(a) of the DTPA, as it appeared when this suit was filed, indicated that “[a] consumer may maintain an action where any of the following constitute a producing cause of *actual damages*.” TEX. BUS. & COM. CODE § 17.50(a) (emphasis added).³ We have stated that the term “actual damages,” as used in the DTPA, means those recoverable at common law. *Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931, 939 (Tex. 1980). It is axiomatic that mental anguish damages *are* actual damages recoverable at common law for “some common law torts . . . , and by analogy for knowing violations of certain statutes such as the Deceptive Trade Practices Act.” *City of Tyler v. Likes*, 962 S.W.2d 489, 495 (Tex. 1997) (citations omitted). Therefore, the Castillos do not have to first prove that they have suffered economic damages in order to recover mental anguish damages. The Castillos have satisfied their burden on the damages element of a DTPA cause of action if they have presented some evidence of mental anguish.

In *Parkway Co. v. Woodruff*, 901 S.W.2d 434 (Tex. 1995), we established the evidentiary requirements for recovery of mental anguish damages. To survive a legal sufficiency challenge,

³ In 1995, the Legislature amended section 17.50(a) to provide that “[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 action or course of action by any person.” Act of May 19, 1995, 74th Leg., R.S., ch. 414, § 5, 1995 Tex. Gen. Laws 2988, 2992 (codified at TEX. BUS. & COM. CODE § 17.50(a)(3)).

plaintiffs must present “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. If there is no direct evidence, the Court will apply “traditional ‘no evidence’ standards to determine whether the record reveals any evidence of ‘a high degree of mental pain and distress’ that is ‘more than mere worry, anxiety, vexation, embarrassment, or anger’ to support any award of damages.” *Id.* (citation omitted).

The plaintiffs in *Parkway* alleged that they were “hot,” “very disturbed,” “not pleased,” and “upset.” *Id.* at 445. We held that these allegations were “mere emotions” that did not rise to a compensable level. *Id.*; *see also Saenz v. Fidelity & Guar. Ins. Underwriters*, 925 S.W.2d 607, 614 (Tex. 1996) (holding that plaintiff’s allegations that she “worried . . . a lot” did not rise to a compensable level under *Parkway*); *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338, 342 (Tex. 1995) (Spector, J., concurring) (stating that plaintiff’s allegations that she was “very upset” by the offending conduct did not rise to the level of any evidence of compensable mental anguish required under *Parkway*). In each of these cases, the plaintiffs’ evidence of mental anguish amounted to “mere emotions.” The mental anguish testimony in this record, however, exceeds that in *Parkway*, *Saenz*, and *Stoker*.

For example, at trial Ernest Castillo testified that because Latham told them he had filed the medical malpractice suit when in fact he had not:

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 It just — it 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.

Audona Castillo testified at trial:

A I — my heart was broken. I was devastated, I felt physically ill.

In sum, there is some evidence that Latham’s conduct caused the Castillos a “high degree of mental pain and distress” that a jury could consider. We are confident that the trial judge will instruct the jury to differentiate between the mental anguish the Castillos suffered because of their daughters’ deaths, which is not compensable in this suit, and that they may have suffered because of Latham’s actions, for which the Castillos may be compensated.

The Castillos have presented some evidence of each element of their DTPA cause of action and the trial court erred in directing a verdict against them on the DTPA claim. We therefore remand this claim to the trial court for a new trial.

B.

The Castillos also complained in the court of appeals that the trial court erred in granting a directed verdict on their fraudulent misrepresentation and breach of contract claims. The court of appeals sustained these points of error without discussion and remanded them to the trial court. The

court of appeals erred by not discussing issues necessary to final disposition of the appeal. *See* TEX. R. APP. P. 47.1. Upon our consideration of these issues, we find no evidence to support these claims.

Under common law, two measures of damages are available for fraudulent misrepresentation: (1) the “out of pocket” measure, which is the “difference between the value of that which was parted with and the value of that which was received”; and (2) the “benefit of the bargain” measure, which is the difference between the value represented and the value actually received. *Formosa Plastics Corp. USA v. Presidio Eng’rs & Contractors, Inc.*, 960 S.W.2d 41, 49 (Tex. 1997); *W.O. Bankston Nissan, Inc. v. Walters*, 754 S.W.2d 127, 128 (Tex. 1988) (citing *Leyendecker & Assocs., Inc. v. Wechter*, 683 S.W.2d 369, 373 (Tex. 1984)). A plaintiff may recover either the out of pocket or the benefit of the bargain damages, whichever is greater. *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 817 (Tex. 1997). The Castillos have not pleaded or proved either of these types of damages.

The Castillos presented no evidence of the amount they expected to recover on the medical malpractice claim for Kay’s death but for Latham’s actions. *See Cosgrove v. Grimes*, 774 S.W.2d 662, 665–66 (Tex. 1989). Accordingly, they presented no evidence to support benefit of the bargain damages. The Castillos also did not demonstrate any out of pocket expenses paid to Latham. Therefore, the Castillos have not presented any evidence of recoverable common-law fraudulent misrepresentation damages, and the trial court correctly granted a directed verdict on this claim.

C.

Finally, the Castillos have alleged a breach of contract claim against Latham for his failure to prosecute the medical malpractice claim for Kay’s death. However, because the only damages alleged, mental anguish, are not recoverable under a breach of contract cause of action, this claim

also fails. *See Stewart Title Guar. Co. v. Aiello*, 941 S.W.2d 68, 72 (Tex. 1997).

III.

We hold that the Castillos have presented some evidence to support each element of their DTPA cause of action. Therefore, we affirm the court of appeals' remand of the DTPA cause of action. We nevertheless reverse and render judgment that the Castillos take nothing on their fraudulent misrepresentation and breach of contract claims.

ROSE SPECTOR
JUSTICE

OPINION DELIVERED: JUNE 23, 1998