

a jury could not value several common grocery items cannot be correct. While we may be offended by the court of appeals' decision to award \$150,000 in attorney's fees when the trial court awarded only \$12,000 in actual damages and clearly indicated the requested fees were excessive, the Court need not abandon legal analysis to correct the court of appeals' error. In my view, we can resolve this matter within the confines of existing procedure and established law. Accordingly, I respectfully dissent.

The Court's analysis of Texas Rule of Civil Procedure 279 begins in the wrong place. Certainly a court may not use rule 279 to deem a finding contrary to a judgment, but here we do not know exactly what judgment was rendered. The Court ignores the patent ambiguity of the trial court's judgment, which contains components of both a DTPA recovery and a negligence recovery, and then strains to create its own negligence judgment when the trial court's judgment was not clearly one or the other. Because we do not know what judgment the trial court rendered, we cannot decide, and the court of appeals should not have decided, whether a deemed finding in support of Low's DTPA claim was appropriate.

Low pleaded and submitted evidence on two theories of recovery: DTPA violation and common-law negligence. *Cf. Cambridge Mut. Fire Ins. Co. v. Newton*, 638 S.W.2d 75, 80-81 (Tex. App. – Dallas 1982, writ ref'd n.r.e.) (applying rule 279 to deem omitted issue in support of a judgment when only one ground of recovery was alleged in the petition and submitted to the jury). The trial court here determined that the evidence supported the jury's verdict, except the jury's award for past psychological treatment. Yet, the trial court's judgment does not clearly identify the basis for Low's recovery. On one hand, the trial court awarded mental-anguish damages but reduced them by Low's percentage of responsibility, which suggests a negligence judgment. On the other hand, Low recovered actual damages

in full, not reduced by his percentage of responsibility, for his spoiled food, which suggests the judgment was for a DTPA violation – not negligence. To complicate matters, the trial court did not award attorney’s fees in its judgment, even though it stated in a letter to the parties that it intended to award Low attorney’s fees, but in an amount less than he requested. However, even if the trial court intended to award a negligence judgment but simply neglected to reduce the spoiled-food damages by Low’s percentage of responsibility, we cannot reach that conclusion based on the record before us.

Because the trial court determined that evidence existed to support all findings except with respect to past psychological treatment, Low could have recovered damages based on either his DTPA or negligence claim. Texas law prohibits a plaintiff obtaining more than one recovery for the same injury; therefore a plaintiff must elect his or her remedy. *Gunn Infiniti, Inc., v. O’Byrne*, 996 S.W.2d 854, 862 (Tex. 1999); *Waite Hill Servs., Inc. v. World Class Metal Works, Inc.*, 959 S.W.2d 182, 184 (Tex. 1998). If the plaintiff does not choose a remedy, the trial court should render the judgment offering the greatest recovery. *Birchfield v. Texarkana Mem’l Hosp.*, 747 S.W.2d 361, 367 (Tex. 1987). Because the jury found that GSU had acted negligently and unconscionably with respect to the same injuries, Low should have chosen his remedy. Low in fact moved for a corrected judgment to award him DTPA damages. But even if he had not done so, the trial court should have rendered judgment on the theory that provided the more favorable judgment. And we do not know what the more favorable judgment would be until the trial court determines the appropriate amount of actual damages under either theory.

Under either a DTPA or negligence judgment, however, Low should receive actual damages for his spoiled food. (Of course, if the court renders a negligence judgment, the court must reduce the damages

award by the percentage of responsibility the jury attributed to Low. *See* TEX. CIV. PRAC. & REM. CODE § 33.012(a).) When a plaintiff suffers damage to personal property as a result of an injury, the plaintiff may recover for that loss. *Pasadena State Bank v. Isaac*, 228 S.W.2d 127, 128 (Tex. 1950). That loss is measured by the diminution in market value of the property before and after the injury, as determined at the place of injury. *Id.*; *Rosenfield v. White*, 267 S.W.2d 596, 599 (Tex. Civ. App. – Dallas 1954, writ ref’d n.r.e.). When market value does not exist, replacement value is the means of assessing damages. *Rosenfield*, 267 S.W.2d at 599. In some situations, replacement value does not properly measure damages because it may represent an economic gain to the plaintiff. *Crisp v. Security Nat’l Ins. Co.*, 369 S.W.2d 326, 328 (Tex. 1963); *see Pasadena State Bank*, 228 S.W.2d at 128. This may be true for household goods, clothing, and personal effects. *Crisp*, 369 S.W.2d at 328. The measure of damages for the destruction of such items is the “actual worth or value of the articles to the owner for use in the condition in which they were at the time of the [injury] excluding any fanciful or sentimental considerations.” *Id.* In determining damages, the jury has discretion to award damages within the range of evidence presented at trial. *Price Pfister, Inc. v. Moore & Kimmey, Inc.*, 48 S.W.3d 341, 352 (Tex. App – Houston [14th Dist.] 2001, pet. denied).

Food, especially spoiled food, does not rationally fall within the class of goods that require testimony of the “actual value to the owner.” Certainly this measure of damages makes sense for items like household goods and apparel. But unlike the value of personal property that may include such considerations as obsolescence, economic gain to the plaintiff, and even sentiment, food has such a basic

quality and commonplace identity that a jury could, from its own experience and knowledge, assess its worth without the owner's own testimony regarding its specific value.

Juries may draw from their common knowledge and experiences when resolving fact questions. For example, in some circumstances when parties offer expert opinion testimony, a jury is not necessarily bound by that evidence and "can form its own opinion from other evidence and by use of its own experience and common knowledge." *Colorado Interstate Gas Co. v. Hunt Energy Corp.*, 47 S.W.3d 1, 14-15 (Tex. App. – Amarillo 2000, pet. denied) (holding that jury could have relied upon other evidence besides plaintiff's expert witness testimony that would have supported its verdict); see *K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000) (holding that expert testimony should be excluded when jury is equally competent to form an opinion about ultimate fact issue or expert's testimony is within jury's common knowledge). Because Low did not testify to the food's value but instead listed those food items that spoiled in his refrigerator, the Court assumes that a jury could not determine damages. Surely this cannot be true. Simply because Low failed to incant a specific monetary amount after describing in detail what he lost does not mean that his testimony is no evidence of his loss, or that the jurors were incapable of assessing damages based upon that testimony and their own experience and common knowledge. The Court's insistence that the jury is incapable or unqualified to evaluate Low's testimony without a recitation of the price of a dozen eggs and a pound of bacon needlessly elevates form over substance.

Part of determining which theory should be the basis for the judgment requires evaluating the amount of attorney's fees, if any, Low would be entitled to under the DTPA. See TEX. BUS. & COM. CODE § 17.50(d). Although GSU argued to the trial court that the \$150,000 jury award was excessive,

the trial court did not include any attorney's fees in its final judgment. Yet the trial court indicated in a letter that it intended to award Low attorney's fees but in the amount of \$35,000, based on the procedural history and complexity of the issues. Under these circumstances, in which we cannot tell precisely what judgment was rendered, we cannot conclude, as did the court of appeals, that GSU waived its complaint concerning excessiveness. *Cf.* TEX. R. APP. P. 38.2(b)(1). Rather, the trial court must evaluate GSU's challenge to Low's requested attorney's fees before it can determine which theory will give Low the greater recovery. Thus the court of appeals erred in rendering judgment for the full amount of attorney's fees that Low sought.

Under either theory of recovery, Low may also be entitled to recover his mental-anguish damages. If the judgment is based on negligence, the amount of damages must be reduced by Low's percentage of responsibility. *See* TEX. CIV. PRAC. & REM. CODE § 33.012(a). If the judgment is based on the DTPA, however, the trial court must determine whether a deemed finding under rule 279 is appropriate. GSU argues that the entire DTPA claim fails because the jury was not asked a knowingly question, which GSU argues is required to support a judgment based on a pre-1995 DTPA unconscionability claim. GSU correctly states the applicable DTPA law, but it is not correct that Low waived his DTPA claim entirely – GSU's failure to object to the omission of a knowingly question from the charge raises the possibility of a deemed finding on that element under rule 279. *See* TEX. R. CIV. P. 279.

Although unconscionability itself does not require proof of knowledge or intent, *Chastain v. Koonce*, 700 S.W.2d 579, 582-83 (Tex. 1985), under pre-1995 DTPA law, recovery of mental-anguish damages under any DTPA theory requires proof of a defendant's knowing conduct. *See City of Tyler*

v. Lykes, 962 S.W.2d 489, 495 (Tex. 1997); *Luna v. N. Star Dodge Sales, Inc.*, 667 S.W.2d 115, 117-18 (Tex. 1984). A plaintiff must present evidence on each essential element of his or her ground of recovery to the jury. *Ramos v. Frito-Lay, Inc.*, 784 S.W.2d 667, 668 (Tex. 1990). When an entire ground of recovery or defense is omitted from the charge, that ground is waived. *Id.* But, when a party's theory of recovery or defense consists of a cluster of issues necessary to support that theory and the charge omits an issue without objection, as occurred in this case, the omission does not waive the entire claim. *See id.*; *Turner, Collie & Braden, Inc. v. Brookhollow, Inc.*, 642 S.W.2d 160, 165 (Tex. 1982). Instead, the parties have waived a jury trial on the unsubmitted element, thereby submitting it to the trial court to resolve. *First State Bank, Morton v. Chesshir*, 634 S.W.2d 742, 747 (Tex. App. – Amarillo 1982, writ ref'd n.r.e.). Absent written findings on the omitted element, the trial court shall be presumed to have decided the omitted factual issue to support the judgment rendered. *Id.* at 747. But as explained above, we do not know precisely what judgment was rendered in this case. The trial court must in the first instance determine which theory supports the greater recovery before deciding whether to deem a finding under rule 279 to support a judgment based on that theory of recovery.

The court of appeals erred by rendering judgment for the full amount of attorney's fees Low sought in the face of GSU's excessiveness challenge. But without knowing precisely what judgment the trial court rendered, or even what judgment it should have rendered, we cannot determine what the appropriate judgment should be. Accordingly, I would remand this case to the trial court for further proceedings. I therefore respectfully dissent from the Court's opinion and judgment.

Deborah G. Hankinson
Justice

OPINION DELIVERED: May 30, 2002