Opinion issued February 17, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-08-00914-CV

CHARLIE MACK TYRE, SR., Appellant

V.

BRAEDEN YAWN, Appellee

On Appeal from the 133rd District Court
Harris County, Texas
Trial Court Case No. 2004-04774

MEMORANDUM OPINION

Appellant Charlie Mack Tyre, Sr. appeals a judgment in favor of appellee Braeden "Brad" Yawn, who operated a family business providing automobile inspections called "Sticker Shoppe." A jury found that Tyre committed fraud and violated the Texas Deceptive Trade Practices Act by his actions, which allegedly

led to the failure of Sticker Shoppe. The jury awarded damages and attorney's fees.

On appeal, Tyre brings nine issues challenging the judgment: (a) issues 1 and 2 contend that there was an implicit election to recover only under the DTPA and the judgment should be corrected to reflect this election; (b) issues 3 and 6 contend that the fraud and DTPA claims are barred because they sound only in contract; (c) issues 4, 5, 7, and 8 challenge the sufficiency of the evidence to support the jury's findings of fraud and violation of the DTPA; and (d) issue 9 challenges the jury's award of attorney's fees. We overrule all of Tyre's issues except his complaint about attorney's fees, and we remand for further proceedings on that sole issue.

I. Background

Brad Yawn owned and operated an automobile inspection business called "Sticker Shoppe," which he established with the help of his father, Rip Yawn. For convenience, this opinion refers to the Yawns by their first names.

Much of the critical testimony at trial was disputed. The parties agree that effective May 1, 2002, new emissions-testing requirements became a component of automobile inspections in the Houston metropolitan area. In advance of that effective date, the State approved several vendors to supply inspection stations with testing equipment. Worldwide Environmental Products was one such

approved vendor. In February 2002, Worldwide sales representative Michael Fortier approached Sticker Shoppe and offered to sell it a compliant emissions-testing machine. At Fortier's invitation, Brad and Rip attended a demonstration of the machine. Rip testified that, in addition to Fortier, three other men attended the initial demonstration, including Tyre, who in his testimony denied attending the meeting.

Fortier made a follow-up visit to Sticker Shoppe, and on February 6 Brad signed an application to secure credit to obtain the machine through a lease-purchase. Upon receipt of the lease application, Worldwide would ordinarily forward it to a lending institution for a credit check. If the purchaser was creditworthy, Worldwide would receive written approval from the lender, a purchase order would be issued, and then the sale would be completed and the machine delivered. On February 16, 2002, Fortier returned to Sticker Shoppe, and Brad made a down payment of $1,000. However, Fortier testified that he told the Yawns he was still awaiting credit approval for the sale.

Meanwhile, in early February before Brad made the down payment, Worldwide had engaged Tyre as an independent-contractor sales representative. For reasons not revealed in the record, Worldwide's relationship with Fortier ended in March 2002. Tyre testified that the Sticker Shoppe account was assigned to him in April and he was told Sticker Shoppe was having difficulty securing

financing for the machine. He also testified that it usually takes from two hours to two days to complete a credit check to secure financing.

Tyre could only recall going to Sticker Shoppe on one occasion, in April 2002, at which time he claims that he informed Rip that Sticker Shoppe "did not have financing available" to purchase the emissions-testing machine. Nevertheless, he said that at Rip's request he laid down large vinyl templates to demonstrate exactly where the machine would be located. He also verified locations for electrical and air connections.

Rip gave a significantly different account of his interaction with Tyre. He testified that Tyre came to Sticker Shoppe twice in April. The first time, Tyre arrived without a prior appointment, announced to them he was replacing Fortier, and said he was there to put down a template to show where the machine would be delivered. Rip testified that Tyre told him that he mailed "certificates of completion." These certificates were dated April 4, 2002, and they indicated that Brad and Rip had been trained on use of the emissions-testing machinery and were ready to begin inspections. Rip testified that during Tyre's second visit to Sticker Shoppe, Tyre led Rip to believe that the machine was coming. Tyre also allegedly told Rip that Worldwide was misleading customers by saying that the emissions-testing machines were delayed at the Port of Houston, but that Sticker Shoppe's

machine nevertheless would be delivered. An officer of Worldwide testified that he had no knowledge of delivery problems involving the Port of Houston.

According to Brad's testimony, Tyre primarily spoke with Rip when he came to Sticker Shoppe. Brad was busy taking care of customers, but he observed Tyre laying out the template and discussing with Rip where to place the machine. Brad testified that he was approximately 12 to 15 feet away when Tyre spoke to Rip, and that he had no other conversations with Tyre after April 2002.

As the May 1, 2002 deadline to begin emissions testing approached, Rip made "continuous" phone calls to Tyre's supervisor at Worldwide, Dick Luther, inquiring about delivery of the machine, to the point that Luther became agitated and said: "Do not worry about it. You will be delivered before May 1st." Despite these alleged assurances, Rip testified that on April 29 Luther said that he could not deliver the machine even if Sticker Shoppe paid cash because there were no machines available. Worldwide never delivered a machine to Sticker Shoppe.

After May 1, 2002, Sticker Shoppe was no longer able to perform vehicle inspections because it lacked the proper equipment. Rip testified that from May to August 2002, he continued trying on a daily basis to obtain an emissions-testing machine. "A lot of it was on the phone trying to get them to honor their obligation to deliver the machinery." However, Rip said he never called Tyre. Sticker Shoppe failed to pay its rent beginning in May 2002 or June 2002 and ceased

operations on July 31, 2002. Sticker Shoppe moved out of its physical premises on August 30, 2002.

On September 11, 2002, Tyre and his wife signed a lease to rent the same space from which the Sticker Shoppe previously operated. Although Tyre's wife, Kathryn, had previously worked as a beautician, a child-care provider in a church nursery, and at a department store, the new business venture was established in her name. Like Sticker Shoppe, the Tyres' new business, called "Sticker Time," was also a vehicle-inspection shop. Tyre purchased the same kind of emissions-testing machine that Brad sought to purchase; however he bought it from Worldwide at a discounted price because it was considered used. Tyre also acquired Sticker Shoppe's telephone number for Sticker Time's use.

Sticker Time began doing business on October 1, 2002. Although the business was in Kathryn's name, Tyre testified that he worked there as well, though without salary. Tyre testified that the seed money for Sticker Time came from Kathryn's inheritance, and thus when they divorced in 2007 the business was determined to be her separate property. Kathryn testified that they began discussing the idea to start Sticker Time in August or September 2002, that the money used to start Sticker Time came from the couple's commingled money, and that Tyre set up the business in her name to avoid an appearance of impropriety. She testified: "Well, the main reason was conflict of interest. He was afraid that

Worldwide might frown on it or something, you know, because he worked for Worldwide, and so it might be a conflict of interest."

Rip, Brad, and relatives who worked with them at Sticker Shoppe sued Tyre, Worldwide, and other individuals associated with Worldwide, alleging breach of contract, fraud, violations of the DTPA, and other causes of action. At the time of trial, only Rip and Brad remained as plaintiffs and Tyre was the only remaining defendant. The case was submitted to the jury on causes of action for fraud and violation of the DTPA. The jury found in favor of Tyre as to all causes of action alleged by Rip, but the jury found in favor of Brad on all of his causes of action. The jury awarded $100,000 for loss of Brad's business, $15,000 for lost profits, and attorney's fees in the amount of $60,000. The trial court rendered judgment on the verdict, and Tyre's motion for new trial was overruled by operation of law. Tyre appeals the judgment in favor of Brad.

II. Economic-loss doctrine

In issues three and six, Tyre argues that Brad's fraud and DTPA claims fail because they sound only in contract. Specifically, Tyre argues that Brad's injury stemmed from Worldwide's failure to deliver an emissions-testing machine pursuant to an alleged agreement between those parties. Therefore, Tyre contends that Brad's sole remedy was a breach of contract claim against Worldwide. *See, e.g.*, *Sw. Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494–95 (Tex. 1991); *Jim*

Walter Homes, Inc. v. Reed, 711 S.W.2d 617, 617–18 (Tex. 1986); *Sterling Chems., Inc. v. Texaco Inc.*, 259 S.W.3d 793, 796–97 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

This argument invokes the economic-loss doctrine. But Tyre's briefing does not show, and we have been unable to find, where the appellate record reflects that this complaint was made to the trial court. We conclude that these issues have been waived. *See* TEX. R. APP. P. 33.1(a).

III. Sufficiency of the evidence

In issues four and five (fraud) and seven and eight (DTPA), Tyre challenges the sufficiency of the evidence to support the jury's verdict.

a. Standards of review

Legal sufficiency. When a party who does not have the burden of proof at trial challenges the legal sufficiency of the evidence, we consider all of the evidence in the light most favorable to the prevailing party, indulging every reasonable inference in that party's favor and disregarding contrary evidence unless a reasonable fact-finder could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005); *City of Houston v. Hildebrandt*, 265 S.W.3d 22, 27 (Tex. App.—Houston [1st Dist.] 2008, pet. denied) (citing *Assoc. Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 285–86 (Tex. 1998)). "If there is any evidence of probative force to support the finding, i.e., more than a mere scintilla, we will

overrule the issue." *Hildebrandt*, 265 S.W.3d at 27 (citing *Haggar Clothing Co. v. Hernandez*, 164 S.W.3d 386, 388 (Tex. 2005)). Nevertheless, we may not disregard evidence that allows only one inference. *City of Keller*, 168 S.W.3d at 822. The trier of fact is the sole judge of the credibility of the witnesses and the weight to give their testimony. *Id.* at 819. So long as the evidence falls within the zone of reasonable disagreement, we may not substitute our judgment for that of the fact-finder. *Id.* at 822.

Factual sufficiency. In reviewing a factual sufficiency complaint, we must first examine all of the evidence. *Lofton v. Tex. Brine Corp.*, 720 S.W.2d 804, 805 (Tex. 1986). After considering and weighing all the evidence, we set aside the fact finding only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Mar. Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406–07 (Tex. 1998); *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). We may not pass upon the witnesses' credibility or substitute our judgment for that of the fact-finder, even if the evidence would clearly support a different result. *Mar. Overseas Corp.*, 971 S.W.2d at 407; *Hollander v. Capon*, 853 S.W.2d 723, 726 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

"The jury is the exclusive judge of the facts proved, the credibility of the witnesses and the weight to be given to their testimony." *Dyson v. Olin Corp.*, 692 S.W.2d 456, 458 (Tex. 1985) (quoting *Benoit v. Wilson*, 150 Tex. 273, 281, 239

S.W.2d 792, 796 (1951)). When the trier of fact is presented with conflicting evidence, it may believe one witness and disbelieve others. *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 697 (Tex. 1986) (citing *Ford v. Panhandle & Santa Fe Ry. Co.*, 151 Tex. 538, 542, 252 S.W.2d 561, 563 (1952)). The trier of fact is permitted to resolve inconsistencies in the testimony of any witness. *Id.* The jury, as the trier of fact, may also draw inferences from the facts and choose between conflicting inferences. *Ramo, Inc. v. English*, 500 S.W.2d 461, 467 (Tex. 1973). We cannot overturn the fact-finder's ruling unless only one inference can be drawn from the evidence. *Havner v. E-Z Mart Stores, Inc.*, 825 S.W.2d 456, 461 (Tex. 1992).

b. Deceptive Trade Practices Act claim

In issues seven and eight, Tyre argues that the evidence is legally and factually insufficient to support the jury's finding that Tyre violated the DTPA because there is no evidence that Tyre violated a specific provision of the DTPA or that any violation was a producing cause of damages. Tyre contends that the basis for the DTPA claim is his wife's lease of the property where Brad operated the Sticker Shoppe, and that this occurred too late in time to be the basis of Brad's DTPA claims. Tyre also argues that there was insufficient evidence to support the jury's award of damages.

In response, Brad contends that Tyre made actionable misrepresentations and that he had engaged in an unconscionable course of action, resulting in lost profits and the ultimate loss of the business value of Sticker Shoppe. Brad's DTPA theory of recovery centers on Tyre's actions of bringing the templates to Sticker Shoppe and placing them on the floor, telling Rip that the machine would be delivered but was delayed at the Port of Houston, and sending certificates of completion to Sticker Shoppe. Although the evidence at trial was disputed about these allegations, after considering and weighing all the evidence, we conclude that there is factually sufficient evidence of each allegation to support a finding by the jury that Tyre committed each alleged act. The question remaining is whether such acts can support a DTPA cause of action.

"The DTPA grants consumers a cause of action for false, misleading, or deceptive acts or practices." *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 649 (Tex. 1996); *see* TEX. BUS. & COM. CODE ANN. § 17.50(a) (West Supp. 2010); *see also id.* §§ 17.45(5), 17.46(b). The elements of a DTPA claim are: (1) the plaintiff was a consumer; (2) the defendant either engaged in false, misleading or deceptive acts (i.e., violated a specific laundry-list provision of the DTPA) or engaged in an unconscionable action or course of action; and (3) the DTPA laundry-list violation or unconscionable action was a producing cause of the plaintiff's injury. *Amstadt*, 919 S.W.2d at 649; *see Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d

472, 478 (Tex. 1995). In our review of a DTPA claim, we must liberally construe and apply the statute to promote the underlying goals of the statute, which include protecting consumers against false, misleading, and deceptive business practices and unconscionable actions. *See* TEX. BUS. & COM. CODE ANN. § 17.44(a) (West 2002); *Latham v. Castillo*, 972 S.W.2d 66, 68 (Tex. 1998).

Tyre does not dispute that Brad was a consumer for purposes of the DTPA. *See* TEX. BUS. & COM. CODE ANN. § 17.45(4). He asserts that there is insufficient evidence that "any violation proximately caused" damages to Brad, but he does not present any argument about the producing cause element of the DTPA claim. *See* TEX. R. APP. P. 38.1(i). Accordingly, the only issue presented on appeal as to DTPA liability is whether there is legally sufficient evidence of actionable deceptive practices.

The jury was asked if Tyre engaged "in any unconscionable action or course of action that was a producing cause of damages" to Brad. *See* TEX. BUS. & COM. CODE ANN. § 17.50(a). The instructions defined "unconscionable action or course of action" as an act or practice which "to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience or capacity of the consumer to a grossly unfair degree." *Id.* § 17.45(5). The jury also found that Tyre knowingly and intentionally engaged in an unconscionable action or course of action.

Unconscionability under the DTPA is an objective standard for which scienter is irrelevant. *See Chastain v. Koonce*, 700 S.W.2d 579, 583 (Tex. 1985); *see also Bradford v. Vento*, 48 S.W.3d 749, 760 (Tex. 2001); *Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 677 (Tex. 1998). To be actionable under the statutory standard, the defendant must have taken advantage of the consumer "to a grossly unfair degree," meaning that "the resulting unfairness was glaringly noticeable, flagrant, complete and unmitigated." *Chastain*, 700 S.W.2d at 583–84 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1002 (1976)). This determination is made "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.

Here, Tyre told Rip in April 2002 that a machine would be delivered to Sticker Shoppe but was delayed at the Port of Houston. It is undisputed that without delivery of an emissions-testing machine in time for installation prior to May 1, 2002, Sticker Shoppe would be unable to perform inspections, the mainstay of its business, beginning on that date. Tyre himself testified that financing for the machine had not been secured, and for that reason Worldwide was not planning to deliver the machine. The evidence also showed that Tyre knew that Brad was expecting Worldwide to deliver the machine, but Tyre nevertheless misrepresented that the machine would be delivered, knowing that it would not be. Excluding any

consideration of Tyre's subjective motives, the jury could have reasonably concluded that Tyre's intentional misrepresentations, under circumstances that objectively jeopardized the viability of Brad's business, were grossly unfair and therefore unconscionable.

Our conclusion in this regard is compelled by the Texas Supreme Court's holding in *Latham v. Castillo*, 972 S.W.2d 66 (Tex. 1998), in which the DTPA claimants alleged that their attorney misrepresented that he had filed and was actively prosecuting their medical malpractice claim. In fact, limitations had run and no claim had been filed. *Id.* at 67. The Court held these alleged misrepresentations supported a DTPA claim alleging unconscionable actions because the clients had presented some evidence that they were taken advantage of to a grossly unfair degree. *Id.* at 68–69. The *Castillo* opinion emphasized that the allegations about the attorney's conduct were not based upon claims of merely negligent misrepresentations but instead alleged "deceptive conduct" of the kind the DTPA was enacted to curtail. *See id*. at 69. We conclude Brad's allegations against Tyre are indistinguishable in this respect. Accordingly, we hold that the evidence is legally and factually sufficient to sustain the jury's finding that Tyre committed an unconscionable act under the DTPA. Because of this conclusion, we need not analyze whether the evidence is also sufficient to sustain the jury's

liability finding on Brad's alternative DTPA theory based upon alleged false, misleading, or deceptive acts or practices.

c. Damages

Finally, Tyre contends there is no objective evidence to support the jury's findings that the market value of Sticker Shoppe was $100,000 and its lost profits were $5,000 per month. He argues that the only evidence in this regard was speculative testimony by Rip.

Rip testified that prior to his experience with Sticker Shoppe, he ran another family-owned vehicle-inspection business in Liberty, Texas, with Brad and another of his sons, Derrick. Rip explained that he had become aware of an opportunity to acquire a similar business that ultimately became Sticker Shoppe, and that that he had "set up" Derrick with the business in Liberty and the new Sticker Shoppe in Brad's name. Based on this experience and his knowledge about sales volumes, Rip opined that that Sticker Shoppe's fair market value was between $140,000 and $175,000. Although the business was set up in Brad's name, Sticker Shoppe was a family-run business. A business owner is permitted to testify about the fair market value of the business if there is a basis for the knowledge, and we conclude that the trial court did not abuse its discretion by permitting Rip's testimony in this circumstance. *See, e.g.*, *Ramex Const. Co. v. Tamcon Servs. Inc.*, 29 S.W.3d 135, 138 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *Laprade v. Laprade*, 784

S.W.2d 490, 492 (Tex. App.—Fort Worth 1990, writ denied). Rip based his opinion on sales volume and his knowledge of the business, which included his experience in starting Sticker Shoppe and in operating another vehicle inspection business. Other evidence adduced at trial showed that Tyre himself placed a value of $100,000 on his wife's similarly situated business in the exact same location.

With respect to lost profits, there is no requirement that the loss be susceptible of exact calculation. *See Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 84 (Tex. 1992). "The amount of the loss must be shown by competent evidence with reasonable certainty," and at a minimum, "opinions or estimates of lost profits must be based on objective facts, figures, or data from which the amount of lost profits can be ascertained." *Id*. Here, Brad introduced evidence of the income tax returns and sales records from Sticker Time, the business that took Sticker Shoppe's place. The tax returns and testimony from Tyre's ex-wife established that Sticker Time was paying Tyre family members in excess of $60,000 annually, or over $5,000 per month, in salary.

Based on this evidence, we hold that the evidence is legally and factually sufficient to support the jury's award of $100,000 as the fair market value of Sticker Shoppe and $15,000 as the amount of profit Brad lost over the course of three months.

* * *

We overrule issues seven and eight, holding the evidence legally and factually sufficient to support the jury's DTPA findings. Because those findings support the judgment regardless of whether the fraud claim also was supported, we need not reach issues four and five relating to the jury's fraud findings.

IV. Election of remedies

In his first issue, Tyre contends that the judgment should be corrected to reflect an election of remedies. "[W]here the prevailing party fails to elect between alternative measures of damages, the court should utilize the findings affording the greater recovery and render judgment accordingly." *Birchfield v. Texarkana Mem'l Hosp.*, 747 S.W.2d 361, 367 (Tex. 1987). There is no dispute that this is effectively what the trial court did, considering that attorney's fees were recoverable under the DTPA and the parties dispute whether fees were also recoverable on the fraud claim. Moreover, Tyre presents no argument that the judgment actually reflects a double recovery in violation of the one-satisfaction rule. Accordingly, no reformation of the judgment is necessary to effect an election of remedies. *See, e.g., Star Houston, Inc. v. Shevack*, 886 S.W.2d 414, 423 (Tex. App.—Houston [1st Dist.] 1994) (holding that reformation of judgment to effect election of remedies is required when prevailing party fails to elect and

trial court fails to render judgment utilizing findings affording greater recovery), *writ denied*, 907 S.W.2d 452 (Tex. 1995). We overrule issue one.

Tyre's second issue contends that because the judgment was implicitly entered on the jury's DTPA findings, Brad's fraud claim is moot and should not be considered on appeal. Tyre suggests that because the DTPA claims afforded a greater recovery than the fraud claim, and judgment was rendered accordingly, Brad should be deemed to have elected a DTPA recovery to the exclusion of any possibility of fraud recovery, despite the jury's findings and even if we were to sustain Tyre's challenges to the DTPA claims on appeal. That logic depends upon a flawed premise. "An election of remedies does not occur when a plaintiff mistakenly pursues a remedy which does not exist as a matter of law." *Fina Supply, Inc. v. Abilene Nat'l Bank*, 726 S.W.2d 537, 541 (Tex. 1987). A recovery in a trial court on a DTPA claim does not render a fraud claim irrevocably moot. Tyre presents no argument or authorities to support this issue. *See* TEX. R. APP. P. 38.1(i). We overrule issue two.

V. Attorney's fees

Finally, Tyre complains about the attorney's fee award to Brad because there was no segregation of fees with respect to claims pursued on behalf of other plaintiffs and against other defendants dismissed before trial, claims unsuccessfully pursued on behalf of Rip, claims for which there was no independent entitlement to

attorney's fees, and various damages models that were not accepted by the jury. During the charge conference, Tyre objected to the failure to segregate attorney's fees, preserving his complaint for appellate review. *See* TEX. R. APP. P. 33.1(a)(1); *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 389 (Tex. 1997).

Here, Brad asserted a claim for fraud, for which attorney's fees are not ordinarily recoverable. The record also reflects that at least some of the evidence presented in support of the fees request was done to advance other claims for which fees are not recoverable in this case. For example, the billing records reflect legal research done on the application of the statute of frauds to breach of contract claims. This issue that does not relate to Brad's DTPA claim and because breach of contract was not submitted to the jury, attorney's fees for such work would not be recoverable here. Also, Brad did not segregate attorney's fees that pertained to his claims from attorney's fees that pertained to Rip's claims. On cross-examination, Brad's attorney was asked: "Have you taken any steps to try to dissect the work you did regarding these parties that are no longer in the case from the work you did regarding my client [Tyre] here?" The attorney responded: "No, sir, I don't have to. I'm not required to by law."

To the contrary, the law does impose upon the party seeking a recovery of attorney's fees the duty to segregate those fees incurred in pursuit of a claim for which fees are not recoverable. "[I]f any attorney's fees relate solely to a claim for

which such fees are unrecoverable, a claimant must segregate recoverable from unrecoverable fees." *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 313 (Tex. 2006). "Intertwined facts do not make tort fees recoverable; it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated." *Id*. at 313–14.

Brad's unsegregated evidence of attorney's fees for the entire case constitutes some evidence of what the segregated amount should be. Accordingly, we sustain issue nine and remand for further proceedings on the issue of Brad's claim for attorney's fees. *See Hong Kong Development, Inc. v. Nguyen*, 229 S.W.3d 415, 455–56 (Tex. App.—Houston [1st Dist.] 2007, no pet.) ("When an appellate court sustains a challenge that attorney's fees were not properly segregated, the remedy is to sever that portion of the judgment awarding attorney's fees and to remand the cause for the issue to be relitigated.").

CONCLUSION

No duplicative remedies were awarded in this case, so election of remedies was not an issue. Tyre has not shown that his arguments about the economic-loss doctrine were made in the trial court, so any error in that regard was not preserved. We conclude the evidence is legally and factually sufficient to support the jury's finding of an unconscionable act or course of action of the DTPA. Tyre presented no legal argument that Brad's damages were not proximately caused by Tyre's

actions. However, Brad failed to present evidence of his attorney's fees for his DTPA claim, appropriately segregated to eliminate fees solely attributable to other work performed by his attorney for which no fee is recoverable. Accordingly, we reverse the judgment as to Brad's claim for attorney's fees and remand for further proceedings on that sole issue. The remainder of the judgment is affirmed.

Michael Massengale
Justice

Panel consists of Justices Jennings, Alcala, and Massengale.