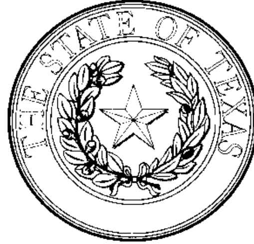
Opinion issued January 20, 2011.



In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00730-CV

ROBERT D. LYALL, INDIVIDUALLY, AND LYALL BROTHERS COLLISION CENTER, Appellants

V.

ERMENEGILDO BERMUDEZ, Appellee

On Appeal from the County Civil Court at Law No. 1
Harris County, Texas
Trial Court Case No. 932238

MEMORANDUM OPINION

Following a bench trial on a suit by appellee Ermenegildo Bermudez for various violations of the Texas Deceptive Trade Practices-Consumer Protection

Act (DTPA)[1] and other causes of action, the trial court entered judgment against appellants, Robert D. Lyall, individually, and Lyall Brothers Collision Center (collectively, "Lyall"). In one issue, Lyall challenges the legal and factual sufficiency of the evidence supporting the trial court's award of treble damages.

We affirm.

Background

In early 2008, Bermudez was involved in a collision. He took his 2007 Toyota Tundra truck to Lyall for repairs on February 6, 2008. One of Lyall's employees, Brian Watchmaker, met with Bermudez, spoke with Bermudez's insurance company, and gave Bermudez an estimate for completing the repairs. The repairs were subsequently completed sometime in mid-February 2008. There was apparently some kind of delay in receiving payment from Bermudez's insurance company, so the truck remained at Lyall's repair shop.

On March 11, 2008, Lyall sent a notice of foreclosure to Bermudez informing Bermudez that he could prevent foreclosure by paying $5,369.05. The foreclosure notice made no mention of storage fees. On March 14, 2008, after Lyall received final payment from the insurance company, Bermudez returned to the shop, paid $970 to cover his deductible, and took the truck home. Approximately one month later, on April 17, 2008, Lyall sent a wrecker driver to

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[1] TEX. BUS. & COM. CODE ANN. §§ 17.41–.63 (Vernon 2002 & Supp. 2010).

repossess the truck from Bermudez. Bermudez eventually returned the truck to Lyall and filed this lawsuit to settle the legal issues between them.

Bermudez alleged that Lyall engaged in an unconscionable action or course of action under the DTPA, that Lyall represented that an agreement conferred or involved rights, remedies, or obligations which it did not involve or which were prohibited by law, and that Lyall failed to disclose information concerning goods or services which was known at the time of the transaction with the intent to induce him into the transaction, in violation of section 17.46(b) of the DTPA. Bermudez's petition also alleged that Lyall's repossession of the truck constituted conversion, that Lyall had committed common law fraud, and that Lyall had violated provisions of the Texas Property Code governing repossession of vehicles.[2]

At the bench trial, Bermudez testified that nothing was said to him, either in writing or verbally, about storage fees at the time he left his truck for repair or in any subsequent interaction until after he had received his truck back from Lyall. None of the estimates or other documents signed by Bermudez mentioned storage fees or provided notice that the vehicle could be subject to repossession.

Bermudez testified that when Watchmaker called in March to tell him that he could come pick up his truck, Watchmaker did not say anything about a

[2] *See* TEX. PROP. CODE ANN. §§ 70.001(c), 70.005(a), (d) (Vernon 2007) (requiring that owner be notified of repossession and given opportunity to pay debt and providing that repossessed vehicle be sold at public auction).

problem with a delay in receiving the payment from the insurance company, nor did he say anything about storage fees. Bermudez went to pick up his truck, paid the $970 deductible, and waited for his truck to be delivered. Bermudez testified that after Watchmaker had already given him the keys to the truck, Watchmaker asked who was going to pay the storage. Watchmaker informed Bermudez that he had accrued $240 in storage fees and "that [they] were going to split it half and half." Bermudez testified that he asked to see a document stating that he was required to pay storage fees and that Watchmaker then told him that he did not have to pay the storage fee.

Bermudez testified that he drove the truck home and did not have any contact with Lyall until April 17, 2008, when he was informed that a wrecker driver was looking for his truck. At that time, Bermudez understood that he had to relinquish the truck and request legal help to resolve the problem, so he took the truck to Lyall. Lyall accepted the keys. Bermudez testified that Lyall did not inform him of what he needed to do to get the truck back and that, up to the time of trial, Bermudez had not been in possession of the truck. Bermudez testified that he did not receive any mail or phone calls from Lyall after he returned the truck. Bermudez also testified that he continued to make loan and insurance payments on the truck for the fourteen months between Lyall's repossession of it and the trial.

Lyall testified that he had owned his repair shop since 1975. He testified that although none of the estimates or other documents mentioned storage fees, he had a sign posted in the repair shop office stating, "NOTICE TO CUSTOMERS Deductibles are to be cash. After 3 days of completion there will be storage charges of $42.50 per day." Bermudez testified that he never saw this sign.

Lyall testified that he overheard Watchmaker tell Bermudez that he would be charged for storage if the shop was not paid, although it's unclear from his testimony whether this conversation occurred on March 14, 2008, when Bermudez came to pick up the truck, or at some other time. Lyall also testified that Bermudez was told that he could file a claim for the storage fees with his insurance company, but if the insurance company did not pay the fees, Bermudez would have to pay them. Lyall stated that he released the vehicle to Bermudez with the understanding that Bermudez "would try to get [the fees] paid." Lyall testified that he submitted a request for the fees to Bermudez's insurance company that was denied and that Watchmaker called Bermudez to inform him that the insurance company refused to pay the storage fees.[3] Following the insurance company's refusal to pay the storage fees, Lyall decided to send the wrecker driver "to see if he could figure out where the truck was."

[3] The exact timing of these attempts was unclear from the record.

Lyall testified that after Bermudez returned the truck, Bermudez never came back to discuss what he needed to do to have the truck returned to him, and Lyall "let [the lien foreclosure] proceed." His counsel questioned him regarding the foreclosure proceedings:

> [Lyall's counsel]: And what happened to the vehicle?
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> [Lyall]: It came—I finally gained title to it.
>
> [Lyall's counsel]: You bought it at the auction?
>
> [Lyall]: Well, it's really—you buy—I mean, it's a mechanic's lien. You don't—there's no auction to it. There's a mechanic's lien. The shop—you know, I got the vehicle. The shop gets the vehicle.

Lyall testified that he and his wife began driving the vehicle after having the title put in his name on April 29, 2008 and that they put approximately 10,000 miles on the truck.

The trial court rendered judgment in favor of Bermudez, stating in its July 3, 2009 final judgment:

> The Court FINDS as follows: LYALL wrongfully repossessed BERMUDEZ's truck, the reasonable loss of use from the wrongful repossession is $10,000, LYALL knowingly repossessed [] BERMUDEZ's truck wrongfully[;] therefore[,] BERMUDEZ is entitled to treble damages in the amount of $30,000, and BERMUDEZ's reasonable attorney fees are $3,000.
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> It is hereby ORDERED, ADJUDGED, AND DECREED that Defendant Robert D. Lyall and Lyall Brothers Collision Center return Plaintiff Ermenegildo Bermudez's truck within ten days of the date of this.

> It is ORDERED, ADJUDGED, AND DECREED for Plaintiff Ermenegildo Bermudez [to] have and recover judgment of and from Defendant Robert D. Lyall and Lyall Brothers Collision Center in the principle [sic] of $30,000.

The trial court also awarded Bermudez attorney's fees and pre- and post-judgment interest. This appeal followed.

Analysis

In his sole issue, Lyall challenges the legal and factual sufficiency of the evidence supporting the trial court's award of treble damages.

In an appeal of a judgment rendered after a bench trial, the trial court's findings of fact have the same weight as a jury's verdict, and we review the legal sufficiency of the evidence used to support them just as we would review a jury's findings. *Daniel v. Falcon Interest Realty Corp.*, 190 S.W.3d 177, 184 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (citing *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994)). In reviewing a challenge to the legal sufficiency of the evidence, we determine whether the evidence would enable reasonable and fair-minded people to reach the verdict under review. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). In conducting this review, we credit favorable evidence if a reasonable fact-finder could and disregard contrary evidence unless a reasonable fact-finder could not. *Id.* We consider the evidence in the light most favorable to the finding under review and indulge every reasonable inference that would support this finding. *Id.* at 822. We hold that the evidence is legally

insufficient only if (1) the record reveals a complete absence of evidence of a vital fact, (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence conclusively establishes the opposite of the vital fact. *Id.* at 810.

In reviewing the factual sufficiency of the evidence, we consider all of the evidence and set the finding aside only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Arias v. Brookstone, L.P.*, 265 S.W.3d 459, 468 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (citing *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam)).

Whether reviewing the evidence for legal or factual sufficiency, we assume that the fact-finder decided questions of credibility or conflicting evidence in favor of the finding if he reasonably could do so. *City of Keller*, 168 S.W.3d at 819–20. We do not substitute our judgment for that of the fact-finder if the evidence falls within this zone of reasonable disagreement. *Id.* at 822. The trial court acts as fact-finder in a bench trial and is the sole judge of the credibility of witnesses. *HTS Servs., Inc. v. Hallwood Realty Partners, L.P.*, 190 S.W.3d 108, 111 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

The DTPA provides:

> A consumer may maintain an action where any of the following constitute a producing cause of economic damages or damages for mental anguish:
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> (1) the use or employment by any person of a false, misleading, or deceptive act or practice that is:
>
> (A) specifically enumerated in a subdivision of Subsection (b) of Section 17.46 of this subchapter; and
>
> (B) relied on by a consumer to the consumer's detriment; [or]
>
> . . . .
>
> (3) any unconscionable action or course of action by any person. . . .

TEX. BUS. & COM. CODE ANN. § 17.50(a) (Vernon Supp. 2010). Section 17.46(b) enumerates causes of action for, among other things, "representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law" and "failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed." *Id.* § 17.46(b)(12), (24) (Vernon Supp. 2010).

The DTPA also defines an "unconscionable action or course of action" as "an act or practice, which . . . takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree." *Id.* § 17.45(5)

(Vernon Supp. 2010); *Bradford v. Vento*, 48 S.W.3d 749, 760 (Tex. 2001). "To prove an unconscionable action or course of action, a plaintiff must show that the defendant took advantage of his lack of knowledge and 'that the resulting unfairness was glaringly noticeable, flagrant, complete, and unmitigated.'" *Bradford*, 48 S.W.3d at 760 (citing *Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 677 (Tex. 1998)). "The relevant inquiry examines the entire transaction, not the defendants' intent." *Cooper v. Lyon Fin. Servs., Inc.*, 65 S.W.3d 197, 207 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (citing *Chastain v. Koonce*, 700 S.W.2d 579, 583–84 (Tex. 1985) ("Section 17.45(5) is intended to be an objective standard.")).

The DTPA further provides that "[i]f the trier of fact finds that the conduct of the defendant was committed knowingly, . . . the trier of fact may award not more than three times the amount of economic damages . . . ." TEX. BUS. & COM. CODE ANN. § 17.50(b)(1). Under the DTPA, "'knowingly' means actual awareness, at the time of the act or practice complained of, of the falsity, deception, or unfairness of the act or practice giving rise to the consumer's claim." *Id.* § 17.45(9). Furthermore, "actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness." *Id.*; *St. Paul Surplus Lines v. Dal-Worth Tank Co.*, 974 S.W.2d 51, 53–54 (Tex. 1998). Actual awareness "means that a person knows that what he is doing is false, deceptive, or

unfair" and does it anyway. *Dal-Worth Tank Co.*, 974 S.W.2d at 53–54. The term "knowingly" lies on a continuum of "gross negligence, 'knowingly,' 'willful' and 'intentional'" with "gross negligence being the lowest mental state and intentional being the highest." *Id.* at 54.

Lyall argues that "[t]here is no evidence that Lyall's actions misrepresented his storage fee policy, or that if he failed to disclose it, (which he denies) that such failure induced Bermudez into the transaction." He further argues that the trial court "found only that Lyall had wrongfully repossessed the vehicle, but wrongful repossession is not a false, misleading and deceptive act as described by the Act [that] even if 'knowing,' would establish the right to treble damages." However, Bermudez's petition also alleged a cause of action for an unconscionable action or course of action. Bermudez argues that Lyall's "actions took advantage of [Bermudez's] lack of knowledge, ability, and experience to a grossly unfair degree by a blatant violation of the Property Code [provisions governing worker's liens and the sale of property]."

Section 70.001 of the Texas Property Code provides in pertinent part:

> (a) A worker in this state who by labor repairs an article, including a vehicle, . . . may retain possession of the article until:
>
> > (1) the amount due under the contract for the repairs is paid; or
> >
> > (2) if no amount is specified by contract, the reasonable and usual compensation is paid.

> (b) If a worker relinquishes possession of a motor vehicle . . . in return for a check, money order, or a credit card transaction on which payment is stopped, has been dishonored because of insufficient funds, no funds or because the drawer or maker of the order or the credit card holder has no account or the account upon which it has been drawn or the credit card account has been closed, the lien provided by this section continues to exist and the worker is entitled to possession of the vehicle . . . until the amount due is paid, unless the vehicle . . . is possessed by someone who became a bona fide purchaser of the vehicle after a stop payment order was made. . . .
>
> (c) A worker may take possession of an article under Subsection (b) only if the person obligated under the repair contract has signed a notice stating that the article may be subject to repossession under this section. A notice under this subsection must be:
>
>> (1) separate from the written repair contract; or
>>
>> (2) printed on the written repair contract, credit agreement, or other document in type that is boldfaced, capitalized, underlined, or otherwise set out from surrounding written material so as to be conspicuous with a separate signature line.
>
> . . . .
>
> (g) A motor vehicle that is repossessed under this section shall be promptly delivered to the location where the repair was performed or a vehicle storage facility licensed under Chapter 2303, Occupations Code. The motor vehicle must remain at the repair location or a licensed vehicle storage facility at all times until the motor vehicle is lawfully returned to the motor vehicle's owner or a lienholder or is disposed of as provided by this subchapter.

TEX. PROP. CODE ANN. § 70.001 (Vernon 2007).

The Property Code makes the following provisions for the sale of property:

> (a) . . . [A] person holding a lien under this subchapter . . . who retains possession of the property for 60 days after the day that the charges accrue shall request the owner to pay the unpaid charges due if the owner's residence is in this state and known. If the charges are not

> paid before the 11th day after the day of the request, the lienholder may, after 20 days' notice, sell the property at a public sale, or if the lien is on a garment, at a public or private sale.
>
> . . . .
>
> (d) The lienholder shall apply the proceeds of a sale under this section to the charges. . . . The lienholder shall pay excess proceeds to the person entitled to them.

TEX. PROP. CODE ANN. § 70.005 (Vernon 2007).

Regarding the allegation that Lyall engaged in an unconscionable action or course of action, Bermudez testified that neither Lyall nor any of his employees informed him of any obligation to pay storage fees at the time he delivered the truck for repairs or in any subsequent discussions, that the March 11, 2008 foreclosure notice did not list storage fees, and that he was first informed of the existence of storage fees in the amount of $240 when he went to pick up the truck on March 14, 2008. Bermudez testified that, after further discussion, Watchmaker told him that he did not have to pay the storage fees, and Bermudez was given possession of his truck after he paid his $970 deductible in addition to the check from the insurance company. Likewise, none of the estimates given to and signed by Bermudez contained any mention of storage fees or a notice that the truck was subject to repossession. The only document in the record that mentioned storage fees was a sign printed on paper that Lyall testified was posted in the repair shop office. Bermudez testified that he never saw that sign or any similar posting.

It is uncontested that Lyall later sent a wrecker driver to repossess the truck from Bermudez at his place of employment. Bermudez testified that he did not know why the truck was being repossessed at that time because he had paid for the repairs in full and, after having been told by Watchmaker that he did not need to pay storage fees, he had no further contact with Lyall until the wrecker appeared at his job site. It is also uncontested that Lyall kept the truck for his own private use and put approximately 10,000 miles on the vehicle. Looking at the entire transaction, we conclude that this evidence is legally sufficient to support a finding of unconscionable conduct surrounding the wrongful repossession of Bermudez's truck, [4] that Lyall's actions took advantage of Bermudez's lack of knowledge, and "that the resulting unfairness was glaringly noticeable, flagrant, complete, and unmitigated." *See Bradford*, 48 S.W.3d at 760; *Cooper*, 65 S.W.3d at 207; *see also City of Keller*, 168 S.W.3d at 810, 822 (holding that we must consider evidence in light most favorable to finding under review and indulge every reasonable inference that would support finding and that evidence is legally

[4] It is undisputed that Bermudez never signed a notice stating that his truck was subject to repossession, which was a violation of section 70.001(c) of the Property Code, that the truck was used by Lyall and his wife, in violation of section 70.001(g), that Lyall did not sell the truck at a public sale and apply the proceeds to the charges and pay the excess to the person entitle to them, which violated section 70.005, subsections (a) and (d). *See* TEX. PROP. CODE ANN. §§ 70.001, 70.005.

insufficient only if there is complete absence of evidence of vital fact or if evidence offered to prove vital fact is no more than scintilla).

Lyall also challenges the trial court's finding that he acted knowingly, arguing that "the record is bereft of any evidence that Lyall knew what it was doing was false, deceptive, or unfair." Lyall testified that he had been in the business of auto repair for more than thirty years. He testified that he had discussed the storage fees with Bermudez's insurance company and that he overheard Watchmaker discuss the storage fees with Bermudez at some point, but he did not testify that he had ever informed Bermudez of the need to pay storage fees. Bermudez testified that, after he received the March 11, 2008 foreclosure notice, he paid for the repairs in full and was told at that time that he did not have to pay the $240 in storage fees mentioned by Watchmaker after he had given Bermudez the keys to the truck. Bermudez further testified that he did not have any further communication with Lyall before Lyall repossessed his truck and that he eventually discovered that Lyall was claiming $1,120 in unpaid storage fees. Lyall did not notify Bermudez in writing that his vehicle was subject to repossession, sell the vehicle at a public sale to cover the debt owed to him, or

distribute the excess proceeds as required by law.[5] Rather, he retained the car for his own personal use.

This evidence is sufficient to support an inference that Lyall, who had been in the business of auto repair for thirty years, knew that keeping a vehicle without telling its owner how to satisfy the alleged lien and without following the proper foreclosure procedure was wrong, but he did it anyway. *See Dal-Worth Tank Co.*, 974 S.W.2d at 53–54. Thus, we conclude that the evidence was also legally sufficient to support the trial court's finding that Lyall's unconscionable conduct in repossessing the truck was committed knowingly. *See City of Keller*, 168 S.W.3d at 810, 822.

Lyall argues that he disclosed the storage fees to Bermudez and that he overheard Watchmaker tell Bermudez that Bermudez would have to pay the storage fees if the insurance company did not. While Lyall's testimony on the nature of the understanding between himself and Bermudez regarding storage fees contradicted Bermudez's testimony, the trial court clearly found Bermudez's testimony to be more credible, and we will not substitute our judgment in place of the fact-finder's. *See City of Keller*, 168 S.W.3d at 819–20, 822 (holding that we assume that fact-finder decided questions of credibility or conflicting evidence in

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[5] *See* TEX. PROP. CODE ANN. §§ 70.001(c) (requiring written, signed notice that vehicle is subject to repossession), 70.005(a) (requiring public sale), 70.005(d) (requiring that sale proceeds be applied to charges and that excess proceeds be distributed to person entitled to them).

favor of finding if he reasonably could do so and that we do not substitute our judgment for that of fact-finder if evidence falls within zone of reasonable disagreement); *HTS Servs., Inc.*, 190 S.W.3d at 111 (holding that trial court acts as fact-finder in bench trial and is sole judge of credibility of witnesses). Considering all of the evidence, we cannot conclude that the trial court's finding that Lyall knowingly repossessed the truck in a wrongful and unconscionable manner is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Arias*, 265 S.W.3d at 468.

Thus, we conclude that the evidence supporting Bermudez's claim for knowing, unconscionable conduct under the DTPA is both legally and factually sufficient to support the trial court's judgment and we overrule Lyall's sole issue.

Conclusion

We affirm the judgment of the trial court.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Sharp, and Massengale.