

Affirmed and Memorandum Opinion filed March 10, 2011.



In The

**Fourteenth Court of Appeals**

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NO. 14-09-01089-CV

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**MICHAEL SMITH CUSTOM CLOTHIER, INC., D/B/A THE CUSTOM SHOP,**  
**Appellant**

**V.**

**LOUIS O. CONSTANTINI, Appellee**

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**On Appeal from the County Civil Court at Law No. 1**  
**Harris County, Texas**  
**Trial Court Cause No. 931,943**

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**MEMORANDUM OPINION**

Michael Smith Custom Clothier, Inc., d/b/a The Custom Shop, appeals from a judgment favoring Louis O. Constantini. Constantini sued The Custom Shop over a set of allegedly ill-fitting custom shirts. After a trial to the bench, the trial court found that The Custom Shop failed to comply with the contract between the parties, violated the Texas Deceptive Trade Practices Act, breached express and implied warranties, and performed negligently. The court awarded Constantini \$1,673 in actual damages and \$4,300 in attorney's fees. On appeal, The Custom Shop contends that Constantini was

not entitled to judgment on any of his theories of recovery and that the attorney's fees awarded were excessive. We affirm.

### ***Background***

On November 10, 2007, while visiting his daughter in the Houston area, Louis Constantini was measured for and placed an order for twelve custom-made shirts at The Custom Shop location in Houston. The shirts were delivered to Constantini's New Mexico residence on December 27, 2007.

At the time of Constantini's purchase, The Custom Shop maintained certain policies that were specified on a display in its Houston location as well as on the sales receipt Constantini signed and the invoice he received. As stated on the display, these policies explained:

### **OUR GUARANTEE**

***Custom Clothing, made to your measurements and styling, is non-refundable.***

***GUARANTEE - We guarantee your satisfaction with our clothing for the following:***

\*FIT: On issue of fit, we reserve the right to correct size and fit problems if possible.

\*STYLE: On issues of style we also reserve the right to correct styling features if possible.

\*FABRIC: On issues of fabric, previous Custom Shop records do not reflect the prior information on what you may have ordered in terms of color, type or pattern. Therefore, we do not claim or guarantee your fabric selection as being the exact same as what you may have ordered in the past. Fabric selection is the responsibility of the individual customer.

If you have issues with your order, they need to be addressed within 120 days of when the order was placed.

ORDER PROCESSING & DELIVERY: Orders typically take 6-8 weeks for delivery; please do not call for status until 6 weeks have passed. . . .

According to Constantini's trial testimony, he had previously purchased from the San Diego, Dallas, and New York locations of The Custom Shop on about five occasions. When he went to the Houston location in November 2007, he was measured by Ron Musgrove. Upon receiving the shirts in December, he set them aside over the holidays. He opened them in mid-January 2008 and immediately noticed that the sleeves were too long, the neck was too large, and the wrong cuff was larger; Constantini had requested the left-side cuff be made larger to accommodate his watch, but the right-side was larger on the finished shirts.

In mid-January, Constantini called Musgrove and told him about the problems. According to Constantini, Musgrove told him to wear the shirts and launder them six times. Constantini told Musgrove that the problems were "really big," but Musgrove reassured him that laundering would correct them. Constantini said that he washed the shirts four times but gave up on that process because they did not fit any better.<sup>1</sup>

On April 17, 2008, Constantini mailed the shirts back to The Custom Shop, along with a letter requesting a refund. On May 1, Constantini called Musgrove. During their conversation, Musgrove told Constantini that he (Constantini) had asked for the shirts to be too large and had lost weight and that there was nothing The Custom Shop could do about the shirts. Constantini then asked to talk to someone at The Custom Shop's headquarters, and Musgrove gave him contact information for Patty Huckabaa. Constantini testified that at that point, he had not even considered whether alterations could remedy the problems with the shirts. His daughter had moved away from the Houston area, and he planned to go to a San Diego location and order the shirts again.

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<sup>1</sup> As will be discussed below, Constantini offered somewhat inconsistent testimony regarding the number of washings, stating four times at one point and "at least twice" at another.

Constantini further testified that he called Huckabaa on the same day he last talked to Musgrove. He said that she was responsive and accommodating at first and said she would call him “right back.” Constantini called her right back and left a message saying that although he had no reason to return to Houston, he was willing to go to any other city to get properly re-measured “to have the shirts redone . . . to include . . . corrections if it could be done.”

Despite Constantini leaving “probably” five messages at different times for Huckabaa, she did not get back to him for several months. In his last message, Constantini stated that he was going to hire legal counsel, but still received no reply. He hired counsel in August 2008, and counsel sent a demand letter to The Custom Shop that month. In November 2008, Constantini spoke to Michael Smith, who Constantini believed to be the owner of The Custom Shop. According to Constantini, Smith screamed at him when he tried to explain his problems, and then Smith hung up on him.

Also in November 2008, Huckabaa sent an email to Constantini, explaining that the problems with the shirts were fixable and requesting that he send her a shirt that fit in the collar and sleeve and tell her what needed to be changed. In his responsive email, Constantini objected to that method of obtaining a custom-made shirt, detailed the lack of response he had received over the preceding several months, and indicated that he was leaving for San Diego to visit his daughter, bemoaning the lost opportunities to have been re-measured in San Diego on prior trips.<sup>2</sup>

During cross-examination, Constantini testified that he did not know the shirts were nonrefundable at the time he purchased them, but he acknowledged that he “should have seen the sign” and that he did sign the receipt on which the policy also appeared. He additionally stated that during his May conversation with Musgrove, he did not have an opportunity to ask that the shirts be adjusted. Constantini further averred that he

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<sup>2</sup> In his testimony, Constantini explained that his mention of San Diego was intended as a suggestion that he be re-measured there, but The Custom Shop never followed up on that suggestion.

agreed in his first conversation with Huckabaa to have the shirts corrected, even though he could not imagine how they could have been corrected. He also offered to be re-measured in “any other store.”

Michael Lampear, an employee of The Custom Shop, testified that it was a fairly simple procedure to fix collars, sleeves, and cuffs. He acknowledged, however, that he never saw the shirts at issue in this case and that custom shirts are expected to fit. He further explained that it was the policy of The Custom Shop that customers had 120 days in which to complain about any problems with their order. He said that a customer needs some time to wear and launder the clothing and to get comfortable with it. He also said that people can lose or gain weight. Except for testimony from counsel regarding attorney’s fees, discussed in detail below, no one else testified at trial in this matter.

After trial, the parties provided the court with joint proposed findings of fact and conclusions of law, which the court adopted as its own. Among the findings of fact, the court found that within thirty days of receiving the shirts, Constantini tried on several of them and noticed that the “neck size was much larger than what was measured, the sleeves were much longer than measured, and the large cuff size was on the wrong arm.” The court also found that The Custom Shop displayed a sign which included the no-refund policy and that Constantini was aware of the policy at the time of his purchase. The court further made numerous specific findings in keeping with Constantini’s version of events.

In its conclusions of law, the court stated that the parties had a contract for the sale of twelve custom made shirts for \$1,673, that Constantini fully complied with the contract, and that The Custom Shop failed to comply. The court specifically held that Constantini “timely and duly notified” The Custom Shop of the problems. The court also concluded that The Custom Shop violated various provisions of the Texas Deceptive Trade Practices Act (DTPA), breached express and implied warranties, and performed

negligently. In its judgment, the court awarded Constantini \$1,673 in actual damages, \$4,300 in attorney's fees, and post-judgment interest on both sums.

We will begin our analysis by considering whether the trial court's judgment is supported by its breach-of-contract findings. We will then consider The Custom Shop's arguments regarding its no-refund and 120-day policies, as well as its challenge to the trial court's finding regarding laundering of the shirts. Lastly, we consider whether the court awarded excessive attorney's fees.

### ***Breach of Contract***

The Custom Shop contends that the trial court's judgment cannot be based on its breach-of-contract ("failure to comply") finding because Constantini did not include that cause of action in his petition. Generally, a court's judgment must conform to the pleadings. *See* Tex. R. Civ. P. 301. However, if issues not raised by the pleadings are tried by express or implied consent of the parties, these issues shall be treated as if they had been raised by the pleadings. *See id.* 67, 301; *Baltzer v. Medina*, 240 S.W.3d 469, 476 (Tex. App.—Houston [14th Dist.] 2007, no pet.). To determine whether a particular issue was tried by consent, we must examine the record not for evidence of the issue, but for evidence of trial of the issue. *Greene v. Young*, 174 S.W.3d 291, 301 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

During his brief opening statement, Constantini's counsel told the court that "[t]he cause of action is based upon breach of contract, the Deceptive Trade Practices Act, negligence, and breaches of express and implied warranty, Your Honor." Further, as explained in detail above and below, there was considerable evidence during trial regarding the terms of the agreement between the parties, as well as The Custom Shop's alleged failure to perform as promised. Lastly, the finding that The Custom Shop failed to comply with the agreement was contained in the parties' joint proposed findings of fact and conclusions of law, which the court adopted as its own findings and conclusions. The Custom Shop does not cite to any point in the proceedings at which it objected to

trial of the breach of contract claims.<sup>3</sup> Accordingly, the breach-of-contract claim was tried by consent and supports the judgment.

***Limitation on Remedies—The No-Refund Policy***

Under its first issue, The Custom Shop contends that given the no-refund policy, Constantini was not entitled to an award of money damages. In support, The Custom Shop cites section 2.719 of the Uniform Commercial Code, which permits parties to a sale of goods to contractually modify or limit the available remedies. Tex. Bus. & Com. Code § 2.719. Further, The Custom Shop asserts that there was no evidence or finding that it waived the no-refund policy or that it refused a request from Constantini to make adjustments to the shirts within the allegedly applicable 120-day period.

In analyzing this issue, the language used in the policy is of utmost importance. *See Cherokee County Cogeneration Partners, L.P. v. Dynegy Mktg. & Trade*, 305 S.W.3d 309, 312 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (“Our primary concern when interpreting a contract is to ascertain and give effect to the parties’ intent. We therefore focus on the language used in the contract because that is the best indication of the parties’ intent.”). Here, the entirety of The Custom Shop’s policy was stated as a guarantee. It specifically guaranteed the customer’s satisfaction with the clothing under certain parameters. It began: “Custom Clothing, made to your measurements and styling, is non-refundable.” The very crux of the case here was whether the clothing was made to Constantini’s measurements. In finding of fact six, the trial court specifically found that it was not.<sup>4</sup> This finding was supported by evidence. Constantini testified at length regarding how ill-fitting the shirts were. He stated that the neck drooped downward when he wore a tie. He said that the sleeves went all the way to his fingers.

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<sup>3</sup> At the close of evidence, the trial court requested brief closing argument from counsel but stated that it did not require recordation by the court reporter. The record does not contain a transcript of closing arguments.

<sup>4</sup> Finding six reads as follows: “Within thirty days of their arrival, Plaintiff tried on several of the shirts and noticed that the shirt neck size was much larger than what was measured, the sleeves were much longer than measured, and the large cuff size was on the wrong arm.”

And he explained that the incorrect cuff had been made larger; he wanted the cuff on his left sleeve to be larger to accommodate his watch but instead the right-side cuff was made larger. Photographic evidence was also presented in support of the neck and sleeve-length issues. Although The Custom Shop suggests that repeated launderings may have helped, it does not otherwise dispute that the clothing did not fit. In short, the evidence was sufficient to support the trial court's finding that the clothing was not made to Constantini's measurements; thus, under the terms of the policy itself, the no-refund language did not apply.<sup>5</sup>

The Custom Shop further points out that the policy also stated: "On the issue of fit, we reserve the right to correct size and fit problems if possible." The Custom Shop suggests that Constantini deprived it of that right by "his failure to take any steps to have the shirts adjusted and his insistence on a refund." We disagree.

According to his testimony, Constantini informed The Custom Shop of the problems with the shirts as soon as he became aware of them. After laundering them—on Musgrove's instructions but not to the extent instructed—Constantini then sent the shirts back to the location where he had ordered them. While he did request a refund at that time, at no point did Constantini refuse The Custom Shop an opportunity to correct the problems. Indeed, he testified that Musgrove told him that nothing could be done. Constantini further testified that he told Huckabaa that he was willing to go to any other city to get properly re-measured "to have the shirts redone . . . to include . . . corrections if it could be done." Afterwards, the evidence shows, Constantini made repeated attempts to communicate with Huckabaa, and even the president of the company, but to no avail. Finally, after months passed and Constantini's counsel sent a demand letter to

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<sup>5</sup> Constantini does not dispute that, had the shirts been made to his measurements, he would not have been able to return them for a refund.



The Custom Shop, Huckabaa offered to adjust the shirts based on a shirt Constantini was to send to her. Constantini rejected this post-demand offer.<sup>6</sup>

The evidence thus supports the conclusion that Constantini paid his money but The Custom Shop did not provide him with custom clothing made to his measurements and did not exercise its right to correct size and fit problems. Consequently, the trial court did not err in concluding that Constantini fully complied with the contract but The Custom Shop did not.

### *120-Day Policy*

Also in its first issue, The Custom Shop contends that the trial court erred in concluding that Constantini complied with store policy by notifying The Custom Shop of the problem with the shirts within 120 days of when he placed his order. This dispute focuses on the meaning of the following language in the policy: “If you have issues with your order, they need to be addressed within 120 days of when the order was placed.” The trial court found in finding twenty-three “[t]hat Constantini addressed his issues with the order of the shirts with The Custom Shop within 120 days of the date the order was placed.” In conclusion of law three, the court held that Constantini “timely and duly notified [The Custom Shop] of the problems with the shirts, in accordance with [The Custom Shop’s] policy.”

The Custom Shop specifically contends that in making these holdings, the trial court applied the wrong definition of “address” as used in the policy. The Custom Shop urges that “address” in this context means “to direct the efforts or turn the attention of (oneself),” quoting *Webster’s Third New International Dictionary* 24 (1993). On this basis, The Custom Shop maintains that Constantini’s one telephone call to Musgrove during the 120-day period was insufficient to demonstrate that he “addressed”—*i.e.*, directed his efforts or attention to—the problems with the shirts in a timely manner. It also points out that after being told in

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<sup>6</sup> The trial judge stated during trial that he considered Huckabaa’s offer to be a settlement offer because it came after The Custom Shop’s receipt of Constantini’s demand letter. The Custom Shop did not dispute this characterization in the trial court and does not do so on appeal.

that one telephone conversation to wash the shirts, Constantini failed to report the results of laundering the shirts, or request The Custom Shop to take any action, before the expiration of the 120-day period. Lastly, The Custom Shop asserts that had the intent of the policy been to require only notice of a problem within 120 days, as the trial court implicitly held, then the terms “notice” or “notify” would have been used instead of “addressed.”

We disagree with The Custom Shop’s interpretation of the policy language. Constantini addressed the problems with the shirts by calling Musgrove, telling him about the problems, and beginning to work toward a resolution. Even under the definition of “address” cited by The Custom Shop, Constantini directed his efforts and turned his attention to the issue of the ill-fitting shirts. It is unclear from The Custom Shop’s interpretation just how much Constantini would have to have done in order to have “addressed” the fit issues within the 120-days. The Custom Shop’s argument appears to only be “more than he did.” The policy itself, however, only requires that any issues “be addressed” within 120 days; it does not expressly or implicitly require that all issues be resolved or even that significant progress be made toward resolution. Accordingly, the trial court did not err in concluding that Constantini complied with store policy by notifying The Custom Shop of the problem with the shirts within 120 days.

### ***Laundering the Shirts***

The Custom Shop also takes issue with the trial court’s finding that despite several of the shirts “being washed four or more times . . . they still did not fit.” As the Custom Shop points out, Constantini testified somewhat inconsistently on this topic, suggesting he washed the shirts four or more times at one point but saying at another place in his testimony that he did so “at least twice.” The Custom Shop also insists that “there [was] no evidence that laundering the recommended six times would not have resulted in a well-fitting shirt.” With this latter contention we disagree. Clearly, as Constantini testified, washing the shirts could not have corrected the alleged error in making the wrong cuff larger. Constantini further testified that after several washings, he realized

that further washings would not correct the sizing issues given the extent of the mistakes. This testimony was supported by photographic evidence showing a drooping collar and sleeves down to Constantini's knuckles. As trier of fact, the judge was free to conclude, based on this evidence, that further washings would not have resolved the fit issues; this is true whether Constantini washed the shirts "four or more times" or "at least twice." Having found none of The Custom Shop's arguments under its first issue to have merit, we overrule the first issue.

### *Additional Issues*

In its second and third issues, The Custom Shop challenges, respectively, the trial court's findings on negligence and various DTPA violations. However, because the damages awarded by the court are supported by the breach-of-contract finding discussed above, we need not consider these challenges to alternative theories of recovery. Consequently, issues two and three are overruled as moot.

### *Attorney's Fees*

In its fourth issue, The Custom Shop contends that the trial court awarded excessive attorney's fees to Constantini.<sup>7</sup> The Custom Shop emphasizes that the court awarded \$4,300 in attorney's fees when the actual damages in the case only amounted to \$1,673.

The determination of reasonable attorney's fees in a given case is usually a question for the factfinder. *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 12 (Tex. 1991). Factors commonly cited in assessing the reasonableness of fees include: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly; (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee

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<sup>7</sup> As a sub-issue under issue four, The Custom Shop also argues that the court erred in awarding any attorney's fees to Constantini because he was not entitled to any actual damages. Because, as explained above, Constantini was entitled to actual damages, this sub-issue is moot.

customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered. *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997) (citing Tex. Disciplinary R. Prof'l Conduct 1.04). It is also well-established that attorney's fees should generally bear some reasonable relationship to the amount in controversy. *See, e.g., Bank of Texas v. VR Elec., Inc.*, 276 S.W.3d 671, 684 (Tex. App.—Houston [1st Dist.] 2008, pet. denied). However, there is no rule that fees cannot be more than actual damages, and fees in excess of three times the amount of actual damages have been affirmed on appeal as reasonable under the circumstances. *See, e.g., Bencon Mgmt. & Gen. Contracting, Inc. v. Boyer, Inc.*, 178 S.W.3d 198, 210-11 (Tex. App.—Houston [14th Dist.] 2005, no pet.); *Murrco Agency, Inc. v. Ryan*, 800 S.W.2d 600, 606-07 (Tex. App.—Dallas 1990, no writ).

As The Custom Shop points out, this was a fairly simple case. The clerk's record reveals few filings in the case, and the reporter's record (101 pages long) reveals that trial proceedings were not particularly lengthy. During his testimony, counsel for Constantini urged the court to award \$6,831.33 in attorney's fees. He said that he worked about 24 hours on the case through trial and that his normal rate was \$315 an hour. He explained his educational and professional background and detailed the following work on this case: initial consultation; review of documents; drafting of DTPA-demand letter, various motions, pleadings, correspondence, and a mediation memorandum; attendance at an approximately four-hour mediation; messages left with defendant and telephone conversations with opposing counsel; review of relevant cases; and preparation for and attendance at trial.

Counsel for The Custom Shop also testified regarding attorney’s fees. He initially asserted that “a reasonable hourly fee for a matter of this size and complexity . . . would be in a range of 175 to maybe 215, 240 an hour at the outside.” He further calculated that about ten hours could have reasonably been spent on the case before the beginning of trial preparations. He indicated that trial preparation itself should not have taken long and pointed out that the trial judge would himself know how long the trial took. Under cross-examination, counsel acknowledged that his opposing counsel (Constantini’s counsel) had become involved in the case almost a year before he did. In its brief, The Custom Shop argued that a reasonable total for time on the case would have been seventeen hours (presumably ten hours before trial-preparation, as counsel testified, plus seven hours for trial preparation and trial itself).<sup>8</sup>

Even if we examined only The Custom Shop’s and its counsel’s representations regarding a reasonable rate (up to \$240 an hour) and a reasonable amount of time spent on the case (seventeen hours), we would derive a figure (\$4,080) that is very close to that awarded by the trial court (\$4,300). Certainly, given the detailed testimony of both counsel, there was sufficient evidence to support the trial court’s award of \$4,300 in attorney’s fees. Consequently, we overrule The Custom Shop’s fourth issue.

We affirm the trial court’s judgment.

/s/ Martha Hill Jamison  
Justice

Panel consists of Justices Brown, Boyce, and Jamison.

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<sup>8</sup> In other parts of his testimony, The Custom Shop’s counsel indicated that \$200 would be “[m]ore reasonable” for a case of this nature. He also averred that a 40-percent contingency fee would have been “[m]ore appropriate.” However, as trier of fact, the trial court was entitled to accept counsel’s statement that a fee of up to \$240 was reasonable and disregard the other testimony.