Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-12-00837-CV

DRURY SOUTHWEST, INC.,
Appellant

v.

LOUIE LEDEAUX #1, INC.,
Appellee

From the 150th Judicial District Court, Bexar County, Texas
Trial Court No. 2008-CI-03926
Honorable Janet P. Littlejohn, Judge Presiding

Opinion by: Rebeca C. Martinez, Justice

Sitting: Karen Angelini, Justice
Marialyn Barnard, Justice
Rebeca C. Martinez, Justice

Delivered and Filed: October 30, 2013

AFFIRMED

Drury Southwest, Inc. appeals the trial court's September 13, 2012 judgment awarding actual and punitive damages to Louie Ledeaux #1, Inc. based on fraud. We affirm the trial court's judgment.

FACTUAL AND PROCEDURAL HISTORY

This is the second appeal by Drury Southwest, Inc. ("Drury") in its underlying lawsuit against Louie Ledeaux #1, Inc. ("Ledeaux") arising out of a restaurant lease on Drury's property. In the first appeal, a panel of this court reversed the trial court's judgment awarding damages to

Ledeaux for Drury's violations of the Deceptive Trade Practices Act ("DTPA"), and remanded for a re-election of remedies by Ledeaux. *See Drury Southwest, Inc. v. Louie Ledeaux #1, Inc.*, 350 S.W.3d 287, 291-92 (Tex. App.—San Antonio 2011, pet. denied). Ledeaux elected to recover on its fraud theory and this appeal by Drury ensued.

The basic facts and procedural history of the case are stated in our prior opinion, but will be briefly re-stated here. Drury, a commercial real estate company, owns property located at 103 NE Loop 410 in San Antonio, Texas, near the Jones Maltsberger intersection. Several hotels and restaurants are located on the property. In 2007, Drury approached Ledeaux and asked it to operate a first-class Mexican food restaurant in one of the vacant restaurant spaces. "To entice Ledeaux," Drury promised to build an outdoor patio and to allow Ledeaux to install a reader board sign. *Id.* at 290. Ledeaux and Drury executed a written lease on August 7, 2007 (the "Lease"). The Lease required Drury to pay for construction of the patio, and gave Ledeaux the right to install a reader board sign on the property. The Lease required Ledeaux to expend $95,000 for improvements to the space in order to trigger a $50,000 investment by Drury, and to acquire $70,000 worth of equipment. Ledeaux borrowed the $95,000 from Sterling Bank on September 10, 2007, and leased $176,500 worth of equipment from American Equipment Finance. Ledeaux also obtained a $50,000 line of credit from Sterling Bank. Drury waived the rent until March 2008, loaned $16,000 to Ledeaux in December for payroll, and gave Ledeaux an "IOU" for approximately $50,000 in food coupons.

Several problems arose before the restaurant opened on December 7, 2007. Drury waited six months to apply for a permit to build the patio. *Id.* Construction of the patio was further delayed because the property on which Drury promised to build the patio was actually owned by a different entity. *Id.* In addition, the reader board sign was not installed because a three-year old dispute between the City of San Antonio and Drury about a different sign on adjacent property

blocked the permit for Ledeaux's sign. *Id.* Finally, Ledeaux discovered that the Jones Maltsberger exit, the closest highway exit to the restaurant, was not going to reopen after the city completed its highway construction project. *Id.* It is undisputed that the patio was not built and the sign was not installed before the restaurant closed in March 2008.

During the three months of its operation, the restaurant failed to generate sufficient business and Ledeaux fell behind on its various payment obligations. On March 5, 2008, the owners of Ledeaux met with Drury and discussed ways to turn the restaurant around, including changing the format to a Cajun restaurant. The Ledeaux owners did not intend to close the restaurant at that time. Five days later, Drury changed the locks on the restaurant premises, forcing the restaurant to close. At a meeting that same day, Drury offered to buy the restaurant business from Ledeaux for $1.00. The Ledeaux owners later learned that Drury had been in discussions with other parties about opening a different restaurant in the space as early as March 3, 2008. At the time Ledeaux closed the restaurant, it had invested approximately $400,000. Ledeaux also owed Sysco Foods $18,061.20, and $35,000 for the sign for which it had contracted.

On the same day it changed the locks, Drury filed for a temporary restraining order to prevent Ledeaux from removing any property or equipment from the space. Ledeaux counterclaimed for breach of contract, fraud, negligent representation, and violations of the Property Code and the DTPA. Drury, in turn, brought a counterclaim for Ledeaux's failure to pay the $16,000 promissory note it signed on December 18, 2007.

At the conclusion of a seven-day trial, a jury found in favor of Ledeaux on its alternative theories of recovery. Specifically, the jury found that Drury breached the Lease, committed fraud against Ledeaux, made negligent misrepresentations to Ledeaux, prevented Ledeaux from entering the leased premises, and violated the DTPA by engaging in false, misleading, or deceptive acts or practices. In addition, the jury found that Ledeaux did not breach the Lease, but did fail to pay the

$16,000 promissory note to Drury. Ledeaux elected to recover under the DTPA, for which the jury had awarded $625,000 in actual damages and $450,000 for Drury's knowing and intentional conduct. After a remittitur, the trial court rendered judgment in favor of Ledeaux for $1,139,000, plus $23,608.56 in attorney's fees. Drury appealed.

On appeal, this court found the evidence legally sufficient to support the jury's finding that Drury engaged in false, misleading, or deceptive acts or practices in violation of the DTPA. *Id.* at 290-92. However, we reversed the award of $625,000 in DTPA damages because the amount was outside the range of the damages evidence, which showed a total investment by Ledeaux of approximately $400,000. *Id.* at 292-93. On Ledeaux's motion for rehearing, the court remanded the case to the trial court to permit Ledeaux to make a re-election of remedies since the jury had made affirmative findings in its favor on several alternative theories of liability. *Id.* at 293.

Upon remand, Ledeaux elected to recover on its fraud theory. In accordance with the jury's findings, the trial court rendered judgment awarding Ledeaux $220,750 in actual damages for Drury's fraudulent conduct and $800,000 in punitive damages, plus pre-judgment and post-judgment interest. The trial court also rendered judgment in favor of Drury for the $16,000 balance due on the promissory note, plus accrued interest of $3,490.01, and $685 in attorney's fees on its breach of contract claim. In addition, the court awarded Drury $25,000 in appellate attorney's fees for its successful appeal of the prior judgment. These awards to Drury effectively operate as an offset against Ledeaux's total judgment for $1,020,750.

On appeal, Drury raises twelve issues which we address by category.

FRAUD (ISSUE NOS. 1, 3, 8)

With respect to liability, Drury challenges the jury's finding in Question No. 9 that Drury committed fraud against Ledeaux, asserting there is "no evidence" that it had the intent to defraud Ledeaux or that it engaged in fraudulent conduct. Drury contends it merely breached its promises

under the Lease. With respect to damages, Drury argues there is "no evidence" of a causal link between its alleged fraudulent conduct and the jury's award of actual damages in the amount of $220,750.

A legal sufficiency, or "no evidence," point will be sustained if (i) there is a complete absence of evidence of a vital fact, (ii) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact, (iii) the evidence offered is no more than a scintilla, or (iv) the evidence conclusively establishes the opposite of the vital fact. *City of Keller v. Wilson*, 168 S.W.3d 802, 812-14 (Tex. 2005); *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 903 (Tex. 2004). Evidence is "more than a scintilla" if it would enable reasonable and fair minded people to differ in their conclusions. *City of Keller*, 168 S.W.3d at 813. A party attacking the legal sufficiency of the evidence on an issue on which it did not have the burden must show there is no evidence to support the adverse finding. *Id.* In considering legal sufficiency, we consider all the evidence, including all reasonable inferences, in the light most favorable to the verdict. *Id.*

Fraudulent Conduct and Intent—Sufficiency of the Evidence

In its first and third issues, Drury challenges the legal sufficiency of the evidence to support the jury's finding in Question No. 9 that it committed fraud. To recover under a fraud claim, the following elements must be proven: (1) that a material representation was made; (2) the representation was false; (3) when the misrepresentation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the speaker made the misrepresentation with the intent that the other party should act upon it; (5) the party acted in reliance on the misrepresentation; and (6) the party thereby suffered injury. *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 758 (Tex. 2001) (orig. proceeding); *Formosa Plastics Corp. USA v. Presidio Eng'rs. & Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998). The jury was

instructed on those elements in Question No. 9 asking it to determine whether Drury committed fraud against Ledeaux. The word "misrepresentation" was defined as "a false statement of fact, or a promise of future performance made with an intent, at the time the promise was made, not to perform as promised." The jury returned an affirmative finding that Drury committed fraud.

Drury argues there is no evidence that it had the intent to defraud Ledeaux, i.e., that when it made the material representations about building the patio and installing the reader board sign, it knew the statements were false or made the positive assertions recklessly without knowing whether they were true or false, with the intent that Ledeaux would act in reliance on the misrepresentations. *See In re FirstMerit*, 52 S.W.3d at 758; *Formosa*, 960 S.W.2d at 47. Drury asserts its conduct was not fraudulent, but rather a mere failure to perform the terms of the Lease, i.e., a simple breach of contract resulting only in economic loss.

Generally, a mere breach of a contract is not evidence of fraud. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 304-05 (Tex. 2006). However, when a party makes a contractual promise with no intent to perform, an action for fraudulent inducement may be brought. *Id.*; *Formosa*, 960 S.W.2d at 46. The Supreme Court has repeatedly recognized that "intent to defraud is not usually susceptible to direct proof." *Tony Gullo*, 212 S.W.3d at 305; *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 435 (Tex. 1986) (noting that intent "invariably must be proven by circumstantial evidence"). A party's intent at the time it made the representation may be inferred from the party's subsequent acts. *Spoljaric*, 708 S.W.2d at 435. Further, intent is a fact issue that is uniquely within the realm of the jury, depending heavily upon the witnesses' credibility and the weight given to their testimony. *Id.* Although breach of a contract is no evidence of fraudulent intent, a "breach combined with 'slight circumstantial evidence' of fraud is enough to support a verdict for fraudulent inducement." *Tony Gullo*, 212 S.W.3d at 305; *Spoljaric*, 708 S.W.2d at 435.

As noted by Ledeaux, this court has already reviewed the trial evidence in this case with respect to Drury's misrepresentations concerning the sign. In our prior opinion, we determined there was legally sufficient evidence that Drury knowingly made a material misrepresentation about the ability to install a reader board sign during the Lease negotiations with Ledeaux. *Drury*, 350 S.W.3d at 291. Specifically, this court described the supporting evidence as follows:

> At trial, Ledeaux presented evidence that Drury told Ledeaux that it may install whatever sign it wanted to install on the leased premises. Two owners of Ledeaux testified that Drury stated that Ledeaux could install any type of sign that it wanted. Ledeaux's owners told Drury that they had envisioned a twelve-foot by sixteen-foot reader board that would display the restaurant's specials and events. They both testified that they felt that this particular sign was essential to the success of the restaurant. Evidence also showed that the City of San Antonio denied the permit application to install this sign because of a pre-existing dispute that Drury had with the City over the erection of another sign on the same property. The evidence also showed that Drury was aware of this dispute and that the dispute had lasted three years. As such, Drury misrepresented to Ledeaux that it would be able to erect the sign that it had wanted.
>
> Drury argues that '[t]he misrepresentations merely stated what the contract stated and were nothing more than statements that the contractual obligations would be fulfilled.' However, under the lease, Ledeaux had to obtain Drury's prior written approval to install a sign, and Drury, subject to permits, had the right to erect an LED sign anywhere on the leased premises. Because Drury's statement that Ledeaux would be able to put up any sign it wanted was more than just its promise to comply with the lease provision regarding the signage, Drury's oral representation was more than a mere promise to perform its obligations under the contract. Thus, Drury's liability under the DTPA may be predicated on these statements.

Id. at 291-92 (internal citations omitted). Thus, we have already concluded there is more than a scintilla of evidence that Drury made a material misrepresentation, with knowledge of its falsity, when it told Ledeaux it could erect any type of sign it wanted on the property, thereby satisfying the first three elements of fraud. *See FirstMerit*, 52 S.W.3d at 758; *Formosa*, 960 S.W.2d at 47. Further, we noted the evidence about Drury's representations to Ledeaux that it would construct an outdoor patio adjacent to the restaurant despite the fact that Drury knew part of the proposed patio was located on property owned by a different entity, and the evidence showing that Drury

did not submit the patio permit for approval until six months after signing the Lease. *Drury*, 350 S.W.3d at 290. This evidence is similarly sufficient to establish the first three elements of fraud regarding Drury's knowing misrepresentations about building the patio.

The trial evidence also supports a finding that Drury made the knowing misrepresentations about the sign and patio with the intent that Ledeaux would act on them, and that Ledeaux did rely on them in executing the Lease, in satisfaction of the fourth and fifth fraud elements. *See FirstMerit*, 52 S.W.3d at 758; *Formosa*, 960 S.W.2d at 47; *see also Miller v. Keyser*, 90 S.W.3d 712, 716 (Tex. 2002) (same misrepresentation that supports DTPA claim may also support common law fraud claim, with added requirement to prove misrepresentation was made with intent to defraud). The misrepresentations were made during the Lease negotiations to induce Ledeaux into agreeing to lease the premises. *Drury*, 350 S.W.3d at 290. Further, Ledeaux's owners, Paul Mayo, Arthur Mayo, and David Gonzalez, testified that the patio and signage promised by Drury were necessary to the success of their business plan for the restaurant. They also testified they relied on Drury's representations about the patio and signage when they executed the Lease on behalf of Ledeaux, and that Drury knew they were relying on its representations. Based on this evidence, the jury could have reasonably found that Drury made the knowing misrepresentations about the sign and patio with the intention that Ledeaux would act on them by executing the Lease, and that Ledeaux did rely on the misrepresentations in signing the Lease.

Drury also argues it owed no duty to Ledeaux because their dealings were arms-length business negotiations that resulted in execution of a contract, whose breach caused only economic damages. To the contrary, "[t]he duty not to fraudulently procure a contract arises from the general obligations of law rather than the contract itself, and may be asserted in tort even if the only damages are economic." *Tony Gullo*, 212 S.W.3d at 304-05 (defendant's liability on the contract does not absolve it from tort liability as well); *Formosa*, 960 S.W.2d at 46-47 (duty not to act

illegally to procure a contract is separate and independent from duties established by contract itself).

We conclude there is more than a scintilla of evidence in the record to support the jury's finding that Drury fraudulently induced Ledeaux into entering into the Lease by making the knowing misrepresentations about the patio and the sign. *See Tony Gullo*, 212 S.W.3d at 305 (breach of contract combined with "slight circumstantial evidence" of fraud constitutes legally sufficient evidence of fraudulent inducement).

Actual Damages for Fraud - Causation

In its eighth issue, Drury argues there is legally insufficient evidence of the sixth element of fraud, i.e., that Ledeaux's damages were caused by Drury's knowing misrepresentations with respect to the sign and the patio. Drury asserts there is "no direct evidence" that links its failure to install the sign and build the patio to the damages suffered by Ledeaux. Drury contends that the restaurant lost money and had to close due to lack of working capital and bad business decisions by the owners, not due to the absence of the sign or the patio. It argues there is no evidence to show "how much would be made from either [the] sign or [the] patio," and no testimony about "research into how much the patio or sign would increase sales."

Ledeaux responds that Drury's argument is misdirected at "lost profits" or "benefit-of-the-bargain" damages, rather than the reliance or "out-of-pocket" damages that Ledeaux sought and received. Indeed, when asked in Question No. 10 to determine the amount of money that would compensate Ledeaux for its damages that resulted from Drury's fraud, the jury was instructed to consider only one element of damages—"the sum of money expended by [Ledeaux] in reliance upon the fraud committed by [Drury]." As discussed above, there is ample evidence to show that Ledeaux relied on Drury's misrepresentations about the sign and the patio in deciding to enter into the Lease with Drury. In turn, the terms of the Lease required Ledeaux to make certain

expenditures prior to opening the restaurant, which amounted to out-of-pocket expenses for Ledeaux. Thus, there is legally sufficient evidence that Ledeaux's out-of-pocket expenditures made in fulfillment of its obligations under the Lease were caused by Drury's fraud. *See FirstMerit*, 52 S.W.3d at 758; *Formosa*, 960 S.W.2d at 47.

Further, the amount of $220,750 in actual damages found by the jury is within the range of damages evidence. *See Gulf States Utils. Co. v. Low*, 79 S.W.3d 561, 566 (Tex. 2002) (jury has broad discretion to award damages within range of trial evidence). In our prior opinion analyzing the jury's award of DTPA damages for misrepresentations, we stated that,

> Drury acknowledges that there was evidence of some of Ledeaux's compensatory damages: a $95,000 note payable to Sterling Bank, a $50,000 line of credit with Sterling Bank, and a $176,500 loan from American Equipment Finance. The total is $321,500. Ledeaux points to evidence that Ledeaux owed Sysco Foods $18,061.20, and that it had invested $35,000 in the sign for its restaurant. Drury and Ledeaux both agree that the evidence supports that Ledeaux's total investment in the restaurant was approximately $400,000.

Drury, 350 S.W.3d at 292. Thus, Drury conceded that the record supported out-of-pocket expenses by Ledeaux that totaled about $400,000. The jury awarded less than that amount to Ledeaux on its fraud claim. However, as long as the award is within the range of damages supported by the evidence, the reviewing court is not permitted to speculate about how the jury actually arrived at its award. *Id.*; *Vela v. Wagner & Brown, Ltd.*, 203 S.W.3d 37, 49 (Tex. App.—San Antonio 2006, no pet.).

The evidence is legally sufficient to establish a causal link between Drury's fraudulent inducement and Ledeaux's damages in the amount of $220,750. Further, the award falls within the range of damages evidence reflected in the record and conceded to by Drury in its first appeal.

PUNITIVE DAMAGES (ISSUE NOS. 4, 5)

In its fourth issue, Drury argues there is legally insufficient evidence to support the jury's finding in Question No. 11 that its conduct warranted punitive, or exemplary, damages. In its fifth

issue, Drury asserts the $800,000 amount of punitive damages is excessive. Section 41.013 of the Civil Practice and Remedies Code instructs that, in reviewing the evidence related to a jury finding of liability for exemplary damages, or the amount of exemplary damages, the appellate court's opinion must state its reasons for upholding or disturbing the finding or award and must address the evidence, or lack of evidence, with specificity in light of the requirements of Chapter 41. TEX. CIV. PRAC. & REM. CODE ANN. § 41.013 (West 2008).

Legal Sufficiency of the Evidence to Support an Award of Punitive Damages

Under section 41.003, exemplary damages may be awarded only if the claimant proves by "clear and convincing" evidence that the harm with respect to which the exemplary damages are sought resulted from fraud, malice, or gross negligence. *Id.* § 41.003(a) (West Supp. 2012). "Fraud" means fraud other than constructive fraud. *Id.* § 41.001(6) (West 2008). "Clear and convincing" evidence means "the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." *Id.* § 41.001(2) (West 2008). This burden of proof may not be met with evidence of ordinary negligence, bad faith, or a deceptive trade practice. *Id.* § 41.003(b).

Here, the same evidence that supports the jury's actual fraud finding against Drury would support its decision to award exemplary damages, as long as the evidence meets the elevated "clear and convincing" standard. *Sw. Bell Telephone Co. v. Garza*, 164 S.W.3d 607, 621-22, 627 (Tex. 2004) (holding that a finding that requires an elevated standard of proof such as "clear and convincing" must also meet an elevated standard of review to be upheld on appeal). In our discussion of Drury's first and third issues, we evaluated the evidence of Drury's fraud to determine whether it amounted to more than a scintilla of probative evidence on all the elements of fraud and was thus legally sufficient to support the jury's fraud finding. Under this issue, we must look at all the evidence in the light most favorable to the finding to determine whether a

reasonable trier of fact could have "formed a firm belief or conviction that its finding was true." *Id.* In doing so, we assume the jury resolved any disputed facts in favor of its finding if a reasonable fact finder could do so, and we disregard all evidence a reasonable fact finder could have disbelieved or found incredible. *Id.*; *City of Keller*, 168 S.W.3d at 817. There is no requirement that the evidence be unequivocal or undisputed; however, we must consider undisputed evidence even if it does not support the finding. *Citizens Nat'l Bank v. Allen Rae Investments, Inc.*, 142 S.W.3d 459, 483 (Tex. App.—Fort Worth 2004, no pet.). Therefore, in addressing Drury's legal sufficiency challenge to the exemplary damages award we must determine whether based on the evidence the jury could reasonably have formed a firm belief or conviction that Ledeaux's harm resulted from Drury's fraud. *See id.* (noting that the "clear and convincing" intermediate standard falls between the preponderance standard of civil proceedings and the reasonable doubt standard of criminal proceedings).

Here, the jury was asked in Question No. 11 whether it found by clear and convincing evidence that the harm to Ledeaux resulted from the fraud it found in response to Question No. 9. The jury answered in the affirmative. In challenging that finding, Drury points to evidence that under the terms of the Lease it abated the rent until March 2008 and provided a $50,000 building allowance after Ledeaux made the required $95,000 investment in remodeling the space. When the restaurant opened in December, Drury loaned $16,000 to Ledeaux in exchange for a promissory note and gave Ledeaux an "IOU" for approximately $50,000 worth of food coupons for meals at the restaurant. In addition, Drury paid an architect to work on a design for the patio, met with the City regarding the permit for the patio, and attempted to find an alternative location and means to install a sign for Ledeaux. Drury argues these actions show it attempted to assist Ledeaux in making the restaurant succeed, and are thus contrary to a firm belief or conviction that Ledeaux's harm was the result of fraudulent conduct by Drury. Ledeaux, on the other hand, points to the

evidence that Drury knew about the pre-existing problems with the proposed patio and sign before the Lease was signed and falsely represented that Ledeaux would be able to have an outdoor patio in the location it wanted and the type of reader board sign it wanted on the pole close to the highway—neither of which ever occurred and both of which Ledeaux considered necessary to the restaurant's viability. Ledeaux further stresses the evidence of Drury's conduct in March 2008. The evidence shows that after the restaurant had only been open three months and was struggling financially, the Ledeaux owners met with Drury on March 5, 2008 to discuss changes to make the restaurant profitable. At that time, the Ledeaux owners had no intention of closing the restaurant. Five days after the meeting, Drury abruptly changed the locks on the restaurant premises, effectively forcing it to close. Later that same day, Drury offered to buy the restaurant from Ledeaux for $1.00. Moreover, evidence was presented that Drury had been in negotiations with other parties to open a different restaurant in the same premises as early as March 3, 2008. The evidence showed Ledeaux lost its approximately $400,000 investment in the restaurant when it closed.

We conclude that when Drury's use of knowing misrepresentations to fraudulently induce Ledeaux into signing the Lease is considered along with its March 2008 actions in abruptly changing the locks on the restaurant without prior notice to Ledeaux, callously offering only $1.00 to buy the restaurant, and lining up another party to run the restaurant prior to meeting with Ledeaux, it constitutes clear and convincing evidence that Drury's fraudulent conduct resulted in a failed venture for Ledeaux. *See id.* at 483-84 (referring to its prior legal sufficiency analysis of the fraud evidence and detailing the evidence and inferences against the exemplary damages finding before concluding the jury's award of exemplary damages was supported by clear and convincing evidence). Because the jury could have reasonably formed a firm conviction or belief that Ledeaux's harm resulted from Drury's fraudulent and reprehensible conduct, we hold the

evidence is legally sufficient to support an award of exemplary damages against Drury. *See Safeshred, Inc. v. Martinez*, 365 S.W.3d 655, 660 (Tex. 2012) (exemplary damages are recoverable if plaintiff proves actual damages plus "outrageous, malicious, or otherwise reprehensible conduct" by defendant).

Excessiveness of Amount of Punitive Damages

Drury next challenges the amount of exemplary damages awarded, arguing that $800,000 is excessive.[1] In Question No. 12, the jury was instructed to consider the following statutory factors in determining the amount of exemplary damages to be assessed against Drury: (1) the nature of the wrong; (2) the character of the conduct involved; (3) the degree of culpability; (4) the situation and sensibilities of the parties; (5) the extent to which such conduct offends a public sense of justice and propriety; and (6) Drury's net worth. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.011 (West 2008). The jury was also instructed to consider that exemplary damages are awarded as "a penalty or by way of punishment." *See id.* §§ 41.010(a), 41.001(5) (West 2008). In reviewing the jury's award, we must be cognizant that the determination of whether to award exemplary damages and the amount of exemplary damages ultimately lies within the discretion of the trier of fact. *Id.* § 41.010(b).

We engage in a de novo review to determine whether the award is excessive in violation of due process. *Bennett v. Reynolds*, 315 S.W.3d 867, 869, 873 (Tex. 2010) (citing *Philip Morris USA v. Williams*, 549 U.S. 346 (2007)). We apply a three-part framework, referred to as the "*Gore*[2]

[1] Drury's brief also references the statutory cap on exemplary damages set forth in section 41.008, but Drury never pled or raised this argument in the trial court. TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (West Supp. 2012); *see Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 896-97, 904-05 (Tex. 2000) (statutory cap on exemplary damages is required to be pled); *see also SJW Prop. Commerce, Inc. v. Sw. Pinnacle Props., Inc.*, 328 S.W.3d 121, 165 (Tex. App.—Corpus Christi 2010, pet. denied); *Shoreline, Inc. v. Hisel*, 115 S.W.3d 21, 25 (Tex. App.—Corpus Christi 2003, pet. denied). Drury first raised the statutory cap in its "Seconded Amended Answer" which was filed three years after trial and one year after its first appeal. Therefore, no error was preserved. TEX. R. APP. P. 33.1(a).

[2] *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

guideposts," and consider the following: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Bennett*, 315 S.W.3d at 873 (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003)).

Drury focuses its argument on the first guidepost, reprehensibility, of which it argues there is no evidence. The analysis of reprehensibility focuses on the "enormity" of the misconduct. *Bennett*, 315 S.W.3d at 874. It involves consideration of five nonexclusive factors—"whether (1) the harm inflicted was physical rather than economic; (2) the tortious conduct showed 'an indifference to or a reckless disregard for the health or safety of others'; (3) 'the target of the conduct had financial vulnerability'; (4) 'the conduct involved repeated actions,' not just 'an isolated incident'; and (5) the harm resulted from 'intentional malice, trickery, or deceit,' as opposed to 'mere accident.'" *Id.* (citing *Gore*, 517 U.S. at 575). One factor alone may not be sufficient to sustain a punitive damages award, while the absence of all the factors renders an award suspect. *Bennett*, 315 S.W.3d at 874 (citing *State Farm*, 538 U.S. at 419). The reprehensibility analysis permits the court to consider related conduct that demonstrates the "deliberateness and culpability of the defendant's action" as long as such conduct has a nexus to the specific harm suffered by the plaintiff. *Bennett*, 315 S.W.3d at 875. The analysis may also consider, to some extent, surrounding circumstances beyond the underlying tort. *Id.* Here, as discussed above, Drury engaged in intentional deceit on the occasions when it made the misrepresentations about the patio and the sign to induce Ledeaux to sign the Lease and make the monetary investments it required. Further, Drury's related conduct in March 2008 when, without warning, it changed the locks and forced the restaurant to close showed a high degree of indifference and callous disregard for Ledeaux's commitment to and sizeable investment in the

restaurant. *See Allen Rae*, 142 S.W.3d at 485 (holding evidence supported jury finding that nondisclosures of material facts were result of callous indifference to the effect of the nondisclosures which justified the award of exemplary damages). Thus, the reprehensibility factors support the jury's award of exemplary damages.

The second guidepost is the ratio between the exemplary award and the compensatory damages award. *Bennett*, 315 S.W.3d at 877. Even though there is no bright-line ratio, the United Supreme Court has stated that, "in practice, few awards exceeding a single-digit ratio . . . will satisfy due process" and "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." *State Farm*, 538 U.S. at 425; *Bennett*, 315 S.W.3d at 877; *see Tony Gullo*, 212 S.W.3d at 310 (finding a 4.33:1 ratio exceeded constitutional limits where the reprehensibility factors did not conclusively support exemplary damages). Here, the ratio is 3.62:1 ($800,000 to $220,750), which is less than a 4:1 ratio.

The third guidepost involves a comparison between the exemplary damages and civil penalties for comparable misconduct. *Bennett*, 315 S.W.3d at 880. The DTPA statute provides for treble damages for these same types of knowing and intentional misrepresentations. *See* TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (West 2011). In this case, treble damages would be $662,250.

Keeping in mind that the amount of exemplary damages ultimately lies within the discretion of the jury, which has assessed the witnesses' credibility and determined the weight to be given to the evidence, and that two of the three *Gore* guideposts weigh in favor of the exemplary award, we cannot conclude that the award of $800,000 is excessive.

CONTRACTUAL LIMITATION ON LIABILITY (ISSUE NO. 2)

Drury asserts that parties may contractually agree to limit their liability to a certain sum, and argues that it did so in Paragraph 35 of the Lease which states in all caps, "in no event shall

lessor be liable to lessee, whether in tort or contract or otherwise, for any amount in excess of . . . $10,000." *See Tamez v. Sw. Motor Transport, Inc.*, 155 S.W.3d 564, 569 (Tex. App.—San Antonio 2004, no pet.) (party may contractually limit liability). However, the jury found that Drury breached the Lease, and therefore Drury may not enforce the remaining provisions of the Lease. *II Deerfield Ltd. P'ship v. Henry Bldg., Inc.*, 41 S.W.3d 259, 265 (Tex. App.—San Antonio 2001, pet. denied). Further, the jury also found that Drury fraudulently induced Ledeaux into signing the Lease, and we have upheld the jury's fraud finding. Therefore, Ledeaux is not bound by the Lease provisions, including the limitation of liability provision. *Formosa,* 960 S.W.2d at 46 (party is not bound by fraudulently induced contract); *Dunbar Med. Sys., Inc. v. Gammex Inc.*, 216 F.3d 441, 454 (5th Cir. 2000).

ADMISSIBILITY OF EVIDENCE ON "SPECIAL DAMAGES" (ISSUE NO. 6)

Drury argues the trial court abused its discretion in admitting evidence of "special damages" because Ledeaux did not plead for special damages with respect to its fraud claim. *See* TEX. R. CIV. P. 56 (requiring items of special damage to be pled). Drury points to the testimony of Arthur Mayo about cash advances on Ledeaux's credit cards and the testimony of Paul Mayo about the restaurant being his life's dream and his emotions when it closed. Drury asserts that the Lease only called for Ledeaux to expend $95,000 for repairs/remodeling and $70,000 for restaurant equipment for a total expenditure of $165,000, yet Ledeaux pled for $400,000 in total out-of-pocket damages as a result of Drury's fraud. Therefore, Drury asserts, the additional expenditures by Ledeaux in excess of $165,000 constitute "special damages" that it was required to specifically plead.

We agree with Ledeaux that Drury's argument conflates several damages concepts, confusing the character of damages with the measure of damages. "At common law, actual damages are either 'direct' or 'consequential.'" *Baylor Univ. v. Sonnichsen*, 221 S.W.3d 632, 636

(Tex. 2007) (quoting *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 816 (Tex. 1997)); *see* RESTATEMENT (SECOND) OF TORTS § 549 (1977) (outlining measure of damages for fraudulent misrepresentation). Consequential, or "special," damages are those damages that result naturally, but not necessarily, from the defendant's wrongful acts. *Sonnichsen*, 221 S.W.3d at 636. Direct, or "general," damages compensate for the loss that is the necessary and usual result of the wrongful act. *Id.* "Texas recognizes two measures of direct damages for common-law fraud: out-of-pocket and benefit-of-the-bargain." *Id.* (quoting *Formosa*, 960 S.W.2d at 49-50). Out-of-pocket damages derive from a restitutionary theory and measure the difference between the value of what was lost and the value of what was received. *Sonnichsen*, 221 S.W.3d at 636. Benefit-of-the-bargain damages derive from an expectancy theory and evaluate the difference between the value of what was represented and the value actually received. *Id.* Thus, damages based on lost profits or lost opportunity are benefit-of-the bargain damages, while damages based on amounts expended are out-of-pocket damages. *Id.* at 637.

Here, the character of damages that Ledeaux pled for was direct or "general" damages, not consequential or "special" damages, and the applicable measure of damages was reliance or "out-of-pocket" damages—which is exactly what the jury awarded. Ledeaux's Third Amended Counterclaim alleged in relevant part,

> Prior to execution of the Lease, [Drury] made misrepresentations of material fact regarding the building and location of the outdoor patio and Ledeaux's ability to install certain signage on the premises. In reliance on these representations, which were either intentionally false or made with reckless disregard for the truth, Ledeaux executed the Lease and incurred expenses totaling approximately $400,000 for equipment and other property necessary for the operation of the restaurant.

Therefore, Ledeaux sought to recover $400,000 in direct general damages based on the monetary expenditures it made either as an express requirement of the Lease or as a direct result of the Lease requiring it to set up and operate a first-class restaurant on the premises. The measure

of damages it sought, and the measure submitted to the jury, was out-of-pocket damages, i.e., the jury was instructed to award damages for fraud based on "the sum of money expended by [Ledeaux] in reliance upon the fraud committed by [Drury]." *See id.* at 636. Drury in fact acknowledges in its brief that Ledeaux sought "reliance damages."

SUBMISSION OF FRAUD DAMAGES QUESTION IN JURY CHARGE (ISSUE NO. 7)

Drury argues the trial court erred in submitting a "general damages issue," and in failing "to segregate the damages between elements." To the contrary, the jury charge shows the court submitted a damages question for each alternative theory of recovery pled by Ledeaux. Question No. 10 pertaining to damages for fraud submitted only one measure, or element, of damages — out-of-pocket damages, as set forth above. Therefore, there was no need for segregation.

"AFFIRMATIVE DEFENSE" OF ELECTION OF REMEDIES (ISSUE NO. 9)

In this issue, Drury argues the trial court erred in not holding a new jury trial on its newly-raised "affirmative defense of election of remedies" which it sought to raise in an "Amended Answer" filed in the trial court after our remand. At the same time, Drury also filed a "Motion for New Trial" presenting purported "newly discovered evidence" that Ledeaux had tried to execute on its DTPA judgment, and arguing Ledeaux had thus "waived" its other theories of recovery.

Drury has repeatedly tried to challenge Ledeaux's right to elect a new remedy on remand. Drury argued against Ledeaux's right to re-elect its remedies in its response to Ledeaux's motion for rehearing in the original appeal. We rejected its argument. *Drury*, 350 S.W.3d at 293. Drury then sought review of that ruling in the Texas Supreme Court. The petition was denied. Subsequently, as noted, Drury sought a "new trial" in the trial court based on an untimely, post-judgment affirmative defense, asserting that Ledeaux had waived its alternative theories of recovery by electing its DTPA remedy and seeking to collect the DTPA damages. Both of Drury's trial court pleadings were untimely and procedurally unavailable to Drury during the post-

appeal/remand stage of the proceedings. *See* TEX. R. CIV. P. 63 (amended pleadings with leave of trial court), 329b (time for filing motion for new trial). Now, through these odd vehicles, Drury again attempts to challenge this court's holding that Ledeaux had the substantive right to re-elect to recover on one of its other alternative theories, and had not waived its other theories merely by originally electing DTPA relief. *Drury*, 350 S.W.3d at 293. This issue has already been resolved by this court, and Drury is bound by our prior holding. *See Briscoe v. Goodmark Corp.*, 102 S.W.3d 714, 716-17 (Tex. 2003) (law of the case doctrine).

SEVERANCE OF DRURY'S CLAIM ON PROMISSORY NOTE (ISSUE NO. 10)

Drury similarly argues the trial court abused its discretion in denying its post-remand motion to sever its counterclaim for Ledeaux's breach of the promissory note. Drury did not file a motion to sever its breach of contract claim until July 11, 2012 — one year after this court's opinion remanding the cause and three years after trial. Rule 41 does not permit a trial court to sever a case after it has been submitted to the trier of fact. TEX. R. CIV. P. 41; *State Dept. of Highways and Public Transp. v. Cotner*, 845 S.W.2d 818, 819 (Tex. 1993) (per curiam). Therefore, the trial court did not err in denying Drury's motion to sever.

ADDITIONAL APPELLATE ATTORNEY FEES (ISSUE NO. 11)

Drury asserts the trial court erred in declining to award it conditional appellate attorney fees on this second appeal. However, Drury is currently appealing a judgment based on fraud, and is not entitled to recover attorney's fees on a fraud claim. *See Tony Gullo*, 212 S.W.3d at 304 (party cannot recover attorney fees in connection with fraud claim). In addition, Ledeaux is not cross-appealing the jury's finding that it failed to pay the $16,000 promissory note to Drury; therefore, Drury would not be entitled to any appellate attorney fees on the breach of contract claim.

CALCULATION OF PRE-JUDGMENT INTEREST (ISSUE NO. 12)

Finally, Drury argues the trial court erred in calculating the pre-judgment interest awarded in the final judgment beginning on May 28, 2008, effectively arguing pre-judgment interest should have been tolled during the pendency of the first appeal. However, Drury did not raise this objection in the trial court during the remand proceedings and thus, it is not preserved. TEX. R. APP. P. 33.1(a).

CONCLUSION

Based on the foregoing reasons, we overrule Drury's issues on appeal and affirm the judgment of the trial court.

Rebeca C. Martinez, Justice