Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00721-CV

402 LONE STAR PROPERTY, L.L.C. and Craig Otto,
Appellants

v.

Barry L. **BRADFORD**,
Appellee

From the 438th Judicial District Court, Bexar County, Texas
Trial Court No. 2014-CI-08653
Honorable Gloria Saldaña, Judge Presiding

Opinion by: Patricia O. Alvarez, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Karen Angelini, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: November 29, 2017

AFFIRMED IN PART; REVERSED AND RENDERED IN PART

402 Lone Star Property, L.L.C. (the "Company") and Craig Otto[1] appeal the trial court's judgment awarding damages and attorney's fees to Barry L. Bradford based on a jury's findings that the Company and Otto made a fraudulent lien or claim against Bradford's home and engaged in common law fraud. On appeal, the Company and Otto challenge the legal and factual sufficiency of the evidence to support the jury's liability findings and the damage awards. Alternatively, the Company and Otto contend: (1) the exemplary damage award is grossly

[1] Otto is the sole member of the Company.

excessive and unconstitutional; and (2) Texas law precludes Bradford's recovery of the same damages for his alternative theories of liability. We reverse the portion of the trial court's judgment awarding Bradford actual damages for his common law fraud claim and render judgment limiting Bradford's recovery to the damages and attorney's fees awarded based on the jury's finding that the Company and Otto made a fraudulent lien or claim against Bradford's home. We affirm the remainder of the judgment.

BACKGROUND

Because Bradford failed to pay his homeowners' association fees, the homeowners' association obtained an order authorizing it to foreclose on Bradford's home. The Company purchased the home at a foreclosure sale on October 1, 2013.[2]

On October 3, 2013, the Company posted a demand to vacate notice on Bradford's door, informing him of the foreclosure sale and demanding that he vacate the property. The notice stated that if Bradford did not honor the demand, a forcible detainer action would be filed against him.

Bradford immediately contacted an attorney and signed a retainer agreement on October 4, 2013. On October 7, 2013, Bradford's attorney sent a letter to the homeowners' association and the Company informing them of Bradford's intention to redeem his home pursuant to section 209.011 of the Texas Property Code and requesting a detail of the amount Bradford was required to pay to redeem his home.

On October 8, 2013, the Company posted a second notice to vacate on Bradford's door demanding that Bradford surrender possession of his home within three days. On October 15, 2013, the Company filed a forcible entry and detainer action in justice court and posted a copy of the petition on Bradford's door. On October 18, 2013, the Company sent Bradford's attorney a

[2] We note the record establishes that the Company's office was located in and Otto resided in Austin, Texas. Bradford's home is located in San Antonio, Texas.

Property Redemption Payoff Statement stating the total amount Bradford was required to pay to redeem his home was $5,877.22 and providing the following detail:

$1,401.22	due as per Texas Property Code 209.011(e)(2)(E)
$ 120.00	due as per Texas Property Code 209.011(e)(2)(C)
$4,356.00	due as per Texas Property Code 209.011(e)(2)(B)

On October 22, 2013, Bradford's attorney mailed the Company a cashier's check for $5,877.22.

On October 25, 2013, the Company filed a motion to dismiss its forcible entry and detainer action. Three days later, the justice court signed an order granting the motion to dismiss, and the Company recorded a deed re-conveying Bradford's home to him.

On May 30, 2014, Bradford filed the underlying lawsuit asserting various claims against the Company and Otto for inflating the amounts due on the Property Redemption Payoff Statement. At trial, Bradford proceeded only on his common law fraud claim and his claim that the Company and Otto made a fraudulent lien or claim against his home. As previously noted, the jury found the Company and Otto were liable on both claims and awarded Bradford damages and attorney's fees. Based on the jury's findings, the trial court signed a judgment awarding Bradford: (1) $20,000 in damages and $25,000 in exemplary damages for his claim that the Company and Otto made a fraudulent lien or claim against his home; (2) $1,859.22 in actual damages for his common law fraud claim; (3) $5,000 in attorney's fees; (4) $10,000 in conditional appellate attorney's fees; and (5) court costs. The Company and Otto appeal.

DOUBLE RECOVERY

We first address one of the alternative issues asserted by the Company and Otto because the resolution of this issue impacts our remaining analysis. In their second alternative issue, the Company and Otto contend Bradford was not entitled to recover damages for both of his claims because Texas law precludes a double recovery for a single injury.

A. Applicable Law

"A party is entitled to bring suit and seek damages on alternative theories; however, the plaintiff may not recover on both theories because these would amount to a 'double recovery.'" *Marin Real Estate Partners, L.P. v. Vogt*, 373 S.W.3d 57, 76 (Tex. App.—San Antonio 2011, no pet.); *see also Foley v. Parlier*, 68 S.W.3d 870, 882 (Tex. App.—Fort Worth 2002, no pet.) (same). "A double recovery exists when a plaintiff obtains more than one recovery for the same injury." *Waite Hill Servs., Inc. v. World Class Metal Works, Inc.*, 959 S.W.2d 182, 184 (Tex. 1998); *see also Marin Real Estate Partners, L.P.*, 373 S.W.3d at 76 (describing double recovery as being "awarded more than one recovery for the same injury"). "'Texas law does not permit double recovery.'" *Marin Real Estate Partners, L.P.*, 373 S.W.3d at 76 (quoting *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 441 (Tex. 1995)). "The prohibition against double recovery is a corollary of the rule that a party is entitled to but one satisfaction for the injuries sustained by him." *Foley*, 68 S.W.3d at 883; *see also Marin Real Estate Partners, L.P.*, 373 S.W.3d at 76 (noting "prohibition against double recovery is a corollary to the one satisfaction rule"). Whether a party has received a double recovery is a question of law that we review de novo. *Marin Real Estate Partners, L.P.*, 373 S.W.3d at 75.

B. Analysis

In this case, both of Bradford's claims sought to recover damages for fraudulent misrepresentations the Company and Otto allegedly made in the Property Redemption Payoff Statement regarding the amount Bradford was required to pay to redeem his home. Therefore, both claims sought to recover damages for the same injury. Although Bradford was entitled to pursue the alternative claims in seeking damages for his injury, recovering on both theories is prohibited. *Parkway Co.*, 901 S.W.2d at 441; *Marin Real Estate Partners, L.P.*, 373 S.W.3d at 76; *Foley*, 68 S.W.3d at 883.

C. Effect of Double Recovery on Judgment and Appeal

If a party receives favorable findings on two alternative theories of liability, the party has a right to a judgment on the theory entitling him to the greatest relief. *E.F. Johnson Co. v. Infinity Glob. Tech.*, No. 05-14-01209-CV, 2016 WL 4254496, at *14 (Tex. App.—Dallas Aug. 11, 2016, no pet.) (mem. op.). If the prevailing party fails to elect between his alternative remedies, the trial court should render judgment on the theory affording the greatest recovery. *Id*.; *Main Place Custom Homes, Inc. v. Honaker*, 192 S.W.3d 604, 613 (Tex. App.—Fort Worth 2006, pet. denied). "If the trial court does not do so, the appellate court must determine the greatest theory of recovery and render judgment accordingly." *E.F. Johnson Co.*, 2016 WL 4254496, at *14; *see also Main Place Custom Homes, Inc.*, 192 S.W.3d at 613.

We must now examine the remaining issues raised by the Company and Otto on appeal to determine which of Bradford's claims afforded him the greatest relief.

SUFFICIENCY OF THE EVIDENCE

In their first two issues, the Company and Otto contend the evidence is legally and factually insufficient to support the jury's liability findings, and, alternatively, the evidence is legally and factually insufficient to support the amount of damages awarded based on those liability findings.

A. Standard of Review

"The final test for legal sufficiency must always be whether the evidence at trial 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 reviewing a legal sufficiency challenge, we "view the evidence in the light favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not." *Id*. at 807. Evidence is legally insufficient when the record discloses: (1) 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 establishes conclusively the opposite of a vital fact. *Id*. at 810 (internal quotation omitted).

In a factual sufficiency review, we consider all the evidence supporting and contradicting the jury's finding. *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 445 (Tex. 1989). We set aside the jury's verdict "only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986).

Whether reviewing the legal or factual sufficiency of the evidence, the jurors are the sole judges of the credibility of the witnesses and the weight to be given their testimony, and may choose to believe some witnesses and not others. *City of Keller*, 168 S.W.3d at 819.

In this case, Bradford was awarded a greater recovery for his claim against the Company and Otto based on the making of a fraudulent lien or claim. Therefore, we first examine the sufficiency challenge made by the Company and Otto to the jury's finding that they made a fraudulent lien or claim against Bradford's home.

B. Elements of Fraudulent Lien or Claim and Jury Charge

The elements of a claim for a fraudulent lien or claim against real property are that the defendant: (1) made, presented, or used a document with knowledge that it was a fraudulent lien or claim against real property, (2) intended the document be given legal effect, and (3) intended to cause financial injury. *See Brewer v. Green Lizard Holdings, L.L.C. Series SR*, 406 S.W.3d 399, 403 (Tex. App.—Fort Worth 2013, no pet.); *Bernard v. Bank of Am., N.A.*, No. 04-12-00088-CV, 2013 WL 441749, at *4 (Tex. App.—San Antonio Feb. 6, 2013, no pet.) (mem. op.); *Gray v. Entis Mech. Servs., L.L.C.*, 343 S.W.3d 527, 530 (Tex. App.—Houston [14th Dist.] 2011, no pet.); TEX.

CIV. PRAC. & REM. CODE ANN. § 12.002(a) (West 2017).[3] The question submitted to the jury as to this claim contained each of these elements and asked the jury:

> Did 402 Lone Star Property, L.L.C. or Craig Otto make, present or use a document with knowledge that the document was a fraudulent lien or claim against real property or an interest in real property with the intent that the document be given the legal effect of evidencing a valid lien or claim against real property or an interest in real property with the intent to cause Barry L. Bradford to suffer financial injury?

The jury was also instructed, "A lien or claim is fraudulent if the person who files or makes it has actual knowledge that the lien or claim was not valid at the time it was filed or made." The jury answered yes as to both the Company and Otto.

C. Bradford's Allegations

Bradford alleged the Company and Otto were liable because the Property Redemption Payoff Statement (the "Redemption Statement") inflated the amount he was legally required to pay to redeem his home. Bradford alleged section 209.011(e)(2) of the Texas Property Code expressly lists the amounts he was required to pay to the Company, and the Company and Otto falsified the amounts they stated Bradford was required to pay for deed recording fees under

[3] Section 12.002(a) of the Texas Civil Practice and Remedies Code provides:

> (a) A person may not make, present, or use a document or other record with:
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> (1) knowledge that the document or other record is a fraudulent court record or a fraudulent lien or claim against real or personal property or an interest in real or personal property;
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> (2) intent that the document or other record be given the same legal effect as a court record or document of a court created by or established under the constitution or laws of this state or the United States or another entity listed in Section 37.01, Penal Code, evidencing a valid lien or claim against real or personal property or an interest in real or personal property; and
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> (3) intent to cause another person to suffer:
> (A) physical injury;
> (B) financial injury; or
> (C) mental anguish or emotional distress.

TEX. CIV. PRAC. & REM. CODE ANN. § 12.002(a).

section 209.011(e)(2)(C) and taxable costs incurred in the forcible entry and detainer proceeding under section 209.011(e)(2)(E).[4]

D. Arguments on Appeal

The Company and Otto argue the evidence was insufficient to establish that they actually knew the amounts they charged in the Redemption Statement were not authorized; therefore, they had no knowledge that the amounts listed in the Redemption Statement were invalid or fraudulent. In addition, the Company and Otto argue the record contains no evidence that they intended for the Redemption Statement to have the same legal effect as a court record or document. Finally, the Company and Otto argue their intent in presenting the Redemption Statement was to be made whole, and the evidence is insufficient to establish that they intended to cause Bradford to suffer financial injury.

Bradford argues the Company's and Otto's knowledge and intent can be established by circumstantial evidence and inferred from the testimony and evidence presented.

E. Evidence Presented

Bradford introduced documentary evidence establishing that the deed recording fees for recording the deed conveying the property to the Company and for recording the deed re-conveying the property to Bradford totaled $56. Bradford also introduced a bill of costs establishing the total court costs for the forcible entry and detainer action were $106. The

[4] Section 209.011(e)(2) provides in pertinent part:

> To redeem property purchased at the foreclosure sale by a person other than the property owners' association, the lot owner or lienholder:
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> ***
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> (2) must pay to the person who purchased the property at the foreclosure sale:
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> ***
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> (C) the amount of the deed recording fee;
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> ***
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> (E) taxable costs incurred in a proceeding brought under Subsection (a).

TEX. PROP. CODE ANN. § 209.011(e)(2) (West 2014). Subsection (a) states, "A … person who purchases occupied property at a sale foreclosing a property owners' association's assessment lien must commence and prosecute a forcible entry and detainer action under Chapter 24 to recover possession of the property." *Id*. at § 209.011(a).

Redemption Statement charged Bradford $120 for deed recording fees and $1,401.22 for court costs.

Bradford also introduced further documentary evidence establishing that the Company and Otto posted a second notice to vacate on Bradford's door after his attorney sent the Company a letter on October 7, 2013, expressing Bradford's intention to redeem the property and requesting a detail of the amount Bradford was required to pay. In addition, on October 15, 2013, eight days after Bradford's attorney sent the letter notifying the Company and Otto of Bradford's intention to redeem the property, the Company and Otto proceeded to file the forcible entry and detainer action and post the petition on Bradford's door. The petition set a court date of October 29, 2013. Only after taking those actions did the Company and Otto send Bradford the Redemption Statement on October 18, 2013.

Otto testified he did not understand the "taxable costs" in section 209.011(e)(2)(E) referred to taxable court costs, asserting the statute uses the term "taxable costs" not "taxable court costs." Otto testified he calculated the "taxable costs" based on expenses he incurred and could report on his taxes, including time he spent preparing documents and traveling to and from Austin for the foreclosure and postings. Otto charged $20 for each hour of time he spent. Otto admitted, however, that he was not an attorney. Otto also testified he included amounts he expended on gas in his travels. Although Otto generally testified regarding the categories of expenses he included in calculating "taxable costs," he did not produce any documentary evidence to support his calculations.

F. Analysis

"Intent is a fact question uniquely within the realm of the trier of fact because it so depends upon the credibility of the witnesses and the weight to be given to their testimony." *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 434 (Tex. 1986). "While there is rarely direct evidence of

fraudulent intent, the fact finder is permitted to draw reasonable inferences from the direct and circumstantial evidence." *Zaragoza v. Jessen*, 511 S.W.3d 816, 823-24 (Tex. App.—El Paso 2016, no pet.); *Spoljaric*, 708 S.W.2d at 434 (noting intent "invariably must be proven by circumstantial evidence"). Intent may also be inferred from a party's subsequent actions. *Spoljaric*, 708 S.W.2d at 434.

In this case, the jury could have disbelieved Otto's testimony that he did not understand the meaning of the term "taxable costs" as used in section 209.011(e)(2)(E). This is especially true given Otto's failure to provide any documentary evidence of any expenses he testified he included in his calculation of that number. Moreover, it is undisputed that the total amount of the deed recording fee was only $56; however, the Redemption Statement charged Bradford $120 in deed recording fees. Based on the evidence presented, the jury could have inferred that the Company and Otto knew the amounts they included in the Redemption Statement were false. The jury could also infer that the Company and Otto intended for the Redemption Statement to be given the same legal effect as a court record or document by sending the statement after the Company and Otto posted a second notice to vacate and filed and posted the petition to evict Bradford on his front door. Finally, given the amount by which the Redemption Statement inflated the actual amounts the Company and Otto were entitled to receive under section 209.011(e)(2), the jury could have inferred their intent was to cause Bradford financial injury by collecting more money than they were entitled to be paid.

Having reviewed the record as a whole, we conclude the evidence is legally and factually sufficient to support the jury's finding that the Company and Otto violated section 12.002(a) by making a fraudulent lien or claim against Bradford's home.[5]

[5] Because we hold the evidence is sufficient to support the jury's finding on this claim which provides Bradford the greatest recovery, we need not address the challenge to the sufficiency of the evidence to support Bradford's common

DAMAGES

The Company and Otto also challenge the sufficiency of the evidence to support the award of $20,000 to Bradford in damages, asserting Bradford was only entitled to $10,000 in damages because they used only one document and injured only one person. Bradford counters that the trial court properly awarded him $20,000 because both Otto and the Company used the fraudulent document.

Section 12.002(b) of the Texas Civil Practice and Remedies Code sets forth the amount a plaintiff is entitled to recover in damages for a claim asserting a person made a fraudulent lien or claim.[6] TEX. CIV. PRAC. & REM. CODE ANN. § 12.002(b). In relevant part, section 12.002(b)(1) provides a person who violates section 12.002(a) by making a fraudulent lien or claim is liable to each injured person for the greater of: (A) $10,000; or (B) the actual damages caused by the violation. *Id*. at § 12.002(b)(1). In this case, the jury found that two "persons", *i.e.*, the Company and Otto, violated section 12.002(a). Accordingly, they each were liable to Bradford for $10,000. *See Vanderbilt Mortg. & Fin., Inc. v. Flores*, 692 F.3d 358, 374 (5th Cir. 2012) (rejecting argument that statutory damages should be limited to $10,000 under section 12.002(b) and holding "*each* of the companies [that were named defendants] were separately liable for $10,000 per lien per plaintiff"). Therefore, the evidence supported the award of $20,000 in damages.

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law fraud claim. *See E.F. Johnson Co.*, 2016 WL 4254496, at *14 (noting appellate court must determine the greatest theory of recovery among alternative claims and render judgment accordingly); *see also* TEX. R. APP. P. 47.1 (providing opinions should only address issues necessary to the final disposition of an appeal).

[6] Section 12.002(b) provides:

> (b) A person who violates Subsection (a) or (a-1) is liable to each injured person for:
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> (1) the greater of:
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> (A) $10,000; or
>
> (B) the actual damages caused by the violation;
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> (2) court costs;
>
> (3) reasonable attorney's fees; and
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> (4) exemplary damages in an amount determined by the court.

TEX. CIV. PRAC. & REM. CODE ANN. § 12.002(b).

EXEMPLARY DAMAGES

Finally, the Company and Otto contend the trial court's award of exemplary damages is grossly excessive and unconstitutional. In support of this argument, the Company and Otto add the $20,000 damage award to the $25,000 exemplary damage award and assert the ratio between the $45,000 in exemplary damages and the $1,359.22 awarded by the jury for Bradford's financial injury is 33:1 which exceeds the constitutionally acceptable limit for exemplary damages.

"[T]he constitutionality of exemplary damages is a legal question for the court." *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 307 (Tex. 2006). "In reviewing the amount of an exemplary damage award for constitutionality, we … consider three 'guideposts': (1) the nature of the defendant's conduct, (2) the ratio between exemplary and compensatory damages, and (3) the size of civil penalties in comparable cases." *Id*. at 308. In this case, the Company's and Otto's argument is premised on their assertion that the total amount of exemplary damages awarded by the trial court is $45,000.

As support for including the $20,000 in damages in their calculation of the total amount of exemplary damages, the Company and Otto cite the Texas Supreme Court's decision in *Wal-Mart Stores, Inc. v. Forte*, 497 S.W.3d 460 (Tex. 2016). In *Forte*, the Texas Supreme Court addressed a question certified to it by the Fifth Circuit and held civil penalties recovered under the Texas Optometry Act are exemplary damages subject to the limitations contained in Chapter 41 of the Texas Civil Practice and Remedies Code which "was enacted to restrict and structure the recovery of exemplary damages." 497 S.W.3d at 466-67. The Company and Otto then refer to the $20,000 as a "statutory penalty" which they equate to the civil penalty addressed in *Forte*, and thereby contend the $20,000 are exemplary damages.

The Company and Otto's position ignores the limited nature of the Texas Supreme Court's holding in *Forte*. In its decision, the court rejected an argument made by the optometrists on appeal regarding the effect of its holding on all civil penalties, reasoning:

> The Optometrists argue that if Chapter 41 applies to civil penalties under the Act, it must apply to all civil penalties under all statutes. They identify 24 Texas statutes allowing for both damages and civil penalties, and seven others allowing for civil penalties without mentioning damages. But whether Chapter 41 applies to any of these other statutes depends on the analysis we have followed here, not simply on a statutory authorization of civil penalties.

Id.

The Fifth Circuit has rejected the argument that the $10,000 awarded under section 12.002(b)(1)(A) should be considered exemplary damages, reasoning:

> Although at first blush it may seem that Section 12.002(b)(1)(A) qualifies as "exemplary damages" under Chapter 41, such a conclusion is undermined by Section 12.002(b)(4), which separately permits "exemplary damages in an amount determined by the court," evincing the Legislature's intent that the $10,000 minimum-damages provision in Section 12.002(b)(1)(A) not be considered "exemplary damages." We agree with the Trevinos that the best reading of the damages permitted under Section 12.002(b)(1)(A) is that they are not exemplary damages but rather "statutory damages" of a generally compensatory nature even if not designed to compensate for any particular, actual harm suffered by the individual named in a fraudulent lien.
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> In this respect, Chapter 12 is strikingly similar to Chapter 123 of the Texas Civil Practice and Remedies Code, which prohibits the interception of communications without consent and provides "statutory damages" of up to $10,000 for each intercepted communication in addition to actual damages in excess of $10,000, punitive damages, attorneys' fees, and costs. TEX. CIV. PRAC. & REM. CODE § 123.004. In rejecting a defendant's argument that the "statutory damages" provision of Chapter 123 amounted to punitive damages, one federal court noted that the purpose of statutory damages was "deterring the public harm associated with the activity proscribed, rather than seeking to compensate each private injury caused by a violation. When designed to address 'public wrongs,' statutory damages need not be limited to actual loss or damages felt by a private party." *DirecTV, Inc. v. Cantu*, 2004 WL 2623932, at *4 (W.D. Tex. Sept. 29, 2004) (citation omitted).
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> The public harms compensated by statutory damages are especially easy to see in the context of Chapter 12. The filing of fraudulent liens undermines the reliability of the public records system on which so many rely, including land

> owners, purchasers, local governments, title companies, insurers, and realtors. Fraudulent liens increase transaction costs for all market participants, even if harm to particular individuals is not readily discernable. As the Legislature has found, fraudulent liens have "clogged the channels of commerce." House Committee, Bill Analysis, HB1185, 75th Leg. (Tex. 1997). Accordingly, damages under Section 12.002(b)(1)(A) are not "exemplary damages" and thus are not subject to the limitations of Chapter 41.

Vanderbilt Mortg. & Fin., Inc., 692 F.3d at 373. In addition, in the opinion the Fifth Circuit issued before certifying the issue addressed by the Texas Supreme Court in *Forte* regarding whether Chapter 41 was applicable to civil penalties recovered under the Texas Optometry Act, the Fifth Circuit distinguished damages recoverable under section 12.002(b)(1)(A) from the civil penalties recovered under the Texas Optometry Act, reasoning:

> *Vanderbilt* is distinguishable here for two reasons. First, in TCPR [Texas Civil Practice and Remedies Code] Chapter 12, "statutory damages" were listed separately from "exemplary damages." Vanderbilt stated that this indicated a legislative intent to treat statutory damages and exemplary damages as mutually exclusive. As statutory damages were not exemplary damages under TCPR Chapter 12, neither were statutory damages exemplary damages under TCPR Chapter 41. But unlike TCPR Chapter 12, the TOA [Texas Optometry Act] contains no indication that civil penalties and exemplary damages are mutually exclusive.
>
> Second, the statutory damages in *Vanderbilt* were not characterized by the statute at issue as a "penalty," which constitutes a central element of the definition for exemplary damages under Chapter 41. By contrast, the TOA characterizes the award the plaintiffs seek here as a "civil penalty."

Forte v. Wal-Mart Stores, Inc., 763 F.3d 421, 428–29 (5th Cir. 2014), *opinion vacated and superseded on reh'g*, 780 F.3d 272 (5th Cir. 2015) (certifying question to Texas Supreme Court).

We are persuaded by the Fifth Circuit's analysis in *Vanderbilt*. In addition to the reasons given by the Fifth Circuit, we note section 12.001(2) defines the term "exemplary damages" as used in section 12.001(b)(4) to have "the meaning assigned by Section 41.001," which defines the term "exemplary damages" for purposes of Chapter 41. TEX. CIV. PRAC. & REM. CODE ANN. §§ 12.002(2), 41.001(5). If the Legislature had intended for the damages awarded under section

12.001(b)(1)(A) to also having the meaning assigned by Section 41.001, it would have included a similar definitional reference. Therefore, we hold damages awarded under section 12.001(b)(1)(A) are not exemplary damages.

Because the damages awarded under section 12.001(b)(1)(A) are not exemplary damages, the Company's and Otto's argument that the exemplary damages awarded in the instant case are unconstitutional is based on the faulty premise that the trial court awarded $45,000 in exemplary damages. Because the trial court awarded only $25,000 in exemplary damages and the Company and Otto do not argue that a $25,000 exemplary damage award is unconstitutional, we do not further address the constitutionality of the exemplary damage award.

CONCLUSION

Because Texas law prohibits a double recovery, we reverse the portion of the trial court's judgment awarding Bradford actual damages for his common law fraud claim and render judgment limiting Bradford's recovery to the damages and attorney's fees awarded based on the jury's finding that the Company and Otto made a fraudulent lien or claim against Bradford's home. We affirm the remainder of the judgment.

Patricia O. Alvarez, Justice