IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1520

HELL GRAPHIC SYSTEMS, INC.,

Plaintiff-Counter
Defendant-Appellee
Cross-Appellant,

versus

KINGCRAFT COLOR GRAPHICS, INC.,
and CLYDE E. KING,

Defendants-Counter
Plaintiffs-Appellants
Cross-Appellees.

Appeal from the United States District Court for
the Northern District of Texas
3:89 CV 0383 T

July 15, 1993

Before POLITZ, Chief Judge, REAVLEY and BARKSDALE, Circuit Judges.

REAVLEY, Circuit Judge:[*]

Hell Graphic Systems, Inc. (HGS) sold pre-press equipment to Kingcraft Color Graphics, Inc. (Kingcraft), owned by Clyde E. King. A jury found that HGS had violated the Texas Deceptive

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Trade Practices Act (DTPA) in its dealings with King and Kingcraft. The district court disregarded the jury's damage findings and entered a take-nothing judgment against King and Kingcraft. We affirm in part and reverse in part.

I. BACKGROUND

In 1985, King formed Kingcraft Color Graphics, a "pre-press" company that manipulates and retouches text and graphic images for its customers. In 1987, Kingcraft purchased electronic pre-press equipment (the "HGS equipment") from HGS, which makes and sells equipment to pre-press and printing companies. According to King and Kingcraft, HGS made several misrepresentations concerning the capability and reliability of the HGS equipment. Kingcraft financed the costs of the equipment through HGS and King personally guaranteed payment of the purchase money notes. The sales agreements provide for monthly installment payments to begin seven months after the system is commercially used or ready for commercial use.

The HGS equipment failed to perform as Kingcraft had anticipated. Kingcraft claims that equipment failures caused it to lose existing and potential customers and forced it to return to more expensive and time-consuming manual assembly.

Seeking payment of the purchase price of the equipment, HGS initiated this lawsuit against Kingcraft and King. Kingcraft and King denied that they owed HGS any of the purchase price, and counterclaimed for fraud and deceptive trade practices.

A jury returned a verdict (1) rejecting HGS's collection claim, (2) rejecting King's and Kingcraft's fraud claims, (3) finding that HGS had violated the DTPA, and (4) finding that some of HGS's acts were committed knowingly. With respect to damages, the jury found: Kingcraft entitled to $684,000 for lost profits; King entitled to $1.5 million for his mental anguish; and King and Kingcraft each entitled to $5 million in additional damages for HGS's "knowing" conduct.[1] After all parties moved for judgment, the district court entered judgment that HGS take nothing on its collection claim. As for King's and Kingcraft's claims, the district court disregarded the jury's DTPA damage findings and entered a take-nothing judgment against King and Kingcraft.

King appeals, contending that the district court erred in disregarding the jury's finding of mental anguish. Kingcraft appeals, asserting that the district court erred in disregarding the jury's finding of lost profits. Alternatively, Kingcraft contends that it is entitled to a remand on the issue of lost profits because the district court refused to allow Kingcraft to fully prove its lost profits. HGS has filed a conditional cross-appeal, seeking a new trial on all issues if this court is unable to affirm the district court's take-nothing judgment against King and Kingcraft.

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[1] The additional damage issue was submitted with the DTPA issues and not predicated on a finding of malice. King and Kingcraft do not contend that they are entitled to more than treble damages set by DTPA.

II. DISCUSSION

A. The Jury's Mental Anguish Finding

The jury found that King should be compensated $1.5 million for his mental anguish. But the district court entered a take-nothing judgment against King on the ground that the evidence at trial was insufficient to support an award of mental anguish.

Mental anguish is more than mere worry, anxiety, vexation, embarrassment, or anger. *Town East Ford Sales, Inc. v. Gray*, 730 S.W.2d 796, 803 (Tex.App.--Dallas 1987, no writ). We agree with the district court that King failed to show that he suffered more than mere disappointment, worry, anxiety, vexation, or anger. Moreover, the district court properly ignored King's testimony that he suffered a heart attack near the time he was encountering problems with HGS's equipment. King presented absolutely no evidence regarding the cause of that heart attack.

B. Jury's Finding of Lost Profits

At trial, Kingcraft claimed that equipment failures caused Kingcraft to lose existing and potential customers. Additionally, Kingcraft claimed that its expenses increased when it was forced to resort back to the manual assembly process. In its closing arguments, Kingcraft requested the jury to find $4 million in lost profits for the DTPA violations. The jury, however, found only $684,000 in lost profits. In ruling on HGS's motion for judgment as a matter of law, the district court concluded that Kingcraft's proof of lost profits was too speculative to support a finding of lost profits. The district

court's discussion focused on Kingcraft's failure to prove profits lost as a result of losing existing and potential customers. We agree that Kingcraft failed to adequately prove lost profits associated with the loss of customers. But we believe the district court failed to adequately consider Kingcraft's evidence of *increased* expenses incurred as a result of the defective equipment.

Increased expenses decrease profits on existing sales. *See Miller v. Lone Star Tavern, Inc.*, 593 S.W.2d 341, 345 (Tex.Civ.App.--Waco 1979, no writ). Kingcraft contends that, if the HGS equipment had worked as promised, Kingcraft would have incurred less expenses and realized higher profits on its existing, actual sales. King testified that, because the equipment did not work as promised, Kingcraft had to hire contract workers to perform part of the work manually. Wyveda Dowdy, Kingcraft's bookkeeper, specifically testified as to the additional production costs incurred from 1988 to 1991 in manually producing the products. Dowdy testified that extra material costs from 1988 to 1991 totaled $339,219 and that extra labor costs in those years totaled $331,257. Dowdy based her figures on Kingcraft's weekly payroll records and invoices of purchased materials. *See Holt Atherton Indus. v. Heine,* 835 S.W.2d 80, 84 (Tex. 1992) (lost profits must be based on objective facts, figures, or data). In addition to evidence of increased production costs, Kingcraft presented evidence that it incurred an additional expense of $13,600 for hiring another

company to repair the HGS equipment. Counting the $13,600 for repairs, Kingcraft presented evidence that its expenses increased $684,076 -- virtually the same amount the jury calculated for lost profits.

On appeal, HGS contends that Kingcraft's increased-expense calculation was incomplete because it failed to take into account labor and material costs saved by not having to operate the defective equipment. As an example, HGS asserts that Dowdy's calculations failed to consider the expense saved in not having to hire two operators to run the HGS equipment. We agree with HGS's general proposition that the material and labor costs saved by not running the defective equipment must be taken into account in order to accurately calculate the increased costs *caused* by the defective equipment.

With respect to material costs, Dowdy specifically testified that her figure represents the "additional" or "extra" expenses associated with having to produce the product manually rather than electronically with the HGS equipment. Dowdy indicated that her calculation was based on additional costs, not total cost of materials. At trial, HGS failed to challenge Dowdy's calculation of increased material expenses.

As for the labor costs, Dowdy likewise testified that her figure represents "extra" labor expense. This "extra" labor expense was presumably attributable to Kingcraft's hiring of contractors to perform manual production. During cross-examination, Dowdy indicated that her calculation for increased

labor costs did not include any deductions for amounts Kingcraft would have had to pay workers to operate the HGS equipment. But Dowdy never testified that there was in fact any cost savings in this respect. And we have found no other evidence in the record demonstrating that Kingcraft actually avoided having to pay two equipment operators. At oral arguments, Kingcraft suggested that its permanent work force (as compared to the independent contractors) would have operated the HGS equipment.

In determining whether to disregard the jury's finding of lost profits, we must consider the evidence in the light most favorable to the jury verdict. Viewing the record in such light, we are unable to conclude that Dowdy's increased costs calculations were flawed. If HGS had support for its contention that Dowdy's calculations failed to take into account costs actually saved in not running the equipment, it should have come forward with it at trial. We hold that the district court erred in disregarding the jury's finding of lost profits.[2]

C. Treble Damages for "Knowing" Violations of the DTPA

Under the DTPA, the plaintiff's first $1,000 of actual damages is automatically trebled. TEX. BUS. & COM. CODE ANN. § 17.50(b)(1). Then, "[i]f the trier of fact finds that the conduct of the defendant was committed knowingly, the trier of fact may award up to three times the amount of actual damages in

[2] Because we conclude that the district court erred in disregarding the jury's finding of lost profits, we need not address Kingcraft's alternative argument that the district court erred in its evidentiary rulings.

excess of $1,000." *Id.*; *see Jim Walter Homes, Inc. v. Valencia*, 690 S.W.2d 239, 241 (Tex. 1985). The DTPA defines "knowingly" as actual awareness of the falsity, deception, or unfairness of the act or practice giving rise to the consumer's claim. TEX. BUS. & COM. CODE ANN. § 17.45(9). Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness. *Id*.

Here, the jury found that HGS: (a) misrepresented characteristics, uses, or benefits of the equipment; (b) misrepresented the standard, quality, grade, style, or model of the equipment; (c) made specific misrepresentations concerning the reliability, profitability, effectiveness, or efficiency of the equipment; and (d) failed to disclose information about the equipment with intent to induce Kingcraft into entering the transaction. In a separate jury question, the jury found that HGS knowingly engaged in the conduct described above. The jury's answer did not specify which conduct -- a, b, c, or d -- the jury found to have been committed knowingly. But a finding of "knowing" on any of the above conduct would support an award of trebled damages. The jury found that Kingcraft should be awarded additional damages for HGS's "knowing" conduct. If there is sufficient evidence in the record to support the jury's finding of a knowing violation, Kingcraft is entitled to the maximum DTPA recovery -- treble damages ($684,000 x 3 = $2,052,000.00).

HGS has not specifically attacked the sufficiency of the evidence to support the "knowing" finding, and based on our review of the record we are unable to conclude that the jury acted unreasonably. Once the jury found that HGS misrepresented the equipment and failed to disclose information about the equipment, it was reasonable for the jury to infer knowledge of falsity from the evidence: that HGS experienced significant problems with the equipment during a demonstration for King; that King was not told of all of the problems that HGS experienced in preparing the demonstration; that HGS continued to assure the quality of the equipment, claiming that the problems were unique to the particular unit used in the demonstration; and that, after the sale to Kingcraft, HGS blamed Kingcraft for the failures in the purchased equipment. *See State Farm Fire & Casualty Co. v. Gros*, 818 S.W.2d 908, 914-15 (Tex.App.--Austin 1991, no writ); *Jeep Eagle Sales Corp. v. Mack Massey Motors, Inc.*, 814 S.W.2d 167, 175 (Tex.App.--El Paso 1991, writ denied).

D. HGS's Cross-Appeal

HGS contends that it is entitled to a new trial on the grounds that the jury's liability findings are inconsistent and that King's and Kingcraft's closing argument was improper.

1. Consistency of Jury Findings

HGS contends that the jury's finding of no fraud is inconsistent with the jury's finding of "knowing" misrepresentations. When jury answers apparently conflict, the reviewing court's duty is to reconcile the conflicts if possible

in order to validate the jury verdict. *FDIC v. Munn*, 804 F.2d 860, 866 (5th Cir. 1986). The jury was entitled to reject hanging a "fraud" label on HGS while finding that certain acts were knowingly done. King and Kingcraft make no complaint and the evidence is sufficient here to support the jury's finding that HGS knowingly engaged in conduct that violated the DTPA.

2. Passion and Prejudice in the Jury Verdict

On its cross-appeal, HGS also contends that the jury's verdict reflects passion and prejudice evoked by King's and Kingcraft's improper jury argument. HGS asserts that the excessiveness of the jury's damage findings demonstrates that the jury was motivated by passion or prejudice.

Jury verdicts can be overturned upon a showing that the jury was improperly influenced by passion or prejudice. *See Westbrook v. General Tire & Rubber Co.*, 754 F.2d 1233, 1241 (5th Cir. 1985). The excessiveness of a damage finding itself can be indicative of passion and prejudice. *See Wells v. Dallas Indep. Sch. Dist.*, 793 F.2d 679, 683-84 (5th Cir. 1986).

Although the verdict lacks support for the mental anguish finding, HGS has not convinced us that the remaining jury's findings were infected by passion and prejudice. *See Auster Oil & Gas, Inc. v. Stream*, 835 F.2d 597, 604 n.6 (5th Cir.) (a new trial is required only on issues infected by the passion or prejudice), *cert. dismissed*, 486 U.S. 1027, 108 S.Ct. 2007, *and cert. denied*, 488 U.S. 848, 109 S.Ct. 129 (1988). Upon reviewing the record, we have found sufficient evidence in the record to

support the remaining jury's findings. Moreover, the fact that the jury made several findings in favor of HGS (no fraud, no knowing violations for breach of warranty and unconscionable acts) and rejected Kingcraft's request for $4 million in lost profits further indicates attention to the evidence on all of the issues rather than prejudice against HGS.

As for the alleged improper closing arguments, HGS did not object to any of the closing arguments at trial or move for a mistrial before the district court submitted the case to the jury. *See Colburn v. Bunge Towing, Inc.*, 883 F.2d 372, 375-76 (5th Cir. 1989); *Nissho-Iwai Co. v. Occidental Crude Sales, Inc.*, 848 F.2d 613, 619 (5th Cir. 1988). Given our holding with respect to the jury's mental anguish finding and the sufficient evidence supporting the remaining jury findings, a new trial in this case is not necessary to prevent a miscarriage of justice. *See Rojas v. Richardson*, 713 F.2d 116, 118 (5th Cir. 1983); *Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276, 286 (5th Cir. 1975).[3]

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[3] On its cross-appeal, HGS also challenges the jury's finding of unconscionable conduct. Given the jury's independent findings of misrepresentations, omissions, and breach of warranty, disregarding the jury's finding of unconscionable conduct would have no effect on Kingcraft's recovery of DTPA damages.

In a short paragraph at the end of its brief, HGS challenges the jury's finding with respect to HGS's collection claim. HGS contends that the finding was "against the great weight of the evidence and contrary to the appropriate legal standards." But HGS's failure to develop its argument and discuss the evidence precluded Kingcraft and King from responding to this point of error. We will not attempt here to decipher or create HGS's arguments.

IV. CONCLUSION

We reverse the district court's take-nothing judgment against Kingcraft and hold that Kingcraft is entitled to recover treble damages in the amount of $2,052,000. We remand this action to the district court to consider Kingcraft's request for prejudgment interest and attorney's fees. We affirm the judgment against King.

AFFIRMED IN PART, REVERSED IN PART. CAUSE REMANDED.