UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-4427
Summary Calendar

AMARILLO SERVICES, INC.,
an Oklahoma Corporation,

Plaintiff-Appellant,

versus

HARTZ MOUNTAIN CORP., a
New Jersey Corporation,

Defendant-Appellee.

Appeal from the United States District Court
For the Eastern District of Texas
(6:90cv274)

(December 9, 1992)

Before POLITZ, Chief Judge, HIGGINBOTHAM and WIENER, Circuit Judges.

POLITZ, Chief Judge:[*]

In this diversity suit for damages resulting from a stillborn commercial transaction, Amarillo Services, Inc. appeals disposition of various post-judgment motions, contending that it is entitled to

---

[*]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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

additional damages for those claims on which it prevailed at trial and to judgment or a new trial on those claims on which it did not prevail. We find that the district court should have awarded prejudgment interest on Amarillo's Deceptive Trade Practices Act claim and modify its judgment. As modified we affirm.

Background

Lon Little Distributing Co. for many years had supplied Albertson's, Inc. stores in Texas and Louisiana with pet supplies when it encountered financial difficulties in the mid-1980s. In May 1988 it sold substantially all its assets, including the right to do business in its name and variants thereof, to Amarillo, a company owned and operated by Kirk Humphreys. Sam Little, president of Little, agreed to work for Amarillo.

Humphreys faced a serious handicap in pet supply distribution: Hartz Mountain Corporation, manufacturer of a prominent product line, did not want to do business with him.[1] Accordingly, Humphreys used the name of Little Wholesale to place a sizeable order with Hartz for products intended for Albertson's stores. The order, placed in May 1988, was accompanied by one cashier's check for $58,679.83 for the merchandise and another for $5,000, both showing Little Wholesale as the remitter but in fact purchased by Amarillo. The enclosure of the $5,000 check continued a practice

[1] Humphreys claims the animosity stemmed from his testimony against Hartz in prior lawsuits; Hartz agrees insofar as Humphreys testified that he had animosity towards Hartz.

begun years earlier by Little; on Hartz' demand, Little sent $5,000 with each order to reduce a debt claimed by Hartz although disputed by Little.

Hartz, meanwhile, had heard rumors that a third party, possibly Humphreys, had purchased a controlling interest in Little and was concerned that the outstanding amount it claimed on the debt, $404,000, might not be paid. These suspicions were heightened by receipt of the two checks at a time when Hartz thought Little in financial difficulty. Accordingly, Hartz deposited the checks and credited them to Little's account but decided not to ship the merchandise.

During the ensuing months Hartz renewed its efforts to discover whether Little had a new investor while Sam Little, representing that the company was wholly owned by family members, unsuccessfully sought delivery of the merchandise. Humphreys first revealed Amarillo's involvement to Hartz in a November 1988 letter from his attorney demanding return of the proceeds of the checks. Hartz refused. Also in November, Albertson's terminated its relationship with Little, unhappy with Little's performance in stocking products, servicing displays and pricing.

Amarillo sued Hartz in Texas state court, asserting claims for conversion, breach of contract, unconscionable action in violation of the Texas Deceptive Trade Practices Act[2], and intentional interference with contract and business relations. Hartz removed

[2] Tex.Bus. & Comm. Code § 17.41 **et seq**.

the suit to federal court. The district court entered summary judgment on Amarillo's claim for conversion of the $58,679 check. The remaining claims were tried to a jury, which returned a verdict for Amarillo on its DTPA claim only and awarded damages of $58,679.83. The court entered judgment in the amount of $60,679.83 on the DTPA claim, representing the face amount of the check plus $2,000 in additional damages required by section 17.50(b)(1) of the DPTA, and $58,679.83 on the conversion claim. Both parties filed motions for judgment notwithstanding the verdict and Amarillo moved for a new trial. The court entered judgment for Amarillo on its breach of contract claim but otherwise denied relief. It also deleted the award of $58,679.83 on the conversion claim and declined to enter an award on the contract claim so as to avoid double recovery for the same injury. Amarillo timely appealed.

Analysis

Amarillo urges multiple assignments of error which we address *seriatim*. We review questions of state law *de novo*.[3] We will affirm denial of judgment notwithstanding the verdict unless the evidence, viewed in the light most favorable to the jury's verdict, points so strongly and overwhelmingly in favor of the movant that a reasonable jury could not have arrived at a contrary conclusion,[4]

---

[3] **City of Arlington, Tex. v. F.D.I.C.**, 963 F.2d 79 (5th Cir. 1992), pet. for cert. filed.

[4] **Boggan v. Data Systems Network Corp.**, 969 F.2d 149 (5th Cir. 1992), quoting **Boeing Co. v. Shipman**, 411 F.2d 365 (5th Cir. 1969) (en banc).

or, in the words of revised Fed.R.Civ.P. 50, "there is no legally sufficient evidentiary basis for a reasonable jury to have found for [the nonmoving] party." We examine denial of a new trial for abuse of discretion, reversing if there is an absolute absence of evidence to support the jury's verdict.[5] Applying these standards, we find merit in only one contention of error.

1. Prejudgment interest

Texas law provides for award of prejudgment interest in DTPA claims but only if the plaintiff specifically pleads for it.[6] Amarillo sought "interest at the lawful rate" in its complaint. The district court found this prayer insufficient under Texas law. Federal law, however, governs the adequacy of pleadings in federal court. Under federal law, it was not necessary for Amarillo to plead specifically for prejudgment interest.[7] Prejudgment interest should be awarded on remand.

2. Lost profits

The district court reversed the jury verdict and entered judgment for Amarillo on its breach of contract claim, but declined

---

[5] **Bank One, Texas, N.A. v. Taylor**, 970 F.2d 16 (5th Cir. 1992).

[6] **Benavidez v. Isles Construction Co.**, 726 S.W. 2d 23 (Tex. 1987).

[7] **Concorde Limousines v. Moloney Coachbuilders, Inc.**, 835 F.2d 541 (5th Cir. 1987).

to award lost profits because the evidence was too speculative. Amarillo asserts error, claiming lost profits from what it says would have been at least a five-year relationship with Albertson's but for Hartz' failure to ship the merchandise ordered in May 1988. We disagree.

Lost profits may be recovered if the natural and probable consequences of wrongful conduct and if the amount is shown by competent evidence with reasonable certainty.[8] Amarillo's contention that Hartz' failure to ship the May 1988 order deprived it of a five-year relationship with Albertson's lacks record support. The undisputed evidence is that Albertson's wanted Hartz products but Hartz refused to deal with Humphreys or any company with which Humphreys was associated. There also was evidence that Albertson's was not interested in dealing with Little if it changed ownership. Thus, Little's relationship with Albertson's would have terminated with the discovery of Amarillo's relationship with Little, regardless of whether Hartz had delivered the May 1988 order. The only lost profits attributable to the failure to deliver the May 1988 order therefore were those that Amarillo would have earned on that order.

"[O]pinions or estimates of lost profits must be based on objective facts, figures, or data from which the amount of lost

---

[8] **Pena v. Ludwig**, 766 S.W. 2d 298 (Tex.App. -- Waco 1989); see also **Southwest Battery Corp. v. Owen**, 115 S.W. 2d 1097 (Tex. 1938).

profits can be ascertained."[9] Amarillo's evidence quantifying lost profits on the May 1988 order does not meet this standard. Humphreys estimated expenses of 75 percent of sales price for product supply and 19.8 percent for other items, leaving 5.2 percent as profit. Even if this unsupported estimate of profit was adequate, a notion we find troublesome, Amarillo failed to prove that Albertson's would have purchased the entire $58,679 order prior to terminating its dealings with Little. Amarillo has not presented a complete calculation; there is no reasonable basis for determining lost profits.[10]

3. Double recovery

Section 17.43 of the DTPA provides:

> The remedies provided in this subchapter are in addition to any other procedures or remedies provided for in any other law; provided, however, that no recovery shall be permitted under both this subchapter and another law of both actual damages and penalties for the same act or practice.

Relying on this provision, Amarillo argues that the action giving rise to its DTPA claim was different from the action giving rise to its breach of contract claim; therefore recovery on both claims

---

[9] **Holt Atherton Industries, Inc. v. Heine**, 835 S.W. 2d 80, 84 (Tex. 1992).

[10] **Holt Atherton**, supra; cf. **Frank B. Hall & Co. v. Beach, Inc.**, 733 S.W. 2d 251 (Tex. App. -Corpus Christi 1987, writ ref'd n.r.e.).

should be allowed.[11] The district court indeed found different wrongful acts: the failure to return the $58,679 check after deciding not to ship the merchandise constituted an unconscionable act for purposes of DTPA liability[12] while the failure to ship the merchandise constituted the contract breach. Nonetheless, the court allowed recovery of the face amount of the check under the DTPA only because Hartz deprived Amarillo of its $58,679 just once. We agree with the district court's analysis of Texas law.

In **Stewart Title Guaranty Co. v. Sterling**[13], the Texas Supreme Court recently reaffirmed the longstanding principle that a claimant may not recover more than once for the same injury. Although **Stewart Title** addressed set-offs of settlements with co-defendants, the court relied on decisions precluding double recovery of actual damages in cases asserting DTPA and other claims. One such decision was **Mayo v. John Hancock Mutual Life Ins. Co.**,[14] where, after holding that plaintiffs could assert claims

---

[11] Amarillo does not appeal the court's refusal to award damages on the conversion claim. The conversion claim arose from the same action as the DTPA claim: Hartz' refusal to return the $58,679 check. Accordingly, section 17.43 of the DTPA by its terms would not provide an independent remedy.

[12] An unconscionable action within the meaning of the DTPA includes an act which "results in a gross disparity between the value received and consideration paid, in a transaction involving transfer of consideration." Tex.Bus. & Comm. Code § 17.45(5)(B).

[13] 822 S.W. 2d 1 (Tex. 1991).

[14] 711 S.W.2d 5 (Tex. 1986).

under both the DTPA and the Insurance Code for different practices resulting in the same injury, the Supreme Court noted that recovery under one claim should be offset by the amount of actual damages recovered in the other. The other decision was **American Baler Co. v. SRS Systems, Inc.**,[15] where an appellate court held that the DTPA did not allow double recovery for actual damages.

Our reading of these and other DTPA cases convinces us that the Texas Supreme Court would not allow double recovery for a single injury in suits asserting the DTPA in conjunction with other claims, even though the DTPA supplements rather than supplants other remedies.[16] We recently suggested this in **Bank One, Texas, N.A. v. Taylor** and now so hold. The district court correctly

---

[15] 748 S.W.2d 243 (Tex.App. -- Houston [1st Dist.] 1987, writ denied).

[16] See, e.g., **Birchfield v. Texarkana Memorial Hospital**, 747 S.W.2d 361, 367 (Tex. 1987) ("[i]n the absence of separate and distinct findings of actual damages on both the acts of negligence and the deceptive acts or practices, an award of exemplary damages **and** statutory treble damages would be necessarily predicated upon the same findings of actual damages and would amount to a[n impermissible] double recovery of punitive damages); **Winkle Chevy-Olds-Pontiac, Inc. v. Condon**, 830 S.W.2d 740 (Tex.App. - Corpus Christi 1992, writ dism'd) (trial court awarded only one recovery of actual damages where plaintiff prevailed on conversion, DTPA and breach of contract claims); **LaChalet Intern., Inc. v. Nowik**, 787 S.W. 2d 101 (Tex.App. -Dallas 1990) (in claims for, inter alia, violation of the DTPA and breach of contract, award of recission and actual damages permissible because necessary to compensate plaintiffs fully for their loss); **Vick v. George**, 671 S.W. 2d 541, 551 (Tex.App. -San Antonio 1983) (while recovery under the DTPA is not exclusive of other rights or remedies, "[i]t is axiomatic . . . that an aggrieved party is entitled to but one recovery for the same loss."), rev'd on other grounds, 686 S.W. 2d 99 (Tex. 1984).

awarded damages on the DTPA claim only.[17]

4. Sufficiency of the evidence

Amarillo's remaining assignments of error challenge the sufficiency of the evidence. None warrants relief.

Amarillo contends that the evidence requires the award of treble damages on its DTPA claim despite the jury's contrary conclusion. Treble damages were available at the jury's discretion only if the jury found that Hartz violated the DTPA knowingly, that is, with actual awareness that the entity which had purchased the $58,679 check was receiving no consideration in return.[18] There is ample evidence, however, that Hartz thought the $58,679 check had been purchased by Little and that Little was receiving consideration by application of the check to the disputed debt. We will not disturb the jury's verdict.

Amarillo also challenges the jury's refusal to award punitive damages on its claim of conversion of the $58,679 check. Punitive damages are available for a conversion claim upon proof of malice.[19] There was evidence, however, that Hartz retained the funds because

---

[17] The court properly selected the DTPA as the measure of damages because it afforded greater recovery than the contract claim. **Birchfield**.

[18] Tex.Bus. & Comm. Code §§ 17.45(5)(B), 17.45(9), 17.50(b)(1).

[19] **First National Bank v. Gittelman**, 788 S.W. 2d 165 (Tex.App. - Houston [14th Dist.] 1990, writ denied).

it feared Little would make no more payments on the disputed debt, not because of ill-will towards Humphreys. Accordingly, the jury's verdict must stand.

Next Amarillo disputes the jury's failure to find in its favor on its claim of conversion of the $5,000 check. The evidence indicates that Little customarily sent a $5,000 check with each order to reduce the debt and that Amarillo intended its $5,000 check as a continuation of this practice, if only to disguise its purchase of Little's assets. Hartz' application of the check to Little's debt thus was not wrongful.[20] The jury's finding that Amarillo did not prove conversion is adequately supported.

Finally, Amarillo contests adverse judgment on its claims of intentional interference with contract and business relations. The former claim requires evidence of a contract between Albertson and Amarillo, the latter evidence of a reasonable probability of such a contract.[21] The jury found neither. Albertson's regional general merchandise manager testified that he thought he was doing business with Little, did not intend to do business with Humphreys or Amarillo and, if Little changed ownership, was not interested in doing business with the new owner. This testimony amply supports

---

[20] "Conversion is the wrongful exercise of dominion and control over another's property in denial of or inconsistent with his rights." **Winkle Chevy-Olds-Pontiac**, 830 S.W. 2d at 746.

[21] **Deauville Corp. v. Federated Department Stores, Inc.**, 756 F.2d 1183 (5th Cir. 1985).

the jury's verdict.[22]

MODIFIED to provide for prejudgment interest on the DTPA claim and, as modified, AFFIRMED. The matter is returned to the district court for entry of an appropriate judgment.

[22] Amarillo seeks a new trial on the additional grounds that Hartz' affirmative defense of fraudulent misrepresentation should not have been submitted to the jury. Amarillo did not contemporaneously object to the admission of the evidence as unduly prejudicial at trial, nor did it object to Hartz' closing argument. We find no merit to its contention.