IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-2892
Summary Calendar

MELVIN HAMMOND
and
ELLOREE CHIMNEY-HAMMOND,

Plaintiffs-Appellants,

VERSUS

MAXUM MARINE, INC., et al.,

Defendants,

MAXUM MARINE, INC.,
and
BAYLINER MARINE CORPORATION,
d/b/a MAXUM MARINE,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-92-1658)

(October 10, 1994)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

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[*] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

In this diversity action, plaintiffs Melvin Hammond and Elloree Chimney-Hammond appeal a motion for judgment as a matter of law ("j.m.l.") pursuant to FED. R. CIV. P. 50(a) entered in favor of Bayliner Marine Corporation ("Bayliner"). Finding no error, we affirm.

I.

On July 7, 1990, the plaintiffs purchased a Maxum 2700 boat from Richard Fun Time Marine, an authorized dealer for boats manufactured by Bayliner, which does business as Maxum Marine Inc. ("Maxum"). The plaintiffs paid $53,362 for the boat including accessories, a trailer, and taxes. Between the time the boat was purchased and October 26, 1991, Hammond used the boat approximately forty to fifty times without incident.

At about 1:30 a.m. on October 26, 1991, while Hammond and four friends were returning to the marina from a fishing trip, and with Hammond piloting, the boat struck a metal buoy lying on its side in the bay. The accident opened a hole in the bow between six and eight inches in diameter. Water was not immediately discovered in the boat, but a few minutes later, while Mark Miller, a friend of the plaintiffs and salesman of the boat, was piloting, one of the passengers noticed that the boat had begun to take on water.

The boat immediately was guided to a boat ramp. As it was being hoisted out of the water and placed onto the trailer, it was discovered that gel-coat and the first layer of fiberglass had

peeled off of the bottom of the boat.[1] In addition, the salt water that had seeped into the boat as a result of the hole in the stem ruined the engine and various other components.

II.

When the plaintiffs purchased the boat, Maxum Marine expressly warranted the hull for five years against structural defects. The plaintiffs filed suit against Bayliner, alleging damages under the Texas Deceptive Trade Practices Act ("DTPA"), TEX. BUS. & COM. CODE ANN. §§ 17.41-17.826. The plaintiffs claimed a breach of express warranty as well as misrepresentation and unconscionable conduct and filed a claim for intentional infliction of mental distress.

Following the prosecution of plaintiffs' case, Maxum made a motion under rule 50(a) for j.m.l., asserting that the plaintiffs had failed to prove the elements of any measure of damages. The district court granted this motion and entered judgment accordingly.

III.

We will first address plaintiffs' DTPA claim. We review the decision to grant j.m.l. de novo and apply the same legal standard that the district court applied. Conkling v. Turner, 18 F.3d 1285, 1300 (5th Cir. 1994). A j.m.l., formerly called a directed verdict, is a conclusion of law "based upon a finding that there is insufficient evidence to create a fact question for the jury."

[1] This condition is referred to as "delamination."

Lubbock Feedlots, Inc. v. Iowa Beef Processors, Inc., 630 F.2d 250, 269 n.22 (5th Cir. 1980). This court must review the entire trial record in the light most favorable to plaintiffs, who are the non-movants. Moreover, all factual inferences are to be drawn in their favor. Conkling, 18 F.3d at 1300.

The DTPA allows a recovery of "actual damages" under § 17.50(b)(1). According to Texas caselaw, actual damages under the DTPA are "'the total loss sustained [by the consumer] as a result of the deceptive trade practice.'' Henry S. Miller Co. v. Bynum, 836 S.W.2d 160, 161 (Tex. 1992) (quoting Kish v. Van Note, 692 S.W.2d 463, 466 (Tex. 1985)). "Actual damages" are those damages that are recoverable at common law. Brown v. American Transfer & Storage Co., 601 S.W.2d 931, 939 (Tex.), cert. denied, 449 U.S. 1015 (1980). The consumer is allowed to choose among the available common law damage remedies to obtain the highest amount, provided all of the elements of that damage remedy have been proven. Kish, 692 S.W. 2d at 466. There are essentially four common law damage remedies available under the DTPA:

1. The "benefit of the bargain" measure, defined as the difference between the value of the item as represented and the value that was actually received at the time of purchase. Leyendecker & Assocs., Inc. v. Wechter, 683 S.W.2d 369, 373 (Tex. 1984).
2. The "out of pocket loss" measure, defined as the "difference between the value of that which was parted with and the value of that which was received." Id.

3. The cost to repair. Guest v. Phillips Petroleum Co., 981 F.2d 218, 220-21 (5th Cir. 1993).

4. Market value of the item at the time of the loss. Hartford Ins. Co. v. Jiminez, 814 S.W.2d 551, 552 (Tex. App.))Houston [1st Dist.] 1991, no writ).

Testimony indicated that repairing the boat in this case is not a practical possibility. Therefore, measure 3 will not be considered. See, e.g., March v. Thiery, 729 S.W.2d 889, 895 (Tex. App.))Corpus Christi 1987, no writ) (holding that cost to repair damages will be awarded only if repairs are feasible and do not involve economic waste).

For purposes of measures 1 and 2, plaintiffs offer their purchase price as the market value of the item as represented by the seller, i.e., the value with which they parted. See Raye v. Fred Oakley Motors, Inc., 646 S.W.2d 288, 291 (Tex. App.))Dallas 1983, writ ref'd n.r.e.). In Texas, "[i]n the absence of other proof of the market value as warranted, the price agreed on between the parties may be taken as the market value of that for which the parties contracted." Smith v. Kinslow, 598 S.W.2d 910, 912 (Tex. Civ. App.))Dallas 1980, no writ).

The purchase order shows a total cost of $53,362; this figure includes the trailer and accessories, however. The cost of the boat, appearing on a separate line, is $42,500 without tax. A jury might have been able to discern a market value from this evidence.

Plaintiffs failed to complete the equation, however, as they also have the burden of showing the value of the boat they actually

received, but they produced no evidence pertaining to the boat's real value at the time of purchase. They argue that their expert, Derrick Espuet, testified that the boat was worthless, which supposedly would establish the entire purchase price as the damages. Espuet's testimony that the boat was "useless" occurred, however, as he was observing pictures of the delamination taken after the delamination occurred. This was over a year from the time of the purchase.

Furthermore, evidence indicates that the plaintiffs had used the boat regularly, without problems, for over a year before the accident occurred. Thus, even if the boat was defective at the time of purchase, it had some value to the plaintiffs when purchased. Plaintiffs correctly note that some successful use of a product does not necessarily mean that is was not "worthless" at the time of purchase. Integrated Title Data Sys. v. Dulaney, 800 S.W.2d 336 (Tex. App.))El Paso 1990, no writ). Integrated Title Data Systems, however, involved the sale of software programming that frequently and unpredictably malfunctioned, rendering it of no value to the users. Here, plaintiffs used the boat for fifteen months without problems, until the boat struck the buoy.

The final possible damage measure available to the plaintiffs is the market value at the time of the loss. Plaintiffs' only evidence in this regard was Hammond's testimony. Texas caselaw has indicated that an owner may testify as to the value of his own property. Mercedes-Benz of N. Am., Inc. v. Dickenson, 720 S.W.2d 844, 849-50 (Tex. App.))Fort Worth 1986, no writ). According to

the trial record, the following exchange occurred:

Q: What was the market value of your boat when you lost it?

Dr. Hammond: 35, $40,000 with the trailer.

Defendants' counsel then objected to Hammond's qualifications to testify. After sustaining the objection, the district court overruled itself and allowed the question. Plaintiffs' counsel continued:

Q: Dr. Hammond, what is the market value of your boat?

Dr. Hammond: 35, $40,000 including the trailer.

Because this is a motion for j.m.l., we resolve the following two ambiguities in favor of plaintiffs: First, we assume that Hammond, though the poorly-worded second question does not specify, was referring to the value at the time of the loss. Second, we assume that he felt that the boat itself was worth $35,000 and that the trailer was worth an additional $5,000, rather than a $35-40,000 range for both the boat and trailer.

Even if we accept the $35,000 as the market value of the boat at the time of the loss, plaintiffs have not produced evidence that plainly separates the portion of the loss attributable to the delamination of the hull from the loss of value caused by the flooding of the boat that resulted from the hole in its stem. Accordingly, plaintiffs failed to prove the portion of value lost because of Bayliner's alleged acts or omissions. See, e.g., McKnight v. Hill & Hill Exterminators, Inc., 689 S.W.2d 206, 208 (Tex. 1985); Texas & P. Ry. v. Dunn, 17 S.W. 822 (Tex. 1891). Testimony unequivocally indicated that the delamination of the hull

and the flooding of the interior because of the hole in the hull were two different occurrences. Because plaintiffs failed to prove all of the elements of any one of the possible damage remedies available under the DTPA, we affirm the j.m.l.

IV.

The district court also, in effect, granted a j.m.l. on the claim of intentional infliction of emotional distress by not sending this issue to the jury. According to § 17.43 of the DTPA, its remedies are not exclusive but are in addition to remedies found in other law, except that double recoveries are not allowed for the same acts or practices.

The Supreme Court of Texas has recognized the tort of intentional infliction of mental anguish as a cause of action. Twyman v. Twyman, 855 S.W.2d 619, 620 (Tex. 1993). The cause of action has four elements as adopted from the RESTATEMENT (SECOND) OF TORTS § 46 (1965):

1. Defendant acted intentionally or recklessly,
2. the conduct was extreme and outrageous,
3. the actions of the defendant caused the plaintiff emotional distress, and
4. the emotional distress suffered by the plaintiff was severe.

Twyman, 855 S.W.2d at 621. In addition, liability should be found "only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency,

and to be regarded as atrocious, and utterly intolerable in a civilized community." Id. (quoting RESTATEMENT (SECOND) OF TORTS § 46, comment d).

Plaintiffs failed to produce evidence that supports a claim that defendants acted in an extreme or outrageous manner. Moreover, while Elloree Chimney-Hammond testified to some symptoms of stress her husband was suffering, there is no indication that Hammond suffered "severe" emotional distress. In addition, Chimney-Hammond admitted that her husband's symptoms really may have been caused by the hole he caused, rather than by the delamination of the hull.

For these reasons, we find that the district court acted properly in not submitting the claim for intentional infliction of emotional distress to the jury. The judgment is AFFIRMED.