1978

Special Issue Submission in Cases Controlled by the Texas Deceptive Trade Practices Act: Spradling v. Williams

Cindy Morgan Ohlenforst

tive under section 17.42 of the DTPA which forbids waiver of the Act's provisions.[47]

III. CONCLUSION

The Texas Supreme Court's decision in *Kamarath v. Bennett* recognized that a covenant of habitability is implied by law in residential leases. The decision rests squarely upon the court's acknowledgment of the realities of the modern landlord-tenant relationship and the obsolescence of the common law doctrine of caveat emptor, a doctrine which is focused upon the needs of an agrarian rather than an urban society. Unfortunately, the decision left important questions about the proper measure of damages and the applicability of the Texas Deceptive Trade Practices-Consumer Protection Act unanswered. Even more disturbing is the possibility that landlords may use exculpatory clauses to avoid the duty imposed upon them by the holding, thereby circumventing the public policy considerations upon which it is based. Should the court subsequently be forced to determine the effectiveness of a waiver provision, it should consider the ramifications of its decision with great care. By declaring that waivers in adhesion contracts are void or are in violation of the DTPA, the court can preserve the protection granted to lessees by the *Kamarath* opinion. On the other hand, approval of such waivers would have the effect of restoring the doctrine of caveat emptor to full force in landlord-tenant law.

Clarence Clinton Davis, Jr.

Special Issue Submission in Cases Controlled by the Texas Deceptive Trade Practices Act: Spradling v. Williams

N.D. Williams sued Hubert Spradling, a boat dealer, under the Texas Deceptive Trade Practices-Consumer Protection Act (DPTA),[1] alleging

TEX. BUS. & COM. CODE ANN. § 17.45(5) (Vernon Supp. 1978). Within such a broad definitional framework, a court might rule that the presence of a waiver in an adhesion contract would take advantage of a lessee to a grossly unfair degree or would result in a gross disparity in consideration. As a result, the landlord might be held liable for treble the tenant's actual damages plus court costs and reasonable attorney's fees. *See id.* § 17.50.

47. *But see* Heath, *supra* note 41, at 10: "The better reasoning is that the implied warranty of habitability can be waived and that if it is effectively waived and disclaimed, then it never exists and cannot be breached within the meaning of section 17.50 of the act."

A comprehensive discussion of the possible effect of the DTPA on landlord-tenant law is beyond the scope of this Note. A detailed discussion is contained in Comment, *Texas Landlord-Tenant Law and the Deceptive Trade Practices Act—Affirmative Remedies for the Tenant*, 8 ST. MARY'S L.J. 807 (1977).

1. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1978) [hereinafter cited and referred to as DTPA or the Act].

that Spradling had made several misrepresentations about a boat Williams purchased. The jury found in answer to special issues that Spradling had made certain representations to Williams, that these representations were deceptive trade practices, and that Williams had relied on these deceptive trade practices in purchasing the boat. The trial court accordingly entered judgment for the plaintiff. The court of civil appeals determined that the trial court's definition of a deceptive trade practice as one having the capacity to deceive was correct.[2] The Texas Supreme Court granted a writ of error. *Held, affirmed*: An act is false, misleading, or deceptive if it has the capacity or tendency to deceive an average or ordinary person, even though that person may have been ignorant, unthinking, or credulous. *Spradling v. Williams*, 566 S.W.2d 561 (Tex. 1978).

I. THE TEXAS DECEPTIVE TRADE PRACTICES ACT

The Texas Deceptive Trade Practices-Consumer Protection Act was passed in 1973[3] and has been amended twice since.[4] The purpose of the DTPA is "to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection."[5] Because the language of the Act is broad, extensive judicial interpretation is necessary before the parameters of the DTPA can be clearly defined. One particular section of the Act that has created confusion requires the courts to interpret the phrase "false, misleading or deceptive acts"[6] according to the federal court interpretations of the Federal Trade Commission Act (FTCA).[7] The federal court decisions in FTCA cases have adopted

2. Spradling v. Williams, 553 S.W.2d 143 (Tex. Civ. App.—Beaumont 1978).

3. For a discussion of the development of the DTPA, see Hill, *Introduction to the Consumer Law Symposium*, 8 ST. MARY'S L.J. 609 (1977); Maxwell, *Public and Private Rights and Remedies Under the Deceptive Trade Practices-Consumer Protection Act*, 8 ST. MARY'S L.J. 617 (1977).

4. Effective September 1, 1975, the legislature broadened the scope of the Act principally by expanding the definition of consumer to include partnerships and corporations, and the definition of goods to include real estate. *See* Bragg, *Now We're All Consumers! The 1975 Amendments to the Consumer Protection Act,* 28 BAYLOR L. REV. 1 (1976). Effective May 23, 1977, the legislature further expanded the scope of the Act and provided three defenses to treble damages, DTPA § 17.50(A). *See* Maxwell, *Important New Amendments to the Consumer Protection Act*, 3 CAVEAT VENDOR 3 (1977); Comment, *What Hath the Legislature Wrought? A Critique of the Deceptive Trade Practices Act as Amended in 1977*, 29 BAYLOR L. REV. 525 (1977).

5. DTPA § 17.44.

6. A consumer has a cause of action under the DTPA if he has been adversely affected by (1) a false, misleading, or deceptive act or practice in the conduct of any trade or commerce (DTPA §§ 17.46(a), 17.50(1)), (2) a breach of an express or implied warranty (DTPA § 17.50(2)), (3) an unconscionable action (DTPA § 17.50(3)), or (4) a violation of TEX. INS. CODE ANN. art. 21.21 (Vernon 1963) (DTPA § 17.50(a)(4)).

7. 15 U.S.C. §§ 41-77 (1976). As DTPA § 17.46(c)(2) states:

> It is the intent of the legislature that in construing Subsection (a) of this section in suits brought under Section 17.50 of this subchapter the courts to the extent possible will be guided by Subsection (b) of this section and the interpretations given by the federal courts to Section 5(a)(1) of the Federal Trade Commission Act [15 U.S.C.A. 45(a)(1)].

Prior to 1977 the courts were directed to follow the interpretations of both the federal courts

the "capacity to deceive" test as the definitional standard for a deceptive trade practice,[8] and prior to *Spradling v. Williams* some Texas courts already had used this definition in DTPA cases.[9] Several authorities therefore concluded that a finding of actual deception is not necessary in an action brought under the DTPA,[10] and a plaintiff need not prove that he believed in or relied on the deceptive trade practice.[11] Although this interpretation may be correct in suits seeking injunctive relief,[12] the Act requires a consumer seeking to recover damages to prove that a deceptive trade practice occurred and that he was adversely affected by that deceptive trade practice.[13] Arguably, then, proof of reliance may be required to establish an adverse effect since the consumer must show some causal link between his damages and the defendant's unlawful conduct.[14] Although the DTPA mandates liberal construction in favor of the consumer,[15] the abandonment of a reliance requirement could create an unfair burden on the defendant since he is potentially liable for three times the plaintiff's actual damages.[16]

---

and the Federal Trade Commission. The 1977 amendments eliminated the reference to the FTC interpretations. *Cf.* DTPA § 17.46(c)(1) (in suits initiated by the attorney general's office the courts are still advised to consider the interpretations of the FTC).

8. *See* Goodman v. FTC, 244 F.2d 584, 604 (9th Cir. 1957) ("*capacity to deceive and not actual deception* is the criterion by which practices are tested under the Federal Trade Commission Act"); Charles of the Ritz Distrib. Corp. v. FTC, 143 F.2d 676, 680 (2d Cir. 1944).

9. *See* Bourland v. State, 528 S.W.2d 350 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.); Wesware, Inc. v. State, 488 S.W.2d 844 (Tex. Civ. App.—Austin 1972, no writ).

10. *See, e.g.*, Hill, *supra* note 4; Maxwell, *supra* note 4.

11. Hill, *supra* note 4, at 613; Maxwell, *Damages under the Deceptive Trade Practices-Consumer Protection Act*, in DAMAGES C-1 (Professional Development Program, State Bar of Texas, September 1977). Maxwell argues that because reliance is inapposite to some of the proscribed acts, no reliance requirement was intended. *Id.* at C-5 to -6. *See also* Lynn, *A Remedy for Undermade and Oversold Products—The Texas Deceptive Trade Practices Act*, 7 ST. MARY'S L.J. 698 (1976). Lynn argues that the presence of a scienter requirement in some of the acts proscribed by § 17.46(b) implies that there is no scienter requirement for the other proscribed acts.

12. The FTCA was designed to authorize injunctive causes of action by the government rather than private actions for damages. The earlier DTPA cases using the FTCA standard also involved injunctions. *See* cases cited at note 9 *supra*; Lynn, *Anatomy of a Deceptive Trade Practices Case*, 31 SW. L.J. 867 (1977). Lynn further notes that government suits to enforce securities laws require less proof of the deceptive nature of the representation than do private actions for damages. *Id.* at 870 n.24. *But see* Note, *The Texas Deceptive Trade Practices Act and Magnuson-Moss: An Explosive Combination*, 29 BAYLOR L. REV. 559 (1977).

13. DTPA § 17.50(a) states that a "consumer may maintain an action if he has been adversely affected" by a deceptive trade practice. *Compare* DTPA § 17.50(a) *with id.* § 17.47, which authorizes public action by the attorney general's office if there is "reason to believe that any person is engaging in, has engaged in, or is about to engage in any act or practice declared to be unlawful by this subchapter."

14. *See* W. PROSSER, LAW OF TORTS § 108 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 537, Comment a (1976).

15. DTPA § 17.44.

16. *Id.* § 17.50(b)(1) provides that a consumer who prevails may obtain three times the amount of his actual damages plus court costs and attorneys' fees. In Woods v. Littleton, 554 S.W.2d 662 (Tex. 1977), the court ruled that trebling is mandatory. *But see* DTPA § 17.50A (defenses to treble damages).

Some question exists as to the constitutionality of awarding treble damages for deceptive trade practices that are not specifically enumerated in *id.* § 17.46(b). *See* Spradling v. Wil-

In practice, the courts have employed several approaches in determining the existence of a deceptive trade practice and in evaluating adverse effect. Some courts have asked the jury whether there was a deceptive trade practice,[17] and whether the plaintiff was adversely affected.[18] Other courts have asked whether the deceptive trade practice was the producing cause of the plaintiff's damage.[19] Finally, several courts have submitted a special issue asking whether the plaintiff relied on the misrepresentation or deceptive trade practice.[20] These various approaches have resulted because the DTPA does not state the extent to which the FTCA definition of deceptive is controlling;[21] nor does it address the question whether reliance is necessary to a cause of action under the DTPA.[22] Against this confused

liams, 566 S.W.2d 561, 565 (Tex. 1978) (Greenhill, C.J., concurring); Singleton v. Pennington, No. 19252 (Tex. Civ. App.—Dallas, May 12, 1978, writ filed) (unreported).

17. MacDonald v. Mobley, 555 S.W.2d 916 (Tex. Civ. App.—Austin 1977, no writ) (representations were a deceptive trade practice which adversely affected plaintiffs); Mobile County Mut. Ins. Co. v. Jewell, 555 S.W.2d 903 (Tex. Civ. App.—El Paso 1977, writ filed); Crawford Chevrolet v. McLarty, 519 S.W.2d 656 (Tex. Civ. App.—Amarillo 1975, no writ) (trial court gave specific instructions containing substantially the pertinent language of DTPA § 17.46; further, the court of civil appeals noted that the record showed evidence of plaintiff's reliance). *See also* Woods v. Littleton, 554 S.W.2d 662 (Tex. 1977) (findings on both reliance and deceptive trade practice).

18. Our Fair Lady Health Resort v. Miller, 564 S.W.2d 410 (Tex. Civ. App.—Austin 1978, no writ); Howze v. Surety Corp. of America, 564 S.W.2d 834 (Tex. Civ. App.—Austin 1978, no writ); MacDonald v. Mobley, 555 S.W.2d 916 (Tex. Civ. App.—Austin 1977, no writ); Town and Country Mobile Homes, Inc. v. Stiles, 543 S.W.2d 664 (Tex. Civ. App.—El Paso 1976, no writ). *See* Ceshker v. Bankers Commercial Life Ins. Co., 558 S.W.2d 102 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.).

19. *See, e.g.*, Boman v. Woodmansee, 554 S.W.2d 33 (Tex. Civ. App.—Austin 1977, no writ). Though producing cause is used primarily in products liability cases, at least one author has suggested its use in DTPA litigation. Maxwell, *supra* note 11, at C-4. *See also* Woods v. Littleton, 554 S.W.2d 662 (Tex. 1977) ("as a result of" defendant's conduct); Woo v. Great Sw. Acceptance Corp., 565 S.W.2d 290 (Tex. Civ. App.—Waco 1978, no writ) (suggests awarding all damages that were "factually caused" by defendant's acts); Yorfino v. Ferguson, 552 S.W.2d 563 (Tex. Civ. App.—El Paso 1977, no writ) ("resulting from the deceptive trade practice"); Crawford Chevrolet v. McLarty, 519 S.W.2d 656 (Tex. Civ. App.—Amarillo 1975, no writ) ("resulting from deceptive trade practices").

20. Singleton v. Pennington, No. 19252 (Tex. Civ. App.—Dallas, May 12, 1978, writ filed) (unreported); Burnett v. James, 564 S.W.2d 407 (Tex. Civ. App.—Dallas 1978, writ filed); Cordrey v. Armstrong, 553 S.W.2d 798 (Tex. Civ. App.—Beaumont 1977, no writ). Whether the courts submitted reliance as a necessary element of a cause of action under the DTPA is unclear in cases in which the defendant was being tried on alternative bases. *See* Littleton v. Woods, 538 S.W.2d 800 (Tex. Civ. App.—Texarkana 1976), *aff'd*, 554 S.W.2d 662 (Tex. 1977) (DTPA and common law fraud); Shepherd v. Eagle Lincoln Mercury, Inc., 536 S.W.2d 92 (Tex. Civ. App.—Eastland 1976, no writ) (DTPA and common law fraud).

21. *Compare* cases cited in note 9 *supra with* Singleton v. Pennington, No. 19252 (Tex. Civ. App.—Dallas, May 12, 1978, writ filed) (unreported) (Aikin, J., dissenting), *and* Vargus v. Allied Fin. Co., 545 S.W.2d 231 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.).

22. In interpreting the Texas Securities Act, another statute creating a cause of action for fraudulent practices, the court decided that reliance is not essential to a cause of action under that Act, reasoning that reliance is not material to some of the practices enumerated by the statute. *See* Rio Grande Oil Co. v. State, 539 S.W.2d 917 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ) (interpreting TEX. REV. CIV. STAT. ANN. art. 581-4f (Vernon 1978)). *Contra*, reliance has been held to be a required element in the implied private right of action for deceptive security trading practices, despite the absence of any codified reliance requirement. *See* Simon v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 482 F.2d 880, 884-85 (5th Cir. 1973); 17 C.F.R. § 240.10b-5 (1977).

background, the Texas Supreme Court decided *Spradling v. Williams*.[23]

II. SPRADLING V. WILLIAMS

The *Spradling v. Williams* decision is important because the court established the proper definition of deceptive trade practice. Furthermore, although the court did not specifically address the reliance issue, some portions of the opinion imply that in a DTPA action a plaintiff must prove reliance. The trial court in *Spradling* submitted special issues to the jury in groups of three. The first special issue in each group asked whether a specific act or misrepresentation occurred; the second special issue asked whether such act or misrepresentation was a deceptive trade practice as defined by the court; and the third special issue asked whether the plaintiff relied on the deceptive trade practice.[24] On appeal the only issues presented concerned the trial court's instructions to the jury.[25] The defendant argued that the trial court's definition of the term "false, misleading, or deceptive acts or practices" as an "act or series of acts which has the capacity to deceive an average or ordinary person, even though that person may have been ignorant, unthinking or credulous"[26] was prejudicial since the definition improperly reduced the plaintiff's burden of proof.[27] The court of appeals, however, ruled that this definition was proper,[28] and the supreme court affirmed.[29]

In explaining its decision, the supreme court noted that because the cause of action is statutorily created, the courts must follow the legisla-

23. In Woods v. Littleton, 554 S.W.2d 662 (Tex. 1977), its only previous interpretation of the DTPA, the court ruled that trebling of damages is mandatory, and that a cause of action accrues at the time of the misrepresentation rather than at the time of sale. *See generally* Note, *Automatic Treble Damages under the Texas Deceptive Trade Practices-Consumer Protection Act*, 29 BAYLOR L. REV. 595 (1977).

24. 566 S.W.2d at 562.

25. The modern trend in appellate review allows the trial court considerable discretion in deciding what instructions are necessary and proper. *See* TEX. R. CIV. P. 277; Mobil Chem. Co. v. Bell, 517 S.W.2d 245 (Tex. 1974); *cf.* Bragg, *supra* note 4, at 14 (suggesting that courts should be tolerant of detailed instructions to insure that the jury fully understands the rules which govern the answers to whether a defendant's conduct is false, misleading, or deceptive).

26. 566 S.W.2d at 562.

27. The defendant also argued that the trial court had erred by giving the jury a list of five specific misrepresentations that Spradling had allegedly made, and instructing the jury that if such representations had been made, they were deceptive trade practices. Both the court of civil appeals and the supreme court held this part of the charge erroneous, but found that Spradling had not been prejudiced. The supreme court noted that other jury findings showed conclusively that Spradling had committed at least one of the deceptive trade practices specifically proscribed in DTPA § 17.46(b); thus, the error was harmless. 566 S.W.2d at 563-64. The court of civil appeals reasoned that the defendant was not prejudiced since the acts listed for the jury were in fact deceptive trade practices; the court also noted that DTPA § 17.44 requires a liberal construction of the Act. 553 S.W.2d at 146. According to Justice Keith's dissent, which was cited by Justice Steakley in his dissenting opinion, 566 S.W.2d at 565, the erroneous charge was harmful since it was an improper comment on the weight of the evidence and informed the jury of the effect of their answers. 553 S.W.2d at 147-48.

28. Justice Keith dissented on this point also. 553 S.W.2d at 149.

29. 566 S.W.2d at 562-63.

ture's directive[30] to use the federal courts' FTCA decisions as a guide in construing the DTPA.[31] The supreme court thus determined that the trial court's definition of a "false, misleading or deceptive act" was correct,[32] noting that the trial court had properly adopted the definition used in FTCA decisions.[33] This holding is significant not only because it is the first supreme court ruling on this key issue, but also because the court applied the FTCA definition of deceptive trade practice, which is used primarily in injunctive actions,[34] to a private action for damages.

The supreme court also clarified the importance of section 17.46(b) of the statute, the "laundry list," in which twenty-two examples of "false, misleading, or deceptive acts or practices" are enumerated.[35] According to the court, the jury should not be asked whether the defendant's action was deceptive if the action corresponds to one of the listed deceptive trade practices.[36] If any of the listed acts is found to have occurred, that act is by law an unlawful deceptive trade practice.[37]

According to some authorities, if an act is by law a deceptive trade practice, a plaintiff need not prove that he relied on the misrepresentation.[38] This interpretation, however, is not entirely supported by the court's opinion.[39] The court limited its decision to the trial court's instructions to the jury, and did not specifically consider the issue of reliance. The court's opinion, however, seems to imply that a showing of reliance is a prerequisite to consumer recovery under the DTPA. The supreme court concluded that Spradling's representation that the boat sold to Williams was a 1973 model, when in fact the boat was an older model, was a deceptive trade practice.[40] If mere existence of a deceptive trade practice were a

30. DTPA § 17.46(c)(2).

31. 566 S.W.2d at 562. The court referred to its previous analysis in State v. Credit Bureau of Laredo, Inc., 530 S.W.2d 288 (Tex. 1975), in which the court dealt with an earlier deceptive trade practices act, TEX. REV. CIV. STAT. ANN. art. 5069-10.02(b) (Vernon 1971) (current version at DTPA § 17.46). In that decision the court looked to federal precedent to see if the federal courts had approved the interpretation used.

32. 566 S.W.2d at 564.

33. *See* note 8 *supra* and accompanying text for a discussion of judicial interpretation of the FTCA.

The Massachusetts consumer protection statute, like Texas' DTPA, points to FTCA interpretations as a guide in construing unfair or deceptive acts. MASS. ANN. LAWS ch. 93A, § 2(b) (Michie/Law. Co-op 1975). The Massachusetts court has accordingly decided that proof of reliance is not necessary in a cause of action under their consumer protection act. Slaney v. Westwood Auto, Inc., 366 Mass. 688, 322 N.E.2d 768 (1975).

34. *See* notes 9 & 12 *supra*.

35. *See generally* Maxwell, *supra* note 3, at 625.

36. According to one commentator, the question of what is "false, deceptive or misleading" requires application of a legal standard and, therefore, is never a question for the jury. Bragg, *supra* note 4, at 12.

37. 566 S.W.2d at 563.

38. *See* note 11 *supra* and accompanying text. This interpretation is particularly appealing since reliance is inapposite to some of the laundry list activities. *See, e.g.*, DTPA § 17.46(b)(21) (proscribes filing suit against a consumer in a county other than the one in which the defendant resides or in which he signed the contract on which the suit is based).

39. *See also* notes 13 & 14 *supra* and accompanying text.

40. 566 S.W.2d at 563-64. The court noted that jury finding number thirteen corresponds to DTPA § 17.46(b)(7): "representing that goods or services are of a particular stan-

sufficient basis for recovery under the Act, the judgment of the lower court could have been approved without further analysis. The supreme court, however, also discussed Spradling's defense that the year model was immaterial because an ordinary consumer would not consider the year model in purchasing a secondhand boat.[41] The court's consideration of this defense indicates that the consumer's reliance on the misrepresentation may be an element of a deceptive trade practice action.[42] Moreover, Justice Greenhill's concurring opinion, which questions the constitutionality of allowing treble damages for activities not specifically proscribed in section 17.46(b), assumes that reliance is integrally related to recovery of damages under the DTPA:

> It is one thing for the Legislature to create a cause of action in tort or contract for actual *damages caused by reliance on unfair and deceptive trade practices*; but it is another thing for it to create a penalty of triple damages for the violation of unwritten, unlisted and unspecified unlawful acts.[43]

Unfortunately, since the court never directly addressed the reliance issue, the opinion is subject to conflicting interpretations.

III. CONCLUSION

In *Spradling v. Williams* the Texas Supreme Court explained the proper means of submitting special issues to determine the existence of a deceptive trade practice under the Texas Deceptive Trade Practices-Consumer Protection Act. If a defendant's action corresponds to one of the activities included in the "laundry list" of proscribed actions, the jury should not be asked whether the defendant's action or representation was false, misleading, or deceptive. In such cases the act is deceptive by law, and a jury finding that the act occurred is sufficient to establish a deceptive trade practice. If a defendant's action is not one specifically enumerated in the Act, the jury must find that the activity occurred and that it was deceptive; that is, that it had the tendency or capacity to deceive an average or ordinary person, even though that person may have been ignorant, unthinking, or credulous. Proof of a deceptive trade practice, however, is not sufficient for recovery under the DTPA; the consumer must also prove that he has been adversely affected. Although the supreme court may later decide that reliance on the deceptive trade practice is required to establish adverse effect, the *Spradling* court refrained from addressing the issue of reliance. The court's decision implies, however, that a special issue submission on reliance is appropriate. Undoubtedly, the court will be forced to clarify

---

dard, quality, or grade, or that goods are of a particular style or model, if they are of another."

41. 566 S.W.2d at 564. That the court dealt with this issue is particularly significant in that it was not one of the points brought forth on appeal.

42. *Id.* The only conclusion the court actually states is that the evidence showed that a 1972 model boat was worth less than a 1973 model. The court, therefore, may have believed that Williams was adversely affected regardless of whether he believed or relied on Spradling's statement because the boat he purchased was worth less than a 1973 model.

43. 566 S.W.2d at 565 (Greenhill, C.J., concurring) (emphasis added).

the elements necessary for recovery under the DTPA in subsequent judicial interpretations.

Cindy Morgan Ohlenforst

CHARLES O. GALVIN