IN THE SUPREME COURT OF TEXAS

No. 04-0961

TONY GULLO MOTORS I, L.P. AND BRIEN GARCIA , PETITIONERS,

v.

NURY CHAPA, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE NINTH DISTRICT OF TEXAS

Argued October 19, 2005

JUSTICE O'NEILL, dissenting.

Nury Chapa's allegations describe what amounts to a bait-and-switch by Gullo Motors, a claim the jury and this Court agree there is evidence to support. The evidence shows that, in furtherance of that scheme, Chapa was threatened, lied to, and her signature and that of her deceased husband were forged. The defendant's conduct in this case was at best reprehensible, and bordered on criminal, prompting the jury to award $250,000 in exemplary damages. Texas law capped that award at $200,000, and the court of appeals further reduced it by remittitur to $125,000. Even though the remitted award is well below the statutory ceiling that the Legislature set, the Court today decides the appeals court award is exorbitant and cannot stand. I do not agree that the court of appeals violated constitutional exorbitancy standards by suggesting the remittitur that it did, nor do

I agree with the Court's advisory determination of the attorney's fee issue. Accordingly, I respectfully dissent.

I. Background

The evidence supporting the verdict in this case demonstrates that Chapa purchased a Toyota Highlander Limited from Gullo Motors, but Gullo Motors tried to make her accept instead a less expensive Toyota Highlander. According to Chapa, she offered her salesman, Brien Garcia, $30,000 for the Highlander Limited on the showroom floor, with the added options of a TV/VCR and Michelin tires. After consulting with management, Garcia responded that the showroom car had been sold but he could get her one for $207.38 more. Chapa agreed, but when she returned to sign the contract it only indicated she was buying a "2002 Toyota." Chapa wrote "Limited," "Michelin tires," "TV" and "VCR" on the contract and then signed it. She was told more signatures were needed and a copy would be mailed to her. Chapa never received the contract.

After sending in her $30,207.38 payment, Chapa received a call informing her that the vehicle had arrived. Chapa went to pick it up, but Garcia presented her with a Highlander, not a Highlander Limited. When Chapa refused to take it, Garcia acknowledged that she had purchased a Highlander Limited and assured her she would get one.

Again, a sales representative called Chapa to say her car was ready, and again a Highlander, not a Highlander Limited, was presented to her. Chapa complained, but Gullo told her the Highlander she was taking had a V-6 engine just like the Limited; in addition, Gullo promised to add the other features from the Limited, plus the Michelin tires, and assured her the modifications would be complete in two days. Chapa agreed to take delivery of the Highlander, but insisted Gullo Motors

write these promises on her new delivery check sheet, which she then signed. Garcia wrote her a "We Owe" form, which stated Gullo owed her Michelin tires and lumbar seats. He did not include the other items, so Chapa listed them on the delivery check sheet; she testified Garcia told her that was enough.

When Gullo Motors failed to install the promised items, Chapa went to the dealership to speak with Brian Debiski, the sales manager. Debiski told Chapa she was "crazy, that [she] didn't buy that [Limited]." Chapa explained that she had a "We Owe" form, but Debiski responded, "[Y]ou have nothing. You are a nobody. It's your word against me." When Chapa told him she would inform the media, Debiski responded that "nobody will dare to go against me, against us," and informed Chapa that he would show her by having her car towed away at her expense.

Later, when Chapa's attorney informed the dealership that Chapa would like to return the car for a refund, Gullo refused, claiming the Highlander had already been titled to Chapa (even though it had not) and explaining that it would thus have to sell the car as used. Gullo produced a New Vehicle Delivery Check Sheet showing Chapa had accepted delivery of the Highlander without complaint. However, Chapa testified that Gullo forged her deceased husband's signature on the delivery check sheet by using documents her late husband, Ernesto Chapa, had signed when they had previously bought a car from Gullo. Chapa also claimed that Gullo forged her deceased husband's signature on the "We Owe" form. Chapa testified that numerous other documents were forged, and there was evidence that Garcia admitted to Gullo he had promised Chapa the features listed on the "We Owe" form.

The jury found Chapa's evidence credible and awarded her $7,213 for breach of contract (the difference in value between the vehicle promised and the one delivered), $7,213 for fraud, $21,639 for mental anguish, $250,000 for exemplary damages, $7,213 for damages under the Texas Deceptive Trade Practices Act, and $20,000 for attorney's fees. The trial court rendered judgment only on the breach of contract claim, but the court of appeals reversed and reinstated all the awards except for exemplary damages, which the court remitted to $125,000, one-half of what the jury awarded.

I agree with the Court that Chapa must elect only one liability theory upon which to recover, and the court of appeals erred to the extent it concluded otherwise. But I disagree that the court of appeals' remittitur is constitutionally infirm or that Chapa's attorney's fees are capable of segregation.

II. Exemplary Damages

In Texas, the amount of exemplary damages for which a defendant may be liable is capped at

> an amount equal to *the greater of*:
>
> (1) (A) two times the amount of economic damages; plus
>
> (B) an amount equal to any noneconomic damages found by the jury, not to exceed $750,000; or
>
> (2) $200,000.

TEX. CIV. PRAC. & REM. CODE § 41.008(b) (emphasis added). I agree with the Court that the mere existence of a statutory cap does not foreclose a federal constitutional check for exorbitancy. But

the United States Supreme Court has instructed that reviewing courts should accord "substantial deference" to legislative judgments concerning appropriate sanctions. *BMW of N. Am. v. Gore*, 517 U.S. 559, 583 (1996). "[A] punitive damages award that comports with a statutory cap provides strong evidence that a defendant's due process rights have not been violated." *Rodriguez-Torres v. Caribbean Forms Mfr., Inc.*, 399 F.3d 52, 65 (1st Cir. 2005) (citing *Romano v. U-Haul Int'l*, 233 F.3d 655, 673 (1st Cir. 2000)). The award the Court finds excessive today is well below the statutory cap that the Legislature determined appropriate when a defendant engages in conduct that would support an exemplary damages award. Neither does the award violate the three-part test for constitutional exorbitancy that the United States Supreme Court has articulated. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418-19 (2003).

Courts must consider three guideposts when reviewing an exemplary damage award: (1) the degree of reprehensibility of the misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil or criminal penalties that could be imposed for comparable misconduct. *Id.; Gore*, 517 U.S. at 575. According to the Supreme Court, it is "the degree of reprehensibility of the defendant's conduct" that is "[t]he most important indicium of the reasonableness of a punitive damages award," and five factors guide that assessment: (1) whether the harm caused was physical rather than economic, (2) whether the conduct evinced an indifference to others' health or safety, (3) whether the harm involved repeated acts or isolated incidents, (4) whether the target of the conduct was financially vulnerable, and (5) whether the harm resulted from mere accident or from "intentional malice, trickery, or deceit . . . ." *Campbell,* 538 U.S. at 419.

The Court summarily concludes that only the last of these factors, deceitful conduct, favors Chapa. And the Court gives that conduct very cursory attention, even though the Supreme Court has said that the "infliction of economic injury, *especially when done intentionally through affirmative acts of misconduct* . . . can warrant a substantial penalty." *Gore*, 517 U.S. at 576 (citing *TXO Prod. Corp. v. Alliance Res. Corp.* 509 U.S. 443, 453 (1993)). Assuming Chapa elected to recover on the jury's fraud finding, she would be entitled to $28,852 in compensatory damages. Thus, the penalty the court of appeals determined to be appropriate reflects a ratio between compensatory and exemplary damages of a little more than 4 to 1, a differential the petitioners have not demonstrated is constitutionally disproportionate to the defendant's conduct here. *See TXO Prod. Corp.,* 509 U.S. at 462 (holding a 10 to 1 ratio permissible); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991) (affirming award of four times compensatory damages and two hundred times economic damages); *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1095-96 (5th Cir. 1991) (upholding a 20 to 1 ratio).

As for the other reprehensibility factors, the Court either misapplies them or gives them short shrift. For example, the Court's conclusion that Gullo's actions caused Chapa only economic harm ignores the jury's award of mental anguish damages, a damage element we have long considered non-economic that compensates for harm with physical elements. *See Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 763 (Tex. 2003). The Court also concludes Gullo Motors' misconduct was an isolated incident that did not involve repeated acts, even though the evidence indicates otherwise. Gullo Motors committed multiple acts of misconduct, including switching contracts, altering documents, engaging in deceptive and threatening behavior, and even forging the signatures

of Chapa and her deceased husband. In sum, the factors that the Court purports to follow in determining the reprehensibility of Gullo Motors' conduct weigh in favor of the court of appeals' remitted award, not against it.

The second guidepost used to review an exemplary damage award examines the ratio between exemplary and compensatory damages. The Supreme Court has refused to adopt a bright-line constitutionally prohibited ratio. Instead, it has suggested a range beyond which exemplary damage awards will likely become constitutionally exorbitant, stating "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Campbell*, 538 U.S. at 419. The Court's opinion in this case highlights a 17 to 1 ratio that reflects a comparison between the remitted award and *economic* damages. The constitutionally relevant comparison, though, focuses on *compensatory* rather than economic damages, which yields a much lower 4.33 to 1 ratio.

The third guidepost considers civil or criminal penalties that could be imposed for comparable misconduct. *Campbell,* 538 U.S. at 48; *Gor*e, 517 U.S. at 575. The Court considers two potential civil penalties of $10,000 and $20,000 that Gullo Motors' conduct might subject it to, yet declines to consider potentially applicable criminal penalties that, according to Chapa, would result in jail time and $80,000 in felony fines for forgery, document destruction, and fraudulently inducing signatures. Certainly I agree that "the remote possibility of a criminal sanction does not automatically sustain a punitive damages award," as the Court recites, but that doesn't mean comparable potential criminal sanctions should be altogether ignored. *Campbell*, 538 U.S. at 428.

In my view the more important issue is not the actual dollar amount that Chapa will ultimately recover, but the low threshold this Court steps over to declare a jury award constitutionally exorbitant. Had I been on the jury in this case, I may well have disagreed with the amount of exemplary damages the jury actually awarded or even the amount the appellate court suggested in its remittitur. Although exemplary damage awards can serve worthwhile purposes, they can also have debilitating economic impact and should be carefully policed by the courts. *See Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 31 (Tex. 1994). Our courts of appeals in Texas have long been empowered to suggest a remittitur of excessive awards when the evidence is factually insufficient to support them. *Id.*; TEX. R. APP. P. 46.3. The court of appeals assiduously exercised that power in this case. It is, of course, appropriate for this Court to intervene if the appeals court allows a constitutionally offensive award to stand. But when the Court chooses a marginal case like this in which to intervene, it risks intruding upon an area that has traditionally been the well-patrolled province of our courts of appeals. And when, as here, the Legislature has chosen to set its own parameters for such awards, the Court's intrusion is even more disturbing.

III. Attorney's Fees

I also question the Court's decision to address the attorney's fee issue in this case. If the court of appeals renders judgment on remand based on the jury's fraud finding, the attorney's fee issue will be moot. Thus, the Court's analysis of the issue is purely advisory. TEX. CONST. art. II, § 1; *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 164 (Tex. 2004). But even assuming the Court properly reaches the issue, I disagree with the Court's application of the rule it announces. According to the Court, when the legal services themselves advance both a recoverable and

unrecoverable claim, segregation is not required. The Court concludes that at least some of Chapa's attorney's fees are attributable only to claims for which fees are not recoverable, requiring a new trial. It is true that some of Chapa's attorney's fees are attributable to her common-law fraud claim for which fees are not recoverable. Attorneys fees are recoverable, though, under the DTPA for deceptive acts or practices. It is unclear to me, and the Court does not explain, how the legal services used to advance Chapa's DTPA claim did not also advance her common-law fraud claim.

The court's charge that was read to the jury instructed that Gullo Motors violated the DTPA if it (1) breached an express warranty, defined as any affirmation of fact that related to the 2002 Highlander Limited and became part of the basis of its bargain with Chapa, or (2) engaged in any false, misleading, or deceptive act or practice upon which Chapa relied to her detriment. A false, misleading, or deceptive act or practice includes representing that goods or services are of a particular standard, quality, grade, or of a particular style or model, or, failing to disclose information concerning goods which was known at the time of the transaction if such failure to disclose was intended to induce the consumer into a transaction the consumer would not have entered had the information been disclosed. As for the common-law fraud claim, the jury was instructed that Gullo Motors committed fraud if (a) it made a material misrepresentation, (b) the representation was made with knowledge of its falsity or made recklessly without any knowledge of the truth and as a positive assertion, (c) the representation was made with the intention that Chapa would act upon it, and (d) Chapa relied on the misrepresentation and thereby suffered injury. The evidence that Chapa presented to support her fraud claim also supported her DTPA claim, and vice versa. Because the

legal services provided to advance the DTPA claim also advanced the fraud claim, the fees incurred cannot be segregated even under the Court's own analysis.

* * *

For the reasons expressed, I respectfully dissent.

Harriet O'Neill
Justice

OPINION DELIVERED: December 22, 2006.