Reversed and Rendered and Opinion filed September 6, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00059-CV

CLEVELAND MACK SALES, INC. D/B/A PERFORMANCE KENWORTH, Appellant

V.

JIMMY C. FOSHEE, Appellee

On Appeal from the 61st District Court
Harris County, Texas
Trial Court Cause No. 97-57639

O P I N I O N

This appeal arises out of a suit for damages under the Deceptive Trade Practices Act ("DTPA"). Appellant, Performance Kenworth ("Performance"), presents four issues for our determination, all relating to whether the jury's answers in favor of appellee, Jimmy Foshee, were supported by legally and factually sufficient evidence. The jury found that (1) Performance engaged in a false, misleading, or deceptive act or practice that was a producing cause of damages to Foshee, (2) Performance was responsible for 75% of Foshee's damages, (3) $42,600.00 would reasonably compensate Foshee for his damages, and (4) Foshee's reasonable and necessary attorney fees for this case amounted to

$38,000.00. A point of error addresses each of these claims. For the reasons set out below, we reverse the judgment of the trial court, and render that Foshee take nothing on his DTPA claim against Performance.

FACTUAL BACKGROUND

A few years ago, Foshee, a professional truck driver, was looking to buy a new tractor.[1] He had hoped to make this his last tractor purchase, and, to that end, planned on spending a good amount of money on it. He also wanted a reliable tractor because the company he leased his truck to, Empire Express, anticipated having a particularly good year at that time, and he wanted to be available to make the most of that opportunity.

Foshee believed Kenworth made the best tractors, so he set out to buy one. Foshee did some shopping around for tractors, Kenworth tractors in particular, when he came upon Performance, and its sales representative, Carl Peck. Peck assured Foshee that he could expect a new tractor, typical of a Kenworth, that would be delivered to him per his specifications.

Before speaking with Peck, Foshee was also considering purchasing a Caterpillar engine with an 1850 foot pound of torque capacity for his new truck. However, Peck informed Foshee about a new 550 horsepower Detroit engine which had a 1650 foot pound of torque capacity. Peck told Foshee that the Detroit engine got good mileage and performed well. After Foshee met with Peck, he started reading about Detroit engines and asking his peers for their opinions about them. However, none of his peers had heard of this particular Detroit engine. Around the time that Foshee was investigating Detroit engines, the engine in Foshee's old Peterbilt tractor, a Caterpillar, broke down and cost too much to repair. Apparently that dissuaded Foshee from buying another Caterpillar engine. Consequently, Foshee ordered the truck from Peck, including the Detroit engine with 1650 foot pound of torque capacity. He actually received a Detroit engine with a 1550 foot

[1] A tractor is the part of a truck that consists of the engine, cab, and the parts necessary to attach a trailer for hauling.

pound of torque capacity.

When Foshee went to pick up his tractor, it would not start. After Performance did some work on the tractor, it started, but the problems had just begun. Over the next three and one-half years, Foshee had his tractor in the shop over fifty times. The problems with the tractor were primarily electrical. Foshee testified that during the first four and one-half months in which he owned the tractor, he went through nine alternators and six sets of batteries. The batteries continually died, and there were several instances of problems with the alternators. Foshee and his expert witness, Phillip Wilson, testified that the electrical problems occurred when Performance installed decorative lights, known as "chicken lights," on the tractor. As support for this contention, they both testified that (1) before Performance installed the chicken lights, the tractor passed tests which checked for electrical problems, and (2) after a shop in Memphis rewired the chicken lights, many of the tractor's problems were remedied. Other problems with the tractor included that it leaked when it rained, the window tracks would not operate in cold weather, the hood did not fit correctly, the light of the Pro Driver computer system in the tractor remained continually lit, and, of course, the engine had less torque capacity than the engine Foshee thought he had purchased.

Performance points out that (1) Foshee signed a valid disclaimer of all warranties, express or implied, (2) the only misrepresentation they might have made dealt with the torque capacity of the engine, which Foshee admits did not cause any of the problems that kept his tractor in the shop for fifty days, and (3) the problems with the tractor that caused damages to Foshee can all be traced back to manufacturing defects, for which Performance claims it is not liable.

DISCUSSION AND HOLDINGS

I. STANDARD OF REVIEW

In each of Performance's points of error, it alleges that the evidence is legally and factually insufficient to support the jury's answers.

In reviewing a no evidence challenge, we consider only the evidence and inferences tending to support the challenged finding in the verdict, and disregard all evidence and inferences to the contrary. *Weirich v. Weirich*, 833 S.W.2d 942, 945 (Tex. 1992). If more than a scintilla of evidence supports the finding, the no evidence challenge fails. *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 84 (Tex. 1992).

In reviewing a factual sufficiency challenge, we examine the entire record, considering the evidence both in favor of and contrary to the challenged finding. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam). We overturn the jury's verdict if it appears from our review of the record that the verdict is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Id*.

II. EVIDENCE TO SUPPORT JURY'S FINDING OF DTPA LIABILTIY

Foshee brought this DTPA action pursuant to what is commonly referred to as the "laundry list." TEX. BUS. & COM. CODE ANN. § 17.46 (Vernon Supp. 2001). Specifically, the trial court submitted a single broad form question about DTPA liability. The question had three subparts which instructed the jury that it could find Performance violated the DTPA if (1) Performance represented that the tractor had or would have had characteristics which it did not have, (2) Performance represented that the tractor was or would be of a particular quality when it was of another, or (3) Performance represented that the tractor's warranty covered or involved rights or remedies which it did not have or involve. The jury answered this question, "yes."

Performance argues that there is no evidence, or factually insufficient evidence, to support the jury's answers. Specifically, it argues that (1) most of the representations made to Foshee amounted to nonactionable "puffing," (2) Foshee failed to prove that the only actionable misrepresentation Performance made, that the engine had a certain torque capacity, was a producing cause of his damages, and (3) Performance lawfully disclaimed all warranties, both express and implied.

A. Applicable Law

The DTPA prohibits "[f]alse, misleading, and deceptive business practices and breaches of warranty in the conduct of any trade or commerce." *Id*. at 17.46(a). The acts of which Foshee complains do not require him to prove Performance's knowledge or intent to make a misrepresentation — making the misrepresentation is, itself, actionable. *Smith v. Baldwin*, 611 S.W.2d 611, 616 – 17 (Tex. 1980). Actionable representations may be oral or written. *Hedley Feedlot, Inc. v. Weatherly Trust*, 855 S.W.2d 826, 838 (Tex. App.—Amarillo 1993, writ denied).

In his brief, Foshee contends that Performance made three specific misrepresentations: (1) that the tractor would be delivered as specified by Foshee, when it was not; (2) that the tractor's Detroit engine would have 1650 foot pounds of torque, when it had only 1550 foot pounds of torque; and (3) that Foshee would receive a new tractor, typical of a Kenworth tractor. Foshee can recover under the DTPA if he shows he detrimentally relied on Performance's false, misleading, or deceptive acts or practices, which were the producing cause of his damages. *See* TEX. BUS. & COM. CODE ANN. § 17.50(a) (Vernon Supp. 2001); *Doe v. Boys Club of Greater Dallas, Inc.*, 907 S.W.2d 472, 481 (Tex. 1995).

B. Tractor Delivered as Specified

The first contention, that the tractor's lack of conformity with specifications made by Foshee caused him damages under the DTPA is without merit. There is no evidence that this was a producing cause of Foshee's damages. In fact, in his brief in support of this contention, Foshee points only to the fact that several accessories he ordered were not attached to the tractor when he accepted delivery of it. However, as Foshee admitted in his brief and again at oral argument, he settled his issues regarding those accessories out of court, so those accessories had no impact on the damages of which he complains in this cause of action.

C. Torque Capacity

As to the second contention, from our review of the record, it is clear that Performance misrepresented the type of engine Foshee would receive. Foshee testified that he relied on Peck's misrepresentations when he purchased his tractor from Performance. Though Foshee conducted his own investigation of Detroit engines, Foshee testified that none of his peers knew about the new Detroit engine with the 1650 foot pound of torque capacity engine. Consequently, we find the evidence is legally and factually sufficient to support the jury's finding that Foshee detrimentally relied on Peck's representations about the type of engine he was purchasing, and that those were a producing cause of his damages because Foshee did not get the engine he was promised.

However, Foshee testified at trial that the difference in the torque capacity did not cause him to put his tractor in the shop. This testimony negated the element of producing cause necessary for Foshee to recover the *lost profit* damages he claims he sustained while the tractor was in the shop for repairs. Thus, the evidence at trial was legally insufficient to support a finding that Foshee can recover lost profits based on Performance's misrepresentations about torque capacity.

Nevertheless, because Foshee also claimed damages for *loss of value* of the vehicle, he can possibly show that the misrepresentations about torque capacity were a producing cause of those damages. Foshee testified that he did not know whether there was a cost difference between a 1650 foot pound torque capacity and a 1550 foot pound torque capacity, and ultimately he agreed with defense counsel that there was no price difference. However, Philip Wilson, Foshee's expert, testified that there would be a difference in price. He guessed that it would be around $300.00 to $350.00. He suggested that, contrary to defense counsel's theory, 100 foot pounds of torque would make a substantial difference in the performance of the vehicle. Foshee also testified that he ordered a special transmission to conform to the extra 100 foot pounds of torque he expected. Foshee was not informed of the engine substitution, nor given the opportunity to purchase a less expensive transmission, and the purchase price was not reduced.

Viewing only that evidence favorable to the verdict, and disregarding all evidence and inferences to the contrary, we find this is more than a scintilla of evidence that Foshee relied, to his detriment, on Peck's misrepresentation about the torque capacity of the engine he sold Foshee, and that misrepresentation was a producing cause of at least a portion of Foshee's damages for loss of value of the vehicle. *Prudential Ins. Co. v. Jefferson Assoc., Ltd.*, 896 S.W.2d 156, 161 (Tex. 1995).

This evidence is also factually sufficient to support the jury's finding that Performance made a false misleading or deceptive statement that was the producing cause of Foshee's injuries. The only evidence or inference to the contrary was Foshee's own agreement with defense counsel that there probably was not a price difference between the two. Both Foshee and Wilson were unsure about the price difference, but Wilson testified with certainty that the decreased torque capacity would cause a diminished performance and would cost less. Additionally, Foshee testified that he purchased a more expensive transmission, to conform to the engine he expected to receive, than he would have paid for a transmission to match the engine he actually received. However, the evidence at trial also established that the transmission Foshee purchased was compatible with the engine he received. Reviewing the entire record, and examining the evidence both in favor of and contrary to the challenged finding, we do not find the jury's determination that Performance violated the DTPA is so contrary to the overwhelming weight of the evidence to be clearly wrong and unjust.[2]

D. A New Kenworth-Quality Truck

We next turn to whether Performance's representation that Foshee would receive a new Kenworth quality truck supports the jury's affirmative finding of a DTPA violation. Foshee testified that he considered Kenworth trucks to be the best truck on the road. According to Foshee's testimony, Peck promised him "[a] new truck[,] ordered to my

[2] However, we reverse and render based on Performance's third point of error challenging the sufficiency of the evidence to support any damages findings. As set out in section III, we find the evidence supporting damages to be insufficient to sustain the verdict.

specifications[,] supposed [sic] to be typical of a Kenworth truck. The best truck on the road, and I didn't get that type of truck." In addition to this testimony, Alan Gillis, an employee of Performance, testified that Performance routinely assures its customers that their new Kenworth tractor will be typical of a new Kenworth — well designed, well engineered, and in good operating condition. However, Gillis was not present at the time representations were made to Foshee, as he did not work at Performance at the time Foshee purchased his tractor.

Under the DTPA, "puffing" is not mentioned as a defense. However, the supreme court has recognized that "mere puffing" statements are not actionable under sections 17.46(b)(5) or 17.46(b)(7) of the DTPA. *Douglas v. Delp*, 987 S.W.2d 879, 886 (Tex. 1999); *Pennington v. Singleton*, 606 S.W.2d 682, 687 (Tex. 1980). Generally, there are three factors courts consider when determining whether a statement is actionable, or mere puffing or opinion. *Humble Nat'l Bank v. DCV, Inc.*, 933 S.W.2d 224, 230 (Tex. App.—Houston [14th Dist.] 1996, writ denied). We consider (1) the specificity of the alleged misrepresentation, (2) the comparative knowledge between the buyer and seller, and (3) whether the representation concerns past or present conditions, or future conditions. *Id*. Misrepresentations concerning future conditions or performance of a good are actionable under the DTPA. *Id.* Imprecise or vague statements are generally considered puffing, and are not actionable under the DTPA, while statements of material fact are actionable. *Douglas*, 987 S.W.2d at 886.

The general purpose of subsections (5) and (7) of the laundry list is to ensure that descriptions of goods offered for sale are accurate. *Pennington*, 606 S.W.2d at 687. Subsection (5) prohibits representing that a good has characteristics, uses, or benefits that it does not have. *Id*. A good may lack its claimed characteristics because it is not in good mechanical condition, or for other reasons such as design or manufacture defects. *Id*. Subsection (7) prohibits representing that a good is of a particular standard, quality, grade, style, or model if it is of another. *Id*.

The only real issue in this case is whether the representation was specific enough

to be actionable. On this issue, it is a close case. We know that Peck promised a new truck, typical of a Kenworth truck. But, when we review the case law to see the kinds of promises that are considered puffing, and those that are actionable misrepresentations, we think this representation falls under the category of puffing.

These are the kinds of representations that were held to be puffing: (1) the statement that "Mercedes Benz was the best engineered car in the world, and [buyer] probably would not . . . encounter any mechanical difficulties" and joking that "the only time loss would probably be was when the car [was brought] in . . . for an oil and filter change every 7500 miles," *Autohaus, Inc. v. Aguilar*, 794 S.W.2d 459, 460 & 64 (Tex. App.—Dallas 1990), *writ denied*, 800 S.W.2d 853 (Tex. 1991); (2) the statement that a building was "super," "super fine," and "one of the finest little properties in the City of Austin," *Prudential Ins. Co. v. Jefferson Assoc., Ltd.*, 896 S.W.2d 156, 163 (Tex. 1995); (3) advice by a law firm that a client should sign an agreement, that it protected their interests, *Douglas*, 987 S.W.2d at 886; (4) the representation by an insurer that a policy was "adequate" or "sufficient," *Employers Cas. Co. v. Fambro*, 694 S.W.2d 449, 452 (Tex. App.—Eastland 1985, writ ref'd n.r.e.); (5) the representation that property would make a nice "bed and breakfast" when it was "fixed up" and that the house only needed "some leveling," *Larsen v. Langford*, 41 S.W.3d 245, 254 (Tex. App.—Waco 2001, pet. denied); and (6) a representation by a banker to his customer that the bank had a "tradition of excellence" and "knows its customers," *Humble Nat'l Bank*, 933 S.W.2d at 229 – 30 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

The comment in the *Restatement* that deals with puffing, though not expressly adopted in Texas, is instructive on this issue:

> The purchaser of an ordinary commodity is not justified in relying upon the vendor's opinion of its quality or worth. For example, one who is purchasing a horse from a dealer is not justified in relying upon the dealer's opinion, although the latter has a greater experience in judging the effect of the factors which determine its value.
>
> e. This is true particularly of loose general statements made by sellers in commending their wares, which are commonly known as "puffing," or "sales

> talk." It is common knowledge and may always be assumed that any seller will express a favorable opinion concerning what he has to sell; and when he praises it in general terms, without specific content or reference to facts, buyers are expected to and do understand that they are not entitled to rely literally upon the words. "Such statements, like the claims of campaign managers before election, are rather designed to allay the suspicion which would attend their absence than to be understood as having any relation to objective truth.: [Learned Hand, C.J., in Vulcan Metals v. Simmons Mfg. Co., (2nd Cir. 1918) 248 Fed. 853, 856.]. Thus no action lies against a dealer who describes the automobile he is selling as a "dandy," a "bearcat," a "good little car," and a "sweet job," or as "the pride of our line," or "the best in the American market."

RESTATEMENT (SECOND) OF TORTS §§ 539 & 542 (1977).

We believe that these cases and the *Restatment's* examples represent a marked contrast to the cases in which statements have been held actionable. In *Helena Chemical Company v. Wilkins*, a suit brought by farmers against a manufacturer of seed, the Texas Supreme Court held that the following oral and written representations were actionable: (1) that Cherokee seed was a good dryland variety, (2) that the seed was "one of the most durable, top yielding hybrids" with an "outstanding disease tolerance package," that the seed had "good" head exertion, "very good" standability, "excellent" yield potential in drylands, and was field tolerant to charcoal rot, and that it had "excellent weatherability" and had "the stamina and hardiness to withstand the harsh conditions from the Texas coastal bend across the lower south to the Carolinas." 47 S.W.3d 486, 503 (Tex. 2001). In holding that the plaintiff farmers presented some evidence of misrepresentations about Cherokee seed's characteristics, quality, and grade that amounted to more than mere puffing, the court highlighted that the company gave the farmers "specific representations about Cherokee seed's characteristics and specific representations about how the Wilkinses' crop in particular would perform." *Id.* at 503 – 04. In *Kessler v. Fanning*, the Fort Worth court held that an actionable misrepresentation was made when vendors incorrectly stated on a form that a house had no "improper drainage" and "no previous structural repair." 953 S.W.2d 515, 519 (Tex. App.—Fort Worth 1997, no pet.) These two cases illustrate the sort of clarity and specificity that is required for the representation to be actionable.

In light of our conclusion that Performance engaged in puffing and not an actionable misrepresentation, the most problematic case is a 1980 Texas Supreme Court case, *Pennington v. Singleton*, 606 S.W.2d 682 (Tex. 1980). There, a person buying a used boat was told that the boat had "the characteristics of a 'new' boat, or a boat in 'excellent' or 'perfect' condition . . . ." *Id*. at 687. The boat was also represented to produce the uses and benefits of a 'new' boat or a boat in 'excellent' or 'perfect' condition." *Id*. Although the language used in *Pennington* seems very close to the language here — "a new Kenworth" — one big distinction exists. In *Pennington*, a *used* boat was being sold and so the words a "new boat" and "perfect condition" were a specific benchmark for the buyer, especially since the boat was in the opposite condition from what it was represented to be. *Id.* Here, Foshee already knew he was buying a new Kenworth, and so the statement that he would receive a "new truck . . . typical of a Kenworth truck" told him nothing new. He was already expecting to receive a new Kenworth, and thus, the comment was a vague statement lacking the specifics contained in *Helena Chemical Company* (involving Cherokee seed) or even in *Pennington*.

In short, we find that the statements made to Foshee were not actionable under the DTPA and that the salesman was merely puffing when he made the statements to Foshee.

E. Misrepresentations About the Tractor's Warranty

We next turn to the alleged misrepresentations regarding the tractor's warranty. The trial court instructed the jury that it could find Performance violated the DTPA if Performance represented that the tractor's warranty covered or involved rights or remedies which it did not have or involve. In his brief, Foshee does not contend that a representation about the tractor's warranty supported the jury's finding that Performance violated the DTPA. Nevertheless, we will address this point because the issue regarding DTPA liability was submitted to the jury in broad form, and might have been supported by any one of the definitions the jury was instructed to consider.

Foshee signed a disclaimer of warranty, dated October 28, 1996 (the day Foshee took delivery of the tractor), which states:

> Performance Kenworth, an authorized truck dealership, MAKES NO WARRANTIES, GUARANTEES, REPRESENTATIONS, OR PROMISES OF ANY TYPE OR KIND, but does perform obligations under the manufacturer's warranties and owner's service policy. SAID DEALERSHIP HEREBY EXPRESSLY DISCLAIMS ALL WARRANTIES, EITHER EXPRESSED OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

Subsection 17.46(b)(19) defines as a false, misleading or deceptive act or practice, "representing that a guarantee or warranty confers or involves rights or remedies which it does not have or involve." TEX. BUS. & COM. CODE ANN. § 17.46(b)(19) (Vernon Supp. 2001). That subsection goes on to state that "nothing in this subchapter shall be construed to expand the implied warranty of merchantability as defined in Sections 2.314 through 2.318 and Sections 2A.216 of the Business and Commerce Code to involve obligations in excess of those which are appropriate to the goods[.]" *Id.*

The undisputed evidence shows that, on the day Foshee signed the invoice for his Kenworth tractor, Foshee signed a disclaimer of express and implied warranties. After reviewing the record, we do not find that there is any evidence that Performance misrepresented that the tractor's warranty confers or involves rights or remedies which it does not have or involve. In addition, while this warranty does not waive Foshee's ability to plead and prove a cause of action under 17.46(b)(19), we find that the disclaimer of warranty negates any finding of producing cause for a misrepresentation of the tractor's warranty. *See Khan v. Velsicol Chem. Corp*, 711 S.W.2d 310, 319 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

In sum, we conclude that none of the alleged misrepresentations was actionable. Consequently, we sustain Performance's first point of error.

III. DAMAGES UNDER THE DTPA

In his third point of error, Performance complains that the evidence was legally and factually insufficient to support the amount of damages found by the jury. We agree.

Foshee has not provided any legally or factually sufficient evidence that any misrepresentation on the part of Performance was a producing cause of his claim for lost profit damages.

Likewise, Foshee failed to prove his claim for damages as a result of the loss of value of his vehicle. A property owner can testify to market value as long as testimony shows it refers to market value, and not intrinsic, or personal, value. *Porras v. Craig*, 675 S.W.2d 503, 504 – 05 (Tex. 1984). A lay witness can give his opinion on the amount of damages as long as he testifies about matters within his knowledge. *Coker v. Burghardt*, 833 S.W.2d 306, 307 (Tex. App.—Dallas 1992, writ denied). Foshee testified that the value of his tractor with defects was $50,000.00, though he paid over $104,000.00 for it. It appears that the evidence at trial did not establish that the value Foshee testified to was based on market value, rather than intrinsic value. Foshee presented no evidence that he was familiar with the actual market value of his truck with defects. What he did testify to was that he is familiar with the value of a truck like his, with like mileage and similar accessories, but without the defects. Thus, there is evidence Foshee knew what his truck should be worth, but no evidence of its actual market value to demonstrate the alleged loss in value.

In addition, Foshee and his expert testified that there should be some difference in cost between the engine he thought he purchased and the engine he actually received. Foshee also claimed that he spent more on the transmission he bought than he would have spent if he knew he was getting an engine with only 1550 foot pounds of torque capacity. However, Foshee testified there was no difference in value between the torque capacities, and Foshee's expert could merely guess that the difference in value would be between $300.00 to $350.00. Foshee said that when he traveled on an incline, he thought the engine did not perform like an engine with 1650 foot pounds of torque capacity. Yet, we note that while he testified that the engine always felt as if it had a smaller torque capacity than 1650, he did not discover the difference until he had already put 92,000 miles on the truck.

For loss of value of the vehicle, the jury was asked to consider "[t]he difference, if any, in the value of the tractor as it is today and as it would have been without the defects." We find that none of the testimony at trial regarding the torque capacity of the engine, or the transmission that Foshee purchased, demonstrates a difference between the value of the tractor as it is today, and as it would have been without the defects. Foshee's testimony and his expert's testimony do not demonstrate, with any degree of reasonable certainty, a difference between the value Foshee paid for his engine, and the value of the engine he received. Indeed, there is no evidence that Foshee paid too much for the engine he received, or that the vehicle "lost value" because of the misrepresentations. As for the transmission, while Foshee claims he paid more for the transmission he bought to match the 1650 foot pounds of torque capacity he expected to receive, there is no evidence in the record to support a damage award on Foshee's claim that he spent more on a transmission to match the engine he expected to receive. Foshee did not testify as to the excessive amount he allegedly paid, and the evidence showed that the transmission he purchased was compatible with the engine he received.

Based on the evidence at trial, we reverse the judgment of damages as found by the jury, and render that Foshee take nothing on his claim for damages. We sustain Performance's third point of error.

IV. PERFORMANCE'S RESPONSIBILITY FOR DAMAGES

Having found that Foshee was not entitled to any damages, Performance's second point of error, alleging that the evidence at trial was legally and factually insufficient to support the jury's determination that Performance caused 75% of Foshee's damages, is now moot.

V. ATTORNEY'S FEES

In Performance's final point of error, it contends that, because Foshee is not a prevailing party under the DTPA, he cannot recover attorney's fees. We agree.

The DTPA provides that "each consumer who prevails shall be awarded court costs and reasonable and necessary attorneys' fees." TEX. BUS. & COM. CODE ANN. § 17.50(d) (Vernon Supp. 2001). The plain language of the DTPA states that a consumer can only maintain an action where conduct, prohibited by the DTPA, is a producing cause of economic damages, or damages for mental anguish. *Id*. at 17.50(a). Here, the alleged misrepresentations that Performance made were either not actionable, or not a producing cause of Foshee's damages. Thus, Foshee is not a prevailing party under the DTPA. *Harma v. Gulden*, 898 S.W.2d 16, 18 (Tex. App.—Dallas 1995, writ dism'd w.o.j.). Therefore, he is not entitled to attorney's fees. *Id*. We therefore sustain Performance's fourth point of error.

CONCLUSION

We find that the evidence at trial was insufficient to support the trial court's judgment. We reverse the trial court's judgment and render that Foshee take nothing on his DTPA claim against Performance.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed September 6, 2001.

Panel consists of Justices Yates, Fowler, and Wittig.

Do Not Publish — TEX. R. APP. P. 47.3(b).