ORAL ARGUMENT — 1/14/99
98-0333
GUNN INFINITI V. O'BYRNE

ALEXANDER: The judgment of the CA should be reversed for two independent reasons: 1) Because the petitioner Gunn was improperly denied submission of these requested jury issues on mitigation error, which entitles Gunn to a reversal and remand of the entire case for a new trial; and 2), and, alternatively, because the evidence is legally insufficient to support the recovery of any damages for mental anguish which would entitle Gunn to a reversal and modification of the judgment as outlined in our briefs.

The crux of the case on mitigation really boils down to this, and before I lay out that crux, I must say that what is about to leave my mouth was hotly disputed at trial, would be disputed again at a new trial, but it's stated consistent with the plaintiff's theory of the case in the light most favorable to them. The crux is this, the plaintiff here purchased a car that he did not want to own. He did not want to own it, not only because it failed to meet the representations that were given him by the seller, he says, but also because it failed to satisfy his absolute minimum standards for the purchase of the automobile. And there was nothing that could be done to that car that would make it meet those standards. Because according to the plaintiff, the only car that he would purchase was one that had not sustained so much cosmetic damage, and this one had.

Where did that leave the plaintiff then? It left him holding a car that he did not want to own, and that is putting it mildly. Because according to the plaintiff, so violent was his dislike of this particular automobile, that the mere sight of it was like a nightmare.

Now the problem with this is, is that shortly after the purchase, he was given the opportunity to rid himself of this festering thorn in his side.

O'NEILL: If in fact Gunn Infiniti's offers were not a mere accommodation, but an offer to settle, would your position be different? I assume you're claiming it was not an offer to settle, but if it were?

ALEXANDER: And by itself, just to clarify it, I mean settled with a release?

O'NEILL: Yes.

ALEXANDER: The position would not be different for two reasons - well here's why the position would not be different in terms of remand being required. And actually I've got a decision for you that kind of answers it. If you go down to No. 3, was the offer accompanied by a demand for release. And I just want to frame it because you make a good point. If the offer would not make the plaintiff whole and if it was accompanied by a demand for a release, then our position would be different. There is no duty to mitigate. And to give a more concrete example, let's do this. Let's say

that you've got a claim and everybody agrees it's worth $10,000. The defendant comes in and says, Look we'll offer you $9,000. That's close and you pay a release. And you sign this release. There's no duty to mitigate. The defendant has failed to pony-up the additional $1,000. And the plaintiff is entitled to sue for that. If, however, the jury could conclude that the offer was for $10,000 that it would make the plaintiff whole, then there is a duty to mitigate. Why? Because what we have in this case is a collision between two competing doctrines. One is the doctrine of avoidable consequences - mitigation. The other is the doctrine that says, That a plaintiff is not required to sacrifice substantial legal rights. How do you accommodate the two? That's what the decision tree is about.

ENOCH: It seems to me this is a case where the buyer bought something that is not worth what he paid for it. How does mitigation have anything to do with that? Where does the duty to mitigate under circumstances where a buyer is disappointed by the transaction?

ALEXANDER: One way probably to illustrate that point better than anything is if you flip to page 2 of our handout, which has highlights. The larger recovery in this case was for mental anguish.

ENOCH: But you had a separate argument on mental anguish. It may be recoverable, it may not be recoverable. I'm just talking about the purchase of this property. And I'm talking about, I'm disappointed in the purchase of that property. How does mitigation play into that transaction?

ALEXANDER: In other words, are we setting aside the issue of mental anguish and focusing strictly on economic damages?

ENOCH: I just want to talk about this transaction, setting aside mental anguish.

ALEXANDER: First off, as illustrated here on mental anguish, it was set aside because everything highlighted in yellow is what he could have avoided in terms of mental anguish had he accepted this offer. Focusing now on the economic recovery. If he had taken this offer, if he had given the car back that he did not want in exchange for the offer that was given him, then what would go in the damages blank, which was ultimately trebled? We say Zero. They say $1,326.

ENOCH: No, because the damages would be the difference in the value of the automobile as represented and the value of the automobile as it existed. And it could ultimately be zero, because the car is worth as much as he paid for it, or it could be the total value of the car because the car's not worth anything.

ALEXANDER: In this case, the benefit of the bargain measure is equivalent to the out-of-pocket measure. And that is because the testimony that was provided by the plaintiff was, that the car as represented was worth what he paid for it. So we don't have to struggle in this case with a situation where the benefit of the bargain is higher than the out-of-pocket. So in our case, and in the testimony that is absolutely clear, and you can see it in the record...

ENOCH: Is your mitigation really just going to the notion of mental anguish?

ALEXANDER: No, it goes to both. And this one of course, this exhibit here illustrates with respect to mental anguish, but it does go to both.

BAKER: So it's your viewpoint then that if he had accepted an offer, then he doesn't end up with any mental anguish, because he would have mitigated the entire mental anguish?

ALEXANDER: It's three things. With respect to the mental anguish, it would have mitigated substantial, because again everything that is highlighted in yellow here, you know every time I saw the car for 4 years it gave me heartburn, etc., etc., would have been avoided.

BAKER: But that involves a weighing of the evidence, which is the jury's function?

ALEXANDER: And in all of this let me make my point clearer on that. We are not asking this court to rule as a matter of law and render a take nothing judgment.

BAKER: All you want is the instruction and the issue and let the jury _____.

ALEXANDER: This is not a siege on the jury system. To the contrary, this is a case where the jury was denied the opportunity to sit.

BAKER: But where it becomes confusing is the argument, Well if it was a $10,000 claim and you offer him $10,000, then there's a mitigation. But if you offer him less, there's not. And so I guess the question, What's left that's the legal claim that he has not given up, because you didn't ask for a release that he can sue on in a DC, mitigation applies?

ALEXANDER: What remains is, and I think there is a disputed fact issue as to whether the offer we provided would have made him completely whole. Our position is, that we offered to return the purchase price of the car plus all expenses, which included his tax, title and license that he paid in Louisiana. Their position is, Yes, you agreed to return the purchase price of the car, you agreed to pay expenses for travel, but it did not include that portion, which is $1,326.

Now it is also their position that this was conditioned upon a release. And with respect to that, I'm not sure that I can add too much to what's already been stated in the briefs. There is no evidence of that.

ABBOTT: The calculus to determine whether or not the offer would have made him whole is determined by what a jury would otherwise provide him?

ALEXANDER: Correct.

ABBOTT: If that's correct, then it seems as though the duty would not arise until after the jury renders its verdict, so you can determine whether or not the offer would have made him whole?

ALEXANDER: And this is a good point. The way that the jury issues are going to be framed is, first the jury is asked to consider what the damages are. First, they are asked, What are his damages? Then the separate submission, which we are denied is, What would his damages have been had he reasonably _____? Those are the two issues.

ABBOTT: What I'm wondering is, could you have conflicting jury answers where a jury says, Well his damages were more than what the offer was. But they go ahead and answer the failure to mitigate question, Yes.

ALEXANDER: You can have a situation, and this is the important thing, the answer on damages is one consideration. Who knows what that number could be, On a re-trial it could be more or less than what was awarded here. The question on mitigation is, Had there been mitigation what would the damages have been? And there is no conflict there. And the number that can be put in that blank could be zero, it could be $1,326, it could be something else. But that's what the jury was denied in this situation. What we have in the situation is that we cannot say, As a matter of law that he would not have avoided his damages or would not have minimized them. Because quite clearly, he would have. At least there's a fact issue on that. That's what the jury was entitled to consider and that's what they were denied. And the reason that he would have avoided them is again the offer would have taken back the car that he did not want to own, which would have erased all of his mental anguish that he claimed for a period of 4 years, and we would no longer have the difference between what he was out-of-pocket and what it was worth, because the exchange has been effectively erased.

BAKER: What's the answer to those points you just raised when you're talking about a DTPA case, which is a different ball game because of knowing and _____ and all of that?

ALEXANDER: The answer is no different for this reason, and that is because as in contract cases under the DTPA there is a duty to mitigate. That appears to be undisputed. And we cited a case in our brief, and nobody disputes that.

BAKER: But I'm still trying to get to what's left under your theory that's going to be tried in the context of the DTPA case and what damages could be awarded if the mitigation instruction is submitted?

ALEXANDER: If this court does not reach the mental anguish issue, which we say there should not be any award at all, let's assume that that goes back, then what would be submitted to the jury is once again a case in which he claims he's got all this mental anguish for 4 years, a case in which he's claiming the difference between the value of the car, which is what he paid, and what it

was worth. Those would go into the calculus for the damages blank. And then a separate issue would ask, Had he acted reasonably and accepted this? Well, you decide whether it was reasonable for him to reject this offer, which would have either erased completely all this or minimized it, and if you conclude that he failed to act reasonably what would his damages then have been? And it is our contention that under that presentation, that the evidence would support an answer of Zero. The jury could give more. They could believe for instance that our offer did not make him completely whole.

PHILLIPS: Your strongest case it seems to me is one that pre-dates the DTPA by a generation. There's not a whole lot of law on this. The DTPA sets up a mitigation scheme. And I assume the plaintiff attempted to comply with that, although I don't recall reading about it in the brief. But some kind of a demand was made and you all said something back that you're not talking a lot about. Why should we go back and superimpose common law notions, which are pretty thin in the idea of the other party mitigating the damages through an offer. General mitigation is something you go out and just do yourself. But why should we go and look at a 1948 case when the legislature has come up with a scheme, Here's how a plaintiff and a defendant are required to do certain things to avoid damages?

ALEXANDER: First, because the statutory scheme - there's nothing to indicate that the statutory scheme under the DTPA was intended to eliminate the duty to mitigate. And once again, I must say, you're right. Texas law on this does not provide much nourishment. And the place that you need to go to really get that nourishment is the treatise. But this is a calculus with respect to the DTPA. There's nothing to indicate that that was intended to disturb the duty to mitigate, nothing to indicate that that was intended to disturb the doctrine that you don't have to sacrifice substantial legal rights. And in this case, it doesn't work. Why? Because under the DTPA scheme, first you have to wait a long period of time until there actually is a matured claim under the DTPA. In our case, once that time has gone by, the chance to just swap out a new product for money is gone. And number 2, and more importantly, under the mitigation scheme if you want to call it that, or under the settlement scheme of the DTPA, what the defendant has to do to get any benefit is to tender an offer, which ends up being substantially equivalent to what the jury awards. In our case, what that means is, the defendant would have had to have tendered an offer for prospective mental anguish damages, for instance, which our whole position is, For crying out loud take the thorn out of your side, give the car back, get your money back. And that's what should occur. What should occur in cases like this is what happens every single day.

PHILLIPS: The DTPA's original intent was to punish somebody who represents a car as being different than what it was and to make it unpleasant enough that that happens less. Under your scheme really that wouldn't happen even if you paid $1,326 times 3?

ALEXANDER: And that's an excellent point, and how do we reconcile that. And I think that the answer is that 400 years of common law tell us that in a contract claim there's a duty to mitigate and that would fit here. 400 years of fraud requires damages to be compensable. Why any difference

under the DTPA?

BAKER: Well I would answer that by the fact that the legislature made it clear that they are doing the DTPA to furnish a remedy for consumers when it didn't exist under common law. And so that's why the whole scheme exists. And I'm a little confused on something you haven't talked about on the DTPA settlement scheme. I got the impression that there had to be a lawsuit filed before the settlement mechanism became effective.

ALEXANDER: There does not have to be a lawsuit filed. There has to be a demand. There has to be a formal demand.

BAKER: And going to that scheme when the plaintiff makes a demand under the DTPA they are supposed to specify what their damages they claim, and what their attorneys' fees are at that time.

ALEXANDER: Correct.

BAKER: So if you respond to that with a settlement offer of X dollars plus X dollars in attorneys' fees on what you think is reasonable, that sets the parameters doesn't it?

ALEXANDER: Well it sets the parameters...

BAKER: And so your job at the trial is to try to get the jury to end up with your figures rather than theirs, so it's all over? And I see your point, that if it drags out, the mental anguish as far as they are concerned increases.

ALEXANDER: Astronomically. In this case once again you've got a recovery of $107,000, and the actual damages were $21,500, including mental anguish that we say would have been avoided.

BAKER: Well then is the effect of the failure to submit the instruction and the question on this case deprives you of the opportunity to argue to the jury that you are arguing right now?

ALEXANDER: It deprives us of the opportunity to argue to the jury what we are arguing now. It deprives the jury of the opportunity to consider the reasonableness of somebody who clings desperately to that which he does not want to own in order to drive up his damages by giving us a _____ on mental anguish. That's what it deprives us of. Completely.

BAKER: So your viewpoint then is by not having the instruction it unfairly balanced the charge in the plaintiff's favor because when he gives the kind of argument you just depicted, you can't respond to it?

ALEXANDER: We are gagged.

HANKINSON: If we agree with you on the mitigation question, then we don't reach the mental anguish question, is that right, because it's being sent back for a new trial?

ALEXANDER: Yes, you could reach it.

HANKINSON: But that would be advisory because we don't know what the evidence would be like...

ALEXANDER: I think that you could draw that conclusion. That's correct. And so what we've asked for is just send it all back.

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RESPONDENT

ADAMS: This was a DTPA and a common law fraud case. We prevailed under both theories in the TC. We elected to go under the DTPA theory because we recovered more money and attorney's fees that way.

First of all, I need to clear up one thing that he's been arguing, and that is, he said, He wanted to keep this car. My client, it's uncontroverted, offered to let them have this car painted where he lives in Louisiana and to pay for that. And the case was over with. Now how is he demanding to keep a car? That's uncontroverted in the record. My client said, Just have this car that has all these grinder problems on it repainted in my state, and this case is over with. On the mental anguish side, he did clear that up too. We're not talking about $100,000, we got $11,000 for mental anguish. That's all we're talking about is $11,000.

BAKER: Was it trebled?

ADAMS: The $11,000 was trebled.

BAKER: So really you got $33,000?

ADAMS: Yes. But by the same token, under the common law fraud theory, we got in addition to finding the fraud, we got $50,000 exemplary damages. I'm going to argue this case in three areas: 1) were the offers that were made offers of a settlement implying the release by the use of the words "settle" and "settlement"? 2) would the offers have ever made my client substantially whole? and 3) should the mental anguish recovery stand up?

I know I have related to facts in great detail in the brief, but I just need to mention a couple of things. My client was in the market to buy a car. He had been in San Antonio.

He attempted to buy it in San Antonio because he found the car there. He asked their salesperson before he bought the car, Is the car damaged? He was told, not. He asked several things. And after he took delivery of the car he discovered, as the court knows, that the car had grinder marks, it had sander marks, it had been painted - literally every part of that car had been worked on. Additionally, he was told the car had an air bag, which it didn't have. There was a factory sticker on it indicating there was an air bag, which it didn't have.

At the time this occurred, when my client inquired about this, the salesman and the sales manager both knew this car was in their body shop for repairs.

HANKINSON: If we assume a duty to mitigate in a DTPA case, putting aside the legal question of the interpretation of the statute, what kind of evidence was the defendant required to put into the trial so that it was then entitled to an issue and instruction on mitigation raising that issue?

ADAMS: First of all, I think for them to get an instruction on mitigation there would not have to be included a requirement of a release.

HANKINSON: But we're not talking about ultimate disposition of whether there was a requirement of a release or not. I just want to know what's that minimum threshold level of proof that may be disputed, but enough to raise a fact issue and put the issue in dispute for the jury to decide?

ADAMS: I think they would have to show that the client would have been made whole.

HANKINSON: Well what is the legal standard for mitigation? Is that being made whole or is that avoiding consequences or minimizing consequences?

ADAMS: I think it's making them substantially whole if it's being accompanied with a release.

HANKINSON: I understand there's a question here about whether there was a release or not. All I'm interested in knowing is the legal standard for mitigation so that we would be able to review the record to determine if there's any evidence that was presented at the trial that would then give the defendant the right to have the jury to decide?

ADAMS: We would have to show that an ordinary prudent citizen would not have required mitigation at that point.

HANKINSON: Well it's the defendant who's complaining that they didn't get an issue and an instruction. And in order for someone to actually be entitled to an issue and instruction from the jury they obviously have to put some evidence on. What is the legal standard under Texas law for mitigation, because that would be the road map for us to look to see what kind of evidence we need

to see in the record?

ADAMS: They must show that the damages could have been avoided.

HANKINSON: So what kind of proof, I'm not asking you to commit that this is actually what the jury would have decided or not, what would they need to put in in order to meet that legal standard and then be entitled to the issue or instruction?

ADAMS: They would have to show that there was evident sufficient to justify the mitigation.

HANKINSON: In what way is the evidence that Mr. Alexander is relying upon deficient under that legal standard?

ADAMS: To be very frank, I don't understand what evidence he is relying upon.

HANKINSON: Well, he's saying that they contacted your client and tried to several things for him. In what way is that proof deficient and it fails to rise to the level of meeting that legal standard?

ADAMS: It didn't make him whole or substantially whole and they wanted a release.

HANKINSON: But if the legal standard is to minimize consequences, why would he have to offer proof that he would be made whole?

ADAMS: Because he was requiring the release. The release is implied.

HANKINSON: Isn't that a fact issue of whether or not they requiring a release or not?

ADAMS: I think it's their burden if they want mitigation to negative the fact the release wasn't implied.

HANKINSON: Do they have to negate it as a matter of law though in order to be entitled to a jury instruction on it?

ADAMS: I just don't feel like a person has to settle their case in order to _____.

HANKINSON: I understand. But the question is, do they have to negate it as a matter of law in order to be entitled to a jury instruction?

ADAMS: Yes, either that or where it's an intentional act, as this was, where they intentionally didn't disclose. I'm not sure that there is even a duty to mitigate in that circumstance.

HANKINSON: Would you agree that the petitioner's position is, We didn't require a release. And your client's position is, Yes, they did?

ADAMS: By the use of the word "settlement."

HANKINSON: Is that right?

ADAMS: Yes.

HANKINSON: Isn't that a disputed fact issue then?

ADAMS: No, because it's implied that there was a release. When they say, this is made for offers of settlement or....

HANKINSON: Why doesn't a jury get to decide that?

ADAMS: Because they required a release, a release was implied.

HECHT: If it weren't implied and there were a release, then what duty to mitigate?

ADAMS: There is a duty to mitigate, unless there's no duty to mitigate when it's an intentional act.

ENOCH: You concede that there is a duty to mitigate. I think I want to divorce the issue of mental anguish from just the purchase of the automobile. Your damages in the purchase of an automobile that's not worth what you paid for it are set on the date that you buy it. Do you say that there's a duty to mitigate at that point?

ADAMS: Not only are your damages set on the day you buy it, you also have the additional damages that are automatic because they deceived you the additional $2,000.

ENOCH: How does mitigation fit in that? Damages are set. Do you lose the damages because after the fact, you could have done something differently that would have settled it?

ADAMS: I would presume not.

ENOCH: Now going to mental anguish, it seems to me that potential there is a duty to mitigate because mental anguish is an on-going damage that accrues. And so a party probably has an obligation not to do something or take some action or it failed to take some action that obviously a reasonable person would have done to keep from accruing additional damages. So it seems to me it makes sense to have a mitigation issue there. I have a hard time looking at mitigation applying to the sales of products when we're arguing over the value of that product.

ADAMS: On the issue of the mental anguish, I want to point out one more thing to the court. There is no finding and no evidence as to when the actual mental anguish occurred. Their offers of settlement according to the record were made 1 month to 6 weeks later. The mental anguish started occurring when he discovered that he had been taken advantage of.

OWEN: If they had offered evidence that he could have sold the car within 1 month of the time of purchase and what his losses would have been, that would have truncated his mental anguish damage. Wouldn't that entitle him to a mitigation instruction?

ADAMS: Assuming that there was a finding as to when the mental anguish occurred. Mental anguish in this case could have occurred well after.

OWEN: My point being, he could have sold the car and he wouldn't have to look at it every day, he wouldn't have to wash it and be sick to his stomach about it, all of the things that he talked about that caused him mental anguish. Had he sold the car within a few weeks after he bought it, he wouldn't have had that on-going.

ADAMS: I understand that, but if he had sold it, I presume he would have sold it for its market value, which according to all the testimony at the TC was $10,500.

OWEN: And he could have sued for the difference between what he thought he was getting plus the $2,000, plus the mental anguish he incurred within those few weeks. Had he sold the car, he wouldn't have had all of those months and months of torture as he described it.

ADAMS: Assuming he had the ability to sell the car and still be able to work. This man was only making $1,000 a month at the time as the record implies.

OWEN: Why would selling the car affect his income stream?

ADAMS: He would have to be able to work. He would have to go back and forth to work. If he didn't have a car, he couldn't do it. How could he make payments on a car that he didn't have, and take a $10,000 loss on the vehicle?

OWEN: Was there evidence on this point?

ADAMS: Yes.

BAKER: You anticipate a jury would balance what you just said on the facts on his side with the facts that they put into evidence about what they offered to do, because both sides are disputing what somebody said they would do or not do?

ADAMS: And you're back to a squaring match. And as the CJ pointed out, the

legislature has given a mechanism for mitigation in these circumstances. And all this is, is a way for this car dealer to get around what they had done.

HANKINSON: Did you client then make a written demand under the DTPA before suing?

ADAMS: Yes.

HANKINSON: And what did that demand entail?

ADAMS: It demanded his economic damages and the recovery for mental anguish to which...

HANKINSON: How much?

ADAMS: We asked for $100,000 in mental anguish, and economic damages of the price of the car.

HANKINSON: And that was before the suit was filed?

ADAMS: Yes.

HANKINSON: How many months after the transaction was that?

ADAMS: That was done 5 months after.

HANKINSON: And what was the response?

ADAMS: The response was, We'll give you X number of dollars for the vehicle, less the mileage you've used it, and no attorneys' fees, which would not have been satisfactory under the DTPA. And I presume that's the reason that they didn't try and prevail on that as they tendered that to the court as an offer of settlement.

BAKER: Did you also ask for attorney's fees?

ADAMS: Yes.

OWEN: When you say, you wanted the price of the car were you willing to give the car back?

ADAMS: Yes.

HANKINSON: He still has the car, right?

ADAMS: Yes. Was a release required? If a release was required, then I don't think we had a duty to mitigate. *Hickcox v. Hickcox*, 151 S.W.2d 913 (El Paso CA, no writ) involved the issue of whether the term "settlement" implies a release. And there they said, A full settlement, again that's not settlement, between the parties having a contractual relationship, which was the case here, implies adjusting all pending matters, the mutual release of all prior obligations existing between the parties.

BAKER: Let me give you a hypothetical. Assume they made an offer to pay you all of the economic damages and you said, Well that's fine, plus attorneys' fees of X. And they say, Ok. And then you say, But we've got other damages, so we're not going to sign a release. If all of that happens, your point now is the word "settlement" implies a release. And you cited a case which probably was in the 30's as support for that. But they say, Well, no, we didn't say we wanted a release. So there's this dispute. But is there anything in the record to say that you said, We'll settle for something, but we won't give you a release because we think we have other legal rights that we're entitled to assert under the DTPA?

ADAMS: There is absolutely nothing in the record about that. We've made several offers of settlement, one of which would have cost them $1,500, and we would have been done with this lawsuit. It would never have been filed. Had they simply told him in fact this car was in the body shop, his testimony was, and it's uncontroverted, He wouldn't have bought the car.

BAKER: I understand that. That's why there is really no dispute, as I understand it, or hard to dispute, the fact that knowing misrepresentations were made. But we're passed that. We're talking about the issue of mitigation and whether that should apply in this case or not.

ADAMS: Not only was it a knowing violation it was an intentional violation.

BAKER: Under the DTPA, knowing is all you have to show?

ADAMS: Yes. On the issue of mental anguish, we have alleged all the facts. Justice Cornyn, in *Parkway*, said, The severity of the mental anguish in establishing a substantial disruption of the plaintiff's routine is sufficient and his testimony is enough. Well in this case, there is no question that there is a substantial disruption of his routine and there is no question that there was sufficient testimony for that.

I would ask the court, if the court chooses, to take away our mental anguish, to reform the judgment and send it back to the CA to base it upon the common law fraud finding and the additional...

PHILLIPS: Wouldn't the CA be the right place?

ADAMS: Yes.

PHILLIPS: Why not the TC, so the defendant could make any objections - since you elected the DTPA?

ADAMS: Yes, back to the TC so they can enter a judgment in accordance with the common law fraud.

HECHT: Did you argue for fraud in the CA?

ADAMS: Yes.

HECHT: As appellee?

ADAMS: Yes.

HECHT: Has the appellant responded to that?

ADAMS: Yes.

PHILLIPS: So it would go back to the CA?

ADAMS: Yes.

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REBUTTAL

ALEXANDER: I want to briefly hit on 3 points and then work my way to Justice Enoch's question about the economic damages. First off, with respect to a clarification point on this business about you know, Well he could have just had the car repainted. If you look at page 433 of the record indicates he was demanding $4,000 for that. There was testimony that he conceded on page 204, that actually all it would take to put it in pristine condition was $1,251.

O'NEILL: Was evidence of the different offers back and forth before the jury?

ALEXANDER: Yes.

O'NEILL: Couldn't they consider then in awarding damages that perhaps the plaintiff was not reasonable to give the car back and include that in the amount they awarded?

ALEXANDER: No.

O'NEILL: Why not?

ALEXANDER: Because that would only go to the question of additional damages. It did not go to the actual damages that he had suffered, because the issue, as submitted, was, What was his mental anguish and with respect to economic damage, what was the difference between X and Y.

O'NEILL: That's what I am saying though. And the question what was his mental anguish, couldn't they consider in deciding the dollar figure to put down there, that he unreasonably rejected these offers or could have stopped the mental anguish damages on his own, and drop the mental anguish figure accordingly?

ALEXANDER: No. Because that issue the way it was done went to the egregiousness of the defendant's conduct, as opposed to the damage he had suffered. It's our position that it could not. And I think that that's the answer, that that's where that went to. And that's the basis is was introduced on was with respect to the one not the other. And that's why they fought to keep it out of there. So, I think that the answer to that is, No. They were just not allowed to consider that with respect to the damages issue, and the way that the damages was framed it wouldn't go to that. It would only go to the other issue with respect to additional damages.

The next clarifying point is the wrongful conduct. They say there is all this wrongful conduct. That is the starting place in litigation. It's assumed that the defendant has acted wrongfully. And I think if you look at the *Austin Hill Country Realty* case by this court, even in those cases where the plaintiff has been victim of wrong, it cannot passively suffer damages to run up the damages, which is what occurred here.

Justice Hankinson raised the question about release. We don't even think there's a fact issue as to whether there was a release. But if there is, yes, that could be submitted to the jury. And under our decision tree it would fit and work out.

HANKINSON: As I understand Mr. Adams' point, his point is, is that we should imply in this evidence if the use of the word "settlement" means release and, therefore, on your decision tree no duty to mitigate as a matter of law, and your out. And I presume your position is that, No, what was meant as between the parties while they talked is the fact issue, is that right?

ALEXANDER: Right. And in the context. Our position goes further than that. It's not even a fact issue. In the context that's made there was just simply no discussion of that. It was not contemplated.

HANKINSON: He's saying the use of the word "settlement" means release?

ALEXANDER: Right. And it was done at a time when there was no lawsuit, no threat of a lawsuit in that context, no. But again if there is a fact issue, that can be submitted.

ENOCH: It seems to me if two parties have a dispute and the defendant says, Well I will

offer them $5 today, $10 tomorrow, and $15 the next day, then I can introduce all my offers into evidence as long as I don't ask for a release on the issue of mitigation. So in essence, I can put the fact that I've been very reasonable, I've been offering this settlement all the way through and let the jury consider my offer of settlement in trying to assess whether or not there were damages.

ALEXANDER: Your question goes to Rule 408. And the 3rd page of the handout, I think, addresses that. And there's actually two parts to your point and I will try to address each one. First off, under Rule 408, the evil that it is designed to address, and we've got treatises that really deal with that in greater detail than any case I can find in Texas, stand for the proposition that the evil is to prevent an offer of settlement being used as an admission of either liability or invalidity of claim. The situation where the plaintiff goes and says, Here is the defendant saying they are not liable, don't you know that a week ago they offered $10,000. Or the situation where the defendant goes, Here is the plaintiff asking for $100,000, don't you know that a week ago they offered to settle for $10,000. That's the evil that doesn't apply to this situation.

The first thing is that most offers, and this is something I think that this court needs to narrowly tailor this appeal. They've raised the floodgate arguments. Why not in any case, wouldn't you be able to bring up offers of compromise? And the reason for that is, I mean let's look for instance at the wrongful death case. In the wrongful death case a child dies. The anguish that you suffer daily, which you do suffer, is because of the empty chair at the dinner table. No amount of money will put the child back in the chair. Contrast that with our case, the mental anguish is seen everyday a car parked in the driveway. Well the offer removes the car, removes the thorn. It's gone and that's exceptional.

BAKER: What about the other side of the argument: Well, the car is gone, but boy I sure do miss what I should have gotten and I'm still anguishing over it daily?

ALEXANDER: Then we would be back to arguing whether that's legally sufficient, and under *Barkely* we don't think it is.

OWEN: Let's suppose that he had accepted one of the offers, for example, and taken the red car and whatever was offered in addition to that, and then he brought a lawsuit for the mental anguish that he had suffered for a period of weeks, and his attorney's fees, and for treble damages, and for the $2,000 statutory penalty. Wouldn't you be saying accord and satisfaction as matter of law, but we had a dispute. You accepted compensation and that's the end of it. Wouldn't you be here arguing that?

ALEXANDER: No.

OWEN: Why not?

ALEXANDER: Unless we are speaking directly out of both sides of our mouth. Unless we

are saying that that offer that we made, that he accepted, was conditioned on a release.

OWEN: Accord and satisfaction isn't necessarily conditioned on a release is it?

ALEXANDER: You stump me there. I think it is. I think that it contemplates an _____ and satisfaction that this is over.

OWEN: Usually if you have a release, you don't have a claim of accord and satisfaction, you have a claim...

ALEXANDER: A claim of release. In this case, I don't even think we can argue accord and satisfaction. As to damages that genuinely could not be covered by what he was offered. I don't think we would have it. Once again litigation is the doctrine of both avoidance and minimization. Anything that's not avoidance you can sue for.

OWEN: Two weeks after he bought the car, you all offered him the red car plus some cash, and he said, Okay, I will take that. He takes the car, deposits the check in his account and then 6 months later you get a lawsuit.

ALEXANDER: And the lawsuit says, You know for a period of a week, I had mental anguishes, and I'm suing for that.

OWEN: And my attorneys' fees, and treble damages, and $2,000.

ALEXANDER: He gets to sue. Now we say, He can't recover because of legal sufficiency. But accord and satisfaction we don't have.

OWEN: Why don't you have an accord and satisfaction under those facts?

ALEXANDER: Because we don't in that situation. What we resolved this with did not address what he is suing for. There's no parallelity(?) if he's suing for mental anguish. How can we say, that the offer we gave addressed that. It didn't. That's a separate issue. He's entitled to sue on it. We're entitled to come in court and say, He doesn't get it. But in terms of accord and satisfaction of a release, he can sue. We might summary judgment, but he can sue. Accord and satisfaction doesn't apply because there is no parallel there between the two.

HECHT: If a new trial on DTPA is required and plaintiff would rather have a fraud judgment, what?

ALEXANDER: I think we are all right. It goes back to the CA.