

NO. 08-0110

* * *

IN THE SUPREME COURT OF TEXAS

* * *

AMERICAN GENERAL FINANCE, INC.,
Petitioner

V.

KYLE ALLEN,
Respondent

* * *

RESPONDENT'S BRIEF ON THE MERITS

* * *

CROFTS & CALLAWAY
A Professional Corporation
Thomas H. Crofts, Jr.
State Bar No. 05099200
4040 Broadway, Suite 525
San Antonio, Texas 78209
(210) 225-5551
(210) 225-7110 (telecopier)

SINKIN & BARRETTO,
P.L.L.C.
Steven A. Sinkin
State Bar No. 18438700
E. B. Barretto
State Bar No. 01816350
105 West Woodlawn
San Antonio, Texas 78212
(210) 732-6000
(210) 736-2777 (telecopier)

LAW OFFICE OF CARLETON
B. SPEARS, P.C.
Carleton B. Spears
State Bar No. 18893800
1015 N.W. Loop 410
San Antonio, Texas 78213
(210) 366-3100
(210) 366-3464 (telecopier)

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STATEMENT OF FACTS

- I. Kyle Allen entrusted to American General Finance, Inc. \$5,000 of his home-equity loan proceeds for the purpose of having AGF discharge the tax lien, and American General Finance, Inc. represented to him that it would use Allen's borrowed funds for the purpose of handling the tax transaction for him.**

Kyle Allen grew up in an Air Force family who lived in the San Antonio house on Nashville Street that figures into this suit. (*RR 3: 154, 161*) After graduating from John Jay High School, he attended college on football scholarships at San Francisco Junior College, University of Houston and Portland State University. (*RR 3: 154-58*) He currently works as a third-party vendor for SBC. (*RR 3: 159*)

Kyle's father deeded the house to him after Kyle's mother died in 1992. (*RR 3: 162*) Kyle was living in Portland in 1998 when he learned from his brother that a tax suit had been filed. Kyle immediately made arrangements to fly to San Antonio to see what was going on and how to resolve the situation. (*RR 3: 163-64*) After getting an extension of time to respond to the suit, Kyle went to the office of his neighborhood finance company -- American General Finance, Inc. ("AGF"). (*RR 3: 164-65*)

When he met with AGF's Mark Esquivel on March 18, 1998, Kyle gave Esquivel the tax suit papers and sought his advice about how to get financing help in order to get the taxes paid and to have the suit dismissed. (*RR 3: 165-66*) Esquivel offered a home equity loan at 14% interest and explained that the minimum loan amount would have to be \$15,000. (*RR 3: 166-67*) Esquivel informed Kyle that AGF would agree to pay off the tax lien directly to the authorities by using part of Kyle's loan proceeds for that purpose, if the loan were to close, and Kyle agreed to this proposition (also electing to

have AGF procure title insurance). (*RR 3: 166-688, 171-72*) When Kyle left the meeting, Esquivel reassured him that AGF would make the necessary calls and get the taxes paid after the closing. (*RR 3: 175*)

In contemplation of securing the loan with a deed of trust, AGF had the property appraised, and the appraiser reported a value of \$54,600. (*RR 3: 52-53*) Since Allen had requested AGF to obtain a lender's title policy, AGF agreed to do so. (*RR 2: 187-88*) In attempting to provide those services, AGF obtained a title company's certificate showing the tax suit brought against Kyle Allen (on behalf of Bexar County, City of San Antonio, Alamo Community College District, and Northside Independent School District) and a delinquency in May 1998 of \$6,321.68. (*RR 2: 169-70*) AGF also received information about the tax suit from Ralph Mayen, the attorney it used to prepare the loan documents. (*RR 2: 172-76*)

II. The Contract document prepared by AGF and the H.U.D. Settlement Statement explicitly document AGF's representation that it would deliver payment for the taxes on Kyle Allen's behalf.

At the May 12, 1998 closing, AGF upped the interest to 16.5%, but Kyle felt he had no option but to go forward with the transaction in order to get the tax suit taken care of. (*RR 3: 176-77*) At the brief closing procedure, Kyle signed AGF's form contract, trust deed and other closing documents, including a property appraisal of \$54,000 and acknowledgement of a \$50 fee for title insurance. (*RR 3: 179-80*)

The AGF contract document contains an "Itemization of Amount Financed," which reflects AGF's obligation to pay the taxes on Kyle's behalf. (*CR 288*) Item 13 on this list recites "Amount paid to you [borrower] or on your behalf itemized below" and

then indicates that total to be \$15,000. (*Id.*) Item 13 continues with a column of eleven blanks on which to designate the referenced itemization of the amounts “paid to you or on your behalf.” (*Id.*) Typed in the first blank is “\$4988.28 to Bexar Tax.” (*Id.*) After a series of zeros and N/A’s in the next nine blanks, “\$10011.72 you” is typed in the last one. (*Id.*) The H.U.D. Settlement Statement signed by Kyle also designates \$4988.28 of his \$15,000 to be disbursed by AGF to “Bexar Tax.” (*CR 426*) AGF’s contract document and the H.U.D. Settlement Statement are attached to this brief as an appendix.

Kyle’s understanding at that point was that it was AGF’s job to take care of the tax situation. (*RR 3: 181*) Kyle divided the remaining \$1,011.72 loan proceeds with his brothers in San Antonio and sent them money from Seattle to make the loan payments, which apparently the brothers had trouble doing. (*RR 4: 7-9*)

III. AGF’s represented commitment to deliver its borrower’s funds to pay a taxing authority on behalf of the borrower is a customary procedure.

Mary Belan Doggett, then with the tax law firm of Heard, Goggan, Blair & Williams, was the attorney who handled the tax lien suit against Kyle Allen. (*RR 4: 73-76*) She had been involved in thousands of cases in which someone who owes property taxes borrows money from a lender to take care of a tax suit; indeed, several times a day, she or her staff advised an inquiring delinquent tax payer to do just that. (*RR 4: 80*)

According to attorney Doggett, Kyle Allen did the prudent thing in contacting the tax office when he first learned of the suit, which is exactly what her law firm wants taxpayers to do in that situation. (*RR 4: 97*) Kyle Allen did nothing wrong in entrusting the amount owed for taxes to AGF, because, in 99.99% of similar cases, resolution

involves only the lender and the tax authorities' attorneys with no further contact from the taxpayer/borrower. (*RR 4: 99-100*)

Mark Anthony Esquivel acknowledged that he was the AGF employee who handled Kyle Allen's \$15,000 home-equity loan application on March 13, 1998. (*RR 2: 156*) Esquivel, who a few months later became a district manager (and was a branch manager at the time of trial), knew that Allen's purpose in obtaining the loan was to take care of a pending tax suit. Esquivel testified that the services he represented AGF would provide, as part of the loan transaction, included "obtaining the amount of taxes due" and "taking care of the taxes and paying them after the loan closed." (*RR 2: 162-63*)

Esquivel testified that when AGF represents that it would perform these services, it is supposed to contact the law firm who filed the tax suit, hand deliver the tax payment immediately upon closing the loan and obtain a certificate of payment for the taxing authorities' attorneys. (*RR 2: 168-69, 180-82*) The services AGF represented it would provide Kyle Allen also included paying accrued interest, the taxing authorities' attorney fees and court costs. (*RR 2: 170*)

Esquivel also testified that, after the closing on May 18, 1998, Kyle Allen should have been able to rely on AGF's representation that it would take care of the tax suit and pay the taxes. (*RR 2: 186*) And, of course, Kyle did exactly that by taking Esquivel at his word. (*RR 3: 181*)

The next thing that Kyle Allen knew after the closing, however, was word from a potential buyer that there had been a tax suit foreclosure sale of his property. (*RR 3: 182*) As it turned out, AGF's services did not have the represented quality.

IV. At trial, AGF admitted that it had completely failed to provide the represented services and that, but for its failures, Kyle Allen's property would not have been foreclosed upon in the tax suit.

Because AGF had not delivered the tax payment for "Bexar tax" as it had represented it would do, Kyle's house had indeed been foreclosed upon in the tax suit and sold to bidder at the foreclosure sale.¹ This event resulted from a near comedy of errors on the part of AGF.

Rather than immediately delivering the designated disbursement to the taxing authorities' attorneys, AGF belatedly sent a check for an insufficient amount to the wrong place (the Bexar County tax office). The amount that AGF attempted to pay late did not include the amount due for city tax. More importantly, the Bexar County tax office did not receive AGF's inadequate check until more than six weeks after the closing -- July 2, 1998. (*RR 3: 63*) By then, it was too late.

AGF failed in various other respects. It did not obtain a lender's title policy. (*RR 2: 160, 163, 182, 186, 189*) And, AGF's file does not reveal any effort to contact the taxing authorities' lawyer, as Esquivel testified AGF was supposed to do. (*RR 2: 181*) In the meantime, AGF had been wrongly charging Allen interest on that amount as if it had been expended for his benefit. (*RR 2: 186*) Even after the tax judgment against Kyle Allen and foreclosure due to the tax lien, AGF sent demand letters for payment on the note that included interest in excess of that allowed by law and that threatened

¹The trial court ruled that certain post-foreclosure circumstances would not be presented to the jury. Among those issues was Kyle Allen's proceeding in the tax case to recoup the excess proceeds from the foreclosure sale. Ms. Doggett testified outside the jury's presence that a customary contingent attorney fee for such a proceeding ranged from 30% to 50%. (*RR 4: 108*) The excess proceeds recovered by Kyle Allen amounted to \$29,993.66, and his attorney fees were one third of the recovery (\$9,997.89), which left a net recovery of \$19,948.95. (*RR 4: 110-11*)

foreclosure and deficiency liability that the Texas Constitution prohibits for home equity lending. (*RR 3: 32-50*)

After acknowledging that Kyle Allen should have been able to rely after the May 18, 1998 closing on AGF's promise to take care of the tax suit, Esquivel conceded that these failures were entirely AGF's fault and not Kyle Allen's. (*RR 2: 161, 171-72, 186*) Esquivel also admitted that if AGF had provided the services it agreed to provide, there would have been no tax foreclosure judgment and Allen would still have his home. (*RR 2: 171*) He acknowledged that AGF breached its agreement with Allen, that AGF's breach had nothing to do with payment due on Allen's note, and that if AGF had obtained title insurance it would not have lost anything on the loan. (*RR 2: 177-78, 189*)

David Ramos was the AGF district manager who supervised Mark Esquivel at the time of the contract with Kyle Allen. (*RR 3: 146-47*) He agreed that a prudent escrow agent in AGF's position would have ensured that the tax suit against Allen got dismissed within a couple of days of the closing on May 18, 1998. (*RR 3: 148-49*) He, too, acknowledged that AGF's failure to perform that service had nothing to do with anything Kyle Allen did or did not do. (*RR 3: 149-51*)

Attorney Doggett testified that, in this instance, AGF paid the wrong amount because it chose to pay only the portion attributable to one of the taxing units and even that was done after an unreasonable delay. (*RR 4: 83-84*) She also testified that AGF should have contacted the law firm to fulfill its responsibility to discharge the taxes and to obtain proof of payment. (*RR 4: 89*) And, she testified that AGF essentially

mishandled the transaction from the beginning, including its attempt to blame Kyle for the foreclosure that occurred in November 1998. (*RR 4: 102-05*)

V. The trial court granted AGF's motion for summary judgment on Kyle Allen's DTPA claim and rendered judgment on the verdict favoring Allen after he accepted the court's suggestion for a substantial remittitur of the amount the jury found for Allen's attorney fees.

Kyle Allen pleaded that he was a consumer as defined by the Deceptive Trade Practices Act ("DTPA") and that AGF had violated the Act by committing false, misleading or deceptive practices in various respects covered by § 17.46 of the Texas Business & Commerce Code. (*CR 264-67, 727-31*) In particular, Kyle's DTPA pleading complained of AGF's misrepresentation that it would discharge the tax lien with a portion of Kyle's borrowed \$15,000 and thus avoid a tax-suit foreclosure of his property.

AGF filed a motion seeking a partial summary judgment on Kyle Allen's DTPA claim with the basic contention that Kyle was not a consumer since "a loan is not a good or service." (*CR 278*). AGF's own proof, however, included the very contract with Kyle in which it represented that AGF would use \$4988.28 of Kyle's borrowed funds to pay the "Bexar Tax." (*CR 288*) Kyle's detailed response asserted that AGF's undertaking extended beyond a mere loan and included proof of the H.U.D. Settlement Statement that, like AGF's note contract, reflected AGF's representation that AGF would use \$4988.28 of Kyle's borrowed funds to pay the "Bexar Tax." (*CR 399-419, 426*) The trial court nevertheless granted AGF's motion in an order decreeing that Kyle Allen take nothing on his DTPA count. (*CR 513*)

The trial court submitted only Kyle Allen's breach of contract and negligence claims to the jury. In another Order signed before the verdict was returned, the trial court determined that, if AGF is found to have breached the contract, the tax foreclosure sale amounted to a direct damage to Kyle Allen. (*CR 846*)

In answer to Questions One and Two, the jury found that AGF failed to comply with its agreement to pay the amount owing in the tax lawsuit. (*CR 834-35*) In answer to Question Three the jury refused to find that AGF's breach was excused. (*CR 836*) In answer to Question Four, the jury found that only AGF was negligent. (*CR 837*) In answer to Question Six, the jury found the value of the Allens' Nashville Street property to be \$54,500. (*CR 839*) In answer to Question Seven, the jury found that AGF charged Allen interest in excess of 18%. (*CR 840*) In answer to Question 8, the jury found Kyle Allen's reasonable attorney fees to be \$150,000 for preparation and trial, \$20,000 for an appeal to the Court of Appeals, and \$20,000 for an appeal to the Supreme Court. (*CR 841*)

The trial court first rendered judgment that Kyle Allen recover \$24,505.23, being the market value of \$54,500 less a credit for the \$29,993.66 that Allen received as excess proceeds from the tax suit foreclosure sale, a \$2,000 usury penalty and attorney fees as found by the jury. (*CR 966*) On the basis of AGF's Motion to Enter Judgment Notwithstanding the Verdict, the court in an Order Suggesting Remittitur suggested a remittitur of \$100,000 of the amount found by the jury as reasonable attorney fees for preparation and trial. (*CR 862, 981*) Kyle remitted \$100,000. (*CR 982*) The court then rendered an amended judgment deleting recovery of the remitted \$100,000. (*CR 986*)

VI. The court of appeals affirmed the trial court's judgment with one exception, reversing only the summary judgment against Kyle Allen's DTPA claim.

The court of appeals rejected Kyle Allen's challenge to the remittitur and rejected AGF's challenges to the trial court's awards of \$24,506.23 for the house and a \$2,000 usury penalty. *Allen v. American General Finance, Inc.*, 251 S.W.3d 676, 684-93 (Tex. App.--San Antonio 2007, pet. filed). The court also rejected Kyle's claim for a reduction of the redemption credit. *Id.* at 693.

The court reversed the take-nothing summary judgment on Kyle's DTPA claim and remanded the cause for further proceedings. *Id.* at 693-95. The court remanded the entire cause because of the potential necessity for Kyle to elect between the recovery awarded on the contract or a potential DTPA recovery. *Id.* at 695.

SUMMARY OF THE ARGUMENT

The court of appeals properly concluded that Kyle Allen was a consumer because his “primary” objective was to obtain AGF’s services to eliminate his debt to the Bexar County taxing authorities, as opposed to a mere extension of credit. The court of appeals did not adopt a broad “sole objective” standard that, according to AGF, would allow any tangential service to convert a pure loan into a consumer transaction. The court based its decision on evidence that Allen’s “primary” objective was to have AGF take care of the tax suit, which results in an even *narrower* standard than *La Sara Grain* would permit.

AGF’s basic usury premise --“that Allen never received a demand for usurious interest” -- is wrong. Allen did “receive” AGF’s demands because AGF sent them to Kyle’s last known address. The Court’s holding that to be a “charge” under the statute the creditor had to at least *indirectly* communicate a demand to the debtor does not require that a sent and received demand be actually read.

AGF’s argument about causation, damages, and mitigation is a confusing hodge-podge. The trial court actually did submit a damages question and did not abuse its discretion in not submitting a mitigation instruction. The court correctly ruled that AGF’s failure to comply with the agreement caused the tax foreclosure. The measure of damage for that loss requires only a determination of market value, which was submitted.

The agreement was sufficiently definite to be enforceable and was supported by consideration. AGF would be alternatively liable for negligence. The court did not abuse its discretion in excluding Allen’s affidavit, because it was not shown to have been false.

ARGUMENT AND AUTHORITIES

I. Because Kyle Allen presented more than a scintilla of evidence that his “primary objective” was to obtain AGF’s services in eliminating his tax debt to Bexar County, the court of appeals properly concluded that he was a consumer and correctly reversed the trial court’s summary judgment on that issue.

A. Introduction

The only DTPA issue presented in AGF’s petition for review is whether Kyle Allen was a consumer. AGF’s petition should be denied because the court of appeals correctly concluded that “AGF failed to establish as a matter of law that Allen was not a consumer” and thus that “the trial court erred in dismissing Allen’s DTPA cause of action on that ground.” *Allen v. American General Finance, Inc.*, 251 S.W.3d at 694-95.

The court of appeals based its decision on a careful analysis of *La Sara Grain Co. v. First National Bank of Mercedes*, 673 S.W.2d 558 (Tex. 1984). And, in two different respects discussed below, this Court’s holdings in *La Sara Grain* demonstrably validate the court of appeals’ decision.

AGF’s *consumer* argument attempts to portray the decisional law on this issue as being in a state of disarray that the Court needs to sort out. That is not the case. By isolating random passages from appellate court opinions, AGF really just uses wordplay to make up a case of confusion that simply does not exist. As will be seen, all of the courts of appeals’ decisions actually hew to the core essence of *La Sara Grain*.

B. In two independent respects, the court of appeal’s decision in this case is in full accord with the Court’s holdings in La Sara Grain.

Regardless of the standard applicable to a “loan” transaction, Kyle Allen was a consumer under *La Sara Grain*, because his transaction with AGF

included AGF's obligation to use Kyle's funds to handle a transaction for him with a third party.

As the court of appeals acknowledged, the Court held in *Riverside National Bank v. Lewis*, 603 S.W.2d 169 (Tex. 1980) that the DTPA's use of the word "services" did not include the mere borrowing of money. *Id.* at 175. That proposition is not in dispute. However, the Court's analysis in that opinion of the meaning of DTPA "services" leads to a very different conclusion about the services that AGF represented it would provide to Kyle Allen:

"Services" was defined by this Court in *Van Zandt v. Fort Worth Press*, 359 S.W.2d 893, 895 (Tex. 1962). We defined services as: "action or use that furthers some end or purpose: conduct or performance that assists or benefits someone or something: deeds useful or instrumental toward some object." This definition described "services" in terms of "action," "conduct," "performance" and "deeds." All of these synonyms demonstrate that services includes *an activity* on behalf of one party by another.

Id. at 174. The Court itself emphasized the words "an activity." *Id.*

In *La Sara Grain*, the Court applied the *Riverside National Bank* characterization of "services" to hold that a bank's checking-account customer was indeed a DTPA consumer. 673 S.W.2d at 564. A court of appeals had earlier held that a bank's processing of a customer's checks was "covered by the definition of 'services' ... in *Riverside*." See *Farmers & Merchants State Bank v. Ferguson*, 605 S.W.2d 320, 324 (Tex. Civ. App.--Fort Worth 1980), *aff'd on other grounds*, 617 S.W.2d 918 (Tex. 1981).

Citing *Farmers & Merchants State Bank*, the Court held in *La Sara Grain* that "[t]he services provided by a bank in connection with a checking account are within the scope of the DTPA." 673 S.W.2d at 564. This holding has, of course, been consistently

followed. *See, e.g., Canfield v. Bank One, Texas N.A.*, 51 S.W.3d 828, 838 (Tex. App.--Texarkana 2001, pet. denied) (quoting the *La Sara Grain* checking services holding); *Security Bank v. Dalton*, 803 S.W.2d 443, 452 (Tex. App.--Fort Worth 1991, writ denied) (same).

The Court's rationale for holding in *La Sara Grain* that checking services "are within the scope of the DTPA" is independent of the Court's later discussion of the loan-objective measure of consumer status in a pure lending context. 673 S.W.2d 564-566. And, the rationale is controlling in this case. AGF's represented service of using Kyle's funds to discharge a tax liability on his behalf is not only analogous to the service provided with a checking account, but also AGF's represented service -- disbursing a portion of Kyle's funds by hand delivery to pay Kyle's "Bexar tax" (as exhibited on the contract documents themselves) -- falls squarely within the source definition of services in *Riverside National Bank*: "All of these synonyms demonstrate that services includes *an activity* on behalf of one party by another." 603 S.W.2d at 174.

Several other decisions illustrate the distinction between seeking the acquisition of money and seeking other independent financial services. In *David Jason West and Pydia, Inc. v. State of Texas*, 212 S.W.3d 513 (Tex. App.--Austin 2006, no pet.), the court held that a finance company's service of undertaking to eliminate a customer's debt to a third party was a service covered by the DTPA rather than a loan of money. In *McDade v. Texas Commerce Bank, N.A.*, 822 S.W.2d 713 (Tex. App.--Houston [14th Dist.] 1991, writ denied), the court held that the lender's role as an IRA trustee made it a DTPA service provider rather than a mere depository of money. *Id.* at 719. In *Security Bank v.*

Dalton, supra, the court held that borrowers were DTPA consumers with respect to misrepresentations concerning the availability of loan funds, which resulted in dishonoring the borrowers' checks. 803 S.W.2d at 452-53.

This case is decidedly on the "services" side of the line drawn by the Court in *Riverside National Bank*. Like the customers in *David Jason West and Pydia, Inc., supra*, Kyle Allen engaged AGF to help eliminate his tax debt to the Bexar County taxing authorities, and the contract documents reveal that AGF represented its services to include that precise *activity* on Kyle's behalf.

The court of appeals correctly applied the other aspect of *La Sara Grain* in holding that Kyle Allen was a consumer because his primary objective was to obtain AGF's services to eliminate his debt to the Bexar County taxing authorities.

The court of appeals' opinion contains a concise narration of the loan-transaction ramifications of this Court's DTPA decisions. The court correctly noted first, citing *Riverside National Bank*, that a borrower complaining only about not being provided money is not a DTPA consumer and that the lender's incidental role in the loan application process did not amount to a DTPA service. *Allen v. American General Finance, Inc.*, 251 S.W.3d at 694.

Next, the court correctly noted the Court's statement in *La Sara Grain*, 673 S.W.2d at 567, that "under Knight and Flenniken, a lender may be subject to a DTPA claim if the borrower's 'objective' is the purchase or lease of a good or service thereby qualifying the borrower as a consumer." *Id. See Knight v. International Harvester Credit Corp.*, 627 S.W.2d 382, 388-89 (Tex. 1982) (borrower was a DTPA consumer

because the transaction was not solely for credit but also to purchase a truck); *Flenniken v. Longview Bank and Trust Co.*, 661 S.W.2d 705, 707-08 (Tex. 1983) (borrower was DTPA consumer as to a lender's unconscionable conduct in transaction through which borrower sought to buy a house).

Based on evidence that the transaction was initiated by Kyle Allen's desire for help "to take care of this tax suit" and by AGF's undertaking to provide that service, the court of appeals correctly applied this Court's decisions to hold:

Allen presented more than a scintilla of evidence that his primary objective was to obtain the services that are the basis of his claim. Accordingly, AGF failed to establish as a matter of law that Allen was not a consumer, and the trial court erred in dismissing Allen's DTPA cause of action on that ground."

Allen v. American General Finance, Inc., 251 S.W.3d at 695.

C. *Contrary to AGF's argument, the court of appeals did not adopt a broad "sole" objective standard that, according to AGF, would allow any tangential service to convert a pure loan into a consumer transaction.*

In its effort to portray supposed disarray among the appellate courts' DTPA lender cases, AGF repeatedly brands the court of appeals' decision in this case as adopting an expansive either-or "sole" objective standard that would allow any incidental service to convert a pure loan into a DTPA consumer transaction. (*See AGF's Brief at 18-20*) This is a red herring of the first order.

To begin with, AGF disregards the court's statement that a borrower does not become a consumer merely because the lender provides services incidental to the loan that are not independent objectives of the transaction." *Allen v. American General*

Finance, Inc., 251 S.W.3d at 694. Then, AGF twists a statement that the court accurately derived from *La Sara Grain* into a false characterization of the court's conclusion.

The statement on which AGF's argument builds its illusion reads: "The determining factor is whether the borrower's 'objective' is solely to obtain a loan or to obtain a good or service. See *La Sara Grain*, 673 S.W.2d at 567." *Allen v. American General Finance, Inc.*, 251 S.W.3d at 695. The court's statement is right out of the *La Sara Grain* opinion, in which the Court observed that a borrower would be a consumer if the "objective" was to purchase or lease a good or service and held *La Sara* was not a consumer because "the loan involves *only* the extension of credit." 673 S.W.2d at 567 (emphasis added).

AGF's argument at 18-19 is way off the mark in characterizing the court of appeals' disposition of the DTPA issue as embracing a consumer standard satisfied by the existence of any tangential service -- a view that was rightly criticized in *FDIC v. Munn*, 804 F.2d 860, 863-64 (5th Cir. 1986). A true reading of the court of appeals' opinion in this case leaves no room whatever for AGF's suggestion that the court adopted such a clearly disfavored standard.

Indeed, to make AGF's toying with words even worse, the court of appeals quite clearly said that the basis for its decision was evidence that Kyle Allen's "primary" objective was to get AGF's help in taking care of the tax suit, which AGF represented it would do by delivering a portion of the borrowed funds directly to the taxing authorities. *Allen v. American General Finance, Inc.*, 251 S.W.3d at 695. Thus, the standard applied by the court of appeals is not "too broad;" if anything, its reliance on Kyle's "primary"

objective actually results in a *narrower* application than the language of *La Sara Grain* would permit.

D. Contrary to AGF’s argument, the courts of appeals have not “adopted multiple and conflicting standards for determining the borrower’s objective.”

AGF’s argument to this effect is a house of cards. According to AGF, the courts of appeals have adopted three conflicting standards that create a need for clarification from this Court. This is not so. All of the cases AGF relies on as comprising the three conflicting standards harmonize completely into the principles of *Riverside National Bank* and *La Sara Grain*, which AGF’s brief acknowledges at 16 to have established the determining principles.

AGF’s brief at 17 characterizes the first of its three so-called conflicting standards as one that determines “whether such services were an objective of the transaction or merely incidental to it,” citing *Maginn v. Norwest Mortgage, Inc.*, 919 S.W.2d 164, 166-67 (Tex. App.--Austin 1996, no writ). The standard applied in *Maginn* -- “the key principle in determining consumer status is that the goods or services purchased must be an *objective* of the transaction, not merely incidental to it” -- lies at the very heart of *Riverside National Bank*, 603 S.W.2d at 175, and it is the very same standard applied by the court of appeals in the instant case.

According to AGF, the second conflicting standard is “one that resolves the issue of whether a loan is a good or service for DTPA purposes by examining whether the ‘borrower’s objective’ was to refinance or otherwise satisfy an existing debt.” (*See AGF’s Brief at 18*) As revealed by the cases AGF cites, that is just another way of saying

that a borrower who seeks only an extension of credit is not a consumer, which again is the precise standard that originated in *Riverside National Bank* and was recognized by the court of appeals in this case as an ingredient in the analysis.

In *Fix v. Flagstar Bank, FSB*, 242 S.W.3d 147 (Tex. App.--Fort Worth 2007, pet. denied), the transaction involved only the borrowers' desire to refinance the loan on their house, and the lender's role involved nothing more than extending credit. *Id.* at 160. Likewise, in *Henderson v. Texas Commerce Bank-Midland, N.A.*, 837 S.W.2d 778 (Tex. App.--El Paso 1992, writ denied), the transaction involved only the borrower's desire to obtain a loan for the purpose of paying a debt, and the lender's role involved nothing more than extending credit. *Id.* at 782. In *Smith v. United States National Bank of Galveston*, 767 S.W.2d 820 (Tex. App.--Texarkana 1989, writ denied), a borrower's guarantor was not a consumer since the principal sought a loan only to obtain money to pay off a debt, and the lender's role involved nothing other than extending credit. *Id.* at 824.

The *Fix*, *Henderson* and *Smith* cases do not represent any standard different from *Maginn* or different from the court of appeals' decision in this case, which AGF attempts to pass off as a third conflicting standard. All agree that a borrower seeking nothing more than an extension of credit is not a consumer.

The court of appeals' allegiance in this case to the principles of *Riverside National Bank* and *La Sara Grain* has already been covered above in section B. The same can be said for the decision in *Maginn*, as well as the decisions in *Fix*, *Henderson* and *Smith*.

E. *In its final attempt for a “bail out” on DTPA exposure, AGF takes the liberty of inverting the evidence to switch Kyle Allen’s stated primary purpose (obtaining AGF’s help in taking care of the tax suit) into a mere incidental aspect of the transaction.*

Notwithstanding Kyle Allen’s testimony (on which the court of appeals held that his “primary” objective was getting AGF’s help in taking care of the tax suit), AGF’s brief actually says:

“Here, the crux of Allen’s complaint is that AGF did not properly disburse the loan funds. Because this service was incidental to Allen’s primary objective -- that is, to obtain a home equity loan, Allen does not qualify as a consumer.”

(AGF’s Brief at 20)

AGF’s bald-faced *ipse dixit* does not make it so, and AGF should not be permitted to get away with simply making up a story like that. The court of appeals based its decision on evidence of the opposite -- that the loan was an incident of Allen’s primary purpose to get AGF’s help in discharging the tax lien by having AGF deliver a share of his borrowed funds directly to the taxing authorities. *Allen v. American General Finance, Inc.*, 251 S.W.3d at 695.

The particularly unique facet of this case lies in the extensive testimony of AGF’s Mark Esquivel and the testimony given by expert Mary Doggett. As discussed in the Statement of Facts, Esquivel’s testimony repeatedly acknowledges that Kyle Allen’s “objective” was to obtain AGF’s services (including but not limited to escrow services) in securing the discharge of the tax loan. Among other things, Esquivel admitted that this service included AGF’s obligation to deal with the taxing authorities and to handle the attendant details. As the court of appeals concluded, these circumstances presented the

clear purpose independent of lending and thus invoked the remedy provided by the DTPA.

Finally, AGF's petition for review does not tell the entire story. In addition to AGF's Esquivel's testimony detailing Kyle Allen's main purpose in the transaction, Allen presented the affidavit of Daniel L. Brown, a Texas attorney Board Certified in Residential Real Estate Law and Commercial Real Estate Law. (CR 445) After reviewing the documents regarding the AGF/Allen loan, attorney Brown testified that AGF "assumed the role of escrow agent in this loan," in addition to being a lender, and that in that capacity AGF violated regulatory rules and failed to perform its agreement to discharge the tax lien with actual awareness of the consequences. (CR 445-47). The AGF escrow duties described by Daniel Brown are services for which consumer status is clearly recognized. See, e.g., *Zimmerman v. First American Title Ins. Co.*, 790 S.W.2d 690, 694-96 (Tex. App.--Tyler 1990, writ denied); *Commercial Escrow Co. v. Rockport Rebel, Inc.*, 778 S.W.2d 532, 536 (Tex. App.--Corpus Christi 1989, writ denied).

Under these circumstances, the court of appeals was correct in concluding that Kyle Allen's DTPA claim was actionable and correctly reversed that part of the judgment and remanded the cause for trial. AGF's petition seeks to suggest a need for clarification that in actuality does not exist at all. The court of appeals correctly applied DTPA law.

II. The court of appeals correctly affirmed the trial court’s assessment of a \$2,000 usury penalty based on the jury’s usury finding against AGF.

A. Introduction

The jury answered “yes” to Question No. 7 inquiring whether AGF “charge[d] interest that is greater than 18%.” (*CR 840*) AGF’s brief does not dispute the calculation or complain that the court should have included a definition of the term “charge.” AGF contends only that there is no evidence on which a reasonable jury could have found that AGF *charged* anything. Because there is more than a scintilla of evidence to support the finding, the trial court correctly rendered judgment that Kyle Allen recover a usury penalty of \$2,000. (*CR 967*) And, the court of appeals correctly affirmed this part of the trial court’s judgment. *Allen v. American General Finance, Inc.*, 251 S.W.3d at 689-90.

B. AGF’s basic premise -- “that Allen never received a demand for usurious interest” -- is wrong.

AGF’s argument about the meaning of the term “charge” in the usury statute confuses the borrower’s “receipt” of the usurious demand with a “reading” of the usurious demand. Throughout the pages devoted to this issue, AGF argues that, in order to be communicated, a usurious charge must be “received.” (*See AGF’s Brief at 21-24*) AGF’s problem on this score is that, while Kyle Allen may not have “read” AGF’s usurious demands, Kyle did “receive” them because AGF sent them to Kyle’s last known address. As a result, the court of appeals’ decision is in accordance with the strict construction that AGF asks for.

In a multitude of contexts, information may be communicated by mail to a person’s last know address. *See, e.g.*, Tex. R. Civ. P. 21a and 239a. Texas procedural

law also dictates that notice mailed to a party or attorney's last known address results in a presumption of receipt at that address. *Mathis v. Lockwood*, 166 S.W.3d 743, 745 (Tex. 2005). AGF did not rebut the presumption that its usurious demands were received at Kyle Allen's last known address.

And, in various contexts, receipt of notice provided by permissible means is deemed to be equivalent to knowledge regardless of whether it is actually read. For example, § 1.202 of the Texas Business & Commerce Code provides that receipt of a notice constitutes "notice of a fact" regardless of actual knowledge. *See also Withrow v. Schou*, 13 S.W.3d 37, 41 (Tex. App.--Houston [14th Dist.] 1999, pet. denied) (notice mailed to last known address met due process requirements).

C. Indeed, the usury statute itself contemplates a violation occurring without the debt obligor having actual knowledge of it.

Two provisions in the usury statute rebut the notion that there can be no usurious charge when a sent and received demand is not read by the obligor. Section 305.103 of the Texas Finance Code contains provisions that enable a creditor to correct a violation. TEX. FIN. CODE § 305.103 (Vernon 2006). To benefit from the correction provision, subsection (a)(2) requires the creditor to provide the obligor with written notice of the violation. *Id.* If the obligor's actual knowledge of the usurious charge were essential to there being a violation, this notice provision would be unnecessary.

Section (c) provides that the creditor's notice to the debtor is effective when given by mail to the debtor's last documented address. *Id.* The corrective action permitted by the legislature *does not* require that the debtor have read the notice. If a usury violation

can be corrected by an unread indirect communication, it certainly follows that a usurious charge can be made by an unread indirect communication.

The fact that a violation of the usury statute is not dependent on the debtor's actual knowledge of the violation is consistent with a basic principle underlying usury law. The mere sum of \$2,000 that AGF argues about in this case represents a *penalty* for its conduct rather than compensation to Kyle Allen. *See Steves Sash & Door Co. v. Ceco Corp.*, 751 S.W.2d 473, 475-76 (Tex. 1988) (discussing penal nature of usury states).

D. The Court has made clear that the act of "charging" may occur through indirect communication.

AGF's argument also misconstrues the Court's leading authority interpreting the usury statute's meaning of the term "charge." The issue in *George A. Fuller Co. of Texas, Inc. v. Carpet Services, Inc.*, 823 S.W.2d 603 (Tex. 1992) was whether a charge, as contemplated by the usury statute, could be made by simply entering it on the books of the creditor. *Id.* at 605. The Court held that to be a "charge" under the statute the creditor had to at least *indirectly* communicate a demand to the debtor. *Id.*

Ignoring the distinction between indirect and direct communication, AGF's argument suggests that there could not be a communicated demand in accordance with *George A. Fuller Co.*, unless the debtor actually "saw or read" the demand. (*See AGF's Brief at 24*). That is not what the Court said in *George A. Fuller Co.*, and it is not a

reasonable interpretation of what the court meant by indirect communication of a demand.²

This is what the Court said in *George A. Fuller Co.*: “The communication need not be direct, as long as the charge is ultimately demanded from the debtor.” *Id.* at 605. And, there is no dispute that the letters AGF sent to the house that Kyle Allen owned on Nashville Street in San Antonio (and received by his brothers) *demanded* payment from Kyle Allen. AGF’s reliance on *Hoxie Implement Co., Inc. v. Baker*, 65 S.W.3d 140 (Tex. App.--Amarillo 2001, pet. denied), is misplaced, because there was no showing there that the defendant had even sent a demand for payment. *Id.* at 149.

The line drawn in *George A. Fuller Co.* between internal book entry and external dissemination does not involve actual knowledge by the person on whom the demand is made. The distinction between indirect and direct communication parallels the distinction between *actual* and *constructive* notice. “Actual notice rests on personal information or knowledge.” *Madison v. Gordon*, 39 S.W.3d 604, 606 (Tex. 2001). “Constructive notice is notice the law imputes to a person not having personal information or knowledge.” *Id.* The phrase *direct communication* is embraced by *actual* knowledge, in contrast to indirect communication resulting from what the law deems to be constructive knowledge. *Houston Oil Co. of Texas v. Griggs*, 181 S.W. 833, 837-38 (Tex. Civ. App.--Beaumont 1915), *aff’d*, 213 S.W. 261 (Tex. Comm. App. 1919, judgment

² The Court’s distinction between an *indirect* and *direct* communication is not an unusual one. *See, e.g., Texas National Resource Conservation Comm’n v. Lakeshore Utility Co., Inc.*, 164 S.W.3d 368, 371 (Tex. 2005) (noting section of the Texas Water Code stating that no public utility may “directly or indirectly...charge, demand, collect or receive” any amount not prescribed in the rate schedule). The legislature has also made the same distinction between “direct” and “indirect” communication. *See, e.g., Hammack v. Public Utility Comm’n of Texas*, 131 S.W.3d 713, 729 (Tex. App.--Austin 2004, pet. denied) (quoting § 2001.061 of the Government Code).

adopted). Moreover, if a mailed demand had to be read in order to be a demand, long-settled principles of constructive knowledge would have to be disregarded.³

Even if AGF's aspersions about Kyle Allen and his mail practices could be taken at face value, AGF's usurious demands were indirectly communicated through the principles of constructive knowledge. Constructive knowledge is imparted even when a mailed communication is not accepted by the addressee. *Gonzales v. Surplus Ins. Services*, 863 S.W.2d 96, 101-02 (Tex. App.--Beaumont 1993, writ denied); *Barnes v. Frost National Bank*, 840 S.W.2d 747, 750 (Tex. App.--San Antonio 1992, no writ).

E. AGF did not request the court to submit a definition of the term "charge."

AGF did not object to the form of the usury question or request that the term "charge" be defined. (CR 744-757, RR 6:4-18) As a result, the jury's affirmative answer to the question inquiring whether AGF made a usurious charge is deemed to have been properly found on the correct standard. *Harris County v. Norris*, 240 S.W.3d 255, 260 (Tex. App.--Houston [1st Dist.] 2006, pet. denied). The absence of any submitted special definition also permits the jury to base its answer on the common meaning of the term in question. *EMC Mortgage Corp. v. Jones*, 252 S.W.3d 857 (Tex. App.--Dallas 2008, no pet.). The common meaning of "charge" includes "to impose a financial burden" and "to ask payment of a person." See *Merriam-Webster OnlineDictionary*, <http://www.merriam-webster.com/dictionary/charge>.

³ See, e.g., *Roberts v. Roberts*, 133 S.W.3d 661, 663 (Tex. App.--Corpus Christi 2003, no pet.) (accepting and reading mail not essential to constructive notice).

AGF's argument essentially boils down to whether the jury's charge finding was based on a correct standard. Because AGF did not request a definition or instruction that would have limited the jury's consideration, AGF waived its complaint in that regard.

III. The trial court actually *did* submit a damages question, and the court of appeals correctly held that the trial court did not abuse its discretion in not submitting a mitigation instruction.

A. *AGF's argument jumbles the principles of causation, damages, mitigation, and set-off into a confusing hodge-podge.*

Part III of AGF's argument complains that the trial court abused its discretion in failing to submit to the jury a damages question and an instruction on mitigation. (*See AGF's Brief at 25*). AGF's objection to charge, however, complained of "the absence of a question that causally links the fair market value to some type of breach ... on the part of [AGF]" because "the jury is not asked to causally connect the fair market value to any type of act on behalf of [AGF]." (*RR 6: 4-5*) AGF's argument in part III of the brief likewise sounds like the point under discussion is *causation* rather than damages. (*See AGF's Brief subtitles B and C at 27 and 30*).

Especially when the duty to mitigate is thrown into the mix, the distinction between causation of injury and measure of damage is critical. *See Hygeia Dairy Co. v. Gonzalez*, 994 S.W.2d 220, 226 (Tex. App.--San Antonio 1999, no pet.) (distinguishing conduct causing the injurious event from the post-injury duty to reasonably avoid subsequent additional injury). The trial court properly maintained this distinction in its rulings on the charge and correctly denied AGF's requested mitigation instruction.

As discussed in more detail below, these are the ingredients that support the trial court's judgment and that dispel AGF's argument under part III: the jury found that AGF failed to comply with its agreement to pay off Kyle Allen's tax lien (*CR 834-35*); in addition to the jury's finding that only the conduct of AGF caused the foreclosure sale (*CR 837*), AGF's judicial admissions conclusively establish that AGF's failure to comply with the agreement was the only cause of the tax foreclosure on Allen's property; the trial court submitted the correct measure of damage for injury by foreclosure (based on market value) (*CR 839*); the court correctly refused AGF's request for a mitigation instruction (*CR 749*), because nothing Kyle Allen did or didn't do could have affected the market value found by the jury.

Finally, it will be seen that what AGF contends to be evidence raising an unsubmitted causation/failure-to-mitigate issue (*See AGF's Brief at 30-31*) is actually subsumed by the cause-of-foreclosure negligence issue that *was* submitted and found against AGF. (*CR 837*) Moreover, AGF's suggestion that Kyle Allen's conduct somehow injured AGF (*See AGF's Brief at 31-32*) would only be pertinent to a counterclaim, if anything, but not material to what caused the foreclosure or to a determination of market value.

B. AGF judicially admitted that its failure to comply with the agreement caused the tax foreclosure.

Never once in its nine-page argument that the trial court erred in not submitting a causation question, does AGF mention its representative's repeated testimony that the tax foreclosure was caused only by AGF's failure to comply with the agreement. These

admissions by AGF's representative fully support the court's decision that there was nothing for the jury to determine on that issue.

Texas law treats testimonial admissions as judicial admissions when: made during a judicial proceeding; contrary to a fact essential to the declarant's asserted theory of recovery or defense; stated clearly, deliberately and unequivocally; treatment as conclusive would be consistent with public policy; and not destructive of the opposing party's theory. *Mendoza v. Fidelity & Guaranty Insurance Underwriters, Inc.*, 606 S.W.2d 692, 694 (Tex. 1980).

The effect of a testimonial judicial admission is an establishing of the issue as a matter of law. *See, e.g., Tenneco Inc. v. Enterprise Products Co.*, 925 S.W.2d 640, 644 (Tex. 1996) (proof including "testimonial admissions by" party representatives established the "defense of waiver as a matter of law"); *Watts v. St. Mary's Hall, Inc.*, 662 S.W.2d 55, 59 (Tex. App.--San Antonio 1983, writ ref'd n.r.e.) (employee's testimonial admissions established good cause for termination as a matter of law).

Mark Anthony Esquivel was the AGF employee who handled the Kyle Allen transaction on behalf of AGF. (*RR 2: 156*) Esquivel testified that, after the closing on May 18, 1998, Kyle Allen should have been able to rely on AGF taking care of the tax suit and paying the taxes, neither of which occurred according to Esquivel. (*RR 2: 186*) Esquivel thus admitted that AGF did not properly provide the services it promised, including obtaining a lender's title policy. (*RR 2: 160, 163, 182, 189*) AGF's file does not reveal any effort to contact the taxing authorities' lawyer, as Esquivel testified AGF was supposed to do. (*RR 2: 181*)

Esquivel conceded that the failure was entirely AGF's fault and not Kyle Allen's. (RR 2: 161, 171-72) Esquivel also admitted that if AGF had provided the services it agreed to provide, there would have been no tax foreclosure judgment and Allen would still have his home. (RR 2: 171) He acknowledged that AGF breached its agreement with Allen, that AGF's breach had nothing to do with payment due on Allen's note. (RR 2: 177-78, 189) David Ramos, who was the AGF district manager supervising Esquivel at the time of the contract with Kyle Allen, also acknowledged that AGF's failure to perform that service had nothing to do with anything Kyle Allen did or did not do. (RR 3: 149-51)

AGF's representatives clearly, deliberately and unequivocally admitted that AGF failed to comply with its agreement and that this failure alone caused the taxing authorities to foreclose on Kyle Allen's property. Given AGF's admissions, there is no room to wonder why the trial court ruled as a matter of law "that if the jury finds that American General Finance, Inc. breached the agreement that the tax foreclosure sale of the property at 9402 Nashville, San Antonio, Texas in Cause No. 96-TA1-2130 is a direct damage to Kyle Allen." (CR 846)

C. In any event, AGF's allegations about Kyle Allen's supposedly joint role in causing the property loss did not require the court to submit an additional jury question.

At a minimum, AGF's judicial admissions establish that AGF's failure to comply with the agreement was a cause of the tax lien foreclosure on Kyle Allen's property. AGF nevertheless argues that some kind of additional causation/mitigation submission was required by supposed evidence of Kyle Allen's failure to use ordinary prudence from

which, AGF says, “the jury could have concluded that Allen would have lost the Nashville property anyway, even if all of the back taxes had been paid.” (*See AGF’s Brief at 30*)

When this proposition is broken down, nothing remains. It is meaningless with respect to AGF’s liability for breach of contract, because a plaintiff’s joint failure to exercise ordinary prudence has no bearing on a defendant’s liability for breach of contract. *See Autobond Acceptance Corp. v. Progressive Northern Ins. Co.*, 76 S.W.3d 489, 494-95 (Tex. App.--Houston [14th Dist.] 2002, pet. denied) (negligence is not a defense to breach of contract); *Behring International, Inc. v. Greater Houston Bank*, 662 S.W.2d 642, 652 (Tex. App.--Houston [1st Dist.] 1983, writ dismissed by agreement) (comparative fault inapplicable to breach of contract).

AGF calls its proposition “failed to mitigate,” but it can’t be that, because its contention relates to the cause of losing the property rather than to a post-event avoidance duty. *See Hygeia Dairy Co. v. Gonzalez*, 994 S.W.2d at 226. Even if Kyle Allen’s conduct vis-à-vis the cause of property loss could be material to a mitigation duty, no additional submission was needed, because: the roles of ordinary prudence in that respect were submitted in the negligence question; and the jury refused to find that the tax foreclosure was caused by any failure of Kyle Allen to exercise ordinary prudence. (*CR 837*)

D. *The measure of damage for a loss of property due to foreclosure is the market value of the property less any amount owed to the foreclosing entity.*

AGF's part III argument actually begins with what amounts to an oxymoron: "[t]he trial court refused to submit a damage question" and "[i]nstead, the trial court awarded damages based on the fair market value of the Nashville Drive property at the time of the foreclosure minus the excess proceeds of the foreclosure sale redeemed by Allen." (*See AGF's Brief at 25*)

The problem with AGF's argument is this: "fair market value" is a damage issue, and the trial court submitted that damage issue in Question No. 6. (*CR 839*) Indeed, the measure of damage for wrongfully causing a property foreclosure *is* the market value of the property at the time of foreclosure (less any appropriate credit). *See, e.g., Farrell v. Hunt*, 714 S.W.2d 298, 299 (Tex. 1986) ("In a wrongful foreclosure suit the measure of damages is the difference between the value of the property in question at the date of foreclosure and the remaining balance due on the indebtedness"); *UMLIC VP LLC v. T & M Sales and Environmental Systems, Inc.*, 176 S.W.3d 595, 610 (Tex. App.--Corpus Christi 2005, pet. denied) (same).

While the cited cases concern lender liability for wrongful lien foreclosure, a foreclosure resulting from a breached promise to discharge another entity's lien (as here) is no less a direct injury to be measured in the same way. A direct damage is one that naturally and necessarily flows from the wrong, in contrast to a consequential damage that might result naturally but not necessarily. *Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812, 813 (Tex. 1997). The tax foreclosure on Kyle

Allen's property was a *direct* damage from AGF's breach of promise to pay Allen's taxes, because, under the property tax laws, foreclosure necessarily flows from a breach of a promise to pay property taxes. *See, e.g., Corpus Christi People's Baptist Church, Inc. v. Nueces County Appraisal Dist.*, 904 S.W.2d 621, 622 (Tex. 1995) (if taxes are not paid, "the taxing unit may sue to collect the tax and foreclose its lien").⁴

E. Once again, the trial court correctly denied AGF's mitigation instruction.

AGF contends that the trial court abused its discretion in not submitting this instruction: "Do not include any amount for any damages resulting from the failure, if any, of Kyle Allen to have acted as a person of ordinary prudence would have done under the same or similar circumstances." (*CR 749*) AGF's pleading, however, would not have supported such a submission, because AGF's pleaded mitigation theory was only that "Allen failed to mitigate his damages by failing to timely notify AGF of the foreclosure proceedings or to respond to notices regarding taxes owed in order to prevent the foreclosure." (*CR 247*)

Ignoring that Kyle Allen did not know of the foreclosure until after it happened and that AGF agreed to pay his taxes so it would not happen, AGF's mitigation pleading relies on contributory fault in causing the foreclosure, which is completely different from the duty to prudently mitigate resulting damage if possible. *Hygeia Dairy Co. v.*

⁴ In a characteristic effort at sleight-of-hand, AGF suggests that a claim for loss due to foreclosure is always a "claim for consequential damages," citing *Haynes & Boone v. Bowser Bouldin, Ltd.*, 896 S.W.2d 179, 182 (Tex. 1995). *See AGF's Brief at 29*) The suggestion is patently wrong. The cited authority concerns a malpractice case brought against Haynes & Boone by its former client, Bowser Bouldin, who claimed that the law firm's negligence in handling the defense of a suit brought by a shopping center tenant resulted in losses that ultimately caused the client's lender to foreclose on the shopping center. In that context of course, the client's claim against Haynes & Boone "for loss due to the foreclosure would be a claim for consequential damages." *Id.* at 182. It would be a different matter altogether, if the suit had been based on a breached promise by Haynes & Boone to pay off its client's note to the foreclosing lender.

Gonzalez, 994 S.W.2d at 226. Disguised as “mitigation,” AGF’s brief suggests at 32 that Allen’s alleged imprudence injured AGF’s own interest. But that would be a claim for affirmative relief not in the case. *See Doyer v. Pitney Bowes, Inc.*, 80 S.W.3d 215, 218 (Tex. App.--Austin 2002, pet. denied) (defining the nature of a counterclaim).

The trial court correctly refused to give the mitigation instruction, because nothing Kyle Allen did or didn’t do impacted determination of the fair market value of the property. Moreover, it was understood by all at the time of the charge conference that the tax-foreclosure excess received by Kyle Allen would be credited against the fair market value as found by the jury, and the court rendered judgment accordingly.⁵ (*RR 6: 13-14, CR 966*)

Putting it all together, the Court appeals correctly concluded that “the negligence issue required the jury to answer” AGF’s argued version of the mitigation issue. *Allen v. American General Finance, Inc.*, 251 S.W.3d at 687.

IV. The court of appeals correctly held that AGF’s agreement to pay Kyle Allen’s delinquent taxes with the loan proceeds that Allen left with AGF for that purpose is binding and enforceable.

A. The agreement was sufficiently definite and certain.

AGF’s argument on this subject rests on erroneously narrow concepts of not only what evidence was presented, but also on the types of evidence that are probative of the terms of an oral agreement. According to AGF, the *only* evidence is Allen’s testimony that Mr. Esquivel said AGF would ‘take care of’ the taxes, and, therefore (says AGF),

⁵ In fact, AGF’s only mention of mitigation at the charge conference, which AGF’s brief relies on for its complaint preservation (*See AGF’s Brief at 27-28*), speaks only to undisputed sums as potential credits from market value. (*6 RR 13*) No jury decision was needed to implement the effect of these potential credits.

AGF's promise to pay Kyle Allen's delinquent taxes from the loan proceeds is too indefinite to be enforceable -- like the generic "we will take care of you" promise that was held to be unenforceable in *University Nat'l Bank v. Ernst & Whinney*, 773 S.W.2d 707, 710 (Tex. App.--San Antonio 1989, no writ). (See AGF's Brief 35-36)

Of course, Kyle Allen's testimony was not as limited as AGF depicts it; Allen's testimony is *not* the only evidence of the agreement; and the testimony of AGF's own representatives evidences the time, place and performance ingredients that were missing in *University Nat'l Bank v. Ernst & Whinney*. But whether an enforceable agreement exists may also be determined from conduct and other circumstances surrounding the communications. *Copeland v. Alsobrook*, 3 S.W.3d 598, 605 (Tex. App.--San Antonio 1999, pet. denied).

Indeed, prominent among those circumstances (from which the requisite definiteness can be inferred) is the fact that AGF *attempted* to perform the very agreement that the jury found had been made by withholding the designated amount from the loan proceeds by earmarking it for the discharge of Allen's tax delinquency, and by attempting to get the money to the taxing authority (but failing to get it there in time). See *Harris v. Balderas*, 27 S.W.3d 71, 79 (Tex. App.--San Antonio 2000, pet. denied) (holding that terms of oral contract were reasonably inferable from the circumstances, including the nature of performance attempted by one of the parties).

The record is replete with evidence of AGF's conduct from which the requisite definiteness can be derived. Again, Esquivel testified that the services AGF agreed to provide, as part of the loan transaction, included "obtaining the amount of taxes due" and

“taking care of the taxes and paying them after the loan closed.” (RR 2: 162-63) In attempting to provide those services, AGF designated at the closing \$4,988.28 of Kyle’s borrowed funds to be delivered by AGF to the taxing authorities’ law firm on Kyle Allen’s behalf. Esquivel testified that when AGF agrees to provide these services, it is supposed to contact the law firm who filed the tax suit, pay the taxes immediately upon closing the loan by hand delivery and obtain a certificate of payment for the taxing authorities’ attorneys. (RR 2: 168-69, 180-82)

These circumstances sufficiently evidence the time, place and performance terms of an agreement that is sufficiently definite to be enforced. AGF’s effort at 35-36 to compare AGF’s agreement with Kyle to facts in *University Nat’l Bank v. Ernst & Whinney* is wasted.

B. The agreement was supported by consideration.

On this subject, AGF purports to recognize that, as this Court stated in *Copeland v. Alsobrook*, an exchange of promises “is sufficient consideration in Texas.” 3 S.W.3d at 606. Nevertheless, AGF argues:

Here, the alleged oral agreement is unenforceable because there was no exchange of obligations or promises between AGF and Allen. The only promise or obligation is AGF’s alleged promise to pay the back taxes and “take care” of the tax suit. But there was no return promise made by Allen. This one-sided alleged promise is insufficient to create an enforceable contract.

(See AGF’s Brief at 37) Attention is directed to this particular passage, not merely to highlight the arrogance of characterizing the clear agreement proven by the testimony of

AGF's own representatives as nothing more than an *alleged promise to take care of something*, but more importantly to expose the degree of wrong thinking it contains.

Kyle Allen went to AGF and executed a promissory note and a deed of trust for the very purpose of procuring AGF's promise (lest AGF forget), so there was clearly a mutual exchange of promises. And, AGF's argument does not own up to the legal effect of that fact. "A basic principle of contract law is that one consideration will support multiple promises by the other contracting party." *Fortner v. Fannin Bank in Windom*, 634 S.W.2d 74, 77 (Tex. App.--Austin 1982, no writ). And, as this Court said in *Mitchell v. Lawson*, 444 S.W.2d 192 (Tex. Civ. App.--San Antonio 1969, no writ), "the consideration for the principal agreement may be sufficient to support other promises that are subsidiary or collateral to the principal agreement." *Id.* at 196.

On those basic principles of contract law, the court in *Fortner* held that the borrower's promise to pay the loan served as sufficient consideration for the lender's promise to fund the loan *and* to file the title to the car he was purchasing. 634 S.W.2d at 76-77. This case is no different.

V. As found by the jury, AGF is alternatively liable for negligently causing the foreclosure.

AGF contends that its "actions do not give rise to liability in tort." (*See AGF's Brief at 38*). The crux of AGF's argument is that it has no duty to not be negligent, because "Allen's remedy rests in contract." *Id.* at 39. The trial court's judgment, of course, rightly rests on AGF's liability for breach of contract, as a result of which the court need not reach this part of AGF's argument. But if for some reason the Court

determines that Allen does not have a contract remedy (as AGF also urges), then AGF's liability may be properly based on the jury's negligence finding.

“The acts of a party may breach duties in tort or contract or simultaneously in both.” *Morriss v. Enron Oil & Gas Co.*, 948 S.W.2d 858, 869 (Tex. App.--San Antonio 1997, no writ). That is the easy part of this analysis, because “[t]he distinction between contract and tort actions is not always entirely clear.” *Thomson v. Espey Huston & Associates, Inc.*, 899 S.W.2d 415, 420 (Tex. App.--Austin 1995, no writ).

Here are the general considerations, as stated in *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617 (Tex. 1986), reiterated in *Southwestern Bell Telephone Co. v. DeLanney*, 809 S.W.2d 493 (Tex. 1991):

The nature of the injury most often determines which duty or duties are breached. When the injury is only the economic loss to the subject of a contract itself the action sounds in contract alone.

Id. at 618 and 495 respectively. If Kyle Allen's loss of his house was only the loss of the subject of the contract, then the trial court's judgment for breach of contract should be affirmed. If not, the judgment should still be affirmed, because the principles of *Jim Walters Homes* and *DeLanney* do not limit liability for breach of contract to a loss of the subject of the contract. As a last alternative, the judgment should be modified to base AGF's liability on the negligence found by the jury.

Kyle Allen's house loss is distinguishable from the economic losses to the contract subjects in *Jim Walters Homes* (house building contract) and *DeLanney* (contract for yellow page advertising) and their progeny. The main subject of the agreement in

question was Allen's delinquent taxes, as opposed to the house itself. *Cf. T.O Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 223 (Tex. 1992) (discussing collateral duty to exercise care in protecting loan collateral). This aspect of the agreement also distinguishes it from a wrongful security interest foreclosure, the remedy for which has been held to be solely in contract. *See, e.g., UMLIC VP LLC v. T & M Sales and Environmental Systems, Inc.*, 176 S.W.3d at 612-15.

“The fact that an act is induced by and done pursuant to a contract does not shield it from regular tort liability.” *Goose Creek Consolidated Ind. School Dist. v. Jarrar's Plumbing, Inc.*, 74 S.W.3d 486, 494 (Tex. App.--Texarkana 2002, pet. denied). And, when the nature of the loss extends to injury that is not merely an economic loss of contract subject, it is actionable in tort. *Id.* at 494-95. In the context of a duty to exercise care, this could not be a case of mere “nonfeasance,” as AGF argues at 40, but is rather misfeasance. As discussed above, the problem is that AGF carelessly failed in its attempt to get the loan proceeds that it had withheld to discharge Allen's tax delinquency to the taxing authorities until it was too late.

VI. The court of appeals correctly held that the trial court did not abuse its discretion in excluding Kyle Allen's foreclosure excess affidavit.

The standard of review on this subject is abuse of discretion. *Crescendo Investments, Inc. v. Brice*, 61 S.W.3d 465, 477 (Tex. App.--San Antonio 2001, pet. denied). “An abuse of discretion occurs when the court acts without reference to any guiding rules and principles.” *Id.* Even if the court determines that the trial court did abuse its discretion, AGF must still “show the error probably caused the rendition of an

improper judgment.” *Id.* To be harmful, “the excluded evidence must be controlling on a material issue.” *Id.*

AGF’s last-ditch complaint that the exclusion of Kyle Allen’s affidavit (to obtain the foreclosure excess) requires reversal cannot overcome those hurdles. In the first place, the court could have reasonably found that the affidavit was not false. Outside the jury’s presence, the court entertained testimony from tax law expert Mary Belan Doggett concerning the affidavit and other circumstances surrounding the redemption of the excess foreclosure proceeds. Ms. Doggett testified that, according to the tax law applicable at the time, only Kyle Allen was entitled to the excess and that, even though a lienholder, AGF was not. (*RR 4: 107-08*) Ms. Doggett also testified that the purpose of the affidavit was to state that Allen had not conveyed any interest in the foreclosure *excess* rather than an interest in the property that had been foreclosed, that other interests in the property itself are irrelevant to the taxing authorities, and thus that the affidavit (though poorly drafted) should be interpreted as referring to the foreclosure excess -- not the property. (*RR 4: 113-14*) In light of Ms. Doggett’s opinion about the purpose of the affidavit, it must be presumed that the court construed the affidavit against AGF’s contention that it was false in exercising its authority under Tex. R. Evid. 104 to resolve preliminary questions of admissibility.

The substance of the affidavit was not controlling on any material issue. It could not be relevant (much less controlling) on mitigation, as AGF claims, because it could have had nothing to do with the jury’s determination of market value. AGF’s argument

tries to tack the affidavit to Allen’s so-called “breach of the home equity agreement.”

(See AGF’s Brief at 44-45) But AGF did not sue Allen on that score.

PRAYER

Kyle Allen prays that AGF’s Petition For Review be denied and for such other relief to which he may be entitled.

Respectfully submitted,

CROFTS & CALLAWAY
A Professional Corporation
Thomas H. Crofts, Jr.
State Bar No. 05099200
4040 Broadway, Suite 525
San Antonio, Texas 78209
(210) 225-5551
(210) 225-7110 (telecopier)

SINKIN & BARRETTO,
P.L.L.C.
Steven A. Sinkin
State Bar No. 18438700
E. B. Barretto
State Bar No. 01816350
105 West Woodlawn
San Antonio, Texas 78212
(210) 732-6000
(210) 736-2777 (telecopier)

LAW OFFICE OF CARLETON
B. SPEARS, P.C.
Carleton B. Spears
State Bar No. 18893800
1015 N.W. Loop 410
San Antonio, Texas 78213
(210) 366-3100
(210) 366-3464 (telecopier)

By: _____
Thomas H. Crofts, Jr.

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of Respondent's Brief on the Merits was on this ____ day of December 2008, mailed by U.S. Mail, postage prepaid, to the following attorneys of record for the petitioner:

Richard C. Danysh
Christopher C. Rulon
Bracewell & Giuliani, L.L.P.
800 One Alamo Center
106 S. St. Mary's Street
San Antonio, Texas 78205

Thomas H. Crofts, Jr.