

NO. 08-0110

IN THE
SUPREME COURT OF TEXAS
AUSTIN, TEXAS

AMERICAN GENERAL FINANCE, INC.

Petitioner,

v.

KYLE ALLEN,

Respondent.

On Appeal from the Court of Appeals
For the Fourth Court of Appeals District of Texas

REPLY BRIEF OF PETITIONER AMERICAN GENERAL FINANCE, INC.

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SUMMARY OF ARGUMENT

The courts use conflicting standards when applying the DTPA to loans. The court of appeals adopted a standard for determining whether a loan is a good or service for the purposes of the Texas Deceptive Trade Practices—Consumer Protection Act ("DTPA") that conflicts with other standards used by the Texas courts. Unlike those other standards, the court of appeals' overly broad standard wrongly imposes DTPA liability upon Petitioner American General Finance, Inc. ("AGF"). Moreover, the home equity loan made by AGF to Respondent Kyle Allen ("Allen") is not analogous to checking account services, as Allen incorrectly claims. Unlike checking account services, loans and services related to loans are excluded from liability under the DTPA.

Neither presumptive nor constructive knowledge applies to usury. Because it is undisputed that Allen never received the usurious demands allegedly made by AGF, Allen instead argues that he either presumptively or constructively received them. However, the principles of presumptive and constructive knowledge do not apply to a usury claim.

No causation language and no mitigation instruction in the charge. Allen's contention that AGF judicially admitted through trial testimony that it caused Allen's damages is not correct, because most of the purported admissions have nothing to do with causation, and because the testimony does not meet the standard for judicial admissions. Moreover, although the trial court submitted a jury question regarding the measure of damages, the submission did not include the necessary causation language linking the measure of damages to the liability questions or a mitigation instruction.

The alleged oral agreement is unenforceable. The testimony of AGF employee Mark Esquivel regarding actions taken after the alleged oral agreement was made did not provide sufficient definiteness or certainty to the agreement, as Allen mistakenly claims. Moreover, Allen did not testify to any consideration given by AGF for the alleged oral agreement. The claimed oral agreement is therefore unenforceable.

No tort liability. Allen cannot recover under a tort cause of action, because his claimed tort damages—the loss of his home—are not separate or independent from the damages that are available under his breach of contract action. Furthermore, AGF's alleged tort liability arises only from a duty imposed by AGF's and Allen's alleged contractual relationship, and not from any independent tort or other legal duty. Allen's negligence claim against AGF is therefore not legally viable.

Allen's false affidavit was improperly excluded. Allen wrongly claims that the affidavit he filed in the underlying tax suit is not false. However, the affidavit plainly and unambiguously states that Allen "never conveyed any right[,] title or interest" in the subject property, which is contrary to the security interest Allen conveyed to AGF as part of the loan transaction. Moreover, the opinions of Allen's expert improperly encroached upon the trial court's purview to decide questions of law, and they are wrong.

ARGUMENT

I. Allen Is Not A DTPA Consumer.

Before the trial court and during this appeal, AGF has challenged Allen's standing as a DTPA consumer with respect to the loan transaction made the basis of this suit. AGF has also demonstrated that the Texas courts are using different and conflicting standards to determine whether a given loan transaction is subject to the DTPA.

A. Allen's analogy between the home equity loan and checking account services fails.

Allen's first response to AGF's DTPA-related arguments is to analogize the home equity loan at issue here to the checking account services held by this Court to be actionable under the DTPA in *La Sara Grain Co. v. First National Bank of Mercedes*, 673 S.W.2d 558 (Tex. 1984). (Br. of Respondent, p. 13 ("AGF's represented service of using Kyle's funds to discharge tax liability on his behalf is...analogous to the service provided with a checking account.")).

A loan of money is *not* a checking account. Although checking account services are actionable under the DTPA, *La Sara Grain*, 673 S.W.2d at 564, a loan of money is not. *Id.* at 567. ("Because the loan involves only the extension of credit, La Sara has not shown itself to be a consumer and therefore has no DTPA claim."). Allen did not have a checking account with AGF, and he has not sued AGF for any services related to a checking account. Allen's analogy of the loan transaction made the basis of this suit to the checking account services at issue in *La Sara Grain* therefore fails.

Allen attempts to save his analogy by pointing out that in *Riverside National Bank v. Lewis*, 603 S.W.2d 169 (Tex. 1980), this Court broadly defined the term "services" in the context of a loan transaction that was purported to give rise to DTPA liability. Once again, Allen's argument fails. First, despite the Court's broad interpretation of services in *Riverside*, the Court nevertheless held that a loan was not a good or service for purposes of the DTPA. *See id.* ("We hold that an attempt to borrow money is not an attempt to acquire either work or labor as contemplated by the DTPA."). Second, the DTPA's definition of services specifically excludes services provided in connection with a loan or other intangible chattel. *FDIC v. Munn*, 804 F.2d 860, 864 (5th Cir. 1986) ("Services' does not include intangible chattels such as stocks, or loans.").

B. *Contrary to Allen's assertion, the court of appeals adopted an overly broad standard for determining whether a loan is subject to the DTPA.*

Allen's next argument takes issue with AGF's interpretation of the language used by the court of appeals when it adopted a sole borrower's objective standard for determining whether a loan is actionable under the DTPA. Allen appears to accuse AGF of falsely inserting the concept of "sole" or "solely" into the court of appeals' holding. (Br. of Respondent, p. 15-17). As demonstrated by the text of the court of appeals' opinion, AGF did nothing of the sort: "The determining factor is whether the borrower's 'objective' is *solely* to obtain a loan or to obtain a good or service." *American General Finance, Inc. v. Allen*, 251 S.W.3d 676, 695 (Tex. App.—San Antonio 2007, pet. filed) (emphasis added) (citation omitted).

Moreover, for the reasons set forth in AGF's petition for review and its brief on the merits, the sole objective standard does not restrict or narrow the scope of loan transactions potentially subject to DTPA liability. (Br. of Respondent, p. 16-17). Rather, because the sole objective standard moots any distinction between loans that are properly considered goods and services under the DTPA and loans that are not, under the holding the court of appeals, virtually every loan is effectively subject to DTPA liability. Accordingly, the court of appeals' sole objective standard greatly expands the scope of potential DTPA liability faced by Texas lenders. This is not only contrary to the legislature's intent, *Munn*, 804 F.2d at 863-64, it also does not provide meaningful guidance to trial courts faced with the task of determining if a given loan is subject to DTPA liability.

C. Application of the facts in this case to the differing standards used by Texas courts to determine whether a loan is subject to the DTPA confirms that those standards conflict.

In a related argument, Allen wrongly claims that there is no conflict in the various opinions addressing DTPA liability for a loan transaction. However, contrary to Allen's assertion, the Fifth Circuit noted the existence of the conflict more than 22 years ago. *Munn*, 804 F.2d at 864 ("The Texas courts, in DTPA cases involving intangibles [such as loans], have struggled to distinguish purchased services from activities not covered by the DTPA.").

Applying the various tests adopted by the Texas courts to the facts of this case further demonstrates the conflict. One of the more common tests for determining whether a lender is subject to DTPA liability is the incidental or ancillary services

standard, in which the "key principle in determining consumer status is that the goods or services purchased must be an *objective* of the transaction, and not merely incidental to it." *Maginn v. Norwest Mortgage, Inc.*, 919 S.W.2d 164, 166 (Tex. App.—Austin 1996, no writ) (quoting *First State Bank v. Keilman*, 851 S.W.2d 914, 929 (Tex. App.—Austin 1993, writ denied) (emphasis original)). Under this standard, Allen does not qualify as a consumer because the fundamental objective of his transaction with AGF was obtaining a home equity loan. (See CR 288, 290-91, 373, 375 (promissory note, deed of trust, loan disclosure statement, and closing statement)).

Likewise, Allen does not qualify as a consumer under the line of cases holding that a loan is not actionable under the DTPA where the borrower's objective was to refinance or otherwise satisfy an existing debt. *E.g.*, *Fix v. Flagstar Bank, FSB*, 242 S.W.3d 147 (Tex. App.—Fort Worth 2007, pet. denied); *Henderson v. Texas Commerce Bank-Midland, N.A.*, 837 S.W.2d 778, 782 (Tex. App.—El Paso 1992, writ denied); *Smith v. United States National Bank of Galveston*, 767 S.W.2d 820 (Tex. App.—Texarkana 1989, writ denied). This is because Allen obtained the home equity loan to repay his existing property tax indebtedness. (See CR 321 (Allen's deposition testimony, stating that "I was asking, you know, for a loan to help me out with the tax suit.")).

But a different result was reached when the court of appeals applied its sole objective standard to these facts. *Allen*, 251 S.W.3d at 695. These differing results contrast sharply with Allen's mistaken argument that there is no need for a clarification of the law. Even a cursory review of the authority cited by AGF and Allen confirms that, having had no guidance from this Court in more than 20 years, the courts of appeals and

the trial courts are applying conflicting and confusing rules when determining whether a loan may or may not form the basis of a DTPA claim.

D. *Allen's escrow service authority is distinguishable.*

Allen cites to two cases, *Zimmerman v. First American Title Insurance Co.*, 790 S.W.2d 690, 693-94 (Tex. App.—Tyler 1990, writ denied) and *Commercial Escrow Co. v. Rockport Rebel, Inc.*, 778 S.W.2d 532, 534-35 (Tex. App.—Corpus Christi 1989, writ denied), to support the erroneous proposition that a lender such as AGF is subject to DTPA liability for failing to provide escrow-related services. (Br. of Respondent, p. 20). These cases are both distinguishable from and inapplicable to this matter, because neither case involved the claimed liability of a lender. *See Zimmerman* 790 S.W.2d at 693-94 (title company sued by real estate agent for negligently closing real estate sale); *Commercial Escrow Co.*, 778 S.W.2d at 534-35 (seller sued escrow agent for wrongful disbursement of earnest money).

For these reasons, and for the reasons set forth in AGF's prior submissions, this Court should grant AGF's petition for review so that it may appropriately limit, and clarify, the circumstances under which a loan may give rise to DTPA liability. This Court should further hold that the trial court properly granted summary judgment in AGF's favor as to Allen's DTPA claim.

II. Allen Did Not Receive The Alleged Usurious Demands.

AGF has requested that this Court grant AGF's petition for review so that it may clarify the law regarding the charging of usurious interest, and hold that there can be no usury liability when the alleged usurious demands were not received by the debtor.

A. *The principles of presumptive and constructive notice do not apply to Allen's usury claim.*

Despite the lack of any evidence that Allen ever received, read, or actually knew that AGF purportedly attempted to charge him with usurious interest, Allen argues that he presumptively or constructively received the demands. For the following reasons, Allen's presumptive and the constructive notice arguments fail.

Initially, Allen cites to no authority supporting the proposition that the presumption regarding the receipt of information communicated by mail applies to a usurious demand. (Br. of Respondent, p. 21-22). Instead, the "mail box" rule authority cited by Allen—Texas Rules of Civil Procedure 21a and 239a, and TEX. BUS. & COMM. CODE ANN. § 1.202—applies to service of pleadings in a lawsuit, the clerk's notice of the entry of a default judgment, and transactions governed by the Uniform Commercial Code. None of these situations is relevant to an alleged usurious demand.

Moreover, the mail box rule does not apply where, as here, it is conclusively rebutted by the evidence. *See, e.g.*, TEX. R. CIV. P. 21a ("Nothing herein shall preclude any party from offering proof that the notice or service was not received..."); *Cliff v. Huggins*, 724 S.W.2d 778, 780 (Tex. 1987) (noting that presumption of receipt "vanishes" upon introduction of evidence that the mail item was not received). Allen represented on his loan application that the Nashville Drive property—the location to which the alleged demands were addressed—was his residence, but Allen neither lived nor received mail there. (RR 3:69-70). Nor did Allen make any effort to have mail sent to him at the Nashville Drive property forwarded to his actual, out-of-state residence.

(RR 4:25-26). Allen also knew that his brothers, who at least did live at the Nashville Drive property, would not read any correspondence sent to Allen at that address or send such correspondence to him. (RR 4:25-27, 62).

As to the issue of constructive notice, Allen cites to no authority where the principle of constructive knowledge has been applied to a usury claim. Allen's constructive notice authority instead regards situations that are not analogous to his usury claim, such as the application of the bona fide purchaser rule in a dispute over title to real property, *Madison v. Gordon*, 39 S.W.3d 604, 606 (Tex. 2001), the legal construction and effect of a deed to real property, *Houston Oil Co. v. Griggs*, 181 S.W. 833, 837-38 (Tex. Civ. App.—Beaumont 1915), *aff'd*, 213 S.W. 261 (Tex. Comm. App. 1919, judgment adopted), and the service of pleadings and motions in a lawsuit. *Roberts v. Roberts*, 133 S.W.3d 661, 663 (Tex. App.—Corpus Christi 2003, no pet.); *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). Unlike an alleged usurious demand, all such situations involve filings made of record with a court or other public office.

Moreover, as confirmed by one of the cases upon which Allen relies, the principle of constructive knowledge "is harsh in its nature." *Houston Oil Co.*, 181 S.W. at 838. Therefore, application of the constructive knowledge principle to a usury claim—which would necessarily expand the scope of the usury statutes—would be directly contrary to this Court's narrow construction of those statutes. *See, e.g., Texas Commerce Bank-Arlington v. Goldring*, 665 S.W.2d 103, 104 (Tex. 1984) ("We have held that the usury

statutes are penal in nature and are to be narrowly construed.") (citing *Houston Sash & Door, Co. v. Heaner*, 577 S.W.2d 217 (Tex. 1979)); *Steves Sash & Door Co. v. Ceco Corp.*, 751 S.W.2d 473, 476 (Tex. 1988) ("Since usury statutes are penal in nature, they must be strictly construed.").

B. *The alleged usurious demands were not indirectly communicated to Allen.*

Allen further argues that a usurious interest charge may be indirectly communicated to a debtor. AGF does not dispute that, as a general proposition, a charge of interest may be indirectly communicated to a debtor—so long as the debtor actually receives the charge. Once again, Allen's argument fails because it is undisputed that Allen never received—directly, indirectly or otherwise—the two letters that he claims contained usurious interest charges. (RR 3:69-70, RR 4:25-27, 62).

Thus, the issue is not whether usurious interest may be indirectly communicated. Rather, the properly framed issue is whether a valid usury cause of action may be asserted where, as in this case, there is no evidence that the debtor ever received, read, or knew of the alleged usurious charge. For the reasons stated in AGF's petition for review and its brief on the merits, the answer is "no." See *George A. Fuller Co. of Tex., Inc. v. Carpet Services, Inc.*, 823 S.W.2d 603, 605 (Tex. 1992) ("[A] charge of interest must be communicated to the debtor."); WEBSTER'S ELEVENTH NEW COLLEGIATE DICTIONARY 251 (11th ed. 2003) (defining "communicate" as "to transmit information, thought or feeling *so that it is satisfactorily received or understood.*") (emphasis added).

C. *AGF did not waive its no evidence point.*

Allen's last argument regarding the usury charge is that AGF did not object to the term "charge" as used in the usury question submitted to the jury. But AGF's argument is not based on the language of the jury question.

Instead, AGF contends there was no evidence that a usurious charge of interest was actually communicated to Allen. AGF timely objected to the sufficiency of the evidence regarding Allen's receipt (or more accurately, non-receipt) of any allegedly usurious interest charge by filing motions for judgment notwithstanding the verdict and for new trial. (CR 854, 861-62, 989, 996-97). Accordingly, AGF did not waive its no evidence point. *Steves Sash & Door Co.*, 751 S.W.2d at 476 (stating that either a motion for judgment withstanding the verdict or a motion for new trial (or both) is sufficient to preserve no evidence objection).

This Court should grant AGF's petition for review and hold that to be actionable, there must be evidence that the debtor actually received and read or understood an alleged usurious charge.

III. The Trial Court Erred In Not Submitting A Damages Question Incorporating Causation Language Or A Mitigation Instruction.

AGF's brief on the merits asserts that the trial court abused its discretion by failing to submit a damages question incorporating the issue of causation or a mitigation instruction to the jury. In response, Allen wrongly suggests that AGF failed to object to the charge. (Br. of Respondent, p. 27). However, as set forth more fully at pages 27-28 of AGF's previously filed brief on the merits, counsel for AGF did object to the omission

of a damages question establishing a causal link between the AGF's conduct and Allen's alleged damages. (RR 6:13, 16). AGF's counsel also tendered a mitigation instruction, which the trial court refused. (CR 749; RR 6:17-18).

A. *AGF did not judicially admit that it was the exclusive cause of Allen's damages.*

Allen substantively argues that through the testimony of AGF's employees Mark Esquivel and David Ramos, AGF judicially admitted that its failure to comply with the alleged oral agreement to "take care of" the taxes caused Allen's damages—the foreclosure of the Nashville Drive property. However, a careful examination of the testimony given by Esquivel and Ramos cited in Allen's brief reveals that there was no judicial admission of causation.

Most of the testimony cited by Allen as purported judicial admissions—that AGF should have paid all of the back taxes but did not do so, that AGF failed to obtain a title policy, and that the failure to pay the back taxes was AGF's fault—that at most related to liability issues or other matters, but not causation. (*See* Br. Of Respondent, p. 28-29) (citing RR 2:160-61, 163, 171-72, 181-82, 186, 189). Accordingly, such testimony does not constitute judicial admissions regarding the cause of Allen's claimed damages.

In fact, only one of the purported admissions arguably relates to the issue of causation. That testimony, which was given by Esquivel, is described by Allen as follows: "[I]f AGF had provided the services it agreed to provide, there would have been no tax foreclosure judgment and Allen would still have his home." (*See* Br. of Respondent, p. 29 (citing RR 2:171)).

However, during this part of his examination, Esquivel was not asked to consider other potential causes of foreclosure, such as AGF foreclosing on its own lien due to Allen's failure to repay the home equity loan. Nor was Esquivel asked about the fact that Allen did not notify AGF of the tax foreclosure sale even though it had a security interest in the Nashville Drive property. (RR 2:171). Esquivel subsequently testified that AGF could have foreclosed on its lien, (RR 3:83-84), and that AGF had no notice of the tax suit foreclosure. (RR 3:120-21). Esquivel testified further that had AGF been notified of the tax suit foreclosure, AGF "would have tried to do something" about it. (RR 3:133).

Because Esquivel did not testify that AGF's failure to pay the back taxes was the *only* cause of the foreclosure, it did not constitute a judicial admission as to causation. *See Mendoza v. Fidelity and Guaranty Ins. Underwriters, Inc.*, 606 S.W.2d 692, 694 (Tex. 1980) (stating that, in order to constitute judicial admission, testimony must—among other things—be deliberate, clear and unequivocal as to the relevant issue).

B. *Allen confuses AGF's alleged liability and his duty to mitigate, which are independent concepts.*

Allen then argues that a mitigation instruction was not necessary, because "a plaintiff's joint failure to exercise ordinary prudence has no bearing on a defendant's liability for breach of contract." (Br. of Respondent, p. 30). The premise for this argument is that a mitigation defense is not permitted in a breach of contract action. Because this premise is not correct, *Walker v. Salt Flat Water Co.*, 96 S.W.2d 231, 232, 128 Tex. 140 (Tex. 1936); *see STATE BAR OF TEX., Texas Pattern Jury Charges* PJC

110.7 (2006) ("Defensive Instruction on Mitigation – Contract Damages"), the argument fails.

Allen's argument also fails because it confuses the concepts of comparative fault and the mitigation of damages, which are separate and distinct. *See Hygeia Dairy Co. v. Gonzalez*, 994 S.W.2d 220, 224 (Tex. App. – San Antonio 1999, no pet.) ("A mitigation of damages instruction is proper when the negligence complained of merely contributed to or added to the extent of the losses or injuries, but has no part in causing the incident in question.").

Here, there was evidence that Allen did not act reasonably after the home equity loan closed (for example, by failing to communicate with AGF), (RR 3:112-21, Def. Ex. 2, 3), and that if Allen had acted reasonably (for example, by notifying AGF of the tax suit foreclosure proceedings), the tax suit foreclosure could have been avoided. (RR 3:133). An instruction on mitigation should therefore have been included with the damages question. *Hygeia Dairy*, 994 S.W.2d at 224; *Pulaski Bank & Trust Co. v. Texas Am. Bank/Fort Worth, N.A.*, 759 S.W.2d 723, 735 (Tex. App.—Dallas 1988, writ denied).

Allen further claims there was no need to submit a damages question because the measure of foreclosure damages is the fair market value of the property. AGF does not dispute the proposition that fair market value may be an appropriate measure of damages in certain circumstances. What AGF does dispute, however, is how the measure of damages in this case—that is, the fair market value of the Nashville Drive property—was connected—or, more accurately, *not* connected—to the liability questions submitted to the jury.

Typically, the connection between liability and the measure of damages is made using causation language, such as: "What sum of money, if any, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for *his* damages, if any, that resulted from such failure to comply." See STATE BAR OF TEX., *Texas Pattern Jury Charges* PJC 110.2 (2006) (second emphasis added); see also STATE BAR OF TEX., *Texas Pattern Jury Charges* PJC 11.2 (2006) (measuring damage to property as the difference in market value "immediately before and immediately after the occurrence in question"). Because the trial court did not submit a damages question that included this kind of causation language, (CR 976), the jury could not consider whether Allen could have mitigated his damages.

C. *Allen's characterization of his damages as direct is irrelevant, because the issue of whether a defendant caused a plaintiff's direct damages is a jury question.*

Allen's last argument regarding the causation/mitigation issue is that any damages he suffered were "direct," and that the trial court therefore did not have to submit a damages question encompassing causation. (Br. of Respondent, p. 31-32). However, even if such a characterization of Allen's damages was correct (which, for the reasons set forth in AGF's previously filed brief on the merits, is disputed) (Br. of Petitioner, p. 28-29) it is beside the point. This is because the amount of direct damages (if any) that were caused by a defendant's acts or omissions is a question of fact for the jury. *Scharer v. John's Cars, Inc.*, 776 S.W.2d 228, 231 (Tex. App.—El Paso 1989, writ denied).

In sum, the trial committed reversible error by failing to submit a damages question that included both causation language and a mitigation instruction.

IV. Allen's Claim For Breach Of The Alleged Oral Agreement Fails.

AGF has challenged the legal definiteness and certainty of its alleged oral agreement to "take care of the taxes," and whether the agreement was supported by consideration.

A. *Neither AGF's "attempted" performance nor the other evidence cited by Allen provides sufficient evidence of the alleged oral agreement.*

Allen's initial attempt to rebut these arguments is a mistaken claim that AGF's partial payment of the taxes (which Allen characterizes as the "attempted" performance of the alleged agreement) constitutes legally sufficient evidence of the alleged oral agreement. Allen's argument is based on a misreading of *Harris v. Balderas*, 27 S.W.3d 71, 79 (Tex. App.—San Antonio 2000, pet. denied) which, according to Allen, holds that the "terms of oral contract were reasonably inferable from the circumstances, including the nature of the performance attempted by one of the parties." (Br. of Respondent, p. 34).

However, the *Harris* court did not hold that the terms of the alleged oral agreement at issue in that case—an agreement to settle a lawsuit—were reasonably inferable from one party's attempted performance of the agreement. Rather, what the *Harris* court actually held was that there was a fact issue regarding the existence of the alleged settlement agreement sufficient to deny competing summary judgment motions filed by the parties regarding the existence/non-existence of the agreement. *Id.*

Allen next claims that testimony from AGF employee Mark Esquivel sufficiently proves up the essential terms of the alleged oral agreement. (Br. of Respondent, p. 34-35)

(citing RR 2:162-63)). Esquivel, however, did not testify to an oral agreement that was separate or independent from the home equity loan. (RR 3:107-08). Instead, he explained that his duties in making loans included the "handling of tax suits for customers who obtain loans from American General." (RR 2:162). Moreover, Esquivel's testimony regarding the terms of the alleged oral agreement was consistent with Allen's testimony—that AGF was to take care of the taxes. (*Compare* RR 2:163 (Esquivel testified that AGF was "taking care of the taxes and paying them after the loan closed") *with* RR 3:168, RR 4:46, 49 (Allen testified that AGF was to take care of and pay the taxes)). This is not evidence of a sufficiently definite or certain agreement. *University Nat'l Bank v. Ernst & Whinney*, 773 S.W.2d 707, 710 (Tex. App.—San Antonio 1989, no writ).

Allen also directs this Court to certain testimony from Esquivel and AGF employee David Ramos regarding what AGF *should have done* to pay the back taxes. (Br. of Appellee, p. 16-17) (citing to RR 2:168-70, 172-76, 180-82, 186; RR 3:63, 146-49). Testimony regarding *post-formation conduct* does not and cannot cure the alleged oral agreement's fatal indefiniteness *at the time the agreement was allegedly made*, because neither a court nor a jury can supply essential contract terms not agreed upon by the parties. *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992); *University Nat'l Bank*, 773 S.W.2d at 710.

B. *Allen did not testify as to any consideration for the alleged oral agreement.*

With respect to AGF's argument that the alleged oral agreement fails for lack of consideration, Allen claims that his promise to repay the home equity loan was sufficient consideration for both: (1) AGF's agreement to make the loan in the first place; and (2) the alleged agreement to take care of the taxes. Tellingly, however, Allen's does not cite to any evidence that Allen and AGF agreed that Allen's promise to repay the home equity loan would be consideration for the agreement to repay the taxes.

The lack of evidence of such an agreement serves to distinguish this case from *Fortner v. Fannin Bank*, 634 S.W.2d 74 (Tex. App.—Austin 1982, no writ), where the plaintiff — borrower specifically testified that he agreed to repay the money he borrowed from the defendant bank to buy a car (plus interest) in exchange for: (1) the bank's loan of that money; and (2) certain services provided by the bank relating to the car's title. *Id.* at 77. Here, however, there is—at best—evidence that Allen told AGF that his purpose for obtaining the home equity loan was (in part) to repay the taxes. But Allen did not testify that he agreed to repay the home equity loan because AGF allegedly agreed to take care of the taxes.

For these reasons and the reasons set forth in AGF's prior submissions, Allen's breach of contract claim fails.

V. **Allen's Damages Are Not Recoverable In Tort Because They Are Not Separate Or Independent From His Contractual Damages, and Because AGF Owed No Tort Duty to Allen.**

In response to AGF's argument that it is not subject to tort liability, Allen wrongly relies on an artificial distinction between his claimed damages—the loss of his home versus AGF's failure to pay all of the back taxes. (Br. of Respondent, p. 37-38). Regardless of Allen's characterization of his damages, however, purely economic losses are not recoverable in tort unless they are "independent and separate" from the economic losses recoverable under a breach of contract claim. *Heil Co. v. Polar Corp.*, 191 S.W.3d 805, 815 (Tex. App.—Fort Worth 2006, pet. filed) (citing *Formosa Plastics Corp. USA v. Presidio Engineers & Contractors, Inc.*, 960 S.W.2d 41, 45-47 (Tex. 1998) and *Southwestern Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494 (Tex. 1991)).

In this case, and as tacitly admitted in Allen's brief, all of Allen's claimed damages are recoverable under his breach of contract claim. (See Br. of Respondent at p. 36, claiming that the trial court's judgment "rightly rests on AGF's liability for breach of contract..."). Allen therefore cannot and does not have tort damages that are separate and independent from any damages that are recoverable under his breach of contract claim.

Moreover, Allen fails to address the key issue in determining whether his claims sound in contract or tort—the source of the alleged duty. See *DeLanney*, 809 S.W.2d at 494-95 (examining the source of the alleged tort duty first, and prior to examining the nature of the plaintiff's alleged loss, when determining whether the plaintiff's claims were contractually or tort based). Here, the sole source of AGF's alleged duty was the claimed oral agreement to "take care of" the back taxes. Stated another way, in order to recover

for AGF's alleged negligence, Allen had to first prove the existence of the alleged oral agreement.

Nowhere, before the trial court or on appeal, has Allen cited to any duty on the part of AGF to pay the back taxes other than the contractual relationship between AGF and Allen. As such, Allen's claims against AGF sound in contract but not tort. *See DeLanney*, 809 S.W.2d at 494 ("[I]f the defendant's conduct – such as failing to publish an advertisement – would give rise to liability only because it breaches the parties' agreement, the plaintiff's claim ordinarily sounds only in contract."); *International Printing Pressman and Assistant's Union v. Smith*, 198 S.W.2d 729, 736 (Tex. 1946) ("[I]n cases where the duty imposed upon the defendant arises purely by virtue of a contract, the action for breach must necessarily be in contract.").

VI. Allen's Interpretation Of The False Affidavit Defies Its Plain Language, And The Affidavit Is Controlling To Material Issues.

The trial court committed harmful error by excluding from evidence a false affidavit filed by Allen in the underlying tax suit. In that affidavit, which was made so that Allen could redeem the excess proceeds following the sale of the subject property, Allen falsely swore that he had not conveyed any interest in the property to a third party.

In response to AGF's contention, Allen first argues that the affidavit was not false. But this argument is simply contrary to: (1) the affidavit's plain language: "I have never conveyed, nor transferred any right[,] title or interest in the above-referenced property...", (Def. Ex. 9); and (2) the undisputed fact that Allen had in fact conveyed a security interest in the property to AGF prior to the making the affidavit—when he took

out the home equity loan that forms the basis of this dispute. (See Def. Ex. 14 (AGF's loan file, including deed of trust conveying security interest)).

In a further effort to avoid the affidavit's plain language, Allen directs the court to certain testimony given outside of the jury's presence by Allen's expert, Mary Belan Doggett. Specifically, Doggett testified as to her interpretation of the affidavit and whether, under the tax law in effect at the time, AGF was entitled to notice of the tax suit proceedings. (RR 4:107-08, 113-14). However, Doggett's conclusions improperly encroached upon the trial court's purview to decide such pure questions of law. *Akin v. Santa Clara Land Co.*, 34 S.W.3d 334, 339 (Tex. App.—San Antonio 2000, pet. denied).

Moreover, Doggett's opinions are wrong. First, she ignores the unambiguous and false statement made by Allen quoted above—that is—that he had not conveyed any interest to the property. Second, as a matter of law, AGF was entitled to notice of the tax suit proceedings. See *Coakley v. Reisling*, 436 S.W.2d 315, 318 (Tex. 1968) ("Persons actually or constructively known to have an interest in the land should be joined as parties in a tax foreclosure suit.") (internal quotations omitted); *Murphee Property Holdings, Ltd. v. Sunbelt Sav. Ass'n of Texas*, 817 S.W.2d 850, 852 (Tex. App.—Houston [1st Dist.] 1991, no writ) ("[A]ctual notice to a lienholder of the pendency of a tax action seeking foreclosure of a superior lien is 'absolutely required' under due process and due course of law.") (citing *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983)).

Allen also mistakenly claims, without meaningful explanation, that the affidavit was not controlling as to any material issue. However, this argument ignores the issues of Allen's failure to mitigate damages and Allen's own breach of the home equity

agreement, which AGF pleaded as affirmative defenses to Allen's breach of contract claim. (CR 120). This argument also ignores the fact that AGF sued for the imposition of a constructive trust upon the excess foreclosure sale proceeds. (CR 119).

For these reasons, and the reasons set forth in AGF's brief on the merits, the trial court's exclusion of Allen's false affidavit was harmful error.

PRAYER

For the reasons stated herein, Petitioner American General Finance, Inc. asks this Court to grant its previously-filed petition for review, set this case for oral argument, and, after argument, reverse the judgments of the trial court and the court of appeals and render judgment in favor of Petitioner American General Finance, Inc. Alternatively, Petitioner American General Finance, Inc. asks that this Court reverse the judgments of the trial court and the court of appeals and remand for a new trial. Petitioner American General Finance, Inc. further prays for any other relief to which it may be entitled, and for general relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 13th, 2009, a true and correct copy of the foregoing has been sent by *certified mail, return receipt requested* to:

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