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Declined to Follow by [Milan Supply Chain Solutions, Inc. v. Navistar, Inc.](#), Tenn., August 2, 2021

960 S.W.2d 41

Supreme Court of Texas.

FORMOSA PLASTICS CORPORATION

USA and Formosa Plastic

Corporation, Texas, Petitioners,

v.

PRESIDIO ENGINEERS AND

CONTRACTORS, INC., Respondent.

No. 95–1291

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Argued Oct. 1, 1996.

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Decided Jan. 16, 1998.

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Dissenting Opinion to Original Opinion of July 9, 1997.

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Rehearing Overruled March 13, 1998.

Synopsis

Contractor brought action against project owner, alleging fraud, breach of contract, and breach of duty of good faith and fair dealing, and owner filed counterclaim, alleging breach of contract. The County Court at Law, Calhoun County, [Michael Fricke, J.](#), rendered judgment in favor of contractor after remitting portion of contractor's actual damages and offsetting owner's damage award. Owner appealed. The Court of Appeals, [941 S.W.2d 138](#), affirmed. Owner's application for writ of error was granted. The Supreme Court, [Abbott, J.](#), held that: (1) when a party fraudulently procures a contract by making a promise without any intent of keeping the promise in order to induce another into executing contract, a tort cause of action for that fraud exists; (2) there was no evidence to support entire damage award; and (3) Supreme Court could not consider request for voluntary remittitur.

Reversed and remanded.

Baker, J., filed a dissenting opinion in which Spector, J., joined.

Baker, J., filed an opinion, in which Spector, J., joined, dissenting to order overruling motions for rehearing and voluntary remittitur.


West Headnotes (18)

[1] **Contracts**  **Fraud and Misrepresentation**

As a rule, a party is not bound by a contract procured by fraud.

[32 Cases that cite this headnote](#)

[2] **Contracts**  **Fraud and Misrepresentation**

Fraud  **Effect of existence of remedy by action on contract**

Legal duty not to fraudulently procure a contract is separate and independent from duties established by contract itself.

[122 Cases that cite this headnote](#)

[3] **Fraud**  **Effect of existence of remedy by action on contract**

Tort damages are recoverable for a fraudulent inducement claim irrespective of whether fraudulent representations are later subsumed in a contract or whether plaintiff only suffers an economic loss related to subject matter of contract.

[381 Cases that cite this headnote](#)

[4] **Fraud**  **Effect of existence of remedy by action on contract**

If plaintiff presents legally sufficient evidence on each element of a fraudulent inducement claim, any damages suffered as a result of fraud sound in tort, even absent an injury that is distinct from any permissible contractual damages.

[161 Cases that cite this headnote](#)

[5] **Fraud**  **Elements of Actual Fraud**

Fraud cause of action requires a material misrepresentation, which was false, and which

was either known to be false when made or was asserted without knowledge of its truth, which was intended to be acted upon, which was relied upon, and which caused injury.

[442 Cases that cite this headnote](#)

[6] **Fraud** 🔑 Existing facts or expectations or promises

Promise of future performance constitutes an actionable misrepresentation if promise was made with no intention of performing at time it was made; however, mere failure to perform a contract is not evidence of fraud.

[312 Cases that cite this headnote](#)

[7] **Fraud** 🔑 Intent

Evidence presented on intent to deceive, as required for fraud claim, must be relevant to intent at time representation was made.

[69 Cases that cite this headnote](#)

[8] **Fraud** 🔑 Intent

Testimony provided more than a scintilla of evidence that project owner made representations to contractor with no intention of performing as represented in order to induce contractor to enter into contract at a low bid price and, thus, supported claim for fraudulent inducement; testimony established that in bid package and contract, project owner represented that contractor would have control of delivery of concrete necessary for project, and in contravention of representation, project owner decided, two weeks before contract was signed, to take over delivery of concrete without informing contractor.

[142 Cases that cite this headnote](#)

[9] **Fraud** 🔑 Difference between actual and represented value

Fraud 🔑 Difference between value and price paid

Two measures of direct damages are recognized for common-law fraud: the out-of-pocket measure and benefit-of-the-bargain measure.

[74 Cases that cite this headnote](#)

[10] **Fraud** 🔑 Difference between actual and represented value

Fraud 🔑 Difference between value and price paid

“Out-of-pocket measure” of damages for common-law fraud computes difference between value paid and value received, while “benefit-of-the-bargain measure” computes difference between value as represented and value received.

[92 Cases that cite this headnote](#)

[11] **Fraud** 🔑 Difference between value and price paid

Out-of-pocket measure for computing damages for common-law fraud allows injured party to recover actual injury suffered measured by difference between value of that which he has parted with, and value of that which he has received.

[52 Cases that cite this headnote](#)

[12] **Fraud** 🔑 Difference between value and price paid

Testimony of contractor's president regarding what he would have bid if he had known truth was not the proper measure of out-of-pocket damages in action for fraudulent inducement of contract; both of president's calculations incorporated expected lost profits on a hypothetical bargain, but out-of-pocket measure only compensates for actual pecuniary loss, not loss of profits that would have been received if contract had been performed.

[56 Cases that cite this headnote](#)

[13] **Fraud** 🔑 Difference between actual and represented value

Under benefit-of-the bargain measure of damages for common-law fraud, lost profits on bargain may be recovered if such damages are proved with reasonable certainty. [Restatement \(Second\) of Torts § 549\(2\)](#).

[47 Cases that cite this headnote](#)

[14] Fraud 🔑 [Difference between actual and represented value](#)

Testimony of contractor's president regarding what he would have bid if he had known truth, calculations which incorporated expected lost profits on a hypothetical bargain, was not proper measure of benefit-of-the-bargain damages in action for fraudulent inducement of contract; while a benefit-of-the-bargain measure can include lost profits, it only compensates for profits that would have been made if bargain had been performed as promised.

[63 Cases that cite this headnote](#)

[15] Fraud 🔑 [Difference between actual and represented value](#)

Proper calculation of benefit-of-the-bargain damages for fraudulent inducement of construction contract was contractor's anticipated profit on bid plus actual cost of job less amount actually paid by project owner.

[9 Cases that cite this headnote](#)

[16] Fraud 🔑 [Difference between actual and represented value](#)

Fraud 🔑 [Amount awarded](#)

Testimony of contractor's president was not legally sufficient evidence supporting an award of \$700,000 in damages for fraudulent inducement of contract by project owner; testimony as to what president would have bid had he known the truth did not establish benefit of any bargain made with project owner as it was not based on expenses incurred and profits lost on contract because of owner's representations, but rather was based on entirely hypothetical, speculative bargain that was never struck and would not have been consummated.

[64 Cases that cite this headnote](#)

[17] Appeal and Error 🔑 [Questions of law or fact](#)
Voluntary remittitur did not present a question of law which could be considered by the Supreme Court in fraud action.

[21 Cases that cite this headnote](#)

[18] Contracts 🔑 [Terms implied as part of contract](#)

There is no general duty of good faith and fair dealing in ordinary, arms-length commercial transactions.

[42 Cases that cite this headnote](#)

Attorneys and Law Firms

***43** [Molly H. Hatchell](#), [Andy G. Navarro](#), [Michael A. Hatchell](#), [Tyler, Joe R. Greenhill](#), [Bob E. Shannon](#), [Joseph R. Knight](#), Austin, for petitioners.

[Robert P. Houston](#), [Cynthia T. Sheppard](#), [John Griffin, Jr.](#), Victoria, [William Powers, Jr.](#), for respondent.

Opinion

[ABBOTT](#), Justice, delivered the opinion of the Court, in which [PHILLIPS](#), Chief Justice, [GONZALEZ](#), [HECHT](#), [ENOCH](#), [OWEN](#) and [HANKINSON](#), Justices, join.

We overrule Respondent's motion for rehearing and motion for voluntary remittitur. We withdraw our opinion of July 9, 1997, and substitute the following in its place.

In *Southwestern Bell Telephone Co. v. DeLanney*, 809 S.W.2d 493, 494–95 (Tex.1991), this Court held that a cause of action for negligence could not be based on an allegation that a party had negligently failed to perform a contract because such a claim sounded in contract, not in tort. Today we are requested to apply a similar analysis to preclude a recovery in tort for a fraudulent inducement of contract claim. We decline to do so, holding instead that our *DeLanney* analysis is not applicable to such a claim. However, because there is no probative evidence to support the entire amount of damages awarded by the trial court, we reverse the judgment of the

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