

Reversed and Rendered and Opinion filed February 17, 2000.



In The

Fourteenth Court of Appeals

NO. 14-98-00602-CV

LYNDA LOUISE ABNEY, Appellant

V.

MARY POLLETT, Appellee

On Appeal from the County Court at Law No. 1
Harris County, Texas
Trial Court Cause No. 644,770

OPINION

Pollett sued Abney for breach of a contract. Abney counterclaimed for breach of contract, fraud and statutory fraud. A jury found neither party breached the contract; however, it held Pollett liable to Abney for fraud for \$16,200 and awarded \$4,200 in attorney's fees. Pollett filed a motion to disregard the jury's answers to the damages questions, which the trial court granted and entered a judgment that Abney take nothing. In three points of error, Abney argues the trail court erred in granting the motion to disregard. We agree.

Background Facts

Abney agreed to move Pollett's house in exchange for title to three lots. Pollett represented to Abney the value of moving Pollett's house was equal to the value of the three lots. Along this line, Pollett also represented to Abney that the outstanding property taxes for the lots totaled about \$7,000, and that there was one well and two septic systems in working condition. Based on these representations, Abney told Pollett she would move two houses onto the lots.

After moving onto the property, Abney encountered numerous problems. For example, the well was condemned, the septic tanks were unuseable, and the outstanding property taxes were over \$19,000. Plus, Abney was required to litigate this outstanding tax balance against Harris County and Humble Independent School District. In the end, Abney lost the property because of this litigation.

Abney testified she suffered substantial damages as a result of Pollett's representations. For instance, she was forced to initially prepare the lots to move the houses onto them, which included repairing the well and septic tanks. She also was required to remove the houses from the lots.

The jury was charged with ten issues.¹ Questions numbers one, two and three were the breach of contract issues, answered against both Pollett and Abney. Question number four was the fraud issue, which was answered in favor of Abney. Question number five and six requested, using a clear and convincing burden of proof, whether Pollett made a "false representation to the contract . . . with actual awareness of the falsity thereof?" and whether "the injury to Lynda Abney result[ed] from the misrepresentation found to be fraud in special issue No. 4." Questions seven and nine asked what damages resulted from Pollett's fraudulent conduct, using a preponderance of the evidence burden of proof.

Motion to Disregard

¹ See *Appendix*, containing the entire jury charge.

After the verdict was accepted, Pollett moved to disregard the jury's answers to questions numbers seven and nine, which were the damages issues, arguing the jury's answers to questions numbers one, two, three, five and six render the damage answers immaterial.

Initially, we find Pollett did not preserve error to complain about the sufficiency of the evidence to support the jury's fraud verdict, because her motion to disregard did not allege there was no evidence to support the jury's finding of fraud. Rather, Pollett chose to base her motion to disregard solely on the immateriality of the jury's answers. *See Steves Sash & Door Co. v. Ceco Corp.*, 751 S.W.2d 473, 477 (Tex.1988). Thus, Pollett waived her sufficiency complaints. *See* TEX. R. APP. P. 33.1(a); *see, e.g., Holland v. Hayden*, 901 S.W.2d 763, 765 (Tex. App.–Houston [14th Dist.] 1995, writ denied).

Because the sufficiency of the evidence is not attacked, we only need to decide whether the trial court properly granted the motion to disregard. A trial court may only disregard a jury finding if it is unsupported by evidence, which complaint was not raised in this case, or if the issue is immaterial. *See* TEX. R. CIV. P. 301; *Spencer v. Eagle Star Ins. Co.*, 876 S.W.2d 154, 157 (Tex. 1994); *see generally*, 6 MCDONALD AND CARLSON'S, TEXAS CIVIL PRACTICE 2d §§ 8:14, 8:15, 47:11 (West 1998). A jury finding is immaterial only if the question should not have been submitted or if the question, though properly submitted, was rendered immaterial by other findings. *See C. & R. Transport, Inc. v. Campbell*, 406 S.W.2d 191, 194-95 (Tex. 1966). A jury finding may also be immaterial if its answer can be found elsewhere in the verdict, or if the finding cannot alter the effect of the verdict. *See Fleet v. Fleet*, 711 S.W.2d 1, 2 (Tex. 1986); *Mouton v. Beeline Trucking Co.*, 753 S.W.2d 820, 822 (Tex. App.–Houston [14th Dist.] 1988, no writ).

The jury, in questions one, two and three, found neither party breached the contract, thus, these answers do not affect the materiality of the fraud damage answers. Similarly, answers to questions five and six were questions seeking to find the elements of fraud under a clear and convincing evidentiary burden and were needed before Abney could receive punitive damages. Questions five and six, with their heightened burden of proof, had nothing to do with the jury's prior affirmative answer to fraud or its

subsequent answer to the amount of damages. Both of the questions required only a preponderance of evidence standard of proof.

The answer to a jury question that is conditioned on an affirmative answer to a prior question, and which requires a higher burden of proof than the prior question, does not render the answer to the prior question immaterial under these circumstances. We find the trial court erred in granting the motion to disregard. Stated another way, the jury's answer to the fraud and accompanying damage submissions are not precluded by a negative answer to the predicated questions that imposed a higher burden of proof. *See Rhodes, Broad Form Submission and Spencer v. Eagle Star Insurance Company: The Death of the Immaterial Issue*, 46 BAYLOR L. REV. 841, 853-55, 862 (1994); *cf. American Recreational Markets v. Hawkins*, 846 S.W.2d 476, 478 (Tex. App.—Houston [14th Dist.] 1993, no writ) (“[W]hen jury questions are conditioned upon an affirmative answer to a prior question, a negative answer to the preceding question renders all subsequent findings either improper, immaterial or devoid of legal significance.”). Although the questions submitted in this case were somewhat lacking in organizational and specific clarity, we must review and reconcile them if possible to carry out the intent of the verdict.

Because we sustain Abney's first point of error, we do not need to address her other two points. Accordingly, we reverse the judgment of the trial court and render judgment in favor of Abney in the amount of \$16,200 plus appropriate legal interest and attorney's fees as awarded.

/s/ Joe L. Draughn
Justice

Judgment rendered and Opinion filed February 17, 2000.

Panel consists of Justices Sears, Draughn, and Evans.**

** Senior Justices Ross A. Sears, Joe Draughn and Frank Evans sitting by assignment.

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

Appendix

Question No. 1. Did either of the persons named below breach the agreement in Question?

Answer "Yes" or "No" for each of the following:

Mary Pollette "No"

Lynda Abney "No"

Question No. 2. Was such breach of the agreement excused ?

Answer "Yes" or "No" for each of the following

Mary Pollette "No"

Lynda Abney "No"

If in answer to Question 1 you have found that either of the persons breached the agreement then answer the following question, otherwise do answer the following question.

Question No. 3. What amount of money, if any, if paid now in cash would fairly and reasonable compensate the person damaged as a result of the breach of said agreement in question?

Answer in dollars and cents for

Mary Pollette "None"

Lynda Abney "None"

Question No. 3A. What sum of money, if any, do you find to be reasonable Attorneys fees for the prosecution of this case by plaintiff, by answering the following:

1. for legal services rendered in the preparation and trial of this case in this court?

Answer in dollars and cents: \$1200.00

2. for legal services if this case is appealed to the Court of Appeals?

Answer in dollars and cents: \$ 1500.00

3. for legal services rendered in an appeal to the Texas Supreme Court

Answer in dollars and cents: \$ 1500.00

Special Issue No. 4. Do you find from a preponderance of the evidence that Mary Pollette committed fraud during the making of the contract signed February 7, 1994?

Answer: We do

You are instructed for the purpose of considering this issue that:

- A. Fraud occurs when
 1. there is a false representation of a past or existing material fact.
 2. the false representation is made to a person for the purpose of inducing that person to enter into a contract.
 3. the false representation is relied on by that person in entering the contract.
 4. that person thereby suffers injury.
- B. Fraud also occurs when a party conceals or fails to disclose a material fact within the knowledge of that party and when she knows that the other party is ignorant of the fact.
- C. A duty to disclose arises if a person makes a partial disclosure which is not the whole truth or if the person knows that the other party is ignorant of a material fact and does not have an equal opportunity to discover it. When one makes a partial disclosure and conveys a false impression, he has a duty to speak. That is, a speaker who makes a partial disclosure assumed a duty to tell the whole truth, even when the speaker was under no duty to make partial disclosure.

If you have answered Special Issue No. 4, “We do”, then answer this special issue; otherwise do not
Special Issue No. 5. From a clear and convincing evidence do you find that Mary Pollette made a false representation in reference to the contract of February 7, 1994 with actual awareness of the falsity thereof?

Answer: We do not

Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

Special Issue No. 6. If your answer to the preceding special issue No. 4 is “Yes”, then answer this special issue: otherwise do not answer the following issue.

From clear and convincing evidence did the injury to Lynda Abney result from the misrepresentation found to be fraud in special issue No. 4?

Answer: We do not

“Clear and convincing evidence” means the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established.

- A. Fraud occurs when
 1. there is a false representation of a past or existing material fact.

2. the false representation is made to a person for the purpose of inducing that person to enter into a contract.
3. the false representation is relied on by that person in entering the contract.
4. that person thereby suffers injury.

Special Issue No. 7. From a preponderance of the evidence what sum of money, if any, if paid now in cash, would fairly and reasonably compensate Lynda Louis Abney for her actual damages, if any that resulted from her reliance on Mary Pollette's misrepresentation, if any?

Answer in dollars and cents, if any

Answer: \$ 16, 200.00

Consider the following elements of Damage:

A. Consequential Damages which were the Natural, probable, and foreseeable consequence of her reliance on the misrepresentations.

B. Mental Anguish

You are instructed that, as used herein, mental anguish implies a relatively high degree of mental pain and distress; it is more than mere disappointment, anger, resentment, or embarrassment, although it may include all of these, and it includes mental sensation of pain resulting from such painful emotions as grief, severe disappointment, indignation, wounded pride, shame, despair an/or public humiliation.

Special Issue No. 8. What sum of money, if any, if paid now in cash, should be assessed against Mary Pollette and awarded to Lynda Abney as exemplary damages, if any, for the conduct found in response to special issue No. 7.

“ Exemplary damages” means an amount that you may in your discretion award as a penalty or by way of punishment.

You may consider

- a. The nature of the wrong
- b. The character of the conduct involved.
- c. The degree of culpability of Mary Pollette
- d. The situation and sensibilities of parties.
- e. The extent to which such conduct offends a public sense of justice and propriety.

Answer in dollars and cents, if any

Answer "Zero"

Question No. 9. What sum of money, if any, do you find to be reasonable attorneys fees for the prosecution of this case by Defendant, by answering the following:

A. for legal services rendered in the preparation and trial of this case in this court?

Answer in dollars and cents: \$1200.00

B. for legal services if this case is appealed to the Court of Appeals?

Answer in dollars and cents: \$ 1500.00

C. for legal services rendered in an appeal to the Texas Supreme Court

Answer in dollars and cents: \$ 1500.00