Reversed and Remanded and Opinion filed September 21, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-01271-CV

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ROBERT H. GOSSUM, Appellant

V.

JOE GEORGE AND BRENDA GEORGE, Appellee

On Appeal from the 155th District Court
Waller County, Texas
Trial Court Cause No. 95-11-13,634

O P I N I O N

This is an appeal from a bench trial in which the trial court found that appellant Robert H. Gossum violated the Deceptive Trade Practices Act in connection with his construction work on appellees Joe and Brenda George's home. Appellant brings three issues, or points of error, claiming that (1) the evidence is insufficient to support the trial court's finding of damages, and insufficient to show that defendant acted knowingly; (2) the trial court erroneously admitted the appellees' evidence about damages where appellees never answered appellant's interrogatories without objections; and (3) the trial court erroneously admitted the appellees' evidence about attorney's fees where appellees never answered appellant's evidence without objections. We reverse the judgment of the trial court and remand this cause for a new trial.

BACKGROUND

Appellees' home had an old garage and driveway that they wished to replace. They approached appellant to tear down their garage, build a new one, and pour a new, accompanying concrete driveway. In December 1994 and January 1995, appellant submitted three proposals to appellees in which he quoted the price to tear down the existing garage and build a new garage with a bathroom, a roofed carport, a roofed patio, and a shed. The appellees paid appellant $20,540.50 of the total cost of $23,600.00 quoted by appellant. After appellant poured the concrete slab for the new garage, there were many holes and coarse, wet spots in it. Appellant offered three excuses for the holes: (1) that the cement trucks did not use chutes to pour the concrete; (2) there were clay balls in the concrete mix; and (3) appellees' dog made the holes when he walked on the wet concrete. There was also a beam of wood embedded lengthwise in the concrete, which Mr. George had never seen on a construction site. Appellant testified that this could have been oversight, but that it acted as an expansion joint between the main floor of the garage and the carport. No freeze boards were installed to prevent birds from entering. The cement sidewalk was poured as a solid block without stress lines to permit contraction and expansion of the sidewalk with the heat. The slab was built slightly slanted so that water from the patio would run into, instead of away from, the garage. A board in the rafters of the garage was too short, and appellant nailed on an extra piece of wood to make it longer. The extra piece gave slightly with the weight of the roof. The rafter was supported by a small block of wood rather than a beam. Although appellant said he would fix the problems that Mr. George found, he never did. He intended to make all corrections before he left the job, but appellees "ran him off" before he finished the job.

Appellees filed suit in November 1995.[1] The case was tried on the DTPA cause of action only in a bench trial.

DAMAGES

[1] The version of the DTPA in effect before September 1, 1995 applies to this case because Appellees' cause of action accrued before September 1, 1995, and they filed suit before September 1, 1996. *See* TEX. BUS. & COM. CODE ANN. § 17.42 (Vernon 1987 & Supp. 2000) (historical and statutory notes following the section in Supp. 2000).

In his first point of error, appellant contends the evidence does not support the trial court's findings of damages or appellant's knowing conduct. He contends the evidence is legally and factually insufficient to support these findings and conclusions of law.

Upon request of appellant, the trial court filed findings of fact and conclusions of law. Because we also have a reporter's record (statement of facts), the trial court's findings of fact are not conclusive. *Middleton v. Kawasaki Steel Corp.*, 687 S.W.2d 42, 44 (Tex.App.--Houston [14th Dist.] 1985), *writ ref'd n.r.e. per curiam*, 699 S.W.2d 199 (Tex.1985). In reviewing the trial court's findings of fact for legal and factual sufficiency of the evidence supporting them, we apply the same standards as we apply in reviewing the sufficiency of the evidence supporting a jury's finding. *Okon v. Levy*, 612 S.W.2d 938, 941 (Tex.Civ.App.--Dallas 1981, writ ref'd n.r.e.). Thus, in reviewing appellant's legal insufficiency points, we may consider only the evidence and inferences, viewed in their most favorable light, that tend to support the trial court's finding, disregarding all evidence to the contrary. *Davis v. City of San Antonio*, 752 S.W.2d 518, 522 (Tex.1988). If there is any evidence of probative force to support the finding, we must uphold the finding. *See Sherman v. First Nat'l Bank*, 760 S.W.2d 240, 242 (Tex.1988).

In reviewing appellant's claim of factual insufficiency, we must examine all of the evidence. *Lofton v. Texas Brine Corp.*, 720 S.W.2d 804, 805 (Tex.1986). We may set aside the finding only if the evidence is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex.1986); *Superior Derrick Services v. Anderson*, 831 S.W.2d 868, 871 (Tex.App.--Houston [14th Dist.] 1992, writ denied).

Conclusions of law will be upheld on appeal if the judgment can be sustained on any legal theory supported by the evidence. *Spiller v. Spiller*, 901 S.W.2d 553, 556 (Tex.App.--San Antonio 1995, writ denied). Conclusions of law will not be reversed, unless they are erroneous as a matter of law. *Hitzelberger v. Samedan Oil Corp.*, 948 S.W.2d 497, 503 (Tex.App.--Waco 1997, pet. denied). In addition, a trial court's conclusions of law are reviewed *de novo* as legal questions. *Id.* Incorrect conclusions of law will not require a reversal, however, if the controlling finding of facts will support a correct legal theory. *Id.*

A "no evidence" point of error may only be sustained when the record discloses one of the following: (1) a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a scintilla of evidence; or (4) the evidence establishes conclusively the opposite of a vital fact. *See Juliette Fowler Homes, Inc. v. Welch Assocs.*, 793 S.W.2d 660, 666 n.9 (Tex. 1990). There is some evidence when the proof supplies a reasonable basis on which reasonable minds may reach different conclusions about the existence of the vital fact. *See Orozco v. Sander,* 824 S.W.2d 555,556 (Tex. 1992).

In its findings of fact, the trial court found the concrete work was "substandard and failed to meet the accepted standards of workmanship within the industry for similar work," and the "concrete surfaces are totally unfit for the intended purpose." The court further found that the remaining work was "incomplete when defendant abandoned the project." The trial court found that appellees suffered $2,000.00 for the incomplete work and $6,000.00 for the defective concrete work, trebled for knowing conduct. Finally, the trial court awarded $4,000 in attorney's fees. Nothing in the findings and conclusions indicates what measure of damages was used by the court to assess these damages.

Appellant argues the evidence is insufficient under the "benefit-of-the-bargain" and "out-of-pocket" measures because appellees did not prove a comparison between the value of the work as received and either the price (out of pocket) or the represented value (benefit of the bargain). Appellants argue that the Georges proved only the price they paid for the work, which is only half the required proof of damages.

Out-of-pocket and benefit-of-the-bargain are two measures of damages under the DTPA. *W.O. Bankston Nissan, Inc. v. Walters,* 754 S.W.2d 127, 128 (Tex.1988). However, the DTPA allows recovery for actual damages. TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon 1987 & Supp. 2000) ; *Henry S. Miller Co. v. Bynum,* 836 S.W.2d 160, 162 (Tex. 1992). The supreme court has defined actual damages under the DTPA as the "total loss sustained [by the consumer] as a result of the deceptive trade practice." *Kish v. Van Note,* 692 S.W.2d 463, 466 (Tex.1985); *Smith v. Baldwin,* 611 S.W.2d 611, 617 (Tex.1981). Actual damages "includ[e] related and reasonably necessary expenses." *Kish,* 692 S.W.2d at 466.

Therefore, such direct measures as "benefit-of-the-bargain" and "out-of-pocket" are not exclusive. *Henry S. Miller Co.,*736 S.W.2d at 162. The supreme court has permitted other damages to ensure that the plaintiff is made whole. *See Kish*, 692 S.W.2d at 466-68 (damages for removing defective product); *White v. Southwestern Bell Telephone Co.*, 651 S.W.2d 260 (Tex.1983) (lost profits); *Smith v. Baldwin*, 611 S.W.2d 611, 617 (Tex.1981) (interest on indebtedness); *see also Mead v. Johnson Group, Inc.*, 615 S.W.2d 685, 687 (Tex.1981) (loss of credit); *Village Mobile Homes, Inc. v. Porter*, 716 S.W.2d 543 (Tex.App.--Austin 1986, writ ref'd n.r.e.) (loss for improvements made).

In this case, the only evidence of damages were George's checks to appellant for $20,540.50 in partial payment for work done on a contract for $23,600.00 for the entire job. In his answers to appellant's interrogatories, Mr. George testified ". . . all of the money I spent on the building was wasted."

There is another measure of damages in actions against repair contractors. Damages may be established by proving the amount paid for repairs and the entire lack of value thereof. *Brown Foundation Repair and Consulting, Inc. v. Henderson*, 719 S.W.2d 229, 231(Tex.App.-Dallas 1986, no writ); *Raye v. Fred Oakley Motors Inc.*, 646 S.W.2d 288, 290 (Tex.App.--Dallas 1983, writ ref'd n.r.e.); *Smith v. Kinslow*, 598 S.W.2d 910, 913 (Tex.Civ.App.--Dallas 1980, no writ). In *Brown Foundation*, testimony from Henderson, his wife, and Walker indicated that the purpose of the project was to place the chimney against the house. As a result of Brown's efforts, the previously existing three-inch gap had been narrowed to two-and-one-half inches. *Brown Foundation Repair*, 719 S.W.2d at 231. In that case, the court of appeals found that the jury could properly have believed that this small amount of correction was essentially worthless. *Id.* A jury finding of damages in an amount *equivalent to the amount paid* would be supported by the evidence. *Id.* (emphasis added).

In this case, the trial court found the appellant's concrete work was "totally unfit for the intended purpose." In appellant's first proposal, he proposed to build a garage, remove an old garage, and lay a concrete foundation for the garage. The total price for all the work in the first proposal was $9,843.00, and the cost of the concrete work was not separately shown. In the second proposal, appellant proposed to build a bathroom, a carport, and a patio with concrete

slabs for a total of $13,757.00. The cost of the concrete work was not separately shown. There is nothing in the record that establishes how much the Georges paid to appellant for the concrete work. There is no testimony establishing what it would cost to repair or replace the defective concrete. The record shows that the Georges suffered damages totaling $20,540.50, but no attempt was made to show how much of this sum was for the defective concrete work. Mr. George's interrogatory answer that all his money was "wasted" established that the concrete work, and the partial improvements on the concrete, was essentially worthless. Nothing in the trial court's findings and conclusions show how the trial court arrived at the $2,000.00 figure for "incomplete work" or the $6,000.00 for the concrete. Accordingly, the specific damage awards were unsupported by *any* evidence. We find that there was no evidence produced by appellees to sustain the trial court's award for $6,000.00 damages to the concrete work and $2,000.00 for the "incomplete work."

We find that the evidence is legally and factually insufficient to sustain the trial court's award of $6,000.00 for the defective concrete work and its $2,000.00 award for "incomplete work." We sustain appellant's point of error one as to the insufficiency of the evidence to sustain the trial court's awards.

Appellants request that we render judgment in their favor that appellees take nothing. However, because of inadequately developed testimony and insupportable findings as to actual damages, we conclude that this cause should be remanded in the interest of justice. TEX. R. APP. P. 43.3(b); *U.S. Fire Ins. Co. v. Carter*, 473 S.W.2d 2 (Tex.1971); *Stephens v. Felix Mexican Restaurant, Inc.*, 899 S.W.2d 309, 314 (Tex.App.–Houston[14th Dist.] 1995, writ denied); *First State Bank v. Keilman*, 851 S.W.2d 914, 932-933 (Tex.App.-Austin 1993, writ denied). Because liability of all issues is contested, we cannot order a separate trial solely on unliquidated damages, and we must reverse the entire cause for new trial. TEX. R. APP. P. 44.1(b); *Redman Homes, Inc. v. Ivy*, 920 S.W.2d 664, 669 (Tex. 1996)(no reversal for a new trial on unliquidated damages when the liability issues are contested).

We find it unnecessary to address the other issues, or points of error, raised by appellant. Our discussion above is dispositive as to appellant's points of error two and three concerning error in admitting evidence as to damages and evidence as to attorney's fees. Our

ruling is dispositive as to appellant's contention that there was no evidence of actual awareness of knowing misconduct by Gossum with respect to the concrete work. Because we must remand this cause for a complete new trial, appellees are not yet entitled to an award of attorney's fees, and all other issues will be retried. TEX. R. APP. P. 47.1; *Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 627 (Tex. 1996).

We reverse the judgment of the trial court and remand this cause for a new trial.

/s/ Ross A. Sears
Justice

Judgment rendered and Opinion filed September 21, 2000.

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

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

* Senior Justices Ross A. Sears, Joe L. Draughn, and Norman Lee sitting by assignment.