Affirmed and Opinion filed April 12, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-99-01070-CV

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JOE A. MEARS AND MARIE A. MEARS, Appellants

V.

HARRIS PARK, INC. DBA H*M/CENTURY 21 REALTY, SHEILA CLIBURN, AND DARRELL McNAIR, Appellees

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On Appeal from the 133rd District Court
Harris County, Texas
Trial Court Cause No. 98-50904

O P I N I O N

Appellants bought a house and later discovered it had a faulty foundation. They sued appellees under the Deceptive Trade Practice Act (DTPA) and for fraud, among other authorities. The court made a pre-trial ruling striking appellants' evidence of mental anguish because they had not properly responded to discovery on that issue. At the close of appellants' evidence at trial, the court granted a directed verdict to appellees because appellants' proof of actual damages was not supported by any evidence. On this appeal, we determine whether the court erred in making these rulings. We affirm.

Background

On February 20, 1996, appellants purchased realty from Ryan and Heather Taylor for $83,500. The tract included a house and a garage/garage apartment which was separated from the house. Ryan and Heather had purchased the home from Ryan's parents, Jeffrey and Dianna Taylor, approximately nine months prior for $27,000. The four Taylors were made defendants in the lawsuit but settled at trial, thus none are parties to this appeal. Ryan and Heather Taylor were represented in the sale of the realty by appellees, Harris Park, Inc. dba H*M/Century 21 Realty and Sheila Cliburn, a real estate agent employed by H*M/Century 21. Appellee, Darrell McNair, inspected the home for appellants prior to purchase and stated the foundation was on a slab and did not indicate any major problems with it. In 1998, appellants discovered the house did not have a slab foundation, as allegedly represented by H*M Realty, Cliburn, McNair, or the Taylors.

In July 1998, nearly two-and-a-half years after they bought the house, appellants hired Don Robinson, an engineer/home inspector, who conducted an inspection of the foundation. The inspection lasted approximately one-and-a-half hours. Robinson testified at trial that the house originally had a pier and beam foundation[1] and that he found the wood in that foundation had largely rotted and was no longer properly supporting the house. Robinson also found that the crawl space under the house had later been filled in with concrete. This concrete fill, he testified, was not a slab foundation and, in fact, was essentially no foundation at all because it did not support the structure. When asked if the foundation could be repaired, Robinson replied, "I don't see any way to make a repair of it. . . . You would just have to tear the house down and build another one." On cross-examination, Robinson stated that he did not observe any doors, windows sticking or sheetrock cracking, which are signs that the foundation is failing. The following exchange also occurred:

Q (by Taylor): Sir, your conclusions and your recommendations that this

[1] Robinson testified that a pier and beam foundation is one in which piers are anchored into the ground with beams setting atop the piers, and the house resting on the beams.

	house might have to be torn down at some time in the future, in order to say that for a fact, you would have to remove the siding a number of places in the house to see what the condition is at least around the exterior, correct?
A (by Robinson):	No, I don't think so. It's just that you would have to do that to define the scope of it, how long you were going to be able to use it.
Q:	It could be a long time, couldn't it?
A:	It depends on what conditions you find.

Robinson did not testify whether the house had any market value at the time of purchase or his inspection.

After the close of appellant's evidence, the trial court held an extended hearing to determine whether appellants put on any evidence establishing actual damages. It found they had not, and thus granted appellees' motion for directed verdict. Appellants now bring this appeal.

Actual Damages

Appellants first argue that the court erred in granting appellees' motion for directed verdict on the element of actual damages. In reviewing the propriety of a directed verdict, we must determine whether there is any evidence of probative force to raise fact issues on the material questions presented. *Szczepanik v. First S. Trust Co.*, 883 S.W.2d 648, 649 (Tex.1994). In our review, we consider all of the evidence in a light most favorable to the non-moving party, disregard all contrary evidence and inferences, and give the non-moving party the benefit of all inferences arising from the evidence. *See Qantel Business Sys., Inc. v. Custom Controls Co.*, 761 S.W.2d 302, 303 (Tex.1988). A court must submit to the jury only issues raised by pleadings and evidence. TEX. R. CIV. P. 278; *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 391 (Tex. 1997) (court properly refused to submit question to jury because question not supported by evidence). A directed verdict is proper when the evidence offered on a cause of action is insufficient to raise an issue of fact. *Knoll v. Neblett*, 966 S.W.2d 622, 629 (Tex .App.—Houston [14th Dist.] 1998, pet. denied).

Appellant seeks benefit-of-the-bargain and out-of-pocket damages. Benefit-of-the-bargain damages are the difference between the value as represented and the value received. *Formosa Plastics Corp. USA v. Presidio Eng'rs and Contractors, Inc.*, 960 S.W.2d 41, 49 (Tex. 1998). Out-of-pocket damages compensate a party for the difference between the value of that with which he or she has parted and the value actually received. *Id.*

Appellee claims these damages can be ascertained as follows:

- Market value represented by appellees of $90,000 (asking price of the property) or $83,500 (sales price);
- Deduct from either of those amounts $38,054, which, per a pre-sale appraisal dated November 16, 1995, is the value of the land and the improvements not attached to the house;
- Market value of the house is calculated at zero, according to Robinson's testimony;
- Damages are thus $51,946 based on the asking price or $45,446 based on the sales price.

The above evidence is not sufficient to have raised an issue to submit to the jury on damages. We need not enumerate every reason the evidence is infirm to warrant a jury issue. Rather, we only need focus on Robinson's testimony, which is the only evidence adduced by appellants that could conceivably be attributed to the market value of the house in the condition it was received.

Appellants assert that Robinson's testimony that the house would have to be torn down to repair the foundation is some evidence the house is a "tear-down," thus it is of no value. Even under our liberal standard of review for a directed verdict, a jury could not make the inferential leap from Robinson's testimony that the market value of the house was zero at the time of sale. First, contrary to appellants' claim, Robinson did not testify the house is a tear-down. Instead, he testified that in order to repair the foundation, the house would have to be torn down. This is not the same as stating the house simply should or would have to be torn down. That is, his assertion that the foundation is faulty is not tantamount to stating the house

is worthless.[2] Indeed, Robinson testified that the windows doors are functioning properly and that the sheetrock is intact. Also, because Robinson had not completely ascertained the condition of the house, it remained an open question at trial whether it would be functional for a "long time." Second, assuming Robinson was competent to do so, he did not testify to the market value of the house, only to the poor condition of its foundation. *See W.O. Bankston Nissan, Inc. v. Walters*, 754 S.W.2d 127 (Tex.1988) (holding that plaintiff's burden of proof is to show the difference between the fair market value of the item at the time it was delivered and the value as it was represented). Finally, Robinson's inspection did not take place until well over two years had passed since the date of closing, thus provided no basis to determine market value of the house at the relevant date in 1996 when title was delivered. *Id.* We find that a jury could not have properly made the necessary conclusions from the evidence that was adduced.[3]

Since appellants failed to produce evidence to raise a fact issue by which the jury could determine the element of actual damages, we hold the trial court did not err in granting a directed verdict in favor of appellees. We overrule appellants' first issue.

Mental Anguish Damages

Next, appellants complain that the court erred in granting a directed verdict because mental anguish damages are recoverable under DTPA, even in the absence of economic damages or physical harm. We do not reach the merits of this claim. After a lengthy hearing on the issue, the trial court properly excluded any evidence of appellants' mental anguish claims because they failed to properly answer or supplement discovery requests pertaining to damages. First, appellee directly asked Joe Mears in his deposition, Are you making a claim for mental anguish?" Mears' counsel interjected, "Not at this time." Second, appellees

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[2] We do not wish to minimize the severity of appellants' foundation problem, however, almost anyone living in the gumbo soil covering much of the Houston area is painfully aware that homes with severely damaged foundations can still have substantial market value.

[3] No questions were asked at trial that would constitute legally sufficient evidence of market value.

tendered an interrogatory requesting appellants specify all damages they incurred in this cause. Appellants never specified mental anguish damages. Rule 193.6, which deals with written discovery, states, in pertinent part, that

> (a) A party who fails to make, amend, or supplement a discovery response in a timely manner may not introduce in evidence the material or information that was not timely disclosed, or offer the testimony of a witness (other than a named party) who was not timely identified, unless the court finds that:
>
> > (1) there was good cause for the failure to timely make, amend, or supplement the discovery response; or
> >
> > (2) the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties.
>
> (b) [] The burden of establishing good cause or the lack of unfair surprise or unfair prejudice is on the party seeking to introduce the evidence or call the witness. A finding of good cause or of the lack of unfair surprise or unfair prejudice must be supported by the record.

TEX. R. CIV. P. 193.6.

Clearly, appellants did not supplement their written discovery response as required by the rule. The trial court did not find good cause for appellants' failure to supplement or that the inclusion of evidence would not unfairly surprise the defendants, nor did appellants carry their burden in establishing either of these exceptions. Therefore, since appellants were precluded from introducing evidence on the issue of mental anguish damages, the trial court did not err in granting a directed verdict. We overrule appellants' second and final issue.[4]

[4] We also note that any challenge to the court's ruling on mental anguish damages was waived because appellants failed to assign error to it on appeal. TEX. R. APP. P. 33.1.

The judgment of the trial court is affirmed.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed April 12, 2001.

Panel consists of Justices Yates, Wittig, and Murphy.[5]

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

[5] Senior Chief Justice Paul C. Murphy sitting by assignment.