Affirmed in Part, Reversed and Rendered in Part, and Opinion filed December 7, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00835-CV

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BEATRICE ELAINE MURPHREE, ET AL., Appellants

V.

LUD A. ZIEGELMAIR, Appellee

On Appeal from the 56th District Court
Galveston County, Texas
Trial Court Cause No. 87-CV-0943

O P I N I O N

Appellants, Beatrice Murphree, Doyle Murphree, and the D.R. Murphree Family Preservation Trust, appeal from the trial court's judgment in a suit brought against them by Lud Ziegelmair for violations of the DTPA, breach of warranty, misrepresentation, and fraud stemming from the sale of a tract of land. Appellants Murphree raise five issues for review, asserting that the trial court erred in rendering judgment rescinding the contract assessing damages. We affirm in part and reverse and render in part.

Background

Sometime in 1979, Doyle Murphree purchased an approximate five acre tract of land in Galveston County. As part of this transaction, Mr. Murphree also purchased a title insurance policy evidencing a seventy-foot wide pipeline right of way cutting across the tract. Subsequent to its purchase, Mr. Murphree then deeded the property to the D.R. Murphree Family Preservation Trust. Six years later, appellee Ziegelmair entered into an earnest money contract with the Trust and the Murphrees as trustees to purchase the tract. After execution of the earnest money contract, Mr. W.R. Williams, real estate broker for the Murphrees, acquired a title report for the tract which failed to mention the pipeline easement. Based on the earnest money contract, the title report, and a phone conversation with Mr. Murphree, Ziegelmair's attorney then prepared a contract for deed. Neither of these documents nor the conversation made reference to any easement, and the contract for deed signed by the Murphrees and Ziegelmair was also silent as to the tract's easement.

Eight months after executing the contract for deed, Ziegelmair finally learned of the easement. Realizing that this easement defeated the purpose for which he intended to use the land, a purpose of which the Murphree's were aware, Zieglemair contacted them in an attempt to reach an agreement. After failing to reach a compromise with the Murphrees, Zieglemair filed suit. Finding for Ziegelmair, the jury returned a verdict against both Mr. and Mrs. Murphree as well as the Trust based on knowing violations of the DTPA. As against Mr. Murphree and the Trust, the jury separately rendered a verdict on grounds of breach of contract and fraud. Both Murphrees and the Trust now appeal the judgment of the trial court.

Breach of Contract

In issue number one, appellants argue that the trial court erred in rendering judgment on the jury's findings to question number five regarding the breach of contract issue. Specifically, appellants argue that the court's judgment on this question was error as there was no evidence, or at best insufficient evidence, to support the breach of contract claim. We disagree.

In reviewing the factual sufficiency of the evidence, we examine all the evidence, and will set aside a verdict only if the evidence is so weak or the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. *See Cain v. Bain*, 709 S.W.2d 175, 176 (Tex.1986). The evidence is "insufficient" to support a fact finding if the evidence supporting the finding is so weak or the evidence to the contrary is so overwhelming that the answer should be set aside and a new trial ordered. *See Jaffe Aircraft Corp. v. Carr*, 867 S.W.2d 27, 29 (Tex.1993). To determine whether there is no evidence of a probative force to support a jury's finding, a reviewing court considers all evidence in the light most favorable to the party in whose favor the verdict has been rendered. In addition, the appellate court indulges every reasonable inference deducible from the evidence in that party's favor. *See Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex.1997), cert. denied, 523 U.S. 1119, 118 S.Ct. 1799, 140 L.Ed.2d 939 (1998). We will sustain a no evidence point if: (a) there is a complete absence of evidence of a vital fact; (b) we are barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; or (d) the evidence conclusively establishes the opposite of the vital fact. *Id*. More than a scintilla of evidence exists when the evidence supporting the finding, as a whole, "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex.1995) (quoting *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 25 (Tex.1994)). We now turn to the facts of the instant case. Prior to answering the question on breach of contract, the jury received court instructions to consider and interpret the following contractual provision based on the intent of the parties at the time of the agreement: "[c]onveying good and indefeasible title, with covenant of general warranty, subject to any conditions and restrictions, if any, existing against said property . . . ." The question then asked the jury to decide whether, in light of such instructions, the parties to the suit intended the foregoing contractual language to include the undisclosed pipeline easement in question. Answering "no," the jury determined that the easement was not intended by the parties to be a condition or restriction existing against the land.

We first address appellants' claim of no evidence. Here, appellants argue that no evidence is available to support the jury's finding as the "subject to" language in the contract for deed bars recovery as a matter of law. As support for this claim, appellants cite *McDaniel v. Calvert* for the proposition that "subject to" language in a deed serves to alert a grantee of limitations to his property such as easements. *See* 875 S.W.2d 482, 484-85 (Tex. App.–Fort Worth 1994, no writ). The facts of *McDaniel*, however, are distinguishable. *McDaniel* involved the issue of whether an easement described in a deed and transferred to another via a "subject to" clause excluded a subsequent transferee from its benefit. *See id.* at 484. Reasoning that the "subject to" language did not have this effect, the court held that such language merely alerts a grantee to the limitation imposed by the described easement rather than excepting any rights he might have in it. *See id.* at 485. In the present case, the argument between the parties was not over the benefit of the easement described in the deed, but rather, over the burden imposed by an easement not described or otherwise disclosed by the contract for deed. Accordingly, appellants' no evidence claim fails.

Neither do we agree with appellants that this finding was based on insufficient evidence. Delia Stephens, the attorney who drafted the earnest money contract for the land, testified as to the intent of the provision. In accordance with the jury's finding, she testified that appellant's promise to convey good title was only subject to the contract's conditions and restrictions, and that because the easement wasn't mentioned therein, it wasn't contemplated by the parties. The remainder of the testimony from each side essentially raises or disputes factual issues bearing on the intent of the parties regarding the provision. Therefore, we conclude that the jury's finding is neither devoid of evidentiary support nor so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Accordingly, we overrule appellant's first issue.

DTPA and Failure to Disclose

In their second issue, appellants argue that the trial court's rendition of judgment on the jury's answers to the DTPA and failure to disclose questions was error as these answers were

either unsupported by evidence or supported by insufficient evidence. Having already stated the standards of review for both no evidence and insufficient evidence issues, we now proceed to the applicable facts.

Regarding the DTPA and failure to disclose findings, the court submitted three questions to the jury. Question one asked the jury to decide whether any of the appellants engaged in false, misleading, or deceptive acts or practices causing damage to Ziegelmair. Question two asked whether any of the appellants represented the property in question as having uses, qualities, etc. which it did not have and if so, whether damages accrued to Zielgelmair as a result. Finally, question three asked whether, in an attempt to induce Ziegelmair to buy the property in question, any of the appellants failed to disclose information concerning the property known to them at the time of sale. The jury answered "yes" to all appellants in the first two questions; on the third question, however, the jury answered "yes" to only Mr. Murphree and the Trust.

We first address appellants' claim of no evidence. Here, appellants argue that no evidence is available to support the jury's finding as the "subject to" language in the contract for deed bars recovery under the DTPA and failure to disclose questions as a matter of law. In support of this argument, appellants cite *Prudential Ins. Co. of America v. Jefferson Associates, Ltd.* for the proposition that the contract's "subject to" language prevented the court, as a matter of law, from submitting the DTPA and disclosure questions to the jury. *See* 896 S.W.2d 156, 161 (Tex. 1995) While the *Prudential* Court did hold that an "as is" clause in a property contract may serve to negate the causation essential to recovery on DTPA and disclosure claims, the Court also cautioned that such a clause would not have this effect in every circumstance. *See id.* at 162. In fact, the *Prudential* court continued to state that "[a] buyer is not bound by an agreement to purchase something 'as is' that he is induced to make because of a fraudulent representation or concealment of information by the seller." *Id.* Because this is precisely what Ziegelmair alleged in his suit, the court did not err in submitting questions one through three. Accordingly, appellants' no evidence claim fails.

Likewise, we also disagree with appellants' claim that the jury's findings in questions one through three were based on insufficient evidence. The jury's answer of "yes" to question one, i.e., that appellant's engaged in false, misleading, or deceptive acts, drew evidentiary support from, among others, the testimony of Zeigelmair's attorney. She testified that prior to drafting the contract for deed, she contacted Mr. Murphree and asked him about the oil and gas activity on the land. He assured her that there was no such activity when in fact he knew of the gas pipeline running beneath the tract. The jury's findings on question two, i.e., that appellants represented that the tract had uses which it did not have, likewise had support in the evidence. Here, Ziegelmair testified that, in July 1985, he told appellants of his plans for developing the tract as a residence with a large pond, circular driveway, tennis or basketball courts, and shop buildings in the back. Ziegelmair's son, while not remembering appellant's exact words, testified that appellants responded favorably to such a use of the property. Finally, the jury's finding on question three, i.e., that appellants failed to disclose information of the easement, finds abundant support in the record as Ziegelmair and his attorney both testified that they were not informed of this fact. Therefore, we conclude that the jury's finding is neither devoid of evidentiary support nor so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Accordingly, we overrule appellants' second issue.

Fraud

In issue number three, appellants argue that no evidence existed to support the trial court's rendition of judgment on the jury's finding of fraud.[1] Here, appellants again rely on *Prudential's* holding that an "as is" clause in a property contract may serve to negate the causation necessary for recovery on a fraud claim. *See Prudential*, 896 S.W.2d 156, 162. However, as discussed previously, an "as is" clause will not have the effect of negating the

[1]The jury limited its finding of fraud to Mr. Murphree and the Trust while excluding Mrs. Murphree.

causation necessary for fraud where the buyer makes a purchase based on fraudulent representations or concealment on the part of the seller. *See id.*

Alternatively, appellants contend that their silence concerning the easement does not constitute fraud as the duty to speak does not arise until the silent party is aware of the facts. *See HTM Restaurants, Inc. v. Goldman, Sachs & Co.*, 797 S.W.2d 326, 329 (Tex. App.–Houston [14th Dist] 1991, writ denied]. In the instant case, "the facts" refer to the existence of the pipeline easement. On direct examination, counsel for Ziegelmair asked Mr. Murphree whether he was "aware of this pipeline back in 1979," to which Murphree answered "[y]es, very much so." Accordingly, appellants, Mr. Murphree and the Trust, were aware of the fact that the easement existed. Therefore, we overrule appellants' third issue.

Entry of Judgment Against Individual Defendants.

In their fourth issue, appellants, Mr. and Mrs. Murphree, argue that the trial court erred by entering judgment against them in their individual capacities. Specifically, appellants argue that no evidence existed to support the jury's finding that Mr. and Mrs. Murphree acted in their individual capacities in the land transaction. Moreover, appellants point to defects in appellee's pleading which render the judgment against them in their individual capacities as void.

We first address appellants' claim regarding the defective pleadings. Here, appellants' assert that no pleading exists to support any cause of action against Mr.or Mrs. Murphree in their individual capacities. As to Mr. Murphree, we disagree. The "Parties" section of appellee's Second Amended Original Petition provides the following: "[d]efendants, Doyle R. Murphree, Individually, and Doyle R. Murphree and Beatrice Elaine Murphree, Trustees of the D.R. Murphree Family Preservation Trust have heretofore been served with citation . . . ." Subsequent sections of the petition assert each cause of action separately. In each of these sections, appellee asserts that the "defendants" acted wrongfully. Because "defendants" included Mr. Murphree, in his individual capacity, as a defendant in the "Parties" section of his pleading, appellee's pleading supports the jury's finding of his individual liability.

Mrs. Murphree, however, is nowhere named as a defendant in her individual capacity in the pleading. In this regard, Texas law requires that a final judgment conform to the pleadings, and entry of the judgment must contain the full name of the parties, as stated in the pleadings, for and against whom judgment is rendered. *See* TEX. R. CIV. P. 301, 306. While conceding this, Ziegelmair argues that Mrs. Murphree has waived any error caused by this omission as her counsel failed to object at trial. TEX. R. APP. P. 33.1(a). As a general rule, appellant is correct in this assertion. *See id*. Jurisdictional defects, however, represent fundamental error which an appellant may raise for the first time on appeal. *See Mapco, Inc., v. Carter*, 817 S.W.2d 686, 687 (Tex. 1991). One such jurisdictional defect recognized by the Texas Supreme Court consists of a judgment entered against an entity never made a party in a plaintiff's petition. *See id*. Because Mrs. Murphree's name appears nowhere in the body of appellee's Second Amended Original Petition, the trial court's rendition of judgment against her was fundamental error and may be raised for the first time on appeal. Accordingly, we sustain appellants' fourth issue as regards Mrs. Murphree.

Defective pleadings aside, appellants also argue that Ziegelmair produced no evidence at trial to prove that Mr. Murphree acted in his individual capacity. As a result, he claims, the court erred by rendering judgment against him based on the jury's findings. We need not reach the merits of this claim, however, as appellants failed to object at trial. Mr. Murphree could have objected to the court's submission of the charge authorizing the jury to find him liable in his individual capacity. Because he failed to do so, nothing is preserved for review. TEX. R. CIV. P. 274; TEX. R. APP. P. 33.1(a). We overrule appellants' fourth issue as to Mr. Murphree.

Assessment of Additional Damages

In their final point of error, appellants assert that the trial court erred by granting Zieglmair a double recovery on the additional damages portion of its judgment. After closely analyzing the trial court's judgment, we find no such double recovery. Appellants concern of double recovery stems from the judgment's recitation of the jury's findings regarding

additional damages followed by the judgment's decree ordering that Ziegelmair recover these additional damages. While the judgment's recitation of these findings were proper inclusions, the recitations preceding the decretal portion of a judgment form no part of the judgment rendered. *See Holt Atherton Industries, Inc. v. Heine*, 797 S.W.2d 250, 253 (Tex. App.–Corpus Christi 1990) aff'd in part and rev'd in part on other grounds 835 S.W.2d80 (Tex. 1992); 5 ROY W. MCDONALD & ELAINE A. CARLSON, TEXAS CIVIL PRACTICE 2d §27:23 (1999). Because only those additional damages stated in the decretal portion of the judgment have legal effect, we overrule appellants' final point of error and affirm the judgment of the trial court in part and reverse and render in part. We reverse that portion of the judgment concerning the liablility of Mrs. Murphree in her individual capacity and render judgment that Ziegelmair take nothing against Mrs. Murphree in her individual capacity.

/s/ Maurice Amidei
Justice

Judgment rendered and Opinion filed December 7, 2000.

Panel consists of Chief Justice Murphy and Justices Amidei and Hudson.

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