Affirmed and Opinion Filed April 4, 2016

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00115-CV

SHIHAB DIAIS AND ODESSA DENTAL SOLUTIONS, P.A., Appellants
V.
LAND ROVER DALLAS, L.P. AND SNELL MOTOR COMPANY OPERATIONS GP, LLC, GENERAL PARTNER, Appellees

On Appeal from the 14th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-13-01137

MEMORANDUM OPINION

Before Justices Bridges, Francis, and Stoddart
Opinion by Justice Bridges

Appellants Shihab Diais and Odessa Dental Solutions, P.A. (Diais) appeal a jury's take-nothing judgment in favor of appellees Land Rover Dallas, L.P. and Snell Motor Company Operations GP, LLC, General Partner (Land Rover). Diais raises five issues challenging the trial court's exclusion of jury questions and plaintiff's exhibit 13. In two remaining issues, Diais argues the evidence is legally and factually insufficient to support the judgment, and he is entitled to a new trial based on newly discovered evidence. We affirm the trial court's judgment.

Background

Diais, a dentist and owner of Odessa Dental Solutions, P.A., lived in Odessa, Texas. His wife worked as the office manager and often used her Land Rover for work-related errands and

for transporting patients. Diais described the car as his wife's "passion, she loves it. It's a luxurious vehicle."

Diais had previously purchased a Land Rover from a San Antonio dealership, but had a bad experience. When he decided to buy another car for his wife, he visited the Dallas Land Rover dealership.

Michael McGovern, a sales guide with Land Rover, met with Diais and his wife on September 15, 2012. He knew the couple previously owned Land Rovers and were interested in the Range Rover or Range Rover Sport. He showed Diais two cars that day. Diais focused on a 2012 Range Rover Sport with an upgraded body kit. McGovern testified he did not say anything untruthful or represent the car as something it was not.

Although McGovern told Diais the Range Rover was the best SUV on the market, Diais said he knew that and "We were there to buy a vehicle so we didn't need any convincing." In fact, Diais admitted he made up his mind to purchase a Range Rover before ever going to the Dallas dealership or talking to anyone.

Diais and his dental practice jointly put down a deposit for the car that day. However, Diais did not drive away with the car because McGovern noticed some scratches that needed to be painted. Diais admitted he would not have noticed the blemishes.

On September 19, 2012, McGovern drove the car to Odessa without issue and delivered it to Diais's dental office. They finalized the paper work, and Diais paid $107,597.96 for the Range Roger Sport. Land Rover provided a four-year, 50,000 mile warranty on the vehicle. The Motor Vehicle's Buyer's Order, which Diais signed, indicated it was a new vehicle. However, his later experiences with the vehicle made him think the car was not new, but deteriorating.

After driving the car for three days, it "suddenly would not move" and hesitated when starting. The check engine light came on and remained on for the day. Mrs. Diais called Land

Rover and when she explained the engine light was not blinking, they told her not to worry about it and to bring it in for maintenance at her convenience when they were in Dallas. The engine light went off on its own, and the car drove without incident for a week.

Diais admitted despite the previous engine light issues, he drove the car to Lubbock about a week later for a business trip, and it ran very well. During the trip, there was a thunderstorm. He admitted the car may have suffered some minor damage, such as small dings, during the storm.

When Mrs. Diais drove the car to work the next Monday, the car would not accelerate over thirty miles per hour and the engine made a loud knocking noise. She did not notice any damage to the car at that time other than a little ding in the upper-right section of the windshield.

Diais called Land Rover, and the dealership towed the car back to Dallas. McGovern saw body damage that was not present when he delivered the car to Odessa.

Richard Johnson, the service manager for Land Rover, worked with technicians and participated in the diagnosis of the car. Land Rover determined the engine needed replacing. A service contract dated October 27, 2012 also noted repairs for a "body electric recall," "tailgate inoperative," and battery replacement.

Land Rover replaced the engine for free under the warranty. After testing the engine, Johnson was satisfied, as the service manager, that the engine was repaired. The engine replacement did not affect the car's value because it was covered by the warranty. Richard Cloud, Land Rover's general manager, explained "that's what the warranty is for, is to repair the vehicle." The body damage, however, was not covered by the warranty because it was not a manufacturer's defect.

Cloud testified he first had contact with Diais when the service and sales department contacted him about an issue with the car. During Cloud's email exchanges with Diais, he determined Diais was unhappy because of the engine failure. Cloud tried to negotiate a substitution of collateral, meaning he could swap one car for the equal value of another car, but he was unsuccessful because of the car's body damage.

After Land Rover replaced the engine and determined it was working back up to specifications, it offered to extend the warranty for an additional two years and 50,0000 miles past the original factory warranty for a total of seventy-two months or 100,000 miles, whichever came first. When Land Rover continued to call Diais about repairs, he informed Land Rover he no longer wanted the car and he never authorized Land Rover to make any repairs. Diais then refused to pick up the car from the dealership.

Diais felt forced to file suit after Land Rover refused to return his money for the car and "make it right." He sued for DTPA violations, breach of contract, negligent misrepresentation, common law fraud, ambiguity, and waiver. The case was tried to a jury. At the conclusion of the evidence, the jury was charged as to Diais's DTPA and breach of contract claims. The trial court refused to submit questions on his claims for fraudulent inducement, negligent misrepresentation, unconscionable action under the DTPA, and enforceability of the "as is" clause. The jury returned a take-nothing verdict in Land Rover's favor. Diais filed a motion for judgment notwithstanding the verdict, which the trial court denied. Diais filed a motion for new trial based on newly discovered evidence, which was denied by operation of law. This appeal followed.

Exclusion of Proposed Jury Questions

Diais argues in his first four issues that the trial court erred by excluding his proposed jury questions on fraudulent inducement, negligent misrepresentation, unconscionable action

under the DTPA, and enforceability of the "as is" clause. Land Rover first argues Diais waived his issues by failing to object to the trial court and obtain a written ruling. Alternatively, Land Rover argues no evidence supported the submission of any of Diais's proposed questions.

We first address the issue of preservation. The procedural rules for governing jury charges state in pertinent part that objections to the charge "shall in every instance be presented to the court . . . before the charge is read to the jury" and that "[a]ll objections not so presented shall be considered waived." TEX. R. CIV. P. 272. Further, the objecting party must point out distinctly the objectionable matter and the grounds of the objection. *Id*. However, "[t]here should be but one test for determining if a party has preserved error in the jury charge, and that is whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling." *Wackenhut Corp. v. Gutierrez*, 453 S.W.3d 917, 919–20 (Tex. 2015).

Diais submitted proposed jury questions and instructions for fraudulent inducement, negligent misrepresentation, unconscionable act under the DTPA, and enforceability of the "as is clause." During the charge conference, the trial court ruled that "[t]o the extent that both the Plaintiff and the Defendant have offered proposed forms of the charge, to the extent that the charge does not include language which was proposed by either . . . , the request to include said language including instructions and/or questions is denied . . ." When Diais's counsel stated, "We have specific objections as far as specific numbers that were not included but - - ." The court cut him off and stated, "I think I just covered that counsel. Anything other than what I've just covered?" to which counsel tried to argue again for the inclusion of a counter-instruction. The court then stated, "Counsel, it includes everything that you proposed that is not in there and everything that is in there that you did not propose. I'm not sure how I can make it more comprehensive." The record is clear the trial court was aware of and rejected his proposed questions. Thus, Land Rover's waiver argument is without merit.

The trial court has broad discretion in submitting jury questions so long as the questions submitted fairly place the disputed issues before the jury. *McIntyre v. Comm'n for Lawyer Discipline*, 247 S.W.3d 434, 443 (Tex. App.—Dallas 2008, pet. denied). This broad discretion is subject only to the limitation that controlling issues of fact must be submitted to the jury. *McKinney Indep. Sch. Dist. v. Carlisle Grace, Ltd.*, 222 S.W.3d 878, 888 (Tex. App.—Dallas 2007, pet. denied).

A party is entitled to have controlling issues submitted to the jury if they are supported by "some evidence." *Moore v. Lillebo*, 722 S.W.2d 683, 686–87 (Tex. 1986); *see* TEX. R. CIV. P. 278. A controlling issue is one that presents to the jury a complete ground of recovery or defense. *Edwards Transp., Inc. v. Circle S Transp., Inc.*, 856 S.W.2d 783, 788 (Tex. App.—Amarillo 1993, no writ.). Controlling issues may be submitted by questions, instructions, and definitions raised by the pleadings and the evidence. TEX. R. CIV. P. 278.

A trial court may refuse to submit a question only if no evidence exists to warrant its submission. *Elbaor v. Smith*, 845 S.W.2d 240, 243 (Tex. 1992). In determining whether a trial court should have submitted a question to the jury, the reviewing court must examine the record for evidence supporting its submission and ignore all evidence to the contrary. *Id.*

To determine whether an alleged error in the jury charge is reversible, we must consider the pleadings of the parties, the evidence presented at trial, and the charge in its entirety to determine if the trial court abused its discretion. *Rosell v. Cent. W. Motor Stages, Inc.*, 89 S.W.3d 643, 653 (Tex. App.—Dallas 2002, pet. denied). A reversal is warranted when the trial court denies proper submission of a valid theory of recovery raised by the pleadings and evidence. *Id.* Otherwise, we do not reverse unless harm results. *Id.*

A. Fraudulent Inducement

To bring a claim for fraud in the inducement, a plaintiff must show the elements of fraud and must show that he has been fraudulently induced to enter into a binding agreement. *In re Guardianship of Patlan*, 350 S.W.3d 189, 198 (Tex. App.—San Antonio 2011, no pet.); *see Haase v. Glazne*r, 62 S.W.3d 795, 798 (Tex. 2001) ("Without a binding agreement, there is no detrimental reliance, and thus no fraudulent inducement claim."). To establish fraud, a party must show the following: (1) a material misrepresentation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth as a positive assertion; (4) the speaker made the representation with the intent that the other party should act upon it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered injury. *Patlan*, 350 S.W.3d at 198.

Diais identified the following alleged false misrepresentations: (1) Land Rover represented the car was in new condition and (2) the car was the most luxurious, rugged vehicle, with a supercharged, high performance engine, but in reality it was not a new car and unsafe to drive because of engine problems and serious abnormalities.

The record is void of any evidence supporting Diais's claim that Land Rover falsely represented that the car was new. Although Diais repeatedly testified about mechanical issues that occurred after he purchased the car, he provided no evidence linking the mechanical issues to any prior ownership of the vehicle.

Diais also failed to provide any evidence Land Rover knew the car had mechanical issues at the time of the sale. He argues nothing more than mere speculation that because Land Rover would have had all the information about the car through inspections, reports, and service history

and because the car developed mechanical problems after the sale, Land Rover must have known mechanical issues would occur.

Finally, Diais cannot rely on Land Rover's statements that the car was the most luxurious, rugged vehicle, with a supercharged, high performance engine because such statements involve mere opinion or puffery. *See Prudential Ins. Co. of Am. v. Jefferson Assocs.*, 896 S.W.2d 156, 163 (Tex. 1995) (statements that building was "superb," "super fine," and "one of the finest little properties in the City of Austin" were not misrepresentations of material fact but merely opinion and puffery that could not constitute fraud). Generally, statements that compare one product to another and claim superiority are not actionable representations. *Autohaus, Inc. v. Aguilar*, 794 S.W.2d 459, 464 (Tex. App.—Dallas 1990, writ denied) (statement by salesman that Mercedes is the best engineered car in the world is not an actionable misrepresentation). Because Diais failed to present evidence of two required elements to support his fraudulent inducement claim—that Land Rover made a material, false representation about the newness of the car—the trial court did not abuse its discretion by failing to include a question on a controlling issue. We overrule Diais's first issue.

B. Negligent Misrepresentation

The elements of negligent misrepresentation are: (1) a representation is made by a defendant in the course of his business, or in a transaction in which he has a pecuniary interest; (2) the defendant supplies false information for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and (4) the plaintiff suffers pecuniary loss by justifiably relying on the representation. *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 791 (Tex. 1999).

Diais again relies on the following alleged false information to support submission of a negligent misrepresentation question to the jury: (1) Land Rover represented the car was in new condition and (2) the car was the most luxurious, rugged vehicle, with a supercharged, high performance engine, but in reality it was unsafe to drive because of engine problems and serious abnormalities. Having previously concluded these statements were not false, Diais failed to provide any evidence of two required elements to support his negligent misrepresentation claim—that Land Rover made a representation in the course of its business in which it had a pecuniary interest and that such information about the newness of the car was false. Accordingly, the trial court did not abuse its discretion by failing to include a question on a controlling issue. We overrule Diais's second issue.

C. Unconscionable Conduct

Section 17.50 of the DTPA provides that a consumer may recover actual damages for "any unconscionable action or course of action" that is the producing cause of the damages. TEX. BUS. & COMM. CODE ANN. § 17.50(a)(3) (West 2011). The DTPA defines an "unconscionable action or course of action" as "an act or practice, which . . . takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree." *Id.* § 17.45(5). Unconscionability under the DTPA is an objective standard for which scienter is irrelevant. *Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 677 (Tex. 1998). To prove an unconscionable action or course of action, a plaintiff must show that the defendant's acts took advantage of his lack of knowledge and "that the resulting unfairness was glaringly noticeable, flagrant, complete and unmitigated." *Id.* The relevant inquiry examines the entire transaction, not just Land Rover's intent. *Chastain v. Koonce*, 700 S.W.2d 579, 583 (Tex. 1985); *Head v. U.S. Inspect DFW, Inc.*, 159 S.W.3d 731, 745 (Tex. App.—Fort Worth 2005, no pet.).

Again, Diais relies on the same representations to support his claim that Land Rover took advantage of his lack of knowledge, ability, experience, or capacity to a grossly unfair degree and to his detriment, which resulted in unconscionable conduct under the DTPA. We disagree. Even if we assumed Land Rover made false representations, nothing in the record supports his assertion that Land Rover took advantage of his lack of knowledge to a grossly unfair degree.

Considering the transaction as a whole, Diais stated he was a sophisticated businessman with an executive MBA from Texas Tech University. He admitted negotiating and purchasing several new cars in the past, including other Range Rovers. He admitted he had several family members in the car business, including a general manager, a sales manager, and a finance manager. He "absolutely" talked with them during the negotiation of the car. Further, Diais admitted his mind was made up before leaving Odessa that he planned to buy a Range Rover in Dallas. He did not need any convincing about the quality of a Range Rover from a salesman. Thus, there is no evidence supporting Diais's claim that he lacked knowledge, ability, or experience to which Land Rover took advantage of to a grossly unfair degree. Accordingly, the trial court did not abuse its discretion by denying his request for a jury question on unconscionable conduct under the DTPA. We overrule Diais's third issue.

D. Enforceability of "As Is" Clause

Diais argues he submitted questions 18-21 to address the "as is" clause elements required under *Prudential Insurance Co. of America v. Jefferson Associates, Ltd.*, 896 S.W.2d 156, 161 (Tex. 1995).[1] Land Rover responds Diais failed to properly inform the trial court his submitted

[1] Under *Prudential*, an "as is" clause may be set aside if (1) the buyer was inducted to enter into the contract containing "as is" language by the seller's fraudulent representation or concealment, or (2) the seller engaged in conduct that impaired, obstructed, or interfered with the buyer's inspection of the property being sold. 896 S.W.2d at 162. Other aspects of a transaction also may influence whether an "as is" clause is enforceable, including (1) the sophistication of the parties and whether they were represented by counsel, (2) whether the contract was an arm's length transaction, (3) the relative bargaining power of the parties and whether the contractual language was freely negotiated, and (4) whether that language was an important part of the parties' bargain, and not simply added in a "boilerplate" provision. *Id.*; *see also Sw. Pipe Servs., Inc. v. Kinder Morgan, Inc.*, No. 14-09-00601-CV, 2010 WL 2649950, at *2 (Tex. App.—Houston [14th Dist.] July 6, 2010, no pet.) (mem. op.).

questions pertained to the enforceability of the "as is" warranty clause under *Prudential*. We agree with Land Rover.

In determining whether an alleged error in a jury charge is reversible, we consider the parties' pleadings, the evidence presented at trial, and the jury charge in its entirety. *GJP, Inc. v. Ghosh*, 251 S.W.3d 854, 887 (Tex. App.—Austin 2008, no pet.). In his original and first amended petition, Diais argued the "as is" language in the purchase agreement was ambiguous and should be construed against Land Rover. Diais never argued to the trial court the enforceability of the "as is" clause in light of *Prudential* prior to submitting his proposed jury questions. *See McIntyre*, 247 S.W.3d at 443 (questions submitted by trial court should fairly place the *disputed* issues before the jury). Rather, he made such arguments for the first time post-trial. Thus, the trial court had nothing before it clearly indicating the "as is" clause was an issue raised by the pleading and evidence when Diais proposed questions 18-21. *See Prudential*, at 887 n.30 (no error in refusing to submit "as is" question when issue was not pleaded as a *Prudential* "as is" causation but as issues of waiver, assumption of risk, contributory negligence, and fraud); *see also* TEX. R. APP. P. 33.1 (to preserve complaint for appellate review, the record must show that at party complained to the trial court through a timely request, objection, or motion with sufficient specificity to make the court aware of the complaint). Accordingly, because Diais did not plead the applicability of the "as is" clause under *Prudential* or timely assert this argument, the trial court did not abuse its discretion by omitting questions 18-21.

Exclusion of Plaintiff's Exhibit No. 13: A Carfax Report

In his fifth issue, Diais argues the trial court abused its discretion by excluding plaintiff's exhibit no. 13, a Carfax report. Diais claimed the report was relevant because it showed there were no reports of damage to the car, which was contrary to the extensive testimony regarding

body damage that greatly decreased the value of the car. Land Rover responds Diais failed to preserve its issue because he did not make an offer of proof or formal bill of exception to the excluded evidence. Additionally, Land Rover argues the trial court properly excluded the document because it was a single-page printout from the Internet that Diais failed to properly authenticate. Diais did not reply to Land Rover's waiver or authentication arguments.

An appellate court does not reach the question of the propriety of the trial court's evidentiary ruling unless the complaint has been preserved for review. *In re Estate of Miller*, 243 S.W.3d 831, 837 (Tex. App.—Dallas 2008, no pet.). To challenge on appeal the trial court's ruling excluding evidence, the complaining party must present the excluded evidence to the trial court by offer of proof or bill of exception and inform the trial court of the substance of the excluded evidence. *See* TEX. R. EVID. 103(a)(2). Simply filing the excluded evidence with the trial court does not suffice. *Id*. at 838.

During a pretrial hearing, the parties presented their objections to exhibits and obtained rulings from the trial court. Land Rover objected to plaintiff's exhibit 13. The trial court sustained the objection. Despite the trial court sustaining the objection, the court reporter included the exhibit in the record[2]; however, Diais has not cited to any offer of proof, informally or formally, in the record and our review has revealed none. Therefore, the record does not reflect the "substance of the evidence was made known" to the trial court so that it could reconsider the ruling in light of the actual evidence. TEX. R. EVID. 103(a)(2) (party must inform court of substance of excluded evidence unless the substance is apparent from context); *Miller*, 243 S.W.3d at 837. Thus, it follows the trial judge could not have erred by excluding it. *See Morris v. Marin*, No. 05-05-01549-CV, 2006 WL 2831004, at *1 (Tex. App.—Dallas Oct. 5,

[2] The Carfax did not contain any reports of damage to the car.

2006, no pet.) (mem. op.) (no harm when record reflected substance of excluded medical affidavits were not presented in an offer of proof). We overrule Diais's fifth issue.

Discovery of New Evidence

In his sixth issue, Diais claims he discovered new evidence entitling him to a new trial. He argues that right after trial, he had the car inspected by Nathan Villarreal. The inspection revealed that the blemishes Land Rover argued were caused by Diais, most likely during his trip to Lubbock, were caused from the dealership's defective paint job and not a collision. Diais further asserts even more issues were found with the car after trial when the Range Rover was evaluated by Paul Sharp at the San Antonio dealership. Diais claims Land Rover failed to disclose this information and misled the jury by arguing Diais caused the damage. He argues the new evidence is so material that it would likely produce a different outcome if granted a new trial. Land Rover responds the evidence is not new or so material to probably cause a different outcome. Alternatively, Land Rover asserts Diais did not use due diligence in attempting to acquire this information prior to trial.

Whether a motion for new trial on the ground of newly discovered evidence will be granted or refused is generally a matter addressed to the sound discretion of the trial court, and the trial court's action will not be disturbed on appeal absent an abuse of discretion. *Rivera v. Countrywide Home Loans, Inc*., 262 S.W.3d 834, 844 (Tex. App.—Dallas 2008, no pet.). To obtain a new trial based upon newly discovered evidence, Diais needed to satisfy the following elements: (1) admissible relevant evidence introduced at the hearing for new trial demonstrating the existence of newly discovered evidence relied upon; (2) no knowledge of such evidence until after the conclusion of the trial and that such evidence could not have been discovered prior to the trial with the exercise of due diligence; (3) such evidence was not cumulative or to be used

for impeachment; and, (4) such evidence would probably produce a different result if a new trial was granted. *Id*.

We agree with Land Rover that Diais has failed to satisfy all the elements to obtain a new trial. Diais cannot claim he first learned of an alleged defective paint job after Villarreal's inspection and that Land Rover "never disclosed to Plaintiff that they had to repaint the Vehicle." McGovern testified that Diais did not drive the Range Rover back to Odessa because he noticed paint blemishes. Diais admitted during trial that McGovern showed him scratches, and McGovern "wanted to make those touch-ups before he actually deliver[ed] it to me."

Further, Diais failed to exercise due diligence in obtaining the alleged new information. "The due diligence requirement has not been met if the same diligence used to obtain the evidence after trial would have had the same result if exercised before trial." *Neyland v. Raymond*, 324 S.W.3d 646, 652 (Tex. App.—Fort Worth 2010, no pet.). Diais knew the car had blemishes prior to taking possession of it and that it incurred body damage at some point before returning to the dealership. He knew the engine had been replaced, and he knew the car had after-market wheels put on as part of the body-kit upgrade. However, Diais showed no diligence in questioning, investigating, or gathering evidence on these issues prior to trial. Rather, when Land Rover repeatedly tried contacting Diais regarding repairs, he said, "This is no longer my vehicle . . . they can do whatever they want to do with it." Only after the jury returned an unfavorable verdict did he then hire Villarreal and Sharp to inspect the car and sign an affidavit regarding their findings. Diais's motion for new trial does not explain why he could not hire Villarreal and Sharp prior to trial to inspect the car. Accordingly, the trial court did not abuse its discretion by denying his motion for new trial based on newly discovered evidence.

Sufficiency of the Evidence

In his final issue, Diais challenges the legal and factual sufficiency of the evidence to support the jury's take-nothing verdict on his DTPA and breach of contract claims. Land Rover argues the evidence is sufficient to support the jury's verdict.

When the party who had the burden of proof at trial complains of the legal insufficiency of the evidence to support an adverse finding, that party must demonstrate the evidence establishes, as a matter of law, all vital facts in support of the issue. *Dow Chem. Co. v. Francis,* 46 S.W.3d 237, 241 (Tex. 2001). In reviewing a legal sufficiency complaint, we consider all of the evidence in the light most favorable to the prevailing party, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). If there is no evidence to support the adverse finding, we then examine the entire record to determine whether the contrary proposition is established as a matter of law. *Francis*, 46 S.W.3d at 241. We sustain the issue only if the contrary proposition is conclusively established. *Id.* The ultimate test for legal sufficiency is whether the evidence would enable a reasonable and fair-minded fact finder to reach the verdict under review. *City of Keller*, 168 S.W.3d at 827.

When a party attacks the factual sufficiency of an adverse finding on an issue he has the burden of proof, he must demonstrate that the adverse finding is against the great weight and preponderance of the evidence. *Francis*, 46 S.W.3d at 242. The court of appeals must consider and weigh all of the evidence and can set aside a verdict only if the evidence is so weak or if the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. *Id*.

The DTPA prohibits "[f]alse, misleading, or deceptive acts or practices in the conduct of any trade or commerce." TEX. BUS. & COMM. CODE ANN. § 17.46(a) (West 2011). Section

17.46(b) is a laundry list of specifically prohibited acts. *Id*. § 17.46(b). The jury was given a broad form question[3] that included eight subparts of the laundry list of actionable conduct under the DTPA. On appeal, Diais appears to challenge only the sufficiency of the evidence to support the jury's negative finding that Land Rover represented "that goods are original or new if they are deteriorated, reconditioned, reclaimed, used or second hand." *See id*. § 17.46(b)(6).

McGovern testified he only showed Diais new vehicles when he visited the dealership. Cloud also testified the vehicle was new. Further, the jury heard Diais's deposition testimony in which he said Land Rover did not make statements that were "necessarily false. It was a brand new vehicle . . . it just did not operate the way it was supposed to have."

Diais agreed no one at the dealership told him the car would be problem-free. In email exchanges with Land Rover after problems occurred, Diais never said Land Rover deceived or defrauded him, but rather that the vehicle was bad. One particular email said his wife no longer wanted the car because she thought it was jinxed. She later clarified she did not really believe the car was jinxed, but returned the car "because it stopped working and it had an engine problem, and not because of anything else." However, the service manager testified Land Rover replaced the engine under the warranty and determined it was working back up to specifications.

The jury also heard testimony that despite Diais's unhappiness with Land Rover, he was still willing to purchase another car. "[E]ither a sports or a full size super charge 2013 after the contract is canceled and the money is returned fully to the bank."

The jury also heard testimony that Diais did not rely on any false statements from Land Rover. Diais admitted his mind was made up before leaving Odessa that he planned to buy a

[3] The jury was charged as follows:

Do you find from a preponderance of the evidence that LAND ROVER DALLAS, L.P. engaged in any false, misleading or deceptive act or practice that SHIHAB DIAlS or ODESSA DENTAL SOLUTIONS, P.A. relied on to their detriment and that was a producing cause of damages to SHIHAB DIAlS or ODESSA DENTAL SOLUTIONS, P.A.?

Range Rover in Dallas and did not need any convincing about the quality of a Range Rover from a salesman.

Considering the evidence in the light most favorable to the jury's verdict, we conclude the evidence is legally sufficient to support the jury's negative finding on Diais's DTPA claim.

We likewise conclude the evidence is factually sufficient to support the jury's verdict. Although Diais repeatedly testified about mechanical issues that occurred after he purchased the car and that he believed the car was deteriorated, he provided no evidence linking the mechanical issues to prior ownership of the vehicle. He also failed to provide any evidence Land Rover knew the car had mechanical issues at the time of the sale. He argues nothing more than mere speculation that because Land Rover would have had all the information about the car through inspections, reports, and service history and because the car developed mechanical problems after the sale, Land Rover must have known the mechanical issues would occur. His testimony and the evidence of mechanical issues post-sale is not so contrary to the overwhelming weight of the evidence that Land Rover sold a new car to render the verdict clearly wrong and unjust. Accordingly, the evidence is factually sufficient to support the jury's verdict. We overrule Diais's DTPA challenge.

We now consider whether the evidence was legally and factually sufficient to support the jury's negative finding on Diais's breach of contract claim. A breach of contract claim requires (1) the existence of a valid contract; (2) performance or tender of performance by Diais; (3) breach of the contract by Land Rover; and (4) damages resulting from the breach. *See Woodhaven Partners, Ltd. v. Shamoun & Norman, L.L.P.*, 422 S.W.3d 821, 837 (Tex. App.—Dallas 2014, no pet.). Diais argued Land Rover breached the contract by providing a defective and deteriorated vehicle. As detailed above, the evidence is both legally and factually sufficient

to support the jury's finding that Land Rover sold Diais a new car. Thus, Diais's argument will not support a breach of contract claim.

To the contrary, the record shows Diais entered into a contract with Land Rover for a new vehicle backed by a manufacturer's warranty. Land Rover personally delivered the car to Odessa without issue. After an engine problem occurred, Land Rover towed the car, at its own expense back to Dallas, and repaired the engine per the warranty. The car then sat at the dealership for approximately two years because Diais refused to pick it up, yet he still claimed ownership of the vehicle as a business expense for tax depreciation. Considering all the evidence and the evidence in the light most favorable to the verdict, the jury's negative finding on Diais's breach of contract claim is legally and factually sufficient to support the verdict.

In reaching this conclusion, we likewise overrule Diais's passing argument that he was entitled to rescission. Rescission is not a remedy for a completed contract in the absence of fraud. *See City of Corpus Christi v. S. S. Smith & Sons Masonry, Inc.*, 736 S.W.2d 247, 251 (Tex. App.—Corpus Christi 1987, writ denied); *Johnson v. McLean*, 630 S.W.2d 790, 791 (Tex. App.—Houston [1st Dist.] 1982, no writ). Accordingly, we overrule his seventh issue.

Conclusion

The judgment of the trial court is affirmed.

/David L. Bridges/
DAVID L. BRIDGES
JUSTICE

150115F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

SHIHAB DIAIS AND ODESSA DENTAL SOLUTIONS, P.A., Appellants

No. 05-15-00115-CV V.

LAND ROVER DALLAS, L.P. AND SNELL MOTOR COMPANY OPERATIONS GP, LLC, GENERAL PARTNER, Appellees

On Appeal from the 14th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-13-01137.
Opinion delivered by Justice Bridges.
Justices Francis and Stoddart participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee LAND ROVER DALLAS, L.P. AND SNELL MOTOR COMPANY OPERATIONS GP, LLC, GENERAL PARTNER recover their costs of this appeal from appellant SHIHAB DIAIS AND ODESSA DENTAL SOLUTIONS, P.A.

Judgment entered April 4, 2016.