

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-09-00484-CV

**ZURICH FINANCIAL LIMITED, D/B/A TIFFANY CUSTOM HOMES, AND
UPSCO, INC., Appellants**

V.

DAVID DAVIS AND ANGELA DAVIS, Appellees

**On Appeal from the County Court at Law No. 3
Montgomery County, Texas
Trial Cause No. 07-12-12268 CV**

MEMORANDUM OPINION

Zurich Financial Limited, doing business as Tiffany Custom Homes, and UPSCO, Inc. (collectively “Tiffany Homes”¹) appeal a judgment awarding David Davis and Angela Davis \$39,790 in actual damages and \$13,500 in attorney fees in a suit over an allegedly defective foundation in a new home the Davises purchased from Tiffany

¹The judgment makes UPSCO, Inc. jointly and severally liable as the general partner of Zurich Financial Limited. Because none of the issues raised in this appeal apply solely to UPSCO, Inc., we refer to the two appellants as “Tiffany Homes” as if the appellants were a single entity.

Homes. Tiffany Homes raises twenty-six issues regarding the jury trial and the Davises raise one issue concerning the denial of appellate attorney fees. We affirm the trial court's judgment.

All but one of the issues raised by Tiffany Homes challenge the legal sufficiency of the evidence. The standard of review requires that we “credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not.” *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). In addition, we must “consider [the] evidence in the light most favorable to the verdict, and indulge every reasonable inference that would support it. But if the evidence allows of only one inference, neither jurors nor the reviewing court may disregard it.” *Id.* at 822 (footnotes omitted). “The final test for legal sufficiency must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review.” *Id.* at 827.

Issues one through five address causation in fact.² Generally, the test for causation in fact “is whether the defendant’s act or omission was a substantial factor in causing the

²Issue one: “The trial court erred in entering a judgment on the Davises’ implied warranty and DTPA claims, because there was no evidence that any conduct of Tiffany Custom Homes was a producing cause or proximate cause of the Davises’ alleged damages.”

Issue two: “The trial court erred in denying Tiffany Custom Homes’ motions for directed verdict on the Davises’ implied warranty and DTPA claims, because there was no evidence that any conduct of Tiffany Custom Homes was a producing cause or proximate cause of the Davises’ alleged damages.”

Issue three: “The trial court erred in denying Tiffany Custom Homes’ Motion for Judgment *Non Obstante Veredicto* on the Davises’ implied warranty and DTPA claims,

injury and without which the injury would not have occurred.” *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 774 (Tex. 2010); *see also Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd.*, 896 S.W.2d 156, 161 (Tex. 1995) (producing cause under DTPA). Tiffany Homes argues that “a tilting slab does not necessarily indicate any sort of construction defect.” The Davises respond that the house was represented to have been built in a good and workmanlike manner but was not because the foundation was not stable.

The Davises purchased the home for \$313,000 as new construction in May 2003. Harry Young, a construction superintendant for Tiffany Homes, testified that no disclosure of any foundation defect was made to the Davises before they purchased their home.³ Tiffany Homes inspected the Davis house one year after the purchase and reported no problems with the foundation. An independent inspector who examined the house one year after the purchase found there was “[n]o visible excessive differential

because there was no evidence that any conduct of Tiffany Custom Homes was a producing cause or proximate cause of the Davises’ alleged damages.”

Issue four: “The trial court erred in denying Tiffany Custom Homes’ Motion for New Trial on the Davises’ implied warranty or DTPA claims, because there was no evidence that any conduct of Tiffany Custom Homes was a producing cause or proximate cause of the Davises’ alleged damages.”

Issue five: “The trial court erred in submitting an issue to the jury on the Davises’ implied warranty or DTPA claims, because there was no evidence that any conduct of Tiffany Custom Homes was a producing cause or proximate cause of the Davises’ alleged damages.”

³The house is built on a canal that was dredged prior to construction, but Young denied that the dredged dirt was placed on the lot and the Davises produced no evidence to controvert Young’s statement.

movement noted at interior or exterior of [the] house. Slab integrity appears stable and slab appears to be performing as intended at this time.” Thus, the evidence shows that no defects in the foundation were apparent for the first year after construction. However, the Davises argue that the fact that the one-year inspection did not reveal the presence of a defect in the foundation does not preclude the possibility that Tiffany Homes failed to construct the foundation in a good and workmanlike manner. The Davises contend the foundation’s instability became apparent within four years of construction.

The jury heard disputed testimony about the condition of the foundation after the first-year inspections. Angela Davis testified that by December 2006 cracks had developed on the ceiling at two different points of the house. She then noticed cracks in the tile in every room in the house. The Davises contacted three large foundation companies and had an engineer investigate the cause of the cracks. The Davises spent \$20,000 repairing the foundation at the rear of the house. They also repaired the interior. Since January 2009, Angela Davis has observed continuing problems associated with a settling foundation. After the foundation repair, the kitchen cabinets have continued to pull away from the wall, some of the grout is cracking against the doorways, and some doors will not stay open. At the time of trial, the house still had foundation problems that require repair of the remainder of the foundation.

Young controverted Angela Davis’s testimony with testimony that he examined the exterior of the home in 2007 and found no slab movement. According to Young, the

sheetrock cracks Angela Davis showed him when he inspected the home in 2007 could have been settlement of either the foundation or the wooden structure of the house. In his rebuttal testimony, Young stated that when he examined the house again in 2008 he did not see any cracks in the sheetrock or floor tiles. Young stated his opinion that the lack of visible cracks in the exterior brickwork meant the foundation did not fail. Young also claimed that when he inspected the home he observed that soaker hoses had not been placed on every side of the house.

At trial, Tiffany Homes suggested that the cracks observed in 2007 were the result of improper watering of the foundation. The independent inspector recommended keeping the soil watered. However, Angela Davis testified that she did keep the yard watered. Both the front and the back yards were equipped with sprinkler systems on automatic timers. The Davises installed a soaker hose at the side of the house. Thus, there is evidence in the record that if believed by the jury would provide a basis for rejecting Tiffany Homes's theory that the movement in the foundation was caused by the property owner's failure to keep the foundation watered.

An architectural engineer named Gary Boyd testified for the Davises. When Boyd inspected the house in 2007, he observed signs of distress that included cracks in the sheetrock and doors that were not square. Boyd measured the elevation of the house in eighty to ninety locations. The data Boyd collected indicated post-construction foundation movement. Boyd testified that the movement of the foundation was not what

one would expect. Boyd explained: “[T]he house is designed and constructed expecting the foundation to remain stable. So if the foundation begins to move after the construction is completed, then it can cause distress, ... cracks in sheetrock, walls and doors that won’t function right and so forth.” A four-year-old structure is considered a new home. According to Boyd, “stable means that you don’t have distress that can’t be easily repaired and not reappear.” Boyd testified that “you would expect [a foundation] to remain stable for a 4-year-old house.” The standard tolerance for the construction of a new residential foundation is 1.5 inches. The measurements Boyd took of the Davis residence exceeded the standard tolerance. Boyd’s report stated that “[t]he ‘total differential’ was measured to be almost 3 inches.” Because he measured the foundation in 2007, Boyd could not determine whether the house was constructed within the standard tolerance in 2003. He concluded that the foundation experienced post-construction differential movement.

A civil engineer named Lowell Brumley testified for Tiffany Homes. Brumley agreed that Boyd’s elevation readings exceeded the 1.5 inch residential foundation tolerance, and Brumley stated that the greatest difference in level that Boyd measured was approximately 2.64 inches from the front right corner to the back rear left corner. Brumley testified that there appeared to be “a small amount” of flexing or bending in the foundation that was within the acceptable tolerances for a foundation. Brumley calculated that the 2.64 inch difference over 60 to 70 feet resulted in a tilt of less than one

percent, which Brumley testified was within the tolerance of the International Residential Code of the Council of American Building Officials and Related Organizations.

A structural engineer named Rod McCasaland also testified for Tiffany Homes. According to McCasaland, the foundation is a “post tension slab on grade” commonly referred to as a “floating foundation.” The foundation is “totally supported by the near surfaces soils” and can move with the movement of those soils. McCasaland agreed with Boyd that the measurements show the slab is tilted, but offered his opinion that tilt is “not necessarily bad” for a floating slab and that in his opinion the data did not show much “deflection,” or upward heave of the slab. In McCasaland’s opinion, the slab was performing very well. However, McCasaland had not seen Boyd’s contour drawings, which would have shown the direction of the slope of the slab. He also admitted that it was preferable to personally inspect the foundation when formulating an opinion regarding whether a foundation had problems, something McCasaland had not done.

Reasonable jurors could credit the testimony of Davis and Boyd and discredit the testimony of Tiffany Homes’s witnesses. *See City of Keller*, 168 S.W.3d at 819-20. The experts disagreed on the ultimate fact--whether foundation failed--but each expert explained how he used the same data to reach his conclusion about the actual state of the foundation. Regarding the physical state of the property, the jury could reasonably give greater weight to Angela Davis’s testimony than to Young’s. For instance, Young admitted that in 2007 Angela Davis showed him interior cracks that could have indicated

settlement of either the home or the foundation. When he saw no cracks in an inspection the following year, it was evident the interior had recently been repaired. Angela Davis testified that interior damage reappeared in 2009. The jury could credit Boyd's testimony that a foundation that has been constructed in a good and workmanlike manner would remain stable for more than four years, accept Boyd's opinion that the foundation in this case became unstable within four years of construction, and conclude that Tiffany Homes's failure to construct a house with a stable foundation was the cause in fact of the repairs to the property. In this case, the evidence supporting cause in fact amounted to more than a mere scintilla. *Id.* at 810, 814. The jury did not ignore undisputed testimony that was "clear, positive, direct, otherwise credible, free from contradictions and inconsistencies, and could have been readily controverted." *Id.* at 820. Reasonable and fair-minded people could reach the verdict under review. *Id.* at 827. We overrule issues one through five.

Issues six through ten contend the Davises presented no legally cognizable evidence of damages at trial.⁴ Tiffany Homes contends the trial court excluded all

⁴Issue six: "The trial court erred in entering a judgment on the Davises' implied warranty or DTPA claims, because there was no evidence that the Davises suffered legally cognizable damages."

Issue seven: "The trial court erred in denying Tiffany Custom Homes' motions for directed verdict on the Davises' implied warranty or DTPA claims, because there was no evidence that the Davises suffered legally cognizable damages."

Issue eight: "The trial court erred in denying Tiffany Custom Homes' Motion for Judgment *Non Obstante Verdicto* on the Davises' implied warranty or DTPA claims, because there was no evidence that the Davises suffered legally cognizable damages."

evidence of the reasonable and necessary cost of past or future repairs. To recover repair costs, the plaintiff must present sufficient evidence to justify the jury's finding that the costs were reasonable and the repairs necessary. *Ebby Halliday Real Estate, Inc. v. Murnan*, 916 S.W.2d 585, 589 (Tex. App.--Fort Worth 1996, writ denied).

Angela Davis buys and sells homes professionally. When she discovered cracks throughout the interior of her home, she contacted the largest foundation repair companies--Due West, Olshan, and Atlas--and had each prepare a report and an estimate. The Davises selected the lowest bid and spent \$20,000 on foundation repairs to the rear of the house and repairs to the interior cracks.

Angela Davis testified that repairs would also have to be made to the remainder of the foundation. Boyd testified that the foundation at issue in this case is a "floating slab on fill" and the repair "should be totally piered" to avoid having "part of the foundation supported by deep piles and the rest is on fill material" which is supposed to have "enough rigidity to tolerate some changes in the support system." The house should not sit on two different systems. Boyd testified that a reasonable cost to repair the back of

Issue nine: "The trial court erred in denying Tiffany Custom Homes' Motion for New Trial on the Davises' implied warranty or DTPA claims, because there was no evidence that the Davises suffered legally cognizable damages."

Issue ten: "The trial court erred in submitting an issue to the jury on the Davises' implied warranty or DTPA claims, because there was no evidence that the Davises suffered legally cognizable damages."

the house would be roughly one-half the amount required for a full repair of the foundation.

The trial court awarded actual damages in the amount of \$39,790. There is sufficient evidence in the record to support damages in this amount. Angela Davis demonstrated her familiarity with the reasonable costs of repair and Boyd established that the initial repair and future repairs would be required to stabilize the foundation. Thus, there was some evidence from which the jury could determine that the past and future repairs were necessary; and the damages awarded in the judgment of \$39,790 to make the repairs would be reasonable. *See City of Keller*, 168 S.W.3d at 827; *see also Ron Craft Chevrolet, Inc. v. Davis*, 836 S.W.2d 672, 677 (Tex. App.--El Paso 1992, writ denied). We overrule issues six through ten.

Issue eleven contends the trial court erred in admitting testimony by plaintiffs' counsel. Counsel was disclosed as a fact witness and as an expert witness on attorney fees, but Tiffany Homes argues the Rule 194 disclosure failed to disclose the substance of counsel's mental impressions and opinions and did not provide a brief summary of the basis for those impressions. *See* TEX. R. CIV. P. 194.2(f)(3).

The disclosure summarized counsel's career and stated that "[h]is testimony will be based upon legal services rendered by any party in this litigation[.]" that "[h]e is expected to testify that a reasonable and necessary hourly fee is \$150.00 per hour[.]" and that he "will review all documentation produced in connection with this case as a basis

for his testimony.” Tiffany Homes argues counsel should not have been permitted to testify to the facts known to him to support his mental impressions because those facts were not disclosed in the Rule 194 response. *See* TEX. R. CIV. P. 193.6(a).

Rule 193.6(a) provides an exception to exclusion if the court either finds that there was good cause for the failure to timely make, amend, or supplement the discovery response; or finds the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties. *Id.* Here, the trial court allowed counsel to describe the work he performed in the case, and the trial court also allowed counsel to tell the jury that he spent seventy hours working on the case through the trial, and that \$150 per hour is a reasonable and customary fee for this work. Counsel for Tiffany Homes did not cross-examine counsel.

The Davises provided sufficient information to enable Tiffany Homes to cross-examine counsel regarding the reasonableness and necessity of attorney fees. *See Big Wheel Dev., Inc. v. Orange County Bldg. Materials, Inc.*, No. 09-07-00381-CV, 2008 WL 2521926, at *2 (Tex. App.--Beaumont June 26, 2008, no pet.) (mem. op.). Given that the Davises disclosed that they would seek to recover attorney fees, that counsel would state that a reasonable and necessary fee would be \$150 per hour, and that counsel would rely on the documentation in the file to give his testimony regarding the services he rendered in the litigation, the trial court could have determined that Tiffany Homes was not surprised by the offer of testimony regarding the number of hours he spent on the case.

Under the circumstances, the trial court could find that Tiffany Homes would not be unduly surprised or prejudiced by the testimony. *See* TEX. R. CIV. P. 193.6(a). We overrule issue eleven.

Issues twelve through sixteen contend there is no evidence to support the award of attorney fees.⁵ Tiffany Homes argues counsel for the Davises failed to testify regarding the reasonableness or necessity of attorney fees in any amount. Counsel testified that he had been practicing law for forty years, that he is familiar with what lawyers charge on an hourly basis, and that because of the circumstances and nature of this case a reasonable fee is \$150 per hour. He described seventy hours of work he performed in pursuing this litigation on behalf of the Davises. The record shows that counsel was familiar with the work done by attorneys and the hourly fees customarily charged by attorneys in litigation of this type. Counsel described the work he performed and the number of hours he expended on the case. Thus, there was some evidence from which the jury could

⁵Issue twelve: “The trial court erred in entering a judgment on the Davises’ alleged attorney fees, because there was no evidence that the attorney fees were reasonable and necessary.”

Issue thirteen: “The trial court erred in denying Tiffany Custom Homes’ motions for directed verdict on the Davises’ alleged attorney fees, because there was no evidence that the attorney fees were reasonable and necessary.”

Issue fourteen: “The trial court erred in denying Tiffany Custom Homes’ Motion for Judgment *Non Obstante Veredicto* on the Davises’ alleged attorney fees, because there was no evidence that the attorney fees were reasonable and necessary.”

Issue fifteen: “The trial court erred in denying Tiffany Custom Homes’ Motion for New Trial on the Davises’ alleged attorney fees, because there was no evidence that the attorney fees were reasonable and necessary.”

Issue sixteen: “The trial court erred in submitting an issue to the jury on the Davises’ alleged attorney fees, because there was no evidence that the attorney fees were reasonable and necessary.”

determine what fee would be reasonable in this case. *City of Keller*, 168 S.W.3d at 827.

We overrule issues twelve through sixteen.

The Davises' cross-issue contends the trial court erred in excluding evidence of appellate attorney fees. They ask this Court to address the cross-issue only in the event we sustain at least one of Tiffany Homes's attorney fees issues and conclude that the evidence of attorney fees is legally insufficient. Because we have overruled Tiffany Homes's attorney fees issues, we do not reach the cross issue.

Issues seventeen through twenty-one contend there is no evidence of uninhabitability before the trial court.⁶ Issues twenty-two through twenty-six urge there is no evidence that Tiffany Homes failed to perform construction of the Davises' house in

⁶Issue seventeen: "The trial court erred in entering a judgment on the Davises' alleged claim for breach of an implied warranty of habitability, because there was no evidence that the House was uninhabitable."

Issue eighteen: "The trial court erred in denying Tiffany Custom Homes' motions for directed verdict on the Davises' claim for breach of implied warranty of habitability, because there was no evidence that the House was uninhabitable."

Issue nineteen: "The trial court erred in denying Tiffany Custom Homes' Motion for Judgment *Non Obstante Veredicto* on the Davises' claim for breach of implied warranty of habitability, because there was no evidence that the House was uninhabitable."

Issue twenty: "The trial court erred in denying Tiffany Custom Homes' Motion for New Trial on the Davises' claim for breach of implied warranty of habitability, because there was no evidence that the House was uninhabitable."

Issue twenty-one: "The trial court erred in submitting an issue to the jury on the Davises' claim for breach of implied warranty of habitability, because there was no evidence that the House was uninhabitable."

a good and workmanlike manner.⁷ The jury questions provided separate findings for breach of implied warranty of good and workmanlike construction; for breach of implied warranty of habitability; for five separate Deceptive Trade Practices Act⁸ laundry- list violations, including representing that the home made the basis of this suit had characteristics which it did not have, representing that the home made the basis of this suit was of a particular standard or quality when it was of another, failing to comply with an express warranty, failing to perform services in a good and workmanlike manner, and selling a home that was not suitable for human habitation. Of these submissions, the jury found that Tiffany Homes breached an implied warranty of habitability and that Tiffany

⁷Issue twenty-two: “The trial court erred in entering a judgment on the Davises’ alleged claim for breach of an implied warranty of good and workmanlike performance, because there was no evidence that the construction of the House was not performed in a good and workmanlike manner.”

Issue twenty-three: “The trial court erred in denying Tiffany Custom Homes’ motions for directed verdict on the Davises’ claim for breach of implied warranty of good and workmanlike performance, because there was no evidence that the construction of the House was not performed in a good and workmanlike manner.”

Issue twenty-four: “The trial court erred in denying Tiffany Custom Homes’ Motion for Judgment *Non Obstante Veredicto* on the Davises’ claim for breach of implied warranty of good and workmanlike performance, because there was no evidence that the construction of the House was not performed in a good and workmanlike manner.”

Issue twenty-five: “The trial court erred in denying Tiffany Custom Homes’ Motion for New Trial on the Davises’ claim for breach of implied warranty of good and workmanlike performance, because there was no evidence that the construction of the House was not performed in a good and workmanlike manner.”

Issue twenty-six: “The trial court erred in submitting an issue to the jury on the Davises’ claim for breach of implied warranty of good and workmanlike performance, because there was no evidence that the construction of the House was not performed in a good and workmanlike manner.”

⁸See TEX. BUS. & COM. CODE ANN. § 17.46 (Vernon Supp. 2010).

Homes engaged in a false, misleading, or deceptive trade practice that the Davises relied upon to their detriment by representing that the home was of a particular standard or quality that it was not and by failing to perform services in a good and workmanlike manner.⁹

Nowhere in Tiffany Homes's brief on appeal does Tiffany Homes challenge the jury's finding that Tiffany Homes engaged in a false, misleading, or deceptive trade practice that the Davises relied upon to their detriment by representing that the home was of a particular standard or quality if it was of another. "Unchallenged jury findings are binding on the appellate court." *Carbona v. CH Med., Inc.*, 266 S.W.3d 675, 687 (Tex. App.--Dallas 2008, no pet.); *Morrell v. Finke*, 184 S.W.3d 257, 285 n.29 (Tex. App.--Fort Worth 2005, pet. denied). The jury's unchallenged finding that Tiffany Homes engaged in a false, misleading, or deceptive trade practice that the Davises relied upon to their detriment by representing that the home was of a particular standard or quality if it was of another supports the judgment. Because the judgment is supported by a liability finding that is unchallenged on appeal and therefore binding on this Court, those liability findings that are challenged on appeal do not present reversible error.¹⁰ *See* TEX. R. APP.

⁹Tiffany Homes mentions the evident conflict in the jury findings in the statement of fact section of its brief, but neither assigns error regarding conflicting jury findings nor argues that the conflict requires a new trial. Accordingly, we express no opinion on the matter.

¹⁰Tiffany Homes does not contend that a new trial is required because charge error prevented proper presentation of the appeal. *See* TEX. R. APP. P. 44.2(a)(2). We note that the trial court submitted the liability findings separately.

P. 44.1(a)(1); *see also Hawkins v. Jones*, No. 05-06-00139-CV, 2007 WL 2004913, at *1 (Tex. App.--Dallas July 12, 2007, pet. denied) (mem. op.). Accordingly, we need not address issues seventeen through twenty-six. We affirm the trial court's judgment.

AFFIRMED.

STEVE McKEITHEN
Chief Justice

Submitted on September 10, 2010
Opinion Delivered October 7, 2010

Before McKeithen, C.J., Gaultney and Horton, JJ.