In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-20-00308-CV

NEW BRAUNFELS INDEPENDENT SCHOOL DISTRICT, APPELLANT

V.

FIELDTURF USA INC., APPELLEE

On Appeal from the 274th District Court
Comal County, Texas
Trial Court No. C2014-0195C; Honorable Bruce Boyer, Presiding

November 12, 2021

MEMORANDUM OPINION

Before QUINN, C.J., and PIRTLE and DOSS, JJ.

This appeal arises out of a dispute between Appellant, New Braunfels Independent School District ("NBISD"), and Appellee, FieldTurf USA, Inc. ("FieldTurf"), over the installation of an artificial sports field.[1] After the field began to disintegrate and after failed

[1] Originally appealed to the Third Court of Appeals, sitting in Austin, this appeal was transferred to this court by the Texas Supreme Court pursuant to its docket equalization efforts. TEX. GOV'T CODE ANN. § 73.001 (West 2013). Should a conflict exist between precedent of the Third Court of Appeals and this court on any relevant issue, this appeal will be decided in accordance with the precedent of the transferor court. TEX. R. APP. P. 41.3.

attempts to restore it through FieldTurf's maintenance programs, NBISD filed suit against FieldTurf, alleging claims of fraud and breach of warranty. A jury found against NBISD with regard to its fraud claim but found in NBISD's favor with regard to its breach of warranty claim. The jury awarded $251,000 in damages and the trial court entered judgment in accordance with the jury's verdict. The jury awarded no attorney's fees and, despite waiting more than two years to enter judgment on the jury's verdict, the trial court denied NBISD's request that the judgment include prejudgment interest.

NBISD appeals the judgment, arguing the trial court erroneously (1) refused a motion for partial new trial on the issue of reasonable and necessary attorney's fees and (2) refused to award prejudgment interest when that interest was properly requested, NBISD prevailed at trial, and the prejudgment interest was mandatory under Texas law. FieldTurf filed a cross-appeal, arguing through five issues: (1) NBISD is barred from recovering any damages under the Texas Uniform Commercial Code[2] because the warranty made repair or replacement the exclusive remedies available; (2) NBISD could not recover any monetary damages for breach of warranty because it failed to plead, prove, or obtain a jury finding that the warranty failed of its essential purpose under section 2.719(b); (3) NBISD's failure to produce any evidence of breach of warranty damages precluded its recovery for breach of warranty; (4) NBISD cannot recover a judgment based on replacement cost because it lacked proof that those damages were

[2] The Texas Uniform Commercial Code is a codification of the Uniform Commercial Code ("UCC"), with the noted exception that the Texas UCC is identified by section numbers rather than article numbers. The section numbers of the Texas UCC correspond with the UCC article numbers, except that a period has been substituted for a dash so that section 1-101 of the UCC is section 1.101 of the Texas Business and Commerce Code. As used herein, all references to "section" or "sections" are references to the Texas Business and Commerce Code, unless otherwise noted.

reasonable and necessary; and (5) at a minimum, FieldTurf was entitled to a settlement credit and a reduced judgment amount. We reverse and render.

BACKGROUND

In 2008, NBISD requested several companies to submit proposals concerning renovations of its athletic sports arena. At issue here was the construction of the artificial sports field. NBISD chose to proceed with FieldTurf's "Duraspine" field,[3] a field that was marketed to be more durable and long-lasting than other fields of similar nature. Artificial fields like the one at issue here are comprised of two primary components: rolls of plastic "grass" known as "fiber" that comes in a variety of colors (green, blue, and white in the case before us) and an artificial substance that supports the fibers called "infill" (consisting of a mixture of sand and black crumb rubber) that is poured onto the field after the fiber is installed.

The artificial field was installed at the end of 2008 and was in use for sporting and other recreational events by January 2009. The field was under warranty for a period of eight years. The warranty provided as follows:

> FieldTurf warrants that if FieldTurf FTOM 1F for football/soccer synthetic turf proves to be defective in materials or workmanship, resulting in premature wear, during normal and ordinary use of the product for the sporting activities set out below or for any other uses for which FieldTurf gives its written authorization, within 8 years from the date of completion of installation, FieldTurf will, at FieldTurf's option, either repair or replace the affected area without charge, to the extent required to meet the warranty period (but no cash refunds will be made) . . . . This warranty is limited to

[3] Another company, TenCate, manufactured and supplied the fiber to FieldTurf for incorporation into the field. Before the issues with the field in question here, FieldTurf filed suit against TenCate, alleging TenCate had sold more than 100 fields using defective "Evolution" fibers that were "degrading prematurely" because of insufficient UV durability. In its suit, FieldTurf alleged, among other things, that it was facing "pending and future claims of tens of millions of dollars as a result of failures of TenCate supplied fiber." By letter, FieldTurf informed TenCate of NBISD's complaints and stated "[t]his customer has complained that the fibers on its field are failing, and has demanded that FieldTurf provide remedial work on the field."

> the remedies of repair or replacement, which shall constitute the exclusive remedies available under this warranty, and all other remedies or recourses which might otherwise be available are hereby waived by the Buyer, FieldTurf will have no other obligations or liability for damages arising out of or in connection with the use or performance of the product including but without limitation, damages for personal injury or economic losses.

By 2011, the fibers making up the field began "splitting" and "breaking off." The issues with the field were particularly noticeable when the area received significant rain because the "fibers would pool on the sideline. You could see the volume of them." Moreover, the logo in the center of the field "had started to come undone." The head football coach contacted FieldTurf to report the problems with the field. He also sent an email in September 2011 to Bryan Cox, NBISD's main contact with FieldTurf, and to the regional sales manager. In that email, the coach noted the splitting and broken fibers and said the players were tracking a lot of the broken fibers into the fieldhouse.

The coach's email was sent to another employee of FieldTurf, Chuck Bailey. That email correspondence indicated that other FieldTurf fields were showing signs of similar problems to those at issue in this case. The coach sent additional emails about a month later, informing FieldTurf of more broken fibers. He included pictures in the emails. FieldTurf notified its legal department, and an employee conducted a site review in early November 2011. The report included conclusions that the white fibers were splitting and shedding and that the green fibers were splitting but "stable." The report was not provided to NBISD until after it filed suit. FieldTurf sent NBISD a letter, dated November 30, 2011, stating in part, "While there is some early minor field fiber fibrillation on the Non-Green fibers[,] we do not feel that the fibers are exhibiting any playability or hazardous concerns

at this time and will continue to monitor the field going forward. Another site evaluation will be scheduled during the spring of 2012."

According to NBISD, the matting and breaking of fibers continued. The football coach inquired of FieldTurf what options were available to clean up the accumulating broken fibers. Of significance, however, NBISD never requested that FieldTurf "repair or replace" the field. FieldTurf provided options and NBISD chose the option to pay $5,500 for additional maintenance under a service program. That service occurred in October 2012, but the condition of the field did not improve. FieldTurf conducted another site review in February 2013. A report generated after that review concluded that the "[w]hite fibers are degrading rapidly" and the "[g]reen fibers are showing uniform wear for the field." FieldTurf did not provide a copy of that report to NBISD. A second maintenance service was performed in August 2013. The field still did not improve but rather, the broken fibers now appeared in the fieldhouse and on the clothes and shoes of those on the field.[4] In February 2014, while the warranty period was still valid, NBISD filed suit against FieldTurf alleging breach of contract, breach of express and implied warranty, product liability, and negligent misrepresentation/fraud. It requested damages "for the repair and replacement of the property damage from the defective work" and also sought attorney's fees. It also sought exemplary damages for the alleged fraud but did not seek specific performance of the warranty provision.

[4] At the trial before jury of this matter, NBISD's expert concluded that the field had been rapidly deteriorating and was in worse condition than it should have been after four years of ordinary use. It exhibited premature wear and had since at least FieldTurf's inspection and report in February 2013.

In the summer of 2016, again while the warranty period was still valid, NBISD replaced the field at its own expense. The field was installed by Swank Sports aka AstroBuilders at a cost of $378,507.00. Prior to replacing the field, NBISD attained seven bids as part of a bidding process. It selected that of AstroBuilders as the lowest bid of the seven.

At the conclusion of the 2017 trial, the jury found FieldTurf had failed to comply with an express warranty and that its failure was a producing cause of damages to NBISD. The jury also found NBISD had provided FieldTurf reasonable notice and opportunity to cure the breach. NBISD did not request an issue as to whether circumstances caused an exclusive remedy, if any, to fail of its essential purpose. The jury awarded NBISD $251,000 as the cost to repair or replace the field as damages for a breach of warranty. The jury further found $0 as reasonable and necessary attorney's fees. The trial court denied FieldTurf's motions for directed verdict and judgment *non obstante veredicto* ("JNOV").

NBISD moved for a partial new trial on the issue of reasonable attorney's fees. That motion was denied. Both parties moved for entry of judgment in June and July 2018, but the trial court did not enter a final judgment until September 3, 2020. Upon entry of judgment, the trial court struck through the calculation of NBISD's prejudgment interest on its past damages. An amended judgment was signed on September 18, 2020, at the request of FieldTurf, to clarify that the trial court was expressly denying the recovery of any prejudgment interest on NBISD's past damages.

STANDARD OF REVIEW

We review a JNOV under a no-evidence standard of review, meaning we "credit evidence favoring the jury verdict if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not." *Tanner v. Nationwide Mut. Fire Ins. Co*., 289 S.W.3d 828, 830 (Tex. 2009) (citations omitted). Furthermore, we will uphold the jury's finding if more than a scintilla of competent evidence supports it. *Id.* (citation 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.* (citation omitted). We apply the same standard of review when considering a denial of a directed verdict. *City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005) ("the test for legal sufficiency should be the same for summary judgments, directed verdicts, judgments notwithstanding the verdict, and appellate no-evidence review").

Our review of a trial court's entry of judgment on a jury verdict presents a pure question of law. *Arbor Windsor Court, Ltd. v. Weekley Homes, LP*, 463 S.W.3d 131, 136 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (citing *Tex Star Motors, Inc. v. Regal Fin. Co., Ltd*., 401 S.W.3d 190, 202 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (noting that determining the legal effect of the jury's answers is a question of law)). Accordingly, we review the trial court's decision *de novo*. *Arbor Windsor Court, Ltd.*, 463 S.W.3d at 136 (citing *Hicks v. Hicks*, 348 S.W.3d 281, 284 (Tex. App.—Houston [14th Dist.] 2011, no pet.) ("We review questions of law *de novo*."); *Resurgence Fin., L.L.C. v. Lawrence*, No. 01-08-00341-CV, 2009 Tex. App. LEXIS 7927 (Tex. App.—Houston [1st Dist.] Oct. 8, 2009, no pet.) (mem. op.) (citing *In re Humphreys*, 880 S.W.2d 402, 404 (Tex. 1994) (stating in the context of entry of judgment that "questions of law are always subject to a *de novo* review")).

ANALYSIS

As noted, both parties have appealed the trial court's amended judgment. Therefore, to provide a clear understanding of our disposition of the issues, we will first address the issues raised by the cross-appeal brought by FieldTurf before we turn to a discussion of the issues raised in the direct appeal brought by NBISD.

FIELDTURF'S CROSS-APPEAL

CROSS-ISSUE ONE—WAS "REPAIR OR REPLACEMENT" THE EXCLUSIVE REMEDY?

FieldTurf argues via its first issue that NBISD was not entitled to the recovery of monetary damages. It contends that the UCC's plain language, coupled with the contractual warranty's plain language, limited NBISD's claim for breach of warranty to the "repair or replacement" of the defective product. NBISD disagrees, arguing the plain language of the UCC permits monetary damages as a remedy for breach of warranty, as a limited measure of repair or replacement costs.

The interpretation of an unambiguous contract is a question of law that we review *de novo* using well-settled contract-construction principles. *URI, Inc. v. Kleberg Cty.*, 543 S.W.3d 755, 763 (Tex. 2018). We presume that parties intend what the words in their contract say, and we interpret contract language according to its plain, ordinary, and generally accepted meaning unless the contract directs otherwise. *Id.* at 763-64.

Section 2.719 of the Texas UCC provides that, subject to certain other provisions,

> (1) the agreement may provide for remedies in addition to or in substitution for those provided in this chapter and may limit or alter the measure of damages recoverable under this chapter, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and

(2) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

TEX. BUS. & COM CODE ANN. § 2.719(a).

Section 2.719 further provides that "[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this title." *See* § 2.719(b). S*ee also* § 2.714 (pertaining to the recovery of reasonable monetary damages resulting from a breach of warranty for non-conforming goods). Where there is no personal injury involved, Texas courts do not hesitate to enforce the limitation of remedy provisions authorized by section 2.719. *Chemetron Corp. v. Syngas Co.*, No. 14-90-00389-CV, 1991 Tex. App. LEXIS 408, at *8 (Tex. App.—Houston [14th Dist.] Feb. 21, 1991, writ denied) (mem. op.) (citing *Mostek Corp. v. Chemetrol Corp.*, 642 S.W.2d 20 (Tex. App.—Dallas 1982, writ dism'd by agr.); *Ganda, Inc. v. All Plastics Molding, Inc.* 521 S.W.2d 940 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.) (partial summary judgment based on limitation of remedies clause affirmed); *Fedonia Broadcasting Corp., Inc. v. RCA Corp.* 481 F.2d 781, 799 (5th Cir. 1973) (plaintiffs' distinct claims of fraud and misrepresentation do not vitiate the limitation of remedy provision in a suit on a contract)).

The language of the warranty in question provides that, at "FieldTurf's option, [it will] either repair or replace the affected area without charge, to the extent required to meet the warranty period (but no cash refunds will be made) . . . ." The warranty further provides that "[t]his warranty is limited to the remedies of repair or replacement, which shall constitute the exclusive remedies available under this warranty, and all other remedies or recourses which might otherwise be available are hereby waived by the Buyer" and "FieldTurf will have no other obligations or liability for damages arising out of or in connection with the use or performance of the product including but without limitation,

damages for personal injury or economic losses." FieldTurf argues that from the plain language of the warranty and section 2.719, it is clear that NBISD has two remedies: repair or replacement of the field. Accordingly, FieldTurf contends the trial court erred in denying its motion for judgment that NBISD "take nothing" on its claim for monetary damages.

NBISD counterargues that it is not limited to the remedy of "repair or replacement" because such a remedy would fail of the essential purpose of the warranty. Section 2.719 states that through a limited warranty, the parties may "limit or alter the *measure of damages* recoverable . . . as by limiting the buyer's remedies . . . to repair or replacement of non-conforming goods or parts." § 2.719 (a)(1). According to NBISD, it is clear that seeking "damages" is distinct from seeking "specific performance" of a contractual obligation as set forth in section 2.711 and section 2.716, which treat specific performance as a completely different remedy from damages. §§ 2.711; 2.716. NBISD argues, citing *Wal-Mart Stores, Inc. v. Forte*, 497 S.W.3d 460, 465 (Tex. 2016), that outside the Texas UCC, "damages" is specifically a reference to monetary remedies. Consequently, the only effect of section 2.719, NBISD contends, is that it allows the parties to elect a different "measure of damages" in lieu of the default measure based on difference in market value. Therefore, it asserts, a claimant can still elect the default *measure of damages* if it can demonstrate the agreed limited warranty fails of its essential purpose.

NBISD posits that under the Texas UCC, a party may elect the benefit of the bargain based on the agreed "measure of damages" when there is a limited repair and replacement warranty under section 2.719. Alternatively, a party may elect to show the warranty has failed of its essential purpose and "may" seek the default remedy provided

under the Code, i.e., the difference in market value. NBISD chose to measure damages recoverable based on the parties' agreement to limit the measure of damages to "repair or replacement." Here, NBISD argues, it presented evidence of a breach of express warranty when FieldTurf was given a reasonable opportunity to honor the warranty but failed to do so. The jury found that to be true in its responses to jury questions 3 and 4. The jury awarded NBISD monetary damages for that breach, measured by the reasonable and necessary cost to *repair or replace* the field. Thus, according to its argument, NBISD obtained the remedy expressly agreed to between the parties under the limited warranty. NBISD did not, however, seek the default remedy under section 2.714, nor did it demonstrate the limited warranty failed of its essential purpose.

Section 2.719 "creates a presumption that clauses prescribing remedies are cumulative rather than exclusive." *Equistar Chems., LP v. ClydeUnion DB, Ltd*., 579 S.W.3d 505, 522 (Tex. App.—Houston [14th Dist.] 2019, pet. denied) (citing TEX. BUS. & COM. CODE ANN. § 2.719, cmt. 2). "If the parties intend the term to describe the sole remedy under the contract, this must be clearly expressed." *Equistar Chems., L.P.*, 579 S.W.3d at 522) (citation omitted).

Here, the warranty contains the type of language courts have held to establish an exclusive or sole remedy provision. *See Equistar Chems., L.P.*, 579 S.W.3d at 522 (citing *PPG Indus., Inc. v. JMB/Houston Ctrs. Ltd. P'ship*, 146 S.W.3d 79, 98, 101 (Tex. 2004) (seller's warranty limited to replacement when contract provided, "Pursuant to this limited warranty, [seller] will only supply a new unit, and no labor, installation or special or consequential damages are included . . . . [Seller] makes no other warranty"); *Henderson v. Ford Motor Co.*, 547 S.W.2d 663, 665, 667-68 (Tex. App.—Amarillo 1977, no writ)

(seller's warranty limited to repair or replacement when contract provided for repair or replacement and that "this warranty is expressly IN LIEU OF any other express or implied warranty, condition or guarantee with respect to the vehicle or any part thereof, including any implied WARRANTY OF MERCHANTABILITY OR FITNESS," and that "vehicle is purchased AS IS"); *Lankford v. Rogers Ford Sales*, 478 S.W.2d 248, 250-51 (Tex. Civ. App.—El Paso 1972, writ ref'd n.r.e.) (seller's warranty limited to repair or replacement when contract provided, "The warranties herein are expressly IN LIEU OF any other express or implied warranty, including any implied WARRANTY of MERCHANTABILITY or FITNESS, and of any other obligation on the part of the Company or the Selling Dealer")). We thus find NBISD's claim for breach of warranty was limited to repair or replacement of non-conforming goods and that the trial court erred in denying FieldTurf's motion for judgment that NBISD "take nothing" on its claim for monetary damages. Cross-issue one is sustained.

CROSS-ISSUE TWO—RECOVERY OF MONETARY DAMAGES

Via its second issue, FieldTurf argues that NBISD could not have recovered any monetary damages for breach of warranty because it failed to plead, prove, or obtain a jury finding that the warranty failed of its essential purpose under section 2.719 of the Texas UCC. NBISD responds that there was no need to find the warranty failed of its essential purpose because NBISD sought the measure of damages provided under the warranty.

Based on our analysis of FieldTurf's first issue, we find that for NBISD to recover damages for breach of warranty, it was required to show the exclusive or limited remedy failed of its essential purpose. § 2.719(b). NBISD candidly admits it did not prove that

the exclusive or limited remedy failed of its essential purpose because its position was it was not required to do so. As such, it presented no evidence that it had requested repair or replacement of the field or that FieldTurf had refused such requests. It presented only evidence of FieldTurf's offer of and NBISD's acceptance of service under a "maintenance plan." Furthermore, NBISD replaced the field through another company at its own expense in 2016—at a time when demand could have been made on FieldTurf to perform according to its warranty. Had NBISD presented evidence proving that the exclusive or limited remedy failed of its essential purpose, the outcome of this matter might have been different.[5] However, based on the facts of this case, we are constrained to sustain FieldTurf's second cross-issue.

CROSS-ISSUE THREE—SUFFICIENCY OF EVIDENCE OF DAMAGES

By its third issue, FieldTurf asserts that NBISD's failure to produce any evidence of breach of warranty damages precluded its recovery for breach of warranty. NBISD counters that the cost of repair or replacement is the proper measure of damages for breach of a repair or replacement warranty. Based on our disposition of cross-issues one and two, we pretermit disposition of cross-issue three. *See* TEX. R. APP. P. 47.1.

CROSS-ISSUE FOUR—EVIDENCE OF REPLACEMENT COSTS

In its fourth issue, FieldTurf contends NBISD cannot recover a judgment based on replacement costs because it lacked admissible proof that such damages were reasonable and necessary. NBISD disagrees, arguing sufficient evidence was presented to prove the cost to replace the field was reasonable and necessary. Based on our

[5] "A limitation of remedies fails of its essential purpose when a warrantor fails to correct the defect within a reasonable time or after multiple attempts." *Orthoflex, Inc. v. ThermoTek, Inc.*, No. 3:11-CV-0870-D, 2013 U.S. Dist. LEXIS 112865, at *23 (N.D. Tex. Aug. 9, 2013) (citing *Mostek Corp.*, 642 S.W.2d at 27).

disposition of cross-issues one and two, we pretermit disposition of cross-issue four. *See* TEX. R. APP. P. 47.1.

CROSS-ISSUE FIVE—FIELDTURF'S ENTITLEMENT TO A SETTLEMENT CREDIT

Lastly, FieldTurf argues it is entitled to a settlement credit of $40,000 and a judgment reduced by that amount. Prior to trial, NBISD settled with RS Global for the same damages alleged against FieldTurf in this proceeding. As such, FieldTurf contends NBISD should not be entitled to recover the full $251,000 judgment. NBISD concedes that FieldTurf is entitled to a $40,000 settlement credit and to a reduced judgment amount. Notwithstanding the concession of NBISD, based on our disposition of cross-issues one and two, we pretermit disposition of cross-issue five. *See* TEX. R. APP. P. 47.1.

NBISD'S DIRECT APPEAL

ISSUE ONE—ERROR IN DENYING ATTORNEY'S FEES

By its first issue in its direct appeal, NBISD argues the jury's $0 award for attorney's fees was not supported by any evidence and thus, the trial court should have granted the motion for partial new trial on that issue. FieldTurf argues the jury's decision to award NBISD no attorney's fees does not warrant a new trial on that issue.

The Texas UCC sections and comments dealing with remedies for breach of warranty are silent on the issue of attorney's fees. *See* §§ 2.714-.715 and cmt. (providing for consequential damages to a buyer in a breach of warranty action but failing to indicate in the comment whether attorney's fees are considered either consequential or incidental damages). The Texas Supreme Court has, however, held that the recovery of attorney's fees based on a breach of warranty claim premised on a written or oral contract is permissible pursuant to the provisions of section 38.001(8) of the Texas Civil Practice

and Remedies Code. *Med. City Dallas, LTD. v. Carlisle Corp.,* 251 S.W.3d 55, 63 (Tex. 2008). To recover attorney's fees under section 38.001(8) a party must be a prevailing party. Because NBISD did not prevail on any of its claims, it is not entitled to recover attorney's fees under section 38.001(8). Issue one is overruled.

ISSUE TWO—PREJUDGMENT INTEREST

Through its second issue, NBISD contends the trial court erroneously refused to include prejudgment interest on its recovery of past damages. FieldTurf responds that the trial court correctly refused to award prejudgment interest on NBISD's breach of warranty judgment because the warranty expressly precluded that relief. In light of our disposition of FieldTurf's cross-issues one and two, we pretermit disposition of issue two. *See* TEX. R. APP. P. 47.1.

CONCLUSION

Having sustained FieldTurf's first and second cross-issues and having overruled or pretermitted the remaining cross-issues and direct issues, we reverse the judgment of the trial court and render judgment that NBISD take nothing on its claim for breach of warranty.

Patrick A. Pirtle
Justice