Affirmed in Part, Reversed and Remanded in Part, and Memorandum Opinion filed February 24, 2011.

In The

Fourteenth Court of Appeals

NOS. 14-09-01005-CV
14-10-00197-CV

ROBERT BARNETT AND CHARLOTTE BARNETT, Appellants

V.

HOME OF TEXAS AND WARRANTY UNDERWRITERS INSURANCE COMPANY, Appellees

On Appeal from the 412th District Court
Brazoria County, Texas
Trial Court Cause No. 43646

MEMORANDUM OPINION

After purchasing their home, Robert and Charlotte Barnett experienced problems with its foundation. They subsequently sued several entities, including appellees Home of Texas and Warranty Underwriters Insurance Company, the providers of the Barnetts' home warranty. Against appellees, the Barnetts alleged, among other things, fraud, breach of warranty, and violations of the Texas Deceptive Trade Practices Act. The case proceeded to trial, during which the trial court granted appellees' motion for directed

verdict against the Barnetts' fraud claims. The jury found for the Barnetts on most of the liability issues submitted, including breach of warranty and violations of the DTPA. The jury also found actual damages, including mental anguish damages, and concluded that the Barnetts were entitled to additional damages because appellees committed certain of the DTPA violations knowingly. The trial court then granted appellees' motion to disregard certain of the jury's answers, specifically those regarding mental anguish and knowing conduct.

On appeal, the Barnetts primarily contend that the trial court erred in disregarding certain jury questions. They contend in the alternative that the trial court erred in granting a directed verdict against their fraud issues. In a cross-point, appellees challenge the legal and factual sufficiency of the evidence to support one of the jury's DTPA violation findings. Appellees further request that this court determine how to apply a post-judgment settlement credit. We modify the judgment and remand for recalculation of prejudgment interest.

Background

The Barnetts bought a home in July 2000 from Gehan Homes Ltd. The home was located in a residential development established by Beazer Homes of Texas, L.P. The home warranty was provided by Home of Texas and Warranty Underwriters Insurance Company (collectively "appellees").[1] Under the terms of the warranty, appellees warranted the home against "major structural defects" in years three through ten after the

[1] In the warranty itself, Warranty Underwriters Insurance Company is defined as the insurer and Home of Texas is defined as the administrator. In the trial court, the parties stipulated that any jury findings against Home of Texas would also be considered findings against Warranty Underwriters. In the jury charge, the two parties were referred to collectively as "Home of Texas." No distinction is made between the two in the appeal.

effective date, with Gehan warranting the home for the first two years. For a "major structural defect" to exist under the warranty, three conditions had to be met:

> a. actual physical damage to one or more . . . specified load-bearing segments of the home;
>
> b. causing the failure of the specific major structural components; and
>
> c. which affects its load-bearing function to the degree it materially affects the physical safety of the occupants of the home.

Soon, the Barnetts began experiencing problems at the home that included drywall cracking in the master bedroom, separation of the bathroom vanity fixture from the wall, as well as drainage and other issues. They sought redress first from Gehan and subsequently from appellees. In November 2003, an independent contractor hired by appellees, D.L. Simpson, inspected the home. In his report to appellees, Simpson stated that he observed numerous problems at the home, including "corner spall" (*i.e.*, chipping or fragmenting) at three corners of the foundation, brick veneer cracks, a gap in one of the window placements, drywall cracks, the rear patio sloping toward the house rather than away from it, and several doors sticking or not latching properly. Specifically regarding floor elevations found at the home, Simpson stated as follows:

> We noted elevation variance throughout much of the home with a maximum change of about 2.8 inches in 18 feet, measured from the front to the rear of the master bedroom. In general, we consider differentials of less than 1 inch in 10 feet to be acceptable. The measured differential exceeds that parameter. When excessive differential settlement occurs, foundation repairs are warranted.

Simpson additionally noted that the end of the pool nearest the master bedroom appeared to be raised two inches above the other end of the pool.[2] He speculated that there were three possible explanations for the floor "heave" found in the master bedroom:

[2] Subsequent to purchasing the home, the Barnetts contracted with Horizon Pools & Landscape, Inc. to install an in-ground pool in the back yard.

(1) the pool that was at least ten feet from the foundation could be leaking, (2) a storm sewer that could be as close as three feet from the foundation could be leaking, and (3) if one or more trees had been removed from the area behind the bedroom, soil in the area could be re-hydrating in the aftermath of their removal. Simpson concluded that, based on his inspection, there was no apparent "actual physical damage" to specified load-bearing elements and no apparent failure of such load-bearing elements so as to affect their load-bearing function.

On December 8, 2003, Home of Texas representative Lorrie A. Stahl sent a letter to the Barnetts regarding Simpson's inspection. In the letter, Stahl stated only that Simpson observed four doors that did not function properly in the home. She then stated that "Home of Texas (HOME) recommends that you take action that is deemed necessary in order to correct the functionality of the listed component [*sic*]." The letter does not mention any other problems identified by Simpson in his report.

Attached to the letter was a "Warranty Coverage Report" also signed by Stahl. This report, clearly based on Simpson's inspection, additionally referenced that "[w]edge chip cracks were observed at three corners of the foundation," the rear patio sloped toward the home, and one end of the pool was raised above the other. The report further indicated that at the time of the inspection, "the criteria for a Major Structural Defect, as defined by the Limited Warranty, had not been met." Lastly, the report instructed the Barnetts that if they agreed with the report, their coverage would remain in effect until 2010, but if they did not accept the report, they could file for binding arbitration under the terms of the warranty. Also enclosed with the letter and report from Stahl was information for homeowners on how to properly maintain a home foundation. Evidence at trial indicated that in 2007, the problems with the Barnetts' home became substantially worse, with the floor in the master bedroom noticeably heaving upward, interior cracks expanding, and sheetrock falling off of walls.

The Barnetts sued numerous parties over the problems with their home, including Gehan (builder and seller), Beazer (developer), appellees (provider of the home warranty), and Horizon Pools and Landscape (pool builder).[3] Against appellees, the Barnetts alleged, among other things, fraud, breach of warranty, and various violations of the Texas Deceptive Trade Practices Act (DTPA). The Barnetts made similar claims against Gehan. Prior to trial, the Barnetts settled their claims against Beazer and Horizon Pools and Landscape. Also, prior to submission of the case to the jury, the trial court granted a directed verdict on the Barnetts' fraud claims against appellees.

In regards to appellees, the jury found that they made negligent misrepresentations (jury question 1), breached the warranty (question 4), engaged in false, misleading, or deceptive acts or practices (question 9), and engaged in unconscionable conduct (question 11). Against Gehan, the jury found that it made negligent misrepresentations, committed fraud, engaged in false, misleading, or deceptive acts or practices,[4] and engaged in unconscionable conduct. In response to multiple damages questions, the jury found that the cost to make structural repairs to the home was $100,000 and the cost of cosmetic repairs was $69,490. The jury further awarded damages for the Barnetts' mental anguish in the sum of $50,000 (in response to a portion of question 13). In response to jury question 14, the jury found that appellees engaged in certain conduct "knowingly."[5] Based on this finding, the jury awarded additional damages of $169,490 (question 15).

[3] In their pleadings, the Barnetts named several apparently affiliated entities for each defendant (builder, developer, pool builder, warranty provider). It is not necessary for purposes of this appeal to list or describe each entity named in the lawsuit.

[4] More specifically regarding the false, misleading, or deceptive acts or practices, the jury found that appellees and Gehan (1) represented "that goods or services had or would have characteristics and benefits that they did not have"; (2) caused "confusion or misunderstanding about the source, sponsorship, approval or certification of goods or services"; and (3) represented "that goods or services are of a particular standard, quality or grade [when] they [were] not." The jury, however, declined to find that appellees or Gehan had represented "that a warranty confer[red] or involve[d] rights or remedies that it [did] not have."

[5] Question 14 was predicated on a positive response to either question 9 (false, misleading, or deceptive acts or practices) or question 11 (unconscionable conduct). It defined "knowingly" as "actual

In response to appellees' motion for judgment notwithstanding the verdict, the trial court disregarded the jury's award of mental anguish damages (a portion of question 13) as well as the jury's award of additional damages for knowing conduct (questions 14 and 15). In its final judgment, the trial court awarded the Barnetts $81,950 in actual damages jointly and severally against appellees and Gehan.[6] The court further awarded the Barnetts attorney's fees, costs, and pre- and post-judgment interest. After entry of judgment, Gehan settled with the Barnetts for $45,000. Appellees subsequently filed a motion for clarification, notifying the trial court of the settlement. However, there is no indication in the record that the trial court ever considered the motion.

On appeal, the Barnetts challenge the trial court's disregarding of certain jury answers and contend, in the alternative, that the trial court erred in granting appellees' directed verdict as to fraud. In a cross-point, appellees challenge the legal and factual sufficiency of the evidence to support one of the jury's DTPA violation findings. Appellees further request that this court determine how to apply a post-judgment settlement credit.

Purported Challenge

In their first two issues, the Barnetts purport to challenge the trial court's disregarding of jury questions 9 ("false, misleading, or deceptive act or practice") and 11 ("unconscionable action or course of action"). However, as appellees point out in their brief, and the Barnetts acknowledge in their reply brief, the trial court did not disregard these jury findings; to the contrary, these findings formed the basis for the trial court's judgment in the Barnetts' favor. Because the trial court did not actually perform the

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awareness, at the time of the conduct, of the falsity, deception, or unfairness of the conduct in question or actual awareness of the conduct constituting a failure to comply with a warranty."

[6] In the judgment, the trial court stated that it derived the $81,950 figure by subtracting from the jury's economic damages award of $169,450 a settlement credit of $87,500. As discussed above, the actual figure found by the jury for economic damages was $169,490. However, no party complains about this apparent $40 discrepancy, so we will not address it further.

action the Barnetts complain of in their first two issues, these issues are summarily overruled.

Knowingly

In issues three, four, and five, the Barnetts contend that the trial erred in disregarding the jury's finding that appellees engaged in certain conduct knowingly (question 14). As mentioned above, the conduct at issue was found by the jury in response to questions 9 and 11. The import of the knowingly finding is that it permitted the jury to assess additional damages beyond actual damages. *See* Tex. Bus. & Com. Code § 17.50(b)(1); *CA Partners v. Spears*, 274 S.W.3d 51, 72-73 (Tex. App.—Houston [14th Dist.] 2008, pet. denied). The jury assessed an additional $169,490 against appellees based on their conduct having been committed knowingly (question 15). The Barnetts' primary argument is that the evidence was sufficient to support the jury's knowingly finding.

We review a trial court's order granting a motion to disregard under the same legal sufficiency standard as no-evidence challenges to the sufficiency of the evidence. *City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005). Consequently, we will uphold the trial court's decision to disregard the jury's finding only if the record contains no evidence supporting the disregarded finding. *Mancorp, Inc. v. Culpepper*, 802 S.W.2d 226, 227 (Tex. 1990). If more than a scintilla of evidence supports the finding in question, the jury's verdict and not the trial court's judgment must be upheld. *Id.* at 228. In an apparent cross-point, appellees contend that even if there was some evidence that they committed the conduct in question knowingly, the jury's finding was against the great weight and preponderance of the evidence.[7] We consider this challenge to the factual sufficiency of the evidence under well-established standards. *See Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761-62 (Tex. 2003).

[7] Although appellees did not properly delineate any cross-points, we will consider all of their arguments in this appeal.

As defined in the charge, "knowingly" means:

> actual awareness, at the time of the conduct, of the falsity, deception, or unfairness of the conduct in question or actual awareness of the conduct constituting a failure to comply with a warranty. Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

Among the evidence the Barnetts point to as demonstrating appellees acted knowingly are Simpson's inspection report he provided to appellees as well as the letter and warranty coverage report appellees' representative Stahl sent to the Barnetts in denying coverage under the warranty. As described in detail above, Simpson's report described numerous problems discovered at the Barnetts' home, including most notably that elevation differentials for the master bedroom floor exceeded acceptable parameters. Simpson further offered three possible causes of the problems and stated that foundation repairs were needed. However, in her letter to the Barnetts, Stahl mentioned only that Simpson had discovered that a few doors were not functioning properly and suggested the Barnetts correct that problem. Furthermore, in her coverage report, although Stahl mentioned a few more details from Simpson's inspection report, she did not provide either the arguably most alarming portion of Simpson's report (the out-of-tolerance floor elevations), his speculation as to possible causes, or his statement that foundation repairs were needed.

On the basis of this evidence, the jury reasonably could have determined that appellees intentionally provided and emphasized certain information (*e.g.*, problems with doors) and omitted certain arguably more important information (*e.g.*, floor elevations, possible causes, and the necessity of repairs) in a deliberate attempt to downplay the severity of the problems with the Barnetts' home. Thus, the jury's finding in question 14 that appellees acted knowingly was supported by legally and factually sufficient

evidence. Accordingly, we sustain the Barnetts' third, fourth, and fifth issues and overrule appellees' cross-point. We reinstate the jury's assessment of additional damages in question 15.[8]

Mental Anguish

In their sixth issue, the Barnetts contend that the trial court erred in disregarding the portion of the jury's answer to Question 13 in which it found that $50,000 was a reasonable sum to compensate the Barnetts for the mental anguish they suffered as a result of appellees' actions. In order to recover mental anguish damages, the Barnetts needed to provide either (1) "direct evidence of the nature, duration, or severity of [their] anguish, thus establishing a substantial disruption in [their] daily routine;" or (2) other evidence of "a high degree of mental pain and distress that is more than mere worry, anxiety, vexation, embarrassment, or anger." *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 444 (Tex. 1995). There must not only be evidence of the existence of compensable mental anguish, there must also be some evidence to justify the amount awarded. *Saenz v. Fid. & Guar. Ins. Underwriters*, 925 S.W.2d 607, 614 (Tex. 1996). The jury "cannot simply pick a number and put it in the blank." *Id*.

Here, the only evidence cited by the Barnetts in support of the mental anguish finding was in the testimony of Robert Barnett. He testified that he was angry, that living in the house was difficult, and that he felt that he had not protected his wife. He said that the past three years had been a nightmare and explained that the couple does not entertain family in the home because their family only wanted to discuss the problems with the house. He further stated that he was embarrassed and that there was no joy between the couple when they were in the home. He indicated however that the issue had not affected

[8] Appellees' primary argument regarding issues three, four, and five was that the Barnetts failed to properly cite to the record because they only cited large swaths of record and did not lay out the import of those citations. The Barnetts, however, did specifically discuss the Simpson report in their briefing, and in their reply brief, they provided specific citation to the inspection report as well as the letter and coverage report from Stahl. Consequently, we consider these issues properly briefed.

his sleep and acknowledged that he had not seen a doctor regarding any issues relating to the home.

This testimony fell short of the "high degree of mental pain and distress" envisioned in *Parkway*. 901 S.W.2d at 444 (indicating mere anger and embarrassment not enough to support monetary recovery for mental anguish); *see also Fifth Club, Inc. v. Ramirez*, 196 S.W.3d 788, 797 (Tex. 2006) (holding that evidence was sufficient to support mental anguish damages where plaintiff and plaintiff's wife testified that plaintiff "continued to be depressed, humiliated, non-communicative, unable to sleep, and angry, continued to have headaches and nightmares, and that his daily activities and his relationships with his wife and daughter continued to be detrimentally affected almost two years after the incident" made the basis of the lawsuit). Further, the testimony did not demonstrate that the mental anguish was such as to establish a substantial disruption in the Barnett's daily routine. *See Parkway*, 901 S.W.2d at 444. The facts of this case also do not suggest the type of disturbing or shocking injuries that permit an inference that mental anguish occurred as a result thereof. *See id*. at 445. The trial court did not err in disregarding the jury's verdict on mental anguish damages. We overrule the Barnett's sixth issue.

Fraud

In issues seven and eight, the Barnetts challenge the trial court's grant of a directed verdict against their fraud claims as well as the court's refusal to submit the fraud claims to the jury. The Barnetts present these two issues as alternative arguments in the event this court were to reverse and render judgment against their DTPA claims, on which the trial court's judgment in their favor was based. Because we do not reverse the judgment on the DTPA violations and damages, we need not address these alternative arguments. Accordingly, issues seven and eight are overruled as moot.

Cross-Point

In their brief, appellees appear to raise an additional cross-point challenging the factual sufficiency of the evidence to support the jury's response to question 9 ("false, misleading, or deceptive act or practice").[9] In considering this argument, it is important to note that all of the damages found by the jury that were predicated on its answer to question 9 were also predicated on its answer to question 11 ("unconscionable conduct"). In other words, the damages findings are supported by the liability findings in response to both questions 9 and 11. Thus, even if appellees are correct that the evidence is factually insufficient on question 9, the damages are still supported by the jury's response to question 11, which appellees do not challenge. Because appellees' challenge to question 9 would have no impact on the court's final judgment, such challenge is moot. *See, e.g.*, *Britton v. Tex. Dep't of Crim. Justice*, 95 S.W.3d 676, 681 (Tex. App.—Houston [1st Dist.] 2002, no pet.) ("[A]n appellant must attack all independent bases or grounds that fully support a complained-of ruling or judgment. If an appellant does not, then we must affirm the ruling or judgment."). Accordingly, we overrule appellees' second cross-point.

Post-Judgment Settlement Credit

Also in their brief, appellees request that this court allocate a post-judgment settlement credit. Apparently, after final judgment was rendered in the court below and after the trial court's plenary power had expired, the Barnetts settled their claims against Gehan Homes. Appellees specifically request that this court apply a settlement credit first towards the prejudgment interest incurred on the judgment and then towards the

[9] This argument was not listed as a cross-point in appellees' briefing but instead was included in a section entitled "Counter-appellant's [*sic*] Argument."

actual damages awarded, and not toward the attorney's fees Gehan was ordered in the judgment to pay to the Barnetts.[10]

Appellees do not, however, cite to any authority authorizing this court to make such an allocation of post-judgment settlement amounts. Appellees are not specifically complaining of any action the trial court took or refused to take, and if they were, they failed to preserve error in the trial court. *See* Tex. R. App. P. 33.1(a) ("As a prerequisite to presenting a complaint for appellate review, the record must show that: (1) the complaint was made to the trial court by a timely request, objection, or motion . . . and (2) the trial court: (A) ruled on the request, objection, or motion, either expressly or implicitly; or (B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal."). Although appellees filed a motion for clarification in the trial court, requesting the trial court to comment on proper application of the settlement, the record does not contain any indication that the trial court ever actually considered the motion much less ruled on it. To the contrary, appellees suggest in their brief that the court could not have entertained the motion because its plenary power had expired.

During oral argument before this court, counsel for appellees indicated that their request for an offset was founded on chapter 33 of the Texas Civil Practice and Remedies Code. However, counsel provided no specific reference to any provision of that chapter, and nothing in that chapter suggests that an appellate court may allocate settlement credits in the absence of preservation of error.[11] In short, appellees have failed to

[10] Although the damages were awarded jointly and severally against appellees and Gehan, due to a stipulation entered into at trial regarding fees, the amount of attorney's fees awarded against each defendant was different.

[11] It should also be pointed out that chapter 33 generally governs cases involving "proportionate responsibility" among liable parties, wherein persons are held responsible for percentages of the harm, and is generally not applicable to cases such as the present one wherein two defendants were held jointly and severally liable for the same damages. *See* Tex. Civ. Prac. & Rem. Code §§ 33.002(a), 33.012; *Tex. Capital Sec., Inc. v. Sandefer*, 108 S.W.3d 923, 925-26 (Tex. App.—Texarkana 2003, pet. denied). *But see* Tex. Civ. Prac. & Rem. Code § 33.013, 33.015 (describing particular circumstances under which chapter 33 has application to parties held jointly and severally liable).

establish their entitlement to have this court allocate a credit for the Barnetts' settlement with Gehan. Their request to do so is therefore denied.

Conclusion

The trial court erred in disregarding the jury's finding of knowing conduct in question 14 and its assessment of additional damages in question 15. We reform the judgment to award the additional damages as found by the jury and remand for the recalculation of prejudgment interest.

/s/ Martha Hill Jamison
Justice

Panel consists of Justices Brown, Boyce, and Jamison.