Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00678-CV

Naomi **MCNEELY** and Joseph Matthew Cooper-Harper,
Appellants

v.

SALADO CROSSING HOLDING, L.P., AVR Realty Company, LLC, and The Lynd Company,
Appellees

From the County Court at Law No. 2, Bexar County, Texas
Trial Court No. 380298A
Honorable David J. Rodriguez, Judge Presiding

Opinion by: Luz Elena D. Chapa, Justice

Sitting: Karen Angelini, Justice
Luz Elena D. Chapa, Justice
Irene Rios, Justice

Delivered and Filed: June 14, 2017

AFFIRMED

Naomi McNeely and her husband Joseph Matthew Cooper-Harper appeal the trial court's summary dismissal of several of their claims against appellees.[1] Naomi and Joseph argue appellees' motion for summary judgment failed to expressly present their grounds for summary judgment and there is more than a scintilla of evidence to support their claims for violations of the Deceptive Trade Practices Act (DTPA), fraud, misrepresentation, constructive eviction, wrongful eviction, and gross negligence. We affirm the trial court's judgment.

---

[1] The trial court severed the dismissed claims into a separate cause, making the judgment final and appealable.

BACKGROUND

Naomi and Joseph were moving to San Antonio from Pearsall, Texas, and sought to lease an apartment. They toured Salado Crossing apartments with two leasing agents. The leasing agents stated the property was "well managed," they "had a quick turnaround on any complaints," and "they will answer your maintenance issues within 48 hours." Based on these statements, the services Salado Crossing offered, and Salado Crossing's proximity to Joseph's school, Naomi executed a lease to rent an apartment at Salado Crossing starting in September 2008. Naomi listed Joseph as an occupant of the apartment on the lease. The lease misstated that "Salado Crossing Apartments, L.P." rather than "Salado Crossing Holding, L.P." was the property owner. In 2009, Naomi renewed the lease through August 31, 2010.

In June 2010, Naomi and Joseph notified Salado Crossing they intended to surrender possession of the apartment on August 31, 2010. Joseph spoke with Erik Wyatt, an agent of the property management company, and told him they were vacating the apartment on August 28, 2010, but they would return on August 31, 2010, for the belongings they had left in the apartment. Joseph and Wyatt also scheduled a final walkthrough of the apartment for August 31, 2010. On August 28, 2010, Joseph again confirmed with Wyatt their final walkthrough was scheduled for August 31, 2010, and reminded Wyatt they would surrender the keys and remove their belongings on that day. Naomi spoke with another agent on August 28, 2010, and told the agent she and Joseph would be back for the walkthrough.

Sometime between August 28 and August 31, 2010, Wyatt instructed a housekeeper, Tammie Shook, to enter Naomi and Joseph's apartment and "trash it out." Using a key Wyatt had given her, Shook entered the apartment; disposed of some of the personal property in a dumpster; left some furniture, cleaning supplies, and kitchen accessories in the apartment; and took a KitchenAid blender to her on-site apartment unit for her personal use. Shook disposed of Naomi

and Joseph's "memorabilia box," containing love letters, photographs, and other personal mementos Naomi and Joseph had exchanged over the course of their relationship, including mementos exchanged when Joseph was serving in Iraq as a member of the U.S. Army National Guard.

On August 31, 2010, before returning for the final walkthrough, Joseph called Salado Crossing to tell them he was en route. A Salado Crossing agent told him the walkthrough was unnecessary and "you don't have to come, don't worry about it." Joseph nevertheless returned to the apartment and discovered some of his property was missing. Joseph contacted Wyatt, who initially denied knowing who had entered the apartment. After making a phone call, Wyatt went to Shook's apartment, retrieved the KitchenAid blender, and returned it to Joseph. Joseph then searched a dumpster where he found the memorabilia box, but some of its contents were missing. The missing contents and other missing property were never recovered. Naomi and Joseph complained to Salado Crossing and sought reimbursement for their lost and destroyed property, but Salado Crossing did not immediately resolve Naomi and Joseph's complaint to their satisfaction. Wyatt offered Joseph a $50 gift card for a bargain store and told Joseph to follow up with the property management company. Joseph did not accept the gift card.

Naomi and Joseph filed suit, alleging a multitude of claims against Salado Crossing; Salado Crossing's general partner, AVR Realty; and the property management company, The Lynd Company. The claims included trespass to real property and personal property; conversion; violations of the DTPA; invasion of privacy; negligence, negligence per se, and gross negligence; fraud; negligent and intentional misrepresentation; breach of contract; breach of express and implied covenants; bailment; wrongful eviction; constructive eviction; and bad faith retention of a security deposit. Appellees filed a no-evidence motion for partial summary judgment on several of Naomi and Joseph's claims. The trial court granted the motion in part and denied it in part. The

trial court rendered a partial summary judgment, dismissing Naomi and Joseph's claims for violations of the DTPA, breach of implied covenant, fraud, misrepresentation, constructive eviction, wrongful eviction, and gross negligence.[2] The trial court severed the dismissed claims into a separate cause, and Naomi and Joseph appealed.

STANDARD OF REVIEW

"We review a summary judgment de novo." *City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556, 561 (Tex. App.—San Antonio 2000, pet. denied). "When a party moves for a no-evidence summary judgment, the nonmovant must produce some evidence raising a genuine issue of material fact." *Romo v. Tex. Dep't of Transp.*, 48 S.W.3d 265, 269 (Tex. App.—San Antonio 2001, no pet.) (citing Tex. R. Civ. P. 166a(i)). The nonmovant does not have the burden to marshal its evidence, but it must produce some evidence that raises a fact issue on the challenged element. *See id.* We take as true all evidence favorable to the nonmovant and "indulge every reasonable inference and resolve any doubts in the nonmovant's favor." *Rhône-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999); *City of San Antonio*, 47 S.W.3d at 561. When, as here, the trial court does not specify the grounds for granting summary judgment, we must affirm if any of the grounds presented in the summary judgment motion are meritorious. *See FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872-73 (Tex. 2000).

SUFFICIENCY OF APPELLEES' NO-EVIDENCE MOTION

Naomi and Joseph argue appellees' no-evidence motion was conclusory and not sufficiently specific. Rule 166a governs no-evidence motions for summary judgment:

> After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to

[2] Naomi and Joseph's other claims remain pending in the original cause.

> which there is no evidence. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.

TEX. R. CIV. P. 166a(i). "Rule 166a(i) does not prescribe a particular form, style or outline for a no evidence motion . . . ." *Welch v. Coca-Cola Enters., Inc.*, 36 S.W.3d 532, 536 (Tex. App.—Tyler 2000, pet. withdrawn). Although a summary judgment motion must not be conclusory, a no-evidence motion for summary judgment is sufficiently specific if it asserts there is no evidence of a particular element of a claim or defense. *See Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310-11 (Tex. 2009) (citing TEX. R. CIV. P. 166a(i), cmt. 1997).

If the grounds for summary judgment are not clear, the nonmovant generally must specially except to preserve error. *See Harwell v. State Farm Mut. Auto. Ins. Co.*, 896 S.W.2d 170, 175 (Tex. 1995). However, the nonmovant need not object if the grounds for summary judgment are not expressly presented in the motion itself because the motion is insufficient as a matter of law. *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 341 (Tex. 1993). Grounds are sufficiently specific if they give "fair notice" to the nonmovant. *Dear v. City of Irving*, 902 S.W.2d 731, 734 (Tex. App.—Austin 1995, writ denied). Because appellees' no-evidence motion challenges different elements of Naomi and Joseph's various claims, we address the sufficiency of appellees' motion in the context of each claim.

DECEPTIVE TRADE PRACTICES ACT

Naomi and Joseph alleged DTPA claims based on "false, misleading, or deceptive acts or practices" under the DTPA's "laundry list,"[3] breaches of warranties, and unconscionable actions or courses of action. Appellees' motion specifically addressed Naomi and Joseph's "laundry list" claims, breach of warranty claims, and unconscionability claims. Naomi and Joseph argue the trial

---

[3] The DTPA's "laundry list" of "false, misleading, or deceptive acts or practices" is contained in section 17.46 of the Texas Business & Commerce Code. *See* TEX. BUS. & COM. CODE ANN. § 17.46(b) (West Supp. 2016).

court erred by rendering summary judgment on these claims. We address each category of DTPA claim in turn.

A. "Laundry List" Claims

Appellees' motion for summary judgment listed all of the "laundry list" violations Naomi and Joseph alleged in their live pleading. Appellees' motion stated, "Plaintiffs ha[ve] presented no evidence that [appellees] engaged in any of the conduct [listed] above." We hold appellees' motion expressly presented a no-evidence ground as to the "false, misleading, or deceptive acts or practices" element of Naomi and Joseph's "laundry list" claims. *See* TEX. BUS. & COM. CODE ANN. § 17.50(a)(1) (West 2011) (providing a consumer may maintain an action for the "false, misleading, or deceptive acts or practices" listed in section 17.46).

Naomi and Joseph argue they produced evidence showing appellees, through their agents, "stated that the apartment community was well-managed and there was a quick turn around on any complaints or issues." They cite summary judgment evidence showing appellees told them "they would quickly try to fix [complaints] or try to get [them] . . . resolved." Naomi and Joseph further argue appellees represented that Naomi and Joseph would "ha[ve] lawful possession of the premises until the apartment was surrendered or abandoned." Naomi and Joseph contend each of these statements are actionable misrepresentations under the DTPA.

1. "Well Managed" Apartment Community & "Quick" Resolution of Complaints

For a misrepresentation to be "false, misleading, or deceptive" under the DTPA, the misrepresentation must be "of a material fact and not merely 'puffing' or opinion." *Pennington v. Singleton*, 606 S.W.2d 682, 687 (Tex. 1980). Broad and vague statements about a service, such as the service being "good," "superb," or "low risk," without more "amounts to mere sales talk, or puffery, not a statement of material fact." *GJP, Inc. v. Ghosh*, 251 S.W.3d 854, 889 (Tex. App.—Austin 2008, no pet.) (quoting W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS

§ 109 (5th ed. 1984)). Puffery may be actionable under the DTPA when "(1) it is intertwined with direct representations of present facts; (2) the speaker has knowledge of its falsity; (3) it is based on past or present facts; or (4) the speaker has special knowledge of facts that will occur or exist in the future." *Id.* (quotation marks and citation omitted).

Appellees' statements that the property was "well managed" and they "quickly" resolve complaints are broad, vague statements of opinion, similar to statements that one's services are "good" or "superb." Naomi and Joseph do not argue that these statements were intertwined with direct representations of present facts; appellees knew the representations were false; the representations were based on past or present facts; or that appellees had special knowledge of facts that would occur or exist in the future. We hold these statements are opinions, puffery, or sales talk, and not representations of material facts under the DTPA. *See Pennington*, 606 S.W.2d at 687; *GJP*, 251 S.W.3d at 889; *see also Bossier Chrysler Dodge II, Inc. v. Rauschenberg*, 201 S.W.3d 787, 799-800 (Tex. App.—Waco 2006) (holding statement regarding promptness of service that provided no "precise timeframe for completion of repairs" was too indefinite to be actionable under the DTPA), *aff'd in part, rev'd in part on other grounds*, 238 S.W.3d 376 (Tex. 2007) (per curiam).

2. Lawful Possession

Naomi and Joseph argue their lease misrepresented they would have exclusive lawful possession of the apartment, other than for reasonable entry, until they surrendered possession. They argue they produced evidence showing this statement was a misrepresentation under the DTPA because appellees entered the apartment before Naomi and Joseph surrendered possession. Such a statement is not "false, misleading, or deceptive" under the DTPA unless the lease agreement actually did not confer the right of exclusive possession other than for reasonable entry. *See* TEX. BUS. & COM. CODE ANN. § 17.46(b)(12). Naomi and Joseph produced the lease, which

gave Naomi and Joseph the exclusive right of possession of the apartment, other than for reasonable entry, until they surrendered possession. Because the lease actually gave Naomi and Joseph the exclusive right of possession other than for appellees' reasonable entry, the lease provision is not an actionable misrepresentation under the DTPA. *See id.* We therefore hold Naomi and Joseph produced no evidence of the "false, misleading, or deceptive conduct" element of their "laundry list" claims.

B. Breach of Warranty Claims

Naomi and Joseph argue they produced more than a scintilla of evidence showing appellees breached express and implied warranties. The DTPA provides consumers may maintain an action when a defendant's breach of an express or implied warranty is a producing cause of economic damages or damages for mental anguish. TEX. BUS. & COM. CODE ANN. § 17.50(a). "Warranties actionable under the DTPA, both express and implied, must first be recognized by common law or created by statute." *See Head v. U.S. Inspect DFW, Inc.*, 159 S.W.3d 731, 746 (Tex. App.—Fort Worth 2005, no pet.). Naomi and Joseph alleged appellees breached the implied warranty of quiet enjoyment and a warranty of "reasonable management."

1. Implied Warranty of Quiet Enjoyment

An essential element of a breach of the implied warranty of quiet enjoyment is permanent deprivation of the tenant's use and enjoyment of the premises. *Goldman v. Alkek*, 850 S.W.2d 568, 571-72 (Tex. App.—Corpus Christi 1993, no writ). Appellees' motion asserted, among other grounds, "[t]here is no evidence supporting [appellees'] mistaken premature entry into the apartment permanently deprived [Naomi and Joseph] of its use." We hold appellees' motion expressly presented a no-evidence ground as to the "permanent deprivation" element. Although Naomi and Joseph argue appellees violated their right of possession by entering the apartment and removing some of their property, they do not argue or explain how this conduct amounts to a

permanent deprivation of their use and enjoyment of the apartment. We hold the record contains no evidence of the "permanent deprivation" element. *See id.*

2. Warranty of "Reasonable Management"

Appellees' motion asserted there is no evidence of a breach of an implied warranty of reasonable management and argued Texas law does not recognize such an implied warranty. We hold appellees' motion expressly presented a no-evidence ground regarding the existence of a warranty of reasonable management and a breach of that warranty. *See Head*, 159 S.W.3d at 746 (stating "a warranty was made" and "the warranty was breached" are elements for recovering for breach of warranty under the DTPA). Citing to various lease provisions, Naomi and Joseph argue appellees "expressly warranted the lease created an express warranty of reasonable management." They argue, alternatively, section 92.0081 of the Texas Property Code provides an implied warranty of reasonable management.

a. Express Warranty Under the Lease

"An express warranty is created when a seller makes an affirmation of fact or a promise to the purchaser that relates to the sale and warrants a conformity to the affirmation as promised." *Id.* To determine whether a contract provides for an express warranty, we construe the contract to determine the parties' intent. *See RSUI Indem. Co. v. The Lynd Co.*, 466 S.W.3d 113, 118 (Tex. 2015). Contract terms are given their plain, ordinary, and generally accepted meanings. *Id.* "We begin our analysis with the language of the contract because it is the best representation of what the parties mutually intended." *Id.* "No one phrase, sentence, or section [of a contract] should be isolated from its setting and considered apart from the other provisions." *Id.*

Naomi and Joseph rely on paragraphs 19, 28, and 42 of the lease. Paragraph 19 provides, "We [appellees] may exclude from the apartment community guests or others who, in our *judgment*, have been violating the law, violating this Lease Contract or any apartment rules, or

disturbing other residents, neighbors visitors or owner representatives" (emphasis added). Paragraph 28 provides, "If you or any guest or occupant is present when repairers, servicers, contractors, our representatives or other persons listed . . . below may peacefully enter the apartment at *reasonable* times for the purposes listed . . . below" (emphasis added). Paragraph 42 provides, "You have surrendered the apartment when: (1) the move-out date has passed and no one is living in the apartment in our *reasonable judgment*; or (2) all apartment keys and access devices listed in paragraph 5 have been turned in where rent is paid—whatever date occurs first" (emphasis added). The plain language of these provisions does not make an affirmation of fact or promise of reasonable management and warrant conformity to such an affirmation. Naomi and Joseph emphasize paragraph 19's use of the term "judgment," paragraph 28's use of the term "reasonable," and paragraph 42's use of the term "reasonable judgment," but we may not construe contract terms in isolation. *See id.* We hold the lease does not create an express warranty of "reasonable management." *See Head*, 159 S.W.3d at 746.

b. Section 92.0081 of the Texas Property Code

Naomi and Joseph argue, alternatively, section 92.0081 of the Texas Property Code provides an implied warranty of reasonable management. We review matters of statutory construction de novo. *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006). In construing statutes, our objective is to give effect to the legislature's intent that we glean from the text. *Id.* In determining that intent, we "presume the Legislature chose statutory language deliberately and purposefully." *Crosstex Energy Servs., L.P. v. Pro Plus, Inc.*, 430 S.W.3d 384, 390 (Tex. 2014). We endeavor to interpret each word, phrase, and clause in a manner that gives meaning to them all. *PlainsCapital Bank v. Martin*, 459 S.W.3d 550, 556 (Tex. 2015).

Section 92.0081's several subsections prohibit a landlord from engaging in specific conduct regarding the removal of property and exclusion of a residential tenant. *See* TEX. PROP.

CODE ANN. § 92.0081 (West 2014). Naomi and Joseph do not cite any specific provision of section 92.0081's numerous subsections to support their contention, and they do not argue appellees violated any of the prohibitions in section 92.0081. Naomi and Joseph suggest section 92.0081 impliedly provides an implied warranty. Considering the statute as a whole, we hold section 92.0081 does not create an implied warranty of reasonable management. Consequently, Naomi and Joseph produced no evidence showing appellees breached an express or implied warranty of "reasonable management."

C. Unconscionability Claims

Appellees' motion asserted Naomi and Joseph did not have "any evidence that [appellees] engaged in an unconscionable course of action or acted knowingly with respect to their alleged actionable conduct." We hold appellees' motion expressly presented a no-evidence ground regarding the "unconscionable action or course of action" element of Naomi and Joseph's unconscionability claims under the DTPA. *See* TEX. BUS. & COMM. CODE § 17.50(a)(3) (providing remedies for "any unconscionable action or course of action").

The DTPA defines "unconscionable action or course of action" as "an act or practice which, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree." *Id.* § 17.45(5). "Taking advantage of a consumer's lack of knowledge to a grossly unfair degree . . . requires a showing that the resulting unfairness was glaringly noticeable, flagrant, complete and unmitigated." *Chastain v. Koonce*, 700 S.W.2d 579, 584 (Tex. 1985). Although there is no requirement that the defendant's unconscionable act occur simultaneously with the transaction that forms the basis of the consumer's complaint, an action or course of action is unconscionable only if it "reflect[s] on the unfairness of the original transaction." *See id.* (holding threats of physical violence one year after transaction were not actionable because it did not "reflect on the unfairness of the original

transaction"); *see also Parkway Co. v. Woodruff*, 901 S.W.2d 434, 441 (Tex. 1995) (explaining "unconscionability requires that the seller take advantage of special skills and training at the time of the sale").

Naomi and Joseph argue appellees engaged in an unconscionable action or course of action because (1) property manager Wyatt initially misstated he did not know who had entered their apartment and removed their items; (2) appellees delayed the resolution of Naomi and Joseph's complaint; and (3) appellees stated the "owner" of the apartment complex on the lease is "Salado Crossing Apartments, L.P." when the actual owner is "Salado Crossing Holding, L.P." Naomi and Joseph leased the apartment nearly two years before their apartment was "trashed out." Thus, the evidence that Wyatt misstated he did not know who had entered their apartment and appellees' delay in resolving their complaint do not reflect on the unfairness of the original transactions of leasing the apartment or renewing the lease. *See Parkway Co.*, 901 S.W.2d at 441; *Chastain*, 700 S.W.2d at 584. Naomi and Joseph argue appellees' misrepresentation of the actual owner on the lease is "confusing," but they do not argue, cite any authority, or explain how the misrepresentation reflects that the original transaction was grossly unfair.[4] We hold Naomi and Joseph produced no evidence of an "unconscionable action or course of action" under the DTPA.

D. Conclusion as to the DTPA Claims

Appellees' no-evidence motion for summary judgment expressly presented no-evidence grounds regarding essential elements of each group of Naomi and Joseph's claims under the DTPA. For each of their DTPA claims, Naomi and Joseph produced no evidence supporting at least one of the elements that appellees expressly challenged in their no-evidence motion for

[4] Naomi and Joseph also do not argue that the lease's misstatement of the owner on the lease is a "false, misleading, or deceptive act[] or practice[]" under the DTPA.

summary judgment. We therefore conclude the trial court did not err by rendering summary judgment on Naomi and Joseph's DTPA claims.

FRAUD & NEGLIGENT MISREPRESENTATION

Naomi and Joseph argue the trial court erred by rendering summary judgment on their fraud and misrepresentation claims. Naomi and Joseph argue their fraud and misrepresentation claims are based on appellees' statements that the property was "well-managed" and complaints were resolved "quickly." They also argue they relied upon representations in the lease regarding "reasonable management" and Wyatt's representation that the final walkthrough of their apartment would be on August 31, 2010.

An essential element of fraud is that the defendant made a material misrepresentation of fact. *Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d 194, 217 (Tex. 2011). Appellees' motion identified the elements of a fraud claim, and asserted Naomi and Joseph do not have "any evidence in support of any of the four required elements of their fraud action." We hold appellees' motion expressly presented a no-evidence ground regarding the "material misrepresentation" element of the fraud claim.

A negligent misrepresentation claim likewise requires a plaintiff to prove the defendant made a false representation of fact or provided false information. *See McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 791 (Tex. 1999). Appellees' motion asserted Naomi and Joseph "have no evidence [appellees] made the alleged statements, or of their falsity." We hold appellees' motion expressly raised a no-evidence ground challenging the "false representation" element of Naomi and Joseph's negligent misrepresentation claim.

For purposes of fraud and misrepresentation claims, "'[p]uffery' is an expression of opinion by a seller not made as a representation of fact." *See Dowling v. NADW Mktg., Inc.*, 631 S.W.2d 726, 729 (Tex. 1982); *Lake v. Cravens*, 488 S.W.3d 867, 892 (Tex. App.—Fort Worth

2016, no pet.). Thus, puffery is not actionable as a material or false misrepresentation for purposes of a fraud or negligent misrepresentation claim. *See Dowling*, 631 S.W.2d at 729; *Lake*, 488 S.W.3d at 892. For the reasons previously discussed, we hold appellees' statements that the property was "well-managed" and they try to resolve complaints "quickly" are puffery or statements of opinion and not false or material representations of fact that may support a fraud or negligent misrepresentation claim.

Furthermore, in the summary judgment context, we may consider only the issues expressly presented to the trial court in a written response as grounds for reversal. TEX. R. CIV. P. 166a(c); *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 677-78 (Tex. 1979). When responding to appellees' challenge to their fraud and negligent misrepresentation claims, Naomi and Joseph did not raise issues regarding Wyatt's statements about the move-out date or the lease provisions regarding "reasonable management." We therefore may not consider these issues as grounds for reversal. *See* TEX. R. CIV. P. 166a(c). Because Naomi and Joseph produced no evidence of a false or material misrepresentation of fact, we hold the trial court did not err by rendering summary judgment on their fraud and negligent misrepresentation claims.

CONSTRUCTIVE EVICTION

Naomi and Joseph argue the trial court erred by granting summary judgment on their constructive eviction claim. An essential element of a constructive eviction claim is the landlord's permanent deprivation of the tenant's use and enjoyment of the premises. *Lazell v. Stone*, 123 S.W.3d 6, 11-12 (Tex. App.—Houston [1st Dist.] 2003, pet. denied). Appellees' motion challenged Naomi and Joseph's constructive eviction claim, specifically listing the "permanent deprivation" element as the third element, and asserted Naomi and Joseph "have no evidence of elements (1) through (4) above." We hold appellees' motion expressly presented a no-evidence ground regarding the "permanent deprivation" element of the constructive eviction claim. For the

reasons previously discussed, we hold Naomi and Joseph produced no evidence showing appellees permanently deprived them of the use and enjoyment of the apartment. Thus, the trial court did not err by rendering summary judgment on the constructive eviction claim.

WRONGFUL EVICTION

Naomi and Joseph argue the trial court erred by rendering summary judgment on their wrongful eviction claim. An essential element of wrongful eviction is the eviction or dispossession of the plaintiff. *McKenzie v. Carte*, 385 S.W.2d 520, 528 (Tex. Civ. App.—Corpus Christi 1964, writ ref'd n.r.e.). Appellees' motion asserted Naomi and Joseph "have no evidence [appellees] evicted or otherwise prevented or impeded their access to the apartment." We hold appellees' motion expressly presented a no-evidence ground regarding the "eviction or dispossession" element.

Naomi and Joseph argue they produced evidence showing appellees "entered the apartment without authority and disposed of appellants' property, making it ready for new tenants, dispossessing [them] of their use and enjoyment of the property." Appellees' entry into Naomi and Joseph's apartment and removal of their personal items is not an eviction or dispossession. Naomi and Joseph's evidence instead shows Joseph remained able to access the apartment on August 31, 2010, when he discovered their belongings had been removed. Because Naomi and Joseph produced no evidence of an eviction or dispossession, the trial court did not err by rendering summary judgment on the wrongful eviction claim.

GROSS NEGLIGENCE

Naomi and Joseph argue the trial court erred by rendering summary judgment on their gross negligence claim. "Gross negligence consists of two elements: 'extreme risk' and 'actual awareness.'" *Russell Equestrian Ctr., Inc. v. Miller*, 406 S.W.3d 243, 250 (Tex. App.—San Antonio 2013, no pet.). Appellees' motion asserted there is no "evidence that, when viewed

objectively from the standpoint of [appellees], the alleged negligent acts or omissions of [appellees] involved an extreme degree of risk; and [appellees] had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others." Appellees' motion expressly presented no-evidence grounds challenging both elements of the gross negligence claim.

Naomi and Joseph argue they produced more than a scintilla of evidence as to each element of gross negligence. The "extreme risk" element is "viewed objectively from the actor's standpoint, [and requires that] the act or omission complained of . . . involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others." *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 785 (Tex. 2001). "'Extreme risk' . . . means not a remote possibility of injury or even a high probability of minor harm, but rather the likelihood of serious injury to the plaintiff." *Id.* "The harm anticipated must be extraordinary harm, not the type of harm ordinarily associated with breaches of contract or even with bad faith denials of contract rights; harm such as death, grievous physical injury, or financial ruin." *IP Petroleum Co. v. Wevanco Energy, L.L.C.*, 116 S.W.3d 888, 897 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (internal quotation marks omitted). The "actual awareness" element requires a plaintiff to prove the defendant knew of the extreme risk "but its acts or omissions demonstrated that it did not care." *Lee Lewis Constr.*, 70 S.W.3d at 785

Naomi and Joseph produced evidence showing Joseph repeatedly notified Wyatt they would return for their belongings, appellees instructed a housekeeper to enter the apartment and "trash out" the apartment, and the housekeeper disposed of a memorabilia box. We hold this evidence does not raise a genuine issue of material fact that appellees were actually aware of an extreme degree of risk of a serious injury, such as death, grievous physical injury, or financial ruin.

See IP Petroleum, 116 S.W.3d at 897. We therefore hold the trial court did not err by rendering summary judgment on Naomi and Joseph's gross negligence claim.

CONCLUSION

We affirm the trial court's judgment.

Luz Elena D. Chapa, Justice