IN THE
TENTH COURT OF APPEALS

No. 10-15-00163-CV

PETER AND CAMELLA SCAMARDO, FLP,
Appellants

v.

3D FARMS, A GENERAL PARTNERSHIP,
AND FRANK DESTEFANO, TRUSTEE,
SAM F. DESTEFANO TESTAMENTARY TRUST,
Appellees

From the 82nd District Court
Robertson County, Texas
Trial Court No. 12-06-19093-CV

MEMORANDUM OPINION

In this trespass case, appellant, Peter and Camella Scamardo, FLP, complains about a judgment entered in favor of appellees, 3D Farms, a general partnership, and Frank DeStefano, Trustee of the Sam F. DeStefano Testamentary Trust. Specifically, appellant challenges the jury's finding with regard to implied consent. Because we conclude that the evidence supporting the jury's consent finding is legally insufficient,

we reverse the judgment of the trial court, render judgment on appellant's trespass claim, and remand for entry of a mandatory injunction in favor of appellant and for consideration of appellant's request for court costs.

I. BACKGROUND

Appellees, whose property lies adjacent to that of appellant, built an irrigation canal along the common boundary between the properties. In its live pleading, appellant complained that a portion of the northern embankment of the canal encroaches on appellant's property and causes water to be impounded. Appellant asserted claims for trespass and Texas Water Code violations and sought an injunction requiring appellees to remove the encroachment. The matter was tried to a jury, and the jury concluded that: (1) appellees trespassed on appellant's property; (2) appellant consented to the trespass; (3) appellant was responsible for 30% of the damage caused, while appellees were responsible for 70%; and (4) appellees did not divert the natural flow of surface waters, thereby causing damage to appellant's property. The trial court entered judgment in accordance with the jury's findings and ordered that appellant take nothing by this suit. The trial court also denied several post-judgment motions filed by appellant. This appeal followed.

II. STANDARD OF REVIEW

An appellate court may sustain a legal-sufficiency challenges only when: (1) the record discloses a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or

(4) the evidence establishes conclusively the opposite of a vital fact. *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 334 (Tex. 1998). In determining whether there is legally-sufficient evidence to support the finding under review, we must consider the evidence favorable to the finding if a reasonable factfinder could and disregard evidence contrary to the finding unless a reasonable factfinder could not. *Cent. Ready Mix Concrete Co. v. Islas*, 228 S.W.3d 649, 651 (Tex. 2007); *City of Keller v. Wilson*, 168 S.W.3d 802, 807, 827 (Tex. 2005).

Anything more than a scintilla of evidence is legally sufficient to support the finding. *Cont'l Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 450 (Tex. 1996); *Leitch v. Hornsby*, 935 S.W.2d 114, 118 (Tex. 1996). When the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence. *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983). More than a scintilla of evidence exists if the evidence furnishes some reasonable basis for differing conclusions by reasonable minds about the existence of a vital fact. *Rocor Int'l, Inc. v. Nat'l Union Fire Ins. Co.*, 77 S.W.3d 253, 262 (Tex. 2002).

III. SUFFICIENCY OF THE EVIDENCE AS TO CONSENT

In its second issue, appellant contends that the evidence is legally and factually insufficient to support the jury's finding that appellant consented to the trespass in this case.

A. Burden of Proof

As noted above, appellant sued appellees for trespass. However, after the parties rested, but before the trial court signed the final judgment, the Texas Supreme Court issued its decision in *Environmental Processing Systems, L.C. v. FPL Farming Ltd.*, 457 S.W.3d 414 (Tex. 2015). The *FPL Farming* Court noted that it "has consistently defined a trespass as encompassing three elements: (1) entry (2) onto the property of another (3) without the property owner's consent or authorization." *Id.* at 419. After reviewing nearly a century of Texas property law, as well as property law of other jurisdictions, the *FPL Farming* Court concluded that "to maintain an action for trespass, it is the plaintiff's burden to prove that the entry was wrongful, and the plaintiff must do so by establishing that entry was unauthorized or without its consent." *Id.* at 425. With its holding, the *FPL Farming* reaffirmed the well-settled, traditional definition of trespass and clarified the plaintiff's burden in such a case. *See Barnes v. Mathis*, 353 S.W.3d 760, 764 (Tex. 2011) ("Trespass to real property is an unauthorized entry upon the land of another, and may occur when one enters—or causes something to enter—another's property." (citing *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 11 n.29 (Tex. 2008); *Glade v. Dietert*, 156 Tex. 382, 295 S.W.2d 642, 645 (1956))); *McDaniel Bros. v. Wilson*, 70 S.W.2d 618, 621 (Tex. Civ. App.—Beaumont 1934, writ ref'd) ("Every unauthorized entry upon land of another is a trespass even if no damage is done or the injury is slight . . . ."); *see also Withrow v. Armstrong*, No. 10-05-00320-CV, 2006 Tex. App. LEXIS 9994, at **2-3 (Tex.

App.—Waco Nov. 15, 2006, pet. denied) (same). As such, it was appellant's burden to demonstrate that the purported trespass was unauthorized or without consent. *See id.*

B. The Record Evidence

At trial, the parties did not dispute that the embankment for the canal encroached on appellant's land.[1] The heart of the dispute was whether appellant impliedly consented to the encroachment. In the charge, the jury was asked the following, with respect to appellant's trespass claim:

QUESTION NO. 1

> Do you find from a preponderance of the evidence that 3D Farms committed a trespass upon the land owned by Peter and Camella Scamardo, FLP that proximately caused damage to the property of Plaintiff?
>
> To constitute a trespass, one must enter the land of another and the entry must have been:
>
> 1. Physical;
> 2. Intentional;
> 3. Voluntary; and
> 4. Proximately cause injury to the owner.[2]
>
> You are instructed that a "trespass" means an entry on the property of another. To constitute a trespass, entry upon another's property need not be made in person but may be made by causing or permitting a thing to cross the boundary of the property or failing to remove an encroachment.
>
> You are instructed that an "encroachment" is an improvement on one person's land extending over the line onto adjoining land and thus occupying and using the adjoining property, without any agreement or easement regarding such use or occupation.

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[1] In his testimony, Patrick DeStefano acknowledged that some of the dirt from the canal trespassed on appellant's property; however, he characterized the trespass as insignificant.

[2] We note that proximate cause of injury is not an element of trespass. There was no objection to the inclusion of this element in the question.

Intent means to commit the act that resulted in the trespass.

To this question, the jury answered, "yes."

Then, the charge asked the jury the following question:

QUESTION NO. 2

> Do you find from a preponderance of the evidence that Peter and Camella Scamardo, FLP consented to the trespass?
>
> Consent to enter may be implied if the owner (1) has actual knowledge that a trespass occurred; and (2) fails to take reasonable steps to prevent or discourage the trespass.

The jury answered in the affirmative.

The record evidence shows that Peter Scamardo declined on several occasions to discuss the canal project with Frank DeStefano.[3] Moreover, Peter testified that he observed the canal being built on the property line, but that "the northern bank spilled over onto our property." Upon discovering this, Peter told Dean Schieffer, the contractor employed by appellees to build the canal, "that he was trespassing and [Schieffer] insisted that he had to finish the job before he would get paid, and the best I remember it

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[3] Peter testified that he declined Frank's invitations to discuss the canal project because,

> [A]t the time Obama had what he called a stimulus package and Robertson County got—uh—I forget the amount, but they got money for more irrigation projects in—in Robertson County. I guess the whole bottom because Brazos County got it too.
>
> And that's when I was told they had approved—they got approved for two projects. I used to think it was three, but I'm pretty sure it's two, but it's two that they got approved for, and if—if you get approved for a project you're going to try to do it.

Given this, Peter thought that the canal project was a "done deal" and that discussing it further would be a "[w]aste of time."

was a $25,000 deal, and if he didn't finish it he didn't get paid." Peter also testified that he mentioned to Schieffer his concerns that the canal would cause water to be impounded on his property. When asked about the actions taken upon discovering the trespass, Peter explained that:

> Well, like I said I don't fool with the other people's property and I didn't want to—some people say I should have got a dozer and knocked it down, but I didn't want no other problems, and I—I just left it like it was and decided to sue them.

Peter recalled that the canal was completed in late 2010 or early 2011. Thereafter, Peter enlisted the services of attorney R. Hal Moorman, who, on April 15, 2011, sent a letter to appellees indicating, among other things, that:

> Without authorization, you and/or your agents have placed the northern embankment of the irrigation canal, constructed for your sole benefit, in a position constituting a trespass on the Scamardo Property. . . . In addition to constituting a trespass, the construction and placement of the fill dirt will serve as a levee, which will likely cause water to become impounded on the Scamardo Property.

Moorman, on behalf of appellant, demanded that appellees: (1) relocate or reconstruct the canal entirely on their property; (2) remove embankments on both sides of the canal so that the water level of the canal rises no higher than ground level; and (3) provide documentation to show how the canal was built and would be maintained to ensure that appellant's interests are protected. On December 16, 2011, Moorman sent appellees another letter requesting that appellees remove the encroachment from appellant's

property.[4] Because appellees did not comply with appellant's demands, appellant chose to file suit.

Schieffer testified that all of the dirt excavated from the digging of the canal was placed on a cart path or on the northern embankment. Schieffer denied having any conversations with appellant prior to the commencement of the project. However, after beginning the project, Peter asked what Schieffer was doing "[i]n great detail." Schieffer recalled that Peter had "concerns" after learning that Schieffer was building an irrigation canal that runs parallel to the property line. Schieffer also noted that:

> Mr. Scamardo and I spoke several times. He did not—on several occasions any—any time he showed up I would get off the machine and speak to him and he never asked me to stop, and he commended me a time or two, and I'd go back to work.

Schieffer later clarified that Peter "said it [the irrigation canal] look[ed] good. Didn't approve of it, but it looked good."

At trial and on appeal, appellees relied on the fact that Peter did nothing to impede Schieffer's work while constructing the canal as support for consent. However, appellees' inference is contrary to the evidence in the record. Specifically, the record reflects that Peter refused to discuss the project; Peter told Schieffer that he did not approve of the project; and appellant sent demand letters to appellees and ultimately sued for trespass. These actions establish that appellant did not consent to appellee's admitted trespass. *See*

[4] Appellees offered to reduce the height of the embankment affecting appellant's property; however, this did not satisfy appellant because Peter felt that the height of the embankment would still result in water being impounded on appellant's property.

Martinez, 977 S.W.2d at 334 (providing that a legal-sufficiency challenge may be sustained if, among other things, the evidence establishes conclusively the opposite of a vital fact); *see also City of Emory v. Lusk*, 278 S.W.3d 77, 85 (Tex. App.—Tyler 2009, no pet.) ("Consent is an agreement, approval, or permission as to some act or purpose, given voluntarily by a competent person. . . . Consent can be manifested by acts and conduct." (internal citations omitted)); *Tex. Dep't of Pub. Safety v. Anonymous Adult Tex.*, 382 S.W.3d 531, 537 (Tex. App.—Austin 2012, no pet.) (same); BLACK'S LAW DICTIONARY 346 (9th ed. 2009). And while the jury could disbelieve the testimony of witnesses, they could not use such evidence for the basis of making an affirmative finding exactly contrary to the facts testified to by these witnesses. *See Hawkins v. Campbell*, 226 S.W.3d 891, 897 (Tex. Civ. App.—San Antonio 1950, writ ref'd n.r.e.); *see also Pioneer Natural Res., USA., Inc. v. W.L. Ranch, Inc.*, 127 S.W.3d 900, 908 (Tex. App.—Corpus Christi 2004, pet. denied) ("The jury could not find the converse of such testimony in the absence of independent evidence to support such finding." (citing *Schwartz v. Pinnacle Comm'cns*, 944 S.W.2d 427, 434 (Tex. App.—Houston [14th Dist.] 1997, no writ); *Rep. Nat'l Life Ins. Co. v. Heyward*, 568 S.W.2d 879, 883 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.))).

Therefore, based on the foregoing, we conclude that the evidence relied upon by appellees to prove consent is so weak as to do no more than create a mere surmise or suspicion and, in legal effect, is no evidence.[5] *See Kindred*, 650 S.W.2d at 118; *see also*

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[5] We recognize that the jury charge was inconsistent given that the jury answered both Question 1—whether appellees trespassed on appellant's property—and Question 2—whether appellant consented to the trespass—in the affirmative. These questions were inconsistent given that the *FPL Farming* Court articulated that a trespass cause of action necessarily includes a consideration of consent. *See Envtl. Processing Sys., L.C. v. FPL Farming Ltd.*, 457 S.W.3d 414, 419, 425 (Tex. 2015). Nevertheless, we do not

Cazarez, 937 S.W.2d at 450. Accordingly, we hold that the evidence is legally insufficient to support the jury's finding in Question 2 of the charge—the consent issue. *See Islas*, 228 S.W.3d at 651; *Wilson*, 168 S.W.3d at 807, 827; *Martinez*, 977 S.W.2d at 334. We sustain appellant's second issue, in part.

IV. APPELLATE RELIEF

In its brief, appellant requests that we,

> reverse the trial court's judgment and render judgment that the Scamardos are entitled to a mandatory injunction requiring that 3D Farms remove, at their cost and within 30 days of the date of the issuance this Court's judgment, the encroachment from Peter and Camella Scamardo, FLP's real property and, in the process, restore the property in its condition immediately prior to Defendants' trespass.

Because we have sustained appellant's second issue, in part, we set aside the jury's finding in Question No. 2 of the charge and render the judgment the trial court should have rendered—that appellant was entitled to judgment on its trespass claim. *See* TEX. R. APP. P. 43.2(c) (providing that we may reverse the trial court's judgment in whole or in part and render the judgment that the trial court should have rendered); *see also Trocchio v. Wagner*, No. 07-03-0101-CV, 2003 Tex. App. LEXIS 9114, at *11 (Tex. App.—Amarillo Oct. 27, 2003, no pet.) (mem. op.) ("Having found the evidence legally insufficient, we have the duty to render the judgment the trial court should have rendered.").

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address this apparent conflict because no complaint has been made about it other than that there is legally insufficient evidence to support the affirmative answer to Question No. 2, with which we agree, thus disposing of the apparent conflict.

However, as stated above, appellant also requests that we enter a mandatory injunction in its favor. Based on our review of the Texas Rules of Appellate Procedure, as well as case law, we are not authorized to do so. *See id.* at R. 43.2 (defining the types of judgments an appellate court may enter); *see also In re Lasik Plus of Tex., P.A.*, No. 14-13-00036-CV, 2013 Tex. App. LEXIS 2140, at *3 (Tex. App.—Houston [14th Dist.] Mar. 5, 2013, no pet.) (noting that an appellate court has the authority to issue a writ of injunction to enforce its own jurisdiction but not to protect the status quo pending trial or to protect a party from damage); *Mathis v. Barnes*, 316 S.W.3d 795, 808-09 (Tex. App.—Tyler 2010), *rev'd on other grounds*, 353 S.W.3d 760 (Tex. 2011) (same). Therefore, in light of Texas Rules of Appellate Procedure 43.2 and 43.3, we remand this proceeding to the trial court with instructions to enter a mandatory injunction in appellant's favor and to consider appellant's request for costs of court. *See* TEX. R. APP. P. 43.2(d), 43.3(a); TEX. R. CIV. P. 131; *see also Trocchio*, 2003 Tex. App. LEXIS 9114, at *11 (concluding that the evidence is legally insufficient, rendering judgment in favor of appellants "that they have title to the property in question, and that they are entitled to a writ of possession to reclaim it," reversing the trial court's denial of appellees' counterclaim for damages, and remanding for proceedings consistent with the opinion).

AL SCOGGINS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Reversed and rendered, in part, and remanded, in part
Opinion delivered and filed January 7, 2016
[CV06]