# TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

**NO. 03-16-00562-CV**

**Jared P. Raia, Individually and as Trustee for the Dennis Raia 2012 Family Trust, Appellant**

**v.**

**Keith Crockett, Appellee**

**FROM THE DISTRICT COURT OF TRAVIS COUNTY, 353RD JUDICIAL DISTRICT NO. D-1-GN-15-001066, HONORABLE STEPHEN YELENOSKY, JUDGE PRESIDING**

## MEMORANDUM OPINION

Appellant Jared P. Raia, Individually and as Trustee for the Dennis Raia 2012 Family Trust,[1] filed suit against appellee Keith Crockett, alleging that the house Crockett sold him was infested with ticks, that Crockett should have disclosed the infestation, that Raia had made multiple attempts to rid the house of ticks, and that Raia had been forced out of the house during the infestation and treatments. Raia asserted claims under the Deceptive Trade Practices Act ("DTPA"), *see* Tex. Bus. & Comm. Code §§ 17.41-.63, and for common-law fraud, fraud in a real estate transaction, *see id.* § 27.01(a), negligence, negligent misrepresentation, and breach of contract, seeking economic, actual, mental-anguish, and exemplary damages and attorney's fees. Crockett answered, seeking attorney's fees under the real estate contract. Following a bench trial, the trial court

[1] Raia is a trustee and beneficiary of the trust who bought the property for his personal use.

signed a final judgment finding that Raia should take nothing on his claims and that Crockett was entitled to attorney's fees under the parties' contract. Crockett was awarded $45,685 in attorney's fees, along with post-judgment interest and conditional appellate attorney's fees. On appeal, Raia argues that the court's findings were not supported by legally or factually sufficient evidence and that the court thus should not have awarded attorney's fees to Crockett, should have granted judgment for Raia on his claims for breach of contract and negligent misrepresentation, and erred in its award of appellate attorney's fees. We modify the portion of the judgment that awarded post-judgment interest on the conditional appellate attorney's fees and affirm it as modified.

**Standard of Review**

Raia sued Crockett for violations of the DTPA, common-law fraud, fraud in a real estate transaction, negligence, negligent misrepresentation, and breach of contract. To prevail under the DTPA, a plaintiff must show that the defendant represented that the goods were of a particular quality and failed to disclose information known to him at the time of the transaction with the intention of inducing the plaintiff into the transaction, and that the plaintiff would not have entered into the transaction had the information been disclosed. *Id.* §§ 17.46(b), .50; *see also id.* § 17.50(a)(2) (plaintiff may also assert DTPA claim for breach of warranty). To prove common-law fraud, a plaintiff must prove that a material representation was made, that it was false, that the defendant knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion at the time the statement was made, that the defendant intended that the plaintiff would rely on the statement, that the plaintiff did rely on it, and that the plaintiff suffered injury as a result. *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997). The elements of statutory fraud in a

real estate transaction are essentially the same except that the plaintiff need not prove knowledge or recklessness. *Lindley v. McKnight*, 349 S.W.3d 113, 128 (Tex. App.—Forth Worth 2011, no pet.); *see* Tex. Bus. & Comm. Code § 27.01(a) (fraud in real estate transaction is false representation of past or existing material fact made with intent of inducing person to enter into contract and relied upon in entering into contract). To prove negligent misrepresentation, the plaintiff must prove that the defendant made the representation "in the course of his business, or in a transaction in which he has a pecuniary interest," the defendant provided false information to guide the plaintiff, the defendant did not exercise reasonable care or competence in obtaining or communicating the information, and the plaintiff suffered pecuniary loss as a result of his justifiable reliance on the representation. *Federal Land Bank Ass'n v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991).

We review a trial court's factual determinations following a bench trial for legal and factual sufficiency under the same standards we apply to jury verdicts. *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996); *Barry v. Jackson*, 309 S.W.3d 135, 139 (Tex. App.—Austin 2010, no pet.). The trial court is the sole judge of witness credibility and the weight to be given the testimony, and we will not disturb the court's resolution of evidentiary conflicts that turn on credibility determinations or the weight of the evidence. *Barry*, 309 S.W.3d at 139.

If a party attacks the legal sufficiency of the evidence supporting an adverse finding on an issue for which he had the burden of proof at trial, he must demonstrate that the evidence establishes all vital facts in support of the issue as a matter of law. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam); *City of Austin v. Chandler*, 428 S.W.3d 398, 407 (Tex. App.—Austin 2014, no pet.); *see Barry*, 309 S.W.3d at 139 (evidence is legally insufficient

"if there is a complete absence of evidence of an essential fact, the trial court was barred by rules of law or evidence from giving weight to the only evidence proving an essential fact, no more than a scintilla of evidence was offered to prove an essential fact, or the evidence conclusively establishes the opposite of the essential fact"). We view the evidence in the light most favorable to the trial court's determinations and credit favorable evidence if a reasonable fact finder could have done so, disregarding contrary evidence unless a reasonable fact finder could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 807 (Tex. 2005); *Barry*, 309 S.W.3d at 139. When attacking the factual sufficiency supporting an adverse finding on an issue for which he had the burden of proof, the party must demonstrate that the finding is against the great weight and preponderance of the evidence, and we consider all of the evidence and will set aside a trial court's determination only if the supporting evidence is so weak that the finding is clearly wrong and unjust. *Francis*, 46 S.W.3d at 242; *Chandler*, 428 S.W.3d at 407-08.

**Factual Summary**[2]

In 2014, Raia bought Crockett's house, which is on eight acres in the Bee Cave area. The parties agree that deer are commonplace on this property and in this area. In his seller's disclosure, Crockett marked "no" to the question of whether he was "aware of" any condition on the property that "materially affects the health or safety of an individual." Crockett had a real estate agent, but Raia did not. Crockett and his four dogs were living in the house at the time. Raia viewed the house twice before deciding to buy the house and testified that he did not see insects in his tours

[2] The facts as recited are taken from the evidence introduced at the bench trial.

of the house; Raia's fiancée, who toured the house with him, similarly testified that she did not see any ticks inside the house. Raia's property inspector, who inspected the physical structure and its mechanical systems in early May, did not note anything about insects on the property, although he testified that he was only certified to find signs of wood-destroying insects.

The sale closed about six weeks later, in mid-June, and Crockett moved out one or two days before closing. Raia hired a painting crew to repaint the house, starting two days after closing. Raia testified that the paint crew soon started noticing "a lot of bugs, a lot of ticks" in the house, and the painting company eventually told Raia that several of the painters found ticks in their cars and homes. Raia testified that the ticks were mostly concentrated in the "mudroom" next to the kitchen but that they were also in the kitchen and "all throughout the house." Raia testified that despite the warnings by the painters, he did not attempt to treat the tick problem before he, his fiancée, and their dog moved into the house in mid-July because he did not realize how serious the problem was. Shortly after moving in, he "was finding them all over my dog and on myself." Raia said that his dog, who is primarily an inside dog, "had literally 30, 50 ticks on him," and that Raia "was plucking them off of him constantly." Raia had not done yard work at the house and did not believe that the ticks got on him while out in the yard. Raia's dog did not come to the house at all until after closing and might have come to the house "once or twice" while the house was being painted. Less than a week after moving in, Raia moved into a hotel while the house was treated for ticks. Raia hired three different pest control companies to treat the ticks, none of which were effective. Raia then hired a fourth company, which treated the yard and tented and fumigated the house over a period of "a couple of days." Since that treatment, Raia has not seen ticks in the house.

Raia testified that after the tick problem became evident, he called Crockett to ask about the ticks, recording the call unbeknownst to Crockett.[3] The trial court listened to the recording, and a transcription of the call was introduced into evidence. In the call, Raia asked Crockett what he did about ticks, explaining that he was finding many on his dog. Crockett answered, "[M]y best friend is a vet. And I said man, I've never had ticks before in my life and he said gee, those ticks are being brought there by the water deer [sic] and the ticks go up in the trees . . . ." The vet advised that spraying the grass would not be sufficient and that Crockett would have to "spray this stuff up into the trees" but that "with the deer migration going through your property, . . . it's a never ending, because they're the carriers . . . . [T]hat's what I kept being told. You know, basically I'm screwed." Crockett said that for a time he used a topical tick treatment on his dogs but that it was ineffective because his dogs frequently swam in the pool. Crockett said, "Of course, in the winter, then it all goes away." When Raia told Crockett that he had found ticks in the mudroom, Crockett said, "Well, they used to sleep there in that wash room in the cold." Raia then asked, "[B]ut in the winter, you said you have less of a problem," and Crockett said, "Yeah, it disappears." Crockett went on to say, "I thought maybe with the harsh winter—and of course, most of—all the spring, I didn't notice anything and so I thought wow, maybe I just had a bad, you know, stretch there. But later in the summer, I guess when it started heating up, they started coming back out." Raia explained that he had pulled at least fifteen ticks off of his dog, and Crockett said, "Good God," and, "I'd never find that many. I mean, I'd find a couple." Crockett told Raia

[3] Crockett objected to the introduction of the recording and transcription of the call, arguing that because he was in California at the time, a California law barring such recording should apply. The trial court allowed in the evidence, and that issue is not before us on appeal.

that his dogs were short-haired and that he had warned a friend who brought his long-haired dogs to the property that he had "some issues with ticks here" and that he "can't do anything about your dogs"; his friend addressed the ticks by having his dogs groomed once a month. Crockett told Raia that if Raia's dog was not a swimmer, the topical treatment should work. Crockett asked "what area is [Raia's dog] hanging out in mostly" and when told that the dog "roams about the house" and that Raia was finding ticks everywhere, he said, "I guess the—call in the exterminator and—but . . . out in the yard is obviously the source." Crockett said he was sorry to hear that Raia was having problems with ticks and said "it certainly was there when I got there, so I don't—but I didn't—I didn't know it was inside. If it's inside, it's because of that damn wash room. I was kind enough to let them in there in the cold." He also said, "I never had one on me in the house."[4]

[4] The transcription shows that at the end of the call, Crockett said, "That's terrible. I—I was just mad because I couldn't keep off—I had a problem in the house." However, at trial, Crockett's attorney disputed whether that portion of the transcription was accurate, saying "that it was basically garbled from the keep off, and that the transcript may—sounds to me to be inaccurate and incomplete with respect to that statement of Mr. Crockett's." The trial court listened to the recording and noted that the dashes (apparently referring to the dashes used in the transcription of the phone call) "could mean a number of things" and that "[t]he only question is, what do the dash dashes mean." In a pre-judgment letter explaining its forthcoming ruling, the court noted that in the phone call, Crockett sounded "genuinely surprised" and "sympathetic" when told about Raia's tick problem and said, "The only statement in the phone call that could be interpreted as an admission about infestation of the house is ambiguous, is preceded by a pause or inaudible words, and, if construed as an admission, would contradict everything else said in the call." The parties refer to that letter in their briefing, but the trial court cautioned that the letter "is not to be incorporated into my order and does not constitute findings of fact or conclusions of law. If findings are requested, I will then prepare them." Although we make note of the trial court's characterization of Crockett's conversation with Raia, we decline to consider the letter as providing additional findings of fact. *See Cherokee Water Co. v. Gregg Cty. Appraisal Dist.*, 801 S.W.2d 872, 878 (Tex. 1990); *Moore v. Jet Stream Invs., Ltd.*, 315 S.W.3d 195, 208-09 (Tex. App.—Texarkana 2010, pet. denied); *Barry v. Jackson*, 309 S.W.3d 135, 138 n.4 (Tex. App.—Austin 2010, no pet.).

Jeffrey London, who owns the painting company that painted Raia's house, testified that he and his crew worked on the house from mid-June until mid-July and that they noticed ticks "within the first week," at first only "finding a couple." When they reached the back area of the house, "[t]hat's where the concentration was." The painters saw occasional "spiders and scorpions in other parts of the house," which was not unusual, but "[t]he entire job, [London] only saw [ticks] in that—the entrance in the back door. And the last day, I think I noticed a couple walking on the floor in the great room." London said they found "more than a couple" and "killed probably ten, 12. And then we started noticing they weren't going away. Like we thought we would just kill the last couple. But towards the back entrance of the door, we realized that there's an infestation." London testified that it was "very hot" and that they "had the air conditioning on as cool as we could get it." "There might have been a couple of days when some windows were open, just for ventilation," he said, but mostly the doors and windows were kept shut and the air conditioning was left on.

Caleb Cunningham owns a pest control company and attempted to address the tick problem. He saw numerous ticks, "primarily concentrated in the mudroom area, just off the garage," and coming from underneath trim in that room; he also saw some ticks in the kitchen, which adjoins the mudroom. Cunningham testified that ticks usually hide in a crevice and "wait for a meal, and then that's when they will come out in the open" and that they "can go dormant or sit still for months at a time, and so if there's no host . . . readily available, they will wait . . . until a meal comes to them." Simply walking through a room would be unlikely to bring ticks out—"some sort of standing or continuous activity in a room is what would really get them out." Cunningham also testified:

> if there was a dog or host of some sort, population in the house, that dog is holding engorged ticks. The engorged tick does not have to go into a wall in order to give birth. The engorged tick merely just needs to have had a meal. So . . . if there were hosts in the house, whether before or after . . . [Raia] bought the house, then that—one of those ticks or multiple ticks can have babies. Whether or not it was in the wall or not, the babies would drop off. . . . [A]t that point, they can all scatter and go wherever . . . .

Jerry McNair, Raia's fiancée's uncle, testified that he helped Raia remove some cabinetry from the mudroom about a week after Raia moved in and that when they pulled it off, "we got to see all the lovely little critters running around on the wall," "falling off of [the cabinet], and the wall and everywhere," "probably three to four in every square foot, at least. And they were crawling back up under the baseboard and everywhere else by the time we got to there."

Both Raia and Crockett called expert witnesses to testify about the tick infestation in the house. Raia called Dr. Raymond Thompson, an entomological and pest-control consultant who both testified and provided a report reciting his opinions, and Crockett called Dr. Roger Gold, who has a Ph.D. in entomology and plant pathology. The experts agreed that the ticks in question are brown dog ticks, which have a three-stage life-cycle, from larva to nymph to adult, and require a "blood meal" from a living animal between each stage. Thompson and Gold agreed that this tick prefers to feed from dogs but will feed from deer and even humans if necessary, that the ticks wait in areas where animals can be found and grab onto a host from which they can feed, and that the full life-cycle generally takes about three to five months to complete, depending on the circumstances.

Thompson testified that an "adult, engorged, mated female can lay anywhere from three to five thousand eggs at one time" and that eighty to ninety percent of those eggs generally hatch and become larvae. He said ticks "are pretty long lived"—as larvae and nymphs, ticks can

live from five to eight months without eating, and some research showed that adults "can live up to 18 months without a blood meal." This kind of tick is more active in warm seasons and "can go many months, actually, without feeding in each one of these stages. They are not in a tremendous hurry, but if the food source presents itself, they immediately go for it." Thompson said that a house air-conditioned to seventy or seventy-five degrees would not be an ideal environment and that the ticks prefer temperatures in the range of eighty to ninety-five degrees, with "the higher the relative humidity, the better for them." However, he also said home infestations are "fairly common with this particular tick" because it prefers indoor environments and can go through its entire life-cycle indoors. Thompson said that they "have a tendency to hide in a lot of places" and then "start climbing upward," such as on walls, when they "get to that point where they need a blood meal."

Thompson was asked whether he would expect to find ticks inside or outside if the homeowner had "outdoor dogs that stayed outdoors, except during freezing weather," and he said he "would expect to find them inside" because the dogs "come in and out." When asked about reports from the tent-fumigation company that guards posted outside the house were "eaten up with ticks outside" and whether it was "at least equally as likely that the source of the tick problem . . . was the outside environment rather than the inside environment," Thompson answered that if the dogs spent "a lot of time outside then that becomes a very convenient food source for [the ticks], as well. So, of course, they would propagate outside." Thompson did not believe this tick infestation could have occurred between closing and mid-July.

Thompson testified that brown dog ticks can carry diseases that can harm dogs and occasionally humans. Thompson focused on Rocky Mountain Spotted Fever as being possibly

carried by this kind of tick, testifying that the Centers for Disease Control and Prevention ("CDC") had reported that twenty people in Arizona were hospitalized with Rocky Mountain Spotted Fever carried by the brown dog tick and that the CDC had also estimated ".2 to 1.2 cases [of Rocky Mountain Spotted Fever] per million people" in Texas.

Gold testified that he disagreed with much of Thompson's testimony and report. He testified that it would be very common to find brown dog ticks on a property such as this, both on the property and in the residence, particularly if the homeowner had pets, but that the ticks' "favorite environment is out of doors." Asked about the fact that Crockett's four dogs were only allowed inside when temperatures approached freezing, Gold answered, "His dogs being in the environment certainly could have had ticks. And I think Mr. Crockett actually testified that he had removed ticks occasionally from his dogs. But the winter scenario is very different because the ticks are not active in the winter." He explained that ticks primarily "go into a state of hibernation" in the winter, hiding under rocks instead of waiting for a food source in the grass or trees. He said that if ticks "had been introduced into" the house while Crockett owned it, they could have survived inside "for some period of time" because they "can go for several months . . . without feeding." Gold also stated that he had to "correct a major thing," explaining, "Ticks don't have nests. They are not like bees or wasps or fire ants. They live free from the females. In other words, they just get into a space."

Gold testified that brown dog ticks had not been "documented as vectors of human pathogens in Texas" and that he did not consider them to be a human health hazard. Gold explained that there were reports in Texas of Rocky Mountain Spotted Fever being passed to a human by a tick, but that those reports were "associated with a different tick species, known as a wood tick.

Certainly not the brown dog tick." He said "[t]he only incident that I can find in the literature was in the state of Arizona, where there was an implication of Rocky Mountain Spotted Fever associated with this tick." Gold testified that "[h]umans are not a good host for this particular tick. They don't like our blood." Asked about the seller's disclosure, Gold noted that the form did not ask about pests other than "wood-destroying organisms" and testified that Crockett's answer of "no" to the question about a condition that materially affected health and safety was correct.

Asked about how he believed the ticks came to be in the house, Gold opined that "there were a lot of people in the house as [it was] being sold" and that there were "more people in a brief period of time, at the wrong time of the year, when the ticks were becoming active outside." He said "ticks are very sensitive and will seek out heat, certain odors, and carbon dioxide. So almost always when there's an activity of humans or other warm blooded animals in and out a structure, they bring ticks in with them." Asked whether he believed that the ticks found by the painters in their cars and homes came from inside the house or in the trees and foliage outside of the house, he testified, "The greatest probability is outside of the house." Gold testified that "[t]he best way to control ticks is outside," by mowing the grass short and keeping shrubbery away from the house.

Lee Ann Crockett, Crockett's ex-wife, testified that she remained on good terms with Crockett after their divorce and that she frequently went to the house for holidays and family gatherings. She sometimes stayed at the house on weekends and often stayed there when Crockett traveled for work, taking care of his dogs and their teenaged daughter. She helped Crockett clean the house and get it ready to put on the market, and the last family gathering there was in mid-May, for Mother's Day. Lee Ann stated that she never saw insects in the house or on Crockett's dogs, nor

did anyone at their family gatherings ever mention seeing insects in the house. Lee Ann had "quite a bit" of Crockett's furniture and belongings stored in a storage unit on her property and had not noticed any increased insect activity since the items were brought to her property. Lee Ann's mother testified similarly, saying that she had attended numerous family events at Crockett's house, that the house was always clean, that she never noticed ticks or other insects in the house, and that Crockett never mentioned a tick problem on the dogs or in the house.

Kevin Kruppa testified that he had been friends with Crockett for years, had done a number of maintenance projects on the house, and frequently checked on the dogs and the house when Crockett was traveling. Before the house went on the market, Kruppa removed wallpaper from the master bathroom, retextured the walls, and painted them. He also helped with landscaping and cleaning outside and helped Crockett move some of his belongings after the sale. He never saw ticks or other insects inside the house, other than small spiders in occasional corners, and he never noticed ticks on his clothing after walking around on the property. Crockett once mentioned to Kruppa that "[m]aybe one dog had been—had ticks on him because he had jumped the fence and was gone." Crockett's realtor testified that she spent "a lot of time" on the property, showing the house sixteen times, that she never saw ticks or other insects, that no other agents reported any insects, and that she would consider a tick infestation to be a material factor that should be disclosed.

Crockett testified that he owned the house for about two years before selling it to Raia. During that time, he lived there, along with his four dogs, which primarily lived outside. His teenaged daughter lived there with him on the weekends. Crockett testified that he only allowed the dogs inside when it was freezing and that in the two years he lived there, he allowed them inside

"a handful of times," generally confining them to the garage or mudroom overnight, putting them back outside in the morning. Crockett did not use a topical tick treatment because his dogs swam in the pool frequently and his veterinarian told him that such treatments would be ineffective if the dogs got wet. Instead, he bathed his dogs outside on the patio about once a week. He did not always find ticks, and when he did, "the wash would kill them and I'd brush them off." He "was aware that there were ticks in—in the hill country and on my property" and "[o]ccasionally" found ticks on his dogs, but he would not describe the ticks "as a problem." Crockett took his dogs to the vet twice a year for normal checkups and never brought them "specifically for a tick problem." Crockett testified that he never saw a tick inside the house and did not have the house or yard treated for pests, saying, "Had no reason to. Eight acres is a lot of land." Crockett said that friends often stayed with him, at least once bringing a dog, and that he never advised anyone about ticks on the property. Crockett agreed that he would want to know if a house he was buying was "infested with ticks" but did not feel he had to disclose a tick problem to Raia because "[t]here was nothing out of the normal."

Crockett was asked about his taped conversation with Raia. Crockett explained that when he said in the phone call that "I couldn't win," he meant that "[w]hen you have eight acres, you can't treat the outside completely, and you have deer passing through the yard on an hourly, daily basis. I was—my expert friends had told me there's nothing I could do outside of stopping the deer from entering the property." Crockett also testified that his vet told him that "as long as you have eight acres, there's nothing much you can do" aside from regular baths. He concluded that "[a]ll you can do is wash the dogs, and there's an occasional tick [on] every piece of property in this county." He testified that some years are worse than others and that ticks usually disappeared in cold weather

and reappeared when it warmed up. Crockett was asked about his statement to Raia about warning his friend who stayed at the house with two long-haired dogs, and he testified that he was trying to explain to Raia that he simply told his friend "his dogs could get ticks playing in my yard." Crockett insisted that he only saw ticks outside, as he informed Raia during their phone call. Crockett said that his only explanation for Raia seeing ticks inside was that they might have come in when he allowed his dogs to sleep in the mudroom. Crockett was asked whether he "made a conscious decision to put up with ticks and not call an exterminator," and he answered, "Out in the yard, yes." Crockett testified that he told Raia that he was sorry he was having a tick problem but that "I thought I made plain to him I had never seen a tick in the house."

Following the bench trial, the trial court ruled in favor of Crockett, finding that Raia should take nothing against Crockett. The court determined that Crockett was entitled to trial and conditional appellate attorney's fees under the parties' real estate contract as the prevailing party. The court signed findings of fact and conclusions of law. The court's findings included:

- Crockett occasionally found ticks on his dogs and removed them, but did not treat the property or house.
- Numerous people visited the house and never saw ticks inside.
- Crockett did not make verbal representations to Raia about the condition of the property, and his written representations were limited to the disclosure and online listing information.
- Raia's inspector did not observe any ticks, nor did Raia prior to closing.
- Raia "did not prove that the presence of ticks at the Property and in the Residence prior to the Closing materially affected the health or safety of persons."
- Raia "did not prove that the Residence or the Property were uninhabitable at the time of the Closing due to the presence of ticks."

- Ticks appeared inside the house shortly after closing, a few at first and then more appearing over the next month.
- Despite being told about the ticks by the painters, Raia did not act on the tick problem until he moved in about a month after closing.
- Raia did not prove by a preponderance of the evidence that Crockett was liable for any of Raia's asserted claims.

The court's conclusions included the following:

- Crockett did not fail to disclose a condition that materially affected human health or safety.
- Crockett did not fail to disclose prior to closing that the residence was uninhabitable.
- Crockett did not violate the DTPA, breach the real estate contract, or commit common-law fraud, statutory fraud, negligence, or negligent misrepresentation.

**Challenges to Trial Court's Findings and Conclusion**

In his first issue, Raia contends that the evidence is legally and factually insufficient to support the trial court's findings (1) that Raia did not prove that the presence of ticks on the property and in the house prior to closing materially affected human health or safety, and (2) that Raia did not prove that the residence or property were uninhabitable due to ticks at the time of closing. In his second issue, he attacks the court's conclusions and award of attorney's fees that were premised on the challenged findings. As plaintiff, Raia had the burden of proof as to those issues at trial and, therefore, must in his legal-sufficiency challenge demonstrate that the evidence conclusively establishes those issues as a matter of law. *Francis*, 46 S.W.3d at 241-42; *Chandler*, 428 S.W.3d at 407. In attacking the factual sufficiency of the evidence, Raia must establish that the trial court's findings are against the great weight and preponderance of the evidence. *Francis*,

46 S.W.3d at 242; *Chandler*, 428 S.W.3d at 407-08. We disagree with Raia's assertions that the trial court's findings are not supported by sufficient evidence.

Raia contends correctly that the evidence does not support a finding that he failed to prove the presence of ticks anywhere on the property prior to closing, a fact Crockett conceded at trial. Raia further argues that the evidence is factually insufficient to support a finding that there were no ticks inside the house at closing. However, as Crockett notes, the trial court did not make that finding. Instead, it found that Raia had not proved "that the presence of ticks at the Property and in the Residence prior to the Closing materially affected the health or safety of persons" or that the "Residence or the Property were uninhabitable at the time of Closing due to the presence of ticks." Crockett did not dispute that he was aware of ticks on the property, and the trial court seems to have found that there were likely some ticks in the house at closing. However, those facts do not establish as a matter of law that at the time of closing, ticks were present in such quantities that they materially affected human health or rendered the property or residence uninhabitable, much less that Crockett was aware of such a problem so as to be held responsible for not disclosing it.

There was testimony by several witnesses that ticks were a common problem in areas such as this, particularly because this property included a migration path for deer. Raia did not present evidence to the contrary, nor did he present evidence that it would have been reasonable to believe that such pests would not be present on this property. Both Thompson and Gold testified that this kind of tick is not uncommon and that they tend to disappear in cold weather and reappear in warm weather. Crockett testified that he was able to address the issue of ticks on his dogs by giving them weekly baths and pulling ticks off when he saw the dogs scratching. He further testified

that he did not see ticks on his dogs every week. Crockett and his teenaged daughter continued to live in the house until shortly before closing, there was no evidence that anyone who visited the property while Crockett owned it ever complained of ticks or saw them inside, and Crockett, his realtor, and three other witnesses testified that they never saw ticks inside.

Although Thompson did not believe the level of tick presence reported by Raia could have arisen between the time of closing in mid-June and Raia's taking residence in mid-July, other evidence was presented to the contrary, including Gold's opinion that the ticks likely came into the house with increased foot traffic in the warming summer months and both experts' testimony that ticks become active in warmer weather. Although Crockett conceded in the phone call that ticks could have come inside on the occasional cold night the dogs were kept inside, that is a far cry from establishing as a matter of law that ticks had infested the house after one of those freezing nights or that Crockett was aware of any such presence.[5] Crockett repeatedly denied that he saw ticks inside. Although Raia argues that Crockett contradicted those assertions, it was for the trial court to hear the testimony and the recorded phone call and make factual determinations. *See Barry*, 309 S.W.3d at 139. We will not second-guess those determinations. *See id*.

A residence or property is "uninhabitable" if it is not fit to be used as intended, and a property "may be rendered uninhabitable by a 'condition [that] materially affects the physical health or safety of an ordinary tenant.'" *See Alewine v. City of Hous.*, 309 S.W.3d 771, 779 n.10

[5] In his brief, Raia asserts that Crockett should have disclosed "the fact that he let the dogs occasionally stay indoors." However, Raia testified that when he toured the house the second time, he saw "evidence of dogs" there, explaining that trim and "[c]abinetry was chewed up." This is some indication that Raia believed at the time he entered into the contract that dogs were at least occasionally allowed in the house.

(Tex. App.—Houston [14th Dist.] 2010, pet. denied) (quoting Tex. Prop. Code §§ 92.052(a)(3), .056(b)(2)) (discussing definition of "habitability" in context of takings and landlord-tenant disputes). However, Crockett, his dogs, and his teenaged daughter continued to live in the house until the day or two before closing, and Crockett's family celebrated Mother's Day at the house one month before closing. There was no evidence that anyone at that or any other family gatherings saw any tick activity. Crockett's realtor spent considerable time in the house, showing it sixteen times, and Raia and his fiancée visited twice, spending at least an hour there. Nor did Raia's inspector see any ticks during his inspection. Kruppa helped move Crockett's belongings out of the house shortly before closing and did not observe any ticks. All of that testimony supports the trial court's determination that the property was not uninhabitable at the time of closing. Further, although the general consensus was that a tick infestation of the level observed in the house in mid-July could be considered a condition that materially affects human health or safety, the evidence does not mandate a finding that the presence of *any* brown dog ticks in the house presents such a condition.[6] Nor will we hold that a property owner has a duty to disclose a normal outdoor population of pests that are commonly found in the area, such as ticks, mosquitos (which can carry the West Nile or Zika

[6] Raia emphasizes Thompson's testimony asserting a link between the brown dog tick and Rocky Mountain Spotted Fever and asks us to take judicial notice of the CDC's web page about Rocky Mountain Spotted Fever. Even if we were to take judicial notice of that website, the CDC states that Arizona had about 140 cases between 2003 and 2010, that the disease in Arizona was transmitted by the brown dog tick, that the American dog tick is the primary transmitter of the disease in the five states that account for 60% of reported cases, and that Texas has between 0.2 to 1.5 cases per million people in 2010, but it does not link the Texas cases to the brown dog tick. Further, Gold cast doubt on whether brown dog ticks in Texas have been known to pass Rocky Mountain Spotted Fever to humans and asserted that they had not "been documented as vectors of human pathogens in Texas." Thus, whether the brown dog tick should be considered a human health risk in the context of the transmission of disease is not a proven fact on this record.

viruses), poison ivy, or other commonplace plants or animals to which humans can have an adverse reaction.[7] *See Nicholson v. Smith*, 986 S.W.2d 54, 63-64 (Tex. App.—San Antonio 1999, no pet.) (in premises-liability context, "[i]f a landowner was required to affirmatively disclose all risks caused by plants, animals, and insects on his or her property, 'the burden on the landowner would be enormous and would border on establishing an absolute liability'" (citation omitted)). Evidence that Crockett was aware of ticks on the property, even that he bathed his dogs weekly to combat them, does not translate into evidence that ticks were present in the house or on the property at the time of closing in such numbers that they materially affected human health or safety or rendered the property uninhabitable, much less that he was aware of such a presence. *See Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd.*, 896 S.W.2d 156, 162 (Tex. 1995) ("A seller has no duty to disclose facts he does not know.").

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[7] Although the issue is more commonly addressed in the context of premises liability, Texas courts have repeatedly said that a landowner does not have a duty to warn of indigenous wild animals, which includes insects, found on the property unless the landowner attempts to possess or harbor the animals or if the animals are located where they are not normally found and the landowner knows or should know of the unreasonable risk of harm and cannot expect visitors to realize the danger. *See, e.g.*, *Riley v. Champion Int'l Corp.*, 973 F.Supp. 634, 642-43 (E.D. Tex. 1997) ("Although defendant [in premises-liability suit] owed plaintiff a duty to warn of hidden dangers, this duty did not include a warning of the presence of indigenous wild animals, such as the ticks that bit plaintiff."); *Union Pac. R.R. v. Nami*, 498 S.W.3d 890, 896-99 (Tex. 2016) (under doctrine of *ferae naturae*, landowners and employers are not liable for injuries caused by "wild animals indigenous to the area unless he reduces the animals to his possession, attracts the animals to the property, or knows of an unreasonable risk and neither mitigates the risk nor warns the invitee"); *Gamble v. Peyton*, 182 S.W.3d 1, 3-4 (Tex. App.—Beaumont 2005, no pet.) (under equine-activities statute, no duty to warn of ant hill because "fire ants are normally present in nature" and presence of ants in outdoor riding pen is natural condition); *Gowen v. Willenborg*, 366 S.W.2d 695, 696-98 (Tex. Civ. App.—Houston 1963, writ ref'd n.r.e.) (landowner was not liable for injuries after child climbed on billboard on which visible wasp nest had been built; "The nest built by wasps is a natural condition and is not in itself dangerous.").

Raia has not shown that the evidence established as a matter of law that, as of the day of closing, the property was uninhabitable or the ticks presented a condition that materially affected human health and safety. Even when the evidence is viewed as a whole, the trial court as finder of fact was responsible for considering the competing expert opinions, weighing the credibility of the witnesses, and resolving evidentiary conflicts.[8] *See id*. Raia has not shown that the trial court's findings were against the great weight and preponderance of the evidence or supported by evidence so weak that the findings are clearly wrong and unjust. *See Francis*, 46 S.W.3d at 242; *Chandler*, 428 S.W.3d at 407-08. We overrule Raia's first issue.[9]

**Breach of Contract and Negligent Misrepresentation**

In his third issue, Raia asserts that the evidence "conclusively proved Crockett was liable" for breach of contract and negligent misrepresentation. He asserts that he reasonably relied, to his detriment, on Crockett's statutorily required disclosures and that the evidence established that Crockett did not disclose the tick problem. However, Crockett was only required to disclose such

[8] Raia notes that he was not represented by a realtor in this transaction, characterizing himself as a "first-time homebuyer in an unfamiliar area without a real-estate agent." However, Raia testified that he had lived "this time" in the Austin area since the end of 2011, that he ran his own business originating private mortgages, and that he and a friend had once bought a home to resell. He decided against using a realtor because he thought the process would be easier and quicker with "[o]ne less person to deal with," but he had a lawyer review the contract before he signed it. Raia was looking at other property in the area when he found Crockett's house because he "really liked that neighborhood." There is no evidence that Crockett knew that Raia might not be familiar with the area or that he spoke to Raia during the transaction or took advantage of Raia's asserted inexperience in any way. Nor is there evidence that a more experienced buyer or one represented by a realtor would have discovered any tick problem.

[9] Because we overrule Raia's first issue, we will not consider his second issue, which asserts that because the findings were supported by insufficient evidence, the court's conclusions and awards of attorney's fees and costs must fall.

conditions of which he was aware—"A seller has no duty to disclose facts he does not know." *Prudential Ins. Co.*, 896 S.W.2d at 162; *see Jones v. Zearfoss*, 456 S.W.3d 618, 623-24 (Tex. App.—San Antonio 2015, no pet.) (no evidence that mold was present on day house was sold, that sellers knew mold remediation company was incompetent, that remediation workmanship was faulty, or that sellers were untruthful in representing remediation work as "corrective work of professionals"). As discussed above, the evidence does not establish that as of the day of closing Crockett was aware of any ticks in the house at all or believed the tick presence outside was out of the ordinary, much less that he had awareness of anything approaching the level of tick activity observed by Raia in mid-July. Raia has not shown that Crockett breached the contract or "supplied false information by not disclosing the tick problem." We overrule Raia's third issue.

**Post-Judgment Interest**

Finally, Raia asserts, and Crockett concedes, that the trial court erred in its award of post-judgment interest on the conditional appellate attorney's fees awarded to Crockett.

The trial court awarded Crockett conditional appellate attorney's fees "along with post-judgment interest at the lawful rate of five percent (5.0%) per annum from the date of filing the appeal," in the event of an appeal to this Court, and "post-judgment interest at the lawful rate of five percent (5.0%) per annum from the date of filing of the petition for review," in the event of an appeal to the supreme court. However, "[a]n award of conditional appellate attorney's fees to a party is essentially an award of fees that have not yet been incurred and that the party is not entitled to recover unless and until the appeal is resolved in that party's favor." *Ventling v. Johnson*, 466 S.W.3d 143, 156 (Tex. 2015). Instead, "an award for conditional appellate attorney's fees accrues

postjudgment interest from the date the award is made final by the appropriate appellate court's judgment." *Id.* We therefore modify the trial court's judgment to award post-judgment interest on the conditional appellate attorney's fees as follows: Crockett is awarded post-judgment interest at the rate of five percent per annum on the attorney's fees related to an appeal to this Court, running from the date of this opinion and judgment; and if Raia appeals to the supreme court and does not prevail, Crockett is awarded post-judgment interest at the rate of five percent per annum on the attorney's fees related to an appeal to the Texas Supreme Court, running from the date of that court's judgment. *See id.*

**Conclusion**

We have overruled Raia's complaints related to the trial court's findings of fact and conclusions of law and his assertion that he proved his breach-of-contract and negligent-misrepresentation claims as a matter of law. We sustain his complaint about the award of post-judgment interest related to the conditional appellate attorney's fees. As to that issue, the judgment is modified as set out above. We affirm the trial court's judgment in Crockett's favor as modified.

David Puryear, Justice

Before Justices Puryear, Pemberton, and Goodwin

Modified and, as Modified, Affirmed

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