



**NUMBER 13-18-00497-CV**

**COURT OF APPEALS**

**THIRTEENTH DISTRICT OF TEXAS**

**CORPUS CHRISTI – EDINBURG**

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**JOHN W. TISDALE AND  
PAMELA J. TISDALE,**

**Appellants,**

**v.**

**PAUL BOLLINGER AND  
ASHLEY BOLLINGER,**

**Appellees.**

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**On appeal from the 332nd District Court  
of Hidalgo County, Texas.**

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**MEMORANDUM OPINION**

**Before Chief Justice Contreras and Justices Benavides and Longoria  
Memorandum Opinion by Chief Justice Contreras**

Appellants John W. Tisdale and Pamela J. Tisdale appeal a summary judgment granted in favor of appellees Paul Bollinger and Ashley Bollinger. By two issues,

appellants argue the trial court (1) did not have jurisdiction and (2) erred when it granted summary judgment on appellees' common-law fraud claim. We affirm.

## **I. BACKGROUND**

On May 19, 2014, appellees entered into an earnest money contract to purchase a house in Edinburg, Texas, from appellants for \$595,000. As part of the transaction, appellants provided appellees with a Seller's Disclosure Notice (SDN) executed on July 26, 2013, in which they represented there were no known defects or malfunctions with the home and that they were unaware of any of the following conditions: previous flooding into the structures or onto the property, previous fires, water penetration, wood rot, and other structural repairs. On June 27, 2014, appellants executed a general warranty deed transferring title of the home to appellees, and appellees executed a deed of trust in favor of their mortgage lender, Compass Bank.

On February 25, 2015, appellees brought suit against appellants and asserted causes of action for breach of contract, statutory fraud, common-law fraud, fraud in a real estate transaction, negligence, gross negligence, negligent misrepresentation, and violations of the Deceptive Trade Practices Act (DTPA). In their third amended petition, appellees stated that, while living at the house, they experienced numerous water penetrations into and onto the property. Appellees further stated that they learned that the individual who performed the initial home inspection before the purchase lacked experience,<sup>1</sup> and that they hired a second licensed home inspector who discovered that: the home had extensive damage to the walls and ceiling from water intrusion, including

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<sup>1</sup> According to appellees, the report of the home inspection performed before the sale characterized the overall condition of the home as "good" and "did not mention the significant damage or the fact that many of the walls had been patched." This report does not appear in the record.

mold, mildew, and wood rot; the roof was defective and in need of repair; and there had been an electrical fire that damaged a wall that had been patched up. The home inspector also discovered that the ceiling had been patched in the hall, laundry room, dining room, and several bedrooms as a result of water damage and that several walls had been patched up. Appellees moved out of the house and the bank foreclosed on the home in April 2017.

Appellees filed a motion for traditional summary judgment on their claims for breach of contract and common-law fraud. As to their common-law fraud claim, appellees argued that appellants “misrepresented the character, quality, and condition of the property and the history of the residence. Specifically, [appellants] indicated that they were unaware of any previous flooding into the structures, fires, water penetration[,] or wood rot.” In support of their motion, appellees submitted multiple exhibits, including the SDN, the second home inspection report, affidavits from appellees, and excerpts from the depositions of appellant John and appellants’ daughter Sherese Tisdale.<sup>2</sup>

On the morning of the hearing on appellees’ summary judgment motion, appellants requested leave from the trial court to file a response, and the trial court granted appellants’ request. Appellants filed a response and attached multiple exhibits, including an alleged email from appellee Paul to appellees’ realtor indicating Paul was aware of some water damage and mildew in the home prior to the purchase. Appellees objected to appellant’s response and the evidence submitted in support, but the trial court did not explicitly rule on the objections.

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<sup>2</sup> In her deposition, Sherese testified that appellants were aware of water intrusion and damage to the house, mold issues, and plumbing defects. Sherese also testified that appellants intentionally lied about the condition of the home so that they could sell it.

Without specifying the grounds for its decision, the trial court granted appellees' summary judgment motion and awarded appellees \$299,389.21 in damages plus pre-judgment and post-judgment interest and attorney's fees. Appellees subsequently amended their petition and nonsuited the remainder of their claims. Appellants filed a motion for new trial, which the trial court denied after a hearing. This appeal followed.

## **II. STANDING**

By their first issue, appellants argue appellees lacked standing due to a provision in the deed of trust that appellees executed in favor of Compass Bank.

### **A. Standard of Review**

A court does not have jurisdiction over a claim made by a plaintiff who does not have standing to assert it. *Heckman v. Williamson County*, 369 S.W.3d 137, 150 (Tex. 2012). A party's standing to sue is not presumed; rather, it must be proved. *Linegar v. DLA Piper LLP (US)*, 495 S.W.3d 276, 279 (Tex. 2016); see *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 445–46 (Tex.1993). Standing is a question of law for the court to determine, although facts necessary to the determination may need to be determined by the factfinder. *Linegar*, 495 S.W.3d at 279. The issue of standing focuses on whether a party has a sufficient relationship with the lawsuit as to have a justiciable interest in its outcome. *Highland Credit Opportunities CDO, L.P. v. UBS AG*, 451 S.W.3d 508, 515 (Tex. App.—Dallas 2014, no pet.); *Rhey v. Redic*, 408 S.W.3d 440, 456 (Tex. App.—El Paso 2013, no pet.); see *In re Union Carbide Corp.*, 273 S.W.3d 152, 155 (Tex. 2008) (orig. proceeding); see also *Heckman*, 369 S.W.3d at 154–55 (discussing standing doctrine in Texas).

When standing is challenged for the first time on appeal, the plaintiff does not have the same opportunities to replead, direct discovery to, or otherwise address the jurisdictional issue as they have when standing is raised in the trial court. *RSL Funding, LLC v. Pippins*, 499 S.W.3d 423, 429 (Tex. 2016) (per curiam). “Thus, when an appellate court is the first to consider jurisdictional issues, it construes the pleadings in favor of the plaintiff and, if necessary, reviews the record for evidence supporting jurisdiction.” *Id.* “If standing has not been alleged or shown, but the pleadings and record do not demonstrate an incurable jurisdictional defect, the case will be remanded to the trial court where the plaintiff is entitled to a fair opportunity to develop the record relating to jurisdiction and to replead.” *Id.*

#### **B. Deed of Trust**

A deed of trust creates a lien on the piece of real property subject to it. *Morlock, L.L.C. v. Nationstar Mortg., L.L.C.*, 447 S.W.3d 42, 45 (Tex. App.—Houston [14th Dist.] 2014, pet. denied); see *Taylor v. Brennan*, 621 S.W.2d 592 593 (Tex. 1981) (noting that Texas follows lien theory of mortgages); see also *Bonilla v. Roberson*, 918 S.W.2d 17, 21–22 (Tex. App.—Corpus Christi–Edinburg 1996, no writ). A foreclosure under a deed of trust has the effect of reducing the indebtedness owed by the mortgagor by the amount paid for the property at foreclosure. *Peacock Hospitality, Inc. v. Assoc. Cas. Ins.*, 419 S.W.3d 649, 653 (Tex. App.—San Antonio 2013, no pet.); *Campagna v. Underwriters at Lloyd’s London*, 549 S.W.2d 17, 19 (Tex. App.—Dallas 1977, writ ref’d n.r.e.).

A deed of trust has “no legal effect apart from the debt or obligation which it is designed to secure.” *O’Dell v. First Nat’l Bank of Kerrville*, 855 S.W.2d 1, 4 (Tex. App.—San Antonio 1991), *rev’d on other grounds*, 856 S.W.2d 410 (Tex.1993). Consequently,

a deed of trust is usually extinguished upon payment of the indebtedness which it was created to secure. *O'Dell*, 855 S.W.2d at 4; see *Tex. Bank & Tr. Co. of Dall. v. Custom Leasing, Inc.*, 402 S.W.2d 926, 930 (Tex. App.—Amarillo 1966, no writ); *Spencer–Sauer Lumber Co. v. Ballard*, 98 S.W.2d 1054, 1055 (Tex. App.—San Antonio 1936, no writ); see also *Zimmerman v. Littlejohn*, No. 05-01-00800-CV, 2002 WL 2005514, at \*6 n.5 (Tex. App.—Dallas 2002, no pet.) (mem. op.).

### **C. Analysis**

Appellants argue for the first time on appeal that the trial court lacked jurisdiction because appellees lacked standing. In support, appellants point to a provision in the deed of trust appellees executed when obtaining the mortgage with Compass Bank that provides that “All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.” The deed of trust defines “Miscellaneous Proceeds” as:

any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

In essence, appellants argue that appellees lack a justiciable interest in the proceeding due to these provisions. The record, however, indicates otherwise. See *RSL Funding*, 499 S.W.3d at 429.

Here, Compass Bank filed a plea in intervention, which was objected to by appellees and struck by the trial court. The record reveals that the deed of trust executed in favor of Compass Bank was for a total of \$476,000, that Compass Bank received \$473,779.95 for the sale of the house, and that the balance owed was satisfied in full. Appellants do not contest any of these facts. Therefore, we conclude that any claim that

Compass Bank had for the relief sought by appellees was extinguished when the debt secured by the deed of trust was paid in full. See *O'Dell*, 855 S.W.2d at 4; *Tex. Bank & Tr.*, 402 S.W.2d at 930; *Spencer–Sauer Lumber*, 98 S.W.2d at 1055.

We also note that appellees' petition clearly pleaded a concrete and particular injury traceable to appellants' conduct that the trial court could redress with the requested relief. See *Linegar*, 495 S.W.3d at 279; *Heckman*, 369 S.W.3d at 154–55. We conclude that appellees had standing.

We overrule appellants' first issue.

### III. SUMMARY JUDGMENT

By their second issue, appellants argue the trial court erred when it granted summary judgment to appellees on their common-law fraud claim.

However, appellees also moved for summary judgment on the basis that appellants breached the contract,<sup>3</sup> and the trial court did not specify whether it was granting summary judgment on appellees' claim for common law fraud or breach of contract; instead, the judgment provided that the motion "should be in all things granted." Where a judgment may rest upon more than one ground, the party aggrieved by the judgment must assign error to each ground or the trial court's judgment will be affirmed on the ground to which no error was assigned. *Inscore v. Karnes Cty. Sav. & Loan Ass'n*, 787 S.W.2d 183, 184 (Tex. App.—Corpus Christi–Edinburg 1990, no writ). In such situations, appellants have waived their right to complain of the ruling to which no error

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<sup>3</sup> The elements of a breach of contract claim are: (1) there is a valid enforceable contract; (2) the plaintiff performed, tendered performance of, or was excused from performing his or her contractual obligations; (3) the defendant breached the contract; and (5) the defendant's breach caused the plaintiff injury. See *Davis v. Tex. Farm Bur. Ins.*, 470 S.W.3d 97, 104 (Tex. App.—Houston [1st Dist.] 2015, no pet.); *Doss v. Homecomings Fin. Network, Inc.*, 210 S.W.3d 706, 713 (Tex. App.—Corpus Christi–Edinburg 2006, pet. denied).

was assigned. *Id.* If this were not the rule, appellate courts would be placed in the precarious position of having to assign error and provide its own argument and authorities. *Id.*; see TEX. R. APP. P. 38.1(i). As such, we must affirm the trial court's judgment. See *Davis v. Tex. Farm Bur. Ins.*, 470 S.W.3d 97, 109 (Tex. App.—Houston [1st Dist.] 2015, no pet.); *Tello v. Bank One, N.A.*, 218 S.W.3d 109, 114–15 (Tex. App.—Houston [14th Dist.] 2007, no pet.); *Inscore*, 787 S.W.2d at 184.

We overrule appellants' second issue.

#### **IV. CONCLUSION**

The trial court's judgment is affirmed.

DORI CONTRERAS  
Chief Justice

Delivered and filed the  
9th day of July, 2020.