

IN THE COURT OF APPEALS 10/17/95

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00193 COA

ROYER MOBILE HOMES OF MISSISSIPPI, INC.

APPELLANT

v.

WILLIAM BROWN AND TAMMY BROWN

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. GASTON H. HEWES, JR.

COURT FROM WHICH APPEALED: HARRISON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

CLYDE RATCLIFF

ATTORNEY FOR APPELLEES:

JESS H. DICKINSON

NATURE OF THE CASE: CIVIL ACTION: BREACH OF CONTRACT, BREACH OF
WARRANTY AND DECEPTIVE TRADE PRACTICES

TRIAL COURT DISPOSITION: JUDGMENT FOR PLAINTIFF IN THE AMOUNT OF \$ 12,
500.00

BEFORE FRAISER, C.J., KING, AND McMILLIN, JJ.

KING, J., FOR THE COURT:

Royer appeals a judgment of the Circuit Court of Harrison County, which affirmed the judgment of the County Court of the First Judicial District of Harrison County and awarded the appellees \$ 1, 875.00 in statutory damages.

FACTS AND PROCEDURAL HISTORY

In July 1991, the lease on William and Tammy Brown's apartment expired; therefore, the couple commenced looking for a mobile home to purchase and move to their lot in Saucier, Mississippi. The Browns went to Royer Mobile Homes where they met with Eric Vaughan. Eric Vaughan showed the Browns a mobile home, which he represented to be 14 x 76 feet. Vaughan allowed the Browns to inspect the mobile home and advised them that the mobile home had one previous owner.

On July 19, 1991, the Browns returned to Royer Mobile Homes and negotiated the purchase of the mobile home they had inspected on their initial visit. During the negotiations, the Browns voiced concerns about the mobile home's cooling capacity. In response to their concerns, Vaughan informed the Browns that the mobile home was equipped with a three and one-half ton air conditioning unit. Vaughn further stated that since the Browns were going to pay \$ 8,000 in cash, he would arrange to have a shingle roof installed over the mobile home, which would shelter the mobile home from direct rays of the sun.

Because delivery was not included in the purchase, Mr. Brown inquired if Vaughan knew anyone who would be willing to move the mobile home in exchange for three International Scout trucks. Vaughan told Brown that he believed an employee of Royer named Curtis would move the mobile home in exchange for Mr. Brown's three International Scout trucks. Assured that the three and one-half ton air conditioning unit and a shingle roof would be sufficient to cool the trailer, and that Curtis would move the mobile home, the Browns tendered a five hundred dollar down-payment on the mobile home.

On July 21, 1991, the Browns returned to Royer and tendered the remaining \$ 7,500.00 of the purchase price to Eric Vaughan. However, Curtis did not agree to move the mobile home in exchange for the trucks as contemplated by Vaughan. Thereafter, Randy Reed, a friend of the Browns, who was employed at Albright Homes, was contacted and agreed to move the mobile home in exchange for the three trucks.

Prior to moving the mobile home to the Brown's lot, Reed informed them that he did not believe the mobile home was 14 x 76 feet. Mr. Brown stated that he believed the mobile home was 14 x 76 feet because his sales contract indicated that the mobile home's measurements were 14 x 76 feet. The Browns were concerned about the mobile home's size due to a covenant in Howardson's Estates, where the mobile home was to be located, which required that all mobile homes have a minimum of 1000 square feet. The actual square footage of the mobile home sold to the Browns by Royer was 896 square feet.

Reed moved the mobile home to the Brown's lot, where Mr. Brown measured the home upon its arrival. The mobile home measured 64 feet, or 65 feet excluding the hitch. Mr. Brown telephoned Eric Vaughan and reported that the trailer's measurements were not as he had represented, and was informed by Vaughan that he would verify the measurements with the office in McComb.

The Browns' sales contract provided that the mobile home was equipped with air conditioning, which the Browns assumed would be operable upon delivery. After delivery, Mr. Brown discovered that the air conditioning unit was not hooked up. The Browns also discovered that the unit was a two and one-half ton unit and not a three and one-half ton unit as represented by Vaughan. The Browns telephoned Vaughan and advised him that the unit was not hooked up, and Vaughan stated that he did not believe hook up of the unit was included in the purchase, but he would call them back. Vaughan did not call the Browns back in several days, and the Browns telephoned Sears and requested that they come and hook-up the unit. Sears was unsuccessful in hooking up the unit due to exposure of the unit's compressor to the elements. The Browns telephoned Royer and advised them that the unit was defective, and Royer sent a representative, who installed a new compressor in the unit.

Subsequent to the system's repair, the Browns were required to spend several days in Jackson where their daughter had surgery. When the Browns returned, they discovered that the unit was not cooling. The Browns reported the problem to Vaughan, and Vaughan told the Browns that Royer had fulfilled its duty. Thereafter, the Browns telephoned Sears, and Sears came and repaired the system. Sears advised the Browns that the repairman sent by Royer had neglected to insert a ring in the system, which would have prevented the system from leaking Freon.

Approximately, one week following the purchase, the Browns had plumbing problems, which resulted in the destruction of the mobile home's insulation. The plumbing problems were reported to Royer, and Royer responded but did not make complete repairs. The Browns expended \$ 90.00 in order to complete the repairs.

In addition, Royer refused to install the shingle roof as Vaughan had promised and failed to provide the Browns with a Certificate of Origin for the mobile home until the Friday before commencement of the trial. Royer withheld the Certificate of Origin because it wanted to secure a statement from the Browns stating that they were satisfied with the mobile home and desired to keep it.

The Certificate of Origin indicated that the mobile home was transferred from Conner Sales to Kevin and Lisa Johnson and subsequently, to a James Pollock. The Certificate of Origin revealed that there were two prior owners of the mobile home and not one as represented by Vaughan.

On September 16, 1991, William and Tammy Brown filed a complaint in the County Court of the First Judicial District of Harrison County seeking a judgment against Royer Mobile Homes of Mississippi, Inc. for breach of contract, breach of warranty, and violations of Mississippi's consumer protection law. On August 17, 1992, trial before a jury commenced, and on August 18, 1992, the jury returned a verdict in favor of the plaintiffs and assessed plaintiffs' damages at

\$ 8,000.00. In response to a special interrogatory, the jury found that Royer had engaged in unfair and deceptive trade practices. Pursuant to the authority conferred upon it by statute, the Court conducted an evidentiary hearing on attorney's fees and awarded the Browns the sum of \$ 4,500.00 in attorney's fees. A final judgment in the amount of \$ 12,500.00 was entered by the court.

Aggrieved by the jury's verdict and the court's judgment, the defendant appealed to the Circuit Court of Harrison County. The Circuit Court of Harrison County affirmed the judgment and awarded plaintiffs \$ 1,875.00 in statutory damages. Royer now appeals the judgment of the Circuit Court of

Harrison County affirming the county court's judgment and assigns the following as errors: (1) the trial court's denial of its motion for judgment notwithstanding the verdict; (2) the trial court's refusal to find that the jury's verdict was grossly disproportionate to the evidence presented on damages; (3) the trial court's granting of plaintiffs' instructions P-1, P-5 and P-8 and its refusal to grant defendant instruction D-8 as originally submitted and (4) the trial court's failure to submit to the jury the issue of attorney's fees and its subsequent act in awarding attorney's fees contrary to the overwhelming weight of the evidence and law. We find no error and affirm the judgment.

ANALYSIS OF THE ISSUES AND LAW

I.

DID THE TRIAL COURT ERR IN DENYING DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR FOR NEW TRIAL?

It is elemental to appellate jurisprudence that this court will not disturb a trial court's grant or denial of a motion for new trial unless it is shown that the trial judge abused his discretion. *See American Fire Protection, Inc. v. Lewis*, 653 So. 2d 1387, 1390 (Miss. 1995); *Muse v. Hutchins*, 559 So. 2d 1031, 1034 (Miss. 1990); *Adams v. Green*, 474 So. 2d 577, 582 (Miss. 1985). Our review of the record revealed no manifest error or abuse of discretion; therefore, we find that the trial judge properly denied Royer's motion for new trial.

In reviewing a denial of a motion for judgment notwithstanding the verdict, this Court considers the evidence in the light most favorable to the appellee, giving the appellee the benefit of all favorable inferences that may be reasonably drawn from the evidence. If the facts so considered point so overwhelmingly in favor of the appellant that reasonable men could not have arrived at a contrary verdict, then we are required to reverse and render. *American Fire Protection, Inc.*, 653

So. 2d at 1390-91. However, if there is substantial evidence in support of the verdict, that is evidence of such quality and weight that reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions, affirmance is required. *Id.* at 1391.

The record contains substantial credible evidence, which would support a jury finding that Royer used deceptive trade practices during purchase negotiations with the Browns. Royer's employee, Eric Vaughan made several false representations to the Browns during the course of purchase negotiations. Specifically, Vaughan represented to the Browns that the mobile home had one previous owner, but the Certificate of Origin indicated that there were two prior owners. Vaughan also represented that the mobile home was equipped with a three and one-half ton air conditioning unit when it was actually equipped with a two and one-half ton unit. Vaughan also represented to the Browns that Royer would install a shingle roof over the mobile home to shield the mobile home from direct sun rays since they were prepared to tender the purchase price in cash. Reasonable and fair minded impartial jurors might conclude that the representations were intentionally calculated by Royer's employee to mislead the Browns and cause them to purchase a less than desired home.

Likewise, reasonable and fair minded impartial jurors might conclude that the representations were made in error. Therefore, since reasonable and fair minded jurors might reach different conclusions, and the evidence supports the verdict, we affirm the trial court's denial of appellant's motion for judgment notwithstanding the verdict.

II.

DID THE TRIAL COURT ERR IN REFUSING TO FIND
THAT THE JURY'S VERDICT WAS GROSSLY
DISPROPORTIONATE TO THE EVIDENCE PRESENTED
ON DAMAGES?

Royer argues that the jury's verdict was grossly disproportionate to the evidence presented at trial and evinces bias, prejudice, and passion; therefore, its motion for new trial should have been granted by the trial court. We disagree.

The standard of review employed by this court in addressing an attack on a jury's damage award is the same standard employed by this court in analyzing a court's grant or denial of a judgment notwithstanding the verdict. *City of Jackson v. Locklar*, 431 So. 2d 475, 480 (Miss. 1983). In applying this standard, we may not consider what we would have done as jurors; rather, we must consider the evidence in the light most favorable to the appellees, together with all reasonable inferences which may be drawn therefrom. We will reverse only if we are able to say that no reasonable jury could on the facts, have concluded that the appellees damages were as the jury determined. *Id.* at 481. We find that there is substantial evidence in the record supporting the jury's damage award.

The record indicates that the retail value of the mobile home delivered to the Browns was

\$ 9,637.00, and the retail value of the shingled-roof mobile home the Browns contracted to purchase was \$ 15,000.00. Therefore, there was a \$ 5,363.00 value differential between the mobile home the Browns contracted to purchase and the mobile home delivered to the Browns. In addition, the Browns expended \$ 90.00 for repairs which should have been performed by Royer. The Browns suffered minor physical distress as a result of being forced to inhabit the mobile home in the midst of summer without proper air conditioning. The Browns suffered considerable emotional distress due to concern for their ailing daughter's comfort, health and well-being as a consequence of being without air conditioning. The Browns also incurred approximately \$ 1,000.00 in expenses for moving the mobile home; however, delivery of the mobile home was not included in the purchase agreement; therefore, the Browns could not recoup these expenses as damages. We cannot say that the jury's verdict unreasonably compensated the Browns for contractual and other losses; therefore, we find that the jury's verdict does not evince bias, prejudice, or passion as the appellant contends.

III.

DID THE TRIAL COURT ERR IN GRANTING INSTRUCTIONS

P-1, P-5, AND P-8 AND IN DENYING DEFENDANT INSTRUCTION

D-8?

Royer independently attacks the trial court's grant and denial of specific instructions. This court does not consider jury instructions in isolation when determining whether a jury has been properly instructed; rather, we consider jury instructions as a whole. *Byrd v. F-S Prestress, Inc.*, 464 So. 2d 63, 66 (Miss. 1985). In our review of the record, we find that the jury instructions as a whole fairly announce the applicable law, and the jury was adequately and properly instructed. Nevertheless, we take time out to address each of the appellant's objections.

Royer states that instruction P-1 is incomplete because it fails to instruct the jury on the seller's right to cure non-conforming goods prior to incurring breach of contract liability. We agree that instruction P-1 is deficient; however, we find that instruction D-4(b) cures the deficiency.

Royer further complains that instruction P-5 is deficient for failing to require a finding of intent. This argument lacks merit since subparagraph or item 2 of the instruction specifically includes the element of intent.

Royer, states that instruction P-8 is erroneous because the issue of attorney's fees should have been determined by the jury. Our Supreme Court has held that absent a contract to the contrary, the award and quantum of attorneys' fees is a matter committed to the sound discretion of the trial judge. *Young v. Huron Smith Oil Co.*, 564 So. 2d 36, 40 (Miss. 1990) (citations omitted). Thus, the trial court properly decided the issue of attorney's fees.

Finally, Royer argues that the trial court erred in refusing to grant Instruction D-8 as originally submitted. Instruction D-8 as originally submitted is not a part of the record on appeal. Objections to instructions, given or refused, will not be considered on appeal where such instructions do not appear of record. *Hazell Machine Co. v. Shahan*, 161 So. 2d 618, 625 (Miss. 1964). Since the instruction complained of was not made a part of the record on appeal, we must presume that on all points, other than those covered by the instructions before us, the jury was correctly instructed. *Shahan.*, 161 So. 2d at 625. Thus, there is no merit in this assignment of error by the appellant.

IV.

DID THE TRIAL COURT ERR IN FAILING TO SUBMIT TO

THE JURY THE ISSUE OF ATTORNEY'S FEES, AND DID

THE TRIAL COURT ERR IN AWARDING ATTORNEY'S

FEES CONTRARY TO THE OVERWHELMING WEIGHT

OF THE EVIDENCE?

We previously addressed Royer's contention that the award of attorney's fees was an issue for the jury to consider in Section III. Therefore, we now consider Royer's allegation that the fees awarded by the court were contrary to the overwhelming weight of the evidence. The award of attorney fees and the amount awarded is within the discretion of the trial court. *Stokes v. La Cav Improvement Bd. of Directors*, 654 So. 2d 524, 529 (Miss. 1995). Our review of the record did not reveal any abuse of discretion by the trial judge in awarding the appellees attorney's fees. Thus, this assignment of error by Royer lacks merit.

In conclusion, we find no merit in any of appellant's assignments of error and therefore, affirm the judgment.

THE JUDGMENT OF THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HARRISON COUNTY IN FAVOR OF THE APPELLEES IS AFFIRMED. STATUTORY DAMAGES AND INTEREST ARE AWARDED. COSTS ARE TAXED TO THE APPELLANT.

FRAISER, C.J., BRIDGES, P.J., BARBER, COLEMAN, DIAZ AND PAYNE, JJ., CONCUR.

MCMILLIN DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY SOUTHWICK, J.

THOMAS, P.J., NOT PARTICIPATING.

APPENDIX

INSTRUCTION P-1 read as follows:

The court instructs you that, when a buyer has accepted goods, and notified the seller that the goods are not in conformity with the contract, the buyer may recover from the seller any loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

Therefore, if you find by a preponderance in this case that Royer Mobile Homes sold a mobile home to the Plaintiffs, and the home was accepted by the Browns, and if you further find that the Browns promptly notified Royer that the mobile home was not in conformity with the contract, you may

award to the Browns any damage or damages which the Browns reasonably can prove by a preponderance of the evidence, provided that all such damage must be the kind of damage which ordinarily would be expected to occur under the circumstances.

INSTRUCTION P-5 read as follows:

The court instructs you that, in the State of Mississippi, the following acts are considered unfair and/or deceptive acts:

1. Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;
2. Advertising goods or services with intent not to sell them as advertised;
3. Passing off goods or services as those of another;
4. Misrepresentation of the source, sponsorship, approval, or certification of goods or services;
5. Representing that goods have characteristics, uses, or benefits that they do not have;

The Court further instructs you that, if you find by a preponderance of the evidence that the Defendant, Royer Mobile Homes, committed any one or more of these deceptive trade practices, than you shall award to the Plaintiffs, Mr. and Mrs. Brown, any ascertainable loss of money or property as a result of the use by the Defendant of such deceptive trade practice, if any.

INSTRUCTION P-8 read as follows:

The Court instructs the Jury that if and only if you find for the Plaintiff, you are to answer the following question:

Do you find that the Defendant engaged in any deceptive trade practices as defined in these instructions?

_____ YES _____ NO

INSTRUCTION D-4(B) read as follows:

In the event a Seller tenders non-conforming goods, the Buyer may reject the goods within a reasonable time after their tender by notifying Seller or the Buyer may accept the goods by

performance of acts that are inconsistent with the Seller's ownership. Upon notice of the non-conformity, the Seller is entitled to reasonable opportunity to cure the defect.

Accordingly, I instruct you that on this claim, the burden of proof is on the Plaintiffs to prove to you by preponderance of the credible evidence: first, that the Defendant breached the contract entered between the parties; and second, Defendant failed to reasonably correct the breach; and third, that such non-conformity was the sole proximate cause, or a proximate contributing cause of Plaintiff's damages, if any, and unless you so find, your verdict shall be for the Defendant on the breach of contract theory.

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McMILLIN, J., DISSENTING:

I respectfully dissent and would reverse and remand this case for retrial. It is my opinion that the evidence on damages was simply insufficient to sustain a verdict of \$8,000.00 and that, even considering the wide latitude given to the jury in the assessment of damages, this is clear evidence that the jury was swayed by bias, passion or prejudice against the defendant. Such a determination compels a retrial.

Taken in the light most favorable to the plaintiffs, the proof showed four things:

- (1) The trailer was approximately 8 feet shorter than represented;
- (2) The air conditioner unit was a 2 ½ ton unit, whereas it was represented to be a 3 ½ ton unit, and the unit was not working properly when the trailer was originally installed;
- (3) There was a problem in the connection of the plumbing when the trailer was set up that led to a leak; and
- (4) The trailer did not have a shingle roof.

Accepting all those things as true, the fact remains that the burden was on the plaintiffs to establish not only liability but to prove their resulting damages by a preponderance of the evidence.

Plaintiffs presented no proof as to the amount of damage suffered by the fact that the trailer was smaller than they were led to expect. Defendants presented proof, based upon available market data, that the difference between the market value of a trailer the size the plaintiffs received and the larger one they anticipated receiving was something less than \$600.00. Since the plaintiffs elected to retain the trailer rather than rescind the contract upon the discovery of the discrepancy, loss of bargain is the correct measure of damages.

Essentially the same considerations apply to the air conditioner. The plaintiffs, upon discovering their problems, were faced with an election of remedies issue. They could elect to rescind the contract or sue for loss of bargain. They elected the latter, but presented no proof as to the variance in value between a used 2 ½ ton air conditioning unit and a used 3 ½ ton unit. This was the proper measure of damages since the plaintiff retained the unit.

The malfunction in the air conditioner and the plumbing problem were corrected through repair. Accepting the fact that this was the obligation of the defendant, the proper measure of damage would be the cost of repair. The proof is uncontradicted that repair costs for the air conditioner were \$60.00 and the cost of correcting the plumbing problem was \$30.00. Plaintiffs offered no proof of any additional consequential damages, except a claim for emotional distress, next discussed.

I must respectfully take strong issue with the majority opinion when it suggests that the plaintiffs were entitled to recover for emotional distress suffered during the time the air conditioner was not functioning "due to concern for their ailing daughter's comfort, health and well-being." Such damages are highly speculative and are simply not warranted. Normally, such consequential damages would not appear recoverable in a simple breach of warranty action unless the special need was communicated to the defendant and formed a part of the bargain. *See*, for example, § 75-2-715(2)(b) of the Mississippi Code of 1972, which requires that consequential damages "resulting from the seller's breach" must result "from general or particular requirements and needs of which the seller at the time of contracting had reason to know. . . ." *See also New Orleans & N.E.R. Co. v. J.H. Miner Saw Mfg. Co.*, 117 Miss. 646, 78 So. 577, 578 (1918) (where the Miss. Supreme Court held that special circumstances from which special damages might arise must be made known to the party sought to be made liable when the contract was made). Even in such instances, it would appear that such a claim, if one could be said to exist, would belong to the daughter.

As to the shingle roof on the trailer, the plaintiffs testified, not that they thought they were getting a shingle roof on the trailer, but that the defendant had agreed to construct a free-standing shed-type structure over the mobile home. In an attempt solely to show how preposterous such a proposition was, a witness for the defendant estimated that it would cost in the range of \$7,000.00 to construct such a shed. The point being pressed was that the plaintiffs were only paying \$8,000.00 for the trailer and that it was beyond the bound of reason that the defendant would agree to such proposition, since the trailer itself admittedly had a fair value in the \$8,000.00 to \$9,000.00 range. The plaintiffs presented no other proof on this issue except for Brown's unsubstantiated opinion of value, for which no predicate was laid and which had essentially no probative value. The majority seizes on this proof as evidence of the loss of bargain suffered by the plaintiffs. In my opinion, the proof was insufficient as a matter of law that the plaintiffs bargained for and were entitled to receive a free-standing shed to house their mobile home. The testimony of the cost of such shed, therefore, does not shed any light on the damage suffered by the plaintiffs by the fact that the mobile home did not have a shingle roof. Any damages awarded on that claim were, therefore, of necessity based upon speculation.

The proof shows, unequivocally, that the plaintiffs suffered some damage in this case. Such damages, under the existing state of the law, consist of the loss of bargain that they can prove by showing they got something less than what they bargained for, together with the costs of repairs associated with the non-functioning items. The proof on these items of damage simply does not add up, by any stretch, to \$8,000.00, even taken in the light most favorable to the plaintiffs. There appears nothing left to support a verdict of this size other than the natural sympathy that the jury must have felt for the plaintiffs, but such bias, sympathy or prejudice cannot, under the law, serve as the foundation for a verdict that, on its face, appears so excessive as to be punitive in nature.

I would reverse and remand for a new trial.

SOUTHWICK, J., JOINS THIS DISSENT.