Reverse, Render and Remand in part; Affirmed in part; and Opinion Filed July 7, 2017

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-01030-CV

RESIDENCES AT RIVERDALE, LP AND RESIDENCES AT RIVERDALE GP LLC, Appellants
V.
DIXIE CARPET INSTALLATIONS, INC., Appellee

On Appeal from the 199th Judicial District Court
Collin County, Texas
Trial Court Cause No. 199-04903-2012

MEMORANDUM OPINION

Before Justices Bridges, Lang-Miers, and Whitehill
Opinion by Justice Bridges

This appeal arises from underlying contracts involving the installation of carpet at an apartment complex. The jury returned a verdict in favor of appellee Dixie Carpet Installations, Inc. (Dixie) on all of its claims against appellants Residences at Riverdale, LP and Residences at Riverdale GP, LLC (Riverdale) and awarded Dixie $142,898 in tort damages and $285,796 in exemplary damages. The jury also awarded Dixie $142,898 in breach of contract damages and $234,816.90 in attorneys' fees against Nations Construction Management, Inc. (Nations); however, Nations has not challenged the judgment on appeal.

Riverdale raises seven issues in which it challenges aspects of the judgment, the sufficiency of the evidence to support the jury's fraud findings and punitive damages award, and the application of the economic loss rule to its contract and conversion claims. We reverse the

trial court's judgment based on the jury's fraud findings against Riverdale, including its award of exemplary damages and joint and several liability with Nations, and render a take-nothing judgment against Dixie on its fraud claims. We remand the case to the trial court for Dixie to make a new election of remedies. In all other respects, the judgment of the trial court is affirmed.

Background

On May 21, 2008, Riverdale hired Nations, as general contractor, to build the Residences at Riverdale Apartments (the project). Nations and Dixie entered into a purchase order agreement on January 19, 2010 for $142,128, in which Dixie agreed to provide carpet, vinyl plank, and rubber flooring to Nations for the project. Linda Kutac, Dixie's president, signed the purchase agreement on behalf of Dixie and John Czapski, Nations' president and owner, signed on behalf of Nations. According to the agreement, Nations was responsible for paying Dixie.

Czapski supervised Connie Strawbridge, the Nations employees responsible for writing checks and paying subcontractors. Nations received draw payments from Riverdale, which Nations used to pay subcontractors. Strawbridge generated the checks and Czapski signed them. Nations received draw payments from Riverdale for draw requests 1 through 9.

In March 2010 and after draw request 9, the payment structure changed. Riverdale learned payments from Nations were not flowing through to its subcontractors on the project. David Stapleton, a limited partner/managing member of Riverdale, explained Riverdale took over the check writing responsibility around March 19, 2010 and initiated a joint checking system to pay subcontractors. When the funds came in, Riverdale asked Czapski or Strawbridge who to pay and how much. Based on their information, Riverdale cut the joint checks for the subcontractors. Howard Akin, a Riverdale limited partner and managing member, also testified Nations decided which subcontractors received payment because "it was their vendors and they

instructed them and they knew whether or not they deserved to be paid." When there was not enough in a draw to pay certain vendors, Akin worked with Strawbridge on the pay applications. According to Riverdale, the ultimate payment decision was Nations.

According to Czapski, however, Riverdale took over the responsibility in March 2010 of determining which subcontractors received payment and then dispersing funds. Czapski claimed the reason for the switch in payment scheme was because Riverdale wanted to have "full control of what was going on." According to Czapski, from March 2010 forward, Nations neither received money from Riverdale to pay subcontractors, nor was responsible for such payments.

Dixie sent its first invoice to Nations on April 12, 2010 for $142,128.[1] Dixie did not receive payment. Stapleton instructed Czapski to offer Dixie a discount on the original invoice.

In November 2010, Czapski called Kutac. During the conversation, Czapski told her there was not enough money to pay all the vendors in full. Czapski told Kutac that Dixie would get paid "if we agreed to take a 20-percent discount on our invoices" and signed a lien release. Czapski told her Dixie would receive its money from an escrow account with Chicago Title Insurance Company (Chicago Title) within two weeks of Chicago Title's receipt of the lien release.

Kutac later called Strawbridge and accepted Czapski's discounted offer. Strawbridge said she would tell Czapski and Riverdale that Dixie accepted the offer. Strawbridge indicated Riverdale would provide payment.

On November 19, 2010, Strawbridge sent an email to Dixie, with the lien release form attached for execution, indicating Dixie would receive information concerning when and where to pick up its check the following week. The lien release indicated Dixie agreed to a discounted

[1] A second invoice totaling $142,898 was sent on July 15, 2011, which included an additional $770 for additional material.

payment of $114,318.40. Kutac signed the lien release on behalf of Dixie on November 22, 2010.

Stapleton executed an escrow agreement, with Riverdale as borrower, Legacy Texas Bank as lender, and Chicago Title as escrow agent, on December 7, 2010 for $669,278.09. A list of subcontractors with unpaid claims, including Dixie, was attached as an exhibit to the escrow agreement. The agreement provided that upon receipt of the lien release, the escrow agent "shall immediately pay, without further instruction, the Unpaid Claims in the amounts and to the parties" listed in the exhibit. Nations was not a party to the escrow agreement.

After Dixie did not receive payment, Kutac reached out to Strawbridge. Strawbridge emailed back on December 6, 2010 requesting Kutac resend the original executed lien release to Chicago Title because Chicago Title never received it. Once Chicago Title received it, Chicago Title would send the check. Kutac executed another (albeit identical to the first) lien release on January 12, 2011.

Chicago Title cut a check to Dixie on January 5, 2011 for $114,318.40 but did not release it. Czapski and Strawbridge said Stapleton instructed Chicago Title to hold the January 5 check. Stapleton denied telling Chicago Title to hold the check or knowing why Chicago Title was holding it. He claimed someone from Nations requested the hold, but admitted Nations did not have such authority under the escrow agreement. A January 31, 2011 email from Chicago Title to Strawbridge indicated Chicago Title still had Dixie's check in its possession and "WAS REQUESTED I STILL HOLD." Riverdale was not included on this communication.

On February 7, 2011, Stapleton, on behalf of Riverdale, sent an email to Chicago Title instructing it to void Dixie's check. The circumstances surrounding the decision to void the check were contested.

Stapleton said he was part of a conference call with Czapski, Strawbridge, and Akin on February 7 that centered on the fact Snell-Northcutt, another subcontractor on the project, had filed a lien and lawsuit for non-payment. At that time, there was not enough money to pay all the vendors. Dixie's check was the only one left big enough to void and pay Snell-Northcutt. Stapleton said Czapski agreed Nations would take care of Dixie and instructed Stapleton to void Dixie's check. Riverdale would then pay Snell-Northcutt from the escrow account.

Akins could not recall any details of the conference call. However, he knew Snell-Northcutt had sued Riverdale and filed a lien against the property. He said Snell-Northcutt's lien, as well as the threats of other subcontractors' liens "popping up," was discussed. He also testified, in contradiction to his previous deposition testimony,[2] that it was Czapski's idea to void Dixie's check and that Czapski said Nations would handle paying Dixie.

Czapski said it was Stapleton's idea to void Dixie's check and then pay Snell-Northcutt. Strawbridge could not recall who set up the conference call or what anyone said during the conversation. However, she remembered the purpose of the call was to discuss Dixie and Snell-Northcutt.[3]

There was no paperwork confirming the alleged agreement reached during the conference call regarding which party was responsible for paying Dixie. However, it is undisputed Stapleton sent the email to Chicago Title on February 7, 2011 instructing it to void Dixie's check and issue a check to Snell-Northcutt.

On March 8, 2011, Kutac emailed Strawbridge demanding to know when Dixie would receive payment. Strawbridge did not respond to the email. Kutac testified it was her understanding, based on what Czapski and Strawbridge said, that Dixie never received payment

[2] He testified during his deposition that it was Riverdale's decision to void the check.

[3] This testimony contradicted her previous deposition testimony in which she said it was Czapski's idea to void the check, and he would pay Dixie.

because its check was voided and used to pay other vendors who had filed liens against the property. Dixie was the only subcontractor on the project that had a check held, later voided, and received nothing.

Dixie filed suit against Nations, Czapski, Strawbridge, Riverdale, Stapleton, Akin, and Chicago Title. Prior to trial, Dixie nonsuited Akin and Strawbridge, and the court granted summary judgment in favor of Chicago Title. The court granted a directed verdict in favor of Czapski and Stapleton. The jury returned a verdict in favor of Dixie on its breach of contract, quantum meruit, fraud, promissory estoppel, conversion, and conspiracy claims against Riverdale, LP. The jury found in favor of Dixie on its quantum meruit claim against Riverdale, GP, LLC. The jury also found in favor of Dixie on its breach of contract claim against Nations. The jury found that Nations committed fraud and breached its contract with Riverdale, but awarded no damages.

The final judgment awarded Dixie $142,898 in actual damages, plus attorneys' fees, from Nations on its breach of contract claim. Dixie elected to recover $142,898 in actual damages, plus $285,796 in exemplary damages and attorneys' fees on its fraud claim against Riverdale. Finally, the judgment ordered Riverdale and Nations jointly and severally liable for $142,898 in actual damages. Only Riverdale is subject to this appeal.

Sufficiency of the Evidence to Support Fraud and Fraudulent Inducement

In its third issue, Riverdale argues the evidence is legally and factually insufficient to support the jury's finding of fraud or fraudulent inducement. It contends the evidence is insufficient to establish that it made any representation to Dixie in November 2010. Alternatively, if Riverdale made a misrepresentation, the evidence is insufficient to establish that it had no intention of performing at the time the misrepresentation was made.

When a party attacks the legal sufficiency of the evidence supporting an adverse finding on an issue for which it did not have the burden of proof, the party must show that no evidence supports the jury's adverse finding. *Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d 194, 215 (Tex. 2011). In conducting a no-evidence review, appellate courts must view the evidence in the light most favorable to the verdict, crediting favorable evidence if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). Evidence is legally sufficient if it "would enable reasonable and fair-minded people to reach the verdict under review." *Id*. Conversely, evidence that is so weak as to do no more than create a mere surmise or suspicion is no more than a scintilla and, thus, no evidence. *Jelinek v. Casas*, 328 S.W.3d 526, 532 (Tex. 2010).

In determining the factual sufficiency of the evidence, we consider and weigh all the evidence. *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996). Findings may be overturned only if they are so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. *Id*.

The elements of common law fraud are: (1) a material misrepresentation; (2) that was false when made; (3) that was known by the speaker to be false when it was made or that was made recklessly as a positive assertion without knowledge of its truth; (4) the speaker made the representation intending that the other party act upon it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered injury. *Rogers v. Alexander*, 244 S.W.3d 370, 382 (Tex. App.—Dallas 2007, pet. denied).

Fraudulent inducement is a species of fraud that arises in the context of a contract; the elements of fraud must be established as they relate to a contract between the parties. *Brauss v. Triple M Holding GmbH*, 411 S.W.3d 614, 622 (Tex. App.—Dallas 2013, pet. denied). A contractual promise with no intention of performing may give rise to an action for fraudulent

inducement. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 304 (Tex. 2006). Breach alone is no evidence that breach was intended when the contract was originally made. *Id*. However, breach combined with "slight circumstantial evidence" of fraud is enough to support a verdict for fraudulent inducement. *Id.*

The jury found Riverdale committed fraud against Dixie by representing to Dixie "in or around November, 2010, that if Dixie would agree to reduce the amount of its claims from $142,898.00 to $114,318.40, that Riverdale would pay Dixie the reduced amount of $114,318.40 with funds to be placed in escrow."

We begin by determining whether Riverdale made a representation to Dixie. Riverdale argues it did not make any representation to Dixie, much less a false one, but rather Nations, through Czapski, made the alleged misrepresentation. According to Riverdale, Dixie failed to plead and prove an actual or apparent agency relationship between Riverdale and Nations. Dixie concedes it did not plead agency; however, it responds it was unnecessary because Czapski acted as an intermediary.

In *Ernst & Young, L.L.P. v. Pacific Mutual Life Insurance Co.*, the supreme court set forth the following test for a fraudfeasor's liability to third parties:

> One who makes a fraudulent misrepresentation is subject to liability to the persons or class of persons whom he intends or has reason to expect to act or to refrain from action in reliance upon the misrepresentation, for pecuniary loss suffered by them through their justifiable reliance in the type of transaction in which he intends or has reason to expect their conduct to be influenced.

51 S.W.3d, 573, 578 (Tex. 2001); *see also Harris v. Am. Prot. Ins. Co.*, 158 S.W.3d 614, 629 (Tex. App.—Fort Worth 2005, no pet.). However, mere foreseeability will not meet the reason-to-expect standard; instead, the claimant's reliance must be "especially likely" and justifiable, and the transaction sued upon must be the type the defendant contemplated. *Ernst & Young*, 51 S.W.3d at 580; *Harris*, 158 S.W.3d at 629.

Riverdale emphasizes it never had any direct contact with Dixie, and Dixie concedes it never communicated with anyone from Riverdale about the November 2010 agreement to reduce the contractual amount owed. However, Akin sent himself an email on October 12, 2010 regarding a conversation with Czapski that involved discussions about offering subcontractors discounts. Akin said he "emailed them the template showing a 20% discount for most subs and a substantial discount on those with issue." Approximately one month later, Czapski said Stapleton gave him instructions to approach Dixie about a twenty percent discount. Czapski said all of the representations he made to Dixie were based upon what Stapleton told him, and Stapleton's testimony to the contrary was untrue. Czapski further emphasized no one from Riverdale ever indicated Nations was responsible for paying Dixie.

Kutac testified that when she talked with Czapski in November, he said he was submitting the offer to discount on behalf of Riverdale. When Kutac called Strawbridge to accept the discounted amount, Strawbridge said she would let Riverdale know of the acceptance and indicated Riverdale would provide payment. Czapski also testified he told Stapleton that Dixie accepted the offer.

Viewing the evidence in the light most favorable to Dixie, the jury could have determined that although Riverdale did not directly communicate with Dixie, Czapski acted as Riverdale's intermediary in making the offer and Riverdale knew "that there [wa]s an especial likelihood that it w[ould] reach those persons and w[ould] influence their conduct." *Ernst & Young*, 51 S.W.3d at 580. We likewise conclude after weighing all the evidence and leaving credibility determinations of Rivedale's witnesses to the jury, the finding is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. *Ortiz*, 917 S.W.2d at 772.

Having concluded Riverdale made the representation to Dixie, we now consider whether its November 2010 offer to reduce the claim and pay it from an escrow account was a material

misrepresentation. The jury charge defined "misrepresentation" as "a false statement of fact or a promise of future performance made with an intent, at the time the promise was made, not to perform as promised." Riverdale argues there is no evidence that at the time it made the representation, it did not intend to perform. Dixie asserts Riverdale's intent not to perform can be inferred from its subsequent actions.

A promise to act in the future constitutes fraud only when made with the intention, design, and purpose of deceiving—a promise made with no intention of performing the act. *Spoljaric v. Percival Tours, Inc*., 708 S.W.2d 432, 435 (Tex. 1986). Although a party's intent to defraud is determined at the time the party made the representation, it may be inferred from the party's subsequent acts after the representation is made. *IKON Office Sols., Inc. v. Eifert*, 125 S.W.3d 113, 124 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). Because intent to deceive or defraud is not susceptible to direct proof, it invariably must be proven by circumstantial evidence. *Spoljaric*, 708 S.W.2d at 435. Intent is a fact question "uniquely within the realm of the trier of fact" because it so depends upon the credibility of the witnesses and the weight to be given to their testimony. *Id*. at 434.

Although circumstantial evidence may be used to establish any material fact, "it must transcend mere suspicion." *Lozano v. Lozano*, 52 S.W.3d 141, 149 (Tex. 2001) (Phillips, C.J., concurring and dissenting). A court must, therefore, not view each piece of evidence in isolation, but in view of all known circumstances. *Id*. Nevertheless, "[l]egally sufficient evidence requires a logical bridge between the proffered evidence and the necessary fact." *Id*. at 152.

Dixie relies on events prior and subsequent to the November 2010 agreement to support the jury's finding that Riverdale acted with intent to commit fraud when it entered into the agreement. Riverdale responds by relying on *Spoljaric* for the settled proposition that, "While a

party's intent is determined at the time the party made the representation, it may be inferred from the party's subsequent acts after the representation." *See Spoljaric*, 708 S.W.2d at 434; *see also IKON Office Sols., Inc.*, 125 S.W.3d at 124. Riverdale then argues the evidence pre-dating the alleged agreement is irrelevant because "acts occurring *before* the alleged agreement are not circumstantial evidence that Riverdale lacked an intent to perform" when the agreement was made. We reject Riverdale's invitation to consider only the post-agreement evidence, as case law indicates we may consider circumstantial evidence of both prior and subsequent acts by a party to determine intent. *See SEECO, Inc. v. K.T. Rock, LLC*, 416 S.W.3d 664, 671–673 (Tex. App.—Houston [14th Dist.] 2013, pet. denied); *IKON Office Sols., Inc.*, 125 S.W.3d at 131–32.

The following represents the pre-agreement evidence relied on by Dixie: (1) Riverdale taking over responsibility of payments from Nations; (2) Riverdale dispersing payments through joint checks; (3) Riverdale submitting affidavits on draw requests representing that all subcontractors would be paid from the funds requested when in fact they were not;[4] (4) Riverdale telling Czapski to negotiate the twenty-percent discount with Dixie; and (5) Akin emailing Czapski a template reflecting the discount. Except for Riverdale telling Czapski to negotiate the discount and Akin emailing the template, the other actions by Riverdale occurred as many as eight months prior to November 2010. Regardless of the timing of the pre-agreement events, there is no "logical bridge" between any of these occurrences and the conclusion Riverdale, at the time it made the agreement, did not intend to pay Dixie. *See, e.g., IKON Office Sols., Inc*., 125 S.W.3d at 131 (concluding pre-acquisition conduct did support "logical bridge" to form intent of party not to perform agreement).

[4] Dixie specifically draws attention to draw requests numbers 19, 20, and 21; however, these requests were made in March, May, and June of 2010.

Dixie points to the following three specific post-agreement acts to establish Riverdale's intent: (1) On December 7, 2010, the escrow agreement was entered; (2) on January 5, 2011, Dixie's check was cut; and (3) during the February 7, 2011 telephone conference between Czapski, Akin, Stapleton, and Strawbridge, the decision was made to void Dixie's check and pay Snell-Northcutt instead.

In addition to these three acts, we further note from our review of the record that (1) Stapleton admitted the February 7 conference call centered on the fact Snell-Northcutt had filed a lien and a lawsuit, and there was not enough money to pay all the vendors; (2) Dixie's check was the only one left big enough to void and pay Snell-Northcutt; and (3) on the same day as the conference call, Dixie's check was in fact voided and a check written to Snell-Northcutt.

These actions, however, do not amount to any evidence that, at the time Riverdale made the discounted offer to Dixie, it did not intend to pay Dixie from the escrow account. Rather, the evidence indicates Riverdale made a business decision to avoid a lien and a lawsuit, based on available funds, which ultimately resulted in Dixie not getting paid. Thus, although Dixie's evidence may establish Riverdale's breach of the contract, breach alone is not evidence that breach was intended when the contract was originally made. *Tony Gullo Motors I, L.P.*, 212 S.W.3d at 304. And while breach combined with "slight circumstantial evidence" of fraud is enough to support a verdict for fraudulent inducement, our review of the record has found no such evidence. A jury may not indulge an inference of fraudulent intent where the same "meager circumstantial evidence" gives rise to other equally probable inferences. *Hancock v. Variyam*, 400 S.W.3d 59, 70–71 (Tex. 2013) ("a jury may not reasonably infer an ultimate fact from meager circumstantial evidence which could give rise to any number of inferences, none more probable than another"); *SEECO, Inc.*, 416 S.W.3d at 674 (defendant's subsequent actions under a contract gave rise to equal inferences of intent to never exercise a buyout option and to mitigate

a buyout fee). Dixie's evidence creates nothing more than a mere surmise or suspicion that Riverdale made a misrepresentation with no intent to perform, and thus, is no evidence. *See Jelinek*, 328 S.W.3d at 532.

Our conclusion is further supported by Riverdale's partial performance of the contract. *See Hardwick v. Smith Energy Co.*, 500 S.W.3d 474, 480 (Tex. App.—Amarillo 2016, pet. filed); *IKON Office Sols.*, 125 S.W.3d at 124. Per the agreement, Riverdale executed an escrow agreement on December 7, 2010, and subsequently, authorized Chicago Title to cut a check on January 5, 2011 to Dixie for $114,318.40. While partial performance does not conclusively or always refute the contention that there was no intent to perform, the absence in this record of other evidence indicating an intent not to fully perform is persuasive. *See, e.g.*, *Ginn v. NCI Bldg. Sys., Inc.*, 472 S.W.3d 802, 834 (Tex. App.—Houston [1st Dist.] 2015, no pet.) ("Evidence of partial performance will not preclude a fraud finding if other evidence indicates an intent not to fully perform."); *see also Arthur v. Wilson*, No. C14-90-00201-CV, 1991 WL 35082, at *4 (Tex. App.—Houston [14th Dist. 1991], writ denied) (the "lack of precaution" of a party to take steps, such as escrow of funds, to insure payment under a contract indicated a lack of intent to fulfill a promissory representation).[5]

Despite our conclusion that there is no evidence supporting an intent not to perform, Dixie argues intent not to perform was only one of two bases for finding fraud. It argues the jury could have also found fraud because Riverdale made a misrepresentation "recklessly without any knowledge of the truth and as a positive assertion." Dixie's argument is misplaced, as it is premised on Riverdale first making a misrepresentation, as defined in the jury charge. Because

[5] We reject Dixie's argument that Riverdale's failure to plead partial performance as an affirmative defense results in waiver. Riverdale is not relying on its partial performance as an "affirmative defense," but rather as evidence negating an element of Dixie's fraudulent inducement claim. Dixie has failed to provide any authority requiring a party to plead partial performance as an affirmative defense under these circumstances. Moreover, case law indicates the contrary. *See Hardwick*, 500 S.W.3d at 480; *Ginn*, 472 S.W.3d at 834; *IKON Office Sols.*, 125 S.W.3d at 124.

we have concluded the evidence does not support a finding that Riverdale made a misrepresentation, we do not reach the second instruction in the jury charge requiring a determination of whether a misrepresentation was made with reckless disregard.[6]

In sum, after viewing all the evidence in the light most favorable to the jury's fraud finding and indulging every reasonable inference in favor of Dixie, we conclude there is no evidence that Riverdale, at the time it made the representation and entered into the contract, did not intend to perform. Accordingly, we conclude the evidence is legally insufficient to support the jury's fraud finding against Riverdale, and the trial court erred by entering judgment in favor of Dixie on its fraud claim. Riverdale's third issue is sustained.

Without the fraud finding, there is no basis for an award of punitive damages. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(a)(1) (West 2015) (awarding exemplary damages only if claimant proves by clear and convincing evidence damages resulted from fraud). Riverdale's fourth issue is sustained. Our disposition of these issues negates the need to address Riverdale's first issue in which it complains the judgment violates the one satisfaction rule, and its second issue in which it argues Dixie's fraud claim is barred by the economic loss rule. *See* TEX. R. APP. P. 47.1.

Accordingly, we reverse the trial court's judgment, including its award of punitive damages, and render a take-nothing judgment against Dixie on its fraud claim against Riverdale. *See Smith v. KNC Optical, Inc*., 296 S.W.3d 807, 813 (Tex. App.—Dallas 2009, no pet.) ("When we uphold a no evidence issue, we render the judgment the trial court should have rendered.").

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[6] The jury charge provides in part:

> Fraud occurs when —
>
> 1. a party makes a material misrepresentation; *and*
>
> 2. the misrepresentation is made with knowledge of its falsity or made recklessly without any knowledge of the truth and as a positive assertion; . . .

Conversion

In its fifth and sixth issues, Riverdale argues Dixie's conversion claim is barred by the economic loss rule, and the evidence does not support punitive damages based on malicious conversion. Dixie responds that although the jury found in its favor on its conversion claim, Dixie requested judgment based on the jury's fraud finding, not conversion. Thus, Dixie argues the judgment was not based on conversion, and Riverdale's argument is moot. We agree.

Dixie's first amended motion for entry of judgment asked the trial court to sign a judgment against Riverdale based upon the jury's finding of fraud. Nothing in the record indicates the trial court signed the judgment based upon a finding other than fraud. *See, e.g., Cty. of Burleson v. Gen. Elec. Capital Corp.*, 831 S.W.2d 54, 61 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (overruling challenge to damages based on conversion when trial court's judgment was not based on a conversion finding). Accordingly, Riverdale's fifth and sixth issues are without merit and overruled.

Joint and Several Liability on Civil Conspiracy Claim

In its final issue, Riverdale argues the trial court erred by attributing joint and several liability to Riverdale LP, Riverdale GP, LLC, and Nations based on civil conspiracy. Dixie responds Riverdale failed to preserve its argument, and alternatively, joint and several liability was not based on a conspiracy finding, but rather the fraud finding; therefore, Dixie's argument is without merit.

Our resolution of this issue does not require an analysis of Riverdale's civil conspiracy arguments. TEX. R. APP. P. 47.1. Although the jury affirmatively found that Nations and Riverdale were part of a conspiracy, we agree with Dixie that the judgment was not based on a conspiracy finding. Dixie moved for judgment against Riverdale on the jury's fraud finding. The final judgment includes damages against Nations for breach of contract and damages against

Riverdale for fraud, which we reversed because of insufficient evidence. Because we reversed the fraud finding, there is no remaining cause of action in this judgment in which Riverdale can be held jointly and severally liable for damages with Nations to Dixie. Accordingly, Riverdale's final issue is moot.

Conclusion

Based on the foregoing analysis, we reverse the trial court's judgment based on the jury's fraud findings, including its award of exemplary damages and joint and several liability with Nations, and render a take-nothing judgment against Dixie on its fraud claims against Riverdale.

The jury found in favor of Dixie on multiple, alternative theories of recovery. Riverdale has asked in its prayer for remand "for Dixie to elect a non-tort remedy." Accordingly, we remand the case to the trial court for Dixie to make a new election of remedies. *See Boyce Iron Works, Inc. v. Sw. Bell Tel. Co.*, 747 S.W.3d 785, 787 (Tex. 1988) (party may seek recovery under an alternative theory if the judgment is reversed on appeal); *see also Myre v. Meletio*, 307 S.W.3d 839, 846 (Tex. App.—Dallas 2010, pet. denied) (remanding to trial court for new election of remedies after concluding evidence legally insufficient to support judgment for fraud).

In all other respects, the judgment of the trial court is affirmed.

/David L. Bridges/
DAVID L. BRIDGES
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

RESIDENCES AT RIVERDALE, LP AND RESIDENCES AT RIVERDALE GP, LLC, Appellants

No. 05-15-01030-CV V.

DIXIE CARPET INSTALLATIONS, INC., Appellee

On Appeal from the 199th Judicial District Court, Collin County, Texas
Trial Court Cause No. 199-04903-2012.
Opinion delivered by Justice Bridges.
Justices Lang-Miers and Whitehill participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and judgment is **RENDERED** in part, **REMANDED** in part, and **AFFIRMED** in part as follows:

The trial court's judgment awarding appellee Dixie Carpet Installations, Inc. "FOUR HUNDRED SIXTY-FIVE ONE HUNDRED SIXTY-TWO AND 35/100 ($465,162.35) (representing actual damages in the amount of $142,898.00, as found by the Jury, together with prejudgment interest thereon at the rate of 5% per annum from May 29, 2010 through July 5, 2015, in the amount of $36,468.35 and exemplary damages in the amount of $285,796.00)," all costs of court, and post-judgment interest on the entire amount of the Judgment at the rate of 5% per annum from date of signing of this Final Judgment until paid in full" against appellants Residences at Riverdale, LP and Residences at Riverdale GP, LLC, jointly and severally, is **REVERSED** and it is **RENDERED** appellee Dixie Carpet Installations, Inc. take nothing on its claim against appellants Residences at Riverdale, LP and Residences at Riverdale GP, LLC.

The trial court's judgment awarding appellee Dixie Carpet Installations, Inc. "ONE HUNDRED FORTY-TWO THOUSAND EIGHT HUNDRED NINETY-EIGHT AND NO/100 DOLLARS ($142,898.00) and prejudgment interest thereon at the rate of 5% per annum from May 29, 2010 through July 5, 2015, in the amount of THIRTY-SIX THOUSAND FOUR HUNDRED SIXTY-EIGHT AND 35/100 ($36,468.35) for a total amount of ONE HUNDRED SEVENTY-NINE THOUSAND THREE HUNDRED SIXTY-SIX AND

35/100 ($179,366.35), jointly and severally, against appellants Residences at Riverdale, LP, Residences at Riverdale GP, LLC and defendant Nations Construction Management Incorporated is **REVERSED**.

We **REMAND** to the trial court for further proceedings consistent with this opinion.

In all other respects, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that each party bear their own costs of this appeal. After Residences at Riverdale, LP and Residences at Riverdale GP, LLC have paid their share of the costs, the clerk of the district court is directed to release the balance, if any, of cash deposit in lieu of cost bond to Residences at Riverdale, LP and Residences at Riverdale GP, LLC.

Judgment entered July 7, 2017.