

1989

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Martha D. Owens

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Recommended Citation

Martha D. Owens *Texas Court of Appeals Refuses to Hold Vendors of Defective Homes Liable Under the Texas Trade Practices Act*, 1 Loy. Consumer L. Rev. 57 (1989).

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TEXAS COURT OF APPEALS REFUSES TO HOLD VENDORS OF DEFECTIVE HOMES LIABLE UNDER THE TEXAS TRADE PRACTICES ACT

In two cases involving the purchase of structurally defective homes, the Texas Court of Appeals found in favor of the sellers. In *Pfeiffer v. Ebby Halliday Real Estate*, 747 S.W.2d 887 (1988), the court held that the seller of a home is liable to the purchaser for damages only if the seller has actual knowledge of a home's defects. In *Dubow v. Dragon*, 746 S.W.2d 857 (1988), the court held that a purchaser's own conduct in making a "careful" inspection of the premises supersedes any wrongdoing on the part of the seller in failing to disclose defects in the home. Both cases were brought under the Texas Deceptive Trade Practices-Consumer Protection Act ("the Act"), Tex Bus. & Com. Code Ann. §§ 17.41-17.826 (Vernon 1987 & Supp. 1989).

The Act provides that false, misleading or deceptive acts or practices in the course of trade or business are illegal. Failure to disclose information known at the time of the transaction is a deceptive act if the failure to disclose was intended to induce the consumer to enter into a transaction which the consumer would not have entered into had she been apprised of the information. To maintain a cause of action under the Act, the consumer must have proof that the deceptive conduct was the "producing cause" of the consumer's damages.

Pfeiffer v. Ebby Halliday Real Estate: Seller Must Have Actual Knowledge of Home's Foundational Defects

In *Pfeiffer*, a husband and wife purchased a home which subsequently proved to have foundation settling problems caused by soil conditions. The Pfeiffers sued the seller, Ebby Halliday Real Estate ("Ebby Halliday"), for failing to disclose the home's defect. The Pfeiffers alleged that Ebby Halliday violated § 17.46(b)(23) of the Act by failing to disclose information within its actual knowledge at the time of the transaction. According to the Pfeiffers, Ebby Halliday intended to induce the Pfeiffers to buy the home by failing to mention the home's foundation defect. The trial court entered a judgment notwithstanding the verdict in favor of Ebby Halliday and the Pfeiffers appealed. The Texas Court of Appeals affirmed, holding that the evidence did not raise a question of fact for a jury as to Ebby Halliday's unconscionable conduct.

On appeal, the Pfeiffers contended that the evidence raised questions of fact for the jury regarding Ebby Halliday's unconscionable conduct as well as its knowledge of the foundation defect. As proof of Ebby Halliday's knowledge of the home's defect, the Pfeiffers pointed to a history of unspecified problems and repairs, and to visual evidence of previous foundation repairs. The Pfeiffers also argued that several real estate brokers in the community would not list the property because it was common knowledge among these brokers that the home had foundation problems. Prior to the purchase of the home, the Pfeiffers hired an expert recommended by Ebby Halliday. After inspecting the home, the expert submitted a report which stated that there was "some foundation settling."

Regarding the allegation that Ebby Halliday's conduct constituted a deceptive trade practice, the court held that a seller does not commit a deceptive trade practice by failing to disclose information of which the seller has no knowledge. The court noted that the Act is violated only when the offending party fails to disclose information which was known to the party at the time of the transaction. Ebby Halliday could not be held liable under the Act for failing to disclose information it did not have at the time of the transaction.

Similarly, the court held that Ebby Halliday's conduct was not unconscionable. Pursuant to § 17.45(5) of the Act, an unconscionable act "takes advantage of the lack of knowledge, ability, or capacity of a person to a grossly unfair degree." The court held that the Ebby Halliday's conduct was not grossly unfair. Based on the expert's inspection report, the Pfeiffers knew about the home's foundation settling, and thus could not have been taken advantage of by the seller. The Pfeiffers presented evidence that Ebby Halliday took advantage of their lack of knowledge of local soil conditions. The Pfeiffers were from California and had no knowledge of the foundation problems caused by soil conditions in Carrollton, Texas. They maintained that it was common knowledge in the area that local soil conditions caused foundation problems, and from this fact, a jury could conclude that Ebby Halliday knew about the home's defect. In addition, the Pfeiffers stated that they had been told by Ebby Halliday's office manager that it was not Ebby Halliday's responsibility to notify potential buyers about soil conditions.

Examining this evidence in the light most favorable to the Pfeiffers, the appellate court concluded that Ebby Halliday had no actual

(continued on page 58)

DEFECTIVE HOMES (from page 57)

knowledge of the foundation defect. The court stated that the Pfeiffers presented no evidence of probative value to support the finding that Ebby Halliday knew of the foundation's condition. The previous repairs to the foundation did not establish the seller's knowledge because, according to the court, repairs correct defects rather than prove their continued known existence. Further, common knowledge regarding local soil conditions and the fact that other real estate agencies refused to list the home was insufficient to establish actual knowledge as required by the Act.

Dubow v. Dragon: Seller's Alleged Misrepresentation as to Home's Condition was not "Producing Cause" of the Purchasers' Damages

In *Dubow*, the plaintiffs were also a husband and wife. They observed that the home they wished to purchase from the Dragons was run down and needed some work. Because the Dubows expected to refurbish and to repair the home, they negotiated with the Dragons to buy the home for \$50,000 less than the asking price. Under the purchase agreement, the Dubows had the right to have the home inspected prior to closing. The closing was contingent upon the receipt of favorable information in the inspection reports.

Two specialists looked at the home and reported that it had several problems: differential movement in the slab, stress cracks, sloping floors, separation of brick veneer from door and window frames, and roof leaks. The estimate for repairs was \$4,000. Concerned with the potential for more problems with the home, the Dubows demanded that the sale price be further reduced by \$17,500. The Dragons agreed, and the Dubows purchased the home.

The modified contract stated that, after a careful inspection of the home which revealed the need for on-going maintenance, the purchasers had agreed to buy the home "as is, WITH ALL CONTINGENCIES REMOVED." 746 S.W.2d at 859 (emphasis in original). After the sale, the Dubows encountered more problems and subsequently filed suit, alleging that the Dragons had informed the Dubows that the home was a "good house with no problems" and that this misrepresentation had induced the Dubows to buy the home.

The trial court granted summary judgement in favor of the Dragons, and the Dubows appealed. On appeal, the main issue before the court was

whether the Dubows had presented evidence from which a jury could conclude that the Dragons' alleged misrepresentation was the "producing cause" of the purchasers' damages. A producing cause is the contributing cause or factual causation of the purchasers' damages. Under § 17.46(b) of the Act, "producing cause," rather than reliance, is the proper legal standard.

The appellate court concluded that any alleged misrepresentation by the Dragons was superseded by the Dubows' knowledge of the home's defects based on the expert's reports. The court determined that the Dubows used this information to obtain a lowered purchase price and that they were fully informed about the home's problems. The Dubows' careful inspection of the home provided an independent basis for their decision to purchase. Accordingly, because the "producing cause" element was lacking, the court held that the Dubows had no cause of action as a matter of law.

Purchasers Take Responsibility for Transaction

Pfeiffer and *Dubow* use different rationales to reach similar conclusions. In *Pfeiffer*, the court held that the seller is not liable for information the seller did not have at the time of the transaction. The court interpreted § 17.46(b)(23) of the Act narrowly by requiring the seller to have actual knowledge of a home's defective conditions. The court also indicated that a purchaser is obligated to investigate once the purchaser has knowledge that there may be a problem with the home. The responsibility to investigate is not with the seller.

In *Dubow*, the court stated that a purchaser's own conduct can break the chain of causation despite any alleged misconduct by the seller. Once the purchaser knows about the condition of a home prior to purchase but buys the house nonetheless, any misrepresentation by the seller becomes immaterial. The court emphasized that the purchasers had detailed information which allowed them to buy the house for a substantially reduced price.

The purchasers in *Pfeiffer* and *Dubow* had varying degrees of knowledge concerning the defective conditions of their homes. In both cases, the appellate court found that the information these purchasers had about their home's problems prior to purchase was enough to release the sellers from liability. In short, these informed purchasers could not use the Act to rescind a bad purchase.

Martha D. Owens

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