

**IN THE
COURT OF APPEALS OF ARKANSAS**

**JEFF BARRINGER and
TAMMY BARRINGER**

APPELLANTS

v.

CASE NO. CA 04-353

**EUGENE HALL and
CONNIE HALL**

APPELLEES

**ON APPEAL FROM THE CIRCUIT COURT
OF WASHINGTON COUNTY**

THE HONORABLE MARK LINDSAY, CIRCUIT JUDGE

APPELLEES' BRIEF

XXXXXXXXXX

TABLE OF CONTENTS

	PAGE
I. POINTS ON APPEAL AND PRINCIPAL AUTHORITIES	ii
II. TABLE OF AUTHORITIES	iii
III. ARGUMENT	Arg 1
A. A SUMMARY OF THE ARGUMENT OF EUGENE AND CONNIE HALL	Arg 1
B. THE JURY’S VERDICT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND NOT CLEARLY AGAINST THE PREPONDERANCE OF THE EVIDENCE	Arg 1
1. The Evidence Admitted at Trial and the Stipulations of Fact Do Not Contradict the Jury’s Verdict, Let Alone Require that Verdict to be Overturned	Arg 1
2. The Appellants’ Argument Regarding the “As-Is” Clause and “Deceptive Selling Practices” Was Not Preserved for Review and Is Raised for the First Time in This Appeal.	Arg 7
C. THE AWARD OF ATTORNEY’S FEES WAS NOT AN ABUSE OF THE TRIAL JUDGE’S DISCRETION BECAUSE THE ACTION SOUNDS PRIMARILY IN CONTRACT RATHER THAN IN TORT	Arg 7
IV. CONCLUSION	Arg 11
V. CERTIFICATE OF SERVICE	Arg 12

I.

POINTS ON APPEAL

- A. Did the trial court correctly find that the jury’s verdict was supported by substantial evidence in denying the appellant’s motion for new trial?**

Ray v. Green, 310 Ark. 571, 839 S.W.2d 515 (1992)

- B. Did the trial court abuse its discretion in characterizing the action as sounding primarily in contract and awarding attorney’s fees?**

Curry v. Thornsberry, ___ Ark. ___ 2003, Ark. LEXIS 587 (2003)

II.

TABLE OF AUTHORITIES

A. CASES

Atkins Pickle Co. v. Burrough-Uerling-Brasuell, 275 Ark. 135, 628 S.W.2d 9 (1982) 9

Beatty v. Haggard, ___ Ark. App. ___, 2004 Ark. App. LEXIS 432 (2004) 5

Chrisco v. Sun Indust., Inc., 304 Ark. 227, 800 S.W.2d 717 (1990) 7, 8

Crockett & Brown, P.A. v. Courson, 312 Ark. 363, 849 S.W.2d 938 (1993) 7

Curry v. Thornsberry, ___ Ark. ___ 2003, Ark. LEXIS 587 (2003) 8, 9, 10

Holcombe v. Marts, 352 Ark. 201, 99 S.W.3d 401 (2003) 7

Meyer v. Riverdale Harbor Municipal Property Owners Improvement Dist. No. 1,
58 Ark. App. 91, 947 S.W.2d 20 (1997) 8

Meyer v. Riverdale Harbor Municipal Property Owners Improvement Dist. No. 1,
1996 Ark. App. LEXIS 87, 8-9 (1996) 8

Ray v. Green, 310 Ark. 571, 839 S.W.2d 515 (1992) 2, 4

Stein v. Lukas, 308 Ark. 74, 823 S.W.2d 832 (1992) 9

Wheeler Motor Co. v. Roth, 315 Ark. 318, 867 S.W.2d 446 (1993) 8, 9

B. STATUTES / RULES

ARK R. CIV. P. 59. 2

ARK. CODE ANN. § 16-22-308 8

C. MISCELLANEOUS

Jack Talbot, Liability for Unintentional Misrepresentation in Arkansas,
49 ARK. L. REV. 525 (1996) 5

IV.

ARGUMENT

A. A SUMMARY OF THE ARGUMENT OF EUGENE AND CONNIE HALL

The appellants argue that the verdict of the jury should be overturned and that the award of attorney's fees was improper. Although the appellants identify evidence admitted at trial in support of their cause of action, they fail to demonstrate that the jury's verdict was clearly against the preponderance of the evidence and not supported by any substantial evidence. As for attorney's fees, they argue that the trial judge abused his discretion in awarding fees because the matter sounded primarily in tort rather than contract. However, the appellants' claims for rescission and punitive damages were not submitted to the jury, leaving only contract damages to be awarded if at all. The entire case concerns a real estate transaction, and the gist of the appellants' case is that they did not receive the benefit of their bargain.

B. THE JURY'S VERDICT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND NOT CLEARLY AGAINST THE PREPONDERANCE OF THE EVIDENCE

1. The Evidence Admitted at Trial and the Stipulations of Fact Do Not Contradict the Jury's Verdict, Let Alone Require that Verdict to be Overturned

The appellants argue that the trial court should have granted a new trial because the jury's verdict was not supported by substantial evidence. As far as can be gleaned from their brief, the primary fact question that was improperly decided concerned the appellees' representation of the presence of a septic system on the property at issue. The appellants argue that the jury's verdict was clearly against the preponderance of the evidence, but they fail to explain how the mere existence of

evidence in support of their case translates into such a clear preponderance that a verdict in their favor was mandated.

A trial court has discretion in setting aside a jury verdict under Arkansas Rule of Civil Procedure 59, but the “trial court is not to substitute its view of the evidence for that of the jury’s unless the jury verdict is found to be clearly against the preponderance of the evidence.” *Ray v. Green*, 310 Ark. 571, 572, 839 S.W.2d 515, 516 (1992). The test for an appellate court to review the denial of a motion for new trial “is whether there is any substantial evidence to support the jury verdict.” *Id.* at 573, 839 S.W.2d at 516. To determine if any such substantial evidence exists, the Court must “view the evidence in the light most favorable to the appellees.” *Id.* Substantial evidence is that which “compels a conclusion one way or the other and is more than mere speculation or conjecture.” *Id.* “***It is only where there is no reasonable probability that the incident occurred according to the version of the prevailing party or where fair-minded men can only draw a contrary conclusion that a jury verdict should be disturbed.***” *Id.* at 517, 839 S.W.2d at 573-74 (emphasis added). The weight and value to give the evidence presented at trial is in the exclusive province of the jury. *Id.*

There were six interrogatories given to the jury at trial on which to return a verdict. The first five concerned liability and the last damages. The answer to each interrogatory was “No,” and signed only by the foreperson – indicating a unanimous verdict. The appellants now argue that there was ***no reasonable probability*** as to whether the appellees made a false representation of material fact, whether they knew or should have known it was false, whether they intended to induce reliance, whether the plaintiffs justifiably relied on the representation to their detriment, and whether the appellees did breach the contract. **R. 40-44; Ab. 66; Add. 15-19.** In order for the result to have

been different, the jury must have answered *all* of the first four interrogatories, or the fifth one alone, in the affirmative. In their brief, the appellants cite examples of testimony that support their position, but fail to explain how that is sufficient to overturn a jury's verdict. The appellees also rely, with slightly more justification, on the stipulations of fact: the listing indicated the house had a septic system; it did not, in fact, have a septic tank; and the appellants paid to install a septic system. **R. 595; Ab. 1; Add. 49.**

The testimony of the appellants' septic tank installer indicated that a "septic system" consists of a tank and lateral lines, not just a straight pipe. **R. 341-42; Ab. 34.** However, Charles Klim, the previous owner, testified that he had installed a sewer system, that said system was approved by the county health department, and that he listed the property as having a septic system when he sold it to the Halls. **R. 257-59; Ab. 20.** While the system in place may not have met the technical definition of a septic system as presented by the plaintiffs' septic system installation expert, there was undeniably a system in place for disposing of waste. Furthermore, the representations on the Owner Property Disclosure form filled out by the Halls are prefaced by the statement that such representations are "To the best of my knowledge." **R. 599; Add. 53.** This form was not a strict guarantee as to the condition of the property, but rather a disclosure of the owners' knowledge concerning the property. The statement that, "To the best of my knowledge, the property has a septic system," is not clearly false even where it turned out that there was no septic tank and lateral lines on the property. In fact, the evidence at trial strongly supports the finding that to the best of the Halls' knowledge, there *was* a septic system (including a septic tank) on the property.

The jury was instructed that a fact or statement is material if it was a substantial factor in influencing the plaintiffs' decision. **R. 564.** Neither the Abstract nor the Record indicate that the

appellants' attorney objected to this instruction at trial, and they have not raised any objection since. The appellants-plaintiffs presented evidence at trial that could have supported a finding that this representation was a substantial factor in the appellants' decision, but the mere fact of evidence in their support does not explain how the jury's negative response to Interrogatory No. 1 was *clearly against the preponderance of the evidence*. There was testimony that the representations in the disclosure were important to the appellants, **R. 359; Ab. 37**, but there was no testimony or other evidence that the specific presence of a septic system as defined as a tank with lateral lines was a substantial factor in the appellant's decision to purchase the home. "The weight and value to be given to testimony of witnesses is in the exclusive province of the jury." *Ray*, 310 Ark. at 574, 839 S.W.2d at 517. Because the appellants had the burden of proof at trial, they were required to prove by a preponderance of the evidence that the representations were both material and false. Since there was no evidence specifically addressing the materiality of the representation regarding the septic system, but there was evidence presented that the appellants had no complaints with the sewage system in place until it became blocked several months after purchasing the house and evidence that the Halls believed – with reason – that there was a septic tank on the property, the jury's answer to Interrogatory No. 1 was not clearly against the preponderance of the evidence.

For their argument that the jury's response to Interrogatory No. 2 was against the preponderance of the evidence – that the Halls knew or should have known that there was no septic tank at the house – the appellants state that: "the testimony of the Halls presented no basis in their knowledge for the jury to consider that a septic system was present on the Property at the time they built it or listed it for sale." (Appellant's Brief at Arg. 7.) The appellants then quote an excerpt from the cross-examination of Eugene Hall, wherein he states that he assumed there was a septic system

and was told that there was one. (Appellant’s Brief at Arg. 7.) **R. 526; Ab. 60.** There was also testimony from Charles Klim that – in addition to listing the property as having a sewer system when he sold the property – when he moved he merely disconnected from the sewer pipe, leaving a four-inch-diameter pipe sticking up out of the ground. **R. 265; Ab. 22.** The evidence at trial was that the Halls had reason to believe there was a septic system, and did in fact so believe, although that belief turned out to be mistaken as to the presence of a septic tank. No evidence was presented that they knew or believed at the time of the sale that there was not a septic tank, or even that they should have known that they did not have enough knowledge to actually know there was.

The appellants are conflating mistaken belief with the required *scienter* for constructive fraud. There must at least be knowledge or belief that one does not know enough to say one way or another whether a fact exists. Commentators have compared Arkansas’ constructive fraud to negligence, although the courts have not done so. *See, e.g.,* Jack Talbot, *Liability for Unintentional Misrepresentation in Arkansas*, 49 Ark. L. Rev. 525 (1996). Whether it is a negligent or intentional tort, constructive fraud is **not** strict liability, and contains a *scienter* element: “knowledge that the representation is false or that there is insufficient evidence upon which to make the representation.” *Beatty v. Haggard*, ___ Ark. App. ___, 2004 Ark. App. LEXIS 432, 16 (2004). Where, as here, the evidence shows that a party believes something to be true with reason, and with no notice that it may not be true, it is appropriate for a jury to find that party did not have the necessary state of mind to impose liability for constructive fraud. Therefore the jury’s negative response to Interrogatory No. 2 is not clearly against the preponderance of the evidence. On the contrary, an **affirmative** response by the jury would have been in error.

The appellants argue that the remaining interrogatories should also have been answered affirmatively. As with the previous two, the appellants explain that evidence was presented which could support a “Yes” response, but fail to show how the jury’s “No” decision was not supported by substantial evidence. As to Interrogatory No. 3, they simply argue that since the appellees were selling their property, they must have intended to induce reliance. That was a question for the jury to answer, and it did. As to Interrogatory No. 4, the appellants point out that they testified as to their reliance on the appellees’ representations, and that the stipulations provide that they were damaged in the amount it cost to replace the septic system. Bare reliance was not sufficient, however: there must have been *justifiable* reliance, and the damages must have been a result of such reasonable reliance. **R. 43; Ab. 66; Add. 18.** The appellants do not even argue that the jury erred in not find *justified* reliance, only that it should have found reliance and resulting damages.

The appellants do not specifically address the jury’s finding that the appellants did not breach the contract (Interrogatory No. 5).

Because interrogatories number one through four or number five must have been answered affirmatively for the verdict to have been any different, and because there was substantial evidence to support the jury’s negative answer to each of those interrogatories, the trial court did not err by refusing to usurp the jury’s role as fact finder and by denying the appellant’s motion for a new trial. Even if the jury had erred on one or two of the interrogatories, it would be necessary for all four dealing with deceit and the fifth concerning breach of contract to be clearly contrary to the preponderance of the evidence in order for the jury’s verdict to be changed. The appellants have failed to show that even one of the interrogatories was against the preponderance of the evidence, let alone all of them, and thus the Court should affirm the jury’s verdict.

2. The Appellants' Argument Regarding the "As-Is" Clause and "Deceptive Selling Practices" Was Not Preserved for Review and Is Raised for the First Time in This Appeal.

The appellants argue that the "as-is" clause in the real estate contract should not be enforced for public policy reasons, presumably related to the question of whether the appellants' reliance on any representations of the appellees' was justified. Not only is the relevance and import of this argument not explained by the appellants (e.g., what the result would be if the Court were to refuse to enforce the "as-is" clause), neither the record nor the abstract reveals any testimony, argument or objections related to this theory. Where the abstract does not reflect an issue being presented to the trial court, it cannot then be argued on appeal. "As we have repeatedly held before, this court will not countenance an argument raised for the first time on appeal." *Crockett & Brown, P.A. v. Courson*, 312 Ark. 363, 366, 849 S.W.2d 938, 940 (1993). "An issue cannot be raised for the first time on appeal." *Holcombe v. Marts*, 352 Ark. 201, 203, 99 S.W.3d 401, 402 (2003).

Because this issue was not properly preserved, and additionally is of questionable relevance, the Court should not disturb the verdict of the jury.

C. THE AWARD OF ATTORNEY'S FEES WAS NOT AN ABUSE OF THE TRIAL JUDGE'S DISCRETION BECAUSE THE ACTION SOUNDS PRIMARILY IN CONTRACT RATHER THAN IN TORT

The appellants allege that the trial court's award of attorney's fees to the appellees was an abuse of discretion. Due to the trial judge's familiarity with the services rendered by the attorneys, "we usually recognize the superior perspective of the trial judge in assessing the applicable factors. Accordingly, an award of attorney's fees will not be set aside absent an abuse of discretion by the trial court." *Chrisco v. Sun Indust., Inc.*, 304 Ark. 227, 229, 800 S.W.2d 717, 719 (1990). The general rule is that fees are awarded only where expressly allowed by statute. Arkansas statute explicitly

allows fees in civil actions to recover on breach of contract. *Id.* at 229, 800 S.W.2d at 718; ARK. CODE ANN. § 16-22-208 (1999). However, where “the prevailing party’s claim is based in tort, an award of attorney’s fees cannot be justified under section 16-22-308.” *Wheeler Motor Co. v. Roth*, 315 Ark. 318, 329, 867 S.W.2d 446, 451 (1993). Where both theories – contract and tort – are advanced, “an award of attorney’s fees to the prevailing party is proper only when the action is based primarily in contract.” *Meyer v. Riverdale Harbor Municipal Property Owners Improvement Dist. No. 1*, 58 Ark. App. 91, 93, 947 S.W.2d 20, 22 (1997).

The appellants cite the *Meyer* case as being on point with this one. However, the only facts in *Meyer* indicate that the appellants in that action had originally sued under theories of fraud and breach of contract and that the court had held in a prior appeal that the action sounded primarily in tort. *Id.* at 92, 947 S.W.2d at 21. Based on that prior holding, the court was bound by the law of the case to find that attorney’s fees were inappropriate because the action sounded in tort. *Id.* at 95-96, 947 S.W.2d at 23. Looking at that previous, unpublished opinion reveals that the court determined that the action sounded in tort (for limitations purposes) because the plaintiffs’ complaint requested equitable remedies and even pleaded their contract claim in tort terms. *Meyer v. Riverdale Harbor Municipal Property Owners Improvement Dist. No. 1*, 1996 Ark. App. LEXIS 87, 8-9 (1996). The facts of this case are clearly distinguishable, as will be explained.

The general rule for determining whether an action sounds primarily in tort or contract is to look to the relief sought. To “determine whether an action sounds in contract or tort, one may look to the nature of the damages prayed for.” *Curry v. Thornsberry*, ___ Ark. ___ 2003, Ark. LEXIS 587, 14 (2003).

The difference between an action in contract and one in tort is not always exact, but we stated the basic distinction in *Atkins Pickle Co. v. Burrough-Uerling-Brasuell*, 275 Ark. 135, 628 S.W.2d 9 (1982): “The purpose of the law of contract is to see that promises are performed; the law of torts provides redress for various injuries.” Owing to that distinction, *the measure of damages in contract cases differs from that in tort cases.*

Id. at 16 (quoting *Bankston v. Pulaski County School Dist.*, 281 Ark. 476, 479, 665 S.W.2d 859 (1984)) (emphasis added). Here, as in the *Atkins Pickle* case, “*the plaintiff cannot establish its right to recovery except by proving . . . the defendants’ failure to perform their promises.*” *Atkins Pickle*, 275 Ark. at 138, 628 S.W.2d at 11 (emphasis added). The majority of the cases overturning an award of attorney’s fees in a combination tort-contract suit seem to rely on the jury’s award of tort damages as defining the action as sounding primarily in tort. *See, e.g., Wheeler Motor Co.*, 308 Ark. at 329, 823 S.W.2d at 451; *Stein v. Lukas*, 308 Ark. 74, 82, 823 S.W.2d 832, 837 (1992).

The appellants’ case can be summed up as the appellants arguing that they did not receive what they contracted to receive: a house with a complete septic system, an operational well, healthy trees, etc. In their complaint, the appellants sought rescission, compensatory damages and punitive damages. The issues of rescission and punitive damages were not submitted to the jury. The only instruction given to the jury regarding damages was:

If an interrogatory requires you to assess the damages to the Plaintiffs, you must then fix the amount of money which will reasonably and fairly compensate them for the following elements of damages sustained which you find was proximately caused by the fault of the Defendants:

That element is, *the cost of repairing, restoring, and/or improving the property so that it has the qualities and value as represented.*

Whether this element of damages has been proved by the evidence is for you to determine.

R. 565 (emphasis added). Neither the Record nor the Abstract reflects that the appellants’ attorney objected to this instruction before, during or after trial. Compensatory damages are contract

damages. In *Curry*, the Court stated that because “the damages sought were for the costs of correcting the defects . . . the complaint stated a cause of action on the contract” and the matter was properly classified as primarily sounding in contract. *Curry*, 2003 Ark. LEXIS at 16-17. Even the appellants implicitly acknowledge that this is a contract action, stating in their brief (with regard to the disclosures) that they “did not receive the benefit of the bargain.” (Appellant’s Brief at Arg. 10.)

Because the appellants were primarily seeking the benefit of the bargain, and the only damages submitted to the jury were compensatory, this action is primarily one for breach of contract in spite of all the language regarding misrepresentations. Simply put, the appellants do not believe they received what they bargained for and are seeking damages based on that perceived failure. Accordingly, this action sounds primarily in contract, the trial court did not abuse its discretion in awarding attorney’s fees, and its decision should be affirmed.

V.

CONCLUSION

The appellants appeal of the jury's verdict is based on nothing more substantial than differing interpretations of the evidence. It is natural for the appellants to interpret the evidence as being in their favor, but it is the province of the jury to interpret and weigh the evidence. There is no indication that the jury did not properly do so in this case, and its verdict is supported by substantial evidence. Even if the appellants were able to show that one or two of the jury's responses to the interrogatories were incorrect, the verdict would not be changed because a negative response to even one of the first four interrogatories would still cause the appellants claimed cause of action to fail.

The appellants attempt to characterize this case as sounding primarily in tort. However, only compensatory damages were submitted to the jury and the essence of the appellants' case is that they did not receive the benefit of their bargain. This case sounds in contract, and the trial judge did not abuse his discretion in awarding attorney fees.

For all of the reasons stated above and throughout this brief, this Court should affirm the decision of the trial court both as to liability and as to damages.

Respectfully Submitted,

By: _____
Ronald G. Woodruff (72113)
WOODRUFF LAW FIRM
Post Office Box 1866
Fayetteville, AR 72702-1866
(479) 444-8444

Attorney for Appellees

VI.

CERTIFICATE OF SERVICE

I hereby certify that I have served the Appellees' Brief of Eugene Hall and Connie Hall by mailing a copy of it to xxxxxx, on this ____ day of August, 2004.

xxxxx