NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 0574

BETTY WHITE JEWELERS, INC.

VERSUS

SEA HAWK INDUSTRIES, INC., THELMA F. ROBICHAUX, MICHAEL PAUL LARUSSA, LARUSSA REAL ESTATE AGENCY, INC., FON'S PEST MANAGEMENT, INC., AND LOUISIANA PEST CONTROL INSURANCE COMPANY, INC.

On Appeal from the 32nd Judicial District Court
Parish of Terrebonne, Louisiana
Docket No. 135,863, Division "D"
Honorable David W. Arceneaux, Judge Presiding

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Plaintiff-Appellee
Betty White Jewelers, Inc.

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Defendants-Appellants
Michael Paul Larussa,
Larussa Real Estate Agency, Inc., and
Chicago Insurance Company

BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

Judgment rendered JUN 17 2011

Guidry, J. concurs.

PARRO, J.

In this case arising out of a commercial real estate purchase, realtor Michael Paul Larussa, Larussa Real Estate Agency, Inc., and their insurer, Chicago Insurance Company, appeal a judgment in favor of the property purchaser, Betty White Jewelers, Inc., awarding damages in the amount of $27,285.92, plus legal interest and costs, based on Mr. Larussa's failure to provide the purchaser with a copy of a property condition disclosure form and on his affirmative misrepresentation(s) concerning the condition of the property. Betty White Jewelers, Inc. answered the appeal, seeking additional damages. For the following reasons, we reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On December 13, 2001, Betty White Jewelers, Inc. (Jewelers), owned by Betty White, purchased a commercial building in Houma, Louisiana, from Sea Hawk Industries, Inc. (Sea Hawk), which was owned by Thelma F. Robichaux. The transaction was handled through Michael Paul Larussa, who was a real estate agent associated with Larussa Real Estate Agency, Inc. (Larussa Agency).[1] After the sale, Jewelers found numerous defects in the property, including a cracked slab, leaking roof, rotten wood, termite and moisture damage, and non-functioning air conditioning units. As a result, Jewelers incurred repair and renovation costs that exceeded their estimates of what would be needed to make the building usable as a jewelry store.

On July 9, 2002, Jewelers filed suit against Sea Hawk, Ms. Robichaux, Mr. Larussa, Larussa Agency, Fon's Pest Management, Inc. (Fon's), and Louisiana Pest Control Insurance Company, Inc. (LPCIC), which insured Fon's. An amended petition added as a defendant Chicago Insurance Company (CIC), which insured the Larussa Agency. Jewelers alleged that Sea Hawk, Ms. Robichaux, Mr. Larussa, and Larussa Agency knew about the defects and failed to disclose them to Jewelers. It further alleged that Mr. Larussa affirmatively misrepresented to Jewelers prior to the sale that there were no defects in the property. The petition claimed that Fon's had a termite protection contract on the property and had issued a wood-destroying insect report as a

[1] At the time of the sale, Ms. Robichaux was also a real estate agent whose sponsoring broker was Larussa Agency.

requirement of the sale from Sea Hawk to Jewelers. That report showed active termite infestation had existed in 2000, but stated that it had been treated and eliminated. Jewelers claimed it had discovered live termites in the building and extensive termite damage after the purchase.

Eventually, Jewelers dismissed its claims against Ms. Robichaux, Fon's, and LPCIC, and the matter proceeded to a bench trial against the remaining defendants. Sea Hawk had never answered the suit, and a preliminary default was entered against it. After a three-day trial, of which the first day was May 24, 2007, and the second and third days were May 11 and 12, 2009, the case was taken under advisement. The court dismissed all claims against Sea Hawk, because the sale document stated that the property was being sold "as is" and without any warranty as to redhibition. The court then rendered judgment in favor of Jewelers and against Mr. Larussa, Larussa Agency, and CIC. The court found that Mr. Larussa owed a duty to Jewelers to exercise reasonable skill and care in the performance of his duties as a licensed real estate agent. That duty included an obligation to communicate accurate information to Jewelers and to disclose any information about material defects of which he was aware. The court further found that Mr. Larussa breached that duty by failing to disclose to Jewelers certain information contained on a property condition disclosure form that was executed by Ms. Robichaux for Sea Hawk and was contained in the files of Larussa Agency. The court also found that Mr. Larussa affirmatively misrepresented to Jewelers certain facts about the condition of the property. Since he was in the course and scope of his employment and was under the direction of Larussa Agency at all times during this transaction, the agency was vicariously liable for his acts, and its insurer was also solidarily liable for the damages caused by those acts.

With regard to the damages caused by Mr. Larussa's failure to communicate accurately concerning the condition of the property, the court found no liability for termite damage or active termite infestation of the property, because Jewelers had contacted Fon's before the sale and had received assurances that there were no termite problems. Therefore, Jewelers had relied on these representations from Fon's and had

not relied on any statements or misstatements made by Mr. Larussa concerning the existence of termites or termite damage. The court did find Mr. Larussa liable for the cost of repairing certain rotted wood, because he did not provide Jewelers with the property condition disclosure form, which showed there was some wood rot in several areas. The court awarded $16,746.42 to repair the rotted portions of the building. The court also found that Mr. Larussa had misrepresented to Jewelers that the air conditioning system was in working condition, when, in fact, the system did not function. Rather than repairing the old units, Jewelers had replaced them at a cost of $5,879.00; the court awarded one-half the cost of replacement, or $2,939.50, for this item of damages. The court also found that because Mr. Larussa did not provide the property condition disclosure form to Jewelers, he failed to make the buyer aware that there was cracking in the concrete slab, a fact that was revealed in that document. The court awarded $6,600.00, based on an estimate of the cost to repair the slab. The property condition disclosure form also mentioned a roof leak that had been repaired. The court found that if Jewelers had been given that form, it probably would have inspected the roof and discovered the roof leak that existed at the time of the sale. The entire roof was replaced at a cost of $4,190.88; the court awarded $1,000.00 toward the cost of the roof replacement. Thus, the defendants were solidarily liable to Jewelers for $27,285.92, plus legal interest from date of judicial demand, and all costs. A judgment to this effect was signed September 17, 2009.

Mr. Larussa, Larussa Agency, and CIC suspensively appealed, assigning as error the court's awards of damages for the air conditioner defect, for wood rot, for a foundation defect, and for a roof defect. They also assert that the court's damage awards for each defect were clearly erroneous and not supported by any competent or discernable evidence in the record. Jewelers answered the appeal, seeking damages for aggravation, inconvenience, and financial stress; for additional repair costs; and for repair of termite damage.

APPLICABLE LAW

A court of appeal may not overturn a judgment of a trial court unless there is an

error of law or a factual finding that is manifestly erroneous or clearly wrong. Morris v. Safeway Ins. Co. of Louisiana, 03–1361 (La. App. 1st Cir. 9/17/04), 897 So.2d 616, 617, writ denied, 04–2572 (La. 12/17/04), 888 So.2d 872. The Louisiana Supreme Court has posited a two-part test for the appellate review of facts in order to affirm the factual findings of the trier of fact: (1) the appellate court must find from the record that there is a reasonable factual basis for the finding of the trier of fact; and (2) the appellate court must further determine that the record establishes that the finding is not clearly wrong (manifestly erroneous). See Mart v. Hill, 505 So.2d 1120, 1127 (La. 1987). Thus, if there is no reasonable factual basis in the record for the trier of fact's finding, no additional inquiry is necessary to conclude there was manifest error. However, if a reasonable factual basis exists, an appellate court may set aside a factual finding only if, after reviewing the record in its entirety, it determines the factual finding was clearly wrong. See Stobart v. State, through Dep't of Transp. and Dev., 617 So.2d 880, 882 (La. 1993); Moss v. State, 07–1686 (La. App. 1st Cir. 8/8/08), 993 So.2d 687, 693, writ denied, 08–2166 (La. 11/14/08), 996 So.2d 1092. If the trial court's factual findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse those findings, even though convinced that, had it been sitting as the trier of fact, it would have weighed the evidence differently. Smegal v. Gettys, 10–0648 (La. App. 1st Cir. 10/29/10), 48 So.3d 431, 435.

With regard to questions of law, appellate review is simply a review of whether the trial court was legally correct or legally incorrect. Hidalgo v. Wilson Certified Exp., Inc., 94–1322 (La. App. 1st Cir. 5/14/96), 676 So.2d 114, 116. On legal issues, the appellate court gives no special weight to the findings of the trial court, but exercises its constitutional duty to review questions of law and render judgment on the record. In re Mashburn Marital Trust, 04–1678 (La. App. 1st Cir. 12/29/05), 924 So.2d 242, 246, writ denied, 06–1034 (La. 9/22/06), 937 So.2d 384.

A real estate broker is a professional who holds himself out as trained and experienced to render a specialized service in real estate transactions. The broker stands in a fiduciary relationship to his client and is bound to exercise reasonable care,

skill, and diligence in the performance of his duties. Mallet v. Maggio, 503 So.2d 37, 38 (La. App. 1st Cir. 1986), writ denied, 504 So.2d 880 (La. 1987). Generally, a broker's duties are limited to those which can be analogically drawn from LSA-R.S. 37:1455 and from the customs and practices of real estate brokers in general. Id. The duty to disclose to a buyer a material defect regarding the condition of real estate of which the broker or salesperson has knowledge is among a broker's duties analogically drawn from LSA-R.S. 37:1455 and from the customs and practices of real estate brokers in general. See LSA-R.S. 37:1455(A)(27); Hughes v. Goodreau, 01-2107 (La. App. 1st Cir. 12/31/02), 836 So.2d 649, 660, writ denied, 03-0232 (La. 4/21/03), 841 So.2d 793. The duty to refrain from knowingly making any false representations to a party in a real estate transaction is also among a broker's duties analogically drawn from LSA-R.S. 37:1455 and from the customs and practices of real estate brokers in general. Tres' Chic in a Week, L.L.C. v. Home Realty Store, 07-1373 (La. App. 1st Cir. 7/17/08), 993 So.2d 228, 232.

A realtor has a fiduciary duty to his client and a breach of that duty to the client is actionable under LSA-C.C. art. 2315. Id. If that duty is breached, the client has a cause of action to recover the amount paid for repairing that defect. See Hughes, 836 So.2d at 663. A plaintiff must show damages as a result of his justifiable reliance on the defendant's misrepresentations or failure to disclose known material defects. See Tres' Chic, 993 So.2d at 232.

ANALYSIS

A key word in describing the realtor's duty to his client is "known" or "knowing." Therefore, we begin our examination of the record to determine what Mr. Larussa knew about the property condition at the time of the sale. About a year before this sale, on behalf of Sea Hawk, Ms. Robichaux completed a "Property Condition Disclosure Form" (the disclosure form) concerning the property and placed it in the file at Larussa Agency. This form was designed to disclose to potential buyers any known material defects regarding the condition of the property. The form consisted of questions concerning the various parts of the building; these could be answered "yes" or "no,"

and there was an additional section at the bottom of the form for handwritten explanations or additional information. To the question, "Has roof ever had a leak?" the answer given was "yes," and the explanation provided was that the "[r]oof leaked when purchased — was repaired." With regard to defects in the foundation, the answer was also in the affirmative, and the explanation stated, "Inside slab has cracks — 4 additional inches of concrete was poured over original slab to add floor drains and plumbing — this top slab has cracks." Regarding defects in the wall and roof structure, the response was "yes," and the additional comments were that "interior walls[,] bathrooms[, and] mop sink has some rot. Top of front has some rotten boards, have been treated [with] preservative [and] covered [with] vinyl siding." Mr. Larussa testified that he could not specifically recall seeing the disclosure form or giving it to Ms. White, but that such forms were generally kept in the agent file, and he would have given it to her as part of his normal practice if it had been there. However, he also said that such a disclosure form was not required for commercial property, stating that this transaction was "pretty much the only commercial piece of property I've seen [with] a residential disclosure form filled out."[2] So if the disclosure form had not been in the file, Mr. Larussa would not have noticed its omission. He further testified that at no time prior to the closing of the transaction was he aware of any defects in the air conditioning, cracks in the foundation, or prior or current roof leaks. Nor did he know about any wood rot in the interior or exterior of the building prior to the sale, other than some obviously rotten siding that was clearly visible on one portion of the fascia board at the front of the building.

Despite Mr. Larussa's inability to recall whether he had actually seen the disclosure form and his testimony that he was unaware of any hidden material defects in the property, the defendants indicated in their answer to a request for admissions that Mr. Larussa "was aware of the information contained on the Property Condition Disclosure Form completed by Sea Hawk Industries ... ." Based on this admission, the court found that Mr. Larussa had knowledge about the items disclosed in the disclosure

[2] This distinction between residential and commercial transactions has since been codified in LSA-R.S. 9:3196-3200, effective July 1, 2004. See LSA-R.S. 9:3197(A).

form. Any matter admitted in an answer to a request for admissions is conclusively established unless the court on motion permits withdrawal or amendment of the admission. See LSA-C.C.P. art. 1468; see also Vardaman v. Baker Ctr., Inc., 96-2611 (La. App. 1st Cir. 3/13/98), 711 So.2d 727, 731. Therefore, we find no error in this conclusion of the trial court.

The other question regarding the disclosure form was whether Mr. Larussa had given a copy of it to Ms. White as an attachment to the purchase agreement or at any other time before the sale. She testified that she had not received a copy of the disclosure form before the sale. She also stated that the buyer's signature on that document was not hers; the record shows that this signature did not match her signature on various other documents related to the sale. Based on this testimony and Mr. Larussa's inability to confirm that he had given her the document, the court concluded that Mr. Larussa had not given Ms. White the disclosure form before the sale. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong. Rosell v. ESCO, 549 So.2d 840, 844 (La. 1989). Therefore, we find no manifest error in this factual finding of the court.

With these facts established, we turn to the various defects for which the court awarded damages and which were objected to by the defendants in this appeal. The court awarded $1,000.00 toward the cost of repairing the roof. Based on the information provided on the disclosure form, Mr. Larussa knew that the roof had leaked when Sea Hawk purchased it in June 2000, and that the roof had been repaired at that time. There is no indication on the disclosure form or anywhere else in the record that the roof leaked again after it was repaired and before the sale to Jewelers. In fact, Ms. Robichaux testified that it had not leaked again after the initial repair was done. Mr. Larussa testified that he did not know that the roof leaked, and there is no evidence that he did know there was a defect in the roof at the time of the sale to Jewelers. Lacking such knowledge, his failure to disclose this information was not a breach of his duty to disclose to the buyer a material defect of which he was aware regarding the condition of the real estate involved in this transaction. We conclude that the trial

court's imposition of liability and award of damages for Mr. Larussa's failure to disclose the roof leak was not supported by the evidence and was manifestly erroneous.

The court also awarded $6,600.00, based on the estimated cost provided by Cable-Lock to repair the concrete slab, which, according to the disclosure form, was cracked across the four inches of concrete that had been poured over the original foundation in order to add drains and plumbing. There was considerable testimony concerning the cracking in the slab, with some witnesses stating that it was clearly visible and others maintaining that it was covered by vinyl flooring and could not be seen by the buyer. Regardless of whether it was visible or not at the time the building was purchased, the evidence revealed that no repairs were made to the slab while the building was being renovated. The renovations were completed in April 2002, and by the time the trial was concluded, the building had been in use as a jewelry store for over seven years without needing any flooring repairs. Additionally, there was no expert testimony to establish that the cracking presented a foundation problem or would require work in the future in order to preserve the building or allow its continued use as a jewelry store. Timothy J. White, Betty White's son, who acted as a general supervisor of the renovation project, testified that no one from Cable-Lock or any other expert told him that the building had any actual structural problem caused by the foundation. Therefore, there was an absence of proof that Mr. Larussa's failure to disclose the cracking in the concrete caused Jewelers any actual loss or damage. Having reviewed all the testimony and other evidence concerning the cracking in the concrete floor, we conclude that the award of damages for this item was not supported by the evidence and was manifestly erroneous.

The court also awarded $16,746.42 to repair rotted wood in portions of the building. As noted on the disclosure form, there was some wood rot in the interior walls of the bathroom and mop room. Also, the top of the front (the fascia or knee wall) of the building had some rotten boards that had been treated with a preservative and covered with vinyl siding. We note that the trial court did not explain how it arrived at the precise amount of $16,746.42 for these repairs, other than stating that it relied

particularly on plaintiff's Exhibit No. 15, as well as the testimony of various witnesses. Plaintiff's Exhibit No. 15 includes contractor Rob Hamilton's estimate of $43,400.00 for "materials and labor to tear out and replace with new." That estimate included, but did not itemize, tearing out and rebuilding the existing walls that were rotten from moisture and termite damage and tearing out and rebuilding the knee wall around the building and the flashing. However, it also included, but did not itemize, painting, tearing out the suspended ceiling, tearing out electrical, plumbing, and air conditioning vents, and replacing the ceiling, electrical, air ducts, and pipes for plumbing. The estimate does not show what the actual costs were for any of these individual items, or if any payments were made to Rob Hamilton. The exhibit also contains an estimate from Houma Builders, Inc., showing a price of $37,469.50 for labor to remove all termite infested exterior walls and interior partitions, labor and materials to construct same, and workers' compensation and general liability insurance for the job. Again, the exact amount attributable to or paid for replacement of rotting wood is not shown. Another estimate from Clarence DeRoche, who performed most of the renovation work, shows a total of $23,873.83, with draws against that amount as work progressed. However, none of those draws shows what kind of work had been accomplished as each of the draws was made. There are several invoices from Wright's Floor Covering, Paint & More, Inc., for flooring materials and installation, as well as for numerous cans of various types of stain and paint. Similarly, there are invoices from Morrison Terrebonne Lumber Center, L.L.C. for materials identified only by part number. Finally, there is an invoice from Corrugated Industries for roofing materials. It is not possible to determine from any of these invoices or estimates what amounts might have been attributable solely to the replacement of rotting wood, either in the back rooms or on the knee wall.

Timothy J. White testified that Jewelers had not intended to change the back rooms, which included the bathrooms and "mop room" where, according to the disclosure form, some wood rot existed. However, he said that once they found the termite damage and began tearing out those wall portions, they ended up having to replace the back wall of the building. He had prepared two different spreadsheets to

show the amounts needed to repair termite damage; one showed a total of $53,872.43 to repair termite damage only, and the other showed a total of $70,879.44, of which $47,358.51 was shown to repair termite damage. On the second spreadsheet, a knee wall repair is estimated as $6,510.00. Mr. White testified that some of the amounts were for actual costs, but most were estimates. A third spreadsheet, which Mr. White did not recall preparing and his mother did not recognize, purported to show the actual amounts paid for various portions of the renovations to the building; it does not break out the amount required for repairing rotting wood. Another handwritten estimate shows $6,000.00 for water damage to the knee wall, but is not dated and does not indicate what amounts may have been paid for the replacement of that portion of the building.

Compensatory damages encompass those damages "designed to place the plaintiff in the position in which he would have been if the tort had not been committed." Frank L. Maraist & Thomas C. Galligan, Jr., LOUISIANA TORT LAW § 7-1 (Michie 1996) (footnotes omitted). Compensatory damages are further divided into the broad categories of special damages and general damages. Special damages are those which have a "ready market value," such that the amount of the damages theoretically may be determined with relative certainty. McGee v. A C And S, Inc., 05-1036 (La. 7/10/06), 933 So.2d 770, 774. In this case, the measure of special damages for Mr. Larussa's failure to disclose the fact that certain areas of the building had rotten wood is the amount paid for repairing that defect. We have thoroughly reviewed all the evidence in the record and cannot determine the amount estimated or paid for repairing the areas of the building that had rotting wood. From the testimony of various witnesses, it appears that most of the wood rot in the back rooms was in areas that were also affected by termite damage and would have had to be replaced for that reason. Photographs in the record also show that the roof was completely changed from a flat roof to a gabled metal roof with a portico over the front entrance, a major change that would have required modification of the knee wall, whether rotted or not. Based on our review of the evidence, we cannot determine with any degree of certainty

the cost of repairing the rotted wood areas, or even whether those areas were replaced due to rotted wood or due to other factors. Therefore, we conclude that the trial court's award of damages for this item was not reasonably supported by the evidence and was manifestly erroneous.

Finally, the court found that Mr. Larussa had breached his duty by misrepresenting to Jewelers that the air conditioning system was in working condition, when, in fact, the system did not function. Jewelers replaced those units for $5,879.00, instead of repairing them. According to Ms. White, this was done because she was told that the cost of repair would be about the same as buying new units. Because there was no evidence identifying the amount that would have been required to repair the units, the court awarded one-half of the replacement cost, or $2,939.50, for this item of damages. We note that, unlike the other items for which damages were awarded, there was nothing on the disclosure form to indicate problems with the air conditioning units. Therefore, to establish Mr. Larussa's liability for **knowingly** making a false representation that they were in working order, there must be other evidence in the record to show that he had knowledge that the air conditioning units were not working or were somehow defective. Our search of the record reveals no such evidence. As previously noted, Mr. Larussa denied any knowledge that the air conditioners were not functioning. In fact, he stated that he assumed they were working, because the building had been used as a Mexican restaurant by Sea Hawk before shutting down, and the air conditioning system was certainly working then. Ms. Robichaux testified that the air conditioning system was working until the restaurant was closed and had remained off for about a year while the building was listed for sale. Absent any knowledge of the defect on Mr. Larussa's part, he cannot be liable for **knowingly** misrepresenting the condition of the air conditioning units. Therefore, the imposition of liability and award of damages for this item was also manifestly and legally erroneous.

Jewelers answered the appeal and asked for an award of general damages for aggravation, inconvenience, and financial stress. A corporation is incapable of experiencing loss of enjoyment, mental anguish, and inconvenience. Whitehead v.

American Coachworks, Inc., 02-0027 (La. App. 1st Cir. 12/20/02), 837 So.2d 678, 682. Additionally, other than the repair costs already discussed, there is no evidence of "financial stress" incurred by the corporation. The financial stress described in Jewelers' brief involves the stress incurred by its owner/president, Ms. White, when she had to pledge personal collateral in order to borrow the additional funds needed to complete the building renovations. Ms. White testified that the business was able to continue its operations in its previous location until the new building was ready to be occupied, and therefore, did not suffer any business interruption loss. Accordingly, the court did not err in failing to award general damages to Jewelers.

Jewelers also contended the trial court erred in failing to award additional damages for the repair costs it incurred, and in failing to make any award for the termite damage found in the building. Jewelers' brief does not address these issues, however. According to the Uniform Rules-Louisiana Courts of Appeal, Rules 2-12.4 and 2-12.5, issues not briefed on appeal are deemed abandoned. Bridges v. Mosaic Global Holdings, Inc., 08-0113 (La. App. 1st Cir. 10/24/08), 23 So.3d 305, 308 n.1, writ denied, 08-2783 (La. 2/20/09), 1 So.3d 496. Therefore, we will not address these issues.

CONCLUSION

For the above reasons, we reverse the judgment of September 17, 2009, and deny the damage claims made by Jewelers in its answer to the appeal. Costs of this appeal are assessed against Betty White Jewelers, Inc.

REVERSED AND RENDERED.