

**Reversed and Rendered and Opinion filed June 23, 2020.**



**In The**  
**Fourteenth Court of Appeals**

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**NO. 14-18-01072-CV**

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**EARTH POWER A/C AND HEAT, INC., Appellant**

**V.**

**JOHN PAGE, Appellee**

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**On Appeal from the County Civil Court at Law No. 1  
Harris County, Texas  
Trial Court Cause No. 1097413**

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**O P I N I O N**

This dispute arises from a contract to install a geothermal HVAC system at a residence. Appellant Earth Power A/C and Heat, Inc. appeals a judgment in favor of the homeowner, appellee John Page. A jury found that both parties failed to comply with the contract, that Earth Power breached first, that Page's subsequent breach was not excused, that Earth Power violated the Texas Deceptive Trade

Practices-Consumer Protection Act (“DTPA”),<sup>1</sup> and that both parties were entitled to damages. Following post-trial motions, the trial court signed a judgment that disregarded the jury’s finding that Page’s breach was not excused, denied Earth Power recovery on its contract claim, and granted Page recovery on his DTPA claim. Earth Power challenges each of these rulings.

We conclude that the trial court erred in rendering judgment against Earth Power on its contract claim because, although Earth Power breached the contract first, Page failed to secure a finding that Earth Power’s prior breach was material, and the evidence does not establish conclusively that Earth Power’s first breach was material. We also conclude that the court erred in rendering judgment for Page on his DTPA claim because no legally sufficient evidence supports the damage award. We reverse the trial court’s judgment and render judgment that Page take nothing from Earth Power and that Earth Power recover its contract damages and stipulated attorney’s fees from Page.

### **Background**

Page and Earth Power entered into a one-page written contract to install a geothermal HVAC system in Page’s home, then under construction. The contract states that Earth Power would provide labor and materials for several listed items. Earth Power guaranteed that all material would be “as specified” and that the work would be “completed in a workmanlike manner.” The agreed contract price was \$47,820.<sup>2</sup> The contract specifies no deadlines or dates for performance and does not state that time is of the essence. The contract provides that Page would make

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<sup>1</sup> See Tex. Bus. & Com. Code §§ 17.41-.63.

<sup>2</sup> The price consists of \$46,700 identified in the contract, plus an increase of \$1,120 due to an agreed change order.

periodic “progress payments,” which, according to Earth Power, meant that it would invoice Page in stages as work was completed.

Page made an initial payment of \$24,600 on or about May 12, 2017, after which Earth Power began work. Earth Power issued additional invoices on June 8 for \$11,900 and on July 14 for \$7,400. It is undisputed that Page paid neither invoice.<sup>3</sup>

According to Page, he did not pay the June 8 invoice because the work represented on the invoice as having been completed was in fact not fully completed. Additionally, Page testified that some of the work performed as of that time was not performed in a workmanlike manner. Specifically, Page characterized some ductwork as the wrong size or installed unprofessionally. Page said he also did not pay the July 14 invoice. Page described several items listed on the contract that he contended had not been fully or correctly completed. Also, he was frustrated that the project was taking too long, when Earth Power told him at the outset that it was a two- to three-week project.

Earth Power contradicted Page’s testimony in several respects. Regarding the project’s anticipated duration, Earth Power’s representative, Mark Smith, testified that he told Page that it would be six to eight weeks before the units could be delivered because they were custom-built. At any rate, according to Smith, most of the work was completed by mid- to late-July, although he acknowledged that some ductwork was deficient and that he planned to make the necessary corrections. Page terminated the contract, however, on July 28, and both sides agree the work was not completed by that date. According to Smith, Earth Power

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<sup>3</sup> Earth Power issued another invoice dated May 25 for \$265, but this invoice was to cover alleged insufficient fund charges concerning Page’s initial payment. It is undisputed that Page did not pay this invoice either.

had about two more days' worth of work to finish the job, but Page would not allow his workers back on the property.

Earth Power sued Page for breach of contract, alleging that Page still owed \$18,185 for work performed.<sup>4</sup> Page filed an answer in which he generally denied Earth Power's claims and asserted an affirmative defense of "repudiation." By this affirmative defense, Page alleged that Earth Power "repudiated the contract by failing to properly install the ducting in workmanlike manner, failing to provide adequate manpower for the project and failing to complete the project." Page also asserted counterclaims that Earth Power violated the DTPA and committed fraud. Page did not assert a counterclaim for breach of contract.

Following trial, a jury found that:

- Page failed to comply with the contract;
- Earth Power failed to comply with the contract;
- Earth Power failed to comply with the contract first;
- Page's failure to comply was not excused;
- Earth Power was entitled to \$10,970 in damages for Page's failure to comply with the contract;
- Earth Power engaged in a false, misleading, or deceptive act or practice;
- Earth Power did not engage in an unconscionable action or course of action;
- Page was entitled to \$3,150.50 in damages for Earth Power's false, misleading, or deceptive act or practice; and
- Earth Power did not commit fraud against Page.

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<sup>4</sup> Earth Power also asserted claims for quantum meruit and conversion, but those claims are not at issue in this appeal.

The jury question asking whether Earth Power failed to comply with the contract was not accompanied by any instructions regarding whether any failure to comply was material.<sup>5</sup> Further, jury question number four, which asked whether Page's failure to comply was excused, instructed the jury only on whether Earth Power repudiated the contract prior to Page's breach. The jury answered that Page's breach was not excused. Question number four did not instruct the jury that it could find Page's breach excused if it found that Earth Power's first breach was material.<sup>6</sup>

The trial court signed a judgment incorporating the jury's findings and ordering that Earth Power recover \$7,819.50 from Page (consisting of the damages awarded to Earth Power, offset by the damages awarded to Page), plus pre-judgment and post-judgment interest, costs, and stipulated attorney's fees.

Page moved to set aside the judgment and to enter judgment on the verdict, arguing that Earth Power's first breach was material and thus excused Page's

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<sup>5</sup> See Comm. on Pattern Jury Charges, State Bar of Tex., Texas Pattern Jury Charges: Business, Consumer, Insurance & Employment, PJC 101.2 (2016) (herein referred to as "PJC"); *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 199 (Tex. 2004) (per curiam). Question number two asked:

Did Earth Power fail to comply with the Agreement? Please answer YES or NO.

Answer: Yes

<sup>6</sup> See PJC 101.21, 101.22. Question number four asked:

Was Page's failure to comply excused?

Failure to comply by Page is excused by Earth Power's prior repudiation of the Agreement.

A party repudiates an agreement when it indicates, by its words or actions, that it is not going to perform its obligations under the agreement in the future, showing a fixed intention to abandon, renounce, and refuse to perform the agreement.

Please answer YES or NO.

Answer: No

further performance. Page argued that the jury's answers to questions two and nine (i.e., Earth Power's breach of contract and DTPA violation) "read together" demonstrated that "Earth Power engaged in a material breach prior to Page breaching thus relieving Page from future performance (i.e. payment)." Page requested that the court render judgment against Earth Power on its breach of contract claim and in favor of Page on his DTPA claim.

In response to Page's post-judgment motion, Earth Power argued that Page's requested relief was unsupported by pleading or jury finding because Page did not plead prior material breach and did not object to the jury charge for its failure to include a question on prior material breach. In any event, Earth Power continued, the jury impliedly found that Earth Power's prior breach was *not* material because the jury expressly found that Earth Power did not repudiate the contract and Page's breach was not excused. Separately, Earth Power filed a motion to disregard the jury's finding on Page's DTPA damages because those damages were barred by the economic loss rule or unsupported by legally sufficient evidence.

The trial court denied Earth Power's motion to disregard and signed an amended final judgment, ordering that Page recover \$3,150.50, plus pre-judgment and post-judgment interest, costs, and stipulated attorney's fees. By signing the amended judgment, the trial court implicitly granted Page's post-judgment motion and necessarily ruled that Earth Power's first breach was material thereby excusing Page's failure to pay the balance of the contract price.

Earth Power timely appealed.

### **Issues**

Earth Power challenges the adverse judgment on its breach of contract claim for several reasons, all of which are fairly reduced to the core argument that Page

waived any affirmative defense of excuse by prior material breach. Earth Power contends: (1) Page did not plead prior material breach, either by an affirmative defense or by a claim for breach of contract; (2) Earth Power did not try the issue by consent; and (3) Page neither requested nor secured a jury finding that Earth Power's first breach was material. Alternatively, Earth Power re-urges its position asserted in the trial court that the jury implicitly found Earth Power's first breach not material based on the finding in question number four. For these reasons, Earth Power argues that Page's failure to pay the amount owed is not excused and that the trial court erred in rendering judgment against Earth Power on its breach of contract claim.

Earth Power also challenges the portion of the judgment awarding Page damages on his DTPA claim for two reasons: (1) no legally sufficient evidence supports the damages; and (2) the economic loss rule bars Page's recovery.

## **Analysis**

### **A. Earth Power's breach of contract claim**

A material breach by one party to a contract can excuse the other party from any obligation to perform in the future. *Bartush-Schnitzius Foods Co. v. Cimco Refrigeration, Inc.*, 518 S.W.3d 432, 436 (Tex. 2017) (per curiam); *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 196 (Tex. 2004) (per curiam) (“It is a fundamental principle of contract law that when one party to a contract commits a material breach of that contract, the other party is discharged or excused from further performance.”). A material breach is conduct that deprives the injured party of the benefit that it reasonably could have anticipated from the breaching party's full performance. *Hernandez v. Gulf Grp. Lloyds*, 875 S.W.2d 691, 693 (Tex. 1994). By contrast, when a party commits a nonmaterial breach, the other party “is not excused from future performance but may sue for the

damages caused by the breach.” *Bartush-Schnitzius*, 518 S.W.3d at 436; *Levine v. Steve Scharn Custom Homes, Inc.*, 448 S.W.3d 637, 654 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). As explained in *Bartush-Schnitzius*, the latter principle is consistent with settled Texas law regarding the elements of a contract claim, which requires a finding of breach, not a finding of material breach. *Bartush-Schnitzius*, 518 S.W.3d at 436; *see also, e.g., Mays v. Pierce*, 203 S.W.3d 564, 575 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (“A breach of contract occurs when a party fails or refuses to do something he has promised to do.”). Accordingly, a material breach by Earth Power would have excused Page from making further contract payments, while a nonmaterial breach would have simply given rise to a claim for contract damages. *Bartush-Schnitzius*, 518 S.W.3d at 436; *see also Mustang Pipeline*, 134 S.W.3d at 196.

A contracting party’s assertion that it is excused from further performance because of the other party’s prior material breach is an affirmative defense that must be pleaded and proved. *See* Tex. R. Civ. P. 94; *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 314 (Tex. 2006); *Leonard v. Knight*, 551 S.W.3d 905, 910 (Tex. App.—Houston [14th Dist.] 2018, no pet.); *Home Loan Corp. v. JPMorgan Chase Bank, N.A.*, 312 S.W.3d 199, 205 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (excuse is an affirmative defense). A party waives an affirmative defense if it is not pleaded or tried by consent. *Frazier v. Havens*, 102 S.W.3d 406, 411 (Tex. App.—Houston [14th Dist.] 2003, no pet.). Earth Power says the defense was neither pleaded nor tried by consent. We need not address those points, however, but will presume that prior material breach was sufficiently raised by Page’s pleadings or tried by consent. We conclude nevertheless that the judgment denying Earth Power recovery on its breach of contract claim was error because Page failed to secure findings necessary to support the assertion that his



failure to perform was excused by Earth Power’s prior material breach and because the jury found otherwise that Page’s breach was not excused.

The party relying on an affirmative defense has the burden to obtain findings of fact on the issue. *XCO Prod. Co. v. Jamison*, 194 S.W.3d 622, 635 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). The materiality of a contract breach generally is a fact question for the jury. See *Bartush-Schnitzius*, 518 S.W.3d at 436; *Hudson v. Wakefield*, 645 S.W.2d 427, 430 (Tex. 1983); *Leonard*, 551 S.W.3d at 910 (“Materiality is normally a question of fact. . . .”); *Briargrove Shopping Ctr. Joint Venture v. Vilar, Inc.*, 647 S.W.2d 329, 333 (Tex. App.—Houston [1st Dist.] 1982, no writ); see also *Mustang Pipeline*, 134 S.W.3d at 200. Thus, Page bore the burden to submit a question and secure a finding that his failure to pay was excused because Earth Power’s prior breach was material. *XCO Prod. Co.*, 194 S.W.3d at 635.

Although the jury found that Earth Power breached the contract first, the jury was not asked whether Earth Power’s breach pre-dating Page’s failure to pay the June 8 invoice was material. Page submitted no question on the materiality of Earth Power’s alleged breach and included no instruction on the materiality factors for the jury to consider in answering questions on Earth Power’s breach or whether Page’s breach was excused.

The failure to request a jury question or instruction on an affirmative defense results in waiver of that ground by the party relying on it unless it was conclusively established. Tex. R. Civ. P. 279; see also *Leonard*, 551 S.W.3d at 910-11; *Robertson v. Odom*, 296 S.W.3d 151, 159 (Tex. App.—Houston [14th Dist.] 2009, no pet.); *XCO Prod. Co.*, 194 S.W.3d at 632, 635; *FedGess Shopping Ctrs., Ltd. v. MNC SSP, Inc.*, No. 14-07-00211-CV, 2007 WL 4387337, at \*3 (Tex. App.—Houston [14th Dist.] Dec. 18, 2007, no pet.) (mem. op.). On appeal, Page does not

argue that prior material breach was proven conclusively, and our review of the record reveals that it was not. Moreover, Page does not even assert that Earth Power's first breach was material. Instead, he contends that because the "jury determined Earth Power breached first," the trial court therefore "ruled as a matter of law Earth Power failed to fully prove its claim for breach of contract." This is an incorrect statement of contract law. Earth Power presented evidence of and obtained the necessary findings to support its breach of contract claim. As explained, that Earth Power breached the contract before Page does not by itself preclude Earth Power from recovering damages for Page's breach. Page's appellate arguments cannot support the judgment.

In sum, Earth Power secured findings that Page breached the contract and caused Earth Power damages; Page did not obtain a finding in his favor on the defense of prior material breach; and Page did not object to the charge on the ground that it lacked a question or instruction on the defense. Therefore, Page waived the defense, and the judgment cannot rest on a theory that Page's breach is excused by Earth Power's prior material breach. Additionally, the jury rejected Page's repudiation defense and found that his failure to pay the full contract price was not excused. Therefore, Earth Power is entitled to recover on its breach of contract claim, and we hold the trial court erred in rendering judgment against Earth Power on that claim. We do not reach the merits of Earth Power's first issue, but we sustain the portions of Earth Power's second and fourth issues challenging the trial court's failure to render judgment for Earth Power.

#### **B. Page's DTPA claim**

In its third issue, Earth Power argues that Page may not recover DTPA damages because they are unsupported by legally sufficient evidence or barred by the economic loss rule. Earth Power presented both grounds in the trial court.

When reviewing the legal sufficiency of the evidence, we consider the evidence in the light most favorable to the challenged finding and indulge every reasonable inference that would support it. *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005). We must credit favorable evidence if a reasonable factfinder could and disregard contrary evidence unless a reasonable factfinder could not. *See id.* at 827. To sustain a challenge to the legal sufficiency of the evidence supporting a jury finding, the reviewing court must find that: (1) there is a complete lack of evidence of a vital fact; (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (3) there is no more than a mere scintilla of evidence to prove a vital fact; or (4) the evidence conclusively established the opposite of a vital fact. *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 903 (Tex. 2004).

We measure evidentiary sufficiency against the charge as given to the jury. *See, e.g., Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 254 (Tex. 2008). The jury was asked what amount of money, if any, would fairly and reasonably compensate Page for his damages, if any, that resulted from Earth Power engaging in a false, misleading, or deceptive act or practice that Page relied on to its detriment and that was a producing cause of damages to Page. Importantly for today's case, the charge instructed the jury to consider only one form of damage and none other. The jury could award Page damages for: "The excess, if any, of (1) the total amount paid by Page for completion of the work provided for by the Agreement, above (2) the amount Page agreed to pay to Earth Power under the Agreement." Page did not object to this instruction and did not request any additional damage elements. The jury awarded Page \$3,150.50.

On appeal, Page contends the damages awarded are supported by evidence because he testified that he hired another contractor to finish the job and was given

an invoice for that work in the amount of \$7,600. Page says the damage award is within the range of the evidence presented, which was more than a scintilla.

We disagree with Page's argument because it does not measure the evidence, viewed most favorably to him, in light of the damage instruction included in the jury charge. Based on the charge, Page could receive damages only if the amount he paid to complete the work exceeded the amount he agreed to pay Earth Power. Page paid Earth Power only \$24,600. After Page terminated the contract, he hired a third party to complete the work. According to closing arguments during trial, Page claimed he paid \$17,661 to the third party, though our record contains only one invoice for \$7,300. We do not have before us invoices totaling \$17,661. Also, Earth Power asserts that Page proved only that he was *invoiced* for the work, not that he actually *paid* to complete the work.<sup>7</sup> In any event, assuming for the sake of argument that Page paid the third party a total of \$17,661, that means Page paid at most \$42,261 for the completed project—\$24,600 paid to Earth Power, plus \$17,661 paid to the third party. On the other hand, Page agreed to pay Earth Power \$47,820. Thus, Page did not present evidence that the amount he paid to complete the work exceeded what he agreed to pay Earth Power. Accordingly, no evidence supports the jury's damages finding in Page's favor. *See Ramirez*, 159 S.W.3d at 903 (no legally sufficient evidence to support jury's finding when there is a complete lack of evidence of a vital fact); *see also Garza v. Dealers Elec. Supply*, No. 14-02-01127-CV, 2004 WL 1193698, at \*1 (Tex. App.—Houston [14th Dist.] June 1, 2004, no pet.) (mem. op.) (concluding that no legally sufficient evidence supported damages finding: "a party

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<sup>7</sup> According to Earth Power, Page "did not provide the best evidence to allow the jury to determine any damages with reasonable certainty," and the jury should not have considered the evidence in determining Page's damages. Given our ultimate disposition of Earth Power's issue, we need not address this contention.

must affirmatively prove each element of the applicable damages, and a fact finder has discretion to award damages only within the range of evidence presented at trial”) (citing *Gulf States Utilities Co. v. Low*, 79 S.W.3d 561, 566 (Tex. 2002)).

We sustain Earth Power’s third issue and hold that no legally sufficient evidence supports the jury’s finding that Page is entitled to \$3,150.50 in damages. We need not and do not reach Earth Power’s alternative argument that the economic loss rule bars Page’s damages.

### **C. Attorney’s fees**

In part of its fourth issue, Earth Power argues that it is entitled to its attorney’s fees.<sup>8</sup> Because we concluded above that Earth Power shall recover damages from Page for Page’s breach of contract, we agree that Earth Power is a prevailing party entitled to attorney’s fees. By statute, a person (which includes a corporation like Earth Power) may recover reasonable attorney’s fees upon prevailing on a breach of contract claim. *See* Tex. Civ. Prac. & Rem. Code § 38.001(8). The parties stipulated to attorney’s fees at trial.

We sustain this part of Earth Power’s fourth issue.

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<sup>8</sup> The parties stipulated at trial that the prevailing party would be entitled to certain attorney’s fees. In its post-trial motion to disregard, Earth Power requested that the trial court award Earth Power its attorney’s fees, which the trial court expressly denied in a written order. *See* Tex. R. App. P. 33.1(a).

## **Conclusion**

We reverse the trial court's judgment. We render judgment that Earth Power recover its damages as found by the jury for Page's breach of contract. We also render judgment that Page take nothing on his DTPA claim. Finally, we render judgment that Earth Power recover its attorney's fees as stipulated by the parties' agreement.

/s/ Kevin Jewell  
Justice

Panel consists of Justices Christopher, Jewell, and Spain.