



LEXSEE 2006 TX APP. CT. BRIEFS 1032B

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STATE FARM LLOYDS AND MARK OGLE, Appellants, v. TERRY A.
HAMILTON, SR. AND JOHNNIE HAMILTON, Appellees.

CAUSE NO. 05-06-01032-CV

COURT OF APPEALS OF TEXAS, FIFTH DISTRICT, DALLAS

*2006 TX App. Ct. Briefs 1032B; 2007 TX App. Ct. Briefs LEXIS
2141*

May 14, 2007

Appealed from the 191st Judicial District, Dallas County.
Cause No. 0501517-J, the Honorable Catharina Haynes, Judge
Presiding.

Initial Brief: Appellee-Respondent

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Brief(s)**

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ATTORNEYS FOR APPELLEES.

EXPERT NAME: Ralph Mansour

TITLE: APPELLEES' BRIEF

TEXT: ORAL ARGUMENT REQUESTED

[***vii**] **ISSUES PRESENTED**

1. Whether there is legally and factually sufficient evidence to support the jury's breach of contract finding?

2. The Hamiltons' expert, Ralph Mansour, is a structural and geotechnical engineer who conducted an extensive investigation and formed an opinion on hard, scientific evidence and data. The trial court critically reviewed Mr. Mansour's opinions and found them sufficient. Is there sufficient evidence to support the jury's finding that State Farm breached the contract?

3. Pursuant to the Texas Supreme Court's holding, Ralph Mansour not only had an opinion as to the cause of the foundation problems but also ruled out other possible causes. In contrast, State Farm did not even attempt to rule out other possibilities in making its decision. Was there legally sufficient evidence to support the jury's verdict?

4. Whether Ralph Mansour's detailed and scientific investigation and conclusions constitute sufficient evidence to support causation and the jury's breach of contract finding?

5. [**8] Whether there is legally and factually sufficient evidence to support the Hamiltons' recovery of costs to repair damages?

6. Whether there is legally and factually sufficient evidence to support the jury's finding that State Farm committed extra-contractual violations?

7. Whether there is legally sufficient evidence to support the jury's award of mental anguish damages to Terry and Johnnie Hamilton?

[*1] STATEMENT OF FACTS

I. State Farm seemed determined from the start that it was not going to pay the Hamiltons' claim.

In October of 2003, Mark Ogle, a twelve-year veteran with State Farm, stood in the middle of the Hamiltons' living room and personally viewed a two foot hole in their living room floor full of water from a corroded, deteriorating cast-iron metal pipe at the bottom. He personally observed the defects with the house and immediately hired George Perdue & Associates, the engineering firm that State Farm had hired 1,440 times in the last four years and paid over \$ 3.3 Million in that time period. n1

- - - - - Footnotes - - - - -

n1 4RR 27; 41, 44, 48, 49.

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[**9]

II. Background.

Johnnie Hamilton purchased the house, which was the subject of this lawsuit in 1990 and paid \$ 65,000. n2 In 1995, Johnnie and Terry Hamilton married. n3

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n2 4RR 261-269.

n3 4RR 208.

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Prior to purchasing the house, the house had foundation problems which were completely resolved and the house did not evidence any problems after the problems were fixed until the plumbing leaks surfaced in 2002. n4

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n4 3RR 96-97.

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After Mrs. Hamilton purchased the house in 1990, she noticed drainage problems on the east side of the house, such that water actually came into the house from east side. n5 This condition was completely fixed by installing a French drain and a concrete skirt on [*2] the east side. In fact, State Farm's own expert, George Perdue & Associates' soil samples showed that the east side of [*10] the house was the driest part of the house. n6

- - - - - Footnotes - - - - -

n5 3RR 159-60; 4RR 232-33; 272-73.
n6 Plaintiffs' Ex. 36, p. 4; 3RR 262-263.

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In June of 2002, the Hamiltons reported a water leak to State Farm. A water leak was discovered in a pipe. n7 In July of 2003, Mrs. Hamilton noticed cracks in sheet rock and some sticking doors. n8 On September 29, 2003, the Hamiltons called State Farm and reported that they suspected they had a plumbing leak which might be affecting the foundation. n9

- - - - - Footnotes - - - - -

n7 4RR 209, 235-37, 262.
n8 4RR 216, 263.
n9 4RR 31-32; Plaintiffs' Ex. 33, p. 8. (Plaintiffs' Ex. 33 is a copy of the claim activity log of Mark Ogle, the State Farm Claim's Representative who handled the Hamiltons' claim).

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The September 29, 2003 claim is the first time the Hamiltons ever reported to State Farm that there existed foundation [*11] movement or that they might have foundation problems. n10 At that time, the Hamiltons' house was insured under a standard State Farm Homeowner's Policy. n11 Under the State Farm Homeowner's Policy, if foundation damage is caused by a plumbing leak, the damage is covered under the policy. n12

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n10 4RR 240-41.
n11 4RR 32-33; Defendant's Ex. 1.
n12 4RR 37; Defendant's Ex. 1.

- - - - - End Footnotes- - - - -

Mark Ogle, the State Farm Claim's Representative, spoke with the Hamiltons, hired some plumbers called Baker Brothers Plumbing and asked them to go to the Hamiltons' house and conduct plumbing tests. n13 The Baker Brothers went to the Hamiltons' house and determined that there were three leaks, one in the living room. n14 Mark Ogle hired George Perdue & Associates to investigate the claim.

When the Baker [*3] Brothers were attempting to investigate the plumbing problem, they had a camera that was stuck at the living room/combo line link. This required the Baker Brothers to excavate or break through the Hamiltons' foundation [**12] to retrieve their camera. This several foot hole revealed a corroded, deteriorating cast-iron pipe which was full of holes. n15

- - - - - Footnotes - - - - -

n13 Plaintiffs' Ex. 33; 4RR 31; 38-39; Plaintiffs' Ex. 33, p. 8.
n14 4RR 39; Plaintiffs' Ex. 8.
n15 4RR 43, 85-68, 133.

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Terry Hamilton was present when the Baker Brothers excavated the foundation in his living room on October 6, 2003. When they opened up the floor, he saw about a foot and a half of water in the hole. n16 Baker Brothers pumped the water that day, retrieved the camera, and tried to fix the pipe. n17 The Baker Brothers stated that they fixed the pipe and that they would back in three days to fill the hole. Mr. Hamilton indicated that would be acceptable and the Baker Brothers put a plastic cover over the hole and covered it with plywood. n18 When the Baker Brothers returned three days later, the hole was, once again, filled with water. n19 Mr. Hamilton inquired about where the water was coming from and the plumbers stated it was ground seepage. Mr. [**13] Hamilton knew this could not be true because it had not rained in a very long time. n20 Mr. Hamilton inquired of the Baker Brothers what they were going to do about the water, and they said they were not going to do anything. They were just going to backfill the hole. Mr. Hamilton replied not to fill the hole with the water still in the hole because the problem was not fixed. n21 Mr. [*4] Hamilton called State Farm and complained about this problem. n22 State Farm indicated that there was no leak (although they never were able to test the plumbing line) and said they would just fill up the hole. That was unacceptable to Mr. Hamilton. n23

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n16 4RR 212.
n17 Id.
n18 4RR 213.
n19 Id.
n20 Id.
n21 Id.
n22 4RR 214.
n23 4RR 214-215.

- - - - - End Footnotes- - - - -

On November 9, 2003, State Farm denied the Hamiltons' claim. n24

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n24 Plaintiffs' Ex. 27.

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[**14]

III. State Farm's reliance on earlier foundation issues is irrelevant because no expert, neither the Hamiltons' nor State Farm's, ever concluded that the prior foundation problems caused the instant problem.

State Farm attempts to raise the issue of the home's prior foundation problems from the early 1990's. However, at trial, no expert, not the Hamiltons' or State Farm's, ever attributed any of the current foundation problems to the prior foundations from the early 1990's that were fixed. Likewise, no one attributed the foundation problems to the alleged water that had come into the east side of the house that had previously been fixed. The water on the east side had been fixed years prior to the problem and no expert testified at trial that this caused the foundation problems. In fact, the soil samples that were taken by State Farm's experts indicated that water on the east side of the house was not a problem. n25 As such, State Farm's reference to the home's prior foundation problems or water events that occurred on the east side of the home is a red herring, had no basis as causation to any of the foundation problems, and is irrelevant.

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n25 3RR 122-123; Plaintiffs' Ex. 36, p. 8-9.

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[**15]

[*5] IV. In pre-trial motions, the trial court took great steps to review the sufficiency of the Hamiltons' claims.

In fact, the trial court granted the following Defendants' Motions for Summary Judgment:

- . Plaintiffs' claims against Mark Ogle; n26
- . Statutory fraud under Section 27.01 of the Texas Business and Commerce Code; n27
- . Plaintiffs' allegations against Mark Ogle for breach of duty of good faith and fair dealing in violation of the Insurance Code; n28
- . Plaintiffs' claims arising from their 2005 insurance claim; n29 and
- . The trial court struck portions of Plaintiffs' expert opinions. n30

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- n26 11CR 2789-90.
- n27 11CR 2789-90.
- n28 11CR 2791.
- n29 11CR 2792.
- n30 3RR 8-9.

- - - - - End Footnotes- - - - -

As such, the trial court took great steps to review the sufficiency of the Hamiltons' claims and of their evidence.

Likewise, in the pre-trial hearing on the Motion to Strike the Hamiltons' Expert, the trial court stated that it was very familiar with the standards [**16] on striking expert's opinions, having recently (a week before trial)

attended a continuing legal education seminar on the very topic. n31

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n31 Id.

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As such, this was not a trial judge who simply let the jury decide. Rather, the trial court was specifically presented with the legal arguments and evidence related to Plaintiffs' case and expert opinions. The trial court very carefully accepted some of those theories and rejected others. The case was submitted on limited issues that the trial court critically reviewed.

[*6] V. Neither State Farm nor Perdue explained what caused the foundation problems.

State Farm and Perdue did not offer the Hamiltons an explanation as to what caused the foundation problem.

This is in spite of the fact that there were admittedly four plumbing leaks; it is undisputed that the house was out of level four inches; and it is undisputed that the soil was very moist at the plumbing leak site from a deteriorated, corroded cast-iron pipe which contained holes. Clem Bommarito [****17**] offered an absolutely contradictory statement when he was trying to justify that the plumbing leaks did not cause the foundation problem. He stated that the reason why the house sloped from east to west was because the house was more moist on the east side where they had prior water problems and that there was vegetation on the west side that sucked up the water. n32

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n32 Plaintiffs' Ex. 36..

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Mr. Bommarito testified as to the importance of soil samples. The only problem is that the soil samples directly contradicted Mr. Bommarito's testimony. In fact, the east side of the house had the least amount of moisture according to the soil samples and the west side had more moisture in the soil samples. As such, Mr. Bommarito's testimony was wholly without merit. n33

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n33 5RR 6-77.

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Mr. Perdue's testimony was based on Mr. Bommarito's findings [****18**] and, therefore, was non-responsive.

In sum, State Farm and Perdue concluded, without any competent back-up, that the plumbing leaks did not cause the foundation problem.

[*7] VI. The trial.

The jury heard from the Hamiltons' expert witness, Mr. Ralph Mansour, a structural and geotechnical engineer. n34 Mr. Mansour was highly critical of the Perdue & Associates' report and of State Farm's handling of the decision. Mr. Mansour testified that based on his own personal investigation and review of the Perdue report, the plumbing leak caused 80% of the foundation's problems. n35

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n34 3RR 81-95.
n35 3RR 130.

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The jury also hears from Mark Ogle, a State Farm veteran, who denied the Hamiltons' claim. He testified that although George Perdue & Associates had been retained by State Farm on 1,440 times over the past four times and been paid \$ 3.3 Million, that he could tell whether or not George Perdue & Associates would be fair. He testified that he could review the reports and determine whether [**19] they were fair.

The jury heard from Mr. Mansour, Mr. Ogle, and cross-examination of George Perdue, and Clem Bommarito that the Perdue report was self-contradicting and was not an objective report and that State Farm had no reasonable basis to deny the claim and that they had failed to conduct a fair investigation.

The jury also heard from Terry and Johnnie Hamilton concerning the ordeal that they had to go through during State Farm's claim handling process, including when State Farm left a hole in the middle of their living room during this entire process. Even though the plumbing leak was not fixed, State Farm wanted to fill in the dirt and cover the hole. This, of course, was not acceptable to the Hamiltons.

[*8] The jury heard the heart-wrenching testimony about the mental anguish that was suffered by the Hamiltons concerning the damage to their single, most valuable asset.

The jury returned a verdict favorable to the Hamiltons on all questions and State Farm appeals.

[*9] **SUMMARY OF ARGUMENT**

In October of 2003, Mark Ogle, a twelve-year veteran with State Farm, stood in the middle of the Hamiltons' living room floor and personally viewed a two foot hole [**20] in their living room full of water from a corroded, deteriorating cast-iron metal pipe at the bottom. He personally observed the defects with the house and immediately hired George Perdue & Associates, the engineering firm that State Farm had hired 1,440 times in the last four years and paid over \$ 3.3 Million in that time period. n36

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n36 4RR 27; 41, 44, 48, 49.

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Mark Ogle testified live at trial in front of the jury that he would be able

to determine whether an engineer's report was biased by looking at the facts and data. He had acquired this knowledge from twelve years of claims handling. But Mark Ogle had in front of him evidence that did not support Perdue & Associates' report:

- . an extreme amount of water in the middle of the Hamiltons' house;
- . the house was four inches out of elevation; and
- . a deteriorated, corroded cast-iron pipe full of holes in the middle of the foundation.

On top of that, the Perdue & Associates' report contradicted itself completely. This is something that [**21] Mark Ogle testified that he would be able to recognize. The Perdue & Associates' report contradicted itself on its face as follows:

. Perdue Statement: The east side of the house had excess water problems and since it was clay soil that would explain the higher elevation on the east side. Contradiction: Soil samples that Perdue & Associates took showed that the east side soil was the driest of all the soil samples.

[*10] . Perdue Statement: Vegetation on the west side may have caused the west side soil to be dry. Contradiction: The north and south sides all had vegetation had vegetation and they were moist. The Hamiltons' expert's soil samples showed the northwest soil to be moist. In fact, the soil samples that Perdue & Associates took showed that the north and south sections were moist.

. Perdue Statement: Plumbing leak did not cause the foundation problems. Contraction: Soil samples from the excavation in the middle of the Hamiltons' living room showed that 3 of the soil samples to be the wettest of all the soil samples.

Thus, based on Mark Ogle's testimony, he should have been able to determine that Perdue & Associate's report contradicted itself on its [**22] face and violated one of the fundamental rules of engineering and science, which is, to rule out other causes. Perdue & Associates did not do this before concluding that the plumbing leak did not cause the foundation problems.

Additionally, Mark Ogle testified that he was required by State Farm to hire George Perdue & Associates. n37 Mark Ogle also knew there were plumbing leaks, but he did not know how long the leaks had been there, how much water was there, and did not have an explanation as to what caused the foundation problems.

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n37 4RR 60.

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Finally, rather than choosing the most obvious source, the water in the center of house, to be the cause of the foundation problems, Mark Ogle denied the Hamiltons' claim.

In contrast, the Hamiltons presented an expert witness who was a structural and geotechnical engineer. He opined that the simplest explanation, the plumbing leak in the center of the house, caused the foundation problem. Also, contrary to *Perdue & [*11] Associates*, he ruled out other possible [**23] causes. Not only did Mr. Mansour offer a reasonable explanation, which the trial court found to be reasonable, it was remarkably strong. Further, based on State Farm's conduct of using an expert it had used 1,440 in the last four years and \$ 3.3 Million and based on the fact that State Farm had breached its duties under the Insurance Code, the trial court correctly entered a judgment against State Farm on the jury's answers.

[*12] **ARGUMENT**

I. There was sufficient evidence to support the jury's verdict.

A. Standard of review.

When a court reviews a legal sufficiency point, it must consider all of the evidence in the record in the light most favorable to the party in whose favor the verdict has been rendered and indulge in that party's favor every reasonable inference deducible from the evidence. *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 48 (Tex. 1998). Courts must disregard all contrary evidence that a reasonable jury could have disbelieved. See *City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005).

Each case must be measured by its own facts, and considerable discretion [**24] and latitude must be given to the jury's award. *Weidner v. Sanchez*, 14 S.W.3d 353, 372 (Tex.App.-Houston [14th Dist.] 2000, no pet.).

A no-evidence complaint may only be sustained when the record shows one of the following: (a) a complete absence of a vital fact; (b) the reviewing court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a scintilla; or (d) the evidence establishes conclusively the opposite of the vital fact. *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997).

[*13] **B. Standards for reliability of an expert's opinion.**

State Farm is essentially basing its no-evidence challenge on the grounds that the Hamiltons' experts' opinions were unreliable. Whether the trial court properly admitted testimony is subject to an abuse of discretion standard of review. *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 499, 44 Tex.Sup.Ct.J. 675 (Tex. 2001); *Allstate Tex. Lloyds v. Mason*, 123 S.W.3d 690 (Tex.App.-Fort Worth 2003, no pet.). To determine whether a trial court [**25] abused its discretion, the appellate court must decide whether the trial court acted without reference to any guiding rules or principles; in other words, whether the act was arbitrary or unreasonable. See *Carpenter v. Cimarron Hydrocarbons Corp.*, 98 S.W.3d 682, 687, 46 Tex.Sup.Ct.J. 305 (Tex. 2002). Merely because a trial court may decide a matter within its discretion in a different manner than an appellate court would in a similar circumstance, does not demonstrate that an abuse of discretion has occurred. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42, 29 Tex.Sup.Ct.J. 88 (Tex. 1985), cert. denied, 476 U.S. 1159, 90 L.Ed.2d 721, 106 Sup.Ct.J. 2279 (1986).

A two-part test governs whether expert testimony is admissible: (1) the

expert must be qualified; and (2) the testimony must be relevant and based on reliable foundation. *Helena Chem. Co.*, 47 S.W.3d at 499. A trial court has a threshold responsibility of ensuring that an expert's testimony rests on reliable foundation and is relevant to the issues of the case. See *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 728, 41 Tex.Sup.Ct.J. 1117 (Tex. 1998). [**26] In meeting that responsibility, a trial court is not to determine whether an expert's conclusions are correct, but only whether the analysis used to reach those conclusions is reliable. *Id.*

[*14] To guide trial courts in assessing reliability, the Supreme Court has crafted two tests: the *Robinson*-factor analysis; and the "analytical gap" test. *Gammill*, 972 S.W.2d at 727 (analytical gap test); *E.I du Pont de Nemours & Co., Inc. v. Robinson*, 923 S.W.2d 549, 556, 38 Tex.Sup.Ct.J. 852 (Tex. 1995).

The San Antonio Court of Appeals has found that an expert's opinions regarding whether foundation movement was caused by plumbing does not follow the *Robinson* factors, but rather applied the *Gammill* analytical gap test. *USAA v. Pigott*, 154 S.W.3d 625, 629 (Tex.App.-San Antonio 2003)(opinion vacated by settlement).

A factor in determining whether an expert's opinion is reliable is whether the expert has ruled out other plausible causes. *Havner*, 953 S.W.2d at 720.

C. Many recent appellate decisions specifically deal with the sufficiency of expert opinions relating to plumbing leaks and foundation problems. [27]**

Most of the recent case law, including this Court's opinions, reviewing the sufficiency of an expert's opinion have concluded that the expert's opinions that plumbing leaks had caused damage to residential foundations were reliable.

By way of example, and not by limitation, the *Hamiltons* cite this Court to the following opinions: *USAA v. Pigott*, 154 S.W.3d 625; *USAA v. Mainwaring*, 2005 Tex.App.LEXIS 2161 (Tex.App.-Dallas 2005, pet. denied); *Allstate Tex. Lloyds v. Mason*, 123 S.W.3d 690; *Travelers Personal Security Ins. Co. v. McClelland*, 189 S.W.3d 846 (Tex.App.-Houston [1st Dist.] 2006, no pet.); *State Farm v. Blacklock*, 2005 Tex.App.LEXIS 7433 (Tex.App.-Waco 2005).

[*15] In *USAA v. Pigott*, the San Antonio Court of Appeals reviewed the reliability of the plaintiff's expert, Mr. Bradley. Mr. Bradley relied on much of the same data as that of USAA's expert. Expert testimony relying on the insurance company's data is reliable. *Id.*; *USAA v. Gordon*, 103 S.W.3d 436, 439 (Tex.App.-San Antonio 2002, no pet.).

Also, the San Antonio Court of Appeals indicated it is very important [**28] that the expert exclude other possibilities, which Bradley did. The Court found Bradley's testimony sufficiently reliable because of his experience and engineering training and his reliance on data regarding elevations and soil samples. In fact, Bradley's interpretation of the soil samples differed from the interpretation of the soil samples of USAA's experts. The Court concluded that this difference in interpretation did not amount to an analytical gap. The trial court could have determined that the analysis Bradley had used in reaching his conclusions was reliable given the conflicting testimony regarding the effect of the percentage increase in moisture content had on the soil. The San Antonio Court of Appeals noted that the trial court was not required to determine whether Bradley's conclusions were correct, but only that whether analysis used to reach them was reliable.

In *Mainwaring*, this Court reviewed the sufficiency of the homeowners' engineering expert about a plumbing leak causing a foundation problem. In *Mainwaring*, like in this case, the homeowners' engineer testified that he performed his structural foundation investigation by taking elevations of the floor, [**29] reviewing videotape of the leak, reviewing the insurance company's expert reports and conclusions, reviewing the vegetation around the home, and reviewing the results of soil testing. In fact, in the present case, the Hamiltons' expert, Mr. Mansour did even more than what the [*16] homeowners' engineer did in *Mainwaring*. In the case at hand, Mansour did all of the same testing the expert did in *Mainwaring*, but additionally he took soil borings as well to determine the type of soil and moisture contents and reviewed soil and moisture contents of State Farm's experts. The homeowners' expert in *Mainwaring* also reviewed detailed descriptions of the actual damage, photographs of the damage, computer generated color diagrams, and a proposal for the repair of the damage, and he concluded that the soil had a vertical differential movement in the affected area. He noted that a downward settlement had occurred along the side of the garage. This Court concluded that the evidence was legally sufficient to support the jury's finding that 95% of the foundation damage was caused solely by the plumbing leak. This Court held that the homeowners' presented an adequate basis from which [**30] the jury could have reasonably inferred what portion of the damage was caused by the plumbing leak.

Just like in this case, Mr. Mansour did even more than the *Mainwaring*'s engineering expert by actually taking soil samples and analyzing moisture contents of the soil, did elevations, and made a conclusion that the area of influence was caused by the plumbing leak.

In *Allstate v. Mason*, the Fort Worth Court of Appeals addressed the same challenge that State Farm is raising in this case. In *Mason*, the expert did a similar investigation that many of the other plaintiffs' experts did, such as conducting an elevation study and observing the structural distress. The expert in *Mason* testified that the plumbing leaks had caused 100% of the damage to the house. He also negated the possibility of other causes. In *Mason*, it was alleged that there was drainage problems [*17] because the Masons had to install a French drain. But there is absolutely no evidence that any of the prior repairs related to any of the current problems. *Mason*, 123 S.W.3d at 700. The testimony was that the house in the earlier years had problems but those problems were corrected. There [**31] was no evidence that the earlier problems affected the house. In *Mason*, Allstate challenged the expert's opinion because he could not conclude what caused the pipes to break, and, therefore, his opinion was sheer speculation. The Fort Worth Court of Appeals rejected that contention, stated that the expert did not have to be correct, his theory only had to be reliable, and affirmed the judgment of the trial court. *Mason*, 123 S.W.3d at 700-703.

In *State Farm v. Blacklock*, the Waco Court of Appeals reviewed the reliability of the homeowner's expert testimony that the plumbing leaks caused foundation problems. Once again, the Court reviewed the expert's testimony that the highest spot in the house was some distance away from the leaks and that the areas around the leak were two inches lower than the entry. State Farm argued on appeal, much like it does in this case, that the expert's inability to explain why the high point is a distance away from the leak rendered his opinion unreliable.

The Waco Court of Appeals rejected that contention because the expert explained that the house had "tilted" from east and west and that there was a

hollow point on the east side [**32] and the lower point on the west side. The Waco Court of Appeals held that this testimony was reasonable and met *Gammill's* analytical gap test. n38

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n38 Ultimately, the Waco Court of Appeals rejected the expert's opinion on grounds that he had been a biased expert solely retained by the plaintiffs lawyer to render an outcome determinative report. Also, the Court noted that the expert himself testified that he would render an opinion that the lawyer wanted him to render.

- - - - - End Footnotes- - - - -

[*18] Likewise, in *USSA v. Croft*, 175 S.W.3d 457 (Tex.App.-Dallas 2005, no pet.), this Court held that an engineer's opinion was reliable and constituted some evidence when he based his opinion on his knowledge, training and experience as a structural engineer, his personal inspection of the homeowner's home, and data supplied by the insurance company. *Croft*, 175 S.W.3d at 465-66.

As such, almost all of the recent appellate court decisions that have directly addressed the issue of the reliability of [**33] an expert's testimony to determine whether a plumbing leak caused the damage to the foundation have affirmed those decisions. In this case, as shown through this appeal, the Hamiltons' expert based his opinions on even more than was found to be reliable in the above-referenced cases.

D. Mansour's opinions were based on reasonable assumptions and, therefore, constitute sufficient evidence.

1. Mr. Mansour's experience and education.

The Hamiltons' expert, Ralph Mansour, was born in Cairo, Egypt and obtained a bachelor's degree in structural engineering in 1983. He obtained a master's degree in geotechnical engineering at the University of Texas in Arlington in 1994. n39 Mr. Mansour began his engineering career in 1985, by doing structural design. He did structural engineering design in both Egypt and in North Texas. n40 After doing structural engineering design, Mr. Mansour began work as a geotechnical engineer between 1990 and 1994. n41 Geotechnical engineering has to do with soil and soil behavior and the reaction to different inferences, how to design a foundation, slope stability in relation to [*19] roads and how the soil acts under home foundations. n42 Structural [**34] engineering is analyzing the imposed loads on the structure and to design systems to sustain its slopes. n43 After completing his education and previous engineering experience, Mr. Mansour was able to additionally study foundations and soils and the relationship between the two. n44 From 1990 through 1994, Mr. Mansour was the project manager for Rone Engineering. He managed projects, assigned field work, assigned laboratory testing, compiled the information together, wrote reports, and submitted them to the project manager. n45 Those were also called geotechnical reports. n46 He worked on soil reports on the various projects relating to subdivisions, commercial properties, utilities, roads, and analyzed slope stabilities and did forensic investigations on all types of different projects. n47 Mr. Mansour testified that the study of soils is important with regard to structures because the way engineers design a foundation is based on the soil, the soil structure and interaction. For example, if a soil has low to

moderate expansion, the engineering does not require as much enforcement and requires less depth than if a soil is highly expansive. n48 Mr. Mansour testified that geology plays [**35] a role in determining soil behavior and the engineering and geotechnical engineering is the cross-over between geology and engineering. n49 That is what Mr. Mansour is trained to do by both education and experience.

- - - - - Footnotes - - - - -

- n39 3RR 82.
- n40 3RR 82-83.
- n41 3RR 83-84.
- n42 3RR 84.
- n43 3RR 85.
- n44 3RR 85.
- n45 3RR 86.
- n46 Id.
- n47 Id.
- n48 3RR 87.
- n49 3RR 87.

- - - - - End Footnotes- - - - -

[*20] In approximately 1996 and 1997, Mr. Mansour also did foundation inspections as well as engineering. n50 Since 1985 his involvement in the engineering field has been substantial which included preparing for an examination with the Board of Engineers in which he had to have completed at least 800 jobs that he had done for Rone Engineering and he had done up to 3000 to 4000 jobs relating to geotechnical and specifically relating to residential foundation evaluations. n51 Currently, Mr. Mansour is a junior partner with Syntec Engineering Group, Inc. and has been with the [**36] company since 2002. n52 For Syntec, Mr. Mansour does geotechnical investigations, forensic investigations, and foundation evaluations. n53 He does this type of forensic investigation for insurance companies, attorneys and homeowners. n54

- - - - - Footnotes - - - - -

- n50 3RR 87-88.
- n51 3RR 89.
- n52 3RR 89.
- n53 3RR 89.
- n54 3RR 90.

- - - - - End Footnotes- - - - -

2. Mr. Mansour's investigation.

Mr. Mansour made an appointment with the Hamiltons. He visited their house on December 31, 2003, inspected the cracks, performed an elevation survey, took soil samples, reviewed Perdue's report, and analyzed the information. n55

- - - - - Footnotes - - - - -

- n55 Plaintiffs' Ex. 20; 3RR 90-91.

- - - - - End Footnotes- - - - -

Mr. Mansour indicated, much like Perdue, that the house was built in 1972 and that the Hamiltons had been living in the house for 12 years. n56 Before the Hamiltons bought the house, there was a report [**37] by an engineer saying that the west side of the house needed underpinnings. There were some pre-cast piers put in, but this was all done before [*21] the Hamiltons bought the house. n57 Previously, water had come in from the east side of the house, but the Hamilton's had fixed that problem approximately ten years ago in 1994 by putting in a French drain and by installing a concrete skirting. n58 Additionally, there were landscaping changes in that a tree had been taken down because it was dead. n59 There was a leak in the hallway bathroom in 2002, but there was no fix to the problem. n60

- - - - - Footnotes - - - - -

n56 3RR 93-94.
n57 3RR 97.
n58 3RR 97-99.
n59 Id.
n60 3RR 96.

- - - - - End Footnotes- - - - -

Mr. Mansour personally observed the hole and the leak in the living room of Hamiltons' home. n61 The Baker Brothers, the plumbers who came out to the house, had done two reports-one in October 14 and another on October 22, 2003. n62 The Baker Brothers found three leaks, one in the water supply line, one at the master cutoff, [**38] and two leaks in the sewer system, one of them was the leak in the living room. n63

- - - - - Footnotes - - - - -

n61 3RR 92; Plaintiffs' Ex. 36, pictures 45 and 46.
n62 3RR 101.
n63 3RR 101.

- - - - - End Footnotes- - - - -

Mr. Mansour noted that this house suffered from four plumbing leaks. n64 In fact, State Farm's own report upon which it relied found three plumbing leaks. n65 When the leak was uncovered in the living room after an excavation was conducted, two feet of water was found and a corroded, deteriorating, cast-iron metal pipe with holes in it was found. n66 The Baker Brother's plumbers tunneled two feet into the Hamiltons' living room and found the standing water. n67

- - - - - Footnotes - - - - -

n64 3RR 100-110.
n65 Plaintiffs' Ex. 36; 3RR 101.
n66 4RR 212; 217; Plaintiffs' Ex. 20, picture 44.
n67 Id.; 3RR 107.

- - - - - End Footnotes- - - - -

[*22] Mr. Mansour did external borings to determine [**39] the depths of

rocks for remediation and he did a boring at the southeast corner of the house and at the northwest corner of the house. He found there was fill material on the northwest side. He also found that the moisture content was consistent in both borings and there was not any indication of moisture content variation that would produce a four inch tilt in the slab. n68

- - - - - Footnotes - - - - -

n68 3RR 128.

- - - - - End Footnotes- - - - -

Plate # 2 on Mr. Mansour's report showed the area of stress signs as a result of a foundation problem. n69 This evidence was uncontradicted at trial. Mr. Mansour also testified at trial that this was the direct area influence of the leak. It is represented by the stress signs as shown and this is the direct area affected by the plumbing leak. n70

- - - - - Footnotes - - - - -

n69 3RR 130; Plaintiffs' Ex. 20; Plate # 2.

n70 3RR 130; Plaintiffs' Ex. 20; Plate # 2.

- - - - - End Footnotes- - - - -

[40] 3. Mr. Mansour's opinions.**

a. Plumbing leaks can cause differential foundation movement and Mansour's opinion did not change.

Mr. Mansour wrote in his report that Plumbing leaks can cause differential foundation movement:

Plumbing leaks can cause differential foundation movant in several ways depending on the initial soil moisture and density conditions.

Excess water, which the soil could not absorb due to its high moisture content, migrates vertically 'downward' and horizontally to less saturated clay and causes it to expand as well.

If the soil is wet or loose, the excess water may cause the clay fill to settle. Settlement can also occur when the soil becomes saturated and lose strength...Heave or settlement due to underground plumbing leaks tend to be localized and close to the source of the leak rather than along the perimeter of the house.

[*23] It should be noted, however, the localized movement does not necessarily have to be where the leak was detected. Often times the water will migrate in the plumbing trenches, which are typically granular materials or undercompacted, loose clay soils and either wash away the fine granular soils or [****41**] cause the expansive clay soils to swell.

At the time the observations were made, differential movement has occurred causing brick veneer and mortar separations in the house

exterior, sheet rock cracks, out of alignment doors, and sloping floors inside the residence.

Based on a visual observation and review of the available information, we conclude that the plumbing leak contributed to the foundation movement. n71

- - - - - Footnotes - - - - -

n71 Plaintiffs' Ex. 36, p. 6-7.

- - - - - End Footnotes- - - - -

Mr. Mansour consistently testified that the plumbing leak caused the foundation problems. Although State Farm attempted through cross examination to challenge his opinion, Mr. Mansour's opinion never changed on that issue. Mr. Mansour testified to the "area of influence" at trial and in his report that was caused by the plumbing leak. n72 The "area of influence" testimony is similar to an insurance expert that testified about the "area of influence" from a plumbing leak. See *State Farm v. Blacklock*, *2.

- - - - - Footnotes - - - - -

n72 3RR 130; Plaintiffs' Ex. 20, Plate # 2.

- - - - - End Footnotes- - - - -

[**42]

b. The house was built on cut and fill. When high moisture content is introduced by a plumbing leak, soil movement will occur in fill soil.

The house was built on a cut and fill site. n73 Standing water was noted in the plumbing excavation in the living room and the soil moisture content from the soil samples that Perdue had conducted indicates extremely wet soil. n74 In fact, according to [*24] Perdue's report, settlement would occur at such high moisture content. n75 More visual observations and the moisture content on the sub-grade soils indicate no recent heave related movements along the east side of the house. The photographs depict no friez board separations at the southeast corner. There was no brick separation along the entire east side of the house. The soil sample tests collected from the southeast corner by Perdue representatives indicated the difference between moisture content and the p.l. was 1% (not even moist).

- - - - - Footnotes - - - - -

n73 P's Ex. 36, p.3; 3 RR 128.
n74 Plaintiffs' Ex. 20, p. 8(d).
n75 Id.

- - - - - End Footnotes- - - - -

[**43]

Mr. Monsour noted that the assumption that clay soil must heave when its moisture content increased is overly simplistic. The majority of structural, geotechnical engineers and foundation repair contractors in the Dallas/Fort

Worth area believe one of the following scenarios could take place in cases of plumbing leaks: (1) if the soils are expansive and were drier than optimum prior to the leak and are high density, the foundation/slab will heave (move upward) in the vicinity of the leak and corresponding damages will be apparent in the structure; (2) if the soil is at optimum density and moisture prior to the leak, there is an opportunity for the soil to contract. It is possible, but not probable, that the slab will retain its original elevation profile because the clay soil expansion/contraction generally does not follow a linear progression as moisture is added and then reduced. The slab could be permanently left above or below its initial elevation; and (3) should a leak occur under the slab where the soil is of very low density, the additional moisture often lubricates the solid clay particles and causes consolidation [*25] of the support soil prior to leak repair. After [**44] the leak is repaired under this example, the slab will often dish or settle (move downward) even more.

c. Excessive water in soil at plumbing leak site corresponds to the floor/slab elevation changes at the spot with a pattern of distress.

Perdue's representatives noted the presence of standing water in the plumbing excavation a week after the plumbing repairs (October 16, 2003). Standing water was noted on December 31, 2003 (2.5 months later). Soil analysis suggests the soil was extremely wet (moisture content was 41% or 21% above the p.l.) at the repaired leak location. The presence of standing water suggests the soil surrounding the leak existed in a wet condition.

There was no indication of dry soils to suggest that the shrinkage due to moisture loss had caused the foundation settlement at the west side of the house. The driest soil samples obtained during Perdue's investigation were only 1% below the p.l. and could not possibly cause the four inch drop in the foundation elevations.

Comparison of the locations of the identified plumbing leaks (where the ponding water was located) correspond with the floor/slab elevation changes and with the pattern of the distress signs [**45] reveal significant foundation movement near the plumbing trenches and in the zone of correlating distress signs (Plates # 2, # 3 and photographs).

Mr. Mansour's soil sample at the living room leak showed high moisture content with the difference between the moisture content and the P.L. was 21%. n76

- - - - - Footnotes - - - - -

n76 P's Ex. 20; p. 4.

- - - - - End Footnotes- - - - -

[*26] Further, Perdue noted standing water in the living room excavation hole a week after the plumbing repairs (October 16, 2003). Standing water was still present two months later on December 21, 2003 as noted by Mr. Mansour. n77

- - - - - Footnotes - - - - -

n77 P's 20, p. 9

- - - - - End Footnotes- - - - -

d. Foundation problems at plumbing leak site and west where gravity and fill would have an effect.

Mr. Mansour found foundation problems at the site of the leak in the living room and at the west side of the house. n78 Further, Mr. Mansour testified that [**46] there was an extreme amount of moisture found in the soil samples in the area of the leak and as a result of the soil composition of the fill on the west side, naturally caused the foundation problems in the area of influence. n79 This water will cause soils to shift resulting in differential movement of the super structure. n80 If water is introduced to fill soil, the soil will settle. n81 State Farm did not contradict this testimony. Mr. Mansour's elevation report showed sharp changes within a short distance from the plumbing leak site. n82 There was also damage to the house at the leak site. n83 Further, there were cracks on the western side of the house that were previously sealed, but cracked and reopened after the leak. n84 The house could tilt from fill soil on the west where settlement would occur and naturally. This testimony was similar to the expert in *State Farm v. Blacklock*, which was found to be sufficient.

- - - - - Footnotes - - - - -

n78 3RR 128-29; Plaintiffs' Ex. 20, Plate # 2.
n79 Id.
n80 Plaintiffs' Ex. 20, p. 10.
n81 3RR 142.
n82 3RR 146-149.
n83 3RR 190.
[**47]

n84 3RR 194.

- - - - - End Footnotes- - - - -

[*27] **e. Timing of foundation problem relate to the plumbing leak.**

The Hamiltons reported no foundations problems since they owned the home until after the plumbing leak. n85

- - - - - Footnotes - - - - -

n85 3RR 98; Plaintiffs' Ex. 20, p.2.

- - - - - End Footnotes- - - - -

f. Mr. Mansour eliminates other possible causes.

(i) Possible cause of house foundation based on vegetation on west side of house rejected because soil moist.

Mr. Mansour testified at trial that it is important to rule out other possible causes of the foundation problem. n86 A house's foundation can sink in clay soil if the soil becomes dry possibly from vegetation. But this possibility could not have happened because soil samples showed the soil was moist. n87 The tree on the west side had been removed. Soil samples from the north and south side which also had vegetation were moist. n88 Further, there were no reported foundation problems during any period of time. [**48] In fact, in the past

there was more vegetation, not less, and there was no reported foundation problem. Therefore, this alleged cause was easily ruled out.

- - - - - Footnotes - - - - -

n86 3RR 114
n87 Plaintiffs' Ex. 20; 3RR 170; 172.
n88 3RR 116-117; Plaintiffs' Ex. 36.

- - - - - End Footnotes- - - - -

(ii) Excessive water on east side of house rejected because dry soil sample found on east side and no reported foundation problems for 10 years based on alleged excessive water on the east side.

Once again, the Hamilton's house had no foundation problems for approximately ten years after the water problems on the east side were fixed. The problem with [*28] excessive water was taken care of long ago by a French drain and by a concrete skirt. Further, George Perdue & Associates own soil sample showed the lowest moisture content. n89 As such, the alleged east side problem had to be rejected. Further, none of the soil samples taken by Perdue were dry enough to cause the foundation problem. n90 This opinion was not challenged at trial or contradicted. [**49]

- - - - - Footnotes - - - - -

n89 3RR 198; P's Ex. 36, p. 8-9; 4 RR 73 (Clem Bommarito's testimony).
n90 P's Ex. 20, p. 9.

- - - - - End Footnotes- - - - -

(iii) Perched ground water.

This contention was easily rejected because the geological and geographic location of the house is not known to have experienced foundation failures relative to subterranean water. n91 In that area, perched ground water is too deep to affect home foundations and must be ruled out. n92

- - - - - Footnotes - - - - -

n91 P's Ex. 20, p. 9; 3RR 124.
n92 Id.

- - - - - End Footnotes- - - - -

Finally, Mansour concluded in his report that the water introduced into the foundation by the confirmed drain line leaks caused the underlying foundation soils to shift, resulting in differential movement of the superstructure.

E. There is legally and factually sufficient evidence to support Mansour's opinions.

State Farm incorrectly sets the stage [**50] for the level of proof required as to causation. In order to recover against an insurance carrier, a plaintiff is required to present some evidence upon which the jury can allocate the damage attributable to the covered cause. *McClelland*, 189 S.W.3d at 851. Although a

plaintiff is not required to establish the [*29] amount of his damages with mathematical precision, there must be some reasonable basis upon which the jury's finding rests. *Id.*

State Farm would have this Court hold the Hamiltons to explicitly prove what is solely attributable to the covered cause. Rather, the case law only requires that there be some evidence that provides a reasonable basis for the jury's finding. *Id.*; see also *State Farm v. Rodriguez*, 88 S.W.3d 313, 321 (Tex.App.-San Antonio 1999, pet. denied). In addition, the Supreme Court in *Travelers Indem. Co. v. McKillip*, 461 S.W.2d 160, 162, 14 Tex.Sup.Ct.J. 363 (Tex. 1971) explicitly stated that it is essential that the insured produce evidence which will afford a reasonable basis for estimating the amount of damage or the proportionate part of damage caused by a risk covered by the insurance policy. [**51] *Id.* at 163.

In *McLelland*, the court of appeals noted that the homeowner's expert appeared to backtrack on cross-examination. The court stated that the jury was able to believe all or any part of the testimony of any witness and disregard all or any part of the testimony of any witness. *McLelland*, 189 S.W.3d at 851; *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 774-75, 46 Tex.Sup.Ct.J. 1133 (Tex. 2003). The *McLelland* Court, in looking at all of the evidence, stated it must review the evidence in the light most favorable to the verdict and that the homeowner's expert's testimony constituted evidence which provided a reasonable basis upon which the jury could have found that 80% of the damage to the house was due to the plumbing leaks.

Likewise, in this case, Mr. Mansour reviewed additional causes such as a slope of the hill, possible vegetation, soil samples and other small factors could contribute to the [*30] additional damage. He referred to other damage as "collateral damage." n93 It is the collateral damage that Mansour contended was not caused by the plumbing leak. Further, it is hard to see why State Farm [**52] is complaining about the Hamiltons' expert opinion when his opinion actually reduces the amount of their recovery. As such, the jury was free to accept some or all of that testimony.

- - - - - Footnotes - - - - -

n93 3RR 130; Plaintiffs' Ex. 20, Plate # 2.

- - - - - End Footnotes- - - - -

III. There is legally sufficient evidence to support the award of damage repairs.

Mr. Mansour not only has a Master's in geotechnical engineer, he also has a degree in structural engineering.

In its brief, State Farm does not cite a single case to support its contention that Mr. Mansour's opinions are legally insufficient. Mr. Mansour included in his report a plan of repair. n94 Mr. Mansour testified that he designed a method to repair the house as a result of the plumbing problem. He recommended, based on his professional opinion, experience and examination of the property, that piers in the proper locations were needed to support the house. n95 In order to fix the problem as a result of the area of influence, he did not recommend any other way to repair the house. n96 [**53] Mr. Mansour

testified that the piers have to be drilled, shaft piers. He testified that the shafts have to be at least twenty feet below ground and that they should be designed based on 32 pounds per square foot and that they should be built on beams. n97 Mr. Mansour specifically testified that piers were needed to repair the house because the house was out of correction on the west side, that [*31] the house had to be lifted up. n98 He further testified that you cannot lift the house from the outside and that since the house was on a slab foundation, there must be very little inertia so the slab can bend. In order to support the west side he analogized it to a table and that you would have to pier both under the other areas as well as the west side. That is why you need the interior piers. n99 He testified there is an enormous amount of water underneath the house and eventually it is going to dry up and as it dries up, the house will dish back again. n100

- - - - - Footnotes - - - - -

n94 Plaintiffs' Ex. 36.
n95 3RR 130-131; Plaintiffs' Ex. 20, Plate # 4.
n96 3RR 131.
n97 3RR 131.
n98 3RR 132.
[**54]

n99 3RR 132.
n100 Id.

- - - - - End Footnotes- - - - -

On page 32 of its Appellant's Brief, State Farm contends that this is the portion of testimony that was struck by the trial court. That is absolutely incorrect. The trial court did not strike Mr. Mansour's opinions on that issue and State Farm's reference to 3RR 8-9 does not support that contention. Rather, the trial court disallowed the portion of testimony that the water had oozed all over the place as the trial court put it. Rather, what Mr. Mansour testified to was there was an enormous amount of water under the house and in the area of influence. This testimony was uncontradicted at trial below and is supported by soil samples that Perdue took. State Farm alleges that Mr. Mansour's opinions are based on the opinion that water leaked all over the place. That is incorrect. Mansour did not testify to that. As stated above, Mr. Mansour testified that the foundation had a tremendous amount of water underneath it. That opinion was not challenged below and is not challenged on appeal.

[*32] State Farm did not present a controverting structural engineer to [**55] counter Mansour's opinions. Certainly, his opinion to stabilize the foundation was necessary given the state of the house. This Court should reject State Farm's point on this issue.

IV. There was sufficient evidence concerning the jury's answers to Questions Nos. 3 and 5 (extra-contractual liability).

In Jury Question No. 3, the jury was asked whether State Farm engaged in any unfair or deceptive act or practice that caused damage to the Hamiltons. The jury was instructed that failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim when the insurer's liability

has become reasonably clear constituted an unfair or deceptive practice. Likewise, the jury was also instructed that refusing to pay a claim without conducting a reasonable investigation of the claim also constituted a violation. n101

- - - - - Footnotes - - - - -

n101 12CR 3083-3084.

- - - - - End Footnotes- - - - -

In Jury Question No. 5, the jury was asked whether State Farm had failed to comply with its duty of good faith and fair dealing. The jury was [**56] given the same two instructions as mentioned above in Jury Question No. 3. The jury answered "yes" to both Jury Question No. 3 and Jury Question No. 5.

A. Case law relating to extra-contractual liability.

The common law duty of good faith and fair dealing is breached when an insurer denies or delays payment of a claim after liability has become reasonably clear. *Universal Life Ins. Co. v. Giles*, 950 S.W.2d 48, 56, 40 Tex.Sup.Ct.J. 810 (Tex. 1997). Within this duty is an insurer's obligation to conduct an adequate investigation of the [*33] claim. See *State Farm Lloyds v. Nicolau*, 951 S.W.2d 444, 449, 40 Tex.Sup.Ct.J. (Tex. 1997). An insurer's reliance on an expert's report will not support a finding of bad faith unless it is shown that the report was not objectively prepared or the insurer's reliance on the report was unreasonable.

Each case must be measured by its own facts, and considerable discretion and latitude must be given to the jury's award. *Weidner v. Sanchez*, 14 S.W.3d 353, 372 (Tex.App.-Houston [14th Dist.] 2000, no pet.). As the fact-finder, the jury is free to evaluate and accept or reject the testimony [**57] it hears. *Dico Tires v. Cisneros*, 953 S.W.2d 776, 791 (Tex.App.-Corpus Christi 1997).

In considering and weighing the evidence, appellate courts defer to the fact-finder as the final determiner of the credibility of witnesses and the weight to give their testimony. See *SunBridge Healthcare v. Penny*, 160 S.W.3d 230, 247 (Tex.App.-Texarkana 2005). Conflicts in the evidence and inferences to be drawn from them are for the jury to resolve. *Dico Tire*, 953 S.W.2d at 791; *Hughes v. Thrash*, 832 S.W.2d 779, 786 (Tex.App.-Houston [1st Dist.] 1992, no writ). As long as sufficient probative evidence exists to support the jury's verdict, courts cannot substitute their judgment for that of the jury. *SunBridge*, at 248 & n. 11; *Dico Tire*, 953 S.W.2d at 972.

The question of whether an insurer's liability has become reasonably clear presents a fact issue for the jury. *Giles*, 950 S.W.2d at 56. Whether an insurer acted in bad faith because it denied or delayed payment of a claim after its liability became reasonably clear is also a question for the fact finder. *Id.*

[*34] **B. A comparison [**58] of this case to this Court's opinion in *Mainwaring*.**

This Court recently had an opportunity to address additional damages for insurer being liable for relying on engineer to support its decision to deny a homeowner's claim that a foundation was damaged to a plumbing leak. See *USAA v. Mainwaring*, 2005 Tex.App.LEXIS 2161 (Tex.App.-Dallas 2005, pet. denied). In

Mainwaring, the insurer allegedly denied its claim in part by relying on an outside engineering expert, Mr. Porter. This Court found there was sufficient evidence to support the jury's finding that USAA had breached its obligations under the insurance code. To support its holding affirming the jury's finding, this Court looked to the fact that Porter concluded that the trees had desiccated the soil under the house and this drying affect had contributed to the foundation damage. However, Porter admitted that he had not performed a test to determine the actual effect of the trees on the foundation.

Likewise, Perdue & Associates concluded that vegetation caused the soil on the west side of the house to be dry. However, they performed no soil tests on the west side. In fact, a tree had been removed. Also, [**59] this was in direct contradiction to the soil samples Perdue took on the north and south side which, likewise, had vegetation but also had moist soil. Additionally, Mansour took soil samples from the northwest side of the house, which indicated there was moist soil.

Next, in Mainwaring, this Court stated the jury heard evidence from which it could have inferred that USAA acted unconscionably. USAA never informed the Mainwaring's of the relationship between the insurance company and the two engineers. Both of these engineers admitted that USAA frequently retained them to investigate [*35] foundation claim. Evidence of each engineer's conclusion in similar foundation claim investigations over the twelve month period preceding the trial was presented to the jury. The Court held that there was evidence that the jury could have inferred that neither one of USAA's experts were totally objective.

Likewise, in this case, State Farm never revealed that it had hired George Perdue & Associates 1,440 times in the last four years and paid George Perdue & Associates over \$ 3.3 Million during that time and that more than 50% of George Perdue and Associates business was from State Farm. [**60] n102 The jury was free to infer, like in Mainwaring, that Perdue was not going to offer an objective report. In fact, George Perdue had testified 48 times, all for the insurer. n103 Further, reference was made at trial that George Perdue had rendered 240 other reports, none of which were in favor of the insured arising from a plumbing leak in a foundation case. n104

- - - - - Footnotes - - - - -

n102 4RR 194.
n103 4RR 189-90; Plaintiffs' Ex. 41.
n104 4RR 198.

- - - - - End Footnotes- - - - -

In Mainwaring, not only did this Court find that the evidence cited above constituted the violations of the Insurance Code, this Court also found that it constituted a knowing violation. In this case, the Hamiltons are simply requesting that this Court affirm the jury's finding that State Farm failed to comply with its duty of good faith and fair dealing by failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of the claim when the insurer's liability became reasonably clear and failing to pay a claim without conducting [**61] a reasonable investigation of the claim.

[*36] **C. Additional supporting facts.**

There are further facts that support the jury's findings:

1. Perdue and State Farm did not rule out other possibilities.

Neither State Farm nor Perdue's experts ever stated another basis for the foundation problem. They are required to eliminate all other issues, then the actual factor could be the plumbing leak. In other words, Mr. Mansour testified that one has to make sure that none of the other alleged problems caused the foundation problem. n105

- - - - - Footnotes - - - - -

n105 3RR 114.

- - - - - End Footnotes- - - - -

2. Perdue and State Farm stated the east side of the home was wet, but their soil samples showed it was dry.

The fact of the matter is that State Farm and Perdue had absolutely nothing to support their contention that the east side was wet. In fact, their soil samples contradict this contention. First, years ago the home had a French drain put in, thereby effectively removing the water. No one opined differently that it did not have that effect. [**62] Secondly, the soil samples actually taken on the east side of the home showed that the soil was the lowest in moisture and the east side was actually the driest-directly contradicting the conclusions of Perdue. Mark Ogle testified that he read the report and determines whether it makes sense, but the soil samples directly conflict with Perdue's conclusion that the east side was wet. n106

- - - - - Footnotes - - - - -

n106 3RR 114-116.

- - - - - End Footnotes- - - - -

[*37] **3. Perdue and State Farm had no soil samples on the west side of the house to support their contention that the west side of the house was dry.**

Perdue and State Farm had no soil samples from the west side of the house to support their conclusion-none at all. Mr. Mansour was severely critical of Perdue and State Farm's conclusion on this bases because they had no soil sample to support their contention that the soil was dry on the west side. State Farm and Perdue's conclusion was completely unsupported by any soil samples. Further, Mr. Mansour did take soil samples from the northwest side [**63] of the house and those were moist. n107

- - - - - Footnotes - - - - -

n107 3RR 172, 173, 175.

- - - - - End Footnotes- - - - -

Perdue and State Farm concluded that the west side of the house was drier because the vegetation sucked up the water. However, the north and south side also had vegetation. But, Perdue took soil samples from the north side and the

north side was moist. So, Perdue's conclusion made absolutely no sense. If the bushes on the front of the house and north side of the house did not suck up the water, but the bushes on the west side sucked up the water, as Mr. Mansour testified: "It just doesn't add up." n108

- - - - - Footnotes - - - - -

n108 3RR 116-117.

- - - - - End Footnotes- - - - -

4. Perdue and State Farm says flow tests support their contention that the plumbing leak did not cause the problem, but there was no flow test on the living room leak.

On page 14 of the Perdue report stated that flow tests showed no loss of water [**64] from the leaks. That was completely not true. They did no flow tests on the pipe that leaked in the living room. There is absolutely no evidence to support that conclusion. n109

- - - - - Footnotes - - - - -

n109 3RR 117.

- - - - - End Footnotes- - - - -

[*38] 5. Perdue and State Farm's conclusion of no liability is not supported by facts.

Perdue made the conclusion that moist soils have not generated sufficient volume to heave the slab. There was moist soil in all of the areas and the driest soil was on the east side directly contradicting Perdue's conclusion. n110 The house was very much out of level, four inches for this type of house. n111

- - - - - Footnotes - - - - -

n110 3RR 119.

n111 3RR 116.

- - - - - End Footnotes- - - - -

6. Perdue and State Farm's conclusion that the house being four inches out of level is acceptable.

Perdue and State Farm's conclusion that the house being four inches off level was acceptable conflicts [**65] with the Federal Housing Authority requirements to accept slab differentials and elevation. n112

- - - - - Footnotes - - - - -

n112 3RR 120; Plaintiffs' Ex. 36, p. 8-moisture content.

- - - - - End Footnotes- - - - -

7. Perdue and State Farm fail to identify stress signs.

The Perdue report does not even state where the distress signs of the house are located. n113 In contrast, Mr. Mansour did state where the distress signs were located. Mr. Mansour placed it in his report under Plate # 2. n114 Perdue tried to explain the presence of the water in the excavation site where there was a rotted, deteriorated cast-iron pipe with holes was based on fresh ground water seepage. n115 Mr. Mansour said Perdue and State Farm overlooked the obvious plumbing leak, the water from the deteriorated cast-iron [*39] pipe with holes in it to reach a conclusion that was not consistent with the geological soil and rock formation for the area. n116

- - - - - Footnotes - - - - -

n113 3RR 123; Plaintiffs' Ex. 36.

n114 3RR 123-124.

[**66]

n115 3RR 124.

n116 3RR 124.

- - - - - End Footnotes- - - - -

8. The face of the report had problems with the honesty of the report. n117

- - - - - Footnotes - - - - -

n117 3RR 124-125.

- - - - - End Footnotes- - - - -

The jury heard evidence that Perdue and State Farm were under an obligation to fairly report under the fair reporting authorities, such as the American Society of Civil Engineering and the Texas Society of Professional Engineers. n118 Areas of irreconcilable conflict of the Perdue report, which should have been readily apparent to State Farm given their alleged vast experience with handling foundation claims, were found on the face of the Perdue report. Part of the fair reporting authority's obligation is if the underlying data does not meet with the conclusions, then the conclusions must be challenged. Another obligation is to eliminate all other possibilities that could have caused the problem. At trial, Mr. Mansour testified that Clem Bommarito's report did not fairly and honestly [****67**] depict the facts. n119

- - - - - Footnotes - - - - -

n118 3RR 113. Additionally, Mansour relied on Treatises such as *Criteria for Selection of Residential Slabs-On Ground*, Report No. 33 to the Federal Housing Administration, Publication 1571, National Academy of Science/Washington D.C./1963 and *Practical Foundation Engineering Handbook*, Robert Wade Brown, Second Edition.

n119 3RR 110; Plaintiffs' Ex. 32.

- - - - - End Footnotes- - - - -

Further, in reaching the conclusion that the Perdue report was not a fair and honest report, one must look at some of the various obvious factors, such as: there is a lot of water under the house. As an engineer, one must eliminate

other causes before reaching a conclusion. Both Mr. Mansour and Perdue agree that there is a lot of water under the house.

[*40] In sum, the jury heard overwhelming evidence in which to conclude that State Farm hired a biased engineering firm to reach the conclusion that denied liability. The jury heard evidence that Mark Ogle, the State Farm veteran, could read a report and determine [**68] whether it seemed fair and honest. Mark Ogle was presented with a report that on its face had direct conflicts and did not make sense. There was more than enough evidence to support the jury's findings to Questions Nos. 3 and 5.

V. There was sufficient evidence of mental damages.

A. Standard of review

An appellant attacking the legal sufficiency of the evidence of an adverse finding on which it did not have the burden of proof must demonstrate that there is no evidence to support the adverse finding. *Bankston Ford of Frisco v. Rouse*, 2005 Tex.App.LEXIS 6507, *3 (Tex.App.-Dallas 2005, pet. denied)(not designated for publication); *Reagan v. Lyberger*, 156 S.W.3d 925, 927 (Tex.App.-Dallas 2005, no pet.). The court of appeals must view the evidence in the light most favorable to the verdict, crediting favorable if reasonable minds could, and disregarding contrary evidence unless reasonable jurors could not. *City of Keller v. Wilson*, 802, 48 Tex.Sup.Ct.J. (Tex. 2005). If there is more than a scintilla of evidence to support a finding, the court will not reverse the trial court's judgment. *Reagan*, 156 S.W.3d at 927. [**69]

Mental anguish is defined as "intense pain of body or mind or a high degree of mental suffering." *Tex. Farmers Ins. Co. v. Cameron*, 24 S.W.3d 386, 394 (Tex.App.-Dallas 2000, pet. denied). It is more than mere worry, anxiety, vexation, anger, disappointment, or embarrassment. *Id.* To recover for mental anguish, the plaintiff must [*41] prove such painful emotions as grief, severe disappointment, indignation, wounded pride, shame, despair, or public humiliation. *Id.* An award of mental anguish damages can survive a legal sufficiency challenge when a plaintiff has introduced direct evidence of the nature, duration, and severity of her mental anguish. *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 444 (Tex. 1995). Such evidence can take the form of the claimants' own testimony. *Id.*

In this Court's opinion in *Texas Farmers Insurance Co. v. Cameron*, Ms. Cameron testified that she was terrified by an accusation of having committed arson. She walked the floor and could not sleep and had prescription medication. It reduced her participation at church. This Court held that this was legally sufficient evidence to support the jury's award of mental [**70] anguish damages in the amount of \$ 336,000.00. Likewise, this Court's opinion in *Bankston* held that Mr. Rouse testified that when a van had been reposed he felt panicked because his parent's were depending upon it to pick up their children, that he lost nights of sleep and that he began having marital and financial problems. They ultimately separated and filed for divorce.

The facts in this case are much stronger than those in either *Bankston* or in *Texas Farmers*. Both Mr. and Mrs. Hamilton testified to the detailed, severe mental anguish that they were suffering. The Hamiltons felt the severity deep in their stomachs, making them sick, needing prescription medication for depression, having an adverse effect on their marriage, having adverse effects

on their financial condition, contributing to their fear of health problems, sleepless nights, anxiety, crying, unable to function as they had [*42] prior to this incident not only on their overall life but in their day-to-day activities, and that all of these emotions were severe.

The evidence in this case far exceeds the evidence previously found by this Court to be sufficient to sustain mental anguish damages in both [*71] *Bankston* and in *Texas Farmers*. This Court should affirm the judgment of the trial court.

Terry Hamilton testified at trial that he was a 55 year old man who was forced to retire from Lucent Technologies because of congestive heart failure in 2001. n120 He had a heart-transplant operation in 2002 and he is not doing well now and he is permanently disabled. n121

- - - - - Footnotes - - - - -

n120 4RR 205-207.
n121 4RR 207.

- - - - - End Footnotes- - - - -

In 2002, the Hamiltons' house sustained a water leak and they told State Farm, who called Mesquite Plumbing to come out to the house to fix the leak. n122 However, the leak was not fixed.

- - - - - Footnotes - - - - -

n122 4RR 208.

- - - - - End Footnotes- - - - -

In September of 2003, State Farm came out again as a result of the foundation problems. n123

- - - - - Footnotes - - - - -

n123 4RR 211.

- - - - - End Footnotes- - - - -

[**72]

State Farm then called the Baker Brothers, who came out to the house on October 6, 2003. n124 The Hamiltons had problems with the living room and when the Baker Brothers' plumbers opened a hole in the living room floor, Mr. Hamilton saw about a foot and a half of water in the hole. He viewed the water and corroded, deteriorating pipe with his very own eyes. The plumbers pumped the water out that day, retrieved their [*43] camera, and tried to fix the pipe. n125 Baker Brothers said they had fixed the leak and said they would be back in three days to fill the hole. The Baker Brothers put a plastic cover over the hole and covered it with plywood. n126 Three days later, the Baker Brothers returned and opened the hole and it was filled with water again. n127 Mr. Hamilton asked the Baker Brothers where the water was coming from and they said ground seepage, but of course it had not rained and the pipe had large holes in it and was corroded. n128 Mr. Hamilton asked the Baker Brothers what they were going to do about it and they said they were not going to do anything about it.

Mr. Hamilton did not want the hole filled back in when the pipe was still leaking. n129 Mr. Hamilton called [**73] State Farm to complain about the water issue, but they never fixed the problem. State Farm sent some engineers out to the house and saw the water and the hole in the living room and then they said there was no leak. n130 Mr. Hamilton knew that was impossible especially in light of the fact that the pipe was cast iron, corroded, deteriorated and had holes, and water had filled in there when it had not rained. n131

- - - - - Footnotes - - - - -

- n124 Plaintiffs' Ex. 33.
- n125 4RR 212.
- n126 4RR 213.
- n127 4RR 213.
- n128 4RR 213.
- n129 4RR 213.
- n130 4RR 213-215.
- n131 4RR 213-215.

- - - - - End Footnotes- - - - -

After faithfully paying his premiums all those years and then when there was a pipe that was corroded and he had water in a hole in the middle of his living room and foundation problems, Mr. Hamilton felt violated when State Farm denied his claim. n132 He felt violated, cheated, and treated unfairly. Mr. Hamilton was extremely worried about [*44] his future. The home was their main asset and he had purchased [**74] insurance to protect it. But now his financial situation was in jeopardy. n133 Mr. Hamilton's feelings had not gotten better over time, they had only gotten worse. The whole thing had been a nightmare and he had been treated for depression and he was concerned about how safe the house was with bacteria given his compromised health condition. n134 Mr. Hamilton has a suppressed immune system because of health-transplant and he was having to fight all the time to try to get this matter resolved. n135

- - - - - Footnotes - - - - -

- n132 4RR 214-218.
- n133 4RR 218-219.
- n134 4RR 220.
- n135 4RR 220.

- - - - - End Footnotes- - - - -

Mr. Hamilton suffered stress, anxiety, and depression of which 90% was caused by this problem. He felt bad, violated, and cheated and it manifested itself in him day-to-day. He lost sleep and worried about this problem daily. n136 Further, this entire problem had caused him worry about his financial safety. His feelings had been constant and on-going daily and all the time it had been sever and that his wife, Johnnie, cries [**75] over it. n137 On multiple occasions, Mr. Hamilton felt very depressed and emotional and was taking medication. When he became depressed, he could not deal with his everyday life. n138 The anxiety, the pressure, and the depression caused Mr. Hamilton to shut down in his everyday life such that he could not function the way he used to and that he could not accomplish daily activities like he used to. n139 The house had not gotten any better and should have been resolved along time ago.

----- Footnotes -----

- n136 4RR 220-221.
- n137 4RR 221-222.
- n138 4RR 222-223.
- n139 4RR 223-224.

----- End Footnotes-----

[*45] As such, when State Farm had violated the insurance code, failed to hire an unbiased expert, failed to prove the claim when it was reasonably clear, refusing to pay a claim without conducting a reasonable investigation, the Hamiltons' damages were clearly caused by State Farm's wrongful activity.

In any event, State Farm failed to object to the charge and, therefore, waived error. See TEX. R. CIV. P. 274; *Harris Cty. v. Smith*, 96 S.W.3d 230, 235-236 (Tex. 2002). [*76]

Johnnie Hamilton testified that that when she received the wrongful denial of the claim and they way it had been handled, she felt violated, hurt, betrayed and let down and that a flood of emotions would come over her-not all at once, but one emotion would come and then another one like a rollercoaster. n140 She testified that she cried herself to sleep because this was her home and she thought it was protected, but the bad emotions were constant, almost daily. She was frustrated and had a sick feeling in the pit of her stomach and she felt the need to vomit. She did a lot of crying. n141 Mrs. Hamilton testified that she was depressed daily and cried every night. More recently, she was crying a couple times a week. She was crying over the loss of her house and its damaged condition. She was worried about how unsafe the house was and the affect on her husband due to his suppressed immune system and worried about him getting sick and dying. She was living in constant fear. She testified she cried two days ago and the severe problems were constant and she felt frustrated and helpless and constantly depressed. Physically, she was in bad shape and this only contributed to her health. She [*77] [*46] was in the hospital for nine days for congestive heart failure and she continually worries about financial issues and being able to have a roof over her head. She had worked for Lucent Technologies for twenty-eight years and was unable to put this matter behind her. n142

----- Footnotes -----

- n140 4RR 263-264.
- n141 4RR 264-265.
- n142 4RR 266-269; 298.

----- End Footnotes-----

The evidence to support the jury's verdict of emotional damages was so overwhelming that when State Farm moved for directed verdict, it led the trial court to state on the record:

You know, actually, hearing this testimony, I was glad I didn't grant the summary judgment motions, so I am going to deny your directed verdict on that. n143

----- Footnotes -----

n143 4RR 299.

- - - - - End Footnotes- - - - -

Since the testimony of the Hamiltons regarding their mental anguish was uncontroverted, the Court of Appeals will conclude [**78] that there is factually sufficient evidence to support the jury's findings and the Court will not set aside the finding of the jury. *USAA v. Mainwaring*, *26; *White v. Sullins*, 917 S.W.2d 158, 162 (Tex.App.-Beaumont 1996, writ denied).

[*47] **PRAYER**

WHEREFORE PREMISES CONSIDERED, Terry and Johnnie Hamilton request this Court affirm the judgment of the trial court in all things, and all other relief to which they are justly entitled to both at law and in equity.

[*48] Respectfully submitted,

/s/ [Signature]
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been forwarded to the following attorneys of record, via Certified Mail, Return Receipt Requested on this 10th day of May, 2007.

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