Opinion issued August 17, 2017

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00791-CV

AMI ASSOCIATION MANAGEMENT, INC. AND

PARC CONDOMINIUM ASSOCIATION, Appellants

V.

DAVID SPRECHER AND LESLIE K. SPRECHER, Appellees

On Appeal from the 333rd District Court
Harris County, Texas
Trial Court Case No. 2010-59445

MEMORANDUM OPINION

This is a dispute over the distribution of property insurance proceeds between a condominium association, its management company, and a condominium owner. In 2008, Hurricane Ike caused substantial damage to the Parc Condominiums in

Houston. The condominiums' management company, AMI Association Management, Inc., filed insurance claims for the costs to repair the damage. AMI contracted with a construction company to perform the repairs, but it ended that contract within a few months due to the contractor's unsatisfactory performance.

David and Leslie Sprecher owned three contiguous condominium units in one of the Parc buildings. AMI's construction contractor began repairs on the Sprechers' units, but the contractor's work was shoddy. After its workers further damaged the units, the Sprechers refused to allow the contractor to enter their units. In September 2010, the Sprechers sued Parc Condominium Association (Parc) and AMI to recover the insurance proceeds so that they could oversee the repairs themselves.

Realizing that its contractor had rendered unsatisfactory performance, AMI and Parc asked the affected unit owners, including the Sprechers, to obtain their own repair estimates for their units. AMI told the Sprechers that it would then provide insurance funds to each unit owner to have the necessary repairs made.

The Sprechers obtained a repair estimate in March 2011 for about $97,000. AMI received the insurance proceeds from the insurance company in that amount in August 2011. AMI tendered the check for the repairs two years later, noting in a cover letter with its tender that the Sprechers had refused earlier tenders. In the meantime, the units were uninhabitable and the cost to make the repairs increased.

The Sprechers amended their suit to claim the increase in costs of repair associated with the delay in remitting the insurance proceeds.

The course of dealings between the parties after Hurricane Ike became the focus of the trial. A jury found that Parc and AMI had unreasonably delayed in paying the insurance proceeds to the Sprechers. It awarded $48,000 in damages, representing the difference in the cost to repair the units on the date the proceeds should have been tendered and the costs to repair them on the date the Sprechers received the proceeds. The jury declined to award lost rental income as damages. The trial court entered judgment on the jury's verdict and awarded the Sprechers their attorney's fees.

On appeal, Parc and AMI contend that (1) the Sprechers lost their standing to sue for the repair costs when they sold their units during the pendency of this lawsuit; (2) Texas law and the governing condominium declarations prohibit a unit owner from receiving insurance proceeds until the covered repairs are actually completed; (3) legally and factually insufficient evidence supports the jury's finding that management unreasonably delayed in tendering the insurance funds; and (4) legally and factually insufficient evidence supports the damages award for the delay in payment. They also challenge the attorney's fee award and the trial court's denial of its counterclaim for attorney's fees. Because the damages award for the delay in tendering the funds is not supported by the evidence, we reverse and remand.

BACKGROUND

The Declaration of Condominium for the Parc Condominiums requires the association board to obtain property insurance "for the full insurable replacement cost of the Common Elements and the Units." The cost of premiums for the policy is a common expense. When a damage event, like Hurricane Ike, involves two or more units, the Declaration requires that any insurance proceeds "be paid to the Board, as trustee . . . to be held in trust for the benefit of the Unit Owners . . . as their respective interests may appear."

The Declaration also holds Parc responsible for contracting "to repair or rebuild the damaged portions of all Units, the Buildings, and the Common Elements substantially and in accordance with the original plans and specifications therefor," using the insurance proceeds held in trust for that purpose.

Efforts to repair after the hurricane

After the hurricane, AMI submitted an insurance claim on the policy, worked with the insurance adjusters, handled the insurance proceeds, and, initially, hired Basic Builders to perform the repairs. The contract with Basic Builders apportioned $51,381.50 of the insurance proceeds for repairing the Sprechers' units.

Basic Builders began making the repairs in February 2009. The Sprechers and other unit owners complained to AMI about the quality of Basic's work. Based on the negative feedback about Basic Builders, AMI terminated Basic Builders and

sought repair estimates from individual unit owners so that AMI "could cut proceed checks to the unit owners to get their units repaired."

In an e-mail to Kathy Sprecher, AMI informed her that "[t]he [i]nsurance would like to settle your dispute and pay for all the repairs." It asked her to submit proposals and invoices for the repairs. Kathy then provided information about the repair cost.

In March 2011, DB General Contractors provided the Sprechers with a formal estimate of $96,828.63 to complete the repairs. The parties dispute when the Sprechers provided the estimate to AMI. In late August 2011, however, an insurance check for $97,000 was deposited into Parc's bank account. Evidence at trial showed that AMI prepared a check payable to David Sprecher the next day, but AMI neither remitted the check nor informed the Sprechers that the funds were available.

Approximately two years later, in September 2013, Parc and AMI's attorney delivered a check for $97,254.45 to the Sprechers' attorney, representing the insurance amount plus interest.

Proceedings in the trial court

The case went to trial in September 2014. During trial, David testified that he and Kathy sold their three units to an investor in "as is" condition for an aggregate price at $183,200.

Before the case went to the jury, the Sprechers nonsuited many of their claims. The trial court granted Parc's and AMI's motions for directed verdict as to the Sprechers' claims for fraud, promissory estoppel, negligence, and negligent misrepresentation but overruled their motions for directed verdict as to the Sprechers' claims for breach of fiduciary duty and breach of contract.

The charge asked the jury: "With regard to the insurance proceeds designated to rebuild or repair the Sprechers' condominium units, if any, did [Parc and AMI] unreasonably delay the payment of such proceeds to the Sprechers or their attorney? The jury answered "Yes" as to both defendants. The damages question predicated on that finding asked the jury:

> What sum of money, if any, if paid now in cash, would fairly and reasonably compensate David and Kathy Sprecher for their damages, if any, that were proximately caused by such unreasonable delay . . .?

The question next asked the jury to find "[t]he difference, if any, between the reasonable cost to rebuild or repair the units on or about the date such proceeds should have been paid in a reasonably timely manner and August 28, 2013 (the date such proceeds were delivered to the Sprechers' attorney)." The jury found the difference to be $48,000.00.

The trial court entered judgment on the jury's damages finding and conditionally awarded the Sprechers their appellate attorney's fees. As to the Sprechers' claim for attorney's fees in the trial court, however, the court held that

the Sprechers had failed to segregate their fees as required by *Tony Gullo Motors I, L.P. v. Chapa*. *See* 212 S.W.3d 299, 313–14 (Tex. 2006). As a result, the trial court ordered a new trial on the Sprechers' attorney's fees incurred through trial "for determination of the proper segregated amount."

In June 2015, after the trial on the Sprechers' attorney's fees, the trial court signed a final judgment awarding the Sprechers damages and attorney's fees based on the jury's findings.

DISCUSSION

I. The Sprechers' sale of the condominium units did not deprive them of standing to bring this lawsuit.

We first consider Parc and AMI's contention that the Sprechers lost their standing to sue when they sold their condominium units.

Standing is a component of subject-matter jurisdiction and may be raised for the first time on appeal. *See Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851 (Tex. 2000); *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443–44 (Tex. 1993). Standing requires a real controversy between the parties that will be determined by the judicial declaration sought. *Wolfe v. Devon Energy Prod. Co., LP*, 382 S.W.3d 434, 443 (Tex. App.—Waco 2012, pet. denied) (citing *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 849 (Tex. 2005)). "[I]ndividual standing contains three elements: (1) the plaintiff must have suffered an 'injury in

fact,' an invasion of a legally protected interest that is concrete and particularized, and that is actual or imminent rather than conjectural or hypothetical, (2) the injury is fairly traceable to the challenged action of the defendant and not the independent action of a third party not before the court, and (3) it must be likely that the injury will be redressed by a favorable decision." *Save Oour Springs All., Inc. v. City of Dripping Springs*, 304 S.W.3d 871, 878 (Tex. App.—Austin 2010, pet. denied) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S. Ct. 2130, 2136 (1992)).

A court may not render an advisory opinion or decide a case that fails to present a live controversy. *Tesco Corp. (US) v. Steadfast Ins. Co.*, No. 01-13-00091-CV, 2015 WL 456466, at *2 (Tex. App.—Houston [1st Dist.] 2015, pet. denied) (mem. op.). A case becomes moot when a party seeks a judgment based upon a controversy that no longer exists or for which the judgment cannot have any practical legal effect. *Robinson v. Alief Indep. Sch. Dist.*, 298 S.W.3d 321, 325 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (citing *Mollinedo v. Tex. Emp't Comm'n*, 662 S.W.2d 732, 738 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.). If a case becomes moot, then the parties no longer have standing to maintain their claims. *David Powers Homes, Inc. v. M.L. Rendleman Co., Inc.*, 355 S.W.3d 327, 334 (Tex. App.—Houston [1st Dist.] 2011, no pet.).

The Sprechers characterize the claim submitted to the jury as a breach of duties that Parc and AMI owed to them, as unit owners, under the Declaration and other governing documents. A condominium declaration forms a contract between the condominium association and the unit owners. *Allan v. Nersesova*, 307 S.W.3d 564, 570 (Tex. App.—Dallas 2010, no pet.). AMI and Parc claim that the Sprechers lost their status as unit owners by selling the units and, as a result, their right to sue under the Declaration.

The Sprechers testified that they sold their condominium units for an "as is" price that amounted to less than half of their investment. David Poynor, their damages expert, testified that the Sprechers would have been required to disclose the unrepaired damage from the hurricane in the seller's disclosure. The Sprechers adduced evidence that the units' diminution in market value occurred because the damage resulting from the hurricane was not repaired before the sale. The jury's findings determined damages sustained during the time frame when the Sprechers owned the condominiums. Because the Sprechers alleged injuries that occurred during their period of ownership and for which they have not obtained relief, we hold that they have alleged a live controversy.

II. The Sprechers were entitled to payment of the insurance proceeds under the TUCA and the Declaration.

Parc and AMI contend that trial court erred in entering judgment on the Sprechers' claim for unreasonable delay in payment of the insurance proceeds. Parc

and AMI rely on language in certain provisions of the Declaration and the Texas Uniform Condominium Act that they interpret as prohibiting unit owners from receiving payment of the insurance proceeds until repairs are completed. *See* TEX. PROP. CODE § 82.111(f).

A. Standard of review

We review the question of statutory interpretation de novo. *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011). When construing a statute, our primary goal is to give effect to the Legislature's intent. *Marcus Cable Assocs., L.P. v. Krohn*, 90 S.W.3d 697, 706 (Tex. 2002). To determine that intent, we begin by looking at the plain and common meaning of the statute's words. *Powell v. Stover*, 165 S.W.3d 322, 326 (Tex. 2005). We consider the statute as a whole and attempt to give effect to all of its provisions, presuming that its language was selected with care and with a purpose in mind. *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010).

We also apply a de novo standard to review an unambiguous contract such as the Declaration. *Chrysler Ins. Co. v. Greenspoint Dodge of Houston, Inc.*, 297 S.W.3d 248, 252 (Tex. 2009) (citing *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996)); *Schwartzott v. Etheridge Prop. Mgmt.*, 403 S.W.3d 488, 498 (Tex. App.—Houston [14th Dist.] 2013, no pet.) ("Condominium declarations are treated as contracts between the parties."); *see also Daly v. River Oaks Place Council of Co-*

Owners, 59 S.W.3d 416, 418 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (explaining that by accepting deed to condominium unit, unit owner accepts terms, conditions, and restrictions in declaration). "In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument." *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex.1983). To achieve this objective, courts consider the entire writing in an effort to give effect to all the provisions of the contract so that none will be rendered meaningless. *Id.*

B. Duty to tender insurance proceeds

According to Parc and AMI's proffered interpretation, section 82.111(f) of TUCA and paragraph 13 of the Declaration prohibit them from tendering insurance funds to unit owners until all repairs are completed, because only then can they determine whether the cost of repairs falls within the amount of insurance proceeds received. Section 82.111 mandates the insurance coverage required for "insurable common elements" to be maintained by a condominium association. *See* TEX. PROP. CODE § 82.111(a)(1), (d). Section 82.111 directs the association's board to designate an insurance trustee, to whom insurance proceeds for any claim of loss under the policy must be paid. *Id.* § 82.111(e). The statute then obliges the insurance trustee to "hold insurance proceeds in trust for unit owners and lienholders as their interests may appear." *Id.* § 82.111(f). Except under circumstances not applicable here, the statute requires that insurance proceeds "be disbursed first for the repair or

restoration of the damaged common elements and units, and unit owners and lienholders are not entitled to receive payment of any portion of the proceeds unless there is a surplus of proceeds after the property has been completely repaired or restored, or the condominium is terminated." *Id.*

Paragraph 13 of the Declaration similarly outlines procedures for managing payment of insurance proceeds following damage to the condominium property. If only one unit is damaged, the proceeds are "paid to the Unit Owner . . . and such Unit Owner . . . shall use the same to rebuild or repair such Unit . . . ." Where two or more units are damaged, "insurance proceeds shall be paid to the Board, as trustee . . . to be held in trust for the benefit of Unit Owners . . . as their respective interests may appear."

Parc and AMI interpret TUCA section 82.111 and Declaration paragraph 13 as prohibiting the Sprechers from receiving the tendered insurance proceeds before the work is completed. This proffered interpretation, however, ignores the requirement, set forth in both the statute and the Declaration, that the insurance trustee hold the funds in trust for the unit owners "as their interests may appear." TEX. PROP. CODE § 82.111(f).

The term "as its interest may appear," is loss-payable language commonly used in insurance policies. *See Old Am. Mut. Fire Ins. v. Gulf States Fin.*, 73 S.W.3d 394, 395 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). It means that the loss

payee—in this case, the unit owner—stands in the shoes of the insured and enjoys the same rights as the insured. *See id.*; *accord SWE Homes, LP v. Wellington Ins. Co.*, 436 S.W.3d 86, 89 (Tex. App.—Houston [14th Dist.] 2014, no pet.); *see also* TEX. PROP. CODE § 82.111(d) (declaring that property insurance policy procured for condominium association must provide that each unit owner is insured person under policy). The jury reasonably could have concluded that Parc and AMI's withholding of the distribution of the insurance proceeds from the Sprechers, who had the same rights as the Board (which was to hold the funds in trust) and an existing interest in those proceeds, does not comply with the statutory requirement that the funds be disbursed for repairs and the Declaration provision that they are to benefit the unit owners.

Applying the language in this case, the Sprechers' interest in the insurance funds sprang into existence when the adjuster assessed the damage that Hurricane Ike caused to their units, estimated the amount of money required to repair that damage, and provided those funds to AMI. Thus, the Sprechers had the right to the insurance proceeds as soon as AMI received them to undertake the repairs that AMI had charged the individual unit owners with completing.

The statutory prohibition on payment addresses situations where surplus insurance proceeds remain after the repair and restoration work has been completed. By then, the insurance trustee has discharged any obligation to the affected unit

owners and it may distribute any surplus proceeds to the unit owners without condition.[1] *See Willow Condo. Owners Ass'n v. Kraus*, 467 S.W.3d 312, 316 (Mo. Ct. App. 2015) (holding, under Missouri's version of Uniform Condominium Act, that surplus insurance proceeds were correctly distributed to all unit owners and not just owners of affected units). That language does not preclude the distribution of insurance proceeds to unit owners so that they can pay for the necessary repairs where the Board and the management company have charged the individual unit owners with making the repairs; it only prohibits the unconditional payment of any surplus insurance funds before the work is done, so that those funds remain available to complete the repairs. Nor does the statute limit the insurance trustee's ability to transfer the insurance funds to either the Board, a management company, a unit owner, or a contractor; rather, it only requires that the funds be used for the repair and restoration of the covered property. We hold that neither section 82.111(f) of the Property Code nor Paragraph 13 of the Declaration prevented Parc or AMI from tendering the insurance proceeds to the Sprechers as a matter of law. Instead, whether the delay in tendering the insurance proceeds breached the Declaration's requirements presented a fact issue for the jury to consider.

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[1] Its counterpoint applies in cases where the cost of repair or replacement exceeds the amount of insurance proceeds available. The statute makes clear that cost is "a common expense, and the board may levy an assessment to pay the expenses in accordance with each owner's common expense liability." TEX. PROP. CODE § 82.111(i).

III. The judgment properly treats the Sprechers as prevailing parties on a breach of contract claim.

A. The Sprechers elected to recover for breach of the Declaration.

Parc and AMI claim that the Sprechers are not entitled to recover attorney's fees because their claim is one for breach of fiduciary duty that can sound only in tort. Parc and AMI observe that this is not a situation where good faith and fair dealing is implied by law, as the Supreme Court rejected that position in *Arnold v. National County Mutual Fire Insurance Co.*, 725 S.W.2d 165, 167 (Tex. 1987). But a contract may create a fiduciary relationship where one would not otherwise exist. *Lundy v. Masson*, 260 S.W.3d 482, 501 (Tex. App.—Houston [14th Dist.] 2008, pet. denied); *see Strebel v. Wimberly*, 371 S.W.3d 267, 283 (Tex. App.—Houston [1st Dist.] 2012, no pet.) (affirming trial court's ruling that party owed fiduciary duties imposed by contract); *see also Nat'l Plan Admin'rs Inc. v. Nat'l Health Ins. Co.*, 235 S.W.3d 695, 702 (Tex. 2007) (observing that parties' agreement contained certain contractual obligations that imposed certain specific fiduciary duties on party); *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 45 (Tex. 1998) (declaring that contract cause of action '"is for the breach of a duty arising out of a contract either express or implied, while an action in tort is for a breach of duty imposed by law"') (quoting *Int'l Printing Pressmen & Assistant's Union v. Smith*, 198 S.W.2d 729, 735 (Tex. 1946)). The Declaration expressly requires Parc's association board to act as a "trustee" in holding insurance proceeds

for the unit owners. This provision, which the statute also imposes, confers the same duties in handling insurance funds for the unit owners that a trustee would owe a trust beneficiary. *See* TEX. PROP. CODE § 82.111(f); *see also id.* § 82.111(e) (providing that association may designate insurance trustee in place of assuming trustee duties itself); *id.* § 82.115 ("A third person dealing with an association in association's capacity as a trustee may assume without inquiry the existence of trust powers and their proper exercise by the association.").

Generally, a party may sue and seek damages on alternative theories of liability. *Waite Hill Servs., Inc. v. World Class Metal Works, Inc.*, 959 S.W.2d 182, 184 (Tex. 1998) (per curiam); *Saden v. Smith*, 415 S.W.3d 450, 465 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); *see* TEX. R. CIV. P. 48. Because the trustee role is prescribed both by statute and contract, the Sprechers can seek recovery against Parc and AMI under (1) the Declaration, through a breach of contract claim, (2) the Property Code, as a statutory claim, or (3) the common law, through a breach of fiduciary duty claim. The Sprechers dismissed their unjust enrichment claim and claimed attorney's fees. These actions demonstrate that they elected to claim breach of contract, and the trial court therefore properly included attorney's fees for breach of contract in its judgment.

B. The Declaration supports the liability finding of unreasonable delay in the payment of insurance proceeds.

Parc and AMI challenge the jury's liability finding in favor of the Sprechers, contending that they cannot be liable for a delay in tendering the insurance funds to the Sprechers because the Declaration does not impose a duty to not "unreasonably delay" payment of insurance proceeds to a unit owner. Even though certain duties inhere in the role of fiduciary, each need not be itemized; rather, the use of the term "fiduciary" signifies their existence. Because the Declaration confers fiduciary status on Parc for the purpose of managing the insurance proceeds, we examine whether Parc, and AMI as its agent, owed the Sprechers a duty to not unreasonably delay payment.

At a minimum, a fiduciary duty encompasses a duty of good faith and fair dealing, and it requires a party to place the interest of the other party before his own. *Abetter Trucking Co. v. Arizpe*, 113 S.W.3d 503, 508 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (citing *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 594 (Tex. 1992)). A trustee's duties "include the use of the skill, diligence, and prudence that an ordinary, capable, and careful person would use in the conduct of his own affairs and loyalty to the beneficiaries of the trust." *Barrientos v. Nava*, 94 S.W.3d 270, 285 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (citing *InterFirst Bank Dallas, N.A. v. Risser*, 739 S.W.2d 882, 888 (Tex. App.—Texarkana 1987, no writ)).

A delay in payment may breach the duty of good faith and fair dealing absent a reasonable basis for the delay. *See Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 18 (Tex. 1994). Thus, a fiduciary may owe a beneficiary a duty not to unreasonably delay in remitting funds owed.

The Declaration imposes fiduciary duties on the handling of insurance proceeds provided for repair of property damage to the units. The Sprechers' alleged, and the evidence at trial showed, that AMI delayed in tendering the proceeds that it had in hand for two years, and that the Sprechers sustained damages as a result of that delay. The allegations and evidence thus support a claim for breach of the Declaration, which required Parc and AMI, as Parc's agent and insurance trustee, to act as fiduciaries in handling insurance proceeds due to unit owners. Parc and AMI challenged the Sprechers' version of events, including countering evidence showing that their delay was not unreasonable given the Sprechers' litigiousness. The reasonableness of the delay and the Sprechers' conduct, however, was a matter for the jury to determine. It does not negate the contractual duty set forth in the Declaration.

Parc and AMI next complain that the damages question did not instruct the jury on the proper causal standard for a contract claim. The question asked the jury to find the sum that would compensate the Sprechers for the damages, if any, proximately caused by the unreasonable delay. According to Parc and AMI, the

charge should have instructed that the jury find damages "resulting from" rather than "proximately caused by" the breach. AMI did not object to the damages question submitted to the jury, and thus this complaint is not preserved for appellate review. *See* TEX. R. APP. P. 33.1.

Lastly, Parc and AMI contend that damages from delay in tendering insurance proceeds are tort damages, not contract damages, citing *Bellefonte Underwriters Insurance Co. v. Brown*, 704 S.W.2d 742 (Tex. 1986), and *Beyer v. Employees Retirement System*, 808 S.W.2d 622 (Tex. App.—Austin 1991, writ denied). Those cases, however, involve statutory claims under the Texas Insurance Code and, as a result, are inapposite. In contrast, Parc and AMI's obligation to act as a trustee with respect to insurance proceeds derives from a contract. The Sprechers alleged economic loss due to failure to comply with that contract, and the jury's finding was based on the difference in value between the insurance proceeds intended for repair and restoration of the units when AMI received those proceeds and when AMI actually paid them to the Sprechers. Accordingly, we hold that the trial court did not err in treating the jury award as damages for breach of contract imposed by the Declaration.

C. AMI is liable for its acts as the agent for Parc.

AMI challenges the conclusion that it is liable to the Sprechers as Parc's agent. The Sprechers argued in the trial court that they are creditor third-party beneficiaries

of the management agreement, pointing out that the agreement makes AMI the sole and exclusive managing agent for the Parc Condominiums and memorializes AMI's promise to fulfill the duties and obligations of the Parc Condominiums as set forth in the governing documents, including the Declaration. In any event, the jury found AMI independently liable for unreasonably delaying the payment of the insurance proceeds to the Sprechers.

"A third party may recover on a contract made between other parties only if the parties intended to secure some benefit to that third party, and only if the contracting parties entered into the contract directly for the third party's benefit." *MCI Telecomms. Corp. v. Tex. Utils. Elec. Co.*, 999 S.W.3d 647, 651 (Tex. 1999). Under the management agreement, AMI accepted Parc's obligations to its unit owners, including the duties associated with the payment of insurance proceeds to individual owners. With respect to the insurance proceeds, the unit owners were known and identified beneficiaries to Parc's agreement with AMI. AMI does not cite any legal authority refuting their derivative contractual liability to the Sprechers under the management agreement. Accordingly, we hold that the trial court did not err in rendering judgment against both Parc and AMI.

IV. Challenges to the sufficiency of the evidence

Parc and AMI challenge the legal and factual sufficiency of the evidence to the jury's findings of liability and damages, which we address below.

A. Sufficient evidence supports the jury's finding of unreasonable delay.

Parc and AMI contend that the evidence is legally and factually insufficient to show that they unreasonably delayed in remitting the insurance funds to the Sprechers. In conducting a legal sufficiency review, we review the evidence presented below in a light favorable to the jury's verdict, crediting favorable evidence if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not. *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 770 (Tex. 2010); *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). We set aside the verdict only if the evidence at trial would not enable reasonable and fair-minded people to reach the verdict under review. *See City of Keller*, 168 S.W.3d at 827. If more than a scintilla of evidence exists to support the finding, the legal sufficiency challenge fails. *Haggar Clothing Co. v. Hernandez*, 164 S.W.3d 386, 388 (Tex. 2005). The trier of fact may choose to "believe one witness and disbelieve others" and "may resolve inconsistencies in the testimony of any witness." *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 697 (Tex. 1986).

To determine whether the evidence is factually sufficient to support the trial court's judgment, we must consider, weigh, and examine all of the evidence that supports or contradicts the factfinder's determination. *See Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 445 (Tex. 1989). We may set aside a verdict only if the evidence supporting it is so contrary to the overwhelming weight of the evidence

as to be clearly wrong or manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam). When conducting a factual sufficiency review, we must not merely substitute our judgment for that of the factfinder. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003). The factfinder is the sole judge of the credibility of witnesses and the weight to be given to their testimony. *Id.*

Parc and AMI point to the evidence they adduced at trial showing that the Sprechers delayed in providing a repair estimate, did not allow Basic Builders to continue to make repairs to their units, filed this lawsuit against them without waiting a reasonable time for the repair process to work, and presented obstacles during the repair process. The jury considered and weighed this evidence, as well as the Parc's and AMI's conduct in the parties' course of dealing. The existence of strained relations between parties, without more, does not relieve a trustee of its duties. *See Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984).

The evidence favorable to the Sprechers, which the jury apparently found credible and accorded greater weight, shows that, after terminating its contract with Basic Builders, AMI offered to provide the Sprechers with their share of the insurance funds to complete the repairs to their three units. The Sprechers accepted that offer by providing AMI with their contractor's repair estimate no later than August 2011, when the insurance company tendered proceeds in that amount. After AMI received the funds from the insurer, it did not tender them to the Sprechers until

approximately two years later. We hold that this evidence is legally and factually sufficient to support the jury's finding that Parc and AMI unreasonably delayed in paying the insurance funds to the Sprechers for the period between 2011 and 2013.

B. Insufficient evidence supports the damages finding.

AMI challenges the sufficiency of the evidence supporting the award of $48,000 as the increased cost to repair the three units. A jury generally has discretion to award damages within the range of evidence presented at trial. *Sw. Energy Prod. Co. v. Berry-Helfand*, 491 S.W.3d 699, 713 (Tex. 2016); *Powell Elec., Inc. v. Hewlett Packard Co.*, 356 S.W.3d 113, 126 (Tex. App.—Houston [1st Dist.] 2011, no pet.). This principle, however, presumes that the jury heard competent evidence of a range of damages. *Bigham v. Se. Tex. Envtl., LLC*, 458 S.W.3d 650, 670 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

We measure the sufficiency of the evidence against the jury charge to determine whether that evidence supports the existence of damages and the amount awarded. *Sw. Energy Prod. Co.*, 491 S.W.3d at 713; *see Osterberg v. Peca*, 12 S.W.3d 31, 54 (Tex. 2000). In determining whether the jury had a sufficient evidentiary foundation on which to base the damages award, we may review the evidence tending to support the jury's verdict and disregard evidence to the contrary, except when contrary evidence is conclusive. *Sw. Energy Prod. Co.*, 491 S.W.3d at

713 (first citing *Mancorp, Inc. v. Culpepper*, 802 S.W.2d 226, 227 (Tex. 1990); then citing *City of Keller*, 168 S.W.3d at 817).

The measure of damages applied in this case, which the trial court submitted without objection, asked the jury to find "[t]he difference, if any, between the reasonable cost to rebuild or repair the units on or about the date such proceeds should have been paid in a reasonably timely manner and August 28, 2013 (the date such proceeds were delivered to the Sprechers' attorney)." The jury found this difference to be $48,000, which is roughly the difference between the Sprechers' 2013 estimate and the 2011 estimate used to obtain the insurance proceeds.

Parc and AMI challenge the award because the 2013 estimate relied on by the Sprechers' expert to compare costs is not comparable to the 2011 estimate. They point out that the Sprechers' trial expert included costs associated with asbestos abatement that were not included in the $97,000 in repairs reimbursed by the insurance carrier; thus, those asbestos abatement costs do not represent an increase in construction costs attributable to the delay in tendering the check. Instead, they are new costs for work that wasn't included in the 2011 estimate. AMI and the Parc moved for a new trial in the trial court on this basis.

The Sprechers' expert, David Poynor, a homebuilder, provided the testimony about the damages to the Sprechers' condominium units. Poynor inspected and photographed the damage to the units as it existed in the summer of 2013. The photographs were introduced into evidence.

David Sprecher also testified about the extent and types of damage he observed in the three units he and Kathy owned. With respect to asbestos, David Sprecher recalled that asbestos had been removed from one of the three units when he bought them, but remained in the ceiling of the other two units. He did not know whether asbestos remediation had occurred since he had purchased them. AMI presented a report from Environmental Solutions, Inc. documenting on-site monitoring of asbestos abatement performed at Parc Condominiums from September 24, 2008 to January 12, 2009.

Poynor included asbestos abatement work throughout his 2013 pricing estimate for repairing the units. Poynor explained that he included the cost of asbestos remediation because the presence of asbestos was disputed. He agreed that the need to complete the asbestos abatement would affect repair pricing. The evidence before the jury, however, did not allow it to exclude the portion of Poynor's cost estimate attributable to asbestos abatement. Poynor did not provide testimony concerning the cost difference between the removal of asbestos-laden drywall and asbestos-free drywall or how the lower cost of removing asbestos-free drywall

would affect the total amount of repair costs. Although Poynor's report and repair estimate was before the trial court, it was never admitted into evidence. The report did not compare the total repair estimate with an estimate of the amount that repair costs would have been had additional asbestos remediation been unnecessary.

The Sprechers contend that the presence of asbestos was controverted and thus the jury could award damages within the range between Poynor's estimate and the 2011 estimate. But the March 2011 DB General Contractors estimate, which served as the basis for the insurance proceeds, did not include asbestos abatement as a part of the cost of repairs. The jury could not find the difference between the DB estimate without having the data necessary to subtract the cost of the asbestos abatement and add the 2013 cost of asbestos-free drywall removal and replacement in its place to make the two estimates comparable. Because the jury could not calculate the amount of damages according to the method prescribed in the jury question by using Poynor's 2013 estimate, we hold that the evidence is legally insufficient to support $48,000 in increased repair costs due to the delay in tendering the proceeds.

The record nevertheless contains some evidence supporting the measure of damages incorporated into the jury charge. Michael Biederstadt, a construction manager and real estate broker who served as Parc and AMI's damages expert, estimated the difference in the cost to repair the Sprechers' units using the same scope of repair as that used in the DB General Contractors estimate. Biederstadt

calculated that the difference in the reasonable cost of repair (1) between December 2008 and August 2013 (the date the Sprechers received the funds) would have been $10,866.21. Alternatively, Biederstadt opined. the difference in the reasonable cost of repair between March 2011 and August 2013 would have been $4,966.20.

Because Parc and AMI raised this challenge in a motion for new trial and there is "some evidence of the correct measure of damages," we remand for a new trial. *See Formosa Plastics*, 960 S.W.2d at 51 (remanding for new trial when no evidence supports damages awarded but there is evidence of some damages); *see Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 682 (Tex. 2000) (holding remand for a new trial is appropriate remedy that where there is evidence of some fraud damages but there is no evidence to support the full amount of damages found by the jury).

V. The pleadings support the award of attorney's fees.

Finally, Parc and AMI contend that the Sprechers' attorney's fees claim fails as a matter of law because the Sprechers failed to plead a statutory basis for attorney's fees. Pleadings, however, are sufficient if they give notice of the issues to be tried or the proof to be introduced at trial. *See* TEX. R. CIV. P. 47(a). Specific statutory references are unnecessary. *Ransopher v. Deer Trails, Ltd.*, 647 S.W.2d 106, 110 (Tex. App.—Houston [1st Dist.] 1983, no writ); *accord Yeske v. Piazza del Arte*, 513 S.W.3d 652, 662 (Tex. App.—Houston [14th Dist.] 2016, no pet.);

Discovery Operating, Inc. v. BP Am. Prod. Co., 311 S.W.3d 140 (Tex. App.—Eastland 2010, pet. denied).

The Sprechers' live pleading asserts a breach of contract claim. As to damages, the pleading alleges that "for breach of contract, Plaintiffs are entitled to regain the benefit of their bargain, which is the amount of their claims and resultant losses plus reasonable and necessary attorneys' fees." We hold that these allegations put Parc and AMI on notice that the Sprechers were seeking attorney's fees under section 38.001 of the Texas Civil Practice and Remedies Code.[2] *See Whallon v. City of Houston*, 462 S.W.3d 146, 165 (Tex. App.—Houston [1st Dist.] 2015, pet. denied) (declaring that if party pleads fact which, if true, entitle him to relief sought, pleading need not identify applicable statute to recover attorney's fees under it) (quoting *Gibson v. Cuellar*, 440 S.W.3d 150, 156 (Tex. App.—Houston [14th Dist.] 2013, no pet.)).

CONCLUSION

We hold that the evidence at trial does not support the jury's award of $48,000 in increased construction costs due to the delay in tendering the insurance proceeds for the claimed repairs. Accordingly, we reverse the trial court's judgment and

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[2] Because of our rulings, we need not address Parc and AMI's challenge to the trial court's denial of their request for attorney's fees. *See* TEX. PROP. CODE § 82.161(b).

remand the case for a new trial. *See* TEX. R. APP. P. 44.1(b) (appellate courts may not order a separate trial on unliquidated damages if liability is contested); *see also Pointe West Ctr., LLC v. It's Alive, Inc.*, 476 S.W.3d 141, 150 (Tex. App.—Houston [1st Dist.] 2015, pet. denied).

Jane Bland
Justice

Panel consists of Chief Justice Radack and Justices Jennings and Bland.