Affirmed and Memorandum Opinion filed April 7, 2016.

In the

Fourteenth Court of Appeals

NO. 14-14-00824-CV

STATE FARM LLOYDS, Appellant

V.

CANDELARIO FUENTES AND MARIA FUENTES, Appellees

On Appeal from the 152nd District Court
Harris County, Texas
Trial Court Cause No. 2010-61039

M E M O R A N D U M O P I N I O N

The appeal concerns a dispute between insureds Candelario and Maria Fuentes and insurer State Farm Lloyds over Hurricane Ike damage to the Fuenteses' home. A jury found State Farm liable and awarded damages as to each of the theories of liability asserted by the Fuenteses—breach of contract, violations of the Texas Insurance Code, breach of the duty of good faith and fair dealing, and fraud. The jury also found that the Fuenteses failed to comply with the policy and

did so first. The trial court disregarded these two particular findings and rendered judgment in the Fuenteses' favor on the remaining findings.

On appeal, State Farm contends that the trial court erred by disregarding the jury findings with regard to the Fuenteses' prior material breach of the policy because: (a) the trial court did not have the authority to reject the jury findings on its own initiative; (b) evidence supports the Fuenteses committed a material breach; (c) evidence supports the Fuenteses breached first; and (d) the findings were material to the verdict. State Farm also argues that the trial court committed reversible error in excluding evidence of the Fuenteses' excessive demand and that the trial court erred in denying State Farm's motion for remittitur or new trial.

State Farm, however, did not challenge all of the freestanding grounds supporting the judgment. In addition, not until its reply brief did State Farm attempt to explain why the judgment could not be affirmed based on any extra-contractual theory of recovery. We conclude that State Farm waived this argument. With regard to excessive demand, even if the trial court should have permitted State Farm's evidence, any error was harmless where no evidence clearly indicated that the Fuenteses would have refused tender of the proper amount owed. Therefore, we affirm the trial court's judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

Hurricane Ike struck the Gulf Coast on September 12 and 13, 2008. The Fuenteses evacuated prior to the storm. When the Fuenteses returned home, they discovered that a tree had fallen through their roof over their master bedroom. Their home sustained exterior damage. According to the Fuenteses, their home also sustained interior damage from water leaking into their bedroom, as well as into their bathroom and laundry room.

On September 22, 2008, the Fuenteses' daughter reported an insurance claim to State Farm for her primarily Spanish-speaking parents. State Farm assigned adjuster Dustin Namirr, who inspected the Fuenteses' home on November 12, 2008. Namirr allowed for total replacement of the roof and covered damage to a backyard shed, the fence, a window, and a screen. Namirr inspected the interior of the home with the Fuenteses. The Fuenteses pointed out several areas of interior water damage from Hurricane Ike. Namirr's log entry and notes do not mention an interior inspection, and he destroyed the two or three photos he took of the home's interior. Namirr claimed that, based on his inspection, he determined that the interior damage was not caused by Hurricane Ike. He went to his truck, printed out an estimate of damages in English, and provided the Fuenteses with a check for $4988.63 for the exterior damage, as well as a check for $350 in "food loss." State Farm closed its file on the same day. The Fuenteses did not receive any written explanation for State Farm's denial of the claim for interior damage.

The Fuenteses filed suit against State Farm for breach of contract, Texas Insurance Code violations, breach of the duty of good faith and fair dealing, and fraud. The case was assigned to the Hurricane Ike MDL court, which presided over pretrial matters, and then was transferred to the trial court. The jury found:

- Both the Fuenteses and State Farm failed to comply with the insurance policy.
- The Fuenteses failed to comply first.
- State Farm engaged in unfair or deceptive acts or practices by failing to promptly provide the Fuenteses a reasonable explanation for the denial of a claim; refusing to pay a claim without conducting a reasonable investigation with respect to a claim; and misrepresenting to the Fuenteses a material fact or policy provision relating to the coverage at issue.
- The Fuenteses provided written notice of their claim to State Farm on September 22, 2008.

- The Fuenteses provided all items, statements, and forms reasonably requested and required by State Farm as to their Hurricane Ike claim on November 12, 2008.
- State Farm waived its right to written notice of a claim from the Fuenteses.
- State Farm knowingly refused to pay a claim without conducting a reasonable investigation with respect to the claim.
- State Farm failed to comply with its duty of good faith and fair dealing to the Fuenteses.
- State Farm committed fraud against the Fuenteses.
- The jury awarded the Fuenteses $18,818 as the difference between the amount paid by State Farm to the Fuenteses and the amount State Farm should have paid under the policy.
- With regard to damages proximately caused by State Farm's unfair or deceptive acts, by State Farm's failure to comply with its duty of good faith and fair dealing, and by State Farm's fraud, the jury awarded the Fuenteses $18,818 as the cost to repair property damages by Hurricane Ike less any amount previously paid by State Farm to repair the same damage; $8750 in past mental anguish sustained by Candelario; $8750 in past mental anguish sustained by Maria; $4750 in future mental anguish as to Candelario; and $4750 in future mental anguish as to Maria.
- The jury awarded the Fuenteses an additional $7527 due to State Farm's knowing conduct.
- With regard to attorney's fees, the jury awarded the Fuenteses $254,545 for trial court representation; $25,000 for appellate representation in the court of appeals; and $25,000 for representation in the Supreme Court of Texas: $7500 at the petition for review stage, $10,000 at the merits briefing stage, and $7500 through oral argument and completion of proceedings.

State Farm filed a motion to enter judgment. The Fuenteses filed a response and request for judgment in their favor. The trial court denied State Farm's

motion. The trial court disregarded the jury findings on prior material breach and rendered judgment in favor of the Fuenteses on the remaining findings. The final judgment awarded the Fuenteses $334,739.29, including past damages, additional damages, 5% prejudgment interest on their past damages, 18% enhanced interest on their economic damages, and trial attorney's fees.[1] The final judgment also awarded the Fuenteses court costs, conditional attorney's fees for appellate proceedings, and postjudgment interest. State Farm filed a motion for remittitur or new trial, which was implicitly denied.

State Farm now appeals, arguing: (1) the trial court erred in disregarding the jury findings that the Fuenteses committed a prior material breach and (2) the trial court erred in excluding evidence of the Fuenteses' excessive demand.

II. ANALYSIS

A. State Farm's first issue

An insured is not precluded from bringing a cause of action for violations of the DTPA or the Insurance Code in addition to any breach-of-contract claim against an insurer. *See Vail v. Tex. Farm Bureau Mut. Ins. Co.*, 754 S.W.2d 129, 136–37 (Tex. 1988) (noting remedial purposes of DTPA and Insurance Code). "If a property insurer fails to pay the full amount of the claim as a result of an unfair claim-settlement practice under the Insurance Code, the insured may elect to recover its damages under either a breach-of-contract or a statutory-violation theory." *United Nat'l Ins. Co. v. AMJ Invs., LLC*, 447 S.W.3d 1, 11 (Tex. App.—Houston [14th Dist.] 2014, pet. dism'd); *see Waite Hill Servs., Inc. v. World Class*

[1] The trial court amended its final judgment to correct an error in the calculation of prejudgment and enhanced interest, and to correct an error in the signature date. The amended final judgment also awarded prejudgment and enhanced interest related to the time period between when the original final judgment and the amended final judgment were issued.

Metal Works, Inc., 959 S.W.2d 182, 184–85 (Tex. 1998) (per curiam) (where insurer's breach of policy, its DTPA and Insurance Code violations, and its breach of duty of good faith and fair dealing all caused one injury—failure to pay proper amount due—insured elects one theory on which to recover).

The Fuenteses pleaded, and provided evidence on, multiple theories of liability. The jury returned findings favorable to the Fuenteses on all their theories—breach of contract, violations of the Insurance Code, breach of the duty of good faith and fair dealing, and fraud. The jury awarded damages to the Fuenteses as to each theory. With regard to breach of contract, the jury awarded $18,818 as the difference between the amount paid by State Farm to the Fuenteses and the amount State Farm should have paid under the policy. With regard to Insurance Code violations, breach of the duty of good faith and fair dealing, and fraud, the jury awarded $18,818 as the reasonable and necessary cost to repair Hurricane Ike damage less any amount previously paid by State Farm to the Fuenteses for the same damage, plus $17,500 for the Fuenteses' past mental anguish and $9500 for their future mental anguish. The jury awarded an additional $7527 for State Farm's knowing refusal to pay a claim without conducting a reasonable investigation. Because the Insurance Code violations resulted in the greatest recovery, the Fuenteses elected to recover under that theory.[2]

"Generally, an appellant must attack all independent bases or grounds that support an adverse ruling." *Cont'l Carbon Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, No. 14-11-00162-CV, 2012 WL 1345748, at *4 (Tex. App.—Houston [14th Dist.] Apr. 17, 2012, no pet.) (mem. op.) (citing *Britton v. Tex. Dep't of*

[2] *See* Tex. Ins. Code Ann. §§ 541.152 (providing for recovery of actual damages, attorney's fees, court costs, and additional damages for knowing conduct), 542.056 (requiring prompt written notice of reasons for rejecting claim), 542.060 (providing for recovery of 18% enhanced interest and attorney's fees for violation of prompt-payment subchapter) (West 2009 & Supp. 2015).

Criminal Justice, 95 S.W.3d 676, 681 (Tex. App.—Houston [1st Dist.] 2002, no pet.)). When the appellant fails to do so, we must affirm. *Id.*; *see Britton*, 95 S.W.3d at 681–82 ("The reasoning is that, if an independent ground fully supports the complained-of ruling or judgment, but the appellant assigns no error to that independent ground, then (1) we must accept the validity of that unchallenged independent ground . . . and thus (2) any error in the grounds challenged on appeal is harmless because the unchallenged independent ground fully supports the complained-of ruling or judgment."); *Harris v. Gen. Motors Corp.*, 924 S.W.2d 187, 188 (Tex. App.—San Antonio 1996, writ denied). "The rule requiring an appellant to attack all independent grounds supporting a judgment has been applied in many contexts, including independent jury findings fully supporting a trial court's judgment." *Aquarium Environments, Inc. v. Elgohary*, No. 01-12-01169-CV, 2014 WL 1778266, at *3 (Tex. App.—Houston [1st Dist.] May 1, 2014, pet. denied) (mem. op.) (holding any error by trial court in submitting DTPA claim harmless where appellant did not challenge jury's affirmative finding on breach of contract, which was independent ground supporting liability and damages); *see Britton*, 95 S.W.3d at 682 (appellant must attack each independent jury finding to obtain reversal). "The Supreme Court of Texas has repeatedly instructed that 'the courts of appeals may not reverse the judgment of a trial court for a reason not raised in a point of error.'" *Cont'l Carbon*, 2012 WL 1345748, at *4 (quoting *Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993) (per curiam)).

In its first issue, State Farm challenges the trial court's action in disregarding the jury findings with regard to whether the Fuenteses were the first to fail to comply with the insurance policy. Specifically, State Farm contends that the trial court improperly disregarded such findings on its own initiative. State Farm next argues the trial court could not disregard the findings because there was evidence

to support that the Fuenteses committed a material breach of the policy and that their breach predated State Farm's breach. Finally, its brief includes the following section:

> **D. The Jury's Findings Are Material to the Verdict.**
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> A trial court may disregard a jury finding if it is immaterial, but there is no basis to reach that conclusion here. A question is immaterial only "when it should not have been submitted," "when it was properly submitted but has been rendered immaterial by other findings," or "when its answer cannot alter the effect of the verdict." *Nat'l City Bank of Ind. v. Ortiz*, 401 S.W.3d 867, 883 (Tex. App.—Houston [14th Dist.] 2013, pet. denied). The jury's answers to verdict questions 1(b) and 2 were plainly material.
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> First, the questions were properly submitted. As discussed above, there was significant evidence in the record regarding Plaintiffs' duties, their breach of those duties, and the prejudice of their breaches. It was therefore entirely appropriate for the trial court to submit questions 1(b) and 2, which asked the jury to determine whether Plaintiffs were first to materially breach their duties under the insurance policy contract. CR 185-86.
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> Second, the jury's findings were not rendered immaterial by other findings. Questions 1(b) and (2) generally asked whether Plaintiffs were first to materially breach their duties under the policy. There are no contrary findings that would render the jury's general answers immaterial. Neither the jury nor the trial court made any such findings.
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> Finally, the jury's findings plainly have an effect on the verdict. As discussed above, it is well established that when one party to a contract commits a material breach, the other party is excused from further performance. Indeed, that is why the court asked the jury which party breached first. And the jury's finding means that State Farm is entitled to have judgment entered in its favor.

State Farm's argument fails to address the independent theory of recovery based on State Farm's violations of the Insurance Code under which the Fuenteses elected to proceed. State Farm does not challenge any of the unpredicated

affirmative jury findings relating to whether State Farm engaged in any unfair or deceptive acts or practices under the Insurance Code.[3] State Farm also does not challenge the jury finding that it knowingly refused to pay a claim without conducting a reasonable investigation with respect to a claim. Nor does State Farm address any other independent theory of recovery. State Farm does not challenge any of the other unpredicated jury findings relating to whether State Farm failed to comply with its duty of good faith and fair dealing, and committed fraud. Because the Fuenteses' Insurance Code claims fully would support the judgment and because State Farm has not assigned any error to those claims, we must accept their validity and affirm the judgment on that independent basis. *See Cont'l Carbon*, 2012 WL 1345748, at *4; *Britton*, 95 S.W.3d at 681–82.

In any event, State Farm has the burden to present and discuss its assertions of error in compliance with the appellate briefing rules. *See Katy Springs & Mfg., Inc. v. Favalora*, 476 S.W.3d 579, 607 (Tex. App.—Houston [14th Dist.] 2015, pet. denied). State Farm's statements that the jury's prior material breach of the policy plainly affected the verdict and "entitled" it to judgment in its favor are brief, conclusory, and unsupported by legal citations. It is not our duty to review the record, research the law, and then fashion a legal argument for an appellant when it has failed to do so. *Canton-Carter v. Baylor Coll. of Med.*, 271 S.W.3d 928, 931–32 (Tex. App.—Houston [14th Dist.] 2008, no pet.). Briefing waiver occurs when a party fails to make proper citations to authority or to the record, or to provide any substantive legal analysis. *See* Tex. R. App. P. 38.1(i); *Marsh v. Livingston*, No. 14-09-00011-CV, 2010 WL 1609215, at *3 (Tex. App.—Houston [14th Dist.] Apr. 22, 2010, pet. denied) (mem. op.); *Canton-Carter*, 271 S.W.3d at

[3] Tex Ins. Code Ann. § 541.060(a)(1) (misrepresentation relating to coverage), (a)(3) (failure to promptly provide reasonable explanation for claim denial), (a)(7) (refusal to pay claim without conducting reasonable investigation) (West 2009); *see id.* § 542.056.

931; *Sterling v. Alexander*, 99 S.W.3d 793, 798–99 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). State Farm provides no legal authority or analysis applying appropriate authority to the facts of its case and, therefore, has waived any challenge to the findings in the Fuenteses' favor on the Insurance Code claims. *See* Tex. R. App. 38.1(i); *Katy Springs*, 476 S.W.3d at 607.

In its reply brief, State Farm first raises the argument that "breach of contract is a prerequisite to extra-contractual claims." State Farm primarily relies on *State Farm Lloyds v. Page*, 315 S.W.3d 525, 532 (Tex. 2010), for the proposition that "[w]hen the issue of coverage is resolved in the insurer's favor, extra-contractual claims do not survive." State Farm acknowledges it could have raised the issue in its opening brief, but insists it should not have to anticipate the Fuenteses' argument, "contrary to established Texas law," that extra-contractual claims survive even when breach-of-contract claims fail. State Farm further contends that this court should address the issue because "the issue is joined" and there is no prejudice to the Fuenteses. State Farm did not file a motion asking us to treat its reply brief as a supplement to its original brief or, alternatively, to amend its original brief.

We reject State Farm's arguments. It is well settled that rule 38.3 of the Texas Rules of Appellate Procedure does not allow an appellant to raise a new issue in a reply brief in response to a matter pointed out in the appellee's brief. *Cont'l Carbon*, 2012 WL 1345748, at *4; *see* Tex. R. App. P. 38.1(f) (requiring appellant's brief to state "all issues or points presented for review"), 38.3; *Marsh*, 2010 WL 1609215, at *3; *Priddy v. Rawson*, 282 S.W.3d 588, 597 (Tex. App.—Houston [14th Dist.] 2009, pet. denied); *Jackson v. Neal*, No. 13-07-00164-CV, 2009 WL 140507, at *7 (Tex. App.—Corpus Christi Jan. 22, 2009, no pet.) (mem. op.); *Bankhead v. Maddox*, 135 S.W.3d 162, 164–65 (Tex. App.—Tyler 2004);

Lopez v. Montemayor, 131 S.W.3d 54, 61 (Tex. App.-–San Antonio 2003, pet. denied). In their appellees' brief, the Fuenteses argue that this court should affirm the judgment because State Farm did not challenge all the separate and independent grounds for recovery based on the jury's verdict. Pointing out the lack of State Farm's argument, however, "does not . . . entitle [State Farm] to assert that argument for the first time in [its] reply brief." *Marsh*, 2010 WL 1609215, at *4 (citing *Howell v. Tex. Workers' Comp. Comm'n*, 143 S.W.3d 416, 439 (Tex. App.—Austin 2004, pet. denied); and *Barrios v. State*, 27 S.W.3d 313, 322 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd)).

Moreover, we cannot agree that the Fuenteses' brief joined any issue. The Fuenteses make no reference to *Page* or its application to extra-contractual claims in the insurance context, much less "fully argue" or "fully brief" this issue. *See Lopez*, 131 S.W.3d at 60–61 (issue not properly before court where appellee's brief "lacks any reference" to authority or evidence raised by appellant in reply brief); *cf. Plasma Fab, LLC v. BankDirect Capital Fin., LLC*, 468 S.W.3d 121, 134 n.7 (Tex. App.—Austin 2015, pet. filed) (appellee "fully briefed" issue regarding summary judgment as to Insurance Code and DTPA violations); *Hutchison v. Pharris*, 158 S.W.3d 554, 563–64 (Tex. App.—Fort Worth 2005, no pet.) (appellee "fully argued" evidence supporting jury finding on causation). This is consistent with the Fuenteses' position at oral argument that they had no opportunity to brief this area of the law.[4]

[4] We also note that the interplay of contractual and extra-contractual claims depends heavily on the particular circumstances of particular cases. *Page* recognized that "to the extent the policy affords coverage, extra-contractual claims remain viable." 315 S.W.3d at 532. No party has provided, and we have not located, any authority where a court has applied *Page* under the circumstances here—where the jury finds for the insureds on all theories of liability and damages, including breach-of-contract and extra-contractual claims, but also finds that the insureds committed a prior material breach. At least one court of appeals has refused to apply *Page* because *Page* did not mention unfair settlement practices under section 541.060 of the

Because State Farm failed to attack an independent ground that supports the judgment, and waived any argument otherwise, we overrule State Farm's first issue.

B. State Farm's second issue

Next, State Farm argues that the trial court committed reversible error by excluding evidence of State Farm's excessive-demand defense. State Farm contends that its evidence demonstrated its entitlement to the defense as a matter of law. State Farm further asserts that, at a minimum, exclusion of the evidence probably resulted in an improper judgment entitling it to a new trial. *See City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753 (Tex. 1995). We disagree.

As a general rule, when a creditor makes an excessive demand upon his debtor, he is not entitled to attorney's fees for subsequent litigation to recover the debt even if he prevails. *See Findlay v. Cave*, 611 S.W.2d 57, 58 (Tex. 1981);

Insurance Code and the jury finding of no breach by the insurer did not establish definitely there was no coverage. *USAA Tex. Lloyd's Co. v. Menchaca*, No. 13-13-00046-CV, 2014 WL 3804602, at *5–6 (Tex. App.—Corpus Christi July 31, 2014, pet. filed) (mem. op.) (jury did not find insurer breached policy but found insurer failed to conduct reasonable investigation); *cf. First Christian Acad., Inc. v. New Hampshire Ins. Co.*, No. CIV.A. H-13-1452, 2014 WL 2949439, at *5–6 (S.D. Tex. July 1, 2014) (mem. op. & order) (citing *Page* for proposition that, to extent policy affords coverage, extra-contractual claims remain viable and refusing to presume that insured's bad-faith, DTPA, and Insurance Code claims "necessarily fail" where court found a fact issue "regarding whether the pre-cancellation incidents were covered by the Policy"); *Primo v. Great Am. Ins. Co.*, 455 S.W.3d 714, 727–28, 732 (Tex. App.—Houston [14th Dist.] 2014, pet. filed) (reversing summary judgment where insurer did not prove unambiguous exclusion of coverage in policy as a matter of law and, although agreeing with insurer that all of insured's claims are contingent upon the existence of coverage under the policy, noting "it does not necessarily follow that [insured's] claims are premised solely upon the breach of the policy" where insured alleged violations of Insurance Code, breach of insurer's duty of good faith and fair dealing, and fraud). *But see Davis v. Nat'l Lloyds Ins. Co.*, —S.W.3d—, No. 01-14-00278-CV, 2015 WL 6081411, at *9–11 (Tex. App.—Houston [1st Dist.] Oct. 13, 2015, no pet.) (applying *Page* where unambiguous policy only covered actual cash value of claim as matter of law and jury found zero actual cash value damages).

Collingsworth v. King, 283 S.W.2d 30, 33 (Tex. 1955); *Beauty Elite Group, Inc. v. Palchick*, No. 14-07-00058-CV, 2008 WL 706601, at *4 (Tex. App.—Houston [14th Dist.] Mar. 18, 2008, no pet.) (mem. op.). Nor is such a creditor entitled to prejudgment interest on the debt. *Warrior Constructors, Inc. v. Small Bus. Inv. of Houston*, 536 S.W.2d 382, 386 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ). Demand is not excessive simply because it is greater than the amount eventually awarded. *See Findlay*, 611 S.W.2d at 58 (excessive amount "cannot be the only criterion for determination, especially where the amount due is unliquidated"). To prevail on this defense, the debtor must establish that the claimant acted unreasonably or in bad faith in making the demand. *See Standard Constructors, Inc. v. Chevron Chem. Co.*, 101 S.W.3d 619, 627–28 (Tex. App.—Houston [1st Dist.] 2003, pet. denied). In addition, the debtor must establish that the creditor refused tender of the amount actually due or clearly indicated to the debtor that such tender would be refused. *Beauty Elite Group*, 2008 WL 706601, at *4; *Hernandez v. Lautensack*, 201 S.W.3d 771, 777 (Tex. App.—Fort Worth 2006, pet. denied); *see Findlay*, 611 S.W.2d at 58; *Warrior Constructors*, 536 S.W.2d at 386 ("[T]ender is excused where the creditor has clearly indicated that he is unwilling to accept what is due in discharge of the debt.").

On November 22, 2010, counsel for the Fuenteses sent a letter to counsel for State Farm. This letter provided the Fuenteses' "demand" for the following amounts: $230,000 in economic damages; $50,000 in mental anguish damages; and $112,000 for expenses, including attorney's fees. The record reflects that State Farm made a bill of exception consisting of testimony from its attorney's-fees expert, who provided his opinion that the Fuenteses' demand letter represented an excessive demand. The trial court excluded this testimony, as well as the letter.[5]

[5] The trial court also refused State Farm's proposed jury question regarding excessive

State Farm insists that the Fuenteses' demand for $230,000 in economic damages when their policy limit was approximately $133,000 and when they only requested approximately $62,000 at trial was unreasonable on its face. State Farm also argues that the demand for $112,000 for attorney's fees and expenses was unreasonable and made in bad faith when the Fuenteses only submitted evidence of $240 in attorney's fees through the date of the letter. Even assuming without deciding that evidence of the demand letter was relevant and admissible to show, or even established,[6] that the Fuenteses acted unreasonably or in bad faith, we conclude any error in excluding such evidence was harmless where State Farm did not show that it probably resulted in rendition of an improper judgment. State Farm offered no evidence that it tendered, and the Fuenteses refused, the amount actually due.[7] Nor did the demand letter clearly indicate that the Fuenteses intended to refuse tender of the actual amount due under the policy.

To meet the futility-of-tender element of excessive demand, the evidence must clearly indicate that the creditor would refuse tender by the debtor of any amount less than the excessive demand. For example, in a case involving unpaid rent, this element was met where "appellant's demand letter stated that the collection would be turned over to attorneys if the *full* amount of $29,519 was not

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demand.

[6] *But see Triton 88, L.P. v. Star Elec., L.L.C.*, 411 S.W.3d 42, 65 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (noting that "the amounts [totaling approximately $385,000] demanded by [creditor] prior to filing suit were not so much greater than the amount [of $314,358.13] it was eventually awarded as to be 'excessive' or to indicate that the demand was made in bad faith"); *Standard Constructors*, 101 S.W.3d at 628 (initial demand of $531,424 where creditor proceeded to trial solely on $97,784 claim did not constitute bad faith as matter of law).

[7] State Farm argues that, if the Fuenteses had argued they would have accepted a reasonable tender, State Farm could have introduced its rule 167 offer in rebuttal. However, it is State Farm that bore the affirmative burden to plead, prove, and request and obtain findings regarding the essential elements of excessive demand to overcome the Fuenteses' statutory right to attorney's fees. *See* Tex. R. Civ. P. 94; *Beauty Elite Group*, 2008 WL 706601, at *4, 6.

paid within three days." *Aero DFW, LP v. Swanson*, No. 2-06-179-CV, 2007 WL 704911, at *4 (Tex. App.—Fort Worth Mar. 8, 2007, no pet.) (mem. op.) (emphasis in original). In another unpaid-rent case, a demand letter found to meet this element stated: "[T]his letter shall serve as a demand that you make arrangements to pay the full amount of $192,000.00 plus attorney's fees of $2,500.00 for handling this matter within thirty (30) days of this letter. In the event you fail to pay the amount, my client will be forced to file suit against you." *McAllister v. Hatbreeze Props., L.L.C.*, No. 02-11-00060-CV, 2012 WL 579436, at *8 (Tex. App.—Fort Worth Feb. 23, 2012, no pet.) (mem. op.) (concluding "language requiring debtor to pay the full $192,000 or else [creditor] would file suit indicates [creditor's] unwillingness to accept the actual amount due"). Likewise, this court considered whether the creditor's demand with regard to unpaid principal on a note was "unqualified" in nature such that the debtor "was excused from making such a useless tender." *Warrior Constructors*, 536 S.W.2d at 386. We concluded that the following language met the futility element—"[N]o less than complete payment of the total unpaid balance of principal, interest and attorney's fees will be accepted." *Id.*

In contrast, nowhere within the Fuenteses' demand letter did they state that they only would accept payment of the "full" or "no less than [the] complete" amount requested. The Fuenteses' demand letter did not indicate a clear intent to refuse the amount actually due to them. Rather, the letter states: "This demand is made in the spirit of compromise." The Fuenteses expressed their "hope" that "this demand is viewed as a good faith and conservative effort on our part to expeditiously resolve this potential litigation on amicable terms." The Fuenteses also expressed that they were "anxious to have this matter resolved promptly" and invited a response from State Farm. The tenor of the Fuenteses' demand certainly

was not "take it or leave it." Such language did not clearly indicate that the Fuenteses would have refused tender of the correct amount due—i.e., that State Farm's tender of what was due in discharge of the debt would have been useless and therefore was excused. To conclude otherwise could stifle negotiations meant to help avoid or to settle litigation, particularly where the circumstances involve more than simply calculating the unpaid portion of a known debt. Texas law and this court recognize the strong public policy favoring and encouraging compromise instead of litigation. *See, e.g.*, Tex. Civ. Prac. & Rem Code Ann. § 154.002 (West 2013); *Wright v. Sydow*, 173 S.W.3d 534, 551–52 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (collecting cases). Therefore, State Farm did not establish that the trial court's exclusion of evidence of the demand letter probably resulted in rendition of an improper judgment, much less that the Fuenteses were precluded from their statutory right to attorney's fees as a matter of law. *See Triton 88, L.P. v. Star Elec., L.L.C.*, 411 S.W.3d 42, 65 (Tex. App.—Houston [1st Dist.] 2013, no pet.); *Hernandez*, 201 S.W.3d at 778.

Because the trial court did not err in awarding the Fuenteses attorney's fees and prejudgment interest, we overrule State Farm's second issue.[8]

[8] State Farm included a separate third issue within its issues-presented section relating to whether the trial court erred in denying State Farm's motion for remittitur or, alternatively, a new trial to correct the erroneous award of attorney's fees and prejudgment interest given the Fuenteses' excessive demand. However, State Farm discussed its position on remittitur and new trial within its second issue relating to whether the trial court committed error by excluding State Farm's evidence of excessive demand. In any event, we address and overrule both issues in our analysis of State Farm's second issue.

III. CONCLUSION

Having overruled all of State Farm's issues, we affirm the trial court's judgment.

/s/ Marc W. Brown
Justice

Panel consists of Justices Boyce, Busby, and Brown.