

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-08-00413-CV

STATEWIDE BANK AND SN SERVICING CORPORATION, Appellant

V.

ANITA KEITH, Appellee

**On Appeal from the 60th District Court
Jefferson County, Texas
Trial Cause No. B-176,673**

OPINION

This appeal concerns two central issues. The first is whether the mortgagee, Statewide Bank (“Statewide”), breached its duties under a deed of trust to its mortgagor, Anita Keith. The second concerns whether the evidence sufficiently supports the jury’s award of \$45,000.00 for Statewide’s breach.

Following a jury trial, the jury found that Statewide breached the deed of trust, found Keith had not committed any breach, awarded damages of \$45,000.00 for the breach of

contract, awarded Keith additional amounts for her attorneys' fees, and awarded prejudgment and post-judgment interest. We hold that the evidence is sufficient to support the jury's finding that Statewide breached the deed of trust, but factually insufficient to support the \$45,000.00 awarded by the jury for Keith's actual damages. We reverse the judgment and remand the cause for a new trial.

Background

Keith financed her purchase of a home in November 2000, and secured it with a vendor's lien and deed of trust. Keith's deed of trust, among other obligations, required her to keep the property in good repair and maintain adequate insurance, including windstorm coverage. As required by the deed of trust, Keith had obtained windstorm coverage.

Among the mortgagee's rights under the deed of trust, the mortgagee had the right to receive any insurance proceeds paid to the mortgagor that resulted from damage to Keith's home. That provision, which is now at issue, states: "[Mortgagee] may apply any proceeds received under the insurance policy either to reduce the note or to repair or replace damaged or destroyed improvements covered by the policy."

In September 2005, Hurricane Rita severely damaged Keith's home. Keith filed a claim under her homeowners' insurance policy. After some delay, on February 17, 2006, Keith received an insurance draft for \$24,894.60 for the damages the hurricane had caused

to her home. The carrier made the draft payable to Keith, her attorney, and Statewide.¹ At the time of the insurance company's payment, Statewide was Keith's mortgagee, as Statewide had acquired Keith's mortgage shortly after the hurricane.²

After receiving the draft from the insurance company, Keith's attorney forwarded the draft to Statewide with instructions requesting that Statewide endorse the check and return it "so as to pay expenses and begin repairs." Instead, the funds were deposited into the account of Statewide's agent, SN Servicing Corporation ("SNSC"). Although Keith sent the proceeds to the address Statewide had instructed its mortgagors to send mortgage payments, Statewide explained that payments received at that address were actually received by another bank with whom it had a relationship. Its deposit relationship with the other bank required that funds sent to the designated address be deposited into an SNSC account for Statewide.³

¹Although the insurance policy is not among the exhibits contained in the record, we assume that the insurance carrier included Statewide as a loss payee because Keith procured a policy that complied with a covenant in the deed of trust; additionally, the record does not indicate that Statewide asserted any claim that Keith breached the deed of trust by failing to procure the endorsements or coverage required by the deed of trust.

²As of December 16, 2005, according to Statewide's notice of the transfer of the lien, Keith's unpaid balance on the mortgage was \$22,578.15. Thus, the insurance proceeds received by Statewide exceeded the outstanding balance on Keith's loan.

³Statewide refers to this arrangement as a "lock box," and explains that the depository bank, upon receipt, placed the funds into the usual SNSC account for Statewide's mortgage payments. The "lock box" agreement is not in the record.

After depositing the funds, the depository bank then forwarded the letter from Keith's attorney that had accompanied the draft to SNSC. Statewide's witness testified that the letter from Keith's attorney, received February 22, 2006, was Statewide's first notice that Keith's home had suffered damaged.⁴

After receiving the letter from Keith's attorney that requested Statewide endorse the insurance draft, and pending further investigation of Keith's loss, Statewide placed the \$24,894.60 in a suspense account. At that point, Statewide did not try to contact Keith or her attorney regarding the circumstances leading to the insurer's payment. On March 9, 2006, when the endorsed check had not been returned, Keith's attorney called and spoke to a Statewide representative. Keith's attorney demanded that Statewide return the draft. On March 22, 2006, when the draft was not returned, Keith's attorney filed suit against Statewide and SNSC. Keith's original petition alleged claims based on several theories, including breach of contract, theft, and breach of fiduciary duty.

On April 14, 2006, shortly after filing an answer to the petition, the attorney for Statewide and SNSC sent Keith's attorney a letter that advised:

⁴The depository bank was not a party to the suit, and no issues were submitted to the jury that addressed whether Statewide, as mortgagee, possessed the necessary authority to allow its agents to deposit funds payable to it into the agent's account. Additionally, the deed of trust has no express provision requiring the mortgagor to notify the mortgagee of any damage to the property secured by the note, but does contain a provision that allows the mortgagee to inspect the secured property at reasonable times.

My client is prepared to disburse the proceeds to Anita Keith and her contractor. Please provide me with the name of your client's contractor along with invoices for work done to repair the property or a contract for work to be done as soon as possible.

In a letter dated April 17, 2006, Keith's attorney expressly rejected Statewide's requests.⁵

Later, when Keith responded to Statewide's discovery responses, Keith apparently produced invoices for work on her home.⁶ On September 18, 2006, after Statewide received Keith's invoices in discovery, SNSC sent Keith a check, in the amount of \$13,394.03, an amount that is equal to the total sum for the invoices Keith indicated she had paid as of the date of her interrogatory answers. However, Keith's interrogatory responses also reflect that she had "cleaned up debris, hauled off trees, . . . and removed damaged carpet," but she did not attach invoices or receipts reflecting amounts for which she sought reimbursement for her own work. Although SNSC's check, payable to Keith, did not include anything for Keith's work, it was also clear that the check was not tendered to settle any of Keith's claims—a cover letter with the tendered check stated: "SN Servicing Corporation will continue to disburse any funds held for this account as invoices or other evidence of repairs are provided." On September 21, 2006, Keith's attorney returned SNSC's check, and stated:

⁵Statewide does not raise an issue in its appeal that challenges the jury's failure to find that Keith had breached the deed of trust.

⁶The record does not contain evidence that establishes the exact date that Statewide received these invoices; according to Keith, on September 8, 2006, she signed answers to interrogatories, and one of her answers identified several specific invoices that she had paid in return for services to repair her home.

“My client will settle for nothing less than the full amount owed—attorney’s fees, cost of court and interest as provided by law.”

Other than requesting that Keith provide Statewide with contracts and invoices, and directing SNSC to make payments for invoices Keith had paid as of September 2006, the record does not contain any additional evidence that Statewide or its agents did anything more to fulfill Statewide’s obligation under the deed of trust to either repair Keith’s home or apply the proceeds to the loan’s balance. For instance, SNSC and Statewide apparently never inspected Keith’s property after the hurricane or before the conclusion of the trial. An inspection would have allowed Statewide to evaluate whether the home was in good condition, as required by the deed of trust. Nor did Statewide or its agents determine an appropriate value for the work that Keith or others performed on the home. Also, SNSC and Statewide never advised Keith of any additional repairs that Statewide required of Keith. Finally, neither SNSC nor Statewide claimed that Keith had breached the deed of trust by failing to keep the property in good repair; instead, at trial, Statewide and SNSC argued that Keith breached the deed of trust by refusing their tendered partial payment and by refusing to provide them with invoices in an amount that equaled or exceeded the proceeds it held. By its verdict, the jury found that Statewide breached the deed of trust and rejected Statewide’s claim that Keith breached the deed of trust.

Statewide's Breach

In its first issue, Statewide challenges the legal and factual sufficiency of the evidence to support the jury's finding that it breached the deed of trust. When analyzing a legal sufficiency claim, we view the evidence in the light most favorable to Keith, the prevailing party, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *See City of Keller v. Wilson*, 168 S.W.3d 802, 807 (Tex. 2005). The evidence is legally sufficient if it enables "reasonable and fair-minded people to reach the verdict under review." *Id.* at 827. In determining the factual sufficiency of the evidence, courts of appeals must weigh all the evidence, both for and against the finding. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001). In reviewing a factual sufficiency challenge to a finding for which the appellee had the burden of proof, we "set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986).

Generally, Statewide argues that it acted reasonably in requiring Keith to provide it with invoices and contracts to protect its interest in making sure that the insurance proceeds were spent on the repair of Keith's home. Statewide further asserts that none of the evidence indicates it acted unreasonably. However, Statewide's brief fails to address one of the questions implicitly resolved by the jury's verdict—whether Statewide made a timely election of its option to either repair Keith's home or apply the proceeds to the principal of the

mortgage. Statewide argues that it still maintains a right under the deed of trust to elect to apply the insurance proceeds to the mortgage balance. Specifically, Statewide argues:

The Deed of Trust, however, imposes no duties or obligations on Statewide, as the Beneficiary. Rather, Statewide receives only certain permissive rights (obtained in consideration of the mortgage), which it may or may not choose to exercise, as it deems to be in its interest.

In contrast, Keith contends that the deed of trust did not require her to provide Statewide with invoices or contracts for the repair of her home. While Keith recognizes that Statewide could place some conditions on the release of the funds it held, she complains that instead of doing so, Statewide “chose to do nothing until [Keith] filed suit.” In summary, before addressing whether Statewide breached the deed of trust, we must first determine if Statewide timely exercised its option to either repair Keith’s property or to instead, apply the proceeds to the outstanding mortgage.

In analyzing whether Statewide made a timely election, we first consider the time period within which Statewide was required to elect its option. The deed of trust provides no specific time. Nevertheless, where contracts do not specify the time within which a party must elect an option, the law presumes that the contracting parties intended the option be exercised within a reasonable period of time. *See Inimitable Group, L.P. v. Westwood Group Dev. II, Ltd.*, 264 S.W.3d 892, 899-900 (Tex. App.—Fort Worth 2008, no pet.) (“If no time for performance is stated in the contract, the law may imply a reasonable one if the contract

is ‘sufficiently definite for a court to be able to fix the time when it can be enforced.’”) (quoting *Moore v. Dilworth*, 142 Tex. 538, 179 S.W.2d 940, 942 (1944)).

We also consider the purpose of the option at issue when determining whether it was exercised in a timely manner. *See Mattern v. Herzog*, 367 S.W.2d 312, 318 (Tex. 1963). With respect to agreements that create options, “[i]t has been stated generally that in options, ‘time is of the essence.’” *Id.* (quoting *Lusher v. First Nat’l Bank of Fort Worth*, 260 S.W.2d 621, 626 (Tex. Civ. App.–Fort Worth 1953, writ ref’d n.r.e.)); *see also Maupin v. Dunn*, 678 S.W.2d 180, 183 (Tex. App.–Waco 1984, no writ) (reasonable time implied with respect to a purchase option in a real estate contract).

An obvious purpose of a mortgagee’s option to repair is to allow it some control over how the insurance funds are used to protect the mortgagee’s damaged collateral. But, the mortgagee’s interest is not the only consideration, as the mortgagor also has an interest in making financial decisions that will impact the mortgagor’s interests in the property. With respect to the length of time a mortgagee may take in making its election, the question arises whether the mortgagee could withhold its decision for such a length of time that the mortgagor could be forced to make a decision to repair the property without knowing if the mortgagee had elected to repair the property. Or, stated another way, can the mortgagee decide, after the mortgagor repaired the property, to apply the insurance proceeds to the

mortgage balance instead of to the property's repair? With respect to that question, we think the answer is no.

Because both have an interest in knowing which option the mortgagee has chosen, the interests of both the mortgagor and mortgagee are protected by requiring the mortgagee, under an agreement that fails to specify otherwise, to exercise its option within a reasonable time. The mortgagor, knowing the mortgagee's election, can then determine what it can reasonably afford, if anything, in repairing the mortgaged property.

In this case, in light of the amount of Keith's outstanding mortgage compared to the insurance proceeds received, we believe that Statewide, acting in a reasonably prudent manner, was on notice that Keith's home had fairly extensive damage. Thus, aware of significant damage to Keith's home, Statewide needed to inform Keith of its election within a fairly short period after receiving the proceeds in order to allow Keith to then decide what to do about repairing her home.

After it received the insurance funds, the evidence tends to show that Statewide did not undertake reasonable efforts to contact Keith or to notify her of its election on the use of the insurance proceeds. Over two weeks passed during which Statewide apparently did nothing to contact Keith. On March 9, 2006, after Keith's attorney had received no response to his letter that requested Statewide endorse and return the insurance draft, Keith's attorney contacted Statewide. William Fogleman, SNSC's in-house counsel and Statewide's

authorized agent, testified that on its first contact, Statewide advised Keith of Statewide's intent to elect to repair Keith's home.⁷ Even if a jury agreed that Statewide stated an intent to repair on the date of their initial contact, a mere statement of an intent to exercise an election is not equivalent to the exercise of an option to repair. In our opinion, a stated intent under such circumstances is ambiguous, as it can also be considered a reservation of the right to make the decision depending upon future information. *See generally Midland Judicial Dist. Cmty. Supervision & Corrs. Dept. v. Jones*, 92 S.W.3d 486, 487-88 (Tex. 2002); *Harris v. Hines*, 137 S.W.3d 898, 907-08 (Tex. App.—Texarkana 2004, no pet.). We conclude that the record does not establish that Statewide exercised its option on March 9 by verbally informing Keith's attorney of its decision to affirmatively use the insurance proceeds that it held to repair Keith's home.

⁷The person with whom Keith's attorney spoke on March 9 did not testify at trial. As Fogleman was not the person with whom Keith's attorney spoke on March 9, 2006, it appears unlikely that Fogleman had personal knowledge of what had occurred during that initial conversation. Additionally, when asked whether he had advised Keith or her attorney of Statewide's intent to repair the property, Fogleman stated that Statewide advised Keith on the initial contact because "[w]e were trying to get the damage reports so we could figure out what the repairs would need to be." One inference from the evidence that Statewide was requesting damage reports is that it had not yet decided whether to elect its option to repair Keith's home as it was still gathering information. Additionally, when Keith's attorney testified, he did not address whether Statewide told him that it had elected to repair Keith's property on March 9; as to what transpired during his initial contact with Statewide, Keith's attorney testified that the Statewide person with whom he spoke was "extremely evasive, and I really couldn't get any real answers out of her."

The record also reflects that on March 28, 2006, Statewide, shortly after receiving the insurance proceeds, recognized that it needed to perform an inspection of Keith's property. An internal note from its loan file on Keith's loan states: "Do we have an inspector in the Beaumont, Texas area. I need an inspecti[on] due to property damage. [Keith's address] Please let me know, as soon as possible." Nevertheless, the evidence indicated that Statewide never sent anyone to inspect Keith's home.

The record also reflects that Statewide first made a written request asking Keith to provide it with invoices on April 14, 2006, and in that same letter advised Keith's attorney that Statewide was "prepared to disburse the proceeds to Anita Keith and her contractor." However, Statewide's April 14 letter does not foreclose the possibility that it was still gathering information; thus, after receiving invoices, the letter does not foreclose Statewide from later electing to apply the insurance proceeds to the mortgage's balance.

When in mid-September, 2006, Keith provided Statewide with invoices for repairs,⁸ Statewide elected to pay all of the invoices that Keith provided in full, totaling \$13,394.03. In the letter transmitting the reimbursement for repairs reflected in these invoices, Statewide stated that "SN Servicing Corporation will continue to disburse any funds held for this account as invoices or other evidence of repairs are provided." After Keith's attorney

⁸Keith sent these invoices to Statewide as part of the lawsuit's discovery: they were not sent in response to Statewide's April 2006 written request.

rejected the partial payment that Statewide tendered, Fogleman indicated that Statewide put the matter “on hold pending the outcome of the lawsuit.” Statewide tendered no further amounts to Keith for repairs, apparently because Keith never provided additional invoices and it never inspected her property to determine the property’s state of repair. Therefore, although we conclude that Statewide elected to apply \$13,394.03 toward the repairs of Keith’s home as of September 18, 2006, the question remains whether, at that point, Statewide continued to maintain the right to exercise an option over how the insurance proceeds would be used.

Generally, an expression that a party is ready, willing, and able to perform is not generally sufficient to remove the issue from the jury of deciding whether a party is willing to perform. *See generally DiGiuseppe v. Lawler*, 269 S.W.3d 588, 599-603 (Tex. 2008). Having reviewed all of the evidence, we conclude that Statewide’s evidence is not conclusive on the issue of its exercise of its option as of either March 9 or April 14. We hold that under the circumstances here Statewide’s expressed desire to receive invoices is not the equivalent of having agreed to pay these invoices upon their receipt.

Thus, we reach the question of whether Statewide continued to maintain a right to elect an option under the deed of trust as of September 18, 2006, which is the date it tendered some of the proceeds to Keith to reimburse her for repairs she had already performed. By statute, mortgagees handling the proceeds of an insurer’s payment on a mortgagor’s property

are generally required to act fairly quickly to notify the homeowner “of each requirement with which the insured must comply for the lender to release the insurance proceeds.” TEX. INS. CODE ANN. § 557.002(a) (Vernon 2009) (providing the mortgagor with ten days after lender receives insurance payment to provide such notice). Then, once the homeowner requests release of all or part of the proceeds, the mortgagee is required within ten days of the homeowner’s request to release the funds if the homeowner has supplied the information the mortgagee required; otherwise, the mortgagee must provide notice to the homeowner that “explains specifically: (A) the reason for the lender’s refusal to release the proceeds to the [homeowner]; and (B) each requirement with which the insured must comply for the lender to release the proceeds.” TEX. INS. CODE ANN. § 557.003 (Vernon 2009). Similar time constraints existed at the time Keith executed the deed of trust governing the rights and obligations of the parties in this case. *See* Act of May 24, 1993, 73rd Leg., R.S., ch. 688, 1993 Tex. Gen. Laws 2722-23. While the two separate statutory ten-day periods are not specifically included in the deed of trust or otherwise incorporated into the party’s agreement as a contractual obligation, the short time limits established by the Insurance Code demonstrate that parties to similar option agreements reasonably expect the mortgagee to act to make a decision on utilizing the insurance proceeds fairly quickly.

In this case, it appears the funds were deposited into SNSC’s account on February 23, 2006. At least two weeks elapsed before Statewide first had any contact with Keith’s

attorney on March 9. That contact was initiated by Keith's attorney, not by Statewide. The first contact initiated by Statewide occurred on April 14, 2006, approximately seven weeks after its receipt of the insurance proceeds. Viewing the evidence in the light most favorable to Keith, the jury could have reasonably concluded that on April 14 Statewide did not make an election to pay for repairs and disbelieved Fogleman's testimony that Statewide stated an intent to pay for repairs.

When Statewide tendered its check for partial payment in September 2006, it made an election, but only with respect to a portion of the proceeds it held. Nevertheless, this attempt to elect to repair occurred nearly seven months after its receipt of the insurance proceeds. On this record, the jury could reasonably conclude that Statewide failed to timely elect one of its two possible options and could have viewed Statewide's decision to continue to hold the funds after receiving a demand for their release as a breach of Statewide's obligations under the deed of trust. *See generally Ellis v. Waldrop*, 656 S.W.2d 902, 904 (Tex. 1983) (failure to timely exercise right of first refusal for real property resulted in waiver of right); *A.G.E., Inc. v. Buford*, 105 S.W.3d 667, 673 (Tex. App.—Austin 2003, pet. denied) (power to enforce option to purchase expires within reasonable time if no specific time is provided in the agreement); *Maupin*, 678 S.W.2d at 183 (failure to timely exercise option given to purchase real estate resulted in waiver). Given the purpose of the deed of trust's option to repair provision, we conclude that reasonable and fair-minded people could

reach the verdict under review and conclude that Statewide breached the deed of trust by failing to timely elect its option to repair Keith's property. *See City of Keller*, 168 S.W.3d at 827. Further, having weighed all the evidence, both for and against the jury's finding, we do not find the jury verdict to be so against the overwhelming weight of the evidence as to be clearly wrong and unjust. *Cain*, 709 S.W.2d at 176. We overrule the arguments raised by Statewide in issue one.

Damages

In issue two, Statewide challenges the legal and factual sufficiency of the evidence to support the jury's damage award of \$45,000.00. The trial court's judgment is based on Keith's breach of contract issue. Statewide timely raised a complaint concerning whether the jury's award was supported by legally sufficient evidence in its motion for judgment notwithstanding the verdict.

First, we note that "[t]he universal rule for measuring damages for the breach of a contract is just compensation for the loss or damage actually sustained. By the operation of that rule, a party generally should be awarded neither less nor more than his actual damages." *Stewart v. Basey*, 150 Tex. 666, 245 S.W.2d 484, 486 (1952); *see also ExxonMobil Corp. v. Valence Operating Co.*, 174 S.W.3d 303, 316 (Tex. App.–Houston [1st Dist.] 2005, pet. denied). Keith's evidence demonstrated that through trial, Statewide had refused to comply with her request to send her \$24,894.60, the amount of the insurance proceeds that Statewide

withheld from her. Although Statewide asserted that the deed of trust allowed it to withhold these proceeds, the jury's verdict determined that it lost that right by breaching the deed of trust. Thus, we conclude that there is legally sufficient evidence to support an actual damage award of \$24,894.60.⁹

The issue, therefore, becomes whether the evidence supports the additional damages that exceed \$24,894.60. In reviewing the record, we note that Keith's contract claim does not include any claim for consequential or incidental damages, nor did Keith produce evidence of any consequential damages. In her petition, Keith asserted a claim for breach of contract damages for a "sum of at least \$24,894.60." This amount represented the amount Keith expected to receive from Statewide, also referred to as her expectancy damages. Expectancy damages are the most common measure of damages in a breach of contract case; they are used to protect the plaintiff's interest in receiving the benefits of the contract. *See Qaddura v. Indo-European Foods, Inc.*, 141 S.W.3d 882, 888 (Tex. App.—Dallas 2004, pet. denied). "Protecting this interest seeks to restore the non-breaching party to the same economic position in which it would have been had the contract not been breached—thus giving the party the benefit of its bargain." *Id.* at 888-89.

⁹We note that the court's charge gave the jury no guidance on the proper standard to consider in measuring Keith's damage award, but Statewide does not advance any complaint on appeal regarding the charge.

However, the jury's award exceeds the amount Keith alleged as her expectancy damages. Keith's brief, in an attempt to explain why the jury's award exceeded \$24,894.60, argues that because the jury heard that Statewide wrongfully withheld funds from Keith and then refused to undertake repairs or to apply the proceeds to the loan, the jury could conclude that Keith's damages were \$45,000.00. Keith offers no further explanation to explain or justify the jury's award of a sum greater than the total amount Statewide had withheld.

We can also offer no explanation to support the jury's award of \$45,000.00 in actual damages. For breach of a contract, in addition to recovering attorney's fees, which in this case were awarded separately, a plaintiff can recover economic damages but not exemplary damages or mental anguish. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 304 (Tex. 2006) ("For breach of contract, [Plaintiff] could recover economic damages and attorney's fees, but not mental anguish or exemplary damages."); *Stewart Title Guar. Co. v. Aiello*, 941 S.W.2d 68, 72 (Tex. 1997) (holding mental anguish and exemplary damages unavailable for breach of contract). While in addition to a party's expectancy interest, a contract damage award can protect a party's restitution and reliance interests, such as the reasonable cost of renting another place to live, Keith did not produce any evidence to support a recovery of restitution. Further, Keith did not prove that she incurred increased costs in repairing her home as a result of delays attributable to the timing of Statewide's exercise of its option under the deed of trust. Most importantly, Keith's pleadings do not allege that she suffered

consequential damages, and the Texas Rules of Civil Procedure require that a party plead for them. *See* TEX. R. CIV. P. 56, *see also* Cagle, Cherry & Kemp, *The Classification of General & Special Damages for Pleading Purposes in Texas*, 51 BAYLOR L. REV. 629, 666-668 (1999) (*e.g.*, explaining that a party must specifically plead for incidental and reliance damages).

While there is legally and factually sufficient evidence that Statewide breached the deed of trust, and legally and factually sufficient evidence to support a damage award of \$24,894.60, we hold that there is not legally sufficient evidence to support the jury's award of \$45,000.00. Thus, because the evidence is not legally sufficient to support the entire amount of damages, but sufficient to support some portion of the jury's award under the correct measure of Keith's damages, we reverse the trial court's judgment against Statewide and remand Keith's breach of contract claims against Statewide for a new trial. *See Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 51 (Tex. 1998). Regardless, on retrial, and in the event Keith prevails, the trial court's judgment should make it clear that Keith is not entitled to a double recovery. Specifically, in the event that another trial results in a judgment against Statewide, the trial court's judgment should extinguish Statewide's option over the insurance proceeds and clarify that Keith's judgment is not an award that is to be added onto other claims Keith may assert to the insurance proceeds held by Statewide.

The remaining issues raised by Statewide would not result in greater relief. Therefore, it is not necessary that we address them. TEX. R. APP. P. 47.1.

SN Servicing Corporation

In issue six, SNSC complains that the judgment provides Keith with an award of court costs against SNSC even though the trial court granted its motion for instructed verdict. Keith did not appeal from the trial court's ruling on SNSC's motion for directed verdict. Rule 131 of the Texas Rules of Civil Procedure requires that trial courts award costs to the successful party. TEX. R. CIV. P. 131. SNSC prevailed at trial. Therefore, we reform the judgment to provide that Keith recover nothing on her claims against SNSC, and tax SNSC's costs against Keith. *See* TEX. R. CIV. P. 131; *Martinez v. Pierce*, 759 S.W.2d 114, 114 (Tex. 1988).

In conclusion, the judgment in Keith's favor must be reversed because the jury's award is not fully supported by sufficient evidence. TEX. R. APP. P. 44.1(b). Therefore, we reverse the judgment Keith obtained against Statewide and remand all claims on her breach of contract theory for a new trial. We further reform the judgment so that it provides that Keith recover nothing against SN Servicing Corporation and that SN Servicing Corporation recover its taxable costs against Anita Keith. In all other respects, the trial court's judgment is affirmed.

AFFIRMED IN PART AS REFORMED, REVERSED AND REMANDED IN
PART.

HOLLIS HORTON
Justice

Submitted on May 28, 2009
Opinion Delivered November 25, 2009
Before McKeithen, C.J., Gaultney and Horton, JJ.