IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 20, 2014 Session

ERIC D. BROOKS, ET AL. V. TENNESSEE FARMERS MUTUAL INSURANCE COMPANY

Appeal from the Chancery Court for Macon County
No. 4476 C. K. Smith, Chancellor

No. M2013-02326-COA-R3-CV - Filed November 26, 2014

Plaintiffs filed suit against their property insurer for breach of their homeowner's insurance policy to recover for damages sustained to their home as a result of a tornado; Plaintiffs also alleged that Defendant violated the Tennessee Consumer Protection Act ("TCPA"). A jury found that Defendant's actions violated the TCPA and awarded damages to Plaintiffs. Finding Defendant's conduct to be willful, the trial court doubled the jury's award; the court also awarded Plaintiffs attorneys fees and costs. Defendant appeals. We modify the award of costs to Plaintiffs; in all other respects, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part and Modified in Part; Case Remanded

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P. J., M. S., and ROBERT WEDEMEYER, SP. J., joined.

Jack O. Bellar and Jamie D. Winkler, Carthage, Tennessee, for the appellant, Tennessee Farmers Mutual Insurance Company.

William L. Moore, Gallatin, Tennessee; and Edgar Taylor, Hartsville, Tennessee, for the appellees, Eric D. Brooks and Tonia D. Brooks.

OPINION

I. FACTUAL BACKGROUND

On February 5, 2008, a tornado struck in Macon County, Tennessee, causing damage to the home of Eric and Tonia Brooks ("Plaintiffs"); they notified their property insurer,

Tennessee Farmers Mutual Insurance Company ("Defendant"), of the damage and made a claim under their homeowner's policy. Defendant engaged Jim Gandee, an independent claims adjuster from Texas, who inspected the damage and met with Plaintiff's contractor; thereafter Defendant offered Plaintiffs $56,788.74 to resolve their claim. Plaintiffs did not accept the offer and, following unsuccessful negotiations, filed suit in Macon County Chancery Court on January 22, 2009.

Plaintiffs alleged that Defendant breached the terms of the insurance policy by refusing to make payment for their loss; that Defendant's actions amounted to an unfair and deceptive act or practice in violation of the Tennessee Consumer Protection Act ("TCPA"); and that Defendant willfully and knowingly violated the TCPA. Plaintiffs sought general and consequential damages, as well as treble damages, attorneys fees and costs pursuant to the TCPA. Defendant answered on April 24, 2009, denying liability for breach of contract or violation of the TCPA; as an affirmative defense, Defendant asserted that the initial offer of $56,788.74 was "fair and reasonable in all respects" and admitted liability to Plaintiffs in that amount.

The case was heard before a jury from December 17 through 20, 2012. At the close of Plaintiffs' proof, Defendant moved for a directed verdict; the court denied the motion and Defendant proceeded to put on its witnesses. The case was submitted to the jury on the breach of contract and TCPA causes of action. Following their deliberations, the jury returned a verdict holding that Defendant did not breach the insurance contract and that Defendant violated the TCPA; the jury awarded Plaintiffs $85,265.00 in damages. Following the discharge of the jury, Plaintiffs moved the court for an award of "multiple damages up to treble damages" and attorneys fees pursuant to the TCPA; Defendant opposed the motion. The court held that Defendant's conduct was willful and knowing, and stated its findings of fact, at the conclusion of which it doubled the damages assessed by the jury; it awarded attorneys fees in an amount to be determined on the basis of Plaintiffs' counsel's affidavits. The court entered its judgment on March 1, 2013, awarding Plaintiffs damages of $170,530.00 and attorneys fees of $94,847.50.[1]

Thereafter, the parties filed various motions pertinent to the issues on appeal: Plaintiffs filed a motion for discretionary costs, and a motion and supplemental motion for post-trial attorneys fees; Defendant filed a motion pursuant to Tenn. R. Civ. P. 50.02 and 59 for judgment notwithstanding the verdict or, alternatively, to alter, amend or set aside the judgment and to grant a new trial. In due course, the court denied Defendant's motion and granted Plaintiffs' motions, awarding discretionary costs in the amount of $6,018.73 and additional attorneys fees in the amount of $18,810.00.

[1] The jury verdict form and transcript of the court's findings of fact made in ruling on Plaintiff's motion for multiple damages and fees were affixed to and incorporated in the judgment.

Defendant appeals, raising the following issues:

1. Whether the trial court erred in denying Tennessee Farmers Mutual Insurance Company a directed verdict or judgment notwithstanding the verdict.
2. Whether the trial court erred in failing to grant Tennessee Farmers Mutual Insurance company a new trial.
3. Whether any material and substantial evidence supports the jury verdict.
4. Whether the trial court erred in enhancing the damages for a willful or knowing violation of the Tennessee Consumer Protection Act.
5. Whether the trial court erred in awarding attorneys fees and costs.

Plaintiffs request an award of attorneys fees for this appeal.

II. ANALYSIS

A. Motion for Directed Verdict and Motion for Judgment Notwithstanding the Verdict

At the close of Plaintiffs' proof, Defendant moved for a directed verdict on Plaintiffs' breach of contract and TCPA claims; the court denied the motions.[2] After the jury rendered its verdict, Defendant moved for judgment notwithstanding the verdict, which was overruled; the court held that there was "ample proof" for the jury to find that Defendant violated the TCPA.

Motions for directed verdicts are governed by Tenn. R. Civ. P. 50.01[3] and are appropriate at the close of evidence offered by an adverse party or at the close of all the proof; it should be granted when the court determines that the evidence does not raise an

[2] The jury subsequently found that Defendant did not breach its insurance contract; the disposition of that claim is not at issue on appeal.

[3] Tenn. R. Civ. P. 50.01 states:

> A motion for a directed verdict may be made at the close of the evidence offered by an opposing party or at the close of the case. The court shall reserve ruling until all parties alleging fault against any other party have presented their respective proof-in-chief. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

issue of fact for the jury to resolve. *See* 4 Nancy Fraas MacLean, *Tennessee Practice Series–Rules of Civil Procedure Annotated* § 50:1 (4th ed. 2008). A motion for judgment notwithstanding the verdict pursuant to Tenn. R. Civ. P. 50.02[4] is made after the jury has returned a verdict, and may be granted where the court determines that the evidence can lead to only one conclusion. *Id.* at § 50:4. The motion is available to a party who has earlier moved for a directed verdict. *Id.*

A succinct statement of the standards to be applied in the trial court's consideration of either motion, as well as our standard of review, was set forth in *Holmes v. Wilson*:

> A post-trial motion for the entry of judgment in accordance with a motion for a directed verdict made during the trial must be gauged by the usual rules relating to directed verdicts. Those rules require that the trial judge, and the appellate courts, take the strongest legitimate view of the evidence in favor of the opponent of the motion, allow all reasonable inferences in his or her favor, discard all countervailing evidence, and deny the motion where there is any doubt as to the conclusions to be drawn from the whole evidence. A verdict should not be directed during, or after, trial except where a reasonable mind could draw but one conclusion. *Vaughan v. Shelton*, 514 S.W.2d 870 (Tenn. Ct. App. 1974); *Keller v. East Tennessee Producton Credit Ass'n*, 501 S.W.2d 810 (Tenn. Ct. App. 1973). *See also Silverii v. Kramer*, 314 F.2d 407 (3rd Cir. 1963).

551 S.W.2d 682, 685 (Tenn. 1977).

We begin our analysis of the court's ruling on the motion for a directed verdict by summarizing the evidence at the time the motion was made. In addition to their testimony,

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[4] Tenn R. Civ. P. 50.02 states:

> Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 30 days after the entry of judgment a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict; or if a verdict was not returned, such party, within 30 days after the jury has been discharged, may move for a judgment in accordance with such party's motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned, the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Plaintiffs' proof-in-chief consisted of the testimony of Mike Rogers, a Macon County Codes Enforcement Officer; Keith Scruggs, the Codes Director for the City of Lafayette and a director for the Tennessee Emergency Management Agency; Tim Driver, a contractor who, at Plaintiffs request, assessed the damage and prepared an estimate of the cost of repair; William Lamb, a structural engineer hired by Plaintiffs to assess the structural integrity of the home and the damage caused by the tornado; and Darrell Partin, Defendant's representative, who testified to the manner in which Plaintiffs' claim was handled and relative to an estimate of the cost of repair he prepared. Plaintiffs also introduced numerous exhibits, including photographs of the home and copies of correspondence between Plaintiffs and Defendant and/or their respective counsel.

Mr. Brooks testified that he reported the damage to his home a week and a half after the storm when he met with Mr. Partin at Defendant's office; that Jim Waller, a structural engineer, and John Gandee, a claims adjuster, both of whom had been engaged by Defendant, assessed the damage; that he received an estimate from Defendant in the amount of $56,788.74, which Mr. Gandee had prepared; that he engaged Mr. Driver to assess the damage and that Mr. Driver's estimate of the cost of repair totaled $85,265.00; that he, Mr. Gandee, and Mr. Driver had a meeting to discuss the difference in the estimates at which time he and Mr. Driver pointed out matters which Mr. Gandee had overlooked; that Mr. Gandee told him "not to worry about a thing. He had missed some stuff and he would make it right"; that he subsequently asked Mr. Rogers to inspect the house and that Mr. Rogers spent over an hour and a half doing so; that Mr. Rogers inspected the house a second time, along with Mr. Scruggs, after which they prepared a letter summarizing their observations; that he met with Mr. Partin again after Mr. Rogers and Mr. Scruggs wrote their letter; that Mr. Partin did not acknowledge that Mr. Gandee missed some things; that Mr. Gandee's estimate did not change; and that he was presented with a check from Defendant for $56,788.74 which he refused to endorse because he believed certain language on the check operated to release his claim.

Mr. Partin testified that he sent Mr. Waller to assess the damage; that Mr. Gandee was hired to estimate the cost of repair; that he was aware of the meeting that Mr. Gandee, Mr. Driver and Mr. Brooks had at the property; that he and Mr. Vitolins, a general contractor specializing in insurance damage restoration, each inspected the property and prepared an estimate of the cost of repair; that, notwithstanding the language that Mr. Brooks testified caused him not to sign the check, Defendant would have supplemented the claim if other damages were owed; that he received the letter Mr. Scruggs and Mr. Rogers wrote; that nothing was done by Defendant and Defendant did not reconsider Mr. Waller's assessment on the basis of information in the letter; and that he was aware of the letter and of the differences in the estimates of Mr. Gandee and Mr. Driver when he presented the $56,788.74 check to Mr. Brooks.

Mr. Rogers testified that he inspected Plaintiffs' property on two occasions, once by himself and a second time with Mr. Scruggs because of some "hidden" issues with the house; that he and Mr. Scruggs took notes on their observations of the property and authored a letter summarizing their findings that he hand-delivered to Defendant's office; that he was not contacted by Defendant with regard to the letter; and that in order to issue a permit to repair the home, the house would have to be stripped down to the support structure to see if the house was still anchored property and if the supports were still secure.

Mr. Scruggs testified as to the damage he observed at the home, including damage to the foundation; that he recommended that the house be torn down and rebuilt; that he concurred in and signed the letter written by Mr. Rogers; and that he was not contacted by Defendant regarding the letter.

Mr. Driver testified that Mr. Brooks requested that he assess the property and prepare an estimate of the cost of repair; that his original estimate was "around [$85,000]," and that he prepared a second bid, totaling $136,017, based on information contained in an engineering report and in the letter written by Mr. Rogers and Mr. Scruggs; that the repairs identified in his bid were reasonable and necessary, and that his charges were consistent with those of other contractors; and that he agreed with Mr. Waller's assessment that there were no issues with the foundation of the house.

Mr. Lamb testified that he was asked to inspect Plaintiffs' property four years after the tornado; that he reviewed the engineering report of Mr. Waller and the codes letter prepared by Mr. Rogers and Mr. Scruggs; that he was concerned about the structural integrity of the house due to the nature of the damage; that there was significant storm damage to the roof system; that it was possible that the electrical wiring could have been compromised; and that he reviewed Mr. Driver's estimate and found it be reasonable.

The TCPA proscribes any "act or practice which is unfair or deceptive to the consumer or to any other person" Tenn. Code Ann. § 47-18-104(b)(27)[5], and applies to insurance companies that commit unfair or deceptive acts or practices in the handling of claims. *Gaston v. Tennessee Farmers Mut. Ins. Co.,* 120 S.W.3d 815, 822 (Tenn. 2003) (citing *Myint v. Allstate Ins. Co.,* 970 S.W.2d 920, 926 (Tenn. 1998)).[6] The TCPA does not

[5] Effective October 1, 2011, the TCPA was amended to eliminate a private right of action for unfair and deceptive acts or practices under this section. Plaintiffs filed suit on January 22, 2009; consequently, their cause of action remains viable.

[6] Effective April 29, 2011, the General Assembly established that the sole remedy for claims against insurance companies is under Tenn. Code Ann. § 56-8-113, which provides in pertinent part:

(continued...)

define "unfair" and "deceptive," making the determination whether a particular act or practice is unfair or deceptive a legal matter to be decided by the court. *Tucker v. Sierra Builders*, 180 S.W.3d 109, 116 (Tenn. Ct. App. 2005).[7] However, whether a specific representation in a particular case gives rise to liability under the TCPA is a question of fact. *Id.*; *see Davidson v. General Motors Corp.*, 786 N.E.2d 845, 851 (Mass. App. Ct. 2003).

While Defendant argues that the evidence introduced by Plaintiffs was evidence tending to show a disagreement over the amount of the loss or only supporting a claim of bad faith failure to pay, the evidence also showed conduct and circumstances which would support a finding that Defendant acted deceptively when it presented the $56,788.74 check to Plaintiffs in "take it or leave it" fashion; that amount was based on Mr. Gandee's assessment of the damage, in which he acknowledged he "missed some stuff" and represented he "would make [ ] right." In addition, the language on the check that endorsement was a full release of the claim was contrary to Mr. Partin's testimony that additional monies could be paid to Plaintiffs. Particularly compelling in this regard is the following testimony from Mr. Brooks regarding one of his meetings with Mr. Partin:

> A: . . . Mr Partin, he read [the codes letter] over and he just smiled at me and he said that anybody can write this is what the man said. And he suggested that I take the check he offered me.
> Q: He said anybody can make that. Is that what you said?
> A: Yes, sir.
> Q: And what else?
> A: It was suggested I take the check he offered me.
> Q: When you say he suggested it, did he say more than that?
> A: Yes, sir. He slid it to me and he said take the check or I'll void it.
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[6](...continued)
Notwithstanding any other law, title 50 and this title shall provide the sole and exclusive statutory remedies and sanctions applicable to an insurer, person, or entity licensed, permitted, or authorized to do business under this title for alleged breach of, or for alleged unfair or deceptive acts or practices in connection with, a contract of insurance as such term is defined in § 56-7-101(a).

[7] The General Assembly has instructed us to look to the federal understanding of these terms in interpreting them in the TCPA. *See* Tenn. Code Ann. § 47-18-115. "A deceptive act or practice is one that causes or tends to cause a consumer to believe what is false or that misleads or tends to mislead a consumer as to a matter of fact." *Tucker*, 180 S.W.3d, at 116; *see* Jonathan Sheldon & Carolyn L. Carter, *Unfair and Deceptive Acts and Practices* § 4.2.3.1, at 118-19 (5th ed. 2001). The concept of unfairness is broader than the concept of deceptiveness and "it applies to various abusive business practices that are not necessarily deceptive." *Id.*; *see Unfair and Deceptive Acts and Practices* § 4.2.3.1, at 156.

Q: After you were told to take it or I'll void it, did you have any more discussions with Mr. Partin?
A: I tried to get Mr. Partin to work with me is what I tried to do. I tried to get everybody together. I've got to get in my house. I said ya'll work with me and. And other than that, no.
Q: Now with regard to the letter from codes, did he make any reference to that to you or did he change anything after he got the Codes letter?
A: He changed nothing.
Q: After what Mr. Gandee said to you about he had missed some things and would make it right, did anything change?
A: He changed nothing.

Allowing all reasonable inferences in Plaintiffs' favor, the court properly denied the motion for a directed verdict.

After the motion for directed verdict was overruled, Defendant introduced its evidence. Defendant's proof consisted of the testimony of Mr. Partin; Jim Waller, a structural engineer and consultant to Vibration Control Engineering, Inc. ("VCE"), a firm engaged by defendant to assess the damage to Plaintiffs' home; and Paul Vitolins, a general contractor specializing in insurance damage restoration who prepared an estimate of the cost of repair. Defendant also introduced the VCE report and Mr. Vitolin's estimate as exhibits.

Mr. Partin testified that it was his responsibility to coordinate adjusters to inspect claims from the storm; that Defendant's independent adjusters came from different areas and that Mr. Gandee, one of the adjusters, was from Texas; that it was Defendant's standard practice to send an engineer to inspect property reported to be a total loss and that VCE had been engaged to assess the damage; that VCE had assigned Mr. Waller to inspect the property and prepare a report; and that, contrary to the testimony of Mr. Brooks, he would not tell an insured that a check in payment of a claim would be voided if not accepted, and that Mr. Brooks could have accepted the check at any time.

Mr. Waller testified that he was engaged by VCE to investigate the tornado damage in Macon County; that he inspected Plaintiffs' property on February 18, 2008, and prepared a report with his conclusions for Defendant; that the house could be repaired rather than torn down; and that he disagreed with Mr. Rogers' and Mr. Scruggs' letter, and disagreed in part with Mr. Lamb.

Mr. Vitolins testified that he was asked by Defendant to prepare an estimate of damages to Plaintiffs' home, and that he estimated the damage to be $41,932.23.

Defendant contends that the evidence only shows that the parties "had a legitimate disagreement over the appropriate amount to repair the home." As noted earlier in our discussion of the ruling on the motion for directed verdict, however, the evidence showed specific conduct and circumstances from which the jury could determine that the manner in which Defendant handled Plaintiffs' claim was deceptive or unfair, thereby violating the TCPA. Considering all of the evidence in the light most favorable to the verdict, the court did not err in overruling the motion for judgment notwithstanding the verdict.

B. Sufficiency of the Evidence to Support the Verdict

Defendant raises the sufficiency of the evidence to support the jury's verdict as a separate issue and as one ground of its argument that the court erred in failing to grant it a new trial; we shall discuss this issue in the context of both.

Where a properly charged jury has considered the evidence and rendered a verdict, our task is to determine whether there is any material evidence to support the jury's verdict. *See Harper v. Watkins*, 670 S.W.2d 611, 631 (Tenn. Ct. App. 1983); *Lassetter v. Henson*, 588 S.W.2d 315, 317 (Tenn. Ct. App. 1979); *see also* Tenn. R. App. P. 13(d). Moreover, "we must take the strongest legitimate view of all the evidence to uphold the verdict, assume the truth of all that tends to support it and discard all to the contrary. We are bound to allow all reasonable inferences to sustain the verdict, and, if there is any material evidence to support the verdict, we must affirm." *Harper*, 670 S.W.2d at 631. We do not reweigh the evidence. *Electric Power Bd. of Chattanooga v. St. Joseph Valley Structural Steel Corp.*, 691 S.W.2d 522, 526 (Tenn. 1985).

In earlier portions of this opinion, we have summarized the evidence at trial. Applying the foregoing standard, there is material evidence which fully supports the jury's verdict, as stated on the verdict form, that Defendant "committed an unfair or deceptive practice or act under the Tennessee Consumer Protection Law that caused damage to the Plaintiff[s]."

We next address Defendant's contention that the trial court, when it denied the motion for a new trial, "misconstrued its function as the thirteenth juror by incorporating the same findings of fact from the motion for judgment notwithstanding the verdict." Defendant argues that the statements made by the court demonstrate that it did not independently weigh the evidence, as it was required to do.

When considering a motion for a new trial, the trial court acts as a thirteenth juror and must independently weigh the evidence; determine the issues presented; and decide whether the jury's verdict is supported by the evidence. *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694,

717 (Tenn. Ct. App. 1999). If, after weighing the evidence, the trial court is satisfied with the jury's verdict, the court must approve the verdict. *Ridings v. Norfolk Southern Ry. Co.*, 894 S.W.2d 281, 288 (Tenn. Ct. App. 1994). If, on the other hand, the trial court is not satisfied with the verdict, it must grant a new trial. *Id.* "The trial court's performance of its function as thirteenth juror must be performed without regard to and without deference being shown to the result reached by the jury." *Id.* at 288-89. An appellate court presumes the trial court properly performed its duty as the thirteenth juror when the trial court approves the jury's verdict without comment. *Id.* at 289. Where the trial court makes comments regarding the verdict on the record, this Court examines such comments in order to determine "whether the trial court properly reviewed the evidence, and was satisfied or dissatisfied with the verdict." *Miller v. Doe*, 873 S.W.2d 346, 347 (Tenn. Ct. App. 1993). This Court may reverse the lower court's judgment and order a new trial only when the record contains statements that the trial court was dissatisfied with or disapproved of the jury's verdict, or when the trial court absolved itself of or misconstrued its function as the thirteenth juror. *See id.*

The motion for new trial and motion for judgment notwithstanding the verdict were heard at the same time, with the latter motion heard first. In ruling on the motion for judgment notwithstanding the verdict, the court stated:

> And for those reasons when I take - - when I look at the facts in the light most favorable to the plaintiff after a motion for directed verdict has been made, I find that there was ample proof before the jury and before the Court that they could have found there was a violation of the Tennessee Consumer Act and I deny your motion under [ground] two there as well.

In ruling on Defendant's motion for a new trial, the court stated, ". . . I'm going to rule on [the motion for a new trial] exactly the same way I ruled on the [motion for judgment notwithstanding the verdict]. It would be the same statements, same ruling. I think it would be redundant for us to go through that."

Upon our review of the transcript of the hearing on the motions, there is nothing in the court's ruling or comments from which we can conclude that the court failed to properly perform its function as thirteenth juror; rather, the comments show that the court independently weighed the evidence, determined that Defendant's actions violated the TCPA, and decided that the verdict was supported by the evidence. Further, nothing in the comments indicates any dissatisfaction with or disapproval of the verdict. The court did not misconstrue its role as thirteenth juror.

C. Admission of the Letter Written by Mr. Rogers and Mr. Scruggs

Defendant contends that the court erred in allowing Plaintiffs to reopen their proof and admitting the letter written by Mr. Scruggs and Mr. Rogers; Defendant also contends that the letter amounted to unqualified expert testimony.[8]

Permitting additional proof after a party has announced that proof is closed is within the discretion of the trial court, and unless it appears that its action in that regard has permitted injustice, the exercise of discretion will not be disturbed on appeal. *Simpson v. Frontier Cmty. Credit Union*, 810 S.W.2d 147, 149 (Tenn. 1991). Defendant does not articulate the manner in which the court abused its discretion in reopening the proof, other than to say that the court had initially declined to admit the letter into evidence; Defendant then argues matters specifically concerning the effect of its admission. Given the substantial deference we give to courts in the conduct of the trial and admission of evidence, there is no factual basis for us to conclude that the court abused its discretion in reopening the proof. *See Eldridge v. Eldridge*, 42 S.W.3d 82 (Tenn. 2001).[9]

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[8] Plaintiffs initially attempted to introduce the letter written by Mr. Scruggs and Mr. Rogers through the testimony of Mr. Rogers; the court sustained Defendant's hearsay objection. At the close of their proof-in-chief and before Defendant began putting on its proof, Plaintiffs moved to reopen their proof in order to have the letter admitted under the business record exception to the hearsay rule. The court granted the motion and admitted the letter for the purpose of showing that Defendant was on notice of possible problems with Plaintiffs' home, stating:

> I'm going to instruct the jury. This is for notice purposes only that this - - they were given notice of the contents of this letter. It's not for the purpose of establishing there were actual electrical - - you know it's not - - it's really to put them on notice that [Defendant] were given [the letter].

On appeal Defendant asserts that the letter constituted inadmissible hearsay; we do not agree. The letter was admitted to show that Defendant was on notice of possible problems and not as proof of such problems; consequently, it did not constitute hearsay. *See* Tenn. R. Evid. 801(c).

[9] Under the abuse of discretion standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to propriety of the decision made." A trial court abuses its discretion only when it "applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining." The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court.

Eldridge v. Eldridge, 42 S.W.3d 82, 85 (Tenn. 2001) (internal citations omitted).

Defendant argues that the admission of the letter was contrary to Tenn. R. Evid. 702[10] and that, as a result of the letter being admitted, "the jury received speculative expert testimony from unqualified individuals with no specialized knowledge or experience to formulate the opinions reached." The record does not support this contention. The letter contained details of observations from the inspection that Mr. Rogers and Mr. Scruggs made of Plaintiffs' home, and identified potential foundation and electrical problems; it was admitted to show that Defendant was put on notice of such potential problems. While both Mr. Rogers and Mr. Scruggs were employed with the Codes Departments of Macon County and the City of Lafayette, respectively, Plaintiffs did not offer either as an expert witness, neither was qualified by the court to testify as an expert witness, and we have not been cited to any testimony where expert testimony was elicited from either; they were only permitted to testify as to their observations from their inspections of Plaintiffs' home.[11]

D. Voir Dire

Defendant argues that the court improperly denied its motion for mistrial, which it made based on the manner in which counsel for Plaintiffs questioned some of the jurors regarding adverse experiences the juror may have had with an insurance company; Defendant characterizes counsel's conduct as engaging in "efforts to treat the jurors effectively as witnesses."

We have reviewed the discourse cited by Defendant in support of its argument and discern no question or comment which was inappropriate, or which otherwise rose to the level which would necessitate a mistrial. The questions asked to prospective jurors properly addressed their qualifications to serve on a case in which an insurance company was a party; when Defendant objected to a particular question, the court ruled and, when necessary, limited the scope of counsel's questions. The trial judge has wide discretion in the conduct of voir dire and the court's action will not be reversed unless the court abuses that discretion. *State v. Jefferson*, 529 S.W.2d 674, 682 (Tenn. 1975). The court did not abuse its discretion in in denying the motion for mistrial.

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[10] Tenn. R. Evid. 702 provides that "if scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise."

[11] We note in this regard that Defendant introduced expert testimony through Mr. Waller, a structural engineer who, presumably, was capable of responding to any matters in the letter with which Defendant took issue.

E. Enhanced Damages

Under the TCPA, if the court determines that the defendant's conduct is willful and knowing it may award up to three times the actual damages. Tenn. Code Ann. § 47-18-109(a)(3). In determining whether damages should be enhanced, the court may consider, among other factors, the competence of the consumer or other person; the nature of the deception or coercion practiced upon the consumer or other person; the damage to the consumer or other person; and the good faith of the person found to have committed a violation. Tenn. Code Ann. § 47-18-109(a)(4). The decision to award multiple damages is within the sound discretion of the court. *Wilson v. Esch,* 166 S.W.3d 729, 731 (Tenn. Ct. App. 2004). The trial court's findings of fact are reviewed *de novo* with a presumption of correctness unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d). Defendant contends that the court erred in enhancing the damages awarded to Plaintiffs because no substantial evidence exists to support the court's holding that its conduct amounted to a willful and knowing violation of the TCPA.

After the jury returned its verdict and was dismissed, Plaintiffs' counsel made an oral motion to multiply the damages awarded by the jury.[12] The court held that Defendant's conduct was willful and knowing, and made the following findings of fact: that Defendant's statement, "take it or leave it" was coercive; that Defendant's statement, "take it or we will void the check" was a false statement intended to mislead Plaintiffs; that the disclaimer language on the check was a false statement; that it was coercive to make a smaller estimate on the house without a full examination of the damage; and that Defendant had notice of potential electrical and plumbing issues from the codes inspectors. The court then doubled the damages awarded to Plaintiffs.

We do not agree that multiple damages were unwarranted. The jury found that Defendant violated the TCPA, which permitted the court to multiply the damages if it found that Defendant's conduct was willful or knowing. *See* Tenn. Code Ann. § 47-18-109(a)(3). The court made specific findings of fact and held that Defendant's conduct was willful and

[12] In its brief, Defendant argues that it did not have the proper opportunity to respond and submit its own proposed findings of fact related to the motion for multiple damages in violation of Tenn. R. Civ. P. 7.02. Rule 7.02 provides that unless made during a hearing or trial, a motion shall be made in writing. Plaintiffs' motion was made during the trial and therefore complied with Rule 7.02.

knowing.[13] We have reviewed the record, and hold that the evidence does not preponderate against the trial court's findings of fact.

After determining that Defendant's conduct was willful and knowing, the court doubled Plaintiffs' award, which is within the sound discretion of the court. *Wilson*, 166 SW3 at 731. For a trial court to abuse its discretion, it must apply an incorrect legal standard, or reach a decision that is against logic or reasoning that causes an injustice to the complainant. *Eldridge,* 42 S.W.3d at 85. There is no evidence in the record to conclude that the court abused its discretion and Defendant has failed to show that the court's award caused it an injustice. The court did not err in finding Defendant's conduct willful and knowing and doubling the award of damages.

F. Award of Fees and Costs

Following the trial, Plaintiffs moved for an award of attorneys fees and costs; the court granted the motion. Plaintiffs' counsel, William L. Moore and Edgar Taylor III, thereafter filed affidavits setting forth the hours expended and the services each performed in the prosecution of the case,[14] along with a suggested hourly rate of $275; in a separate affidavit, Mr. Moore identified costs of $6018.73 incurred. Following a hearing, the court entered an order awarding fees of $94,847.50 and costs of $6,018.73. Plaintiffs filed a supplemental motion for attorneys fees related to matters arising after the entry of judgment, including several hearings; the court granted the motion and awarded $18,810.00. Defendant contends that the court erred in its award of fees to Plaintiffs because the evidence does not show a violation of the TCPA and because the award is unreasonable. Defendant also contends that, notwithstanding the judgment in their favor, Plaintiffs were not entitled to all amounts sought as discretionary costs.

i.) Attorneys fees

Tenn. Code Ann. § 47-18-109(e)(1) provides that, if the trial court finds that a party has violated the TCPA, the prevailing party may be awarded reasonable attorneys fees.

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[13] Defendant argues that the court failed to conduct a "factor by factor analysis of the statutory requirements necessary to enhance damages" listed at Tenn. Code Ann. § 47-18-109(a)(4). We do not agree that this language requires a court to review those specific factors; rather, the court in its discretion, may analyze the factors listed or any other relevant evidence in making its determination. The record shows that the court complied with the applicable law when it analyzed the nature of coercion practiced on Plaintiffs, false statements made by Defendants, false statements intended to mislead Plaintiffs, and the good faith of Defendant in its investigation of the claim.

[14] Mr. Moore expended 212.70 hours and Mr. Taylor 132.50.

Inasmuch as we have affirmed the jury's determination that Defendant violated the TCPA, we affirm the decision to award attorneys fees to Plaintiffs.

Trial courts are to consider the factors set forth in *Connors v. Connors*, 594 S.W.2d 672 (Tenn. 1980), and, when appropriate, the guidelines listed in Supreme Court Rule 8, RPC 1.5 when making an award of counsel fees.[15] The "determination of reasonable attorneys' fees is necessarily a discretionary inquiry" by the trial court; absent an abuse of that discretion, appellate courts will uphold the trial court's decision. *Keith v. Howerton*, 165 S.W.3d 248, 250-51 (Tenn. Ct. App. 2005) (quoting *Killingsworth v. Ted Russell Ford*, 104 S.W.3d 530, 534 (Tenn. Ct. App. 2002)). A court abuses its discretion when it applies an incorrect legal standard, or reaches a clearly unreasonable decision that causes an injustice to the party complaining. *Id. at 251* (citing *Kline v. Eyrich*, 69 S.W.3d 197, 204 (Tenn. 2002)).

At the hearing on their application for fees, Plaintiffs relied upon the affidavits of their counsel and introduced two witnesses: Russell Brown, a lawyer who had practiced in Macon County for almost 30 years, and Frank Lannom, a trial lawyer from Wilson County, who had 21 years of experience and also practiced in Macon County. Mr. Brown testified that he

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[15] The factors set forth in *Connors* include:

> (1) The time devoted to performing the legal service;
> (2) The time limitations imposed by the circumstances;
> (3) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly;
> (4) The fee customarily charged in the locality for similar legal services;
> (5) The amount involved and the results obtained; and
> (6) The experience, reputation, and ability of the lawyer performing the legal service.

Connors, 594 S. W. 2d at 676. Tennessee Supreme Court Rule 8, RPC 1.5 lists similar factors:

> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) The fee customarily charged in the locality for similar legal services;
> (4) The amount involved and the results obtained;
> (5) The time limitations imposed by the client or by the circumstances;
> (6) The nature and length of the professional relationship with the client;
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services;
> (8) Whether the fee is fixed or contingent;
> (9) Prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and
> (10) Whether the fee agreement is in writing.

reviewed the affidavits of Mr. Moore and Mr. Taylor, and that "there was a pretty good division of attorney economy"; that in preparing for trial, counsel was "pressed at every matter to try this matter and were successful"; that there were two lawyers "at the top of their game that can command [a $275 hourly rate] easily"; that he charges $200 an hour, but should charge more; that there is value to the lawyers' experience having handled hundreds of jury cases; and that he was aware of another attorney in Macon County charging $275 an hour. Mr. Lannom testified that the amount of time spent by counsel was reasonable due to the complexity of the case; that he rarely tried cases alone; that his hourly rate for "noncomplex cases" is $300; that the division of labor on the affidavits is "exactly the way [he] prepare[s] for trial"; that Mr. Taylor's reputation and skill in the area was well known; and that he charged $300 per hour on TCPA cases if there was no contingency fee arrangement.

Defendant called James Madewell, an attorney in Putnam County who had been in practice since 1971, and introduced the deposition testimony of John Knowles, a trial attorney since 1964; Defendant also called Plaintiffs' counsel to testify.

Mr. Madewell testified that he had tried cases in Macon County; that he practiced a great deal in Clay County, which is adjacent to Macon County; that his hourly rate was between $135 and $175; that he had been involved with TCPA and breach of contract cases; that two attorneys for a TCPA case is not necessary; that he was not able to determine the amount of time devoted to each claim after reviewing the affidavits; that he had spent the last 25 years in insurance defense; and that he has never prosecuted a TCPA claim, but has defended against such claims. Mr. Knowles testified that has never prosecuted a TCPA case; that he ordinarily takes a contingency fee on plaintiff's cases; that there may have been some overlapping of work on the affidavits provided by Plaintiffs' counsel; that a reasonable fee for two attorneys on a TCPA case was $150 per hour; and that he could not determine from the affidavits the time spent in pursuing the breach of contract claim from that spent pursing the TCPA claim.

Mr. Moore testified that he had been lead counsel in over 200 jury trials and maintained a full case load until the month of Plaintiffs' case; that most of his complex cases involved other counsel; that he charges $275 an hour in commercial litigation if there is no contingency fee arrangement and had been awarded a fee of $275 per hour; that he is experienced in TCPA cases and that the TCPA is a very difficult area of law; that he had been awarded a fee in a TCPA case; that his affidavit did not distinguish between the breach of contract and TCPA claims because the claims were based on "a common core of facts";

that the fee arrangement with Plaintiffs was a hybrid claim[16]; and that the fee arrangement was in writing. Mr. Taylor testified that he had previously been awarded attorneys fees in TCPA cases; that he conducted over 175 jury trials as lead counsel; that he maintained a full case load during the four years this case was litigated; and that he was a part of the same fee agreement that Mr. Moore had with Plaintiffs.

In ruling on the motion, the court made several findings relative to the factors at Tenn. S. Ct. R. 8, including that there was "very little overlapping" in the hours in which each attorney worked, that the "breach of contract and . . . violation of consumer protection were not . . . discreet and severable," and that the fees requested were "made in good faith and [were] reasonable in light of the complexity of the case and the success achieved." The findings are supported by the affidavits of counsel and the testimony of witnesses for both parties and demonstrate that the court properly considered the applicable factors in determining that the amount requested was reasonable.

Defendant also argues that the award is unreasonable because the fee equals 55.5% of the judgment; this argument, however, is based on an incorrect standard. In *Keith v. Howerton*, a TCPA case, we reversed an award of counsel fees, the amount of which was based on a proportion of the amount of attorney's fees requested to the award of damages granted plaintiffs. *Keith v. Howerton*, No. E2002-00704-COA-R3-CV, 2002 WL 31840683, at *7 (Tenn. Ct. App. Dec. 19, 2002); *see also Keith,* 165 S.W.3d at 253 ("The [TCPA] is to be liberally construed to protect consumers and others from those engaged in deceptive acts or practices. . . . [T]he rule of proportionality would make it difficult, if not impossible, for individuals with meritorious claims but relatively small potential of damages to obtain redress from the courts without the attorneys for such parties to be reasonably compensated for their legal services in obtaining the relief sought."). The damages awarded in a TCPA case is not the measure of reasonableness of the amount of the fee to be awarded for the successful prosecution of the action.

The award is authorized by the TCPA and supported by the evidence; the court did not abuse its discretion in granting Plaintiffs their reasonable attorneys fees.

[16] Mr. Moore testified that the hybrid fee arrangement provided that his compensation would be the greater of "one-third of the total recovery" or court awarded attorneys fees.

ii.) Discretionary Costs

After the trial concluded, Plaintiffs filed a motion for discretionary costs in which they requested $6,018.73[17] as "reasonable and necessary . . . in the preparation and trial of the case." Attached to Plaintiffs' motion was Mr. Moore's affidavit in which the costs were itemized as follows:

01/22/2009	Macon County Chancery Court filing fee	$347.50
01/14/2011	Ad Litem Reporting-Court Appearance	$100.00
07/26/2012	Ad Litem Reporting-Transcript	$323.75
09/11/2012	Elrod & Company-Expert	$1,000.00
11/29/2012	Elrod & Company-Expert	$981.73
12/11/2012	Betsy Pierucki-CR W Lamb transcript	$195.25
12/12/2012	Betsy Pierucki-CR T. Driver transcript	$181.50
	Betsy Pierucki-CR K. Scruggs transcript	$ 88.00
	Betsy Pierucki-CR M. Rogers transcript	$ 93.50
12/12/2012	Macon County Chancery Court	$ 18.00
12/17/2012	Trial Per Diem	$730.00
12/17/2012	Elrod & Company Expert Witness Testimony	$1,937.50
01/03/2013	Betsy Pierucki-CR-Findings of Fact	$ 40.00

After a hearing on the motion, the court entered an order granting Plaintiffs the full amount of discretionary costs requested. Defendant argues on appeal that the court erred in granting costs related to Plaintiffs' expert witness, William Lamb, because Mr. Lamb "testified as to the level of damage suffered by the home and the jury did not find that TFMIC breached its contract with the Plaintiffs or that the home suffered the extent of damages to which he opined."[18]

Tenn. R. Civ. P. 54.04(2)[19] permits a trial court to award costs not included in the bill of costs prepared by the clerk in the court's discretion. *Perdue v. Green Branch Mining Co.*,

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[17] In Mr. Moore's affidavit, the total for the discretionary costs is listed as $6,018.73, which is also the amount awarded by the court; however, the correct total for the discretionary costs is $6,036.73.

[18] The costs attributable to Mr. Lamb are contained in the entries for Elrod & Company.

[19] Tenn. R. Civ. P. 54.04(2) permits a trial court to award the following discretionary costs:

> reasonable and necessary court reporter expenses for depositions or trials, reasonable and necessary expert witness fees for depositions (or stipulated reports) and for trials, reasonable and necessary interpreter fees for depositions or trials, and guardian ad litem fees; travel expenses are not allowable discretionary costs.

837 S.W.2d 56, 60 (Tenn. 1992). Discretionary costs should be awarded to a prevailing party if the costs are reasonable and necessary, and if the party has filed a timely and properly supported motion. *Massachusetts Mut. Life Ins. Co. v. Jefferson*, 104 S.W.3d 13, 35 (Tenn. Ct. App. 2002); *Scholz v. S.B. Intern., Inc.*, 40 S.W.3d 78, 84 (Tenn. Ct. App. 2000). When deciding whether to award discretionary costs, courts should (1) determine whether the party requesting the costs is the "prevailing party," (2) limit awards to the costs specifically identified in the rule, (3) determine whether the requested costs are necessary and reasonable, and (4) determine whether the prevailing party has engaged in conduct during the litigation that warrants depriving it of the discretionary costs to which it might otherwise be entitled. *Massachusetts Mut. Life Ins. Co.*, 104 S.W.3d at 35-36. We likewise employ the deferential "abuse of discretion" standard when reviewing a trial court's decision on a motion to assess discretionary costs. *Id.* at 35; *Scholz*, 40 S.W.3d at 84. Applying these standards, we have determined that the award of costs should be modified.

Plaintiffs prevailed on the TCPA claim and timely moved for discretionary costs; we have not been cited to evidence in the record that would prevent an award of discretionary costs. We have determined that certain items, however, should not have been awarded. First, $1,981.73 of the expenses incurred with respect to Mr. Lamb on dates other than when he testified as an expert witness must be excluded, since only fees for depositions and trial are awardable under the rule. *See Waggoner Motors, Inc. v. Waverly Church of Christ,* 159 S.W.3d 42, 66 (Tenn. Ct. App. 2004) ("[Rule 54.04(2)] limits recovery to the fees charged by expert witnesses to give testimony at deposition or trial.").[20] Second, the $730.00 recorded on the affidavit as "trial per diem" is not explained. At the hearing on the motion for costs counsel and the court discussed a "travel per diem" but did not explain the term; the rule does not allow recovery for travel expenses. In the absence of sufficient explanation in the record, the award of this cost to Plaintiffs is not supported.

Accordingly, the award for discretionary costs is modified by deducting the foregoing costs and reducing the award to $3,325.00.

[20] We do not agree with Defendant that Mr. Lamb's testimony related only to the breach of contract claim. The jury found that Defendant violated the TCPA in the manner in which it handled Plaintiffs' claim and, as noted earlier in this opinion, there was evidence that the amount of Defendant's tender to Plaintiffs was determined without regard to damage at the home which was not readily ascertainable and presented to them in "take it or leave it" fashion. Mr. Lamb testified to the damage he observed and as to concerns he had regarding the structural integrity of the house, damage to the roof and electrical wiring. This was evidence directly relevant to the TCPA claim and the fact that Plaintiff's did not prevail on the breach of contract claim is not dispositive of whether they are entitled to be reimbursed for Mr. Lamb's fee for testifying.

G. Plaintiffs' Attorneys fees on Appeal

Plaintiffs contend that they are entitled to an award of attorneys fees as a result of Defendant's appeal. Our Supreme Court has construed the TCPA to allow an award of attorneys fees generated on appeal. *Killingsworth v. Ted Russell Ford, Inc.*, 205 S.W.3d 406, 409-10 (Tenn. 2006). In order to recover fees for the appeal, the trial court must have determined that the TCPA was violated and the requesting party must raise the fees as an issue in its brief. *Id.* at 410-11; Tenn. Code Ann. § 47-18-109(e)(1).

In our discretion and in accordance with the TCPA, we have determined that Plaintiffs' request for an award of fees for this appeal should be granted and the case remanded for the trial court to determine the appropriate amount of the award.

CONCLUSION

For the foregoing reasons, the award of discretionary costs is modified; in all other respects, the judgment is affirmed. The case is remanded for further proceedings in accordance with this opinion.

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RICHARD H. DINKINS, JUDGE