Opinion issued July 28, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-21-00078-CV

MILAD ATTALLA, Appellant

V.

LOYC INVESTMENTS LTD. CO., Appellee

On Appeal from the 80th District Court
Harris County, Texas
Trial Court Case No. 2019-78630

MEMORANDUM OPINION

This appeal arises from a landlord-tenant dispute. The tenant, Loyc Investments Ltd. Co., sued its landlord, Milad Attalla, for breaching the lease by failing to refund its security deposit or provide a written description itemizing any

amount of the deposit being retained after the lease came to an end. The parties tried their dispute to the trial court, which rendered judgment for Loyc Investments.

Attalla appeals. In nine issues, he asserts that the trial court erred in:

(1) hearing this suit due to lack of subject-matter jurisdiction;

(2) allowing Loyc Investments to untimely file its first amended petition;

(3) allowing Loyc Investments to untimely file its second amended petition;

(4) allowing Loyc Investments to correct its name from "Loyc Investments" to "Loyc Investments Ltd. Co." after trial but before the entry of judgment;

(5) rendering a judgment in favor of Loyc Investments because it had forfeited its legal status and could no longer sue in its own name;

(6) awarding damages under Chapter 92 of the Texas Property Code because they were barred by the applicable statute of limitations;

(7) implicitly finding that Loyc Investments gave him the kind of notice required by the lease and Chapter 92 of the Property Code;

(8) implicitly finding that a representative of Loyc Investments gave him the notice required by the lease and Chapter 92 of the Property Code; and

(9) awarding compensatory damages, statutory damages, and attorney's fees.

We modify the trial court's judgment to eliminate the separate award of $3,300 in compensatory damages to Loyc Investments in addition to the statutory damages awarded under Chapter 92 of the Property Code. We further modify the judgment to condition the award of any appellate attorney's fees to Loyc Investments on Attalla's lack of success in appellate proceedings. We affirm as modified.

BACKGROUND

Loyc Investments sued Attalla for breach of contract, alleging that Attalla's failure to refund its security deposit breached the terms of a residential lease executed by the parties. Loyc Investments sought to recover the $3,300 in deposits that it had paid Attalla at the outset as well as attorney's fees. Loyc Investments' original petition did not refer to the Texas Property Code.

Attalla filed a general denial and asserted affirmative defenses, including collateral estoppel, res judicata, and limitations. He also counterclaimed for breach of contract, alleging lease violations by Loyc Investments. Attalla later filed amended pleadings, but the claims and defenses he asserted in them did not materially differ from those he initially made.

Several days before trial and after the deadline set forth in the trial court's docket control order, Loyc Investments filed its first amended petition. In its amended petition, Loyc Investments continued to allege breach of contract. But in addition to seeking to recover the $3,300 security deposit and its attorney's fees, Loyc Investments sought statutory damages for Attalla's bad-faith failure to return the deposit under Chapter 92 of the Property Code.

The day of trial, Attalla moved to strike Loyc Investments' pleadings. In his motion, Attalla argued that Loyc Investments was registered as a limited liability company under the name Loyc Investments Ltd. Co. but had forfeited its certificate

or charter before it had filed suit due to its failure to pay franchise taxes. Citing Section 171.252 of the Texas Tax Code, Attalla argued this forfeiture barred Loyc Investments from suing or defending in court.

The trial court heard Attalla's motion to strike after the parties announced that they were ready for trial. The trial court denied Attalla's motion because it challenged Loyc Investments' capacity but was unverified and untimely.

Trial was held via ZOOM. Setting aside testimony from counsel about fees, two witnesses testified at trial: Javier Gonzalez and Milad Attalla.

Gonzalez testified in his capacity as the representative of Loyc Investments. He signed the lease on behalf of Loyc Investments.

The lease was a standard Texas Association of Realtors residential lease. Though Loyc Investments was the party that executed the lease, Gonzalez, his wife, and their children were the occupants. The lease required Loyc Investments to give 30 days' written notice of termination. The lease also required Loyc Investments to pay Attalla a security deposit of $2,700. The lease's security-deposit provisions provided that any additional deposits paid would become part of the security deposit. Like the termination provision, the lease required Loyc Investments to give 30 days' written notice before Attalla had to account for or refund the security deposit. The lease provided for the award of attorney's fees to the prevailing party in any suit.

The lease's security-deposit provisions also referred to provisions of Chapter 92 of the Texas Property Code and provided an Internet link to a copy of the Code.

Gonzalez testified that in addition to the initial $2,700 security deposit, Loyc Investments paid a $600 security deposit for a pet. Thus, the total amount of the security deposit under the lease was $3,300.

Gonzalez's wife sent Attalla a notice of termination of the lease via e-mail on September 30, 2015. Like the lease, a copy of her e-mail was admitted into evidence. The lease allowed written notice via e-mail.

The Gonzalez family vacated the leased property in mid-October 2015. According to Gonzalez, the property was then empty. Apart from normal wear and tear, he said, the property was clean and undamaged. The lease provided that Attalla could deduct reasonable charges for damages and repairs from the security deposit, excluding normal wear and tear.

In mid-October 2015, Gonzalez's wife e-mailed Attalla requesting refund of the security deposit. In her e-mail, she provided Attalla with a specific address to which he should send the refund check. But Attalla never refunded any part of Loyc Investments' security deposit.

Thirty-five days after Gonzalez's wife sent the e-mail requesting refund of the deposit, Attalla responded with an e-mail asserting "the property was in a very bad condition, lots of damages, filthy." Attalla included a link in the e-mail to a form

noting the specific complaints about the condition of the leased property. Attalla signed and dated the linked form, which bore a date thirty-one days after Gonzalez's wife had sent her initial refund-request e-mail. Attalla's form did not itemize the amount of damages associated with his complaints about the condition of the leased property. Gonzalez testified that Attalla never provided an itemization explaining why he had retained any particular amount or amounts of Loyc Investments' $3,300 security deposit.

Gonzalez said the leased property was in good condition when his family moved in. He agreed that Attalla was entitled to deduct reasonable charges for damages from the security deposit, excluding normal wear and tear. But Gonzalez denied various damage claims raised on cross-examination, including alleged damage to the garage door, drapes and wooden blinds, windows and screens, doorknobs and locks, walls and floors, ceiling fans, and the dishwasher and refrigerator. He also denied that he failed to return various keys, the garage-door opener, and a gate opener. In addition, he denied having removed the garbage disposal. Likewise, he denied failing to prevent water leaks and leaving trash in the house after moving out.

When Attalla took the stand, he agreed that he had not refunded any part of the security deposit. He also agreed that the form he sent concerning his complaints

about the alleged damage to the leased property did not state any dollar amount, and that any refund of the security deposit was due the date he signed this form.

Loyc Investments' counsel asked Attalla several questions about Chapter 92 of the Texas Property Code and the lease's reference to it. Attalla's counsel objected to these questions on the ground that Loyc Investments had not asserted a Chapter 92 violation until it filed its first amended petition, which Loyc Investments did after the deadline for amending pleadings and without leave of court. The trial court overruled the objection.

Attalla testified that the house was brand new when the Gonzalez family moved in, which was in October 2007. Attalla stated that after the Gonzalez family moved out in October 2015, there was extensive damage to the property, including scratch marks on a ceiling and walls, holes in walls, stains on walls, carpet stains and a cut in some carpeting despite recarpeting the house in April 2013, missing door stops, a broken door, missing trim, discoloration of or burn marks on wooden flooring, missing electrical outlet covers, broken light fixtures, missing stove handles, a missing cabinet hinge, a cracked marble floor tile, missing door handles or broken doorknobs, and missing and broken wooden blinds. During his testimony, Attalla referred to a number of photographs admitted into evidence that depicted some but not most of the alleged property damage. Attalla said the property damage

he testified about exceeded the amount of the security deposit. He testified that repairing the house would cost more than $25,000.

Attalla testified that he did not provide an itemization of the various amounts of damages at issue because he had not yet had the repairs made. According to Attalla, he was unable to afford the repairs at that time.

On cross-examination, Attalla agreed that he had not bought the leased property brand new. The house was built in August 2004. Attalla conceded that he had not obtained estimates for the repair or replacement of items he claimed were damaged, like the carpet and wooden floors. He also conceded that he did not have invoices for repairs he made.

After the bench trial but before the trial court entered judgment, Loyc Investments filed a second amended petition. Its second amended petition was materially the same as its preceding petition but for identifying Loyc Investments Ltd. Co. as the plaintiff rather than Loyc Investments. With the second amended petition, Loyc Investments included a draft order granting it leave to file this pleading, which the trial court signed and entered.

The trial court rendered judgment in favor of Loyc Investments Ltd. Co. for $3,300 in compensatory damages, $10,000 in statutory damages under Chapter 92 of the Texas Property Code, $8,725 in attorney's fees, additional appellate attorney's

fees in the event of appeals, and awarded costs and interest. The trial court ordered that Attalla take nothing by way of his counterclaim.

DISCUSSION

I. Subject-Matter Jurisdiction (Issue 1)

Attalla contends the trial court erred in trying the suit and rendering judgment due to lack of subject-matter jurisdiction. He maintains the trial court lacked subject-matter jurisdiction because the parties already litigated these claims in a prior suit.

A. Standard of review

We review questions concerning subject-matter jurisdiction de novo. *Farmers Tex. Cty. Mut. Ins. Co. v. Beasley*, 598 S.W.3d 237, 240 (Tex. 2020).

B. Applicable law

Subject-matter jurisdiction refers to a court's power to hear a particular type of suit. *TV Azteca v. Ruiz*, 490 S.W.3d 29, 36 (Tex. 2016). Texas courts derive their subject-matter jurisdiction from the Texas Constitution and state statutes. *In re Allcat Claims Serv.*, 356 S.W.3d 455, 459–60 (Tex. 2011). Our Constitution and state statutes vest district courts with general jurisdiction, and we thus presume they have subject-matter jurisdiction absent a contrary showing. TEX. CONST. art. V, § 8; TEX. GOV'T CODE §§ 24.007–.008; *Dubai Petrol. Co. v. Kazi*, 12 S.W.3d 71, 74–75 (Tex. 2000).

C. Analysis

When a party says that prior litigation bars another from litigating a claim or issue again, the party is asserting claim preclusion, which is also known as res judicata, or issue preclusion, which is also known as collateral estoppel. *Barr v. Resolution Tr. Corp.*, 837 S.W.2d 627, 628 (Tex. 1992). Both are affirmative defenses. TEX. R. CIV. P. 94; *Barnes v. U. Parcel Serv.*, 395 S.W.3d 165, 173 (Tex. App.—Houston [1st Dist.] 2012, pet. denied). Even when claim or issue preclusion applies, neither implicates the trial court's subject-matter jurisdiction. *Whallon v. City of Houston*, 462 S.W.3d 146, 155 (Tex. App.—Houston [1st Dist.] 2015, pet. denied); *Dolenz v. Vail*, 200 S.W.3d 338, 341 (Tex. App.—Dallas 2006, no pet.).

Attalla did not litigate the affirmative defenses of claim and issue preclusion below. On appeal, he has not included any record references that support his arguments about claim and issue preclusion. *See* TEX. R. APP. P. 38.1(d), (g), (i) (requiring factual assertions to be supported by references or citations to record).

Instead, Attalla has included documents from other litigation between the parties in an appendix to his brief. They are not in the clerk's or reporter's record, and we cannot consider documents outside the record. *Democratic Sch. Research v. Rock*, 608 S.W.3d 290, 305 (Tex. App.—Houston [1st Dist.] 2020, no pet.).

We overrule Attalla's first issue.

II. Amended Petitions (Issues 2 and 3)

Attalla contends the trial court erred in allowing Loyc Investments to file its first and second amended petitions because they were untimely, as Loyc Investments filed them after the docket control order's deadline for amending the pleadings. Attalla argues the first amendment surprised and prejudiced him by adding an additional claim for violation of Chapter 92 of the Texas Property Code. He argues the second amendment prejudiced him because it altered the plaintiff's identity from Loyc Investments to Loyc Investments Ltd. Co. after trial and thereby prevented him from conducting discovery on the issue of the correct identity of the plaintiff.

A. Standard of review

We review a trial court's decision on whether to allow a party to amend its pleadings for an abuse of discretion. *Chapin & Chapin, Inc. v. Tex. Sand & Gravel*, 844 S.W.2d 664, 665 (Tex. 1992) (per curiam); *Air Prods. & Chems. v. Odfjell Seachem*, 305 S.W.3d 87, 92 (Tex. App.—Houston [1st Dist.] 2009, no pet.).

B. Applicable law

Rules 63 and 66 of the Texas Rules of Civil Procedure address pleading amendments. Rule 63 generally allows a party to amend its pleadings at any time so long as the amendment does not surprise the other side. TEX. R. CIV. P. 63. But if a party wants to amend its pleadings after the deadline in a docket control order, the party must obtain leave of court, which the court must grant unless the other side

shows the amendment operates as a surprise. *Id.* Rule 66, in turn, states that trial courts may allow trial amendments and directs them to do so freely when doing so will promote the presentation of the merits and the other side does not show the amendment will prejudice its ability to be heard on the merits. TEX. R. CIV. P. 66.

Under Rules 63 and 66, a trial court has no discretion to refuse an amendment unless: (1) the other side presents evidence of surprise or prejudice; or (2) the amendment asserts a new cause of action or defense, and thus is prejudicial on its face, and the other side objects to the amendment. *Greenhalgh v. Serv. Lloyds Ins. Co.*, 787 S.W.2d 938, 939 (Tex. 1990). If an amendment is not mandatory, then the decision to allow or deny the amendment rests within the sound discretion of the trial court, and we may reverse only if the trial court's decision is a clear abuse of discretion. *State Bar of Tex. v. Kilpatrick*, 874 S.W.2d 656, 658 (Tex. 1994).

Therefore, even when an amendment asserts a new cause of action or defense and thus seems prejudicial on its face, the trial court retains the discretion to find that it is not prejudicial under the particular circumstances before it. *Ginn v. NCI Bldg. Sys.*, 472 S.W.3d 802, 837–39 (Tex. App.—Houston [1st Dist.] 2015, no pet.). For an amendment to be prejudicial on its face, it must: (1) assert a new substantive matter that reshapes the nature of the trial; (2) be of such a nature that the other side could not have anticipated it in light of the development of the case; and (3)

detrimentally affect the other side's presentation of the case. *Francis v. Coastal Oil & Gas Corp.*, 130 S.W.3d 76, 91 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

C. Analysis

1. First amended petition

Loyc Investments' first amended petition, filed after the deadline for amending the pleadings and without leave of court, asserted for the first time that Attalla had violated Chapter 92 of the Property Code. Though Attalla moved to strike the first amended petition before trial, he did not do so on the basis of the newly added Chapter 92 allegations. However, Attalla did object to the admission of evidence about alleged Chapter 92 violations midway through trial. Attalla argues the first amended petition was prejudicial on its face because it asserted a new claim.

On appeal, Loyc Investments does not contend that Attalla's objection was untimely or that he failed to preserve error with respect to his objection to the first amended petition by waiting until midway through trial to object. Instead, Loyc Investments argues that Chapter 92 merely makes certain damages available in cases involving disputes about residential security deposits, rather than creating a cause of action. Because Chapter 92 violations are not an independent cause of action, Loyc Investments reasons, its first amended petition was not prejudicial on its face.

We have previously described Chapter 92's provisions on residential security deposits as stating causes of action for the bad-faith retention of a security deposit

and bad-faith failure to make an accounting of any amount of the deposit retained. *E.g.*, *Richardson v. Est. of Smith*, No. 01-14-00034-CV, 2014 WL 6068427, at *1 (Tex. App.—Houston [1st Dist.] Nov. 13, 2014, no pet.) (mem. op.). At least two other courts have described these statutory provisions in the same manner. *Williams v. Colthurst*, 253 S.W.3d 353, 360 (Tex. App.—Eastland 2008, no pet.); *Pulley v. Milberger*, 198 S.W.3d 418, 427–28 (Tex. App.—Dallas 2006, pet. denied). Review of the relevant statutory provisions confirms this understanding of them.

Subchapter C of Chapter 92 of the Property Code governs security deposits in residential leases. TEX. PROP. CODE §§ 92.002, 92.101–.111. Under this subchapter, a landlord generally is required to refund a security deposit within 30 days after the tenant surrenders the property, so long as the tenant gives written notice of the tenant's forwarding address. *Id.* § 92.103(a). The landlord may deduct from the deposit damages and charges for which the tenant is liable under the lease but may not retain any portion to cover normal wear and tear, which includes deterioration resulting from the dwelling's intended use but not deterioration resulting from negligence, carelessness, accident, or abuse. *Id.* §§ 92.001(4), 92.104(a)–(b). If the landlord does withhold a portion of the deposit, he must refund the balance of the deposit, if any, with a written description and itemized list of all deductions, unless the tenant owes rent and the amount of rent owed is undisputed. *Id.* § 92.104(c). None of the landlord's deposit-related duties can be waived. *Id.* § 92.006(a).

Subchapter C then provides: "A landlord who in bad faith retains a security deposit in violation of this subchapter is liable for an amount equal to the sum of $100, three times the portion of the deposit wrongfully withheld, and the tenant's reasonable attorney's fees in a suit to recover the deposit." *Id.* § 92.109(a). If the landlord fails to return the deposit or give a written description and itemization of deductions within 30 days of the tenant's surrender of the property, the landlord's bad faith is presumed. *Id.* § 92.109(d). In a suit brought by the tenant under this subchapter, the landlord bears the burden of proving the retention of any portion of the deposit was reasonable. *Id.* § 92.109(c). A landlord who in bad faith does not give a written description and itemized list of damages and charges forfeits the right to withhold any of the deposit, forfeits the right to bring suit for property damages, and is liable for attorney's fees in a suit to recover the deposit. *Id.* § 92.109(b).

Hence, contrary to Loyc Investments' argument, the residential security-deposit provisions of Subchapter C do more than merely make available certain damages in the context of preexisting common-law causes of action, like breach of contract. Instead, Subchapter C imposes statutory duties that exist independent of the language of any residential lease and specifies particular remedies for the breach of these independent duties. *Id.* §§ 92.103–.104, 92.109. In doing so, this subchapter describes both the conduct that will result in liability and the consequences of liability. *Cf. Sanders v. Constr. Equity*, 42 S.W.3d 364, 370 (Tex. App.—Beaumont

2001, pet. denied) (statute lacking "description of what conduct will result in liability," let alone specific elements of claim, did not create cause of action). Indeed, one of Subchapter C's provisions explicitly refers to "an action brought by a tenant under this subchapter." PROP. § 92.109(c). Accordingly, consistent with our court's prior precedent, we hold that Loyc Investments' first amended petition asserted a new cause of action against Attalla. *See Richardson*, 2014 WL 6068427, at *1.

Because Loyc Investments' first amended petition asserted a new cause of action for the first time after the deadline for filing amended pleadings, the trial court had the discretion to deny the amendment but was not necessarily required to do so. *Kilpatrick*, 874 S.W.2d at 658. Thus, the question before us is whether the trial court clearly abused its discretion in failing to strike Loyc Investments' first amended petition. *Id.* On this record, we hold the trial court did not abuse its discretion.

When a party adds a statutory cause of action premised on the same facts previously alleged, the amendment does not amount to the kind of wholesale revision of the suit that requires the trial court to reject the amendment. *Ginn*, 472 S.W.3d at 839. Both before and after the amendment, Loyc Investments alleged Attalla failed to return the deposit paid under the lease. The underlying factual allegations essentially remained the same. In its first amended petition, Loyc Investments added a statutory cause of action for violation of Chapter 92 in addition to its common-law cause of action for breach of contract. The sole factual difference

this amendment made was that it placed Attalla's state of mind—whether he kept the deposits in bad faith—at issue. The addition of this one issue did not reshape the basic nature of the bench trial.

Nor was Loyc Investments' first amended petition of such a nature that Attalla could not have anticipated the amendment in light of the development of the litigation. The lease's security-deposit provisions expressly refer to Chapter 92 of the Texas Property Code, including the provision of an Internet link to the Property Code. Thus, both sides were on notice that the Code contained provisions concerning security deposits in residential leases that could affect their legal rights.

Finally, there is no indication that Loyc Investments' first amended petition detrimentally affected Attalla's presentation of the case. His own state of mind—whether he acted in bad faith—is a matter on which Attalla could readily testify.

We overrule Attalla's second issue.

2. Second amended petition

Two days after the parties tried their dispute to the bench, Loyc Investments sought leave to file a second amended petition. The purpose of this amendment was to state that the correct identity of the plaintiff is Loyc Investments Ltd. Co., rather than Loyc Investments. The trial court granted leave to amend a day later, just before it entered judgment.

The general rules as to amendments remain the same in the context of Loyc Investments' second amended petition: a party may amend its pleadings after trial but before the entry of judgment, unless the other side establishes surprise or prejudice. *See Gilbert v. Tex. Dep't of Crim. Justice*, 490 S.W.3d 598, 601 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (citing *Greenhalgh*, 787 S.W.2d at 940)). Attalla argues that the trial court abused its discretion in allowing the amendment, as the amendment prejudiced him by depriving him of the chance to conduct discovery on Loyc Investments' correct identity due to the amendment's untimeliness.

But in his original answer, which was filed more than eight months before trial and more than five months before the close of discovery, Attalla identified Loyc Investments Ltd. Co. as the plaintiff and counter-defendant. Thus, Attalla's own pleading shows he was aware of Loyc Investments' correct identity from the moment he appeared in the suit and had ample opportunity to conduct discovery on this issue. On this record, Attalla has not shown that he was surprised or prejudiced.

We overrule Attalla's third issue.

III. Loyc Investments' Correct Name (Issue 4)

Attalla contends the trial court erred in allowing the second amended petition for an additional reason—because Loyc Investments did not adduce evidence at trial that the correct name of the company is Loyc Investments Ltd. Co. But Attalla

himself alleged that the name of the plaintiff and counter-defendant is Loyc Investments Ltd. Co. in his original and subsequent answers, including his second amended answer, which was his live pleading at trial. Attalla's own unequivocal factual allegation in his live pleading constitutes a judicial admission.

A clear, deliberate, unequivocal factual allegation made in a live pleading and not pleaded in the alternative is a judicial admission, which conclusively establishes the fact and bars the pleader from disputing it. *Lake Jackson Med. Spa v. Gaytan*, 640 S.W.3d 830, 839 (Tex. 2022). When a party has judicially admitted a fact, the other side is relieved of the burden to offer evidence on the factual issue. *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 905 (Tex. 2000).

Having judicially admitted that the correct name of Loyc Investments is Loyc Investments Ltd. Co., Attalla cannot dispute this fact. Nor can Attalla argue that the trial court should have disallowed the second amended petition on the ground that Loyc Investments had failed to adduce evidence as to its correct name.

We overrule Attalla's fourth issue.

IV. Capacity to Sue (Issue 5)

Citing the Texas Tax Code, Attalla contends the trial court erred in entering judgment for Loyc Investments because it had forfeited its charter in 2018 by failing to pay franchise taxes and thus lacked capacity to sue or defend in its own name.

When a party challenges another's capacity, he challenges the other's legal authority to participate in the lawsuit. *Austin Nursing Ctr. v. Lovato*, 171 S.W.3d 845, 848–49 (Tex. 2005). To raise the issue of capacity, a party must file a verified pleading. TEX. R. CIV. P. 93. If the party fails to raise the issue of capacity in a verified pleading in the trial court, he cannot contest capacity on appeal. *Ray Malooly Tr. v. Juhl*, 186 S.W.3d 568, 571 (Tex. 2006). The issue is waived. *Id.*

Attalla challenged the capacity of Loyc Investments in the trial court based on the forfeiture of its charter, but he did not do so in a verified pleading. Having failed to raise the issue of capacity in a verified pleading, Attalla has waived the issue.

We overrule Attalla's fifth issue.

V. Statute of Limitations (Issue 6)

Attalla contends that Loyc Investments did not assert its claim for violation of Chapter 92 of the Texas Property Code within four years of when it accrued. Therefore, Attalla says, the claim is barred by the four-year statute of limitations.

Loyc Investments does not dispute Attalla's position as to the date of accrual. Loyc Investments instead responds that, assuming its Chapter 92 allegations constitute an independent cause of action subject to limitations, this cause of action relates back to the company's original petition, which it filed within limitations.

A. Standard of review

Whether an otherwise untimely claim relates back to a claim filed within the period prescribed by the statute of limitations is a question of law, which we review de novo. *See Lexington Ins. Co. v. Daybreak Express*, 393 S.W.3d 242, 244–45 (Tex. 2013) (per curiam) (deciding for itself, with no deference to lower courts, whether one claim related back to earlier one without explicitly stating standard of review).

B. Applicable law

The statute of limitations for a breach-of-contract claim is four years. *Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d 194, 203 (Tex. 2011) (citing TEX. CIV. PRAC. & REM. CODE § 16.051). Chapter 92 of the Property Code does not state a limitations period for the causes of action it creates. So, the residual statute of limitations, which is four years, applies to these claims as well. CIV. PRAC. & REM. § 16.051.

The relation-back doctrine is codified in Section 16.068 of the Civil Practice and Remedies Code. Entitled "Amended and Supplemental Pleadings," it provides:

> If a filed pleading relates to a cause of action, cross action, counterclaim, or defense that is not subject to a plea of limitation when the pleading is filed, a subsequent amendment or supplement to the pleading that changes the facts or grounds of liability or defense is not subject to a plea of limitation unless the amendment or supplement is wholly based on a new, distinct, or different transaction or occurrence.

CIV. PRAC. & REM. § 16.068. As this provision's language shows, its purpose is to allow a party to assert other grounds of liability or defense after limitations have run,

provided that they relate to the same transaction or occurrence the party had placed at issue in a pleading filed within limitations. *See Syrian Am. Oil Corp. v. Pecten Orient Co.*, 524 S.W.3d 350, 363 (Tex. App.—Houston [1st Dist.] 2017, no pet.).

In deciding whether claims arise from the same transaction or occurrence, we focus on whether there is a logical relationship between the claims. *Lexington Ins. Co.*, 393 S.W.3d at 244. If the claims arise from a common core of operative facts, then they arise from the same transaction or occurrence, even though the requirements for the proof of the claims may differ somewhat. *Id.* at 244–45; *see also Goss v. City of Houston*, 391 S.W.3d 168, 174–75 (Tex. App.—Houston [1st Dist.] 2012, no pet.) (indicating that when original claim was timely filed, relation-back doctrine applies so long as amended pleading changing ground of liability is not wholly based on new, distinct, or different transaction or occurrence).

C. Analysis

It is undisputed that Loyc Investments timely filed its original petition alleging breach of the residential lease within fours years of the accrual of this claim. It likewise is undisputed that Loyc Investments did not assert its Chapter 92 claim within four years of its accrual. Hence, the question before us is whether Loyc Investments' Chapter 92 claim arises from the same transaction or occurrence as its breach-of-contract claim and is thus rendered timely by the relation-back doctrine.

Loyc Investments' original petition, in which it alleged breach of contract, and its first amended petition, in which it added its Chapter 92 claim, state factual allegations that are virtually identical. Both claims concern Attalla's failure to refund Loyc Investments' security deposit. As these two claims arise from a common core of operative facts, they arise from the same transaction or occurrence. *Lexington Ins. Co.*, 393 S.W.3d at 244–45. When, as here, a party amends its pleading to change the grounds of liability relating to the same transaction or occurrence, the relation-back statute applies and renders an otherwise untimely amendment timely. CIV. PRAC. & REM. § 16.068; *e.g.*, *Lexington Ins. Co.*, 393 S.W.3d at 245 (holding relation-back doctrine applied because statutory cargo-damage claim and breach-of-settlement claim based on settlement to resolve cargo-damage dispute arose out of same occurrence—shipment of cargo).

We overrule Attalla's sixth issue.

VI. Written Statement of Forwarding Address (Issue 7)

Attalla contends that his statutory obligations to refund Loyc Investments' security deposit and provide a written statement of any amounts withheld were never triggered because the record contains no evidence or legally insufficient evidence that Loyc Investments gave him its forwarding address. Thus, Attalla reasons, the trial court erred in awarding any relief under Chapter 92 of the Property Code.

A. Standard of review

Loyc Investments bore the burden to prove it gave Attalla a written statement of its forwarding address, thus triggering his obligations to refund the security deposit and account for any amount of the security deposit he withheld. *Jordan v. Schwing*, No. 01-03-00008-CV, 2004 WL 1351409, at *6 (Tex. App.—Houston [1st Dist.] June 17, 2004, no pet.) (mem. op.). When, as here, the party who did not have the burden of proof at trial challenges the legal sufficiency of the evidence supporting an adverse finding, he must show that no evidence supports the finding. *Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d 194, 215 (Tex. 2011).

B. Applicable law

Under Chapter 92, a "landlord is not obligated to return a tenant's security deposit or give the tenant a written description of damages and charges until the tenant gives the landlord a written statement of the tenant's forwarding address for the purpose of refunding the security deposit." PROP. § 92.107(a). Once a tenant gives this notice, it triggers the landlord's statutory obligations to refund the security deposit and provide an accounting of any amount withheld. *Hardy v. 11702 Mem'l, Ltd.*, 176 S.W.3d 266, 272 (Tex. App.—Houston [1st Dist.] 2004, no pet.).

C. Analysis

At trial, Loyc Investments introduced testimony and documentary evidence that Gonzalez's wife e-mailed Attalla requesting refund of the deposit. In her e-mail,

which was admitted into evidence, she gave Attalla the address to which he should send the refund check. The lease specifically provides that the parties may provide notice by e-mail, and Gonzalez's wife sent the e-mail in question to the address specified for Attalla in the lease. Attalla did not deny that he had received this e-mail in his trial testimony. Accordingly, the record contains uncontradicted evidence supporting the trial court's implicit finding that Loyc Investments provided a written statement of its forwarding address as required to trigger Attalla's Chapter 92 security-deposit obligations.

We overrule Attalla's seventh issue.

VII. Notice of Surrender Under the Lease (Issue 8)

Attalla contends his statutory obligations to refund Loyc Investments' security deposit and provide a written statement of any amounts withheld were never triggered for another reason. He contends this is so because the record contains no evidence or legally insufficient evidence that Gonzalez's wife, who gave notice of surrender of the premises, was authorized to act on behalf of Loyc Investments.

A. Standard of review

Loyc Investments bore the burden to prove it gave Attalla proper advance notice of its surrender of the premises under the lease. *See Jordan*, 2004 WL 1351409, at *6 (assigning burden to tenant as to written statement of forwarding address). When, as here, the party who did not have the burden of proof at trial

challenges the legal sufficiency of the evidence supporting an adverse finding, he must show that no evidence supports the finding. *Exxon Corp.*, 348 S.W.3d at 215.

B. Applicable law

Under Chapter 92, a landlord may condition refund of the security deposit on a requirement that the tenant give advance notice of the surrender of the premises, provided that "the requirement is underlined or is printed in conspicuous bold print in the lease." PROP. § 92.103(b). The security-deposit provisions of the lease state that Loyc Investments had to give Attalla at least 30 days' written notice of surrender before he was obligated "to account for or refund the security deposit." This statement in the lease is underlined, as required by Chapter 92.

C. Analysis

It is undisputed that Gonzalez's wife gave Attalla written notice of Loyc Investments' surrender of the premises. Attalla, however, argues that she was not designated in the lease as someone authorized to act on behalf of Loyc Investments. Thus, Attalla asserts, her notice of surrender was not legally effective.

Attalla does not identify a provision in the lease that designates anyone as Loyc Investments' representatives or requires any notice given on Loyc Investments' behalf to be given by these designated persons. The lease's provision on notices specifies to whom notices must be sent—Gonzalez and Attalla

respectively—but does not provide that only these two may send lease-related notices.

Notably, the record contains multiple e-mails between Gonzalez's wife and Attalla in which they communicated about the leased property, including about notices required under the lease. In one of these e-mails, Gonzalez's wife explicitly stated she was providing formal notice of termination of the lease "[o]n behalf of Loyc Investments." Neither in his response to this e-mail nor in response to any other did Attalla express surprise that she was acting on behalf of Loyc Investments. Nor did Attalla testify at trial that he did not understand or believe Gonzalez's wife had the authority to represent the company. Accordingly, the record contains some evidence supporting the trial court's implicit finding that Loyc Investments gave Attalla the required notice of surrender.

We overrule Attalla's eighth issue.

VIII. Chapter 92 Damages (Issue 9)

The trial court awarded Loyc Investments both $3,300 in compensatory damages, which was the amount of the security deposit, as well as $10,000 in statutory damages under Chapter 92, which was comprised of three times the amount of the security deposit plus $100, as well as attorney's fees. On appeal, Attalla claims the trial court erred in awarding these damages on multiple grounds. First, he argues Loyc Investments cannot recover any damages for bad-faith failure to refund the

security deposit because Loyc Investments did not provide the written statement of its forwarding address required by Chapter 92. Second, he argues the trial court erred in awarding any damages to Loyc Investments under Chapter 92 because any claim under the statute is barred by limitations. Third, Attalla argues he is entitled to an offset of $25,000 in damages based on his counterclaim for damages to the leased premises. Fourth, he argues that Loyc Investments is not entitled to both refund of its deposit as well as treble that amount under Chapter 92. Finally, Attalla argues Loyc Investments cannot recover appellate attorney's fees, which the trial court awarded, because Loyc Investments did not plead for the recovery of these fees and no statute provides for an award of these fees in the event of an appeal.

Attalla's first two damages-related arguments are restatements of his sixth and seventh issues, which we have already addressed and rejected, and thus require no further analysis. We address each of his remaining three damages-related complaints in turn, even though Attalla's issue is an improperly multifarious one, because the ostensible errors about which he complains are readily comprehensible. *See Guimaraes v. Brann*, 562 S.W.3d 521, 545 (Tex. App.—Houston [1st Dist.] 2018, pet. denied) (court of appeals can disregard multifarious appellate issue—single issue that challenges trial court ruling based on numerous grounds or that challenges several distinct and separate trial court rulings—or may consider issue if court can ascertain complaints being made with reasonable certainty based on briefing).

A. Offset for counterclaim

In its judgment, the trial court ordered that Attalla take nothing on his counterclaim for damages to the leased property, concluding he had not overcome the statutory presumption that he retained the security deposit in bad faith and that his bad faith barred his counterclaim. On appeal, Attalla argues that because Loyc Investments did not comply with the statutory requirement to give him a written statement of its forwarding address for the purpose of refunding the security deposit, the bad-faith provisions of Chapter 92 do not bar his counterclaim for damages.

Attalla's position that Loyc Investments did not comply with the statutory requirement to give its forwarding address is a restatement of his seventh issue, which we have addressed and rejected. This, in turn, defeats Attalla's argument that he is entitled to an offset based his on counterclaim for damages to the property.

When a landlord does not refund a residential security deposit or give a written description and itemization of deductions within 30 days of the tenant's surrender of the premises, the law presumes the landlord acted in bad faith. PROP. § 92.109(d). The evidence conclusively shows Attalla neither refunded the deposit nor provided an itemization of deductions within this timeframe. Thus, the presumption of bad faith applies. To rebut the presumption, Attalla had to prove he retained the deposit and failed to provide an itemized accounting in good faith, which is honesty in fact as to the conduct or transaction concerned. *FP Stores v. Tramontina US*, 513 S.W.3d

684, 692 (Tex. App.—Houston [1st Dist.] 2016, pet. denied). The trial court found that Attalla did not overcome the presumption of bad faith, which compels a finding of bad faith. *Hardy*, 176 S.W.3d at 271. On appeal, Attalla neither challenges the sufficiency of the evidence as to the trial court's finding that he failed to overcome the presumption of bad faith or the concomitant finding that he in bad faith failed to comply with Chapter 92's security-deposit obligations.

When a landlord in bad faith does not give a written description and itemized list of damages and charges, he "forfeits the right to withhold any portion of the security deposit or to bring suit against the tenant for damages to the premises." PROP. § 92.109(b)(1). This statutory bar on bringing suit defeats Attalla's counterclaim as a matter of law. *Lost Creek Ventures v. Pilgrim*, No. 01-15-00375-CV, 2016 WL 3569756, at *7 (Tex. App.—Houston [1st Dist.] June 30, 2016, no pet.) (mem. op.).

We overrule this aspect of Attalla's ninth issue.

B. Compensatory and treble damages

In its judgment, the trial court awarded Loyc Investments both the amount of its security deposit as compensatory damages as well as $100, treble the amount of its security deposit, and attorney's fees. Attalla contends the trial court erred in awarding both the amount of the deposit as compensatory damages and treble the amount of the deposit, as Chapter 92 only provides for treble damages. Or, stated

differently, Attalla argues the trial court erred in awarding quadruple the amount of the security deposit when the statute only provides for treble damages.

Attalla's quadruple-damages complaint concerns the correct interpretation of Chapter 92. The correct interpretation of a statute presents a question of law, which we review de novo. *Davis v. Morath*, 624 S.W.3d 215, 221 (Tex. 2021).

Section 92.109 of the Property Code, entitled "Liability of Landlord," states, in relevant part, that any "landlord who in bad faith retains a security deposit in violation of this subchapter is liable for an amount equal to the sum of $100, three times the portion of the deposit wrongfully withheld, and the tenant's reasonable attorney's fees in a suit to recover the deposit." PROP. § 92.109(a). No other provision of Chapter 92 provides for additional liability in any amount or otherwise provides for recovery of the deposit itself. For this reason, in *Robinson v. Bontha*, our court rejected the contention that a tenant could recover both the amount of his deposit plus three times that amount when the tenant prevailed in a suit alleging the landlord retained the deposit in bad faith. No. 01-19-00777-CV, 2020 WL 7349508, at *4–5 (Tex. App.—Houston [1st Dist.] Dec. 15, 2020, no pet.) (mem. op.). Thus, we agree with Attalla that the trial court erred in awarding quadruple damages.

Loyc Investments argues *Robinson* is not binding precedent because it is a memorandum opinion. Loyc Investments further argues that *Robinson* is wrong.

We disagree on both counts. All opinions and memorandum opinions issued in civil cases from 2003 onward have precedential value. *See* TEX. R. APP. P. 47.7(b); TEX. R. APP. P. 47.7 cmt.; *see also PAK Foods Houston v. Garcia*, 433 S.W.3d 171, 176 n.4 (Tex. App.—Houston [14th Dist.] 2014, pet. dism'd) (reaching same conclusion based on same appellate rule and its associated comment). Our court's decision in *Robinson* thus is precedential, and we are bound to follow it. *Medina v. Tate*, 438 S.W.3d 583, 588 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

But even if we were free to revisit the issue of what damages are available under Chapter 92, we would hew to *Robinson*'s holding. Chapter 92 creates a cause of action for bad-faith retention of a security deposit and specifies the damages recoverable in connection with this cause of action. PROP. §§ 92.103, 92.109(a). Chapter 92's provisions do not expressly provide for the recovery of both the amount of the deposit wrongfully retained as well as triple this amount in additional damages. Nor does Chapter 92 as a whole suggest the legislature intended to provide for both an award of actual or compensatory damages as well as treble damages.

If the legislature had intended to authorize the factfinder or trial court to award both actual or compensatory damages and triple this amount of damages upon a finding of bad faith, the legislature knew how to effect this intent because other statutes expressly do so. *E.g.*, TEX. BUS. & COM. CODE § 17.50(b)(1) (allowing consumer who prevails in DTPA action to recover economic damages plus three

times amount of economic damages when defendant's conduct was committed knowingly); TEX. INS. CODE § 541.152(a)(1), (b) (allowing plaintiff who prevails in certain insurance-related suits to recover actual damages plus three times amount of actual damages when defendant knowingly committed act subject to suit). The provisions of Chapter 92, in contrast, do not resemble these other statutes in structure or language. When, as here, the legislature enacts a statute that lacks structure or language that other statutes include, we presume these differences and any resulting differences in meaning are purposeful, reflecting the legislature's conscious decision to enact a different result. *See, e.g.*, *State v. One (1) 2004 Lincoln Navigator*, 494 S.W.3d 690, 701 (Tex. 2016) (observing that legislature knew how to effectuate intent to provide for exclusionary rule in civil proceeding based on rule's inclusion in criminal statute and reasoning that legislature did not intend exclusionary rule to apply in civil proceeding based on omission of rule from applicable civil statute).

We sustain this aspect of Attalla's ninth issue.

C. Appellate attorney's fees

The trial court awarded Loyc Investments "$9,000 in attorney's fees if this judgment is appealed to an intermediary court of appeals." Attalla contends the trial court erred in awarding appellate fees because Loyc Investments did not request them in its live pleading. Attalla further argues the trial court erred because Chapter 92 does not authorize an award of fees in the event of an appeal.

Chapter 92 provides that a landlord who in bad faith retains a security deposit "is liable for . . . the tenant's reasonable attorney's fees in a suit to recover the deposit." PROP. § 92.109(a). It also provides that a landlord who in bad faith does not give a written description and itemized list of damages and charges "is liable for the tenant's reasonable attorney's fees in a suit to recover the deposit." *Id.* § 92.109(b)(2). Because these fee provisions both provide that a landlord "is liable" for fees in instances of bad faith, they are mandatory when applicable. *See Bocquet v. Herring*, 972 S.W.2d 19, 20 (Tex. 1998) (fee provisions providing that party "may recover," "shall be awarded," or "is entitled to" attorney's fees are not discretionary); *George v. Dallas Cty. Hosp. Dist.*, No. 02-10-00357-CV, 2011 WL 3546630, at *4 n.5 (Tex. App.—Fort Worth Aug. 11, 2011, no pet.) (mem. op.) (characterizing statute providing party "is liable" for fees when other side prevails as mandatory).

When a statute mandates an award of attorney's fees, the party seeking them does not need to request them in its pleading to recover them in the judgment. *Rogers v. Bagley*, 623 S.W.3d 343, 357 (Tex. 2021). At any rate, Loyc Investments did request its fees under Sections 92.109(a) and 92.109(b)(2) of the Property Code in its second amended petition. Thus, the sole questions are whether Chapter 92 authorizes an award of appellate fees and whether such an award is proper here.

The general rule is that a trial court's award of attorney's fees may include appellate attorney's fees. *Hunsucker v. Fustok*, 238 S.W.3d 421, 431 (Tex. App.—

Houston [1st Dist.] 2007, no pet.); *Keith v. Keith*, 221 S.W.3d 156, 169 (Tex. App.—Houston [1st Dist.] 2006, no pet.). The general rule can, of course, be altered by statute. *E.g.*, PROP. § 21.019(b) (stating trial court that hears and grants motion to dismiss condemnation suit filed by party that filed condemnation petition must award attorney's fees incurred by property owner through date of hearing). But the language of Sections 92.109(a) and 92.109(b)(2) does not alter the general rule that a trial court's fee award may include appellate attorney's fees, and Attalla has not included any argument or authority in his briefing that suggests otherwise. Thus, we hold that Chapter 92 authorizes a trial court to award appellate attorney's fees. Indeed, when an award of attorney's fees incurred through trial is mandatory under the statute because the requesting party has put on the necessary evidence, an award of appellate attorney's fees is also mandatory when the party presents the requisite proof of the reasonableness of these fees. *See Ventling v. Johnson*, 466 S.W.3d 143, 154 (Tex. 2015) (holding that when attorney's fee award is mandatory under Section 38.001 of Texas Civil Practice and Remedies Code, award of appellate attorney's fees is likewise mandatory, provided requesting party puts on necessary proof); *The Iola Barker v. Hurst*, 632 S.W.3d 175, 194 (Tex. App.—Houston [1st Dist.] 2021, no pet.) (holding same under Texas Citizens Participation Act's fee provision).

Nonetheless, a trial court must condition an award of appellate attorney's fees upon the appellant's unsuccessful appeal, as an appellant should not be penalized for

pursuing a meritorious appeal. *Sky View at Las Palmas v. Mendez*, 555 S.W.3d 101, 115–16 (Tex. 2018). Unless the court of appeals resolves the appellant's appeal in favor of the appellee to whom the trial court conditionally awarded appellate attorney's fees, the appellee cannot recover its appellate attorney's fees. *Id.* at 116; *Ventling*, 466 S.W.3d at 156. The trial court abuses its discretion if it awards appellate attorney's fees to the appellee without conditioning the award on the appeal's outcome. *In re Ford Motor Co.*, 988 S.W.2d 714, 721 (Tex. 1998). If the trial court errs by awarding unconditional appellate attorney's fees, we do not reverse; we modify the trial court's judgment to condition receipt of these fees on the ultimate outcome of appellate proceedings. *Ansell Healthcare Prods. v. United Med.*, 355 S.W.3d 736, 745 (Tex. App.—Houston [1st Dist.] 2011, pet. denied).

Here, the trial court did not condition its award of appellate attorney's fees on Attalla's lack of success on appeal. This was error. We have held that Attalla's complaint that the trial court erred in awarding quadruple damages to Loyc Investments is meritorious, which renders an award of appellate attorney's fees to Loyc Investments improper. Because the trial court's judgment nonetheless allows for the recovery of appellate attorney's fees unconditionally, we must modify it to bar their award unless Attalla is ultimately unsuccessful in any further appeal.

We sustain this aspect of Attalla's ninth issue.

CONCLUSION

We modify the trial court's judgment to delete the separate award of compensatory damages in the amount of $3,300 to Loyc Investments and to condition the award of any appellate attorney's fees to Loyc Investments on Attalla's lack of success on appeal. We affirm the trial court's judgment as modified.

Gordon Goodman
Justice

Panel consists of Chief Justice Radack and Justices Goodman and Hightower.