

Affirmed and Memorandum Opinion filed November 29, 2016.



In The

Fourteenth Court of Appeals

NO. 14-15-00701-CV

**M SCOTT CONSTRUCTION, LTD. AND RLI CORP A/K/A RLI
INSURANCE COMPANY A/K/A RLI SURETY, Appellants**

V.

JOHN MIRELES D/B/A JM2 CONSTRUCTION, Appellee

**On Appeal from the County Civil Court at Law No. 3
Harris County, Texas
Trial Court Cause No. 1047357**

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

M Scott Construction, Ltd. and RLI Corp a/k/a RLI Insurance Company a/k/a RLI Surety (collectively, “Scott Construction”) appeal from a final judgment in favor of John Mireles d/b/a JM2 Construction in connection with a contract dispute arising from a construction project.¹ Scott Construction contends that (1)

¹ Although RLI is identified as an appellant, the appellants’ brief does not challenge the trial court’s findings or judgment with respect to RLI. Therefore, we refer to Scott Construction throughout the opinion.

legally and factually insufficient evidence supports the trial court's award of damages, attorney's fees, and court costs to JM2; and (2) the trial court erred in denying Scott Construction's counterclaim for damages, attorney's fees, and court costs. We affirm the trial court's judgment.

BACKGROUND

I. The Project

Scott Construction served as the general contractor on a project to construct and install the sanitary sewer and storm water system for the Sawmill Ranch housing development pursuant to a master land development agreement with Meritage Homes of Texas, LLC. JM2, a subcontractor on the project, submitted a \$158,200 proposal to Scott Construction in March 2013. Scott Construction and JM2 continued to negotiate the scope of work after JM2's initial submission. JM2 submitted a second proposal in March 2013 at a revised cost of \$120,255, under which JM2 would work concurrently on the sanitary sewer and storm water system. JM2 submitted a third proposal in May 2013, also based on the work being performed concurrently, at a revised cost of \$134,585. Under the third proposal, JM2 agreed to supply \$14,330 in steel casing for the project. No additional writings defined the agreement between JM2 and Scott Construction.

JM2 began work in May 2013. While the work was ongoing, JM2 and Scott Construction verbally agreed that JM2 would perform additional work and purchase additional materials totaling \$10,401. They also agreed that items totaling \$7,800 would be deleted from the scope of JM2's work on the project.

JM2 submitted invoices to Scott Construction as the project progressed. Scott Construction paid each invoice until July 30, 2013; Scott Construction disputed a charge for \$17,940 in sidewalk work on the July 30, 2013 invoice.

Scott Construction paid JM2 \$111,343.09 in response to invoices received. Scott Construction also paid two invoices from JM2's vendors for \$2,674.49 and \$11,292.76. Scott Construction's payments in connection with JM2's work totaled \$125,310.34 as of October 9, 2013.

Scott Construction contends JM2 stopped working on the project on September 15, 2013. The parties dispute whether JM2 had completed its work on the project by that time.

A final inspection was performed in November 2013 and a punch list was given to Scott Construction, which it did not provide to JM2. Scott Construction retained Allgood Construction Company to complete the punch list items and paid Allgood \$6,500 for the work. JM2 later obtained a copy of the punch list from Dannenbaum Engineering Corporation, the project engineer. By the time JM2 obtained a copy of the punch list, the items had been completed by Allgood.

II. JM2's Claim on the Payment Bond

JM2 sent a \$68,139.37 notice of claim on the payment bond to Scott Construction, RLI, and Meritage Homes on October 15, 2013. Scott Construction contended that JM2 agreed to perform its work on the project for \$144,986, and that Scott Construction did not owe the amount JM2 demanded in the notice of claim. Scott Construction said it would determine the remaining balance due to JM2 when the project was completed, taking into consideration the sums previously paid and the additional costs Scott Construction incurred to complete JM2's work on the project.

In response, JM2 agreed with Scott Construction that there had been a mistake in calculating the value of the sidewalk work.² JM2 said the contract total

² JM2 originally submitted an invoice to Scott Construction dated July 30, 2013 including

for its work was \$182,931, consisting of the \$158,200 figure from proposal one plus agreed-upon extras totaling \$24,731. JM2 said it completed all work within the scope of its agreement and asserted that Scott Construction owed a balance due of \$59,620.66.

III. Procedural History

JM2 sued Scott Construction and RLI on May 9, 2014, and asserted claims for breach of contract, or in the alternative, quantum meruit and unjust enrichment. JM2 alleged an outstanding balance due on the project of \$59,620.66. Scott Construction and RLI answered and asserted prior material breach, offset, laches, limitations, statute of frauds, and rights under Chapter 42 governing offers of settlement. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 42.001-.005 (Vernon 2015). Scott Construction also filed a counterclaim seeking damages and declaratory relief.

The trial court conducted a bench trial on May 11, 2015; it signed a final judgment on May 20, 2015, awarding JM2 \$11,875.66 in damages along with attorney's fees and court costs. Scott Construction and RLI requested findings of fact and conclusions of law on May 21, 2015. Scott Construction and RLI also filed a "Motion to Modify, Motion for New Trial and Request for Oral Hearing."

The trial court signed findings of fact and conclusions of law on August 20, 2015. The trial court concluded that (1) JM2 and Scott Construction had a valid and enforceable agreement based on the terms and amounts specified in proposal three; and (2) Scott Construction breached the agreement causing JM2 to incur damages totaling \$11,875.66. The trial court also awarded attorney's fees, pre-judgment and post-judgment interest, and court costs to JM2. The trial court's

\$17,940 for "sidewalk removal & replacement." JM2 later acknowledged the correct value of the work was \$4,680.

final judgment makes Scott Construction and RLI jointly and severally liable to JM2 for its damages, attorney's fees, interest, and costs. Scott Construction and RLI filed a timely notice of appeal from the trial court's judgment on August 18, 2015.

ANALYSIS

The trial court found that proposal three was the operative agreement between JM2 and Scott Construction; JM2 performed services in accordance with the agreement; Scott Construction paid \$125,310.34 to JM2 or JM2's suppliers; Scott Construction failed to provide JM2 with a punch list or an opportunity to complete the work; Scott Construction could not claim a \$10,175 offset for backcharges;³ and JM2's actual damages totaled \$11,875.66, consisting of a \$1,700.66 balance owed to JM2 plus the improper backcharges claimed by Scott Construction. JM2 does not challenge these determinations. Scott Construction does challenge them, but its arguments are not entirely clear.

An appellant's brief "must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." Tex. R. App. P. 38.1(i). Scott Construction's 72-page brief is neither clear nor concise. But "appellate courts should reach the merits of an appeal whenever reasonably possible." *Perry v. Cohen*, 272 S.W.3d 585, 587 (Tex. 2008); *see also* Tex. R. App. P. 38.1(f), 38.9. To the extent reasonably possible, we address Scott Construction's contentions regarding legal and factual sufficiency of the evidence to support the trial court's findings.

³ The trial court's findings of fact state that the claimed backcharges total \$10,750. The evidence presented at trial establishes the claimed backcharges total \$10,175. Additionally, the damage award suggests the claimed backcharges total \$10,175. Neither party discusses this discrepancy on appeal. For purposes of our opinion, we presume \$10,750 is a typographical error and use \$10,175 as the dollar amount representing the backcharges at issue.

Findings in a bench trial have the same force and dignity as a verdict upon jury questions. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991). We review fact findings in a bench trial for legal and factual sufficiency of the evidence by applying the same standards used in reviewing the evidence supporting a jury's verdict. *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996). We review the trial court's conclusions of law *de novo*. *Smith v. Smith*, 22 S.W.3d 140, 143-44 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

In reviewing legal sufficiency, we consider only the evidence and inferences tending to support the trial court's findings and disregard all evidence and inferences to the contrary. *Id.* at 143. In reviewing factual sufficiency, we consider and weigh all the evidence; a judgment can be set aside only if the challenged findings are so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Id.*

I. Scott Construction's Challenge to the Judgment in Favor of JM2

Scott Construction attacks the trial court's judgment and contends there is legally and factually insufficient evidence to support the trial court's findings in favor of JM2 because (1) JM2's prior material breach excused further performance by Scott Construction; (2) JM2 made excessive demands on Scott Construction and is not entitled to attorney's fees; (3) futility excused Scott Construction from making any further demand for performance on JM2; and (4) JM2 failed to perform hydrostatic testing as required under the parties' agreement. We address each contention in turn.

A. Prior Material Breach

Scott Construction contends its failure to pay amounts due to JM2 was excused by JM2's prior material breach, which occurred when JM2 charged

\$17,940 for \$4,680 worth of sidewalk work. Scott Construction further contends that JM2 breached the agreement when it failed to complete the work and abandoned the project. Scott Construction asserts that JM2's breaches excused Scott Construction's further performance, including providing the punch list to JM2 and paying JM2 the \$1,700.66 balance due on the contract.⁴ We construe Scott Construction's argument as a challenge to the trial court's Finding of Fact Nos. 7, 9, and 12. Finding of Fact No. 7 states that Scott Construction failed to provide the punch list to JM2. Under Finding of Fact No. 9, Scott Construction is not entitled to deduct backcharges because Scott Construction did not provide the punch list to JM2. In Finding of Fact No. 12, the trial court found that JM2 is entitled to the \$1,700.66 balance owed under the contract and \$10,175 for improper backcharges.

“It is a fundamental principle of contract law that when one party to a contract commits a material breach of that contract, the other party is discharged or excused from further performance.” *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 196 (Tex. 2004). Prior material breach is an affirmative defense on which Scott Construction had the burden of proof. *See Compass Bank v. MFP Fin. Servs., Inc.*, 152 S.W.3d 844, 852 (Tex. App.—Dallas 2005, pet. denied); *Welch v. Hrabar*, 110 S.W.3d 601, 606 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). “When a party attacks the legal sufficiency of an adverse finding on an issue on which she has the burden of proof, she must demonstrate on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue.” *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001).

⁴ Scott Construction offered evidence that the balance due to JM2 under the agreement was \$1,700.66. At trial, Scott Construction contended this amount was offset by backcharges on a different project totaling \$22,616 and therefore it was owed \$20,915.34 from JM2. The trial court found Scott Construction was not entitled to backcharges on the different project because that project was the subject of a separate pending lawsuit.

While Scott Construction contends JM2 was the first party to breach the agreement, it identifies no evidence or argument establishing that any alleged breach by JM2 was material. Presuming, without deciding, that the complained-of actions constitute a breach, we evaluate whether Scott Construction conclusively established the elements of prior material breach on which it had the burden of proof.

Factors used in evaluating whether a breach was material include the (1) extent to which the injured party will be deprived of the benefit reasonably expected; and (2) likelihood that the party failing to perform or to offer to perform will cure the failure, taking account of the circumstances including any reasonable assurances. *See Mustang Pipeline Co.*, 134 S.W.3d at 199 (citing Restatement (Second) of Contracts § 241 (Am. Law Inst. 1981)). John Mireles of JM2 testified that the \$17,940 invoice for sidewalk work was a miscalculation and agreed the value of the work was \$4,680. There is no evidence that Scott Construction paid \$17,940 for the sidewalk work. In response to the July 30, 2013 invoice totaling \$22,111, which included the sidewalk work, Scott Construction paid JM2 \$2,000. JM2 corrected the miscalculation in April 2014. Any asserted breach of the agreement based on the erroneous sidewalk charges was cured. Even if the miscalculation resulted in a breach, Scott Construction failed to meet its burden and conclusively establish that it was a material breach.

We next address Scott Construction's contentions that JM2 did not complete the work and abandoned the project. In doing so, we evaluate whether Scott Construction established it would be deprived of a benefit it reasonably could anticipate from full performance. Scott Construction offered evidence it was owed backcharges totaling \$10,175 due to JM2's actions or inactions. These backcharges consisted of the \$6,500 payment to Allgood related to the punch list

items; \$2,000 for grading and dirt work; \$1,175 for lost air release valves; and \$500 for a broken water meter.

Scott Construction did not offer evidence conclusively establishing these items are provided for in the agreement or were consequences of JM2's alleged breaches. JM2 disputed the inclusion of these items in the agreement based on its terms. Scott Construction failed to conclusively establish it was deprived of a benefit reasonably expected.

We reject Scott Construction's arguments attacking the trial court's judgment based on JM2's prior material breach.

B. Excessive Demand

Scott Construction contends that JM2 is not entitled to "any actions or fees expended" because it made an excessive demand. We construe Scott Construction's argument as challenging the trial court's Finding of Fact Nos. 13 and 15 concerning attorney's fees. Scott Construction argues that JM2 made an excessive demand in the form of the (1) overcharge for sidewalk work; (2) claim on bond dated October 15, 2013; (3) claim on bond dated April 3, 2014; and (4) amount sought in JM2's petition.

A creditor who presents an excessive demand to a debtor is not entitled to attorney's fees for subsequent litigation required to recover the debt. *Findlay v. Cave*, 611 S.W.2d 57, 58 (Tex. 1981). In order to preserve an excessive demand challenge, Scott Construction had to (1) plead excessive demand as an affirmative defense to the claim for attorney's fees; and (2) request and obtain findings of fact regarding the essential elements of excessive demand. *See Kurtz v. Kurtz*, 158 S.W.3d 12, 21 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (excessive demand is an affirmative defense that must be pleaded); *Tuthill v. Sw. Pub. Serv.*

Co., 614 S.W.2d 205, 212 (Tex. Civ. App.—Amarillo 1981, writ ref'd n.r.e) (excessive demand is an affirmative defense that must be pleaded, and the party asserting excessive demand must request and obtain findings of fact on the essential elements of excessive demand).

JM2 contends that Scott Construction failed to plead excessive demand as an affirmative defense. Scott Construction states that “JM2 overlooked the First Amended Answers including contesting conditions precedent, recovery of damages, recovery of interest, and recovery of attorney’s fees. Appellants sought recovery of their attorney’s fees in their Prayer.” Scott Construction further points to the language in its counterclaim stating as follows: “JM2 first breached the contract for work completed by [Scott Construction], JM2’s claim is not timely or valid in whole or in part . . . [and] JM2 is inequitably asking relief in excess of that allowed by Texas law and wrongfully sued Appellants.” Scott Construction argues that its post-trial brief details the authority and facts in support of the excessive demand defense; the defense was included in its motion for new trial as well. Scott Construction also argues it submitted a proposed finding of fact on excessive demand to the trial court.

Pleading an affirmative defense provides notice of defensive issues to be tried and an opportunity to respond. *See MAN Engines & Components, Inc. v. Shows*, 434 S.W.3d 132, 136 (Tex. 2014). Scott Construction’s statements in its first amended answer and counterclaim do not plead the affirmative defense of excessive demand. Scott Construction misplaces its reliance on arguments in its post-trial brief, motion for new trial, and proposed findings of fact; Texas Rule of Civil Procedure 94 requires affirmative defenses to appear in a pretrial pleading. *See id.* (“[I]f we read Rule 94 to allow for the post-trial raising of an affirmative defense, the rule would become meaningless, since it would do nothing more than

other rules governing waiver of issues on appeal.”); *see also* Tex. R. Civ. P. 94.

Scott Construction did not plead excessive demand as an affirmative defense and the issue was not tried by consent. Scott Construction did not properly preserve its excessive demand challenge, and we overrule its arguments on this issue.

C. Futility

Scott Construction contends JM2’s “excessive demands, turning over the Contract to his attorney, rejecting settlement offers, walking the job in September 2013, [and] . . . [repudiating] the Contract” establish that any demand would have been futile. Scott Construction states that, as a result of JM2’s actions, it had to retain another subcontractor to complete the punch list and remaining work. We construe Scott Construction’s contentions as attacking Finding of Fact Nos. 7 and 9 on grounds that it would have been futile to demand JM2 complete the punch list or the work.

In Finding of Fact No. 7, the trial court found Scott Construction failed to provide JM2 with a punch list; this failure prevented JM2 from curing any asserted defects in its work. The trial court also determined in Finding of Fact No. 9 that Scott Construction is not entitled to an offset for backcharges because the backcharge items were not included in the scope of the work; JM2 was not provided with a punch list; or Scott Construction did not demand that JM2 complete the backcharge items.

Scott Construction relies on *Chapman v. Olbrich*, 217 S.W.3d 482, 491 (Tex. App.—Houston [14th Dist.] 2006, no pet.), to argue that it would have been futile to demand further performance from JM2. Under *Chapman*, tender of performance by a party seeking specific performance is excused when tender

would be futile or defendants have repudiated the contract. *Id.* at 491. Neither JM2 nor Scott Construction is seeking specific performance. Scott Construction appears to argue that providing JM2 with a punch list or demand for completion of the work was excused, entitling it to an offset for backcharges, because JM2's actions made clear any such demand would be futile.

The record does not establish that it would have been futile for Scott Construction to request that JM2 complete the punch list. There is evidence that, when JM2 left the project, it believed its work was completed. Further, there is evidence that JM2 was in a position to address items on the punch list related to its work once it obtained the list from Dannenbaum, but the work already had been completed.

Assuming Scott Construction can raise futility without having pleaded it as an affirmative defense, this record provides no basis for disturbing the trial court's Finding of Fact Nos. 7 and 9. To the extent Scott Construction is making a no-evidence challenge, we conclude there is evidence in the record supporting the trial court's findings. There is some evidence that, if Scott Construction had provided a punch list, JM2 could have addressed the punch list items. Mireles testified that, when JM2 received the punch list from Dannenbaum, it was in a position to complete the items related to its work but they already had been completed. We reject Scott Construction's arguments attacking the trial court's judgment based on futility.

D. Hydrostatic Testing

Scott Construction contends that JM2 failed to perform required hydrostatic testing of the sanitary sewer and storm water system. Scott Construction also contends it is entitled to an offset against amounts owed to JM2 for costs incurred to complete the hydrostatic testing. We construe Scott Construction's argument as

contending the evidence does not support the trial court's Finding of Fact Nos. 5 and 9.

Scott Construction contends the "Parole Evidence Rule further precludes JM2 from denying what he wrote in his email about hydrostatic testing of his lines." Parol evidence is inadmissible to vary, contradict, or add to the terms of an otherwise unambiguous contract in the absence of fraud, accident, or mistake. *See Frost Nat'l Bank v. Burge*, 29 S.W.3d 580, 589 (Tex. App.—Houston [14th Dist.] 2000, no pet.). In the trial court's Conclusion of Law No. 1, it found a valid and enforceable agreement existed based on the terms specified in proposal three.

Scott Construction's argument that hydrostatic testing is included in the parties' agreement is based on email correspondence between JM2 and Scott Construction. Mireles testified that the proposals to Scott Construction did not include hydrostatic testing, and testing was not agreed to later. Scott Construction does not cite, and our review of the record does not reveal, evidence establishing the inclusion of hydrostatic testing in the description of services in proposal three. Regarding the emails, Mireles testified that he agreed to look into testing; had testing been agreed to, there would have been an additional charge.

The evidence supports the trial court's finding that the parties had a valid and enforceable agreement based on the terms and amounts specified in proposal three. Because the agreement does not include hydrostatic testing, JM2's failure to perform hydrostatic testing does not undermine the trial court's Finding of Fact No. 5 that services were performed in accordance with the agreement. Additionally, because hydrostatic testing was not within the scope of the work, there is evidence in the record supporting the trial court's Finding of Fact No. 9 that Scott Construction is not entitled to backcharges for costs related to hydrostatic testing. Accordingly, we reject Scott Construction's argument

attacking the trial court's Finding of Fact Nos. 5 and 9 related to hydrostatic testing.

In summary, Scott Construction failed to establish that JM2 committed a prior material breach of the contract. Scott Construction failed to plead that JM2 is not entitled to attorney's fees due to an excessive demand. Scott Construction failed to show that providing JM2 with the punch list or an opportunity to complete or cure its work would have been futile. Scott Construction failed to present evidence establishing hydrostatic testing was included in the contract. Viewing the evidence in the light most favorable to the trial court's determination, we conclude that reasonable and fair-minded people could reach the conclusion that JM2 is due the balance under the contract and Scott Construction is not entitled to an offset for backcharges. Further, we cannot conclude that the award of damages, attorney's fees and court costs is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The evidence is legally and factually sufficient to support the trial court's judgment. We overrule Scott Construction's first issue.

II. Scott Construction's Counterclaim

In its second issue, Scott Construction challenges "that portion of trial court's Judgment denying [Scott Construction] damages resulting from JM2's first breach of contract and denying recovery of [Scott Construction's] litigation costs[,] attorney's fees[,] and costs of court." For the same reasons we rejected the prior material breach argument above, we reject it again here.

To prevail on a claim for attorney's fees under Chapter 38 of the Civil Practice and Remedies Code, a party must "(1) prevail on a cause of action for which attorney's fees are recoverable, and (2) recover damages." *Acad. Corp. v.*

Interior Buildout & Turnkey Constr., Inc., 21 S.W.3d 732, 743 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *see* Tex. Civ. Prac. & Rem. Code Ann. § 38.001 (Vernon 2015). JM2 was the prevailing party. We have overruled each of Scott Construction’s arguments for a recovery against JM2. Therefore, Scott Construction has not established entitlement to attorney’s fees under Chapter 38.

Additionally, Scott Construction argues it is entitled to the “rights afforded by Ch. 42 Civ. Pr. & Rem. Code, including recovery of its legal fees.” Chapter 42 and Texas Rule of Civil Procedure 167 provide for an award of litigation costs against a party who rejects a settlement offer made in accordance with the rules. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 42.002-.005; Tex. R. Civ. P. 167.1-167.7. “A settlement offer not made in compliance with this rule, or a settlement offer not made under this rule, or made in an action to which this rule does not apply, cannot be the basis for awarding litigation costs under this rule as to any party.” Tex. R. Civ. P. 167.7; *see also* Tex. Civ. Prac. & Rem. Code Ann. § 42.002(e). The record contains no evidence that Scott Construction made a settlement offer in writing to JM2 in accordance with Chapter 42 and Rule 167. *See* Tex. Civ. Prac. & Rem. Code Ann. § 42.003(a); Tex. R. Civ. P. 167.2(b). Accordingly, Scott Construction is not entitled to legal fees. *See generally Amedisys, Inc. v. Kingwood Home Health Care, LLC*, 437 S.W.3d 507, 513 (Tex. 2014).

Scott Construction also argues the Declaratory Judgment Act supports an award of attorney’s fees, and that the denial of the award was unjust. *See, e.g.,* Tex. Civ. Prac. & Rem. Code Ann. § 37.009 (Vernon 2015); *In re Lesikar*, 285 S.W.3d 577, 584 (Tex. App.—Houston [14th Dist.] 2009, orig. proceeding). Scott Construction was found to have breached the agreement and was not the prevailing party at trial. We have determined there is no basis for

disturbing the challenged findings of fact on this record. Accordingly, Scott Construction was not entitled to attorney's fees under the Declaratory Judgment Act.

The trial court's judgment, which did not award Scott Construction damages or attorney's fees, was based on legally and factually sufficient evidence. Accordingly, we overrule Scott Construction's second issue.

III. Other Issues

Scott Construction raises a host of additional issues that are not (1) germane to its legal and factual sufficiency challenge; or (2) properly before us due to briefing waiver. Scott Construction makes the following arguments.

- The parties' agreement is unambiguous and JM2 should not be able to alter it by parol evidence. We reject this contention because the trial court's findings do not address alteration of the agreement based on parol evidence.
- JM2 should not be awarded damages under a theory of quantum meruit. We reject this contention because the trial court awarded damages based on the parties' agreement and not under a theory of quantum meruit.
- JM2's judicial admissions that a contract existed should prohibit it from arguing otherwise. We reject this contention because the trial court found an agreement existed between the parties in Finding of Fact No. 4.
- It was error not to credit Scott Construction for payment of JM2's bills in the amount of \$2,674.49 and \$11,292.76. We reject this contention because the trial court credited Scott Construction with

these amounts in Finding of Fact No. 6.

- The trial court should not have found that an agreement existed between the parties based on proposal one. We reject this contention because the trial court found that an agreement existed based on proposal three.
- Equity bars recovery by JM2. In support of its argument, Scott Construction cites *Roberts v. Haltom City*, 543 S.W.2d 75, 80 (Tex. 1976). *Roberts* addresses equitable estoppel. We construe Scott Construction's argument as raising the defense of estoppel. Presuming Scott Construction sufficiently raised this affirmative defense, we reject this contention because Scott Construction points to no evidence in the record establishing the elements of estoppel on which it bore the burden of proof. See *Dow Chem. Co.*, 46 S.W.3d at 241; *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 515-16 (Tex. 1998).
- Usury is established based on JM2's prayer for pre-judgment interest in the amount of 1.5 percent in its petition. Scott Construction contends its usury argument was invited by JM2's citation to *Sage Street Associates v. Northdale Construction Company*, 863 S.W.2d 438 (Tex. 1993), in its brief. JM2 relies on *Sage Street Associates* in support of its argument that excessive demand was not tried by consent. The Texas Rules of Appellate Procedure do not allow inclusion of a new issue in a reply brief not raised in Scott Construction's original brief. See Tex. R. App. P. 38.3. Without discussing the applicability of usury to this matter, we conclude this issue was waived. *Priddy v. Rawson*, 282 S.W.3d 588, 597-98 (Tex.

App.—Houston [14th Dist.] 2009, pet. denied).

- The trial court erred in denying its motion for new trial. Scott Construction did not include argument in its brief addressing the motion for new trial. Scott Construction has insufficiently briefed any argument related to the denial of its motion for new trial and presented nothing for our review with respect to this issue. *See* Tex. R. App. P. 38.1(i).
- The trial court erred in not finding JM2 was unjustly enriched by its award of damages. JM2 argues that unjust enrichment was not pleaded or proven in this case. Scott Construction has not cited any evidence in the record in support of its argument nor did Scott Construction plead unjust enrichment as a theory of recovery in the trial court. Without discussing the applicability of unjust enrichment in this case, we do not consider Scott Construction’s argument raised for the first time on appeal. *See Dreyer v. Greene*, 871 S.W.2d 697, 698 (Tex. 1993).

We reject Scott Construction’s remaining arguments.

CONCLUSION

We affirm the trial court’s judgment.

/s/ William J. Boyce
Justice

Panel consists of Justices Boyce, Christopher, and Jamison.