Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-15-00436-CV

Bryan **SMITH** d/b/a Vision Design and Build,
Appellant

v.

Robert **OVERBY** and Teresa Overby,
Appellees

From the 438th Judicial District Court, Bexar County, Texas
Trial Court No. 2008-CI-02799
Honorable Gloria Saldaña, Judge Presiding

Opinion by: Jason Pulliam, Justice

Sitting: Karen Angelini, Justice
Rebeca C. Martinez, Justice
Jason Pulliam, Justice

Delivered and Filed: August 24, 2016

AFFIRMED IN PART AS MODIFIED, REVERSED AND REMANDED IN PART

Appellees Robert and Teresa Overby filed suit against appellant Bryan Smith d/b/a Vision Design and Build for breach of warranty, breach of contract, and negligence under a residential construction contract. A jury found in favor of the Overbys and awarded the Overbys $175,782.00 in actual damages and attorneys' fees. On appeal, Smith contends the trial court erred by not submitting two proposed jury questions, not reducing the attorneys' fees award, and improperly calculating the total amount awarded. Smith additionally contends the evidence is legally and factually insufficient to support the trial court's judgment and the damage award.

BACKGROUND

Smith entered into a construction contract with the Overbys on June 22, 2006, to remodel their home. A certificate of completion was executed on February 2, 2007, and the Overbys later presented Smith with a list of construction defects requiring repair.

On December 30, 2007, the Overbys filed a request for a state-sponsored inspection and dispute resolution process with the Texas Residential Construction Commission ("TRCC"), alleging over fifty construction defects. The TRCC approved the request as eligible on January 23, 2008, and assigned the request to third-party inspector John Henderson, who conducted an inspection on February 14, 2008. Henderson filed his inspection report with TRCC on July 2, 2008. The Overbys appealed the initial report. A remand inspection report was issued by third-party inspector Andre Adams on November 10, 2008.

In a letter dated December 23, 2008, the TRCC informed Smith the deadline to appeal the third-party remand inspection report had expired. Smith was advised he had fifteen days in which to make a written offer of repair. Smith made a written offer of repair on February 9, 2009. On February 19, 2009, Smith made a revised offer of repair and on March 10, 2009, Smith submitted a supplemental offer of repair. The Overbys partially accepted each offer of repair.

The Overbys filed suit on March 30, 2009. A jury found Smith liable for breach of contract, breach of warranty, and negligence. The trial court entered a final judgment in the Overbys' favor for $200,394.76. This appeal followed.

ANALYSIS

The Texas Residential Construction Liability Act ("RCLA") applies to "any action to recover damages or other relief arising from a construction defect, except a claim for personal injury, survival, or wrongful death or for damage to goods." TEX. PROP. CODE ANN. § 27.002(a)(1) (West 2014). The RCLA does not create a cause of action; rather, it modifies causes of action for

damages resulting from construction defects in residences by limiting and controlling causes of action that otherwise exist. *Timmerman v. Dale*, 397 S.W.3d 327, 330 (Tex. App.—Dallas 2013, pet. denied).

The Texas Residential Construction Commission Act ("RCCA") provided for the TRCC,[1] to oversee the registration of homes, homebuilders, and remodelers, to administer a state-sponsored inspection and dispute resolution process, and to create limited statutory warranties and building and performance standards. *See* TEX. PROP. CODE ANN. §§ 401.001-438.001 (West 2007 & Supp. 2008). The RCCA provided that before suit could be filed on an action for damages or other relief arising from a "construction defect," the homeowner or builder must comply with the Act's Subtitle D, which included a state-sponsored inspection and dispute resolution process. *Id*. § 426.005 (West Supp. 2008), §§ 428.001-.005 (West 2007 & West Supp. 2008), § 429.001 (West 2007).

Jury Questions

Standard of Review

A trial court must submit questions, instructions, and definitions that are raised by the pleadings and evidence. TEX. R. CIV. P. 278; *Elbaor v. Smith*, 845 S.W.2d 240, 243 (Tex. 1992). Only issues raised by the evidence are to be submitted to the jury. TEX. R. CIV. P. 278. A trial court may refuse to submit a question only if no evidence exists to warrant its submission. *Elbaor*, 845 S.W.2d at 243. If there is some evidence to support a jury question and the trial court does not submit it, the trial court commits reversible error. *Id*. In determining whether a trial court should have submitted a question to the jury, the reviewing court must examine the record for

[1] The TRCC did not survive Sunset Review in 2009. The commission stopped accepting claims in September 2009 and stopped processing existing claims in September 2010, when it ceased operations.

evidence supporting submission and ignore all evidence to the contrary. *Id*. Conflicting evidence presents a fact question for the jury. *Id*.

Application

Proposed Question Six

In his first issue, Smith contends the trial court erred by refusing to submit the following jury question:

> Was Bryan Smith d/b/a Vision Design and Build's offer of repair dated February 19, 2009 reasonable?

Smith argues his pleadings and the evidence support submission of the question to show he complied with the provisions of the RCLA, thus limiting the damages the Overbys could recover.

The RCLA provides, in part, that in a claim seeking damages against a contractor for a construction defect, the contractor is entitled to "make a written offer of settlement" or "an offer of repair" in accordance with specified requirements. TEX. PROP. CODE ANN. § 27.044(b) (West 2014). If the contractor fails to make a reasonable offer, the contractor loses the benefit of a limitation on damages as set out in section 27.004(e). *Id*. § 27.004(f). Likewise, if the homeowner rejects a reasonable offer or does not allow the contractor a reasonable opportunity to inspect or repair defects, the homeowner is limited in the damages he may recover. *Id*. § 27.004(e). The written offer of repair must be made to the homeowner within fifteen days after the TRCC's final, unappealable determination. *Id*. § 27.004(b).

The Overbys properly filed a request with the TRCC and followed the appropriate procedures in the inspection and report process. Smith asserts his company continued to attempt to work with the Overbys to correct defects and make repairs during the pendency of the TRCC's inspection and report process. The record shows the TRCC notified Smith on December 23, 2008,

the time for appealing the remand inspection report had expired and Smith had fifteen days to make an offer of repairs. Therefore, Smith's written offer of repair was due by January 7, 2009.

It is undisputed Smith's initial written offer of repair was made on February 9, 2009. Although this was outside the statutory time requirement for making such an offer, Smith asserts the offer was timely because the parties agreed to extend the deadline. The RCLA allows that a homeowner and a contractor may agree to extend the time periods contained in Chapter 27. *Id*. § 27.004(h). However, the agreement to do so must be in writing. *Id.*; *see also In re Anderson Constr.*, 338 S.W.3d 190, 193 & n.1 (Tex. App.—Beaumont 2011, no pet.) (noting an explicit written agreement to extend the Chapter 27 deadlines). The record does not contain a writing in which the parties explicitly agree to extend the time periods. Smith contends the Overbys' implicit agreement to extend the deadline is shown through the continued communications between the parties and the Overbys' partial acceptance of the initial offer and the subsequent revised and supplemental offers of repair.

Assent to an agreement may be implied. *Effel v. McGarry*, 399 S.W.3d 789, 793 (Tex. App.—Dallas 2011, pet. denied). However, there must be a meeting of the minds with regard to that agreement. *Id*. When one party disputes the existence of a meeting of the minds, the existence of an agreement is called into question. *Hallmark v. Hand*, 885 S.W.2d 471, 474, 476 (Tex. App.—El Paso 1994, writ denied).

This court concludes the evidence in the record does not support Smith's contention the parties implicitly agreed to extend the deadlines. The communications in the record do not affirmatively show the Overbys were aware of the January 7, 2009 deadline. Without such evidence, it cannot be shown the Overbys had a meeting of the minds with regard to extending that same deadline. Thus, there is no evidence the Overbys expressly or implicitly agreed to extend the fifteen-day deadline for the initial offer of repairs.

Accordingly, this court concludes the evidence does not support the inclusion of a jury question regarding the reasonableness of Smith's February 9, 2009 offer of repairs. Smith did not provide the written offer within the RCLA timelines and could not benefit from the limitation on damages mandated by the RCLA if a homeowner rejects a reasonable offer of repair. Therefore, the trial court did not err by refusing to submit proposed question six to the jury.

Issue One is overruled.

Proposed Question Five

In his second point of error, Smith contends the trial court erred by refusing to submit his proposed mitigation question to the jury. Smith argues the "record is replete with [his] ongoing attempts to finish the repair work that was declined by the Overbys and the repair work was often delayed." Smith, in his reply brief, also argues the Overbys' lack of acceptance of Smith's buy-back offers, dated November 19, 2009, December 4, 2009, and March 11, 2010, is evidence the Overbys failed to mitigate their damages. Additionally, Smith contends the Overbys' refusal to accept a supplemental offer of repair dated March 31, 2010 or either of two mitigation proposals dated November 25, 2014, and December 6, 2014, is additional evidence of the Overbys' failure to mitigate damages. Smith argues there was sufficient evidence presented at trial to warrant the submission to the jury of the requested mitigation question.

A mitigation of damages instruction is proper when the negligence complained of merely contributed to or added to the extent of the losses or injuries, but has no part in causing the incident in question. *Elbaor*, 845 S.W.2d at 245. "The burden of proving a failure to mitigate is upon the party who caused the loss and the standard is that of ordinary care, i.e. what an ordinary prudent person would have done under the same or similar circumstances." *Hygeia Dairy Co. v. Gonzalez*, 994 S.W.2d 220, 224 (Tex. App.—San Antonio 1999, no pet.). "Evidence must be developed which clearly shows a plaintiff's failure to mitigate caused further damages, and the evidence must

be sufficient to guide the jury in determining which damages were attributable to a plaintiff's failure to mitigate." *Id*. at 225. Further, there must be some evidence in the record from which a jury could make a reasoned calculation about losses from the failure to mitigate. *Id*. at 226.

In *Hygeia*, the court was presented with the case of a dairy farmer who, when his cattle became ill, did not test his herd to determine the cause of the illness as any prudent dairy farmer would do. *Id*. at 224. The court determined a mitigation instruction was proper because there was strong evidence showing the farmer's failure to act increased his damages. *Id*.

The instant case involves homeowners who worked with a contractor for over two years toward the repair of construction defects before filing suit. After the Overbys filed suit, they still attempted to work with Smith toward full repair of the construction defects. Smith complains the Overbys requested the work be completed at certain times of the day and stopped work at various times. Smith bore the burden of showing that the Overbys' requests and actions were not that of a prudent homeowner in the same situation. *See id.* at 225-26. Smith did not present evidence showing the Overbys' actions were not those of a prudent homeowner. Nor did Smith present evidence showing the Overbys' reluctance to accept Smith's buy-back offers, supplemental offer of repair, or mitigation proposals increased their damages. Thus, Smith failed to meet his burden of presenting evidence to support submission of the proposed mitigation question to the jury. Accordingly, this court concludes the trial court did not err by refusing to submit Proposed Question Five to the jury.

Issue Two is overruled.

Sufficiency of the Evidence

Standard of Review

When a party attacks the legal sufficiency of an adverse finding on an issue for which it did not have the burden of proof, the party must show no evidence supports the adverse finding.

Exxon Corp. v. Emerald Oil & Gas Co., L.C., 348 S.W.3d 194, 215 (Tex. 2011). In a legal sufficiency challenge, the appellate court views the evidence in the light most favorable to the verdict or finding, credits favorable evidence if reasonable jurors could do so, and disregards contrary evidence unless reasonable jurors could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 807 (Tex. 2005). In a factual sufficiency review, the appellate court will set aside the verdict only if the evidence supporting the finding is so weak that it is clearly wrong and unjust or the finding is against the great weight and preponderance of the evidence. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001).

Application

Breach of Warranty and Contract

In his third issue, Smith contends the evidence is insufficient to support the jury's determination Smith is liable for breach of warranty, breach of contract, or negligence.[2] Although breach of warranty and breach of contract are distinct causes of action, an express warranty comprises part of the basis of the bargain and thus is contractual in nature. *Med. City Dall., Ltd. v. Carlisle Corp.*, 251 S.W.3d 55, 60 (Tex. 2008). Both breach of contract and breach of warranty claims involve a party seeking damages based on the opposing party's failure to uphold its end of a bargain. *Id*. This court therefore considers Smith's challenges on these issues together. *See id.*

Smith argues "based on the evidence of Vision's repeated willingness to repair the defects, contrasted with the Overbys' refusal to allow Vision to make all of the repairs, it was in fact the Overbys' actions that proximately caused the damages sought and obtained." In support of this argument, Smith relies on the unpublished opinion *Whitecotton v. Silverlake Homes, L.L.C.* *See Whitecotton v. Silverlake Homes, L.L.C.*, 2009 WL 2045224 (Tex. App.—Beaumont March 2,

[2] Although Smith purports to challenge the sufficiency of the jury's negligence finding, this issue is not briefed and will, therefore, not be addressed by this opinion.

2009, no pet.) (not designated for publication). In *Whitecotton*, a homeowner wholly refused to allow the contractor to repair the defects found by the TRCC third-party inspector. *Id*. at *7. The Beaumont court concluded that although the contractor's offer to repair was untimely and did not operate to limit damages, the homeowner's refusal to allow the contractor to make repairs resulted in a finding of no causation as between the breach of warranty and the alleged damages, which precluded recovery. *Id*.

In the instant case, however, the Overbys did not refuse to allow Smith to repair the construction defects. The inspector's report found numerous defects, which, in effect were breaches of warranty. *Id*. at *6. Smith did not challenge the findings in the inspection report. Section 426.008 of the expired RCCA provided the "recommendation or ruling [in the inspection report] shall constitute a rebuttable presumption of the existence or nonexistence of a construction defect." *See* TEX. PROP. CODE ANN. § 426.008. "A party seeking to dispute, vacate, or overcome that presumption must establish by a preponderance of the evidence that the recommendation or ruling is inconsistent with the applicable warranty and building and performance standards. *Id*.

The evidence shows the Overbys worked with Smith both prior to and during the pendency of the TRCC inspection and resolution process. The construction on the Overby's home was substantially completed in February 2007. Several series of emails between Smith and the Overbys, as well as between Smith and the TRCC show the contractor continued working on the noted construction defects throughout the TRCC inspection process, which began in January 2008. The TRCC inspection reports were issued in July and November 2008.

Following the issuance of the initial report in July, the Overbys and Smith communicated frequently regarding the state of the repairs, as well as the parties' agreements regarding the scheduling of repairs. Upon the TRCC's final determination, the Overbys and Smith continued to negotiate the scope of repairs despite Smith's untimely first written offer of repair. According to

Mr. Overby, the initial offers of repair did not contain a plan or offer to repair all of the defects noted in the TRCC reports. The parties' negotiations resulted in an agreement on an offer to repair in April 2009.

The evidence presented at trial also shows the Overbys requested they be present during the repair process or that the repairs be completed at certain times and within a set schedule. The evidence does not support Smith's contention the Overbys wholly refused to allow Smith to make the repairs. For example, during Mr. Overby's testimony, he testified regarding one series of emails during which he requested the repairs be completed "according to TRCC" and told Smith he wanted to see the "complete plan" and would "get back with you tomorrow evening." The emailed reply from Smith advised "[d]ue to your refusal of work to proceed, we cannot start work again until January 5 at the earliest." Mr. Overby testified he informed Smith he was not refusing work, but simply wanted to be fully informed and have a copy of the plans.

On the other hand, during Smith's testimony, he presented a series of email updates to the TRCC in which Smith complained the Overbys would not allow work to progress because Mrs. Overby did not understand the work that was to be completed, the Overbys asserted they did not have "the plans," or Mr. Overby could not be present when the work was to be completed.

As the trier of fact, the jury assigned the weight to be given testimony and resolved any conflicts or inconsistencies in the testimony. *See McGalliard v. Kuhlmann*, 722 S.W.2d 694, 697 (Tex. 1986). Viewing the evidence in the light most favorable to the jury's verdict, this court concludes the jury reasonably could determine the Overbys established, under section 27.006 of the RCLA, breaches of warranty and contract caused the Overbys' alleged damages. *See* TEX. PROP. CODE ANN. § 27.006 (West 2014). Additionally, the evidence supporting the jury's finding of breach of contract and breach of warranty is not so weak that it is clearly wrong and unjust or against the great weight and preponderance of the evidence.

Issue Three is overruled.

Damages

In his fourth issue, Smith contends the evidence is insufficient to support the jury's award of damages for the following: foundation repairs; installation of drainage system; installation of house skirting; plumbing repairs; and bathroom repairs. Smith argues the cost of the repairs was not shown to be reasonable and necessary at trial.

A party seeking to recover remedial damages, such as those for the cost of repairs, must prove that the damages sought are reasonable and necessary. *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 200 (Tex. 2004) (per curiam). To establish the amounts requested for the cost of repairs are reasonable and necessary, a plaintiff must show more than the nature of the injuries, the character of and need for the services rendered, and the amounts charged for the repairs. *McGinty v. Hennen*, 372 S.W.3d 625, 627 (Tex. 2012) (per curiam). Some additional evidence showing the charges are reasonable is required. *Id*.

Foundation Repairs

Smith presented testimony from his own expert who opined the foundation slope was within the TRCC guidelines, which Smith argues shows the repair was not necessary. The Overbys presented an engineering report showing the foundation slope, as well as evidence of defects found by inspectors. Adolfo Rodriguez of Arredondo Foundation explained the foundation slope was outside acceptable guidelines, which necessitated the foundation repairs. Rodriguez testified $18,969.00 was a fair and reasonable estimate for the necessary foundation repairs. Additionally, Rodriguez detailed items included in the estimate and explained the reasoning for their inclusion. Thus, the Overbys presented more than the nature of the foundation problem, the character and need for the repairs, and the charges for those repairs. *See id*.

The jury was entitled to believe all, part, or none of each expert's testimony. *Vela v. Wagner & Brown, Ltd.*, 203 S.W.3d 37, 50 (Tex. App.—San Antonio 2006, no pet.). The mere fact competing expert testimony was presented does not render the evidence insufficient to support the jury's verdict. *Bay Rock Operating Co. v. St. Paul Surplus Lines Ins. Co.*, 298 S.W.3d 216, 230 (Tex. App.—San Antonio 2009, pet. denied).

Viewing the evidence in the light most favorable to the verdict, this court concludes the jury could discern from the evidence presented at trial that the expense for foundation repair was a reasonable and necessary cost of repair. Further, the evidence supporting the jury's determination is not so weak that it is clearly wrong and unjust or against the great weight and preponderance of the evidence. Accordingly, this portion of Smith's fourth issue is overruled.

Installation of Drainage System

Smith complains the only testimony presented regarding the cost of repairs attributed to the installation of a drainage system was Mr. Overby's testimony he paid the invoice. Mr. Overby testified Texas Landscaping "sloped" the property, but did not regrade it. According to Mr. Overby, the sloping was required because of the flood waters from the alley behind his home, which the Overbys pumped from the back yard into the front yard to drain into the street. The invoice referred to during Mr. Overby's testimony referencing a bid proposal dated September 17, 2007, which details the work to be included as part of installing a drainage system in the Overbys' back yard. However, the evidence presented at trial regarding the installation of the drainage system did not address the reasonableness of the cost of the repair.

Although the evidence presented at trial, when viewed in the light most favorable to the jury's decision, arguably supports the jury's determination that the cost of repair was necessary, the Overbys presented no evidence the expense for installation of a drainage system was a

reasonable cost of repair, as they were required to do. Accordingly, Smith's complaint regarding the damages awarded for installation of a drainage system is sustained.

Installation of House Skirting

Dr. Schaezler, who served as the Overbys environmental engineer, issued a report that was presented at trial and explained the house skirting was removed to allow for the removal of water damaged materials and to allow for mold remediation. From Dr. Schaezler's explanation, a jury could reasonably determine replacing house skirting that had been removed for repairs to be conducted was necessary. However, the only testimony regarding the reasonableness of the cost of the repair was Mr. Overby's testimony he paid Countywide Exteriors "$5,100 or $5,200" to install metal house skirting. The estimate and invoice referred to in the Overbys' brief and included in the record were not admitted into evidence during trial, and the Overbys presented no further testimony at trial from which the jury could discern the reported payment to Countywide Exteriors was a reasonable amount to pay for the services rendered.

This court concludes the Overbys presented no evidence the expense for installation of the house skirting was a reasonable cost of repair, as they were required to do. Accordingly, Smith's complaint regarding the damages awarded for installation of the house skirting is sustained.

Plumbing Repairs

Dario Armendariz of Quarter Moon Plumbing testified he was contacted for a plumbing repair by the Overbys. When Armendariz inspected the plumbing, he discovered the piping installed was Kitec PEX. According to Armendariz, the piping had been recalled prior to the time of construction. Armendariz further testified he recommended, per industry standards, that all the Kitec piping should be replaced. Armendariz opined that leaving the recalled piping intact would result in additional damage to the plumbing system. Armendariz further explained the replacement

would require 180 feet of piping and doing so would entail tedious work. Armendariz concluded the cost of the repair was reasonable.

Armendariz's testimony satisfied *McGinty's* requirement of "something more" apart from the nature of, need for, and cost of the repair. *McGinty*, 372 S.W.3d at 627.

Based on a review of the record, this court concludes the evidence is both legally and factually sufficient to support the jury's determination the cost of repair for plumbing repairs was both necessary and reasonable. Accordingly, the portion of Smith's fourth issue complaining of the damages awarded for plumbing repairs is overruled.

Master Bathroom Repairs/Shower Pan

Smith contends the Overbys failed to show the repair costs for the master bathroom shower pan were necessary because the Overbys did not make a claim regarding the shower pan prior to expiration of the two-year warranty.

The Overbys presented evidence in the form of an email from Mr. Overby to Smith describing the history of the shower pan water leak that references a 2009 report by Dr. Schaezler. The report is not a part of the appellate record and does not appear to have been entered into evidence. According to the email, Dr. Schaezler noted the shower pan was installed incorrectly, opined the leak had been active since the time of the construction, and recommended the leak condition should be repaired. The Overbys additionally presented a letter from Smith to the City of San Antonio Plumbing Inspections dated November 1, 2006, in which Smith assumed responsibility for the shower pan.

In the initial TRCC inspection request, which was dated December 30, 2007, the Overbys indicated they discovered the shower pan was installed incorrectly in November 2006. The inspection request additionally complained of a leak in the master bathroom. Following the inspection process, however, in an email dated July 9, 2009, TRCC third-party inspector Andre

Adams wrote to Smith: After further discussion with Mr. Beasley (SIRP Manager) and the AP panel, it has been determined that you are not responsible for the shower pan.

General contractor Rick Reed inspected the Overbys' home in April 2013, and submitted a proposal to complete several repairs, including those in the master bathroom. Reed described the proposal as fair and reasonable, but cautioned the costs had increased approximately 15% between the time he submitted his proposal and the time of trial. Reed additionally explained the individual costs of the repair, including overhead costs and the tile allowance. Reed testified the tiles in the bathroom were "coming up" and explained the entire shower needed to be replaced, including the shower pan. Reed agreed on cross-examination that the TRCC inspection report did not indicate any issues with the shower pan. However, Reed additionally testified the sub-floor surrounding the shower pan was rotted, which indicated a leak to him.

The jury was instructed the TRCC third-party inspector's recommendations constituted a rebuttable presumption of the existence or nonexistence of a construction defect or the reasonable manner of repair of a construction defect. From the evidence presented at trial, the jury could discern the Overbys complained of a shower pan defect prior to expiration of the two-year warranty. The jury could also determine the Overbys overcame the presumption created by the TRCC report through a preponderance of the evidence.

Viewing the evidence in the light most favorable to the jury's decision, this court concludes the jury could determine from the evidence presented at trial that the expense for the master bathroom repairs was a reasonable and necessary cost of repair. Further, the evidence supporting the jury's determination is not so weak that it is clearly wrong and unjust or against the great weight and preponderance of the evidence.

Smith's complaint with regard to the sufficiency of the evidence supporting the jury's damage award for the master bathroom shower pan repairs is overruled.

Issue Four is overruled in part and sustained in part.

Attorneys' Fees

In his fifth issue on appeal, Smith contends the amount of attorneys' fees awarded must be reversed because the RCLA limits the amount of recoverable attorneys' fees. Smith further contends that should this court determine any of the damages awarded should be reversed, the issue of attorneys' fees should be remanded to the trial court for retrial.

RCLA Limits on Attorneys' Fees

If a homeowner rejects a reasonable offer or does not allow the contractor a reasonable opportunity to repair defects pursuant to the acceptance of a reasonable offer, the homeowner may recover only attorneys' fees incurred before the offer was rejected or considered rejected. TEX. PROP. CODE ANN § 27.004(e)(2). However, if the contractor fails to make a reasonable offer, the contractor loses the benefit of the limitation on attorneys' fees set out in section 27.004(e)(2). *Id.* § 27.004(f).

This court previously concluded Smith's offer of repair was not timely made and Smith was not entitled to the benefit of the RCLA limitation on damages. Likewise, Smith is not entitled to the benefit of the limitation on the RCLA limitation on attorneys' fees.

Jury Influenced by Erroneous Damage Award

When the amount of damages is meaningfully reduced, the issue of attorneys' fees should ordinarily be retried unless the appellate court is reasonably certain the jury was not significantly influenced by an erroneous damage award. *Young v. Qualls*, 223 S.W.3d 312, 314 (Tex. 2007). However, not every appellate adjustment to a damage award requires a remand on the issue of attorneys' fees. *Barker v. Eckman*, 213 S.W.3d 306, 314 (Tex. 2006).

This court's resolution of this appeal resulted in a reduction of the actual damages awarded to the Overbys by $13,987.38, which is approximately 17 percent. This court notes the jury's

attorneys' fee award matches exactly the fees detailed in the Overbys' case billing. Although the attorneys' fees awarded matches the billing details, this court cannot be reasonably certain the jury was not significantly affected by the erroneous damage award.

Issue Five is sustained. Accordingly, this court reverses the issue of attorneys' fees and remands for a new trial.

Error on the Face of the Judgment

In his sixth issue, Smith contends the total amount of the final judgment awarded by the trial court is improper on its face because the amount is based on an error in calculation.

The final judgment awarded the following: (1) actual damages, $80,884; (2) attorneys' fees, $94,898; and (3) prejudgment interest, $24,612.76. The final judgment additionally states the total judgment is reduced by $2,500 because of a previous settlement. The total of these amounts is $197,894.76. However, the final judgment awards the Overbys $200,394.76 – a difference of $2,500.00. It appears a mathematical error occurred in tallying the final judgment.

Smith's sixth issue is sustained. Accordingly, Smith's six issue is remanded to the trial court for a recalculation of the total amount of the final judgment. On remand, the district court should likewise recalculate the prejudgment interest award in light of the reduced actual damage award.

CONCLUSION

Based on the forgoing, this court modifies the trial court's judgment to award the Overbys $66,896.62 in actual damages. This court reverses the judgment awards of attorneys' fees and prejudgment interest and remands those issues for further proceedings consistent with this opinion. The trial court's judgment is otherwise affirmed as modified.

Jason Pulliam, Justice