In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-15-00408-CV

STATE FARM LLOYDS, Appellant

V.

DENNIS WEBB, Appellee

On Appeal from the 58th District Court
Jefferson County, Texas
Trial Cause No. A-194,468

MEMORANDUM OPINION

We issued a memorandum opinion in this cause on March 9, 2017, concluding that the judgment of the trial court should be affirmed in part, reversed and rendered in part, and remanded in part to the trial court. Both the appellant and appellee filed timely motions for rehearing. We now withdraw our previous memorandum opinion and judgment issued on March 9, 2017, substitute the following memorandum opinion and judgment in their place, and overrule the appellant's and the appellee's motions for rehearing. *See* Tex. R. App. P. 19.1(b) (stating that our plenary power

over a judgment expires thirty days after all timely filed motions for rehearing are overruled).

State Farm Lloyds ("State Farm") appeals the trial court's judgment in favor of Dennis Webb following a jury trial. In five appellate issues, State Farm challenges the legal and factual sufficiency of the evidence supporting the jury's bad faith findings and award of extra-contractual damages, as well as the trial court's admission of expert testimony, exclusion of evidence, refusal to limit the scope of cross-examination, and acceptance of an incomplete jury form. We affirm the trial court's judgment in part, reverse and render in part, and reverse and remand in part.

PROCEDURAL BACKGROUND

Appellee Dennis Webb sued State Farm and four of its insurance adjusters for breach of contract and extra-contractual claims arising from State Farm's denial of Webb's claim for damages to his home and garage that Webb contends were caused by a plumbing leak. Webb submitted a claim to State Farm for property damage, foundation damage, and structural damage, requesting that State Farm cover the cost of repairs. According to Webb, State Farm wrongfully denied his claim for repairs when his policy provided coverage for such losses, and State Farm underpaid some of his claims "by not providing full coverage for the damages sustained by Plaintiff, as well as under-scoping the damages during its investigation." Webb asserted claims for fraud, conspiracy to commit fraud, breach of contract, unfair settlement

practices, failure to promptly pay as required by the Texas Insurance Code, and breach of the common law duty of good faith and fair dealing. Webb also sought to recover attorney's fees.

The jury found that State Farm failed to comply with the terms of the insurance policy and awarded Webb $15,000 for breach of contract. The jury also found that State Farm knowingly engaged in an unfair or deceptive act or practice that caused damages to Webb by failing in good faith to effectuate a prompt, fair, and equitable settlement when liability had become reasonably clear, and by refusing to pay the claim without conducting a reasonable investigation. The jury awarded $20,000 in damages for the unfair settlement practices and awarded $60,000 in additional damages because the unfair or deceptive practice was committed knowingly.

In addition, the jury awarded Webb attorney's fees of $80,000 for representation in the trial court, $50,000 for representation in the Court of Appeals, $15,000 for representation at the petition for review stage in the Supreme Court, $10,000 for the merits briefing stage at the Supreme Court, and $10,000 for oral argument and the completion of proceedings in the Supreme Court. The jury did not answer question number eight, which asked the jury to determine the reasonable fee for the necessary services of Webb's attorneys during two timeframes. The jury answered "N/A" in the blank for each timeframe.

State Farm objected to the verdict and moved for a mistrial, complaining that there were inherent conflicts in the jury's answers and that the jury failed to answer question eight. The trial court overruled State Farm's objections to the verdict, denied State Farm's motion to instruct the jury to answer question eight, and denied its motion for a mistrial. The trial court granted Webb's motion for entry of final judgment and signed a final judgment, in which it found that Webb "is entitled to judgment against State Farm based upon the jury's answers to questions 1-7." The trial court awarded Webb all the damages the jury found. State Farm timely filed a motion for new trial, which was overruled by operation of law. State Farm then filed this appeal from the trial court's judgment.

THE EVIDENCE

In May 2012, Webb discovered a water leak at his home. Webb found a semicircle of water approximately one foot wide where his garage meets his driveway. Webb testified that the water was seeping up from underneath the house and coming out of an expansion joint between the garage and driveway slabs. Webb explained that the plumbing leak originated from a cold water line that runs under the garage and services the exterior hose bib. Webb testified that the leak occurred under the garage about eight to ten feet from the southeast corner of his home. Webb explained that the wet area in his garage got up to eight feet wide and there was a wet spot where his driveway meets the street. Webb testified that his grass was soggy

and his water meter can was full of water. Webb contacted State Farm, and Janice Warner, an insurance adjustor, inspected the wet area in his garage and took photographs. Webb told Warner that he had contacted a plumber to repair the leak. The plumbing company tunneled under Webb's home, found the leak, and repaired a copper water pipe. When Warner inspected the plumbing repairs, Webb did not report having any cracked tiles. Webb paid $2500 for the plumbing repairs and sent Warner the receipt. Warner testified that she did not collect the plumber's invoice for payment, because she determined that there was no water damage to Webb's property, and thus, no coverage. Warner's determination was based on her observations that there were no water stains anywhere and there was nothing wet in the house. Warner also testified that while she did not investigate for foundation damage, she did not find any signs of foundation damage.

Several weeks after Webb had the leak repaired, Webb contacted Warner and reported that he had found cracks in the ceramic tiles in his kitchen. Webb explained that he had the tile installed in 2005 or early 2006 after Hurricane Rita, and the tile contractor used a "very thin mortar product[,]" and did not use an anti-crack membrane. When Hurricane Ike hit in 2008, Webb's ceiling fell in and water poured inside the home. Webb testified that he chipped twenty-five to thirty tiles while shoveling up mud and other debris from his floor, and the chipped tiles were located in the hallway, kitchen, and bathrooms. Webb explained that he was only able to

replace sixteen of the chipped tiles because the manufacturer no longer made the tile. According to Webb, he did not have a problem with the tiles cracking until 2012, when the water leak occurred. Webb testified that other than the leak, nothing unusual had happened at his home during that time period that would explain why the tiles had cracked. Webb further testified that six weeks after the leak occurred, he noticed a crack in his garage floor.

Warner transferred Webb's claim to the foundation unit and notified Webb that a foundation specialist would be handling his claim. Webb testified that the homeowner's policy that was in effect when the plumbing leak occurred indicates that in addition to the basic policy, Webb purchased additional coverage that includes a dwelling foundation endorsement and a water damage endorsement. Webb's policy indicates that the dwelling foundation coverage includes loss caused by seepage or leakage of water from within a plumbing system, including the "settling, cracking, shrinking, bulging, or expansion of pavements, patios or foundations." Webb's benefits under the foundation damage endorsement have a policy limit of $20,000.

In June 2012, Steve Leal, a weather and catastrophe claim representative who had worked with State Farm for twenty-seven years, took over Webb's foundation claim. Leal explained that when Webb reported having cracks in his garage and kitchen, his claim became a foundation loss claim. According to Leal, when Webb's

claim changed nature and became a foundation related claim, it was a "normal movement" to transfer the claim to his unit. Leal explained that the first step to handling a foundation claim is to hire a plumber to investigate the pressure and drain lines for additional leaks, and the second step is to hire an engineer and provide the engineer with a copy of the plumbing report.

According to Webb, Leal inspected the cracked tiles in the kitchen and the plumbing repairs. Webb requested that State Farm pay for the plumbing repairs, replace the cracked tiles, and stabilize the slab in the garage. State Farm hired Conestoga Rovers & Associates/HSA ("HSA"), an engineering firm, to investigate Webb's foundation claim and provide an engineering report. Leal relied on HSA's finding that the plumbing leak did not cause foundation movement in determining that Webb's claim was not covered. Leal testified that he is not an engineer, and he does not have the credentials to verify an engineer's conclusions. Leal explained that he exercises his independent judgment as an adjuster using an adjuster's skills when he reviews an engineering report, and he compares the conclusions to the evidence to ensure that the report makes sense. According to Leal, he did not see anything in the engineering report that was unreasonable.

When Leal issued Webb a letter denying coverage due to lack of causation, Webb submitted an engineering report from his expert, Peter Rabner, for State Farm's review. Leal forwarded Rabner's report to HSA, and HSA rendered a

decision stating that its findings were unchanged. According to Webb, Leal told him that his policy did not cover the repairs, but that Leal did not have a problem stabilizing the slab in the garage. Leal denied having told Webb that State Farm would stabilize the home's foundation, and he asserted that he has never told a customer his claim was covered or not covered before the investigation was completed. Leal testified that he treated Webb fairly by adhering to the terms of the policy and investigating the claim thoroughly. Webb testified that after he dealt with Leal, another adjuster, Ernest Perez, began handling the claim.

Perez, State Farm's corporate representative, testified that he has worked as a licensed insurance adjuster and team manager for almost thirty years. Perez managed the team of adjusters that handled Webb's claim, which was known as the large loss complex team. Perez explained how State Farm handles a claim for foundation damage. Perez testified that the investigation takes time and is not a "'one-and-done type claim[].'" First, State Farm notifies the policyholder about the investigative parts of the claim and talks with the customer about hiring a plumber at State Farm's expense. State Farm hires a plumbing company from a rotation list to inspect the property's supply line and sewage line and to render a report concerning its findings. Perez explained that State Farm hires a plumber first because it wants to pinpoint the type of leak and its location. If there is a below-grade leak, State Farm assigns an engineer to investigate the cause of the plumbing leak. In this case, Webb had the

plumbing leak repaired before State Farm could inspect the property, so State Farm sent Insurance Services to test the sewage and supply lines to ensure that there were no additional plumbing leaks underneath the foundation. Insurance Services reported there were no additional leaks.

Perez testified that in September 2012, State Farm issued a reservation of rights letter in Webb's case, because at that point in the investigation, State Farm did not know if there was coverage because it was too early in the file to determine whether an exclusion applied. Perez explained that State Farm has a regional list of engineering companies that it has approved to be used for foundation claims, and HSA is one of the companies on the list. Perez testified that State Farm based its decision on HSA's engineering report. According to Perez, he has to be consistent in the manner he handles claims, and if an engineer finds no causation, then he has to render a decision based on the engineer's finding. Perez believed it was reasonable for State Farm to rely on HSA's report, and he also stated that State Farm exercised its independent judgment in evaluating that report.

Perez explained that when a customer disagrees with State Farm's decision to deny coverage, State Farm is open to receiving additional information, and in this case, State Farm considered Webb's expert's engineering report in making its determination regarding coverage. According to Perez, State Farm agreed that Webb had a plumbing leak under the garage slab, Webb had coverage in place for damage

caused by plumbing leaks, a significant amount of water leaked underneath Webb's house as a result of the plumbing leak, there are expansive clay soils underneath Webb's house, and that Webb's foundation moved, causing the tile to crack. However, Perez testified that, according to the HSA report, there were multiple factors that could have caused Webb's foundation to move and the plumbing leak was not one of them. State Farm offered no opinion as to what caused Webb's foundation to move.

Perez maintained that the duty of good faith and fair dealing requires a licensed insurance adjuster to be fair and equitable when handling an insured's claim and to investigate a claim promptly and advise the insured about any potential exclusions. Perez agreed that an adjuster must conduct a reasonable investigation, and that once liability is clear, there is a duty to pay a claim within a timely manner. Perez testified that State Farm handled Webb's claim in good faith, and he did not see any instances in which State Farm treated Webb in an unfair manner.

In August 2012, Brandon English, a structural engineer employed by HSA, inspected Webb's house and performed a three-hour investigation, including measuring the elevations in the home and taking photographs. English also reviewed Webb's water consumption records and soil information from Webb's area. English testified that State Farm hired HSA to ascertain whether structural damage had occurred to Webb's dwelling due to a reported domestic water supply line leak below

the foundation in the area of the garage. According to English, the focus of his investigation was to determine whether the foundation moved as a result of the leak and not to determine what caused the tiles to crack.

Based on his investigation, English concluded that the structure does not have a lot of problems, but he noted that trees are causing some seasonal variations in the northwest corner. English testified that the elevations of the home do not vary dramatically. English identified the location of the leak and determined that the elevations on the foundation do not have discontinuities indicating that the foundation has moved as a result of the leak. English did not observe any cracking of the slab on top of the location where the leak occurred. He saw no indication that the center beam underneath the garage had lifted up. The only crack that English observed in the garage was the one near the door, and that crack did not indicate a heave of the foundation as a result of the plumbing leak. According to English, the slab does not require repairs and is still performing as intended.

English testified that there were no cracks in the grout joints between the tiles, and he explained that due to the coloration difference between the grout and tile, he could tell that some tiles had been replaced. English testified that the cracks have the characteristics of a shrinkage crack as opposed to a heave crack. English concluded that "[t]here are no indications that this reported and previously repaired leak below the foundation has contributed to the observed foundation conditions or distress

associated with foundation movement." He further concluded that the "hairline cracks in the tile are consistent with expansion and contraction of the concrete slab surface where tiles are bonded and cracks in the concrete slab surface being transferred through the tile." According to English, there was no evidence indicating that the cracked tiles were caused by a heaving foundation being pushed up by swelled soils.

Rabner, a licensed engineer who conducts residential investigations, testified that Webb's attorney hired him to give an engineering opinion concerning the causation of the damages to Webb's home. In February 2014, Rabner inspected Webb's home and spoke with Webb about the damages. In forming his opinion concerning whether any of Webb's damages related back to the water leak, Rabner reviewed the claim file, Webb's previous hurricane claims, prior reports, elevation surveys, the timing of Webb's reporting of the leak and cracked tiles, as well as his observations, experience, and training. Rabner focused on areas where he expected to see damages from the type of water leak that Webb had, which he described as a small pinhole in one of the copper water lines, and Rabner explained that he would expect to see most of the damage close to where the leak occurred.

Rabner identified the approximate location of the leak in the garage slab and found damage on the garage floor. Rabner explained that the gray epoxy coating on top of the slab had popped off, revealing a ten to twelve-inch crack in the concrete.

Rabner testified that the crack could be longer. While Rabner testified that he did not know if the foundation under the tile was cracked, he agreed with English's opinion that the tiles cracked because the slab cracked underneath. Rabner also testified that he did not see any indication that the foundation needed to be supported by piers. Rabner reported finding a crack in the mortar of the center column between the two headers that run over the garage door opening and cracks in the tile in the dining room and kitchen area. According to Rabner, the cracks in the mortar and the kitchen tile were present when English inspected Webb's home in August 2012, and Rabner noted that the cracks had not gotten any wider. However, English maintained that in 2012, he did not see the crack in the garage that Rabner photographed in 2014, and English testified that because the crack runs east to west, it is not consistent with the direction the crack should run if it had been caused by heave. English further testified that the crack in the brick that Rabner identified is a hole in the brick and not a continuous crack that would indicate that the foundation had heaved up and moved back down.

Rabner testified that the insurance company inspected Webb's home in 2005 after Hurricane Rita, in 2008 after Hurricane Ike, and in May 2012 after Webb reported the leak. According to Rabner, none of the inspectors or engineers had reported seeing cracks in the tile or slab or any significant foundation movement prior to Webb reporting the water leak. State Farm's contact logs indicate that Webb

reported seeing cracks about two to three weeks after he reported the leak. Rabner testified that the only thing that had significantly changed when Webb first observed the cracks was the water leak. Rabner concluded that soil movement caused Webb's damages and that the soil movement was caused by the water leak underneath the slab.

In forming his opinion, Rabner reviewed foundation surveys prepared in 2009, 2012, and 2014, and Rabner testified that he "did not see anything indicating from those that piers were required and that significant movement was indicating [sic] in the foundation." Rabner agreed that according to the elevation surveys, "[w]e don't have a pinpoint area showing a specific heave or settlement in the home[,]" nor did he see an area that showed a substantial change in the pattern between the three different surveys. Rabner testified that because the elevation surveys did not show a significant change in the pattern, he ruled out seasonal change and vegetation as potential causes of the cracking. While it appeared that there had been some movement to the house due to age, Rabner did not see indications of cyclical movement because the cracks were fairly consistent and had not changed much since 2012. Rabner further testified that he saw separation in a corner of one of the bedrooms between sheetrock that he did not attribute to the plumbing leak, and that this was the only location in the house that indicated some seasonal movement.

Although the 2009 and 2012 foundation surveys show that the foundation of Webb's home had not significantly changed, Rabner opined that between April 2012 and August 2012, the foundation of the house heaved up and returned back to "pretty close to where it started out to be[,]" and the foundation "moved in a different manner in that time frame than it had in its previous history." English disagreed with Rabner's theory, stating that if the foundation had heaved up and sunk back down as Rabner proposed, there should be other indicators to show that the event occurred, but English did not see any. English further testified that Rabner's 2014 elevation study did not change his opinion that the plumbing leak did not cause the cracks in the foundation.

EXPERT TESTIMONY

In issue one, State Farm complains that the trial court abused its discretion in denying its motion to exclude Rabner's testimony and opinions. State Farm argues that Rabner's opinions are unreliable under Texas Rule of Evidence 702 because there is an unacceptable analytical gap in Rabner's methodology due to his failure to rule out other plausible causes for the event that his expert testimony was offered to explain. State Farm argues that in forming his opinion, Rabner relied on a false timing sequence provided by Webb, an interested witness. Rabner based his opinion on Webb's account that he first observed tile cracks in the kitchen floor shortly after he discovered the leak. According to State Farm, Rabner admitted he lacked data

supporting his opinion and attempted to explain away data showing no appreciable foundation movement by speculating that the foundation must have heaved up, cracked the tiles, and then settled back down so as to go undetected in the elevation surveys. State Farm maintains that Rabner also failed to perform testing to corroborate his theory. According to State Farm, without Rabner's testimony, the evidence is legally and factually insufficient to support the jury's breach of contract and damages findings. Because resolution of this issue impacts our analysis of State Farm's legal and factual sufficiency issues, we address it first.

Under Rule 702 of the Texas Rules of Evidence, the party seeking to admit expert testimony must establish that (1) the expert is qualified to render an opinion on the subject matter and (2) the testimony is relevant to an issue in the case. Tex. R. Evid. 702; *TXI Transp. Co. v. Hughes*, 306 S.W.3d 230, 234 (Tex. 2010). Expert testimony must rely on sufficient data and proper methodology. *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 905-06 (Tex. 2004); *Kerr-McGee Corp. v. Helton*, 133 S.W.3d 245, 257 (Tex. 2004). "An expert's bare opinion will not suffice." *Ramirez*, 159 S.W.3d at 906. If the analytical gap between the offered opinion and the underlying data is too great, the expert testimony is unreliable. *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 39 (Tex. 2007); *see Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 726 (Tex. 1998). A trial court must act as a gatekeeper to screen out unreliable expert evidence. *Gen. Motors Corp. v. Sanchez*,

997 S.W.2d 584, 590 (Tex. 1999). The examination of an expert's methodology, technique, or foundational data is a task for the trial court in its role as gatekeeper. *Coastal Transp. Co. v. Crown Central Petroleum Corp.*, 136 S.W.3d 227, 233 (Tex. 2004).

The record shows that State Farm's counsel moved to exclude Rabner's opinions concerning causation as being unreliable due to an analytical gap in Rabner's analysis. State Farm also argued that Rabner based his opinion on unsupported speculation and failed to rule out other causes. The trial court denied State Farm's motion.

The trial court has broad discretion in determining the admissibility of expert testimony, and we review the trial court's ruling for an abuse of discretion. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 578 (Tex. 2006). The trial court's role is to determine whether the analysis the expert used to reach his conclusions is reliable, not to determine whether the expert's opinion is correct. *Gammill*, 972 S.W.3d at 728. As the proponent of the expert testimony, Webb was permitted to show the reliability of Rabner's testimony "through 'his experience, skill[,] and consideration of whether his analysis is grounded in scientific methods and procedure.'" *Gulley v. State Farm Lloyds*, 461 S.W.3d 563, 569 (Tex. App.—San Antonio 2014, pet. denied) (quoting *State Farm Lloyds v. Mireles*, 63 S.W.3d 491, 499 (Tex. App.—San Antonio 2001, no pet.)). In determining whether there is an analytical gap in

Rabner's analysis, we review the record to see if Rabner failed to show how his observations, assuming they were valid, supported his conclusion that the plumbing leak caused the foundation to move, resulting in damages to Webb's home. *See State Farm Lloyds v. Hamilton*, 265 S.W.3d 725, 731 (Tex. App.—Dallas 2008, pet. dism'd).

In forming his opinion, Rabner, a licensed engineer who conducts residential investigations, testified that in addition to his observations, experience, and training, he inspected Webb's home, interviewed Webb, and he also reviewed the claim file, Webb's previous hurricane claims, prior reports, and elevation surveys. Rabner concluded that soil movement caused Webb's damages and that the soil movement was caused by the water leak underneath the slab. The record shows that Rabner and English, State Farm's expert, reviewed and relied upon the same foundation surveys, and although Rabner agreed that the foundation surveys did not show significant movement in the foundation, he opined that the plumbing leak caused soil movement that resulted in the foundation heaving up and settling back down, causing the foundation and tiles to crack. Although Rabner interpreted the data and findings differently than English, Rabner testified concerning the basis for his interpretations. It was for the jury to determine which interpretation of the data and methodology was persuasive. *See Hamilton*, 265 S.W.3d at 733.

Additionally, while an expert's testimony on causation can be unreliable if the expert fails to rule out other plausible causes, the record shows that Rabner ruled out other plausible causes. *See Allstate Tex. Lloyds v. Mason*, 123 S.W.3d 690, 698 (Tex. App.—Fort Worth 2003, no pet.). Rabner testified that based on his review of the elevation surveys, he excluded the possibility that the foundation movement was caused by seasonal change, cyclical movement, or vegetation. We conclude that Rabner's opinions concerning causation were not unreliable. *See Gulley*, 461 S.W.3d at 569-70. We further conclude that the trial court did not abuse its discretion by admitting Rabner's testimony. We overrule issue one.

SUFFICIENCY OF THE EVIDENCE

In issue three, State Farm argues that the evidence is legally and factually insufficient to support the jury's award of extra-contractual damages. In its answer to question number three, the jury found that State Farm engaged in unfair or deceptive acts of practices by (1) failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim when the liability under the insurance policy issued to Dennis Webb had become reasonably clear; and (2) refusing to pay a claim without conducting a reasonable investigation with respect to a claim. In question number four, the jury determined that $20,000 would fairly and reasonably compensate Webb for his damages that resulted from State Farm's unfair settlement practices. In answer to question number five, the jury found that

State Farm engaged in such conduct "knowingly," and in question number six the jury determined that in addition to actual damages, Webb should be awarded $60,000 because State Farm's conduct was committed knowingly. State Farm asserts that the evidence is legally and factually insufficient to support the jury's bad faith findings because there is no evidence that it engaged in an unfair or deceptive act or practice by failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim when liability under the insurance policy had become reasonably clear or by refusing to pay the claim without conducting a reasonable investigation, or that it had engaged in such conduct knowingly.

When a party challenges the legal sufficiency of the evidence on an issue for which the party did not have the burden of proof, the appellant must demonstrate there is no evidence to support the adverse finding. *Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983); *United Servs. Auto. Ass'n v. Croft*, 175 S.W.3d 457, 463 (Tex. App.—Dallas 2005, no pet.). In reviewing a no-evidence challenge, we must view the evidence in the light most favorable to the verdict. *Weirich v. Weirich*, 833 S.W.2d 942, 945 (Tex. 1992). We are to "credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not." *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). If there is more than a scintilla of evidence to support the finding, the no-evidence challenge fails. *Holt Atherton Indus. v. Heine*, 835 S.W.2d 80, 84 (Tex. 1992). "Evidence does not exceed

a scintilla if it is 'so weak as to do no more than create a mere surmise or suspicion' that the fact exists." *Kroger Tex. Ltd. P'ship v. Suberu*, 216 S.W.3d 788, 793 (Tex. 2006) (quoting *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004)).

In reviewing the legal sufficiency of the evidence supporting a bad faith finding, we view the evidence in the light most favorable to the prevailing party. *Lyons v. Millers Cas. Ins. Co. of Tex.*, 866 S.W.2d 597, 600 (Tex. 1993). "The evidence presented . . . must be such as to permit the logical inference that the insurer had no reasonable basis to delay or deny payment of the claim, and that it knew or should have known it had no reasonable basis for its actions." *Id.* The issue of bad faith focuses on the reasonableness of the insurer's conduct in rejecting the claim and not on whether the claim was valid. *Id.* at 601. In determining whether the insurer had a reasonable basis to deny a claim, we review the facts available to the insurer at the time of the denial. *Viles v. Security Nat'l Ins. Co.*, 788 S.W.2d 566, 567 (Tex. 1990). Evidence that merely shows a bona fide dispute about the insurer's liability on the contract does not rise to the level of bad faith. *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 17 (Tex. 1994). Thus, a disagreement among experts concerning whether the cause of the loss is covered by the policy will not support a judgment for bad faith. *Id.* at 18.

"The threshold of bad faith is reached when a breach of contract is accompanied by an independent tort." *Laird v. CMI Lloyds*, 261 S.W.3d 322, 328

(Tex. App.—Texarkana 2008, pet. dism'd w.o.j.). An insurer breaches its duty of good faith and fair dealing when the insurer fails to settle a claim if the insurer knew or should have known that it was clear that the claim was covered. *Hamilton*, 265 S.W.3d at 734; *see Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 56 (Tex. 1997). An insurer's reliance on an expert report, standing alone, will not necessarily shield the carrier if there is evidence that the report was not objectively prepared or the insurer's reliance on the report was unreasonable. *State Farm Lloyds v. Nicolau*, 951 S.W.2d 444, 448 (Tex. 1997). Whether an insurer acted in bad faith because it denied payment of a claim after its liability became reasonably clear is a question for the factfinder. *Giles*, 950 S.W.2d at 56.

We agree with State Farm that Webb offered no evidence showing that the report of its expert, English, was not objectively prepared or that State Farm's reliance on the report was unreasonable. Webb failed to offer evidence from which a factfinder could infer that State Farm acted without a reasonable basis and that it knew or should have known that it lacked a reasonable basis for its actions. Based on his investigation, English concluded that there were no indications that the plumbing leak had contributed to the observed foundation conditions or distress associated with the foundation movement. According to English, there was no evidence indicating that the cracked tiles were caused by a heaving foundation being pushed up by swelled soils. State Farm's adjuster, Leal, testified that he relied on

English's finding that the plumbing leak did not cause foundation movement in determining that Webb's claim was not covered. Leal also explained that while he is not an engineer and does not have the credentials to verify an engineer's conclusions, he exercised his independent judgment as an adjuster in reviewing English's report to ensure that the report made sense. According to Leal, he did not see anything in English's report that was unreasonable. Leal believed that he had treated Webb fairly by adhering to the terms of the policy and investigating the claim thoroughly.

Perez, State Farm's corporate representative and a licensed adjuster, testified that State Farm based its decision on English's report and that he believed it was reasonable for State Farm to rely on the report. According to Perez, there were multiple factors that could have caused Webb's foundation to move and the plumbing leak was not one of them. Perez testified that State Farm handled Webb's claim in good faith, and he did not see any instances in which State Farm treated Webb unfairly.

The experts in this case disagreed on whether the plumbing leak caused Webb's foundation damages, and State Farm's adjusters believed it was reasonable to rely on its expert's report. We conclude that when State Farm denied Webb's claim, liability was not reasonably clear, and based on the findings of its expert, State Farm had a reasonable basis to deny the claim. *See Viles*, 788 S.W.2d at 567. Webb

offered no evidence showing that State Farm failed to conduct a reasonable investigation, that English's report was not objectively prepared, or that State Farm's reliance on English's report was unreasonable. *See Nicolau*, 951 S.W.2d at 448. Because the evidence merely shows a bona fide dispute about State Farm's liability on the contract, it does not support a judgment for bad faith. *See Moriel*, 879 S.W.2d at 17-18. Moreover, evidence that shows an insurer was incorrect about the factual basis for its denial of the claim is not evidence of bad faith. *Id.* at 18. On this record, we hold that State Farm did not act in bad faith when it relied on its expert's report in denying Webb's claim.

State Farm also asserts that the evidence is legally and factually insufficient to support the jury's bad faith findings because Webb failed to produce evidence of an injury independent of the denial of insurance policy benefits. According to State Farm, Webb admitted that he did not suffer any injury separate and apart from the denial of policy benefits. In Webb's motion for rehearing, Webb argued that the jury's actual damages award for his Insurance Code claim was supported by the evidence and was within policy limits. Webb further argued that he was not required to prove an independent injury because the Texas Supreme Court had recently rejected State Farm's independent-injury argument in *USAA Tex. Lloyds Co. v. Menchaca*. *See USAA Tex. Lloyds Co. v. Menchaca*, No. 14-0721, 2017 WL 1311752, at *11 (Tex. Apr. 7, 2017) (not yet released for publication) (holding that

the independent-injury rule does not apply if the insured's statutory or extra-contractual claims are predicated on the loss being covered under the insurance policy or if the damages flow from the denial of the claim for policy benefits).

In *Menchaca*, the Supreme Court held that "if the policy does entitle the insured to benefits, the insurer's statutory violation does not permit the insured to recover any actual damages beyond those policy benefits unless the violation causes an injury that is independent from the loss of the benefits." *Id.* at *12. Our review of the record shows that Webb only sought to obtain the benefits of the policy he had with State Farm, and Webb presented no evidence showing that State Farm's alleged statutory violations caused an injury that was independent from the loss of benefits under the policy. Webb testified that he was seeking repair costs under his insurance policy, and Webb's counsel argued that this case was solely a breach of contract case. Webb testified that he wanted State Farm to reimburse him for repairing the leak, and that he wanted State Farm to stabilize the foundation, which would require taking down a portion of the fence and removing landscaping. Webb wanted State Farm to redo the landscaping, replace all the cracked tile, and complete any required carpentry work. Webb testified that he sought to recover the benefits of his policy as well as attorney's fees and costs, but he did not seek damages for mental anguish. When Webb's counsel rested, State Farm moved for an instructed verdict, arguing that because the evidence only supported damages for breach of contract, the trial

court should dismiss Webb's other causes of action. We hold that Webb could not recover extra-contractual damages beyond the policy benefits for his claim under the Insurance Code because he failed to demonstrate damages independent from the loss of the benefits. *See id.*; *Progressive Cty. Mut. Ins. v. Boyd*, 177 S.W.3d 919, 922 (Tex. 2005).

We conclude that the evidence does not enable reasonable and fair-minded people to find that State Farm engaged in a deceptive act or practice. *See City of Keller*, 168 S.W.3d at 827; *Lyons*, 866 S.W.2d at 600. Having determined that the evidence is legally insufficient to support Webb's recovery against State Farm on his Insurance Code claim, we need not address State Farm's argument that the evidence is factually insufficient. *See* Tex. R. App. P. 47.1. We sustain issue three and reverse that portion of the trial court's judgment awarding Webb a recovery on his extra-contractual claims. Accordingly, we reverse the jury's award of actual damages in the amount of $20,000 for unfair settlement practices, and we reverse the jury's award of additional damages in the amount of $60,000 for knowingly engaging in unfair settlement practices. We affirm the jury's award of breach of contract damages in the amount of $15,000, in addition to prejudgment and postjudgment interest as stated in the final judgment. Having sustained issue three, we need not consider State Farm's argument that there is an irreconcilable conflict between the jury's answers to questions two and four that necessitates a new trial, or

its argument that the verdict is in conflict with section 542.152 of the Texas Insurance Code. *See* Tex. R. App. P. 47.1.

EXCLUSION OF EVIDENCE

In issue two, State Farm argues that the trial court erred by refusing to allow it to introduce its claim adjuster's field note documenting the presence of cracks in Webb's kitchen tile in 2008 when Webb filed his Hurricane Ike claim. According to State Farm, the trial court should have allowed the admission of the field note after Rabner testified that no one at State Farm had noticed cracks prior to the 2012 leak, because the field note contradicted Rabner's hypothesis that the absence of cracks prior to the 2012 leak established that the leak caused foundation movement. State Farm maintains that Rabner's testimony laid a foundation for it to introduce the field notes and reports from Webb's 2008 Hurricane Ike claim, because Rabner testified that he relied on the report from Webb's claim.

The record shows that Rabner testified that based on his review of insurance documents, he determined that the first time any cracks were reported was in 2012. According to Rabner, the insurance documents, which included an engineering report from Hurricane Ike, indicated that no one had reported seeing cracks during prior inspections. When State Farm's counsel attempted to cross-examine Rabner concerning the field note which showed cracked tiles in 2008, the trial court refused to allow cross-examination. State Farm's counsel made a bill of exception,

introduced the field note into evidence, and moved for a new trial based on the court not allowing it to introduce the field note into evidence. The field note, labeled "SF/Webb 2008 Ike Claim 53-131-6470430[,]" documents cracked tiles in the kitchen and hallway.

If an expert's opinion is based on certain assumptions about the facts, we cannot disregard evidence showing that those assumptions are unfounded. *City of Keller,* 168 S.W.3d at 813. Undisputed contrary evidence becomes conclusive when it concerns physical facts that cannot be denied. *Id.* at 815. While the trial court is required to allow the disclosure of evidence to discredit an expert on cross-examination, the trial court has the discretion to limit evidence. *See* Tex. R. Evid. 705. For the exclusion of evidence to constitute reversible error, the complaining party must show that (1) the trial court committed error, and (2) the error probably caused rendition of an improper judgment. Tex. R. App. P. 44.1(a); *Gee v. Liberty Mut. Ins. Co.*, 765 S.W.2d 394, 396 (Tex. 1989). Even assuming that the trial court abused its discretion by preventing State Farm from cross-examining Rabner about the evidence of cracks as stated in the 2008 field note, State Farm has failed to show reversible error. *See* Tex. R. App. P. 44.1(a). To show that the trial court's error probably caused the rendition of an improper judgment, the complaining party must show that the judgment turned on the particular evidence that was excluded. *Interstate Northborough P'ship v. State*, 66 S.W.3d 213, 220 (Tex. 2001).

The record shows that in making his assumption that no cracks were reported prior to 2012, Rabner relied on the contact log from State Farm, in which Warner reported that on May 15, 2012, she did not observe any cracks at Webb's home. Rabner also relied on an engineering report from Hurricane Ike in which the licensed engineer did not report seeing cracks. State Farm cannot show that Rabner's assumption was unfounded, because there was conflicting evidence concerning the presence of cracks prior to 2012. Thus, the evidence concerning the presence of cracks prior to 2012 was not conclusive. *See City of Keller*, 168 S.W.3d at 815-16. Additionally, while State Farm contends that the absence of cracks is the only fact that Rabner cited to establish that Webb's damages occurred after the plumbing leak, the record shows that Rabner testified that the absence of reported cracks was just one of the things he considered in forming his conclusions.

On this record, State Farm has failed to show that the judgment turned on the exclusion of the field note. *See Interstate Northborough P'ship*, 66 S.W.3d at 220; *see also* Tex. R. App. P. 44.1(a). Because the exclusion of the field note did not prevent the jury from hearing uncontroverted evidence, we conclude the exclusion did not probably cause the rendition of an improper judgment. We overrule issue two.

CROSS-EXAMINATION

In issue four, State Farm argues that the trial court erred by allowing Webb's counsel to cross-examine Perez about an unrelated 1997 court opinion, *State Farm Lloyds v. Nicolau*, 951 S.W.2d 444, 450 (Tex. 1997), in which a jury found that State Farm had breached its duty of good faith. State Farm complains that the trial court then permitted Webb's counsel to argue that State Farm was found guilty of acting in bad faith in 1997. According to State Farm, it was grossly prejudicial to allow Webb's counsel to imply that State Farm's prior bad act proved that State Farm acted in bad faith in handling Webb's 2012 claim.

Having concluded that there is no evidence supporting the jury's findings that State Farm engaged in a deceptive act or practice and reversed that portion of the trial court's judgment awarding Webb a recovery on his extra-contractual claims, we need not consider State Farm's argument that Webb's counsel's cross-examination was grossly prejudicial because it implied that State Farm had acted in bad faith. *See* Tex. R. App. P. 47.1. We overrule issue four.

JURY ISSUE

In issue five, State Farm argues that the testimony of Webb's attorney's fees expert, Randy Cashiola, constituted legally and factually insufficient to support the jury's award of attorney's fees. State Farm also argues that Webb's damages should

have been limited by State Farm's offer of settlement and that the trial court erred in accepting an incomplete jury form.

We first address State Farm's argument that the evidence is legally and factually insufficient evidence to support the jury's award of attorney's fees. State Farm argues Cashiola admitted facts that rendered his conclusions insufficient, such as (1) he had never seen the fee contract between Webb and his attorneys; (2) he was unaware of the material terms of the agreement except that it was a contingency agreement; and (3) he did not know the percentage of recovery that would go to Webb's attorneys. State Farm complains that Cashiola testified based on a worksheet summarizing the work of Webb's attorneys without identifying the material that supported the worksheet. State Farm points out that Cashiola testified that Webb's counsel did not keep contemporaneous time records and that the worksheet was created after the fact by an assistant. According to State Farm, Cashiola failed to identify a reliable methodology showing the worksheet as a reliable foundation for his opinion.

We generally review an attorney's fee award for an abuse of discretion. *Ridge Oil Co. v. Guinn Invs., Inc.*, 148 S.W.3d 143, 163 (Tex. 2004). "Even though the appropriate standard of review is abuse of discretion, we may nevertheless review a fee award for sufficiency of the evidence." *Cordova v. Sw. Bell Yellow Pages, Inc.*, 148 S.W.3d 441, 446 (Tex. App.—El Paso 2004, no pet.). The lodestar method of

determining what constitutes a reasonable attorney's fee involves two steps: (1) determining the reasonable hours spent by counsel and a reasonable hourly rate for such work, and (2) multiplying the number of such hours by the applicable rate, "the product of which is the base fee or lodestar." *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 760 (Tex. 2012). "[A] party applying for an award of attorney's fees under the lodestar method bears the burden of documenting the hours expended on the litigation and the value of those hours." *Id*. at 761. Sufficient evidence should include, "at a minimum, documentation of the services performed, who performed them and at what hourly rate, when they were performed, and how much time the work required." *Id*. at 764. Contemporaneous evidence may be unavailable, but it is permissible for attorneys to reconstruct their work to provide the factfinder with sufficient information. *Long v. Griffin*, 442 S.W.3d 253, 256 (Tex. 2014).

As Cashiola acknowledged during his testimony, the Supreme Court has set forth a list of eight factors that the factfinder should consider when determining the reasonableness of attorney's fees. *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997). In *Arthur Andersen*, the Supreme Court held that the factors the factfinder should consider are:

1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;

2) the likelihood . . . that the acceptance of the particular employment will preclude other employment by the lawyer;

3) the fee customarily charged in the locality for similar legal services;

4) the amount involved and the results obtained;

5) the time limitations imposed by the client or by the circumstances;

6) the nature and length of the professional relationship with the client;

7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

Id. (quoting Tex. Disciplinary R. Prof'l Conduct R. 1.04, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (West 2013) (Tex. State Bar R., art. X, § 9)). State Farm asserts that Cashiola's testimony was legally and factually insufficient. A party need not prove all of the *Arthur Andersen* factors for the evidence supporting an attorney's fee award to be sufficient. *Arthur J. Gallagher & Co. v. Dieterich*, 270 S.W.3d 695, 706 (Tex. App.—Dallas 2008, no pet.).

Cashiola testified that the rates charged per hour by Webb's attorneys are reasonable, reflective of the risk of taking the case, and commensurate with the attorneys' skills, and he explained that the rates are reasonable for the area of first-party insurance law, as well as for the Jefferson County area. Cashiola further explained that this is a contingent-fee case and that Webb's attorneys would only recover their fees if Webb won the lawsuit. Cashiola also testified that appellate

attorneys charge approximately $500 per hour, and he used that figure in estimating appellate attorney's fees.

Cashiola testified that his assistants prepared a worksheet that summarizes the work that Webb's attorneys performed in the case, which reflected their work up to six days before the trial began, and the worksheet was admitted into evidence without objection. The fee report lists the services performed, who performed them, the hourly rate for the services, when they were performed, and how much time the work required. As previously discussed, Cashiola testified that $49,205 in attorney's fees had been incurred, and he explained that attorney's fees were accruing during trial and would amount to approximately $36,000, totaling approximately $85,000 in attorney's fees.

Cashiola explained that five percent should be segregated from the award of $85,000 in attorney's fees because Webb is not entitled to recover attorney's fees for his common law causes of action. Cashiola also testified that he would not segregate the fees spent and the time incurred for representing the adjusters who were sued because the work was inextricably intertwined and falls within the five percent that should be segregated. However, our review of Cashiola's testimony shows that Cashiola did not opine as to the attorney's fees attributable to only Webb's claims under the Insurance Code as opposed to Webb's other causes of action.

A party seeking attorney's fees must segregate recoverable attorney's fees from unrecoverable attorney's fees. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 313 (Tex. 2006). "Intertwined facts do not make tort fees recoverable; it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated." *Id.* at 313-14. While Webb's claims were all dependent upon the same set of facts or circumstances, that does not mean that they all required the same research, discovery, proof, or legal expertise. *See id.* at 313. Under circumstances such as this, where at least some of the attorney's fees are attributable only to claims for which fees are not recoverable, segregation of fees is required. *See id.* at 314. We conclude that Cashiola's testimony failed to sufficiently segregate Webb's attorney's fees between the causes of action for which Webb could recover attorney's fees and those for which he could not. *See Chapa*, 212 S.W.3d at 313 ("[I]f any attorney's fees relate solely to a claim for which such fees are unrecoverable, a claimant must segregate recoverable from unrecoverable fees."). We sustain issue five, in part, due to Webb's failure to sufficiently segregate his attorney's fees.

Because an unsegregated damages award requires a remand, we must remand for a new trial with respect to Webb's recoverable attorney's fees. *See Chapa*, 212 S.W.3d at 314 (remanding because evidence of attorney's fees for entire case is some evidence of what amount of segregated fees would be); *see also CA Partners v.*

Spears, 274 S.W.3d 51, 84 (Tex. App.—Houston [14th Dist.] 2008, pet. denied); *United Servs. Auto. Assoc. v. Hayes*, No. 01-14-00133-CV, 2016 WL 4536333, at **14-16 (Tex. App.—Houston [1st Dist.] Aug. 30, 2016, pet. filed). Additionally, we need not address State Farm's other arguments in issue five complaining that Webb's damages should have been limited by State Farm's offer of settlement and that the trial court erred in accepting an incomplete jury form, as they would not result in greater relief. *See* Tex. R. App. P. 47.1.

CONCLUSION

In conclusion, we affirm the jury's award of breach of contract damages in the amount of $15,000, in addition to prejudgment and postjudgment interest as stated in the final judgment. We reverse the jury's award of actual damages in the amount of $20,000 that resulted from State Farm's alleged unfair settlement practices and the jury's award of additional damages in the amount of $60,000 that resulted from the finding that State Farm knowingly engaged in unfair settlement practices, and render judgment that Webb take nothing as to those claims. We also reverse and remand for a new trial with respect to the attorney's fees recoverable on Webb's breach of contract claim.

AFFIRMED IN PART; REVERSED AND RENDERED IN PART; REVERSED AND REMANDED FOR NEW TRIAL IN PART.

STEVE McKEITHEN
Chief Justice

Submitted on October 28, 2016
Opinion Delivered May 4, 2017

Before McKeithen, C.J., Kreger and Horton, JJ.