COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00029-CV

PULTE HOMES OF TEXAS, L.P. — APPELLANT

V.

TEXAS TEALSTONE RESALE, L.P. D/B/A TEALSTONE RESALE, L.P.; TEALSTONE MANAGEMENT, L.P. D/B/A TEALSTONE CONTRACTORS, L.P.; AND TEALSTONE CONTRACTORS, INC. — APPELLEES

FROM THE 442ND DISTRICT COURT OF DENTON COUNTY
TRIAL COURT NO. 15-09067-431

MEMORANDUM OPINION[1]

In two issues, Appellant Pulte Homes of Texas, L.P. (Pulte) appeals the trial court's order dismissing its claims against Appellees Texas Tealstone

[1]*See* Tex. R. App. P. 47.4.

Resale, L.P. d/b/a Tealstone Resale, L.P.; Tealstone Management, L.P. d/b/a Tealstone Contractors, L.P.; and Tealstone Contractors, Inc. (collectively, Tealstone), arguing that the trial court erred by granting Tealstone's motion for no-evidence summary judgment. We reverse.

Background

This case arises out of a dispute related to the construction of townhouses and other buildings in a subdivision known as "Main Street Village." Pulte was the general contractor on the project and, in 2010, Pulte was sued by Main Street Village Homeowners Association, Inc. (the HOA) for defects in the design and construction of work performed at Main Street Village. Pulte settled that lawsuit (the HOA suit) in November 2014 by paying the HOA approximately $5.4 million.

Pulte brought the underlying action against Tealstone in November 2013,[2] alleging that Pulte and Tealstone had executed a Contractor Base Agreement (CBA) for foundation construction and flatwork for five townhouse units at Main Street Village—units 350, 354, 358, 362, and 366—and that Tealstone was responsible for defects in the foundation and flatwork of those units. Pulte sought damages for negligence, breach of contract, and indemnity under the CBA by Tealstone, as well as attorneys' fees and costs incurred in both the HOA suit and the instant suit.

[2]Pulte also sued seven other subcontractors as part of this suit. Pulte's claims against Tealstone were severed after the trial court granted Tealstone's motion for no-evidence summary judgment in September 2015; thus, none of the other seven subcontractors are part of this appeal.

In July 2014, Tealstone filed a no-evidence motion for summary judgment on all of Pulte's claims. On the breach of contract claim, Tealstone alleged that Pulte had no evidence that Tealstone had materially breached the contract or that Pulte had suffered any damages as a result of the breach. On the claim for indemnification, again, Tealstone alleged that Pulte had no evidence that the claimed damages arose out of Tealstone's performance of work under the contract, in addition to asserting that there was no evidence that Pulte provided notice or demand for indemnification prior to filing suit, as required under the CBA. On its claim for negligence, Tealstone argued that Pulte had no evidence that Tealstone breached a legal duty to Pulte or that any alleged breach proximately caused Pulte's injury. Finally, Tealstone alleged Pulte had no evidence of breach of contract to support an award of attorney's fees under chapter 38 of the civil practice and remedies code and that Pulte did not present its claim for fees to Tealstone.

Pulte filed a response to Tealstone's motion, attaching five affidavits with supporting exhibits. Pulte also filed two supplemental responses to Tealstone's motion, discussed in more detail below. In total, Pulte filed nine affidavits[3] in response to Tealstone's motion and to support its claims against Tealstone.

Tealstone objected to much of Pulte's evidence, and the trial judge sustained all but one of the objections, striking the bulk of Pulte's summary

[3]Pulte also attached two of Tealstone's responses to discovery but does not rely on them in this appeal, so we have not addressed them.

judgment evidence, and then granted Tealstone's motion for no-evidence summary judgment on all of Pulte's claims.

I. Pulte's summary judgment evidence

A. Bryson affidavit—Pulte's relationship with Tealstone

In its initial response, Pulte filed an affidavit by Scott Bryson, Pulte's vice president and director of finance in the Dallas market as well as a custodian of records. In its second supplemental response, Pulte filed a second affidavit by Bryson that closely resembled the first but offered more facts. In its brief to this court, Pulte relies solely on the affidavit submitted as part of its second supplemental response. Thus, our references are limited to the second affidavit.

As part of his duties, Bryson reviewed and maintained documents related to the Main Street Village project, including "construction cost control documents," financial statements, and the CBA Pulte entered into with Tealstone to perform foundation construction work and flatwork for Pulte. A CBA was attached to Bryson's affidavit as exhibit 1 and identified by Bryson as "the contract whereby Tealstone . . . agreed to perform foundation construction work and flatwork in 2003 for Pulte" at the Main Street Village project. The CBA provided that the work performed by Tealstone was to be "completed in the standards and quality which prevail among construction contractors of superior knowledge and skill" and in a workmanlike manner "according to the highest standard of the trade." The CBA also included the following indemnification provision:

> Indemnification of Pulte by Subcontractor, Duty to Defend
> Contractor hereby agrees to save, indemnify, and keep harmless Pulte and its agents and employees against: all liability, claims, judgments, suits, or demands for damages to person[] or property arising out of, resulting from, or relating to Contractor's performance of the work under this Agreement ("Claims") unless such Claims have been specifically determined by the trier of fact to be the sole negligence of Pulte. Contractor's duty to indemnify Pulte shall arise at the time written notice of a Claim is first provided to Pulte regardless of whether claimant has filed suit on the Claim. Contractor's duty to indemnify Pulte shall arise even if Pulte is the only party sued by claimant and/or claimant alleges that Pulte's negligence was the sole cause of claimant's damages. Contractor's indemnification obligation shall include, but not be limited to, any Claim made against Pulte by: (1) a Contractor's employee or subcontractor who has been injured on property owned by Pulte; (2) a homeowner or association; and (3) a third party claiming patent, trademark or copyright infringement.

In addition to attaching the CBA as Exhibit 1 to his affidavit, Bryson also attached cost control sheets reflecting payments Pulte claimed to have made to Tealstone for its work on the Main Street Village project.

Bryson further stated that Pulte was the sole defendant in the HOA lawsuit, that it was sued for damages in excess of $11 million, that Pulte paid $5,401,232.00 to settle the HOA suit, and that this amount was based upon Pulte's determination of the scope of necessary repairs to Main Street Village, including repairs necessary to the foundation and flatwork performed by Tealstone on units 350, 354, 358, 362, and 366.

1. Tealstone's objections and the trial court's rulings

Tealstone objected to the following statements in Bryson's amended affidavit on the basis that those statements were no more than unsupported

"factual conclusions" because "there is no mention of Main Street Village in the [CBA], [nor] is there any mention of foundation construction work and flatwork" in it:[4]

> 1. I am custodian of records for Pulte and as part of my duties, I have control over copies of construction cost control documents as well as yearly and monthly financial statements for the Dallas market, including costs and expenses related to the construction of Main Street Village . . . and the Contractor Base Agreement between Pulte and [Tealstone] **whereby Tealstone Contractor agreed to perform foundation construction work and flatwork work for payment by Pulte at the Main Street Village residential town home construction project in November and December 2003.**
>
> 2. A true and correct copy of the Contractor Base Agreement between Pulte and Tealstone Contractor for its foundation construction work and flatwork performed during the construction of Main Street Village is attached hereto as Exhibit 1.
>
> 3. In my role as Director of Finance, **I have personal knowledge of the history of foundation construction work and flatwork performed by Tealstone Contractor at Main Street Village, which includes the Contractor Base Agreement between Pulte and Tealstone Contractor for its work at Main Street Village. The Contractor Base Agreement attached hereto as Exhibit 1 is the contract whereby Tealstone Contractor agreed to perform foundation construction work and flatwork in 2003 for Pulte at Main Street Village**.
>
> 4. The indemnity provision provides that Tealstone Contractors will indemnify Pulte in the event of a claim against Pulte arising out of or relating to Tealstone Contractor's work at Main Street Village.

[4]The objected-to statements are listed as Tealstone presented them in its brief to this court. Each statement is a portion of a paragraph from Bryson's affidavit. For clarity, where Tealstone objected to a part of a sentence, rather than the entire sentence, we have emphasized in bold the objected-to language.

> 5. Pulte is seeking indemnification under the Contractor Base Agreements from Tealstone Contractors for claims . . . that result from Tealstone Contractors' defective construction work and flatwork at the Main Street Village construction project in 2003.
>
> 6. Pulte hired Tealstone Contractor in 2003 to perform the foundation construction work and flatwork at 350 Main Street, 354 Main Street, 358 Main Street, 362 Main Street and 366 Main Street in Main Street Village as agreed to under the Contractor Base Agreement attached hereto as Exhibit 1.
>
> . . . .
>
> 8. Tealstone Contractor performed the defective foundation construction work and flatwork at 350 Main Street, 354 Main Street, 358 Main Street, 362 Main Street and 366 Main Street in Main Street Village, which is one of the claims for defective work Plaintiff made in the lawsuit. See Exhibit 1 & 2.
>
> 9. Pulte settled the lawsuit in good faith by paying $5,401,232.00, which Pulte determined to be fair and reasonable under the circumstances considering the scope of damages determined by both the Plaintiff and Pulte's experts—**including repairs to the foundation and flatwork that Tealstone Contractor's performed at 350 Main Street, 354 Main Street, 358 Main Street, 362 Main Street and 366 Main Street—**coupled with the potential for an arbitration award in favor of the Plaintiff.

Tealstone also objected to the above paragraph 5 on the basis that "Bryson is not an expert on construction work and flatwork and has no personal knowledge as to any allegedly defective work." The trial court sustained this objection.

Additionally, Tealstone objected to the following statement as conclusory because it contained no evidence of alleged payments received by Tealstone and the cost control sheets attached were created more than 10 years after Tealstone would have provided the services:

> Pulte paid Tealstone Contractor in November and December 2003 to perform the foundation construction work and flatwork . . . for Pulte at 350 Main Street, 354 Main Street, 358 Main Street, 362 Main Street, and 366 Main Street in Main Street Village.

Tealstone's conclusory objection to the above was all sustained by the trial court.

Finally, Tealstone objected to the affidavit in its entirety on the basis that there was "nothing to indicate any basis for Bryson's alleged 'personal knowledge.'" This objection was the only objection overruled by the trial court.

B. Lee affidavits—Structural and cosmetic damage

In his affidavit, Kerry Lee, a structural engineer and senior vice president at Nelson Architectural Engineers, Inc. (NAE), stated that he worked in the structural engineering industry performing services such as investigation and analysis of materials used in residential, commercial, and industrial construction. According to Lee, he performed an evaluation of the Main Street Village project that was used in the HOA suit. A copy of the report he prepared for that suit was attached as exhibit 1 to his affidavit (NAE report).

The NAE report included aerial photos of the Main Street Village project as well as individual photos of and written observations about the townhome units. Lee observed fractures in the townhome unit foundations, and he measured those fractures. In the report, Lee also observed fractured and tilted flatwork in sidewalks, walkways, and alleyways throughout the project, as well as separations and distortion in multiple retaining walls. The report identified cracking and other evidence of distress in the exterior veneers of townhomes,

including buckling, separations, nail pops, floor distress, staining, out-of-level floors, and inoperable doors inside units. Lee also reported deficiencies in the townhomes' roofs, and he evaluated grading and draining issues. The NAE report included repair recommendations for each problem addressed.

Among his conclusions, Lee found that the foundations of 28 of the 33 townhomes had experienced a performance failure, that "multiple foundation systems" had also experienced a strength failure, and that the concrete flatwork had "failed to provide normally expected performance."

Pulte subsequently supplemented Lee's affidavit with a second affidavit that provided Lee's curriculum vitae (Lee's Supplemental Affidavit). The NAE report was also incorporated into Lee's Supplemental Affidavit, which included illustrations, including engineering drawings for Main Street Village that had not been included as attachments to the original affidavit as well.

1. Tealstone's objections and the trial court's ruling

Tealstone argued that Lee's Supplemental Affidavit was irrelevant because (a) it did not refer to or mention Tealstone, (b) it was "prepared as a basis for an opinion of probable construction costs of repair," but contained "no such cost estimate," (c) the report stated that "the cause of the observed distress is indeterminate," (d) Lee did not access the interior of the relevant units, and (e) the affidavit "essentially negate[d] any alleged construction work by Tealstone . . . as a cause of the alleged foundation and flatwork failures." Tealstone further objected that Lee's Supplemental Affidavit contained hearsay and was supported

by unauthenticated documents because Lee referred to a list of items he relied upon in making the report but did not attach those documents to his affidavit.

The trial court granted all of Tealstone's objections to Lee's Supplemental Affidavit and thus struck all of Lee's substantive testimony, leaving only Lee's original affidavit, which proved up the NAE report.

C. Lozos Affidavit—Repair costs

Timothy J. Lozos was the technical director at NAE, and as part of his duties, he provided construction cost estimating and cost analysis services, including estimating remedial repair costs for residential, multi-family structures that had sustained damages resulting from construction defects. Lozos had prepared an estimate report for the HOA suit, and he attached it as an exhibit to his affidavit. In his report, Lozos estimated that the cost to repair Main Street Village in its entirety would total $11,694,241.97. Tealstone did not object to Lozos's affidavit.

D. Marshall Affidavit—Foundation Repair Bid

Fredrick S. Marshall was the president of Structural Repair, LLC, general partner for Advanced Foundation Repair, LP, and claimed over 23 years of experience in foundation repair. Marshall's affidavit provided individual repair cost bids for necessary foundation repairs for 26 separate buildings, including a repair cost bid of $76,425.00 for 350-366 Main Street, the building that Pulte claims Tealstone performed work on. Marshall's bid made no mention of

Tealstone, nor did he specifically attribute any of the repair work to Tealstone's work on the property.

1. Tealstone's objections and the trial court's ruling

Tealstone objected to Marshall's affidavit on the ground that it was "based solely upon a conclusory statement of repair costs, without setting forth any facts to support such a statement" and complained that the affidavit "failed to include any estimates, bids, invoices, industry standards, materials, description of work or the like." Tealstone further objected on the basis that the affidavit was irrelevant because it "failed to attribute any costs" to work performed by Tealstone.

The trial court sustained Tealstone's objections to Marshall's entire affidavit.

E. Motheral affidavit—Cosmetic Repair and Restoration Bid

R. Lynn Motheral, the president of Austin Design Build, Inc. and a general contractor with over 34 years of experience in construction and repair of commercial and residential buildings, including multi-unit residential buildings, also provided an affidavit. In it, Motheral stated that in March and April 2013 he inspected the townhomes and garages at Main Street Village and then prepared a bid for necessary repairs. Motheral's bid included the necessary cost to repair damages caused by foundation movement, including costs to repair drywall, tile flooring, ceramic tile, misaligned doors and door frames; costs for interior texture and paint; costs for epoxy of cracks and joint filler; costs for caulking and repair

to trim work; cleanup costs; restoration costs; and alternate living expenses for tenants during the repairs. Marshall estimated the costs to repair damages resulting from foundation movement at 350, 354, 358, 362, and 366 Main Street—the units for which Pulte claims Tealstone provided foundation work—to be $7,232.90 for cosmetic repairs, $33,750.00 for alternate living expenses, and $15,255.00 for restoration costs.

1. Tealstone's objections and the trial court's ruling

Tealstone objected to Motheral's affidavit for the same reasons it objected to Marshall's affidavit—it argued that it was "based solely upon a conclusory statement of repair estimates, without setting forth any facts to support such a statement." It also argued that the affidavit was irrelevant because it failed to attribute any of the costs to work performed by Tealstone.

The trial court sustained Tealstone's objections to Motheral's entire affidavit.

F. Matney affidavit—Notice to Tealstone

John R. Matney served as Pulte's attorney in the HOA suit. Attached to Matney's affidavit as exhibit 1 was an April 16, 2013 letter written by Matney on behalf of Pulte and addressed to Tealstone seeking enforcement of the CBA's indemnification clause. In it, Pulte demanded that Tealstone defend and indemnify Pulte against the allegations made against it in the HOA suit. Tealstone did not object to Matney's affidavit.

G. Francis affidavit—Notice to Tealstone's insurer

Michael F. Francis also worked as an attorney for Pulte in the HOA suit. Francis stated in his affidavit that he provided notice of the HOA suit to Tealstone's insurance carrier, Ohio Casualty, by letter dated May 30, 2013. A copy of that letter was attached to Francis's affidavit as exhibit 1. In it, Pulte demanded that Tealstone indemnify Pulte as required by the CBA, which included payment of Pulte's attorney's fees incurred in the HOA suit. In a July 31, 2013 letter attached to his affidavit as exhibit 2, Francis further acknowledged that America First Insurance had received the notice of the HOA suit on behalf of Tealstone, that Francis notified America First Insurance of the upcoming mediation to be conducted in the HOA suit, and that Francis provided several documents that had been requested by America First Insurance. Tealstone did not object to Francis's affidavit.

Discussion

Pulte brought two issues on appeal. First, Pulte argued that the trial court improperly excluded affidavit evidence submitted in response to Tealstone's motion for no-evidence summary judgment. Second, Pulte argued that the trial court improperly granted Tealstone's motion for no-evidence summary judgment because, if the trial court had considered the erroneously-struck evidence, Pulte produced more than a scintilla of evidence in support of the challenged elements in its contractual indemnity, breach of contract, negligence, and attorney's fees claims.

I. Tealstone's objections to Pulte's evidence

We review a trial court's ruling sustaining or overruling objections to summary judgment evidence for an abuse of discretion. *Paciwest, Inc. v. Warner Alan Properties, LLC.*, 266 S.W.3d 559, 567 (Tex. App.—Fort Worth 2008, pet. denied). To determine whether a trial court abused its discretion, we must decide whether the trial court acted without reference to any guiding rules or principles; in other words, we must decide whether the act was arbitrary or unreasonable. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985), *cert. denied*, 476 U.S. 1159 (1986). Merely because a trial court may decide a matter within its discretion in a different manner than an appellate court would in similar circumstance does not demonstrate that an abuse of discretion has occurred. *Id.*

A. Bryson affidavit

The majority of Tealstone's objections to Bryson's affidavit argued that his statements were impermissible "factual conclusions." To constitute competent summary judgment evidence, affidavits must be made on personal knowledge, setting forth such facts as would be admissible in evidence, and must affirmatively show that the affiant is competent to testify to the matters stated therein. Tex. R. Civ. P. 166a(f); *Garner v. Long*, 106 S.W.3d 260, 267 (Tex. App.—Fort Worth 2003, no pet.). Affidavits supporting a motion for summary judgment must set forth facts, not legal conclusions. *Garner*, 106 S.W.3d at 267; *see also Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984) (holding that

affidavits containing conclusory statements unsupported by facts are not competent summary judgment proof).

Based on the arguments made to the trial court and on appeal, the parties appear to disagree as to the meaning of "conclusory" in the context of objections to affidavits submitted in summary judgment proceedings. *See, e.g.*, *Rizkallah v. Conner*, 952 S.W.2d 580, 587 (Tex. App.—Houston [1st Dist.] 1997, no writ), *superseded on other grounds by rule as stated in Landers v. State Farm Lloyds*, 257 S.W.3d 740, 746 (Tex. App.—Houston [1st Dist.] 2008, no pet.). Simply put, "[a] conclusory statement is one that does not provide the underlying facts to support the conclusion." *Haynes v. City of Beaumont*, 35 S.W.3d 166, 178 (Tex. App.—Texarkana 2000, no pet.). In other words, conclusions in and of themselves are not objectionable, but to constitute proper summary judgment evidence, they must be "[l]ogical conclusions based on stated underlying facts." *Thompson v. Curtis*, 127 S.W.3d 446, 450 (Tex. App.—Dallas 2004, no pet.). Thus, a conclusory statement in an affidavit is not proper summary judgment proof when there are "no facts to support the conclusion." *Rizkallah*, 952 S.W.2d at 587. But when conclusions are based on stated underlying facts in the record, logical conclusions are proper in both lay and expert testimony. *Id*. at 586.

The requirement that affidavits submitted in summary judgment proceedings be based on personal knowledge is satisfied "by an affirmative showing in the affidavit of how the affiant became personally familiar with the facts so as to be able to testify as a witness, not by a self-serving recitation by

the affiant that she has 'personal knowledge.'" *Coleman v. United Sav. Ass'n of Tex.*, 846 S.W.2d 128, 131 (Tex. App.—Fort Worth 1993, no writ) (holding that an apartment manager's statements demonstrated personal knowledge of facts sufficient to support her conclusion that the smoke detector was in working order prior to the fire).[5] Tealstone relied upon *Coleman* to argue that Bryson's affidavit did nothing more than recite that it was based on personal knowledge. We disagree. *Coleman* actually lends support to Pulte's argument because, much like the apartment manager in *Coleman* who attested to her duties to receive maintenance requests and complaints, Bryson detailed his involvement as the vice president and director of finance and his duties in that role, including:

> review of construction cost control documents as well as yearly and . . . monthly financial statements for the Dallas market, including costs and expenses related to the construction of Main Street Village townhome subdivision which is part of the Dallas market, litigation review/support for cases in the Dallas market, vendor/trade costs and payments for the Dallas market, including the Main Street Village townhome subdivision, **review and approval of contractual arrangements and Contractor Base Agreements entered into by the Pulte Dallas Division, which includes the Contractor Base**

[5] *Coleman* involved a claim for wrongful death after a tenant died in a fire at the apartment. *Id.* In support of its motion for summary judgment, the defendant submitted an affidavit by the apartment manager at the time of the fire that attested to her duty "to receive maintenance requests and complaints." *Id.* This court held that those statements affirmatively showed that the manager had personal knowledge that the smoke detector had been tested and was in working order, that the decedent had not made a complaint to the manager about his smoke detector, and that the apartment manager never received a request for repair, replacement, or maintenance of the smoke detector. *Id.*; *see also Choctaw Props., L.L.C. v. Aledo I.S.D.*, 127 S.W.3d 235, 243 (Tex. App.—Waco 2003, no pet.) (holding statement in affidavit that attached records were "exact duplicates of the originals" was not conclusory because of affiant's role as custodian of records).

> **Agreements for all work performed at the construction of Main Street Village** and record retention/management oversight for the Dallas market, which includes Main Street Village. [Emphasis added.]

The basis for Bryson's statement that Tealstone performed foundation construction work and flatwork at the Main Street Village project in November and December 2003 is found in his statement that, as director of finance, he had "personal knowledge" of the "history of foundation construction work and flatwork performed by [Tealstone] at Main Street Village." And the trial court tacitly acknowledged as much by overruling Tealstone's objection that "there is nothing to indicate any basis for Bryson's alleged 'personal knowledge' of the work as he testifies."

Bryson's affidavit further attests to his personal knowledge of the contract, including the indemnity provision—at issue in paragraphs four and five—in connection with Tealstone's work at Main Street Village.

Tealstone largely took issue with the fact that the CBA did not define the specific project on which Tealstone was to perform work, but instead referred to a "Schedule A," which was not attached to the summary judgment evidence, to identify such work. However, the CBA clearly identified Tealstone as the contractor with whom Pulte entered into the CBA, and Bryson's affidavit explained that Tealstone had "agreed to perform foundation construction work and flatwork . . . for payment by Pulte at Main Street Village . . . in November and

December 2003" and that the CBA attached to Bryson's affidavit was for such work relating to the townhomes at issue in this case.

Tealstone's argument incorrectly focuses on the evidence Pulte did not produce, whereas in a summary judgment context, we must look to the evidence that Pulte did produce. *See City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005) (noting that, in reviewing a summary judgment, we "must examine the entire record in the light most favorable to the nonmovant"). The absence of Schedule A is not fatal to Pulte's response—as the nonmovant, Pulte was not required to marshal its proof to defeat Tealstone's motion, but only to provide sufficient evidence to raise a fact issue on the challenged elements. *See* Tex. R. Civ. P. 166a(i) cmt. Thus, while the inclusion of Schedule A might have provided additional evidence to support Bryson's statement that Touchstone agreed to perform work on the Main Street Village project, the fact that Schedule A was not attached did not render Bryson's statements conclusory. Nor did it render the statements in Bryson's affidavit related to the CBA, or the CBA itself, inadmissible. Rather, its absence goes to the weight to be given the CBA and Bryson's testimony, a consideration for the fact finder at trial, not for the trial court in considering a summary judgment motion. *See State v. Durham*, 860 S.W.2d 63, 66 (Tex. 1993) ("The weight to be given a witness's testimony is a matter for the trier of fact, and a summary judgment cannot be based on an attack of a witness's credibility.").

Tealstone further argued that Bryson's statement that Pulte is seeking indemnification under the CBA because of Tealstone's defective work is unsupported and conclusory because "Bryson is not an expert on construction work and flatwork; has no personal knowledge as to any allegedly defective work; and, there is nothing to support his conclusion that the legal claims and resulting damages and fees resulted from any defective work performed by Tealstone at Main Street in 2003." This is a misinterpretation of Bryson's statement. Bryson's statement was not offered as proof that Tealstone's work was actually defective. His statement in conjunction with his other statements that (1) Pulte contracted with Tealstone to perform the foundation work and flatwork in five townhomes at Main Street Village, (2) Tealstone performed and was paid for that work, and (3) Pulte was sued by the HOA for defective foundation work in the construction of Main Street Village, including the five units for which Tealstone constructed the foundation and provided the flatwork, shows that Tealstone's allegedly defective work was at issue in the HOA lawsuit and formed the basis for Pulte's claim for indemnification. *See 1001 McKinney Ltd. v. Credit Suisse First Boston Mortg. Capital*, 192 S.W.3d 20, 27 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) (holding affidavit's statements were not conclusory because they offered logical conclusions based on underlying facts); *Thompson v. Curtis*, 127 S.W.3d 446, 450–51 (Tex. App.—Dallas 2004, no pet.) (same).

Finally, Tealstone took issue with the following statement as conclusory:

> Pulte paid Tealstone Contractor in November and December 2003 to perform the foundation construction work and flatwork . . . for Pulte at 350 Main Street, 354 Main Street, 358 Main Street, 362 Main Street, and 366 Main Street in Main Street Village.

In particular, Tealstone argued that the attached cost control sheets did not provide any evidence of payments received by Tealstone and the sheets were created ten years after the payments were allegedly made. But Bryson's affidavit explains that, through his positions as director of finance and custodian of records for Pulte, he had control over the cost control documents "as well as yearly and monthly financial statements . . . including costs and expenses related to the construction of Main Street Village" and that the attached cost control sheets reflected payments made to Tealstone for its foundation construction work and flatwork at Main Street Village. Again, Tealstone's arguments attack the credibility of Bryson's statements and therefore go to the weight to be attributed to the cost control sheets as evidence, not their admissibility. *See Durham*, 860 S.W.2d at 66.

We therefore hold that the trial court abused its discretion by sustaining Tealstone's objections to Bryson's statements as conclusory.

B. Lee's Supplemental Affidavit and the NAE report

Tealstone objected to Lee's Supplemental Affidavit on the basis that it was irrelevant, that it contained hearsay, and that the documents relied upon by Lee in it were not properly authenticated.

1. Relevance

Tealstone argued that Lee's Supplemental Affidavit was irrelevant for five reasons: (1) neither the affidavit nor the attached report referenced or mentioned Tealstone; (2) the affidavit stated that it was "prepared as a basis for an opinion of probable construction cost of repair" but failed to state the actual costs and specify which costs were attributable to work performed by Tealstone;[6] (3) the affidavit stated that "the cause of the observed distress is indeterminate"; (4) the NAE report stated that Lee did not access the interior of the relevant units when he evaluated Main Street Village; and (5) the NAE report named the foundation design, subgrade preparation, and improper drainage as contributing factors to the foundation failures.

Relevant evidence is evidence that has any tendency to make a fact of consequence more or less probable than it would be without the evidence. Tex. R. Evid. 401. Expert witness testimony is relevant if it is "sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." *E.I. du Pont de Nemours and Co., Inc. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995) (citing *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1985)). Evidence that has *no* relationship to any of the issues in the case is irrelevant. *Id.*

[6]In Lee's Supplemental Affidavit, he did not estimate repair costs but rather identified the necessary repairs. Nor did he attribute the damage he observed to Tealstone, but merely reported the defects he observed.

That the affidavit and report do not directly attribute the construction defects to Tealstone and that they do not provide a cost for repairs do not render Lee's statements irrelevant. As the report states, Lee and his firm, NAE, were retained to investigate "reported/observed construction defects" at Main Street Village and provide a *scope* of repairs. As Pulte has pointed out, Tealstone provides no support for its argument that an expert such as Lee must identify the party responsible for the construction defects he was hired to evaluate. Nor does Tealstone explain why Lee's affidavit and report would be rendered entirely irrelevant simply because they did not attribute the evidence of foundation failures to Tealstone specifically. As part of its case against Tealstone, Pulte must ultimately show the extent to which the foundation and flatwork provided by Tealstone on the affected townhomes were defective, but at the summary judgment stage, Pulte need only provide some evidence that some of the foundation and flatwork provided by Tealstone to the affected townhomes was defective. Lee's report is relevant to that element of Pulte's claims. *See, e.g.*, *United Serv. Auto Ass'n v. Croft*, 175 S.W.3d 457, 461 (Tex. App.—Dallas 2005, no pet.) (describing expert report by engineer evaluating house foundation and identifying causes of foundation problems).

Tealstone's final three relevancy objections are red herrings. Tealstone points selectively to statements contained in letters included in the appendix to Lee's report that "the cause of the observed distress is indeterminate" and noting that Lee did not have access to the interior of the townhomes. However,

the probative value of the NAE report is not derived from a snapshot in time, but is found in its totality—as an explanation of Lee's work in progress.

The brief, two-page letters included in the appendix to the NAE report outline preliminary findings as of November and December 2010, including initial observations of "areas of distress." Each letter notes that, "[b]ased upon NAE's limited exterior review of the buildings, the cause of the observed distress is indeterminate" but also further notes that "foundation movement resulting in distress to the superstructure are likely contributors." Each letter then suggests the next steps to be taken to determine the cause of the observed distress. The final report, issued in December 2012—two years after the letters to which Tealstone objects—detailed the further steps taken by NAE to investigate the observed distress, including relative elevation surveys, representative destructive testing, a brick anchor survey, and observations of the interior of the townhomes.

Far from indeterminate, NAE's final report found that the majority of the Main Street Village townhomes, including the units for which Bryson attested that Tealstone provided foundation construction and flatwork, had experienced a foundation performance failure, that "multiple foundation systems" also experienced a strength failure, and that the concrete flatwork had "failed to provide normally expected performance." The report specifically noted that the townhomes—townhomes that other witnesses identified as ones on which Tealstone performed foundation work—had experienced foundation damages

including edge lift, fractures in the foundation slab, mortar joint separations, wall/ceiling separations, inoperable doors, tile fractures, and nail pops.

The journey from "indeterminate" cause to conclusions is to be expected in an expert analysis that passes muster under *Robinson*. It would be questionable indeed for an expert report to start and end at the same place; as *Robinson* noted, "coming to a firm conclusion first and then doing research to support it is the antithesis of [the] scientific method." *Robinson*, 923 S.W.2d at 559 (citing *Claar v. Burlington N. R.R.*, 29 F.3d 499, 502–03 (9th Cir. 1994)). The letters attached to NAE's report signal to us that it did the opposite—first it made observations, performed tests, and otherwise evaluated the Main Street Village property. Based on those observations, tests, and evaluations, which are described at length in the report, NAE came to its conclusions that the foundations and flatwork were defective and required repair.

Similarly, Tealstone relies upon more statements contained in the report's appendix that the design of the foundations, improper drainage, and improperly prepared subgrade could have been contributing factors to the foundation failures. These statements were contained in a rebuttal report issued by NAE in June 2013 but the same report stated clearly that, while those may have been contributing factors, the improperly constructed foundations also contributed to the foundation failures:

> Based on the results of NAE's evaluation and analysis presented in NAE Report 1, **the foundations at the subject site have failed based on both strength and performance and do not meet the**

> **minimum standard of care required by the applicable building codes and standards.** [Emphasis added.]

For the above reasons, we disagree with Tealstone's argument that Lee's affidavit and the attached report were irrelevant and therefore sustain Pulte's first issue as it relates to Lee's affidavit.

2. Hearsay and Authentication

Tealstone further objected that Lee's Supplemental Affidavit and the NAE report attached thereto were inadmissible because they

> contain[ed] hearsay and [were] supported by unauthenticated documents. For example, on Page 7, Lee provides a list of multiple items, including settlement letters which were relied upon in forming his opinions yet there is no business record affidavit authenticating those documents, nor does he include those documents in his affidavit.

Tealstone advanced this argument on appeal but also argued that because Lee attached the NAE report as part of his affidavit "instead of attaching the documents as business records, [Lee's Supplemental Affidavit] in its entirety needs to be based upon his personal knowledge." Tealstone forfeited this particular argument by failing to advance it below. *See Dulong v. Citibank, N.A.*, 261 S.W.3d 890, 893 (Tex. App.—Dallas 2008, no pet.) (noting that objections that an affiant does not have personal knowledge or that an affidavit fails to comply with the business records exception to the hearsay rule are objections to the form of the affidavit and must be preserved); *Wrenn v. G.A.T.X. Logistics, Inc.*, 73 S.W.3d 489, 498–99 (Tex. App.—Fort Worth 2002, no pet.) (holding

objections to lack of verification and authentication were defects of form and were forfeited by appellant's failure to raise them at trial court level).

Tealstone's arguments that Lee's Supplemental Affidavit and the NAE report should be struck because they contain hearsay by referring to documents relied upon by Lee and NAE and that those documents were not properly authenticated also fail. As Tealstone points out, the underlying documents were referred to in the affidavit but not attached to it. Lee did not attempt to prove the contents of the documents themselves but listed them to demonstrate which documents he relied upon in forming his conclusions. Thus, the list of documents relied upon is not hearsay—as it was not offered for the truth of the matters asserted—nor does it invoke the need for authentication, as the documents themselves were not admitted into evidence. *See* Tex. R. Evid. 703; *In re Christus Spohn Hosp. Kleburg*, 222 S.W.3d 434, 440 (Tex. 2007) ("expert witnesses may testify about facts or data not personally perceived but 'reviewed by, or made known' to them").[7]

The trial court therefore abused its discretion in granting these objections and striking Lee's entire supplemental affidavit.

C. Motheral and Marshall affidavits

Marshall's affidavit provided repair cost bids for foundation repairs at Main Street Village, including the units specifically at issue in this suit, and Motheral's

[7]Tealstone did not argue that the documents are not such that are reasonably relied upon by experts in the field.

affidavit provided a cost to repair the damages caused by the foundation movement. As to its objections to these two affidavits, this time Tealstone complained of the exclusion, rather than inclusion, of underlying data to support the expert opinions. In essence, Tealstone argued that Motheral's and Marshall's affidavits were conclusory because they did not provide back-up documentation to support the estimated cost of repairs and, further, that they were irrelevant because they failed to allocate specific repair costs to Tealstone. Although Tealstone is correct that Motheral and Marshall did not provide back-up documentation for their estimates, this does not mean that they failed to provide sufficient bases for their conclusions.

In Motheral's affidavit he stated that he had 34 years' experience in residential construction and repair. He stated that he personally inspected the affected townhomes. Drawing on that experience, Motheral stated that he estimated the repair costs for "work to repair drywall, tile flooring, ceramic tile, misaligned doors and door frames, interior texture and paint, epoxy of cracks and joint filler, caulking and repair to trim work, cleanup costs, restoration costs and alternative living expenses during all repairs" to the units that other summary judgment evidence attributed to Tealstone's work to be $56,237.90. Likewise, Marshall based his opinion on repair costs on his 23 years of experience in foundation repair, including the managing of repairs to "thousands of structures both commercial and residential in the DFW area." In his affidavit, Marshall stated that he had prepared a repair bid to underpin foundations affected by

movement within Main Street Village, including the townhome units at issue. He estimated the repair costs for those units—units that were linked through other summary judgment evidence to Tealstone's work—to be approximately $76,425.00. Both affidavits were based upon stated experience in the industry for making estimates of this nature, and as such, neither affidavit was impermissibly conclusory. *See, e.g.*, *Carrow v. Bayliner Marine Corp.*, 781 S.W.2d 691, 694 (Tex. App.—Austin 1989, no pet.) (holding expert testimony to repair estimate was sufficient to support award of repair costs). The trial court abused its discretion in granting this objection as to both affidavits.

We further disagree with Tealstone's argument that the affidavits are irrelevant—the costs of repairing the foundations and of repairing additional damage related to the foundations and flatwork are certainly relevant to Pulte's claims for damages. As discussed above, the fact that these two affidavits did not name Tealstone as the responsible party for the damages does not negate the other summary judgment evidence that does. Because the facts contained in these two affidavits have a "tendency to make a fact more or less probable than it would be without the evidence," the trial court abused its discretion in sustaining Tealstone's relevancy objections to them. Tex. R. Evid. 401(a). We therefore sustain Pulte's first issue regarding Tealstone's objections to Motheral's and Marshall's affidavits.

D. Conclusion

Because we have held that the trial court abused its discretion by sustaining Tealstone's objections to Pulte's proffered summary judgment evidence, we sustain Pulte's first issue.

II. Grant of summary judgment

Given our holding above, and considering the summary judgment evidence that was erroneously struck by the trial court, we now consider whether the trial court erred in granting summary judgment. We hold that it did.

A. Standard of review

After an adequate time for discovery, the party without the burden of proof may, without presenting evidence, move for summary judgment on the ground that there is no evidence to support an essential element of the nonmovant's claim or defense. Tex. R. Civ. P. 166a(i). The motion must specifically state the elements for which there is no evidence. *Id.*; *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009). Rule 166a(i) provides that the trial court must grant the motion unless the nonmovant produces summary judgment evidence that raises a genuine issue of material fact. *See* Tex. R. Civ. P. 166a(i) & cmt.; *Hamilton v. Wilson*, 249 S.W.3d 425, 426 (Tex. 2008).

When reviewing a no-evidence summary judgment, we examine the entire record in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion. *Sudan v. Sudan*, 199 S.W.3d 291, 292 (Tex. 2006). We review a no-evidence summary judgment

for evidence that would enable reasonable and fair-minded jurors to differ in their conclusions. *Hamilton*, 249 S.W.3d at 426 (citing *City of Keller*, 168 S.W.3d at 822). We credit evidence favorable to the nonmovant if reasonable jurors could, and we disregard evidence contrary to the nonmovant unless reasonable jurors could not. *Timpte Indus.*, 286 S.W.3d at 310 (quoting *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006)). If the nonmovant brings forward more than a scintilla of probative evidence that raises a genuine issue of material fact, then a no-evidence summary judgment is not proper. *Smith v. O'Donnell*, 288 S.W.3d 417, 424 (Tex. 2009); *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003), *cert. denied*, 541 U.S. 1030 (2004).

Less than a scintilla of evidence exists when the evidence is so weak that it does nothing more than create a mere surmise or suspicion of a fact. *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983). More than a scintilla of evidence exists when the evidence would enable reasonable and fair-minded people to reach different conclusions. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004); *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997). A genuine issue of material fact is raised by presenting evidence on which a reasonable jury could return a verdict in the nonmovant's favor. *Abdel-Hafiz v. ABC, Inc.*, 240 S.W.3d 492, 504–05 (Tex. App.—Fort Worth 2007, pet. denied); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2514 (1986) (interpreting Fed. R. Civ. P. 56).

B. Pulte's breach of contract claim

In order to succeed on its breach of contract claim, Pulte was required to show that (1) there existed a valid contract between Pulte and Tealstone, (2) Pulte tendered performance under the contract, (3) Tealstone breached the contract, and (4) Pulte was damaged as a result of Tealstone's breach. *Rice v. Metro. Life Ins. Co.*, 324 S.W.3d 660, 666 (Tex. App.—Fort Worth 2010, no pet.). Tealstone moved for no-evidence summary judgment on the grounds that there was no evidence that (1) Tealstone materially breached a contract with Pulte or that (2) Pulte was damaged as a result of such a breach.

Among other evidence, Pulte submitted Bryson's affidavit as evidence of Tealstone's breach. Bryson's affidavit established that Pulte contracted with Tealstone to construct foundations and perform flatwork at Main Street Village in November and December 2003 and that Pulte paid Tealstone for that work. The CBA attached to Bryson's affidavit provided that the work performed by Tealstone was to be "completed in the standards and quality which prevail among construction contractors of superior knowledge and skill" and in a workmanlike manner "according to the highest standard of the trade." Bryson further attested that a claim was made in the HOA suit that arose out of Tealstone's defective foundation construction work and flatwork and that Pulte was damaged as a result.

Pulte also submitted Lee's affidavits and the attached NAE report, which detailed NAE's evaluation of the foundations and flatwork at Main Street Village

and expressed opinions that the foundations of the townhomes, including those on which Tealstone provided work, were not constructed correctly and had failed and that the flatwork in the townhomes was poorly constructed. Additionally, Pulte submitted the Lozos, Marshall, and Motheral affidavits, which described Pulte's damages and estimated costs of repairs. Lozos estimated the cost of repairs for the entire Main Street Village project to be $11,694,241.97. Marshall and Motheral's affidavits provide evidence narrowing this number to those townhouses for which Tealstone provided foundation work and flatwork, which we know from Bryson's affidavit. Marshall attests to $76,425 in foundation repairs at 350–366 Main Street and Motheral attests to an additional $56,237.90 in repairs to those units necessary as a result of the foundation and flatwork defects.

Considering the evidence in the light most favorable to Pulte as the nonmovant, we hold that more than a scintilla of evidence exists such that a genuine issue of material fact was raised. *See Abdel-Hafiz*, 240 S.W.3d at 504–05; *see also Dorsett v. Hispanic Hous. & Educ. Corp.*, 389 S.W.3d 609, 613–14 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (holding affidavit by creditor authenticating attached promissory note presented a fact issue and defeated debtor's argument that it had no duty to pay the note).

We therefore hold that the trial court erred by granting summary judgment on Pulte's breach of contract claim.

C. Pulte's claim for indemnification

In its motion for no-evidence summary judgment, Tealstone argued to the trial court that (1) Pulte provided no evidence that it provided notice or a demand for indemnification to Tealstone of its claim for indemnification, and (2) Pulte had no evidence that Tealstone was liable under the indemnification provision. In particular, Tealstone argued that Pulte did not provide evidence that its settlement in the HOA suit arose out of work allegedly performed by Tealstone in accordance with the CBA.

On appeal, Tealstone appears to have abandoned its argument that Pulte has no evidence that it provided notice or a demand for indemnification. In any event, we note that Pulte did provide evidence of its notice to Tealstone given in its letter to Tealstone dated April 16, 2013, a copy of which was attached as an exhibit to Matney's affidavit, and which we discuss in more detail in addressing Pulte's claim for attorney's fees in section III.E. below.

As to Tealstone's no-evidence challenge on whether the CBA is related to the HOA suit that Pulte settled, once the evidence that the trial court impermissibly struck is considered, including Bryson's statements that Tealstone performed foundation work and flatwork at Main Street Village pursuant to the CBA, the record reveals sufficient evidence to prove that Tealstone performed the work at issue here. In a nutshell, the summary judgment record included the CBA with the indemnification clause at issue. Then Bryson's affidavit provided evidence that the CBA applied to Main Street Village and that Tealstone provided

services at Main Street Village in accordance with the CBA. Considering the evidence in the light most favorable to Pulte as the nonmovant, Pulte has presented more than a scintilla of evidence to preclude the grant of no-evidence summary judgment on its claim for indemnification. We therefore hold that the trial court erred by granting summary judgment on Pulte's claim for indemnification.

D. Pulte's claim of negligence

To succeed on its claim of negligence, Pulte was required to show that (1) Tealstone owed a legal duty to Pulte, (2) Tealstone breached that duty, and (3) Tealstone's breach proximately caused Pulte's injury. *Nabors Drilling, U.S.A., Inc. v. Escoto*, 288 S.W.3d 401, 404 (Tex. 2009). Tealstone argued in its motion for no-evidence summary judgment that Pulte had no evidence of the second and third elements, breach of duty and proximate cause.

The CBA provided evidence of the applicable standard of care in requiring that the work performed be "completed in the standards and quality which prevail among construction contractors of superior knowledge and skill" and in a workmanlike manner "according to the highest standard of the trade." Bryson's affidavit further provided that Tealstone contracted to perform foundation and flatwork at Main Street Village, that a claim was made against Pulte in the HOA suit alleging defects in the construction of Main Street Village, including damages to the foundation and flatwork, and that Pulte settled those claims. Lee's affidavit and the attached NAE report provided evidence that Tealstone's work was

substandard and provided evidence that the substandard work caused the townhomes to experience foundation and flatwork failures.

Proximate cause is generally a question of fact unless the evidence is undisputed and only one reasonable inference can be drawn. *Ambrosio v. Carter's Shooting Ctr., Inc.*, 20 S.W.3d 262, 266 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). Nevertheless, Lee's affidavit further provides evidence of proximate cause. In it, Lee attested to foundation defects in Main Street Village, including those of the townhomes Bryson alleged were constructed by Tealstone, that were caused in part by improper construction and had experienced structural failures, as well as attesting to flatwork that had performed poorly and not up to the expected standards. While Tealstone argued that Lee's affidavit cannot be considered as evidence of proximate cause because it did not specifically name Tealstone as responsible for the defects and failures, as discussed above, the link to Tealstone is provided by Bryson's affidavit. *See Sudan*, 199 S.W.3d at 292 (explaining that we must examine the *entire* record in reviewing a no-evidence summary judgment).

And, as we noted above, the fact that Lee's affidavit cited to other contributing factors, such as improper drainage or subgrade preparation, did not negate its evidence that the foundation was constructed and flatwork had performed beneath acceptable industry standards. Viewing the summary judgment record in the light most favorable to Pulte, we hold that Pulte provided

more than a scintilla of evidence in support of the challenged elements of its negligence claim.

We therefore hold that the trial court erred by granting summary judgment on Pulte's claim for negligence.

E. Pulte's claim for attorney's fees

Pulte pleaded for the recovery of its attorney's fees incurred in both the HOA suit and this suit based on the indemnity provision of the CBA and chapter 38 of the civil practice and remedies code. Tex. Civ. Prac. & Rem. Code § 38.001 (West 2015). In its brief to this court, Pulte contended that Tealstone's no-evidence summary judgment motion did not challenge Pulte's claim for attorney's fees based upon the indemnity provision of the CBA. Tealstone refuted this in its brief, arguing that it challenged Pulte's claim for attorney's fees through its assertion that it was entitled to summary judgment on the indemnification claim as a whole. Assuming, without deciding, that Tealstone is correct, we have held the trial court's grant of summary judgment on Pulte's claim for indemnification erroneous, and thus Tealstone's argument as to the attorney's fees portion of that claim also fails.

Tealstone additionally moved for no-evidence summary judgment on Pulte's claim for attorney's fees under chapter 38 on the basis that Pulte did not present its claim to Tealstone. *See* id. § 38.002(2) (West 2015). Pulte submitted Matney's affidavit as evidence that it had provided notice of its claim to Tealstone. Matney stated in his affidavit that he provided notice of Pulte's claim

to Tealstone by letter dated April 16, 2013, a copy of which was attached to the affidavit as an exhibit. The letter stated that it "serves as Pulte's demand to Tealstone" arising from "alleged construction defects regarding the foundation and concrete flatwork installed in and around certain townhome buildings located within the Main Street Village."

The letter referred to the terms of the CBA, including the indemnification clause, stating:

> Pulte entered into a Contractor Base Agreement (the "Agreement") with Tealstone to perform Concrete Work. Section 28 of the Contractor Base Agreement requires Tealstone to indemnify Pulte as follows:
>
> Contractor [Tealstone] hereby agrees to save, indemnify, and keep harmless Pulte and its agents and employees against:
>
> *all liability, claims, judgments, suits, or demands for damages to persons or property arising out of, resulting from or relating to [Tealstone's] performance of the work under this Agreement ("Claims") regardless of whether such claims are founded in whole or in part upon the alleged negligence of Pulte unless such Claims have been specifically determined by the trier of fact to be at the sole negligence of Pulte. [Tealstone's] duty to indemnify Pulte shall arise at the time written notice of a Claim is first provided to Pulte regardless of whether claimant has filed suit on the Claims. [Tealstone's] duty to indemnify Pulte shall arise even if Pulte is the only party sued by claimant and/or claimant alleges that Pulte's negligence was the sole cause of claimant's damages. [Tealstone's] indemnification obligation shall included, but not be limited to, any Claim made against Pulte by: (1) a [Tealstone] employee or subcontractor who has been injured on property owned by Pulte; (2) a homeowner or association; and (3) a third party claiming patent, trademark, or copyright infringement.*
>
> . . . .

> Tealstone's duty to defend and indemnify Pulte under the Agreement arose on March 7, 2011, when Plaintiff filed the Lawsuit against Pulte.
>
> . . . .
>
> Pulte demands that you defend and indemnify it against the allegations set forth by Plaintiff in the Lawsuit. Pulte requests that you accept this tender of defense and indemnification within ten (10) days of the date of this letter. If Pulte's demand is not met, I have been instructed to pursue all remedies to which Pulte may be entitled, including filing cross claims against Tealstone.

While Tealstone takes issue with the letter's failure to mention a specific claim for attorney's fees under chapter 38, it provides no authority for this argument. Chapter 38 is to be liberally construed to promote its underlying purpose. Id. § 38.005 (West 2015); *see also id.* art. 38.001(8) (allowing for recovery of attorney's fees "if the claim is for . . . an oral or written contract"). Thus, no particular form of presentment of claim to an opposing party is required—all that is required is that the plaintiff assert its claim to defendant and request compliance. *Ashford Dev., Inc. v. USLife Real Estate Serv. Corp.*, 661 S.W.2d 933, 936 (Tex. 1983) (holding presentment of claim for breach of contract was shown where plaintiff sent a letter requesting a refund of $11,000 commitment fee); *Jones v. Kelley*, 614 S.W.2d 95, 100 (Tex. 1981) (holding that letter and telephone conversation informing sellers of buyers' intentions to go through with sale of property met requirements of presentment); *VingCard A.S. v. Merrimac Hosp. Sys., Inc.*, 59 S.W.3d 847, 867–68 (Tex. App.—Fort Worth 2001, pet. denied) (collecting cases and holding that claim was adequately presented

through letter in which plaintiff advised of legal actions if defendant took any actions to "subvert" plaintiff's position). For instance, in *Various Opportunities, Inc. v. Sullivan Inv., Inc.*, the court held that presentment of the plaintiff's claim for specific performance of a real estate contract occurred

> when the appellant appeared at the closing, was given the closing documents to sign, and refused to comply within thirty days. **The contract itself set forth the conditions or requirements for compliance with which the appellant was or should have been quite familiar**. The reason and purpose of the rule was duly accomplished and the appellant was afforded ample opportunity to avoid attorney's fees.

677 S.W.2d 115, 119 (Tex. App.—Dallas 1984, no writ) (emphasis added). In this case, Pulte provided evidence of its contract with Tealstone—the CBA—and the letter from Matney notified Tealstone of Pulte's claim seeking compliance with the terms of the contract as a result of Tealstone's poor performance, thereby providing Tealstone with an opportunity to comply with the terms of the contract or face an ensuing lawsuit by Pulte. *See id.* Thus, we hold that Pulte presented sufficient evidence to defeat Tealstone's summary judgment challenge as to this claim.

The trial court erred by granting summary judgment on Pulte's claims for attorney's fees. We reverse the trial court's grant of no-evidence summary judgment on this ground.

F. Conclusion

Having concluded that the trial court erred by granting summary judgment on Pulte's claims for breach of contract, indemnification, negligence, and attorney's fees, we sustain Pulte's second issue.

Conclusion

Having sustained both of Pulte's issues in their entirety, we reverse the trial court's grant of no-evidence summary judgment and remand this case to the trial court for further proceedings.

/s/ Bonnie Sudderth
BONNIE SUDDERTH
JUSTICE

PANEL: MEIER, GABRIEL, and SUDDERTH, JJ.

DELIVERED: May 4, 2017