IN THE
TENTH COURT OF APPEALS

No. 10-14-00309-CV

ALEXIS NICOLE SWAN AND TERRISA D. SWAN,
Appellants

v.

BIENSKI PROPERTIES, LP,
Appellee

From the County Court at Law No. 1
Brazos County, Texas
Trial Court No. 13-001511-CV-CCL1

MEMORANDUM OPINION

This case arose out of a residential landlord/tenant dispute. The tenant, Alexis Nicole Swan, and her mother, Terrisa D. Swan, now appeal from the trial court's judgment rendered after a jury trial. The landlord, Bienski Properties, LP (Bienski) also initially appealed from the trial court's judgment, but its appeal was subsequently dismissed. Moreover, Bienski has not filed an appellee's brief.

Background

Bienski owns the property located at 4334 North Graham Road in College Station, Texas. On August 8, 2011, Alexis, then a Texas A&M University student, entered into a lease contract with Bienski to rent the property, and Terrisa signed a guaranty of the lease contract. The term of the initial lease contract was August 10, 2011, to July 30, 2012. On February 20, 2012, Alexis then entered into a second lease contract with Bienski to rent the property for a second term. The term of the second lease contract was July 31, 2012, to July 30, 2013. On May 10, 2013, however, during the term of the second lease contract, Bienski sent Alexis a written notice to vacate the premises. The notice advised Alexis that her lease was being terminated immediately and that she had twenty-four hours from the delivery of the letter to vacate the premises. Alexis was current in her rent; the action was nevertheless allegedly being taken because:

- "You have violated Paragraph 2 of your lease by allowing another person to stay in the dwelling for more than five (5) consecutive days without our prior written consent, and for more than ten (10) days in any one month."
- "You have violated Paragraph 20 of your lease by disturbing or threatening the rights, comfort, health, safety, or convenience of others (including our agents and employees) in or near the dwelling, and by disrupting our business operations."
- "You have violated Paragraph 25 of your lease by making alterations to the Premises, including but not limited to installation of an illegal and unauthorized alarm system and changing of the locks."
- "You have violated Paragraph 27 of your lease by having unauthorized animals on the premises."
- "You have violated Paragraph 28 of your lease by improperly refusing entry to repairers, servicers, contractors, our representatives, or other persons entitled to enter."

When Alexis did not immediately vacate the premises, Bienski filed an eviction suit against her in the justice court and obtained a judgment of eviction. Additionally, before Alexis moved from the property on June 14, 2013, Bienski filed the underlying lawsuit against Alexis and Terrisa in the county court at law for damages and attorney's fees. In the underlying suit, Bienski alleged that Alexis breached both the first and second lease contracts, that Alexis committed statutory fraud, that Terrisa breached the lease contract guaranty in connection with both the first and second lease contracts, and that Terrisa committed common law and statutory fraud. Alexis and Terrisa responded by denying the allegations. Alexis further asserted several counterclaims against Bienski, including alleging that Bienski breached both the first and second lease contracts, committed statutory fraud, retained her security deposit in bad faith, and retaliated against her. Alexis and Terrisa also pleaded for recovery of attorney's fees.

The trial court ultimately granted Terrisa's motion for summary judgment as to Bienski's claim that she breached the guaranty as it related to the second lease contract and granted Terrisa's motion for summary judgment as to Bienski's fraud claims against her with regard to the second lease contract. After Bienski presented its case-in-chief to the jury at trial, the trial court further granted Terrisa's motion for directed verdict as to Bienski's fraud claims against her with regard to the first lease contract.

The trial court thereafter submitted the remaining issues to the jury. Regarding Bienski's claims, the jury found that Alexis complied with the first lease and that, likewise, Terrisa complied with the guaranty agreement with Bienski in connection with

the first lease. The jury then found that Alexis repudiated the second lease but that she complied with it. On the other hand, the jury found that Alexis committed statutory fraud against Bienski on the first and second leases. The jury determined that the amount of money that would fairly and reasonably compensate Bienski for its damages that were proximately caused by the fraud committed by Alexis with regard to the first lease was $412.06 and $17.06 with regard to the second lease. Finally, the jury determined that a reasonable fee for the necessary services of Bienski's attorneys was $5,000 for representation in the trial court; $3,500 for representation through appeal to the court of appeals; $3,500 for representation at the petition-for-review stage in the Texas Supreme Court; $3,500 for representation at the merits-briefing stage in the Texas Supreme Court; and $3,500 for representation through oral argument and the completion of proceedings in the Texas Supreme Court.

As for Alexis's counterclaims against Bienski, the jury found that Bienski complied with the first lease. The jury, however, determined that Bienski failed to comply with the second lease, resulting in damages to Alexis in the amount of $1,000; that Bienski committed fraud against Alexis on both the first and second leases; that Bienski retained Alexis's security deposit in bad faith; and that Bienski retaliated against Alexis, resulting in damages to her in the amount of $1,971.02. Finally, the jury determined that a reasonable fee for the necessary services provided by the attorneys of each Alexis and Terrisa was $2,500 for representation in the trial court; $1,750 for representation through appeal to the court of appeals; $1,750 for representation at the petition-for-review stage in the Texas Supreme Court; $1,750 for representation at the merits-briefing stage in the

Texas Supreme Court; and $1,750 for representation through oral argument and the completion of proceedings in the Texas Supreme Court.

Bienski subsequently filed a motion to disregard many of the jury's answers. Alexis filed a motion for judgment, requesting that the trial court award her damages on her fraud claims even though the damages questions in connection with her fraud claims "appear[ ] to have [been] inadvertently left out." The trial court held a hearing, and Alexis and Terrisa then filed a proposed final judgment based on the jury's findings, as well as a brief in support of their proposed final judgment. The trial court ultimately rendered its judgment, stating in pertinent part:

> The Court having considered this Motion and the Defendants' Response thereto, and the evidence adduced at trial, grants JNOV to the following jury questions:
>
> 1. On question 8, the Court finds in favor of the Plaintiff, Bienski Properties, LP. Bienski Properties, LP did not commit fraud against Alexis Nicole Swan.
>
> 2. On question 11, the Court finds in favor of the Defendant, Alexis Nicole Swan. Alexis Nicole Swan did not repudiate the second lease.
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> 3. On question 17, the Court finds in favor of Plaintiff, Bienski Properties, LP. Bienski Properties, LP did not fail to comply with the second lease.
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> 4. On question 18, the Court finds in favor of Plaintiff, Bienski Properties, LP. Bienski Properties, LP did not commit fraud against Alexis Nicole Swan on the second lease.
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> 5. On question 19, the Court finds in favor of Plaintiff, Bienski Properties, LP. Bienski Properties did not retain the security deposit of Alexis Nicole Swan in bad faith.

6. On question 20, the Court finds in favor of Plaintiff, Bienski Properties, LP. Bienski Properties, LP did not retaliate against Alexis Nicole Swan.

7. On question 24, the Court finds in favor of Plaintiff, Bienski Properties, LP. Bienski Properties, LP's damages for fraud in connection with the second lease are $4,261.17.

Based upon the above rulings, the answers to jury questions 21, 25, 26 and 27 are rendered moot.

Therefore, the Court orders judgment for damages to Bienski Properties, LP in the amount of $4,673.23, attorney fees in the amount of $5,000 for representation at the trial court, $3,500 for representation through appeal to the court of appeals, $3,500 for representation at the petition for review stage in the Supreme Court of Texas, $3,500 for representation at the merits briefing stage in the Supreme Court of Texas, and $3,500 for representation through oral argument and the completion of proceedings in the Supreme Court of Texas, plus costs of court.

Issue No. 1

In Issue No. 1, Alexis contends that the trial court erred in granting Bienski's motion to disregard the jury's answers to Questions 8, 17, 19, and 20 and in declaring moot the damages awarded by the jury in Questions 26 and 27.

Standard of Review

A trial court may disregard a jury's findings and render judgment notwithstanding the verdict (JNOV) only when a directed verdict would have been proper. *Clear Lake City Water Auth. v. Clear Lake Country Club, L.P.*, 340 S.W.3d 27, 33 (Tex. App.—Houston [1st Dist.] 2011, no pet.); *see* TEX. R. CIV. P. 301; *Fort Bend County Drainage Dist. v. Sbrusch*, 818 S.W.2d 392, 394 (Tex. 1991). A directed verdict is proper only under limited circumstances: (1) when the evidence conclusively establishes the right of the movant to judgment or negates the right of the opponent; or (2) when the evidence is

insufficient to raise a material fact issue. *Norhill Energy LLC v. McDaniel*, 517 S.W.3d 910, 915-16 (Tex. App.—Fort Worth 2017, pet. denied) (citing *Prudential Ins. Co. of Am. v. Fin. Review Servs., Inc.*, 29 S.W.3d 74, 77 (Tex. 2000)).

To determine whether the trial court erred by rendering a JNOV, we view the evidence in the light most favorable to the verdict under the well-settled standards that govern legal sufficiency review. *Id*. at 916; *see Ingram v. Deere*, 288 S.W.3d 886, 893 (Tex. 2009). We may sustain a legal sufficiency challenge only when (1) the record discloses a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence establishes conclusively the opposite of a vital fact. *Ford Motor Co. v. Castillo*, 444 S.W.3d 616, 620 (Tex. 2014) (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005)). In determining whether there is legally sufficient evidence to support the finding under review, we must consider evidence favorable to the finding if a reasonable factfinder could and disregard evidence contrary to the finding unless a reasonable factfinder could not. *Cent. Ready Mix Concrete Co. v. Islas*, 228 S.W.3d 649, 651 (Tex. 2007); *City of Keller*, 168 S.W.3d at 807, 827.

Jury Charge Question 8

We begin with whether the trial court erred in granting Bienski's motion to disregard the jury's answer to Question 8, to which the jury found that Bienski committed fraud against Alexis on the first lease.

Business and Commerce Code section 27.01 provides a statutory cause of action for fraud in real estate transactions. *See* TEX. BUS. & COM. CODE ANN. § 27.01 (West 2015). As relevant to this case, the elements of a cause of action for statutory fraud are: (1) the transaction involved real estate; (2) during the transaction, the defendant (or counter-defendant) made a false representation of a past or existing material fact; (3) the false representation was made to the plaintiff (or counter-plaintiff) for the purpose of inducing the plaintiff to enter into a contract; (4) the plaintiff relied on the false representation by entering into the contract; and (5) the reliance caused the plaintiff injury. *See id.* § 27.01(a)(1); *In re Guardianship of Patlan*, 350 S.W.3d 189, 200 (Tex. App.—San Antonio 2011, no pet.).

Regarding the fourth element, a plaintiff's reliance must be reasonable or justifiable to sustain a statutory fraud claim. *Baker v. City of Robinson*, 305 S.W.3d 783, 791 n.6 (Tex. App.—Waco 2009, pet. denied); *see Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 182 (Tex. 1997).

> "[A]s Texas courts have repeatedly held, a party to a written contract cannot justifiably rely on oral misrepresentations regarding the contract's unambiguous terms." [*Nat'l Prop. Holdings, L.P. v.*] *Westergren*, 453 S.W.3d [419,] 424-25 [(Tex. 2015)] (citing *Thigpen* [*v. Locke*], 363 S.W.2d [247,] 251 [(Tex. 1962)]).
>
>> [A] party to an arm's length transaction must exercise ordinary care and reasonable diligence for the protection of his own interests . . . . Therefore, reliance upon an oral representation that is directly contradicted by the express, unambiguous terms of a written agreement between the parties is not justified as a matter of law. . . . If written contracts are to serve a purpose under the law, relative to oral agreements, it is to provide greater certainty regarding what the terms of the transaction are and that those terms will be

> binding, thereby lessening the potential for error, misfortune, and dispute. . . . [A] party who enters into a written contract while relying on a contrary oral agreement does so at its peril . . . .
>
> *See DRC Parts & Accessories, L.L.C. v. VM Motori, S.P.A.*, 112 S.W.3d 854, 858-59 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

JPMorgan Chase Bank, N.A. v. Orca Assets G.P., L.L.C., 546 S.W.3d 648, 658 (Tex. 2018).

Here, Alexis's statutory fraud counterclaim against Bienski is based on Tasha Bienski's alleged false representation, made before Alexis signed the first lease contract, that Alexis could keep her dog and cat on the property during the course of her leases.[1] Paragraph 27 of the first lease contract that Alexis subsequently signed provides, however: "*No animals (including mammals, reptiles, birds, fish, rodents, amphibians, arachnids, and insects) are allowed, even temporarily, anywhere in the dwelling, porches, patios, balconies, or yards unless we've so authorized in writing.* If we allow an animal, you must sign a separate animal addendum and pay an animal deposit." Alexis acknowledged at trial that she did not get written authorization for her pets and instead contends that Tasha's alleged oral representation means that she could keep her pets on the leased property even without written authorization. But the unambiguous terms of the first lease contract directly contradict Alexis's interpretation of Tasha's alleged oral representation. Therefore, Alexis's reliance, as a matter of law, could not have been justified. *See id.* Thus, the trial court did not err in granting Bienski's motion to disregard the jury's answer to Question 8.

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[1] Tasha testified that she is the "owner-manager" of Bienski.

Jury Charge Questions 17 & 26

We next address whether the trial court erred in granting Bienski's motion to disregard the jury's answer to Question 17, to which the jury found that Bienski failed to comply with the second lease.

In her counterclaim against Bienski for breach of the second lease, Alexis alleged that one of the ways that Bienski failed to comply with the second lease was by wrongfully terminating the lease and evicting her from the property. Paragraph 32 of the second lease identifies when Bienski was allowed to terminate the lease and evict Alexis from the property: "**Eviction.** *If you default or holdover, we may end your right of occupancy by giving you a 24-hour written notice to vacate*. . . ." It is undisputed that Alexis was not holding over when Bienski sent her the twenty-four-hour written notice to vacate on May 10, 2013. Instead, Paragraph 32 of the second lease also provides in pertinent part: "You'll be in default if . . . you or any guest or occupant violates this Lease Contract," and the notice to vacate that Bienski sent to Alexis specifically stated that Bienski was terminating the second lease because Alexis had violated several paragraphs of the lease. Whether Bienski failed to comply with the second lease by terminating it therefore depends on whether Alexis had violated the second lease when Bienski gave her the twenty-four-hour written notice to vacate.

The jury found in Question 12 of the charge that Alexis complied with the second lease. Bienski moved the trial court to disregard the jury's answer to Question 12, but the trial court did not do so, and Bienski has not challenged on appeal the sufficiency of the evidence to support the jury's answer to Question 12. The unchallenged jury finding is

therefore binding on appeal. *See Chesser v. LifeCare Mgmt. Servs., L.L.C.*, 356 S.W.3d 613, 628 n.15 (Tex. App.—Fort Worth 2011, pet. denied); *Solares v. Solares*, 232 S.W.3d 873, 880 (Tex. App.—Dallas 2007, no pet.).

Furthermore, the fact that the jury also found in Question 11 of the charge that Alexis repudiated the second lease is irrelevant. Before the trial court rendered its judgment, Alexis filed a proposed final judgment and a brief in support of the proposed final judgment. In the brief, Alexis argues in part that the jury's answer to Question 11 on repudiation was immaterial. We construe this as a motion to disregard the jury's answer to Question 11. Thereafter, the trial court did disregard the jury's answer to Question 11, and Bienski has not challenged the trial court's ruling on appeal.

We therefore conclude that the record establishes that Alexis had not violated the second lease when Bienski gave her the twenty-four-hour written notice to vacate. Thus, the evidence is legally sufficient to establish that Bienski wrongfully terminated the second lease and that Bienski consequently failed to comply with the second lease.[2] Accordingly, the trial court erred in granting Bienski's motion to disregard the jury's answer to Question 17. Furthermore, because the trial court erred in granting Bienski's motion to disregard the jury's answer to Question 17, the trial court erred in declaring the accompanying damages question—Question 26—moot.

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[2] We need not address whether the evidence is legally sufficient to establish that Bienski failed to comply with the second lease in the other ways alleged by Alexis.

Jury Charge Question 19

We next address whether the trial court erred in granting Bienski's motion to disregard the jury's answer to Question 19, to which the jury found that Bienski retained Alexis's security deposit in bad faith.

Chapter 92, subchapter C of the Property Code governs security deposits in residential leases. *See* TEX. PROP. CODE ANN. §§ 92.101-92.1041 (West 2014), § 92.105 (West Supp. 2017), §§ 92.106-92.109 (West 2014), § 92.110 (West Supp. 2017). A landlord is required to refund a security deposit to the tenant on or before the thirtieth day after the date the tenant surrenders the premises. *Id.* § 92.103(a). However, before returning a security deposit, the landlord may deduct from the security deposit damages and charges for which the tenant is legally liable under the lease or as a result of breaching the lease. *Id.* § 92.104(a). The landlord may not retain any portion of the security deposit to cover normal wear and tear. *Id.* § 92.104(b).

If the landlord retains all or part of the security deposit, the landlord shall give the tenant, within thirty days of the tenant's surrender of the premises: (1) the balance of the security deposit, if any; (2) a written description of the damages; and (3) an itemized list of all deductions. *Id.* § 92.104(c). However, the landlord is not obligated to return a tenant's security deposit or give the tenant a written description of the damages and an itemized list of the deductions until the tenant gives the landlord a written statement of the tenant's forwarding address for the purpose of returning the security deposit. *Id.* § 92.107(a).

Subsection 92.109(a) establishes a cause of action permitting a tenant to seek recovery of his security deposit from his landlord based on the landlord's bad faith retention of the security deposit. *See id.* § 92.109(a). To prevail under the cause of action, the tenant must prove the landlord: (1) acted in bad faith; and (2) retained the security deposit in violation of chapter 92, subchapter C. *Id.* When a landlord is found liable under subsection 92.109(a), the tenant may recover from the landlord: (1) an amount equal to the sum of $100; (2) three times the portion of the security deposit wrongfully withheld; and (3) the tenant's reasonable attorney's fees in a suit to recover the security deposit. *Id.*

Here, there is no evidence that Bienski retained the security deposit in violation of chapter 92, subchapter C because there is no evidence that Alexis gave Bienski a written statement of her forwarding address for the purpose of returning the security deposit. *See id.* §§ 92.107(a), 92.109(a). When Alexis was asked at trial if she ever provided a forwarding address to Bienski, she replied that she had not.

Alexis argues that there was nevertheless evidence that Bienski had a forwarding address for her and that her claim for her security deposit was not forfeited by not providing a forwarding address. But whether Bienski had a forwarding address for Alexis is irrelevant to whether Bienski's obligation to return Alexis's security deposit under chapter 92, subchapter C was triggered. *See id.* § 92.107(a). Subsection 92.107(a) states that the landlord's obligation to return a tenant's security deposit under chapter 92, subchapter C does not arise until "the tenant gives the landlord a written statement of the tenant's forwarding address for the purpose of refunding the security deposit." *Id.*

Subsection 92.107(b) does provide: "The tenant does not forfeit the right to a refund of the security deposit or the right to receive a description of damages and charges merely for failing to give a forwarding address to the landlord." *Id.* § 92.107(b). But subsection 92.107(b) does not eliminate the tenant's requirement to give the landlord a written statement of his or her forwarding address in order to trigger the landlord's obligation. *See id.* § 92.107. Therefore, the trial court did not err in granting Bienski's motion to disregard the jury's answer to Question 19.

Jury Charge Questions 20 & 27

Finally, we address whether the trial court erred in granting Bienski's motion to disregard the jury's answer to Question 20, to which the jury found that Bienski retaliated against Alexis.

Section 92.331 of the Property Code provides:

> (a) A landlord may not retaliate against a tenant by taking an action described by Subsection (b) because the tenant:
>
> (1) in good faith exercises or attempts to exercise against a landlord a right or remedy granted to the tenant by lease, municipal ordinance, or federal or state statute;
>
> (2) gives a landlord a notice to repair or exercise a remedy under this chapter;
>
> (3) complains to a governmental entity responsible for enforcing building or housing codes, a public utility, or a civic or nonprofit agency, and the tenant:
>
> (A) claims a building or housing code violation or utility problem; and
>
> (B) believes in good faith that the complaint is valid and that the violation or problem occurred; or

> (4) establishes, attempts to establish, or participates in a tenant organization.
>
> (b) A landlord may not, within six months after the date of the tenant's action under Subsection (a), retaliate against the tenant by:
>
> (1) filing an eviction proceeding, except for the grounds stated by Section 92.332;
>
> (2) depriving the tenant of the use of the premises, except for reasons authorized by law;
>
> (3) decreasing services to the tenant;
>
> (4) increasing the tenant's rent or terminating the tenant's lease; or
>
> (5) engaging, in bad faith, in a course of conduct that materially interferes with the tenant's rights under the tenant's lease.

TEX. PROP. CODE ANN. § 92.331 (West 2014).

We begin with whether the evidence is legally sufficient to establish that Alexis engaged in one of the protected acts identified in subsection 92.331(a). Alexis first argues that there is evidence that she engaged in one of the protected acts because there is evidence that she exercised her rights under the lease, state law, and federal law by installing an alarm system on the property and thereafter maintaining it and by calling and reporting an incident to the police after a realtor working on behalf of Bienski entered the property to show it to prospective tenants, the realtor set off the alarm system, and the realtor exited the property without locking the front door.

Subsection 92.331(a)(1) provides that a landlord may not retaliate against a tenant because the tenant "in good faith exercises or attempts to exercise *against a landlord* a right or remedy granted to the tenant by lease, municipal ordinance, or federal or state statute."

Id. (emphasis added). Installing an alarm system on the property and maintaining it does not constitute exercising or attempting to exercise a right or remedy *against* Bienski. Furthermore, Alexis's testimony does not support that her calling the police constituted exercising or attempting to exercise a right or remedy *against* Bienski. Alexis testified that she got out of class on the day that the incident with the realtor occurred, and she had a voicemail on her phone from her alarm company that the alarm at the property was going off and that they were going to dispatch the police. When Alexis arrived at the property, the police had left. Alexis unlocked the gate and went up to the front door, and the front door was unlocked. Alexis stated that she called the police "just to make sure that, you know, everything was okay." A police officer then came back out to the property, and he and she had a discussion about what had happened. Alexis testified that during this discussion, she did complain to the police officer that Bienski was supposed to make appointments with her before attempting to show the property to prospective tenants; however, we do not believe that Alexis's actions constituted exercising or attempting to exercise a right or remedy *against* Bienski.

Alexis next claims that there is evidence that she exercised her rights under the lease, state law, and federal law because she reported and complained to Tasha in an email about the incident with the realtor and about the perceived violation of her rights under the lease and the law. Alexis informed Tasha in the email that any representative from Bienski may only enter the house on the property with permission from Alexis and that being on the property without her permission is criminal trespass. Paragraph 28 of the second lease, however, does not support Alexis's statement. Instead, Paragraph 28

provides for occasions when Bienski's representatives may enter the dwelling on the property when no one is in the dwelling. Therefore, we cannot conclude that sending the email constituted exercising or attempting to exercise against a landlord *a right or remedy granted to the tenant by lease, municipal ordinance, or federal or state statute.*

Alexis then argues that there is evidence that she engaged in one of the protected acts identified in subsection 92.331(a) by making good-faith repair requests when the carport on the property collapsed and caused damages to her truck and when the air conditioning stopped working during the summer. Paragraph 26 of the second lease provides:

> **Procedures for Repairs by Us.** <u>If you or any occupant needs to send a notice or request—for example, for repairs, installations, services, ownership disclosure or security-related matters—**IT MUST BE SIGNED AND IN WRITING** to our designated representative</u> (except in case of fire, smoke, gas, explosion, overflowing sewage, uncontrollable running water, electrical shorts, crime in progress, or fair housing accommodation or modification). Our written notes on your oral request do not constitute a written request from you.

Similarly, section 92.052 of the Property Code addresses the landlord's duty to repair or remedy a condition. *See id.* § 92.052 (West 2014). Subsection 92.052(d) states: "The tenant's notice under Subsection (a) must be in writing only if the tenant's lease is in writing and requires written notice." *Id.* § 92.052(d). Alexis's lease is in writing and requires written notice; therefore, her notice to repair must have been in writing. *Id.*

Alexis does not point to any evidence, nor have we found any, that indicates that she sent a signed written notice or request for her repairs to Bienski. Therefore, we cannot conclude that there is legally sufficient evidence that Alexis engaged in one of the

protected acts by her actions in making repair requests when the carport on the property collapsed and caused damages to her truck and when the air conditioning stopped working during the summer.

Alexis finally argues that there is evidence that she engaged in one of the protected acts identified in subsection 92.331(a) because there is evidence that she made a good-faith complaint to a governmental entity about a housing code violation. Without explanation, Alexis maintains that the complaint that she made to the police regarding the incident with the realtor constituted a "housing code" complaint. We, however, cannot conclude that there is legally sufficient evidence that Alexis engaged in one of the protected acts by complaining to the police regarding the incident with the realtor.

In light of the foregoing, we conclude that the evidence is legally insufficient to establish that Alexis engaged in one of the protected acts identified in subsection 92.331(a). Accordingly, we conclude that the evidence is legally insufficient to establish that Bienski retaliated against Alexis. *See id.* § 92.331. The trial court therefore did not err in granting Bienski's motion to disregard the jury's answer to Question 20. Furthermore, because the trial court did not err in granting Bienski's motion to disregard the jury's answer to Question 20, the trial court did not err in declaring the accompanying damages question—Question 27—moot.

Issue No. 1 is sustained in part and overruled in part.

Issue No. 2

In Issue No. 2, Alexis contends that the trial court erred when it did not render a take-nothing judgment against Bienski and did not award damages, attorney's fees, and court costs in her favor.

Alexis first argues that the trial court erred when it awarded $4,673.23 in damages to Bienski. The trial court reached the damages award as follows. In response to Question 23 of the charge, the jury had determined that the amount of money that would fairly and reasonably compensate Bienski for its damages that were proximately caused by the fraud committed by Alexis with regard to the first lease was $412.06. The trial court had then granted Bienski's motion to disregard the jury's answer to Question 24 of the charge, to which the jury had found that the amount of money that would fairly and reasonably compensate Bienski for its damages that were proximately caused by the fraud committed by Alexis with regard to the second lease was $17.06. Instead, the trial court had determined that Bienski's damages for fraud in connection with the second lease were $4,261.17.

Alexis claims that the trial court erred in granting Bienski's motion to disregard the jury's answer to Question 24 and in determining that Bienski's damages for fraud in connection with the second lease were $4,261.17 because the trial court's ruling did not comply with what was requested in Bienski's motion to disregard, nor was it supported by the evidence. However, because Alexis engages in no discussion or analysis beyond her conclusory statement of this proposition, we hold that this portion of Issue No. 2 is inadequately briefed. *See Eaves v. Unifund CCR Partners*, 301 S.W.3d 402, 409 (Tex. App.—

El Paso 2009, no pet.) (holding issue inadequately briefed when argument consisted of only three conclusory sentences). Accordingly, we hold that the trial court did not err when it awarded $4,673.23 in damages to Bienski.

Alexis next claims that Bienski was not entitled to recover attorney's fees or claim the attorney's fees as an offset against Alexis's damages because Alexis substantially prevailed in the case. Bienski, however, prevailed on its statutory fraud claims against Alexis, and subsection 27.01(e) of the Business and Commerce Code provides that a person that commits statutory fraud "shall be liable to the person defrauded for reasonable and necessary attorney's fees, expert witness fees, costs for copies of depositions, and costs of court." TEX. BUS. & COM. CODE ANN. § 27.01(e). Accordingly, we hold that the trial court did not err when it awarded attorney's fees in favor of Bienski.

Finally, Alexis argues that she is entitled to recover her attorney's fees and costs of court pursuant to Paragraph 32 of the second lease and the Property Code. Paragraph 32 of the second lease provides: "A prevailing party may recover reasonable attorney's fees and all other litigation costs from the non-prevailing parties . . . ." We already determined above that the trial court erred in granting Bienski's motion to disregard the jury's answer to Question 17, to which the jury found that Bienski failed to comply with the second lease, and in declaring the accompanying damages question—Question 26—moot. Alexis was therefore the prevailing party regarding the breach-of-contract claims, and the trial court erred when it did not award her attorney's fees and costs of court.

Issue No. 2 is sustained in part and overruled in part.

Issue No. 3

In Issue No. 3, Terrisa contends that the trial court erred when it did not render a take-nothing judgment in her favor even though every claim that Bienski asserted against her was disposed of in her favor. We agree.

Rule of Civil Procedure 301 provides that the judgment of the court shall conform to the pleadings, the nature of the case proved, and the verdict, provided that the court may, upon motion and notice, disregard any jury finding on a question that has no support in the evidence. TEX. R. CIV. P. 301. Here, the record establishes that all of Bienski's claims against Terrisa were disposed of in her favor. The trial court granted summary judgment in Terrisa's favor on Bienski's claim that she breached the lease guaranty in connection with the second lease contract and granted summary judgment in Terrisa's favor on Bienski's fraud claims against her with regard to the second lease contract. The trial court granted Terrisa's motion for directed verdict on Bienski's fraud claims against her with regard to the first lease contract, and the jury found that Terrisa complied with the guaranty agreement with Bienski in connection with the first lease contract. Bienski moved to disregard the jury finding, but the trial court did not disregard it.

Accordingly, we conclude that the trial court erred when it did not render a take-nothing judgment in Terrisa's favor. *See id.* Issue No. 3 is sustained.

Issue No. 4

In Issue No. 4, Terrisa contends that the trial court erred when it did not award her attorney's fees and costs.

Attorney's fees are not recoverable unless provided for by statute or contract. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 310-11 (Tex. 2006). Terrisa argues that she is entitled to the recovery of attorney's fees based on the provision in Paragraph 32 of the first lease contract that states: "A prevailing party may recover reasonable attorney's fees and all other litigation costs from the non-prevailing parties . . . ." The issue is thus whether the term "prevailing party" applies to Terrisa.

Terrisa claims that she, as guarantor, was a party to the first lease contract. But she was not listed as a party to the contract and did not sign the contract. Instead, only Alexis and Bienski are identified in the contract as parties, and the contract specifically provides, "If anyone else has guaranteed performance of this Lease Contract, a *separate* Lease Contract Guaranty for each guarantor must be executed. [Emphasis added.]" *See Ashcraft v. Lookadoo*, 952 S.W.2d 907, 913 (Tex. App.—Dallas 1997, pet. denied) ("A guaranty is a separate contract distinct from the primary obligation."). Terrisa, in fact, did sign a separate Lease Contract Guaranty that did not include the same provision regarding "attorney's fees and all other litigation costs."

Terrisa cites several cases holding that language similar to the provision in Paragraph 32 of the first lease contract permitted third-party real estate brokers to recover attorney's fees as long as they were a prevailing party in a legal proceeding related to the contract. *See Boehl v. Boley*, No. 07-09-0269-CV, 2011 WL 238348, at *3 (Tex. App.—Amarillo Jan. 26, 2011, pet. denied) (mem. op.); *Sierra Assoc. Group, Inc. v. Hardeman*, No. 03-08-00324-CV, 2009 WL 416465, at *9-10 (Tex. App.—Austin Feb. 20, 2009, no pet.)

(mem. op.). We, however, decline to extend such a holding to this case to include Terrisa, a non-party to the contract.

Finally, citing *GXG, Inc. v. Texacal Oil & Gas*, 977 S.W.2d 403, 424 (Tex. App.—Corpus Christi 1998, pet. denied), Terrisa argues that she is entitled to attorney's fees under principles of equity. *GXG, Inc.*, however, is distinguishable because it involves the recovery of attorney fees for litigation with a third party caused by the defendant. *See id.* at 424-25 (plaintiff was forced to defend itself in multiple lawsuits against royalty owners, lessors, and oil-and-gas operators because defendant did not convey all real and personal property under deed of trust and promissory note). Here, Terrisa was not forced into third-party litigation because of Bienski.

We therefore conclude that the trial court did not err when it did not award Terrisa attorney's fees and costs. Issue No. 4 is overruled.

Conclusion

In light of the foregoing, we reverse the trial court's judgment to the extent that it rendered JNOV in favor of Bienski on Alexis's counterclaim against Bienski for breach of the second lease, and we render judgment that Alexis recover damages from Bienski in the amount of $1,000 and attorney's fees in the amount of $2,500 for representation in the trial court, $1,750 for representation through appeal to the court of appeals, $1,750 for representation at the petition for review stage in the Supreme Court of Texas, $1,750 for representation at the merits briefing stage in the Supreme Court of Texas, and $1,750 for representation through oral argument and the completion of proceedings in the Supreme Court of Texas, plus costs of court. We also modify the trial court's judgment to reflect

that Bienski takes nothing on its claims against Terrisa. The trial court's judgment is otherwise affirmed.

REX D. DAVIS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
(Chief Justice Gray dissenting)
Affirmed in part as modified; reversed and rendered in part
Opinion delivered and filed September 19, 2018
[CV06]